

KRT TRIAL MONITOR

Case 002 ■ Issue No. 2 ■ Fitness to Stand Trial I ■ 29 – 31 August 2011



Case of Ieng Thirith, Nuon Chea, Khieu Samphan and Ieng Sary

Asian International Justice Initiative (AIJI), a project of East-West Center and UC Berkeley War Crimes Studies Center

*The more debates are public, the more...the victims, the civil parties
and the public in general will understand what is going on,
what is happening, and what the real stakes are.*

- Elizabeth Simmoneau-Fort, Civil Party Lead Co-Lawyer

I. OVERVIEW

On 29 to 31 August 2011, the Trial Chamber conducted a preliminary hearing on the fitness to stand trial of Ieng Thirith and Nuon Chea, following the submission of the reports of Professor John Campbell,¹ the medical expert the Chamber appointed to examine the health of the Accused Ieng Sary, Ieng Thirith and Nuon Chea.²

A joint session was held on the first day of hearing for issues common to Ieng Thirith and Nuon Chea, particularly the qualifications of Professor Campbell as an expert and the methodology he used in his assessments. In the discussion of his methodology, Professor Campbell explained the various sources he used in arriving at his evaluation. The second day focused on issues relating to Professor Campbell's report on Ieng Thirith, which disclosed that she is most likely suffering from Alzheimer's disease, the most common cause of dementia. Professor Campbell concluded that Ieng Thirith is cognitively impaired to the point that she will be unable to meaningfully participate in her trial. On the final day of the preliminary hearing, the geriatrician maintained that based on his assessment, Nuon Chea is fit to stand trial.

II. LEGAL AND PROCEDURAL ISSUES

The following issues were discussed during the three-week hearing: (A) Professor Campbell's qualifications; (B) the methods he used to assess the health of Ieng Thirith and Nuon Chea; (C) Professor Campbell's findings on Ieng Thirith's mental health; (D) his findings on Nuon Chea's mental health; (E) the right of the Accused to keep details on the condition of their health private vis-à-vis the right of the public to information, and (F) the right of the Accused not to be present at the courtroom.

A. Professor John Campbell's Qualifications

At the beginning of the first day of the hearing, the parties questioned Professor Campbell on his qualifications. He testified that he is an expert from New Zealand with substantial clinical and academic experience in the fields of internal and geriatric medicine. Notably, he has authored and co-authored over a hundred publications with peer reviews in his subject areas. He currently divides his time between consultant clinical practice, teaching and research in geriatric medicine.

Throughout the hearings, the Judges, the Prosecution and the Ieng Thirith Defense Team all expressed acceptance of Professor Campbell's qualifications as an expert. To bolster his credibility, Ieng Thirith's International Lawyer, Ms. Diana Ellis, highlighted Professor Campbell's extensive experience in his field, as well as the prestigious positions he holds.

Nuon Chea's Defense Team, through Mr. Jasper Pauw, on the other hand, repeatedly propounded questions aimed at challenging Professor Campbell's expertise and credibility. Unsatisfied with the diagnosis of his client, Pauw sought to cast doubt on the reliability of Professor Campbell's findings. Pauw highlighted the expert witness' lack of experience in assessing the fitness of an accused to stand trial in a criminal case.

The International Co-Prosecutor, Mr. Tarik Abdulhak, opposed the arguments of the Nuon Chea Defense in his closing statement. He noted that, since the Nuon Chea Defense neither filed any objection nor challenge Professor Campbell's qualifications when the Trial Chamber appointed him or even after he submitted his reports, the Nuon Chea Defense has implicitly accepted his qualifications as an expert.

B. Methodology Used to Assess Ieng Thirith and Nuon Chea's Health

Questions about the methodology and the tests Professor Campbell employed during the medical assessment of Ieng Thirith and Nuon Chea took up a significant part of the three-day hearing.

In his testimony, Professor Campbell explained the various sources he used as basis to evaluate the health conditions of the two Accused. He clarified that the primary basis for his assessments were the subjects' medical histories and his own interviews and examinations. To evaluate Ieng Thirith and Nuon Chea's medical history, Professor Campbell used the following: (i) a report dated 2009 by professionals who examined Ieng Thirith, Dr. Brinded and Professor Ka; (ii) pre-existing medical reports from Calmette Hospital and Bangkok; (iii) reports from the court doctor and the staff of the holding cells; (iv) the report of persons who take care of the Accused daily; and (v) interviews with the Accused.

