



ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

អង្គជំនុំជម្រះសាលាដំបូង
Trial Chamber
Chambre de première instance

សំណុំរឿងលេខ: ០០២/១៩ កញ្ញា ២០០៧/អវតក/អជសដ

Case File/Dossier No. 002/19-09-2007/ECCC/TC

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Before: Judge YA Sokhan, for the President
Judge Jean-Marc LAVERGNE
Judge YOU Ottara
Judge Claudia FENZ
Judge THOU Mony

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**FIFTH DECISION ON FITNESS OF THE ACCUSED NUON CHEA TO STAND TRIAL AND
ORDER FOR QUARTERLY COGNITIVE TESTING**

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1. PROCEDURAL HISTORY

1. Pursuant to Internal Rule 32, the Trial Chamber, on its own motion, assigned two experts, Dr. CHAN Kin Ming and Dr. HUOT Lina (“Experts”), to examine the Accused and to report on their present fitness to stand trial.¹ The Experts, after examining the Accused in accordance with this Chamber’s orders, filed their reports on 27 July 2016.² On 27 July 2016, the Trial Chamber enquired whether the Parties intended to examine the Experts on their reports and opinions during the hearing of 29 July 2016.³ On 27 and 28 July 2016, the Parties responded via email that they had no questions to put to the Experts. Accordingly, there was no hearing on the Accused’s fitness to stand trial.

2. The Trial Chamber has previously ruled on four separate occasions that NUON Chea is fit to stand trial.⁴ For the purposes of the current decision, the Trial Chamber ordered the Experts to report information which would enable the Chamber to determine the Accused’s fitness according to the criteria outlined in the *Strugar* Appeal Judgement.⁵

2. THE EXPERT EXAMINATION

3. The Experts examined NUON Chea on 25 July 2016 and reviewed weekly medical reports prepared by physicians at the ECCC detention facility and the Khmer-Soviet Friendship Hospital in Phnom Penh.⁶ In the NUON Chea Report, the Experts state that NUON Chea has a history of several chronic ailments but note that his blood pressure, heart sounds, pallor, breathing, muscle tones, and hearing are all normal.⁷

4. NUON Chea has complained of lower back pain since 2007.⁸ The Experts report that his treating doctors at Khmer-Soviet Friendship Hospital noted that his back pain remains

¹ Order Assigning Experts to Assess the Accused’s Fitness to Stand Trial (“Order”), E389, 7 March 2016.

² Expert Medical Report: NUON Chea (“NUON Chea Report”), E389/3, 27 July 2016; Expert Medical Report: KHIEU Samphan, E389/4, 27 July 2016. Both Reports were filed as strictly confidential due to privacy reasons.

³ Email from Trial Chamber to the Parties dated 27 July 2016.

⁴ Fourth Decision on Fitness of the Accused NUON Chea to Stand Trial, E329/7, 18 February 2015 (“Fourth Decision on Fitness”); Decision on Fitness of the Accused Nuon Chea to Stand Trial, E301/11, 25 April 2014; Second Decision on Accused NUON Chea’s Fitness to Stand Trial, E256/5, 2 April 2013; Decision on NUON Chea’s Fitness to Stand Trial and Defense Motion for Additional Medical Expertise, E115/3, 15 November 2011.

⁵ Order, para. 6, citing *Prosecutor v. Strugar*, ICTY Appeals Chamber, IT-01-42-A, Judgement, 17 July 2008 (“*Strugar*”), para. 55.

⁶ NUON Chea Report, paras 3, 5, 7.

⁷ NUON Chea Report, paras. 6, 12.

⁸ NUON Chea Report, para. 6; *See* Fourth Decision on Fitness, para. 5.

stable, subsiding when he remains still, and he can sit up for short periods of time.⁹ The treating doctors added that although his movements are slower, he can still walk independently using a frame, with some assistance.¹⁰ The Experts attribute his back pain to age-related degeneration and an old injury but state that this should not affect his ability to stand trial.¹¹

5. NUON Chea has also complained about dizziness in the past, which persists occasionally when he changes posture.¹² The Experts attribute NUON Chea's dizziness to an age-related degeneration of the nerves in his ears but state that this should not affect his ability to stand trial.¹³ The Experts conclude that NUON Chea is of good health relative to his age and chronic medical conditions.¹⁴

6. During his interview with the Experts, NUON Chea was able to both sit up unsupported for up to 60 minutes and supported with a backrest more comfortably.¹⁵ NUON Chea spoke loudly and clearly and remembered that he had met the Experts before although he could not remember their names.¹⁶ NUON Chea told the Experts that he did not believe his eyesight to be good but he listened to the news on the radio and was able to consult a globe and world map for countries referred to in the news broadcast.¹⁷

7. The Experts report that NUON Chea's treating doctors at Khmer-Soviet Friendship Hospital noted no problems with his memory, and specifically remarked about his 'good memory' with regards to his recent medical history.¹⁸ The treating doctors also noted that his mood appeared stable.¹⁹ The Experts find that NUON Chea was able to fully concentrate for the duration of their 60 minute interview and note that he did not seem to tire or experience discomfort, he remained alert, and responded clearly to all questions posed.²⁰ The Experts also report that NUON Chea demonstrated an awareness of the crimes he had been charged with.²¹ Additionally, NUON Chea scored within the range

⁹ NUON Chea Report, para. 7.

¹⁰ NUON Chea Report, para. 7.

¹¹ NUON Chea Report, paras 17, 41.

