

# KRT TRIAL MONITOR

Case 002 ■ Special Report: Ieng Thirith's Fitness to Stand Trial ■ November 2012



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

## I. Overview

Ieng Thirith, alias “Phea,” is one of four accused in Case 002 at the Extraordinary Chambers of the Courts of Cambodia (hereafter **ECCC** or Court). She was indicted on 10 September 2010 for crimes against humanity, genocide, and grave breaches of the Geneva Conventions of 1949. However, on 21 February 2011, Ieng Thirith's Defense filed for an assessment of the fitness to stand trial of the Accused and asserted that, “the mental condition of the Accused inhibits the Defense in its ability to prepare for the forthcoming trial.”<sup>1</sup> On 17 November 2011, after multiple hearings and expert evaluations, Ieng Thirith was found unfit to stand trial on the basis of a mental condition.<sup>2</sup> The Trial Chamber severed Ieng Thirith's case from the others in Case 002 to avoid delay of the other Defendants' trial, and ordered her immediate and unconditional release.<sup>3</sup> The Office of the Co-Prosecutors (**OCP**) filed an immediate appeal,<sup>4</sup> which was granted by the Supreme Court Chamber on 13 December 2011.<sup>5</sup> The Supreme Court ordered Ieng Thirith held, treated for her medical issues, and reassessed in six months to see if she is fit to stand trial. This reassessment and the related hearings occurred between 27-31 August 2012, with a final Decision from the Court in favor of indefinite stay of proceedings and provisional release issued on 13 September. The Co-Prosecutors immediately appealed this decision on 14 September 2012, on the basis that they believed the Court should retain more supervision of the indicted person. The Supreme Court Chamber will hear arguments regarding this appeal on 13 November 2012.

<sup>1</sup> Ieng Thirith Defense. “Defense Request for Appointment of a Neuropsychiatrist to Assess Madame IENG Thirith's Fitness to Stand Trial” (21 February 2011). E52 [hereinafter, **REQUEST FOR NEUROPSYCHIATRIST**]. par. 36.

<sup>2</sup> Trial Chamber. “Decision on Ieng Thirith's Fitness to Stand Trial” (17 November 2011). E138 [hereinafter, **TRIAL CHAMBER DECISION**]. pp. 29-30.

<sup>3</sup> “The Trial Chamber held that it is in the interests of justice to sever the charges against the Accused Ieng Thirith in Case 002 pursuant to Internal Rule 89ter and to stay the proceedings against her.” Trial Chamber Decision, par. 64. 23. ECCC Internal Rules, as revised 3 August 2011 [hereinafter, **INTERNAL RULES**]. Rule 89ter on Severance states that “When the interest of justice so requires, the Trial Chamber may at any stage order the separation of proceedings in relation to one or several accused and concerning part of the entirety of the charges contained in an Indictment.”

<sup>4</sup> Co-Prosecutors. “Immediate appeal against Trial Chamber Decision to order the release of accused Ieng Thirith” (18 November 2011). E138/1/1 [hereinafter, **IMMEDIATE APPEAL**].

<sup>5</sup> Supreme Court Chamber. “Decision on immediate appeal against the Trial Chamber's Order to release the accused Ieng Thirith” (13 December 2011). E138/1/7 [hereinafter, **SUPREME COURT CHAMBER DECISION**].

With Ieng Thirith's case once again coming to the fore of proceedings this month at the ECCC, AIJI is publishing this Special Report to provide a concise review of the pertinent legal and procedural issues confronted by the Court thus far in its handling of this Accused. These issues include: (i) Respect for Ieng Thirith's fair trial rights as someone with potentially diminished mental capacity; (ii) Determination of the appropriate remedy (*i.e.* stay or termination of the proceeding against her); (iii) Establishment of the correct legal basis for ordering medical treatment; and (iv) Deciding whether it is legally acceptable to continue her detention, or release her (either conditionally or unconditionally). This report considers each topic in turn, discussing the relevant legal standards and precedents, summarizing the Decisions and reasoning of the Trial and Supreme Court Chambers thus far.

## **II. Mental Capacity and Fair Trial Rights**

On 21 February 2011, Ieng Thirith's Defense team expressed concern that her mental state was hindering their ability to prepare for trial.<sup>6</sup> The Trial Chamber ordered five experts in geriatric medicine and psychiatry, with particular expertise in Alzheimer's disease, to assess the Accused. The experts found that she has a deteriorating dementing disorder, probably Alzheimer's disease.<sup>7</sup> If a diminished mental capacity precludes her from being able to understand the proceedings or to participate in her defense effectively, she may not be fit to stand trial. Both ECCC Law and the International Covenant on Civil and Political Rights (**ICCPR**) afford Ieng Thirith certain important rights as a defendant in a criminal proceeding, and compliance with some of these fundamental rights may be unachievable in the case of diminished mental capacity of an Accused.

### **A. Defining Fair Trial Rights and the Fitness Standard: *Prosecutor v. Strugar***

Both international standards and ECCC law provide defendants with specific trial rights. For example, the ICCPR and ECCC Law dictate that, "the accused shall be equally entitled to the following minimum guarantees:

- (a) to be informed... in a language that they understand of the nature and cause of the charge against them;
- (b) to have adequate... facilities for the preparation of their defence and to communicate with counsel of their own choosing
- ...
- (d) ... to defend themselves in person..."<sup>8</sup>

The above indicates that the accused has a right to understand the nature and cause of the charge against her, and to participate in her defense. If she has a right to be informed of the charges in a language she understands, it seems reasonable that she should also have the right to understand the charges, whether there is a linguistic, mental or other barrier to her understanding. An expansive definition of the rights to "adequate facilities" to prepare her

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<sup>6</sup> REQUEST FOR NEUROPSYCHIATRIST, par. 36.