In addition, Professor Campbell conducted two formal tests to assess the cognitive functions of the two Accused: (i) the Folstein Mini-Mental State Examination and (ii) the Montreal Cognitive Assessment. Professor Campbell explained that he used these tests as supplementary evaluation tools because he took into account differences in language and culture, as well as the general design of the tests, which are conducted on persons seeking "to show that they are as good as they possibly can be."³

While conducting these tests, Professor Campbell asked Ieng Thirith about her personal history to test her memory. He also asked her to draw a clock face, and indicate particular times on it to test her spatial organizing abilities. He then conducted a trail-following test to examine her sequencing skills. Ieng Thirith failed in these cognitive tests. She could not recall her personal history well; for example, she confused her birthday with her wedding day. Neither could she remember the number of her own children, nor correctly identify the time using the clock face she drew. Additionally, she was unable to perform the sequencing required in the trail-following test.

When the Chamber and the Parties raised concerns that leng Thirith may have purposefully misled Professor Campbell into finding her cognitively impaired, the Professor explained with confidence that, based on his substantive experience in administering cognitive tests, he would have detected any pretension or intent to delude him. He further expressed his belief that leng Thirith does not possess the capacity to mislead him.

The Nuon Chea Defense challenged Professor Campbell's methodology and the tests he conducted to assess their client's health. They argued that the sources Campbell used to assess Nuon Chea were insufficient and dated. Professor Campbell countered that the sources on which he based his report were both sufficient and timely, and that he would have culled more information if necessary, but it was not. Mr. Son Arun, National Counsel for Nuon Chea, claimed that Campbell did not closely follow up on how Nuon Chea's stroke and high blood pressure might affect his mental capacity. Professor Campbell explained that it is common for someone who had a small stroke to have high blood pressure, but this does not affect cognitive function. The Defense emphasized that Professor Campbell did not spend adequate time interviewing Nuon Chea and assessing his health condition. Professor Campbell rejected this claim, stating that the time he spent with the Accused was sufficient to gain the information he needed for his medical assessment.

The CPLCL pointed out that there was lack of reference in the medical reports to the standards laid out in the case of *Prosecutor vs. Pavle Strugar*⁴ regarding the ability of the accused to appreciate the proceedings. Professor Campbell affirmed that, nevertheless, he did take the *Strugar* criteria into consideration in forming his assessments. President Nil Nonn clarified that the Chamber, and not the medical expert, has the competence to decide based on the legal standards articulated in the *Strugar*. The expert is only responsible for providing technical, medical information that will assist the Chamber in deciding the fitness to stand trial of the Accused. As such, there was no need for Professor Campbell to cite the *Strugar* criteria in his medical reports.

C. Findings on Nuon Chea's Fitness to Stand Trial

Professor Campbell summarized his findings on Nuon Chea's physical health conditions in this manner: first, he found Nuon Chea's cardiovascular system to be stable, considering that he did not suffer any stroke recently. Professor Campbell thus opined that sitting in court would not pose a risk for heart failure or shortness of breath. Second, there was no finding that cerebrovascular disease had affected Nuon Chea's language or cognitive function, except for some effect on mobility, which had already been treated. Third, musculoskeletal problems may affect the ability of the Accused to sit for a prolonged period and to concentrate, but Nuon Chea himself stated that he can sit for two to three hours and concentrate for an hour and a half, which is the approximate duration of each session in court.

In an attempt to discredit Professor Campbell's findings, the Nuon Chea Defense raised a list of physical ailments the accused has suffered in the past, especially the stroke he suffered in 1995. However, Professor Campbell explained that the stroke Nuon Chea suffered sixteen years ago was a minor one, involving the lacunae, which did not impair his cognitive ability. The lacunar stroke did affect some motor functions, but the changes are minimal and difficult to detect.

