

**VICTIM PARTICIPATION PROJECT AND THE LIVING DOCUMENT PROJECT**

**ARE THE ACCUSED IN CASE 002 LEGALLY FIT TO STAND TRIAL?**

**29-31 AUGUST 2011**

*[Nuon Chea] is so selfish. He should be as brave as when he was in power. Sitting and listening in court are not as difficult as working under his regime.*

~ Hav Sophea, a civil party from Kampong Thom

**I. PURPOSE OF THE HEARING ON FITNESS TO STAND TRIAL**

The hearing from 29 to 31 August 2011 at the Extraordinary Chambers in the Courts of Cambodia (ECCC) was scheduled to examine the medical assessment of accused Ieng Thirith and Nuon Chea by Professor John Campbell, a geriatrician from New Zealand. The hearing was an opportunity for the Trial Chamber to consider the outcome of Prof. Campbell's medical report and for the parties to put questions to him and, if in disagreement, contest the findings of Prof. Campbell. The hearing was not intended to result in a final decision regarding whether any of the accused is fit or not fit to stand trial. Such a decision will occur at a later date.

The hearing was limited to an examination of medical reports as to the accused Ieng Thirith and Nuon Chea, but not Khieu Samphan and Ieng Sary. Khieu Samphan has refused to be examined medically and declared himself fit for trial, while Prof. Campbell concluded that Ieng Sary is fit to stand trial, which was not contested by the Ieng Sary defense. According to the scheduling order, Prof. Campbell recommended that some accommodations be implemented to assist Ieng Sary's participation in the courtroom and discussions are ongoing as to how these recommendations will be implemented at trial. A summary of the findings will be discussed below in this report.



Ieng Thirith (left), 79, and Nuon Chea (right), 85 (ECCC photo)

According to the findings of Prof. Campbell which were uncovered gradually throughout the hearing, Ieng Thirith's mental capacity is a grave concern for the Court and needs to be further assessed. As far as Nuon Chea's mental and physical condition, he was considered fit to stand trial by Prof. Campbell, although he contested the findings and has requested additional assessment of his fitness.

## **II. SUMMARY OF FINDINGS**

### **Findings regarding Ieng Thirith:**

As for Ieng Thirith's physical status, Prof. John Campbell found that she is "generally frail" but her physical condition is not such that it would prevent her from participating in the trial. It is true that Ieng Thirith, who is 79 years old, is frail and, thus, suffers from a number of chronic illnesses. Prof. Campbell was, nonetheless, of the view that these illnesses have been managed appropriately. According to his assessment of Ieng Thirith's physical condition, Ieng Thirith would be able to attend most of the hearing sessions, but it would be helpful to use holding cell where she could lie down when she tires. He further added that there is no special accommodation such as special chair is necessary in the case of Ieng Thirith.

Her cognitive function is, however, of serious concern. According to Prof. Campbell's findings, Ieng Thirith is likely to be mentally unfit to stand trial. He recommended that an additional expert be appointed to assess and ascertain her cognitive ability. According to him, Ieng Thirith exhibits symptoms of "significant cognitive impairment." There are a number of causes that might have contributed to her dementia and one of those is "most likely Alzheimer disease." Other contributing causes may be stress, medication and her social conditions. Ieng Thirith's mental state had previously been assessed in 2009 by two psychiatrists, one national and the other international. The two experts found signs of an early stage of a "dementing process" but that, nonetheless, this change was consistent with her age.

According to the facts uncovered at the hearing, Ieng Thirith had an accident in early 2006 and, up until her arrest in November 2007, had been an outpatient of Bamrung Rat hospital in Thailand. Since this time, according to the experts, she has developed "disturbed behavior." Ieng Thirith's international defense lawyer during the cross-examination publicly displayed two reports filed by the head of the ECCC detention center before being ordered to take the documents off the screen. These reports described many occasions during which Ieng Thirith insulted other accused in the detention center and exhibited other "inappropriate behavior." The report also indicated that Ieng Thirith had lost her capacity to take care of herself. Prof. Campbell added that, even with all appropriate care and medication for Alzheimer's disease, Ieng Thirith's recovery would be unlikely.