<sup>7</sup> Geriatric Expert Professor A. John Campbell. "Report Prepared in Response to the Trial Chamber's Order Assigning Expert, Geriatric Expert Report – Mrs. IENG Thirith" (23 June 2011). E62/3/6 [hereinafter, **GERIATRIC EXPERT REPORT**]. par. 40. Trial Chamber Decision, par. 33 and 45. 13 and 17.

<sup>8</sup> Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, as amended. NS/RKM/1004/006 (27 October 2004) Oct. 27, 2004 [hereinafter, **ECCC LAW**]. Article 35 new, (a), (b), (d). Also, International Covenant on Civil and Political Rights (16 December 1966) [hereinafter, **ICCPR**]. Article 14(3) (a), (b), (d).

defense and to communicate with counsel would necessarily include the capacity to participate, prepare, and communicate her wishes. Understandably, these rights may be affected by a condition like Ieng Thirith's, which limits her ability to remember, understand, and be cognizant of her situation.

The International Criminal Tribunal for the former Yugoslavia (ICTY) faced a similar problem in *Prosecutor v. Strugar*. In that case, the defendant, Pavle Strugar, was diagnosed with vascular dementia. Vascular dementia is the second-most common form of dementia after Alzheimer's disease. It is caused by insufficient blood supply to the brain. Symptoms include loss of memory, mood changes, and problems with language, reasoning and decision-making.<sup>9</sup>

In the *Strugar* case, the ICTY Trial Chamber found that the analysis of an accused person's fitness to stand trial "is not confined to establishing whether a given disorder is present... but rather is better approached by determining whether he is able to exercise effectively his rights in the proceedings against him."<sup>10</sup> The ICTY Trial Chamber and the Appeals Chamber analyzed the relevant statutory law, alongside jurisprudence from other international courts, as well as civil and common law national jurisdictions<sup>11</sup> to compile a non-exhaustive list of criteria to assess an accused's fitness to stand trial. The Court identified at least seven mental capacities as relevant to fair trial rights. These included the capacity:

- to plead,
- to understand the nature of the charges,
- to understand the course of the proceedings,
- to understand the details of the evidence,
- to instruct counsel,
- to understand the consequences of the proceedings,
- and to testify.<sup>12</sup>

These capacities are commonly referred to as the *Strugar* criteria, and are used<sup>13</sup> as a guideline to assess an accused's fitness to stand trial. However, the ICTY Chamber clearly specified that this is a non-exhaustive list, and that "[i]t would be entirely inappropriate, and unjustified, and antithetical to the application of international criminal law, to require that each of these capacities must be present at their notionally highest level, or at the highest level that a particular accused has ever enjoyed... Rather... what is required is a minimum standard of

<sup>9</sup> Alzheimer's Society. "What is vascular dementia? Factsheet 402." Available at <[http://alzheimers.org.uk/site/scripts/documents\\_info.php?documentID=161](http://alzheimers.org.uk/site/scripts/documents_info.php?documentID=161)>, accessed 23 July 2012.

<sup>10</sup> *The Prosecutor v. Pavle Strugar*. IT-01-42-A. ICTY Trial Chamber II. "Decision Re the Defence Motion to Terminate Proceedings" (26 May 2004). [Hereinafter, **STRUGAR TRIAL CHAMBER DECISION**]. par. 35.

<sup>11</sup> This included the ICTY, International Criminal Tribunal for Rwanda, International Military Tribunal, European Court of Human Rights, International Criminal Court, Special Court for Sierra Leone, Special Panels for Serious Crimes in East Timor, Australian, Canadian, Indian, Malaysian, United States, Austrian, Japanese, Korean, Dutch, German, Russian, Bosnian, Croatian and Serbian law and precedents. *The Prosecutor v. Pavle Strugar*. IT-01-42-A. ICTY Appeals Chamber. "Judgment" (17 July 2008). [Hereinafter, **STRUGAR APPEALS CHAMBER JUDGMENT**]. par. 45-54.

<sup>12</sup> *STRUGAR TRIAL CHAMBER DECISION*, par. 2, "Capacities of an accused"; *STRUGAR APPEALS CHAMBER JUDGMENT*, par. 41.

<sup>13</sup> The *Strugar* criteria have most often been used at the ICTY. However, other international criminal courts have also used the criteria: the International Criminal Tribunal for Rwanda (ICTR) in *Prosecutor v. Karemera et al* and *Gacumbitsi v. Prosecutor*; Special Court for Sierra Leone (SCSL) in *Prosecutor v. Taylor*, SCSL-2003-01-T, Trial Chamber II, "Defense Application to Exclude the Evidence of Proposed Prosecution Expert Witness Corinne Dufka or, in the alternative, to Limit Its Scope" (28 January 2008); Special Panels for Serious Crimes in Dili, East Timor, in *Deputy General Prosecutor for Serious Crimes v. Josep Nahak*, No. 01A/2004, Dili District Court before Judge Phillip Rapoza, "Findings and Order on Defendant Nahak's Competence to Stand Trial" (1 March 2005). par. 28-29.

overall capacity below which an accused cannot be tried without unfairness or injustice.”<sup>14</sup> In this way, the Chamber left a lot of room for judicial discretion in subsequent cases.<sup>15</sup>

Furthermore, the ICTY Trial Chamber found that the assistance of legal counsel may be sufficient to compensate for an accused’s diminished capacity and to make proceedings against an accused fair and just.<sup>16</sup> However, the Chamber acknowledged that an accused must have a certain level of cognizance in order to be able to use counsel sufficiently to stand trial fairly.<sup>17</sup>