The Defense also raised concern over Nuon Chea's high blood pressure but Professor Campbell confirmed that the medical team looking after Nuon Chea is managing this appropriately. This is likewise true for his cardiac condition, which has been stable for a number of years, with his angina managed through medication. Professor Campbell verified that coronary artery obstruction is not unusual for Nuon Chea's age, and he is taking medication to prevent further obstruction. Despite some difficulty with his reading and vision,

Nuon Chea has the ability to comprehend the contents of documents that will be brought to him. Accordingly, Professor Campbell concluded that Nuon Chea is able to understand the proceedings, respond appropriately, concentrate, and engage with others. He should therefore be deemed fit to stand trial in this case.

Nuon Chea personally addressed the Chamber twice during the proceedings to discuss his weakened medical condition. On the morning of the first day of the hearing, Nuon Chea claimed with a loud and clear voice that, although he would like to participate in the proceedings, his health is gradually deteriorating with his advanced age. He complained that he has problems concentrating, understanding and reading materials. He told the Chamber that he could not remain seated for a long time, as this affects his eyesight, his head becomes heavy and his back aches. He also implied that remote participation in the holding cell would not improve his difficulties in concentration, even with the technical facilities and the medical attention provided. He also criticized Professor Campbell's failure to assess his capacity to concentrate. He requested that another doctor be assigned to examine him on this aspect, and then asked to be excused from court for the day to participate remotely. At the end of the second day of hearing, Nuon Chea spoke again, this time out of turn after Professor Campbell's summary of his findings. He insisted that his health is not the same, and that it is becoming worse every day physically, emotionally and intellectually. Ironically, the Co-Prosecutors referred to these incidents to illustrate the point that Nuon Chea is in fact capable of defending himself and effectively participating in his trial.

D. The Right of the Accused to Privacy vis-à-vis the Right of the Public to Information

At the beginning of the session for Nuon Chea, his Defense raised his right to privacy, and asked that the session be held *in camera*. The Defense stated that the parties would be able to discuss the issue more freely and present confidential documents in a closed session. The Co-Prosecutors and the Counsel for the Civil Parties objected to the motion. Abdulhak stressed that significant aspects of Nuon Chea's assessment had already been discussed in public in the previous sessions. The International CPLCL, Ms. Elizabeth Simonneau-Fort, added that the matters in issue are extremely important, and it is necessary for the public to understand what is going on and the reasons for decisions that the Chamber will make.

After a brief deliberation, the Chamber rejected the Nuon Chea Defense's application for a closed session and decided to proceed with the public hearing. The Chamber was persuaded by the argument that most of the matters in issue have already been made public in the previous sessions. Nevertheless, the Judges assured the Accused that if required, sessions will be held *in camera*.

E. Waiver of the Right of the Accused to be Present

Although the Accused may waive his right to participate in the proceedings, the Chamber directed the ECCC doctors to submit a medical report on the condition of the Accused when he or she seeks to participate remotely in the holding cells or requests to be brought back to the detention center. This way, the Chamber may have an adequate basis for a ruling on the request.

As early as the first day, Nuon Chea personally addressed the Chamber on day one, declaring that although he would like to participate in the proceedings, it was difficult for him to do so because of his health. He asked the Chamber to appoint another doctor to examine his capacity to concentrate and he subsequently retired to his holding cell. The court doctors reported that the results of their examination of Nuon Chea were within normal ranges. Accordingly, the Chamber saw no reason to allow Nuon Chea to return to the detention facility, and ordered that he be brought only to the holding cell where he could remotely participate in the hearing.

Given the age and health of the four Accused, we anticipate that issues relating to their right to be present at their trial and the waiver of this right by the Accused will be a recurring matter.

III. TRIAL MANAGEMENT

Throughout the three days of hearing, it appeared that the Chamber made remarkable effort in pushing the courtroom to run efficiently and expeditiously. They exhausted all the questions posed by the parties during the proceedings, and yet managed the proceedings well by constantly directing the parties to avoid repetitious questions, and advising them to try to limit the scope of their questions and oral submissions in accordance with the agenda set by the Chamber. In addition, upon Abdulhak's objection, the Chamber also directed Son Arun to show the documents referred to in his arguments so that everyone could follow the discussion.