¹² NUON Chea Report, paras 7, 18; *See* Fourth Decision on Fitness, para. 6.

¹³ NUON Chea Report, para. 18.

¹⁴ NUON Chea Report, para. 41.

¹⁵ NUON Chea Report, para. 42.

¹⁶ NUON Chea Report, para. 10.

¹⁷ NUON Chea Report, para. 11.

¹⁸ NUON Chea Report, paras 21-22.

¹⁹ NUON Chea Report, para. 21-22.

²⁰ NUON Chea Report, para. 23.

²¹ NUON Chea Report, para. 24.

considered as normal on a mental examination administered by the Experts which is a commonly used screening test for cognitive impairment.²² The Experts note that regular mental tests in the form of Abbreviated Mental Tests (AMTs) were performed on NUON Chea every three months and that his scores were normal.²³ Overall, the Experts' opinion is that NUON Chea's mental state is normal and that his short term memory, concentration and attention are all well-preserved for his age.²⁴ The Experts also specifically find that NUON Chea has the necessary capacities outlined in *Strugar*.²⁵

8. The Experts observe that NUON Chea is 89 years old, frail, and at risk of deconditioning with a rapid decline of physical function.²⁶ They recommend that he continues with physiotherapy at least once to twice per week.²⁷ They also find it likely that NUON Chea's memory and cognitive function will gradually deteriorate further with age.²⁸ They therefore recommend regular reviews of his cognitive function, particularly if there is a noticeable decline.²⁹ The Experts suggest that in order to ensure his most effective participation at trial, NUON Chea could sit on his wheelchair or a chair with arms and a high backrest for support during hearings.³⁰

3. APPLICABLE LAW

9. To be fit to stand trial, the Accused must be capable of meaningful participation which allows him to exercise his fair trial rights to such a degree that he is able to participate effectively in his trial and has an understanding of the essentials of the proceedings.³¹

4. FINDINGS

10. In making this assessment, the Chamber considers all pertinent factors, including expert evidence, its own observations, the impact of the Accused's medical conditions, the

²² NUON Chea Report, para. 25.

²³ NUON Chea Report, para. 20.

²⁴ NUON Chea Report, paras 26-27.

²⁵ NUON Chea Report, paras 28-39.

²⁶ NUON Chea Report, para. 16.

²⁷ NUON Chea Report, para. 16.

²⁸ NOUN Chea Report, para. 47.

²⁹ NOUN Chea Report, para. 47.

³⁰ NOUN Chea Report, para. 42.

³¹ *Strugar*, para. 55.

availability of practical measures to mitigate the effects of any impairment, and that the Accused is represented and advised by competent legal counsel.

11. Having reviewed the NUON Chea Report, the Trial Chamber is satisfied that NUON Chea remains fit to stand trial and does not currently suffer from any mental or physical impairment which would prohibit his participation in the proceedings for Case 002/02.

12. The Chamber will continue with its revised sitting schedule that includes a two-hour recess at lunchtime to provide a longer mid-day rest period and will sit daily from 9:00 a.m. to 11:30 a.m., and again from 1:30 p.m. to 4:00 p.m., generally from Monday through Thursday.³² The Chamber will also continue to take practical measures – such as allowing the Accused to participate in proceedings via audio-visual link from his holding cell, pursuant to Internal Rule 81(5) – when necessary. The Chamber finds that such measures will adequately mitigate any impairment based on NUON Chea’s medical condition.

13. In light of the recommendation of the Experts to have regular reviews of NUON Chea’s cognitive function, the Chamber orders the continuation of his quarterly cognitive testing. The Chamber considers that these tests should continue to be devised by the Experts, changed as necessary in order to avoid results tainted by familiarity with the test, and administered by medical professionals contracted to provide services to the ECCC Detention Unit (“Medical Unit”).³³ The Chamber will also, as appropriate, issue future orders implementing the Experts’ recommendations for resuming NUON Chea’s physiotherapy regime and making accommodations which would allow him to sit through proceedings despite his back problems after determining the most feasible methods for doing so.

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER

AFFIRMS that the Accused NUON Chea is fit to stand trial;

ORDERS that the Accused NUON Chea’s cognitive function continue to be tested at least once every quarter;

³² See Fourth Decision on Fitness, para. 14, *citing* T. 27 January 2015, pp. 25-26.

³³ See Order for the Quarterly Cognitive Testing of NUON Chea and KHIEU Samphan, E329/9, 9 June 2015; Order for the Quarterly Cognitive Testing of NUON Chea and KHIEU Samphan – CLARIFICATION, E329/9.1, 24 June 2015; Order Scheduling Cognitive Testing of the Accused, E329/11, 26 August 2015.

APPOINTS the Experts to prepare tests to assess the Accused NUON Chea's cognitive function and to work with qualified ECCC Medical Unit staff to administer these tests and report the to the Trial Chamber; and

DIRECTS WESU to coordinate and schedule these tests, to begin no later than 22 September 2016.

Phnom Penh, 6 September 2016

For the President of the Trial Chamber

APPOINTS the Experts to prepare tests to assess the Accused NUON Chea's cognitive function and to work with qualified ECCC Medical Unit staff to administer these tests and report the to the Trial Chamber; and

DIRECTS WESU to coordinate and schedule these tests, to begin no later than 22 September 2016.

Phnom Penh, 6 September 2016

For the President of the Trial Chamber



A handwritten signature in black ink, appearing to be 'YS' or similar initials.

YA Sokhan