### **Findings regarding Nuon Chea:**

Nuon Chea's defense requested that the portion of the hearing discussing his substantive health issues be conducted in closed session. His request, however, was objected to by the Prosecution and the Civil Parties and denied by the Trial Chamber.

According to Prof. Campbell, Nuon Chea informed him that his concentration span is 90 minutes, beyond which he cannot concentrate. The expert, nonetheless, is of the view that 90 minutes is actually the usual length of each portion of a court session and therefore, Nuon Chea's shortened concentration abilities do not affect his ability participate in the hearing. Prof. Campbell added that Nuon Chea's previous physical assessment indicates that Nuon Chea's physical condition is stable for a man of 85 years old.

As far as Nuon Chea's cognitive function is concerned, he has been assessed approximately every six months. According to Prof. Campbell, who had reviewed Nuon Chea's previous medical records, findings by previous medical experts have been consistent and that "no cognitive impairment or problems with language or structural problems" are evident. Nuon Chea had a stroke in 1995 but, according to Prof. Campbell, this stroke was small and is not associated with causing diminished cognitive capacity. Indeed, in 2009, Nuon Chea declined an opportunity to have his cognitive ability tested. Prof. Campbell believes that Nuon Chea is fit to stand trial and that "no further assessment was needed."

Nuon Chea, however, does not accept the findings by Prof. John Campbell. He took the floor to speak, even after the President of the Trial Chamber, Judge Nil Non, informed him that he would be given the opportunity to make his statement at the later part of the hearing and must wait. "Past and present is different," said Nuon Chea. "My disease has changed and my health decreased. Not that I do not believe in doctors, but my health condition has changed, worse and worse, including my physical, emotional and intellectual capacities. And that's why, past and present is different... nothing stays the same." At the beginning of the hearing on fitness to stand trial, Nuon Chea also complained of high blood pressure, short concentration and other conditions when contesting the findings by Prof. John Campbell that he is fit to stand trial. Such complaints have drawn sharp criticism and reactions from civil parties and the general public. The following section consists of a sampling of the opinions of people who attended the hearing.

### **III. PARTICIPATION OF CIVIL PARTIES AND VICTIMS**

For the ECCC hearing on the fitness to stand trial of Ieng Thirith and Nuon Chea, the Victim Participation Project of the Documentation Center of Cambodia in conjunction with the Center's Living Document Project invited 14 civil parties and 20 non-civil party villagers to attend the hearing as part of their regular and ongoing activities. Invitees first participated in an updates meeting, which informed them of recent developments in both Case 001 and Case 002. This meeting was led by the author and Living Document Project team leader Sokheang Ly on the afternoon of 28 August 2011. During the meeting participants were also given an opportunity to share their expectations for the fitness hearing, and ECCC proceedings generally.



Sokheang Ly and Terith Chy provides ECCC updates to Case 002 civil parties and villagers at DC-Cam.

Participants attended the entire first day and part of the second day of the three-day hearing. The hearing was scheduled to last the three full days, however, due to the confidential nature of the fitness proceedings and likelihood that major portions of the hearing would be conducted in closed session, as laid out in the scheduling order, the invitation of civil parties and villagers lasted only for the whole day of 29 August and the morning of 30 August.

The Victim Participation Project had earlier planned to invite all 28 civil parties who had been recently been admitted by the Pre-Trial Chamber on 24 June after being assisted by the Project. Most of these newly admitted civil parties could not attend however, for such reasons such as observing the final day of Ramadan and being busy with the planting season. The Project subsequently invited other Case 002 civil parties to observe the hearing instead. The original purpose for inviting these newly admitted civil parties was to facilitate their consultation with their lawyers on any subjects of concern and also for the lawyers to inquire about possible additional information from their new clients. These newly admitted civil parties have been invited to participate in upcoming regional forums organized by the ECCC's Victims Support Section. The Project however believes additional meetings with the lawyers are also necessary, however, as numerous civil parties are present at each regional forum making it hard for individual civil parties to have an effective consultation with their lawyers. It is important that these newly admitted civil parties have adequate time with their lawyers if their claims are to be effectively presented to the ECCC. For

such reasons, the Project will endeavor to provide recently admitted civil parties an opportunity during the next hearing to have a meaningful meeting with their lawyers.