## **B. Ieng Thirith’s Mental Capacity**

The Trial Chamber called on the expertise of one expert in geriatric medicine and four psychiatric experts to determine if Ieng Thirith is fit to stand trial. The geriatrician’s expertise included dementia and Alzheimer’s disease; the four psychiatric experts worked in the fields of psychiatry, geriatric psychiatry, dementia, and cognitive assessment in Cambodia and abroad.<sup>18</sup>

All five experts agreed that Ieng Thirith suffers from a “moderately severe dementing illness, most probably Alzheimer’s disease.”<sup>19</sup> They found that related impairments “would compromise her ability to participate fully in her trial and exercise her fair trial rights.”<sup>20</sup> The experts specifically addressed aspects of her cognitive impairment that affect her fair trial rights as defined in *Strugar*. They noted that she remembers appointments with her legal counsel on some occasions but not others,<sup>21</sup> she does not recall that she was a Minister,<sup>22</sup> she could not remember the first hearing before the Pre-Trial Chamber, and had no memory of the charges against her.<sup>23</sup> Furthermore, the experts found that, due to her dementia, she has an impaired ability to comprehend questions, follow instructions, recall events, concentrate and maintain a

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<sup>14</sup> *STRUGAR TRIAL CHAMBER DECISION*, par. 37.

<sup>15</sup> *Ibid.* The Chamber also used the following language: a chamber must view the accused’s capacities “overall and in a reasonable and commonsense manner” (par. 3); a decision on an accused’s fitness is “merely the balance of probabilities” (par. 4); an accused must be able to “sufficiently” exercise his rights (par. 3) at a “minimum standard of overall capacity” (par. 37).

<sup>16</sup> “The availability of counsel... may well adequately compensate for any deficiency of a relevant capacity.” *Ibid.*, par. 22; also cited in *TRIAL CHAMBER DECISION*, par. 28. 11.

<sup>17</sup> “The use of counsel requires, however, that the accused has the capacity to be able to instruct counsel sufficiently for this purpose.” *STRUGAR TRIAL CHAMBER DECISION*, par. 22; also cited in *TRIAL CHAMBER DECISION*, par. 28. 11.

<sup>18</sup> Pursuant to Internal Rule 32: “The Co-Investigating Judges or the Chambers may, for the purpose of determining whether a Charged Person or Accused is physically and mentally fit to stand trial, or for any other reasons, or at the request of a party, order that they undergo a medical, psychiatric or psychological examination by an expert. The reasons for such order, and the report of the expert, shall be recorded in the case file.”

<sup>19</sup> *GERIATRIC EXPERT REPORT*, par. 40.

<sup>20</sup> *Ibid.*, par. 41. See also, *TRIAL CHAMBER DECISION*, par. 50, 18, citing Psychiatrists. “Expertise Report Prepared in Response to the Trial Chamber’s Expertise Order E111, 23 August 2011” (9 October 2011). E111/8 [hereinafter, **PSYCHIATRIC EXPERTS REPORT**]. par. 43. Original Psychiatric Experts Report unavailable.

The four psychiatric experts found that her “cognitive impairment would compromise the ability to understand what was said in court, reason and weigh information, and comment intelligibly on it. Specifically... she would not be able to retain information from any statement made in court long enough to be able to comment on them intelligibly.”

<sup>21</sup> *Ibid.*, par. 13.

<sup>22</sup> *Ibid.*, par. 14.

<sup>23</sup> *Ibid.* The expert geriatrician said she “does not recall she was a Minister” nor “the date of victory of the regime” (par. 14), she does not remember the number of siblings or children she has (par. 19), and she “could not remember the first hearing, had no memory of the charges and said there were no accusations against her (par. 22). The psychiatric experts also found she would not be able to instruct her counsel or assist in the preparation of her defense “due to her memory impairment, not only in relation to her involvement at the time of the alleged offences, but memories for the wider context of her life at the time.” (*PSYCHIATRIC EXPERTS REPORT*, par. 45, cited in *TRIAL CHAMBER DECISION*, par. 51. 18.)

consistent line of thought.<sup>24</sup> As such, the experts thought she would have difficulty instructing counsel, testifying and understanding the nature of charges, the course of proceedings, the details of evidence and the consequences of proceedings, which are all *Strugar* criteria for determining fitness to stand trial.

Based on these reports, the five medical experts did not appear to think that Ieng Thirith had sufficient mental capacity to effectively exercise her fair trial rights. Her defense team supported that claim, in particular that she was not fit to instruct counsel in the preparation of her defense.<sup>25</sup> All experts considered it unlikely that Ieng Thirith could falsely present with dementia.<sup>26</sup> Furthermore, all five experts found that it was unlikely that Ieng Thirith would ever recover sufficiently to stand trial.<sup>27</sup>

### C. Assessing Ieng Thirith's Fitness to Stand Trial, under the *Strugar* Criteria

Based on the assigned experts' opinions<sup>28</sup> and the Trial Chamber's hearings on the subject,<sup>29</sup> the Trial Chamber found that Ieng Thirith lacks many of the capacities delineated in *Strugar*.<sup>30</sup> The Trial Chamber found that because "Ieng Thirith is unable to exercise these fundamental fair trial rights meaningfully, and in accordance with the international standards set forth in the *Strugar* Decision, the Chamber has no alternative but to declare her to be unfit to stand trial."<sup>31</sup> The Trial Chamber found that "[t]rial and continued detention of an Accused who lacks capacity to understand proceedings against her or to meaningfully participate in her own defense would not serve the interests of justice,"<sup>32</sup> and so severed her case from the others in Case 002.

The OCP did not appeal the fact that Ieng Thirith was deemed unfit to stand trial. As such, the Supreme Court Chamber has never sat in judgment of any motion on this issue.