A. Translation Concerns

Translation proceeded smoothly during the proceedings, and Professor Campbell said the translation was quite accurate, although there were occasional background noises in the translation units, particularly in the translation from French to English. Moreover, the speakers understood the need to allow the translators to catch up and adjusted the speed of their speech accordingly.

B. Attendance by the Public

The hearing was well attended, particularly on the first day, with only a minimal reduction in audience attendance during the next two days.

C. Technical problems

There were brief power shortages in the public gallery during the course of the hearing. While the Chamber continued with the hearing using a power generator, the people in the public gallery could not hear the proceedings and it took some time for the audio to work.

D. Time Management

DATE	START	MORNING BREAK	LUNCH	AFTERNOON BREAK	RECESS	TOTAL HOURS IN SESSION
Monday 29/08/11	09.00	10.41 – 11.07	12.12 – 13.40	15.06 – 15.27	16.12	4 hours and 57 minutes
Tuesday 30/08/11	09.00	10.33 – 10.57	12.00 – 13.31	15.19 – 15.33	16.15	5 hours and 6 minutes
Wednesday 31/08/11	09.05	10.33 – 10.59	12.05 – 13.41	14.43 – 15.03	15.38	4 hours and 11 minutes

Average no. of hours in session : 4 hours 45 minutes

Total no. of hours this week : 14 hours and 14 minutes

Total no. of hours, days, and weeks at trial: 14 hours and 14 minutes

Unless specified otherwise,

- the documents cited in this report pertain to *The Case of Nuon Chea, Ieng Sary, Ieng Thirith and Khieu Samphan* (Case No. 002/19-09-2007-ECCC) before the Extraordinary Chambers in the Courts of Cambodia;
- the quotes are based on the personal notes of the trial monitors during the proceedings;
- **Case 001** refers to *Case of Kaing Guek Eav alias “Duch,”* Case No. 001/18-07-2007-ECCC; and
- photos are courtesy of the ECCC.

Glossary of Terms

CIA	Central Intelligence Agency
CPC	Code of Criminal Procedure of the Kingdom of Cambodia (2007)
CPK	Communist Party of Kampuchea
CPLCL	Civil Party Lead Co-Lawyer
DK	Democratic Kampuchea
ECCC	Extraordinary Chambers in the Courts of Cambodia (also referred to as the Khmer Rouge Tribunal or “KRT”)
ECCC Law	Law on the Establishment of the ECCC, as amended (2004)
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IR	Internal Rules of the ECCC Rev. 8 (2011)
KR	Khmer Rouge
OCP	Office of the Co-Prosecutors of the ECCC
RAK	Revolutionary Army of Kampuchea
VSS	Victims Support Section
WESU	Witnesses and Experts Support Unit



* This report was authored by Mary Kristerie A. Baleva, Samuel Gilg, Princess Principe, Noyel Ry, Kimsan Soy, Penelope Van Tuyl and Flavia Widmer as part of AIJI’s KRT Trial Monitoring and Community Outreach Program. AIJI is a collaborative project between the East-West Center, in Honolulu, and the University of California, Berkeley War Crimes Studies Center. Since 2003, the two Centers have been collaborating on projects relating to the establishment of justice initiatives and capacity-building programs in the human rights sector in South-East Asia.

¹ The Trial Chamber appointed Professor A. John Campbell as a medical expert in an Expertise Order dated 4 April 2011 (Confidential).

² See Trial Chamber. “Scheduling Order for Preliminary Hearing on the Fitness to Stand Trial” (11 August 2011). E110. The Trial Chamber did not conduct a hearing on Professor Campbell’s report on his findings on Ieng Sary’s health, as the latter did not challenge the report’s conclusion that he was fit to stand trial.

³ Trial Chamber, “Transcript of Preliminary Hearing on Fitness to Stand Trial” (29 August 2011). E1/8.1. Lines 15-16, 17.

⁴ *Prosecutor v. Pavle Strugar*, IT-01-42-T. International Criminal Tribunal for the Former Yugoslavia Trial Chamber. “Decision Re The Defense Motion to Terminate Proceedings” (26 May 2004). The Ieng Thirith Defense referred to this case in Document E62/2 (Confidential) and in the Trial Chamber’s Expertise Order E62/3 (see footnote 1).