### **Civil Parties in Attendance:**

14 civil parties from Case 002, hailing from 8 provinces and cities attended the three day hearing on fitness to stand trial. During the pre-hearing meeting, these individuals met with their lawyers. They are represented by the group Avocats Sans Frontières, by Mr. Hong Kim Suon's legal team and by

Ms. Chet Vanly's legal team. The participants observed the proceedings as Prof.

Campbell answered questions put to him by the Trial Chamber judges and parties regarding his medical findings concerning the health conditions of the accused Ieng Thirith, 79 years old, and Nuon Chea, 85 years old. The civil parties demonstrated a strong will and enthusiasm to observe the hearing on fitness to stand trial despite their busy schedule and having to seat in the strongly air-conditioned courtroom public gallery, where they had to remain silent and were subject to other restrictions they are not used to; however, they showed remarkable compliance with all requirements. Their ultimate purpose, according to the majority of participants, was to see the accused and how the court proceedings took place.



Civil party lawyers from Avocats Sans Frontières meet with their clients at DC-Cam before the hearing on fitness to stand trial.

Civil party Chann Krouch, who sat in the courtroom despite the cool temperature of the room, wore only one layer, a simple shirt and flip flops, while Nuon Chea wore three layers of shirts and a fancy coat. Unfortunately, the accused, especially Nuon Chea, spent most of the hearing in the holding cell after asking to leave the courtroom due to his health condition. However, Nuon Chea was still able to deliver a clear and loud statement during the hearing. Hour Thol, a civil party from Prey Veng, stated that "he still looks so strong and his health seems not deteriorated [...]" His conduct reveals his attempt to prolong the proceedings until his eventual death." Most of the civil parties were not satisfied with the reasons provided by Nuon Chea to support his claims for not being able to concentrate over a period longer than 90 minutes.





Civil party lawyer Ms. Chet Vanly and her colleague meet Case 002 civil parties at DC-Cam.

Civil party Man Saut, a 79 year old man from Kampong Thom, did not buy the arguments made by Nuon Chea. "I don't know about his individual condition [...] but I am also at this age. I could travel, attend the hearing, and sit for this long [...] this is what he claims [he cannot do] and everyone at this age could say the same thing," he said. Nuon Chea did not even use glasses to read his

statement but Man Saut does. Man Saut's son, Man Sim, was arrested and later executed at S-21. All that was left of him was a prisoner biography from Tuol Sleng, which Man Saut brings with him everywhere he goes. Saut never had a photograph of his son, except for one copied from his prisoner biography at Tuol Sleng. Saut did not find this photograph until 30 August 2011, during his third trip to the Tuol Sleng prison museum as part of the hearing trip activities. Saut had long understood that his son was executed at the hands of Duch's comrades, but was extremely excited to have found the only remaining photograph of his son, even in the awful condition it was in. "I found it. I feel such a relief. I can go back and share with my wife and family. They will be very happy," said Saut. It was only six months ago that Saut was able to save enough money to hold a religious ceremony for the death of his son.

Nuon Chea, in some aspects, enjoys luxuries the victims of the Khmer Rouge do not. He is provided with high quality medical treatment and is kept in good conditions to ensure that he will remain in good health to stand trial. These are something that the vast majority of the victims do not enjoy. According to civil parties assisted by the Victim Participation Project, at least five recognized civil parties have already died and some apparently could not even afford the simplest medical treatment.

Civil party Huor Thol from Prey Veng became frustrated seeing the accused arguing that they are not fit to stand trial. She said:

I am very disappointed. I filed a civil party application because of the death of my parents and relatives and I want nothing but justice ... I am just wondering why we, the victims, of whom there are hundreds of thousands, could not do anything ... Despite the fact that millions of

people died, these [accused] still think that they were right and do not even recognize their responsibility ... I will not find closure. The flame of anger would still burn in my mind.