### III. Stay or Termination of Proceedings

After the Trial Chamber found Ieng Thirith unfit to stand trial, the Court had to decide if it was within their discretion to stay or terminate proceedings, and then determine what would be appropriate given the circumstances of this case. The Trial Chamber elected to stay, rather

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<sup>24</sup> GERIATRIC EXPERT REPORT, par. 34.

<sup>25</sup> REQUEST FOR NEUROPSYCHIATRIST, par. 36; TRIAL CHAMBER DECISION, par. 19, which cites transcript from hearing 20 October 2011, p. 103.

<sup>26</sup> TRIAL CHAMBER DECISION, par. 52. 19.

<sup>27</sup> The Psychiatric Experts noted the "gradual insidious decline" of her condition. Furthermore, "they commented that Alzheimer's disease is not a reversible form of dementia." TRIAL CHAMBER DECISION, par. 70, citing Psychiatric Experts' Report, par. 36 and Transcript 19 October 2011, p. 129.

<sup>28</sup> GERIATRIC EXPERT REPORT; Geriatric Expert. "Follow Up Report Concerning Mrs. IENG Thirith in Accordance to Trial Chamber's Expertise Order E62/3, 4 April 2011" (26 August 2011). E62/3/12 [hereinafter, **FOLLOW-UP REPORT OF GERIATRICIAN**]; PSYCHIATRIC EXPERTS' REPORT.

<sup>29</sup> From 21 February 2011 to 17 November 2011, the Trial Chamber heard written and oral arguments regarding Ieng Thirith's fitness to stand trial.

<sup>30</sup> The Trial Chamber said Ieng Thirith "may still possess some capacity to enter a plea, to understand the charges against her, to understand the details of evidence, and to testify. However, the Accused's impaired memory will likely impact upon her ability to accurately recall events that occurred between 1975 and 1979." (TRIAL CHAMBER DECISION, par. 57. 21.) In addition, she "lacks the capacity to understand the proceedings against her and... [to] participate meaningfully in her own defence." (TRIAL CHAMBER DECISION, par. 65. 24.) The *Strugar* criteria includes all of these capacities as specific qualities to be evaluated when considering if an accused is fit to stand trial.

<sup>31</sup> TRIAL CHAMBER DECISION, par. 59. 21.

<sup>32</sup> Ibid, par. 60. 21-22.



than terminate, the proceedings against Ieng Thirith. However, there was little discussion of the issue in the written Decision of the Court.<sup>33</sup>

On appeal, the Defense argued that the stay of charges had the effect of terminating proceedings against Ieng Thirith, but the Prosecution argued that an effective termination would be inappropriate at this stage.<sup>34</sup> As the Supreme Court observed, this decision fell to the discretion of the Court, since the Cambodian Code of Criminal Procedure grants judges the power to suspend or stay proceedings “in circumstances where there is a lasting impediment to the continuation of proceedings.”<sup>35</sup> In its final Decision on the matter, the Supreme Court Chamber focused on whether the terms of the stay issued by the Trial Chamber left open the possibility that the trial might later resume. According to the Supreme Court, “a stay that does not carry a tangible promise of resumption effectively terminates the proceedings from continuing and bars arriving at a judgment on the merits.”<sup>36</sup>

Looking to international criminal jurisprudence from other tribunals for guidance, the Chamber noted that once a person has been charged, international courts have often stayed proceedings, rather than terminate them, in order to exhaust every possibility to prosecute, even when the accused suffered from a serious medical condition.<sup>37</sup> The Chamber particularly cited the *Djukić*, *Kovačević*, and *Tadić* cases from the ICTY.

When Djordje Djukić went on trial, he was in the final stages of a terminal disease. The Chamber decided to provisionally release the defendant for humanitarian reasons. However, his proceedings were not terminated until his death, and the Chamber specifically rejected requests to withdraw the indictment, even though said requests came from both the Prosecution and the Defense.<sup>38</sup> Djukić’s case was terminated eleven days after his death.

Vladimir Kovačević had a mental condition<sup>39</sup> that limited his ability to exercise his fair trial rights according to a standard similar to the one used in *Strugar*.<sup>40</sup> In his case, the Trial Chamber provisionally released the accused to Serbia. His case was not terminated, but was referred to the Serbian justice system.<sup>41</sup>

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<sup>33</sup> Ibid, par. 61, 64, 22, 23.

<sup>34</sup> IMMEDIATE APPEAL, Section II (B)(i), p. 2.

<sup>35</sup> Code of Criminal Procedure of the Kingdom of Cambodia (2008). [Hereinafter, **CAMBODIAN CODE OF CRIMINAL PROCEDURE**]. Articles 343, 345, 310, Cited in SUPREME COURT DECISION, par. 17.

<sup>36</sup> SUPREME COURT DECISION, par. 15. 9.

<sup>37</sup> Ibid, par. 19. 11.

<sup>38</sup> Ibid, citing *Prosecutor v. Djordje Djukić*. IT-96-20-T. ICTY Trial Chamber I. “Decision Rejecting the Application to Withdraw the Indictment and Order for Provisional Release” (24 April 1996). [Hereinafter, **DJUKIĆ DECISION**] stated “neither the Statute nor the Rule authorize the withdrawal of an indictment for medical reasons, no matter how serious, for the major crimes over which the Tribunal has jurisdiction.” *Prosecutor v. Djordje Djukić*. IT-96-20-T. ICTY Prosecution. “Prosecutor’s Motion to Withdraw Djukić’s Indictment” (19 April 1996). The Prosecutor argued that it would be “unjust and inhumane” to force the defendant to stand trial when he was suffering from a terminal disease.

<sup>39</sup> Condition unknown. Redacted from the document for confidentiality reasons.

<sup>40</sup> *Prosecutor v. Kovačević*. IT-01-42/2-1. ICTY Trial Chamber I. “Public Version of the Decision on Accused’s Fitness to Enter a Plea and Stand Trial” (12 April 2006). par. 5.

<sup>41</sup> Kovačević’s case has since been referred to the Serbian judicial system and awaits trial. “Kovačević Case Information Sheet.” Available at <[http://www.icty.org/x/cases/kovacevic\\_vladimir/cis/en/cis\\_kovacevic\\_vladimir.pdf](http://www.icty.org/x/cases/kovacevic_vladimir/cis/en/cis_kovacevic_vladimir.pdf)>, accessed 23 July 2012.

Momir Tadić was provisionally released after his trial was suspended nine months into trial due to health concerns. He died eight months later and his case was terminated 15 days after his death.<sup>42</sup>

The Supreme Court Chamber found that these precedents favored a stay of proceedings, rather than a termination. They found that the default response to an obstacle to proceedings is a stay of proceedings; a termination may only be appropriate following the death of the accused, or after the statute of limitation has run for an offense.<sup>43</sup> Furthermore, the Supreme Court Chamber reasoned, the public, the victims, the Defense and the Prosecution all had an interest in allowing for the possibility of a continuation of trial. The Chamber stated, “there is a strong public interest... to prosecute the Accused. This Court’s very existence... [is] a testament to the great public interest in the prosecution of the persons and crimes within its jurisdiction and to prevent impunity and foster national reconciliation.”<sup>44</sup> The Chamber also argued that because the Defense pleaded not guilty, they had a legal interest to present their case. Victims had an interest in learning the truth and pursuing their civil claims, and the Prosecution had an interest in completing their task.<sup>45</sup>

On this basis, the Supreme Court Chamber upheld the Trial Chamber’s decision to stay proceedings against Ieng Thirith, rather than terminate them.<sup>46</sup>

#### **IV. Ordering Medical Treatment**

Because the stay of proceedings was based on the diminished mental capacity of the Accused, trial could only resume against Ieng Thirith if there were some improvement in her condition, sufficient to render her fit to stand trial. Logically, the question arose as to whether the Court was entitled to impose certain measures to attempt to improve her condition. Cambodian Criminal Code of Procedure Article 223 (11) permits an investigating judge to impose mandatory medical treatment on a charged person at the pre-trial stage.<sup>47</sup> However, this article only specifically addresses the power of an investigating judge. According to the Supreme Court Chamber, “Cambodian law... does not provide for the effects of a stay of proceedings on the exercise of rights, obligations, and competencies during the stay.”<sup>48</sup> Therefore, the Chamber largely had to look to international precedents.

##### **A. Power of the Court to Compel Medical Treatment**

The ICTY Trial Chambers have ordered medical treatment for an accused on several occasions. In *Stanišić and Simatović*, the ICTY Trial Chamber “provisionally released [Stanišić] with conditions, including that the accused be taken to a hospital in Belgrade, assessed, and, if

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<sup>42</sup> “Tadić Case Information Sheet,” pp. 3-4. Available at <[http://www.icty.org/x/cases/talic/cis/en/cis\\_talic\\_en.pdf](http://www.icty.org/x/cases/talic/cis/en/cis_talic_en.pdf)>, accessed 23 July 2012.

<sup>43</sup> SUPREME COURT DECISION, par. 18. 10.

<sup>44</sup> Ibid, par. 28. 16.

<sup>45</sup> Ibid, par. 28. 16.

<sup>46</sup> The Supreme Court Chamber did not specifically address if an effective termination is legally permissible. However, its argument that a stay is the only appropriate course implies that an effective termination would be as inappropriate as an official termination of proceedings.

<sup>47</sup> CAMBODIAN CODE OF CRIMINAL PROCEDURE, Article 223 (11): “An investigating judge may place a charged person under judicial supervision if the charged person is under investigation for an offense punishable by imprisonment. Judicial supervision has the effect of subjecting a charged person at liberty to one or more of the following obligations: ... 11. to undergo a medical examination and/or treatment under the medical supervision in the hospital.”

<sup>48</sup> SUPREME COURT DECISION, par. 17. 10.

necessary, admitted for treatment...”<sup>49</sup> This turned into a year-long saga of medical treatments, assessments, and requests for the revocation of provisional release and the restart of trial from the prosecution, or the continuation of the stay and medical treatment from the defense. Stanišić was eventually deemed fit and is still on trial, with modifications to proceedings, including that he may view proceedings by videolink from Belgrade in order to continue to receive treatment.<sup>50</sup> In *Kovačević*, the defendant was provisionally released and ordered to remain in a mental health facility and submit to treatment therein.<sup>51</sup> Certain rights recognized in international human rights covenants—such as the right to bodily integrity, the right to participate in one’s own defense,<sup>52</sup> and the right to refuse treatment<sup>53</sup>—might weigh against these precedents, and suggest that leng Thirith should be able to make this decision for herself. However, these rights must be considered in light of the fact that compelled treatment could actually improve leng Thirith’s ability to participate in her own defense,<sup>54</sup> and to make informed choices for herself thereafter.

For practical reasons, it is important for a Court to consider the likelihood of success, when weighing whether or not to compel medical treatment. In the case of leng Thirith, all five experts thought that it was unlikely that leng Thirith’s condition would improve very much, if at all. However, the experts did present four measures that they thought could possibly improve her condition, or maintain her mental capacity at its current level.<sup>55</sup> Professor Campbell suggested a new drug, *Donepezil*, which stalls the effects of Alzheimer’s disease in about one-third of recipients. However, improvement could be “modest at best.”<sup>56</sup> Furthermore, *Donepezil* is not currently available in Cambodia, and requires refrigeration and careful administration. Therefore, it may not be possible to administer this drug in Cambodia in leng Thirith’s current holding conditions.<sup>57</sup>

The four psychiatrists suggested less complex measures. They suggested a consistent living environment, physical and mental exercises, and treatment of other existing medical conditions to maintain or improve leng Thirith’s cognitive function.<sup>58</sup> Professor Campbell noted, “Until

<sup>49</sup> SUPREME COURT DECISION, par. 21. 13.