Civil party lawyer Hong Kim Suon meet with their clients at DC-Cam, August 2011.

Hav Sophea from Kampong Thom felt that Nuon Chea was confident and had adequate ability to argue in court when read his statement in an attempt to explain to the court that his health conditions are deteriorating and that his concentration is limited. "When he reads his statement, it seems to me that he is fit and his mental condition is normal, given his ability to

read and the contents of his statement," she said, "He is so selfish. He should be as brave as when he was in power. Sitting and listening in court are not as difficult as working under his regime." As for Ieng Thirith, Sophea does not believe that she is mentally incapacitated. "She was arguing and well aware of the charges against her ... Also, even if she is really unfit, she should be prosecuted because she was fit when committing those crimes," said Sophea. She told the Victim Participation Project that she would be extremely disappointed if some of the accused are found not fit to stand trial as this goes against victims' original expectations.

### **Non-Civil Party Victims:**

The fitness hearing resulted in widespread concern among the attending public. Attendees appeared unconvinced by Nuon Chea's six main points of notes, of which he mainly argued that he has a problem with his "concentration". Nuon Chea argued that his brain can work normally for 90 minutes at a time only. He thus appeals that continuing his trial is not appropriate owing to his "concentration" problem.

Tit Chantha, 40, of Takeo province, questioned Nuon Chea's short statement, stating that Nuon Chea looked energetic both mentally and physically. Tit questioned how anyone could believe Nuon Chea's claims because he could write and read fluently. So, the question according to Tit is: "is it appropriate [for Nuon Chea] to seek the status of being a patient?" Similarly, Neth Phally of Kampong Cham province said

"honestly, despite some mental impairment, [the accused] should remain subject to mandatory appearance before the court."

Without the presence of the accused in the courtroom, Tit even believed the hearing itself was "annoying, stressful and unsatisfactory." Both Phat Sophea of Kampong Chhnang province, Ngi San of Takeo province and Tit would prefer that the ECCC put all of the accused on trial as quickly as possible because the accused are responsible for the approximately 1.7 million lives and terrible living conditions. Despite these complaints and concerns, some reiterated the importance of respecting the rule of law and democratic principles. Indeed, it's the court's mandate to guarantee the rights of the accused. Tit emphasized that it would be reasonable if the court decides to let both Nuon Chea and Ieng Thirith be treated at a specific facility. However, he believes the people need to keep a close watch on the court process. Such statements demonstrate the long-held craving for truth and justice among Cambodians.

#### **IV. CONCLUSION**

From the testimony of Prof. Campbell, it appears that Ieng Thirith is likely to be found mentally incapacitated and thus unfit to stand trial, regardless of physical capabilities. Should this be the case, the ECCC would face a tremendous challenge in deciding what to do with her. If she is found unfit, one likely outcome would be, according to findings by other international tribunals, to find an appropriate medical facility to treat her until her conditions become normal, although her recovery is highly unlikely. One question would be whether the existing mental facilities in Cambodia are capable of providing adequate treatment? Also, since the ECCC has a limited mandate, it is also unclear what would happen if Ieng Thirith regained her mental capacity after the dissolution of the ECCC. Would Ieng Thirith be transferred to the national court, or would she be simply released, given her age and frail conditions? This would be a difficult decision for the ECCC to take, taking into consideration the interests of justice, expectations of victims and Ieng Thirith's rights and current medical conditions.

Nuon Chea is fit to stand trial according to the findings of Prof. Campbell. Nuon Chea and his defense team nonetheless remain defiant and have expressed their challenges to Prof. Campbell's findings. Through the questions put to Prof. Campbell and arguments raised in the court, Nuon Chea is likely to raise arguments about his health problems throughout trial. This would definitely prolong the proceedings. In turn, it is expected that victims and civil parties alike could become even more frustrated when the substantive hearings begin.

By Terith Chy and Sokheang Ly