<sup>50</sup> See UN ICTY. “The Cases: Stanišić & Simatović (IT-03-69),” <[http://www.icty.org/case/stanisis\\_simatovic/4](http://www.icty.org/case/stanisis_simatovic/4)>, accessed 12 November 2012.

<sup>51</sup> SUPREME COURT DECISION, par. 22. 13.

<sup>52</sup> Universal Declaration of Human Rights (10 December 1948), Article 3, “Everyone has the right to life, liberty and security of person.” ICCPR, Article 7, “...no one shall be subjected without his free consent to medical or scientific experimentation.” Article 10 (1), “All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.” See also Section II.A of this report.

<sup>53</sup> See U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 14, “The right to the highest attainable standard of health” (November 8, 2000). par. 12; United Kingdom Mental Capacity Act, 2005; United States Supreme Court *O’Connor v. Donaldson* (1975); France, Code de la santé publique, Article L.1111.-4, par. 3. Cambodia does not appear to have similar specific protections. However, Cambodia is party to the International Covenant on Economic, Social and Cultural Rights (1966), which incorporates the right to health including the right to control one’s own health and body, the right to be free from interference, and the right to be free from nonconsensual medical treatment. However, exceptions are sometimes made in all of these jurisdictions in order to provide care for people with mental illnesses.

<sup>54</sup> SUPREME COURT DECISION, par. 35, 37. 18, 19.

<sup>55</sup> First, Professor Campbell tried a careful reduction of her psychotropic medications to try to gain a slight improvement in her condition. However, after the reduction of those drugs, Professor Campbell reexamined the accused and found her condition the same. (FOLLOW-UP REPORT OF THE GERIATRICIAN.)

<sup>56</sup> Ibid, par. 8(ii), cited in Trial Chamber Decision, par. 37. 14.

<sup>57</sup> TRIAL CHAMBER DECISION, par. 53. 19.

<sup>58</sup> The Psychiatrists stated that the following may be beneficial to the accused: “[C]onsistent and stable staffing; retaining a familiar environment; flexibility to accommodate her fluctuating abilities; physical exercise, with assessment and advice from a physiotherapist when needed; and support for participation in activities she enjoys. In addition, a structured cognitive stimulation programme may be helpful (but needs to be undertaken with those who are trained and supervised). Furthermore, the treatment of her knee and back pain and the regular monitoring of her



we've explored all possibilities and tried all measures to try and improve function, we cannot be definite that she will not be able to participate in her defense."<sup>59</sup> However, the experts generally emphasized that, while drugs, mental exercises and other appropriate care might slow or stall the deterioration of her mental capacity, they are unlikely to improve it.<sup>60</sup>

## **B. The Decision regarding an Order of Medical Treatment**

The Trial Chamber was split on the issue of whether or not it could or should order medical treatment for the Accused. The Cambodian Judges were in favor of ordering medical treatment; the international Judges found that there was "no legal basis to impose mandatory orders to hospitalize and treat Ieng Thirith, given that her case was stayed, her condition was unlikely to improve, and it was unlikely that proceedings would continue."<sup>61</sup>

The Cambodian Trial Judges depended heavily on Article 223 (11) of the Cambodian Criminal Code of Procedure, which states that "an investigating judge may place a charged person under judicial supervision..." under certain listed circumstances, and that this supervision "has the effect of subjecting a charged person at liberty to one or more of the following obligations... to undergo a medical examination and/or treatment under the medical supervision in the hospital."<sup>62</sup> However, the international Judges argued that this article only pertained to measures at the pre-trial stage; this case, in their view, is completely different because the defendant has been charged, has been found unfit to stand trial, and the proceedings have been stayed without "any reasonable prospect of resuming."<sup>63</sup>

The Cambodian Judges also cited *Kovačević* from the ICTY to support imposing medical treatment on an Accused. However, the international Judges felt this was not a relevant precedent because in the *Kovačević* case, both parties agreed to medical treatment.<sup>64</sup> In Ieng Thirith's case, the Defense has not requested and has in fact objected to mandatory medical treatment.<sup>65</sup>

The international Judges placed particular weight on the finding of the medical experts that Ieng Thirith's condition is unlikely to improve. This left room for a different outcome if the facts were interpreted to conclude that Ieng Thirith's condition might actually improve. The Co-Prosecutors addressed just this issue. The OCP thought it possible that Ieng Thirith could recover sufficiently to stand trial and, therefore, all measures should be tried to help her to recover.

Ultimately, the Supreme Court Chamber agreed with the OCP's position, concluding that it was appropriate to order medical treatment of the Accused, because the Court had an obligation to

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physical health would be important to maintain. The continued treatment of co-existent medical conditions will improve her prognosis. We note that there are no occupational therapists currently in Cambodia, but if there were, an assessment of her activities of daily living would be helpful and advice on any environmental modifications to her living conditions could be sought." (Psychiatric Experts' Report, cited in SUPREME COURT DECISION, par. 36. 19.

<sup>59</sup> SUPREME COURT DECISION, par. 35, 18, citing Transcript 30 August 2011, p. 92, lines 16-19.

<sup>60</sup> TRIAL CHAMBER DECISION, par. 70-2. 25-26.

<sup>61</sup> Ibid, par. 74. 26.

<sup>62</sup> CAMBODIAN CODE OF CRIMINAL PROCEDURE, Article 223 (11).

<sup>63</sup> TRIAL CHAMBER DECISION, par. 74. 26.

<sup>64</sup> Ibid, par. 75. 27.

<sup>65</sup> Ieng Thirith Defense. "Response by Defense for Madame Ieng Thirith to Co-Prosecutors Appeal Against the Trial Chamber's Decision of 17 November 2011" (28 November 2011). E138/1/5, [hereinafter, **DEFENSE RESPONSE**]. With reference to Internal Rule 63(3), the Defense stated, "there is no condition which provides for compulsory hospitalization for an accused to obtain medical treatment." (par. 23) "Therefore, it is submitted that the Respondent should be released unconditionally." (par. 31)

exhaust all possibilities to make a defendant fit to stand trial before that defendant is released.<sup>66</sup> The Chamber noted that the medical experts presented a possibility, however slight, that the Accused's condition may improve. As such, the Court may order Ieng Thirith to undergo the recommended treatments<sup>67</sup> under the supervision of the Trial Chamber.<sup>68</sup>

## **V. Detention or Release**

Once the Supreme Court Chamber ordered medical treatment for Ieng Thirith, the Chamber had to address whether it could and should continue to detain Ieng Thirith, or provisionally release her for the medical treatment.

### **A. Legal Basis to Continue Detention**

International law and precedent support the fundamental right to liberty.<sup>69</sup> ICCPR Article 9 (1) states, "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."<sup>70</sup> Therefore, there is a presumption in favor of liberty.

Furthermore, international and Cambodian law favors a presumption in favor of bail, rather than detention for those facing criminal charges. Article 305 of the Cambodian Criminal Code of Procedure states that "the accused will remain free [after the indictment]... unless the investigating judge or the President of the Investigation Chamber decides to provisionally detain him."<sup>71</sup> ECCC Internal Rule 82(1) states that "the Accused shall remain at liberty whilst appearing before the Chamber unless Provisional Detention has been ordered..."<sup>72</sup> The Supreme Court Chamber of the ECCC has ruled, "The interpretation most favorable to the Accused must be preferred, and liberty is considered the norm and detention is an extraordinary measure."<sup>73</sup>

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<sup>66</sup> SUPREME COURT DECISION, par. 19-20, 25, 28. "Once a person has been charged, international criminal courts have gone to great lengths to ensure that every possibility to prosecute the accused is exhausted, including where the accused suffers from a serious medical condition" (par. 19. 11). "During a stay of criminal proceedings, measures of compulsion can be ordered against an accused with a serious medical condition" (par. 20. 12). In *Stanišić, Kovačević, and Tadić*, the accused were all required to submit to medical treatment as a part of their provisional release. The Supreme Court Chamber found these precedents indicate that mandatory treatment that was instrumental for the goal of resuming proceedings was permissible. (par. 25. 14)

<sup>67</sup> "The Supreme Court Chamber holds that, considering the interest of justice in trying the accused, upon a finding of unfitness, remedial action must be undertaken in the light of a possibility, even slight, of a meaningful improvement." Ibid, par. 29. 17. The Chamber noted however that this treatment was "not based on an urgent medical need but on the need to pursue the possibility of improving her mental condition" and to make her fit for trial. As such, "the present case is distinguishable from the international case law..." (Ibid, par. 42. 21).

<sup>68</sup> "Once seized with the Closing Order, the Trial Chamber alone has the authority to establish and implement such a mechanism, as the Trial Chamber alone has the jurisdiction over the Accused." (Ibid, par. 29. 16.) This is in response to the Trial Chamber's order for the OCP to monitor the accused. The OCP appealed that no statute supported the OCP responsibility to oversee treatment or assessment of the accused, and therefore it was outside of its powers. As such, the OCP felt it could not implement this order and would therefore never be able to reassess Ieng Thirith and be in a position to ask for the Chamber to resume trial. The OCP felt, therefore, that this order was an effective termination of proceedings. (IMMEDIATE APPEAL, par. 5.) The Defense disagreed, saying the OCP has "the inherent ability to ask the Trial Chamber to reassess the accused and recommence the trial at any time." (Defense Response, par. 17, cited in SUPREME COURT DECISION, par. 14. 9.)

<sup>69</sup> See also TRIAL CHAMBER DECISION, par. 80. 29.

<sup>70</sup> ICCPR, Article 9 (1).

<sup>71</sup> CAMBODIAN CODE OF CRIMINAL PROCEDURE, Article 305.

<sup>72</sup> Internal Rule 82 (1).

<sup>73</sup> "The interpretation most favorable to the Accused must be preferred, and liberty is considered the norm and detention is an extraordinary measure." SUPREME COURT DECISION, par. 9. 5-6.

Nevertheless, even with such a presumption in place, it may be deemed appropriate to detain an accused for several reasons, including ensuring the defendant's appearance at court, protecting society from a possible threat, and protecting the defendant from possible wrath of the community relating to the alleged crimes. The Cambodian Criminal Code of Procedure does permit detention at the pre-trial stage for some of these reasons. Article 223 finds that provisional detention may be appropriate in order to ensure the presence of the accused, contribute to her security from the public, and provide appropriate medical care.<sup>74</sup> The Cambodian Code, which was adopted by the National Assembly in June 2007 and by the Senate in July 2007,<sup>75</sup> also provides for the provisional detention of alleged criminals, specifically for those alleged to have committed war crimes, genocide or crimes against humanity.<sup>76</sup> Accordingly, the ECCC Internal Rules dictate that, at the trial stage, an Accused "shall remain in detention until the Chamber's judgment is handed down..."<sup>77</sup>

Practice in other international tribunals has been similar to the ECCC approach. The ICTY has consistently detained or only provisionally released defendants in order to ensure their appearance in court, protect society, and facilitate medical treatment. In *Prosecutor v. Kovačević*, the Chamber ordered Kovačević provisionally detained in order to facilitate medical care relevant to the defendant's recovery and ability to stand trial. In *Djukić, Stanišić, and Tadić* the defendants were provisionally released due to health concerns, either on humanitarian grounds for end of life care or to facilitate treatment.<sup>78</sup> These cases seem to set a clear precedent at the ICTY for detention or mere provisional release, as opposed to unconditional release. However, the Defense argued that these cases do not demonstrate that detention or confinement is the norm when an accused is found unfit to stand trial; rather, they argue each case was evaluated on a case-by-case basis.<sup>79</sup>

The International Criminal Court has always retained its accused in custody once they have been arrested, citing concerns about ensuring their appearance in court.] In *Prosecutor v. Lubanga*, Trial Chamber I issued an indefinite stay of proceedings due to possible fair trial rights violations. The Chamber found at that time that "there was no prospect that a fair trial could be held." However, the Court found that even such a reason for a stay does not necessarily permanently bar the Court from exercising jurisdiction over the person concerned.<sup>80</sup> The ICC Appeals Chamber reasoned that it needed to retain the accused in custody to ensure that he would appear if the trial resumed. The European Court for Human Rights has held that

<sup>74</sup> CAMBODIAN CODE OF CRIMINAL PROCEDURE, Article 223(4), (5), (11). This citation was challenged by the international Trial Chamber Judges, see section IV.C, par. 1 of this paper.

<sup>75</sup> Criminal Procedure Code of the Kingdom of Cambodia. 2. Available at <<http://www.oecd.org/site/anti-corruptioninitiative/46814242.pdf>>, accessed 12 November 2012.

<sup>76</sup> CAMBODIAN CODE OF CRIMINAL PROCEDURE, Article 210, "In case of crimes against humanity, genocide or war crimes, provisional detention shall not exceed one year for each of these offenses. However, when this time period ends the investigating judge may extend a provisional detention for another year by an order with a proper and express statement of reasons. The extension can only be made twice." Article 205, "Provisional detention may be ordered when it is necessary to: 1. stop the offense or prevent the offense from happening again; 2. Prevent any harassment of witnesses or victims or prevent any collusion between the charged person and accomplices; 3. preserve evidence or exhibits; 4. guarantee the presence of the charged person during the proceedings against him; 5. protect the security of the charged person; 6. preserve public order from any trouble cause by the offense."

<sup>77</sup> Internal Rule 82 (1).

<sup>78</sup> See III, paragraphs 6-8 of this report.

<sup>79</sup> SUPREME COURT DECISION, par. 12. 7-8, citing Response to Immediate Appeal, par. 24-5.

<sup>80</sup> The Court retained the accused in custody because of the "conditional character" of the stay. *Prosecutor v. Lubanga*. "Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled 'Decision on the release of Thomas Lubanga Dyilo'" Appeals Chamber 21 October 2008, par. 37. Cited in SUPREME COURT DECISION, par. 24. 14.

continued detention can be justified if there are specific grounds for fear of abscondment or injury to the accused or others.<sup>81</sup>

## **B. Practical Concerns and Best Medical Treatment**

Given the nature of leng Thirith's condition, particularly her memory loss and difficulty focusing, the Supreme Court Chamber expressed concern about the Accused's ability to appear in court and to attend related meetings without having to be reminded and escorted to said meetings.<sup>82</sup>

The Court has a vested interest in the improvement of leng Thirith's mental capacity and her related fitness to stand trial. The medical experts mentioned that a release to her home environment might help to improve her condition. However, in detention, the Court and contracted professionals would be able to better monitor her treatment and condition. The Chamber found that less onerous measures, such as provisional release, would be less effective to achieve the goal of conducting this treatment and doing the utmost to try to make the Accused fit to stand trial.<sup>83</sup> Furthermore, the experts judged that living in the detention center was not having a detrimental effect on her mental state. The ICTY Trial Chamber faced a similar issue in *Prosecutor v. Kovačević*; in that case, the Chamber stated that provisional release may be appropriate to facilitate medical care, as long as Serbian authorities committed to appropriate monitoring and security measures.<sup>84</sup>

## **C. Decision**

The Supreme Court Chamber argued that measures aimed at securing the presence of the Accused at trial or attempting to facilitate the resumption of proceedings are permissible.<sup>85</sup> Therefore, the Chamber found that continued detention was warranted primarily to ensure the presence of the Accused at trial, and secondarily to ensure the best treatment for a possible recovery for trial.<sup>86</sup> The Chamber decided to maintain leng Thirith in the ECCC Detention Facility, or another appropriate facility if that was deemed better for her care.<sup>87</sup> The Chamber ordered her to submit to medical treatment as directed by the medical experts, and to undergo another medical, psychiatric and psychological exam after six months of treatment. The Chamber did not address the international Trial Judges' argument that such measures may only be permissible with the agreement of the Accused through her counsel, as in *Kovačević*.

## **D. Further Implications: Continuing Detention if leng Thirith's Condition Does Not Improve**

The Chamber decided there is still a chance leng Thirith's condition may improve. However, all parties recognize there is only a small chance that someone with Alzheimer's may improve. As

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<sup>81</sup> SUPREME COURT DECISION, par. 44. 21.

<sup>82</sup> The Chamber stated, the "present deficiencies with the Accused's memory [created]... a greater risk that she may render herself unavailable for trial..." Ibid, par. 41. 21. See also, GERIATRIC EXPERT REPORT, par. 13. 8.

<sup>83</sup> Ibid, par. 45. 22.

<sup>84</sup> *Prosecutor v. Kovačević*. IT-01-42/2-1. ICTY Trial Chamber I. "Decision on Provisional Release" (2 June 2004).

<sup>85</sup> SUPREME COURT DECISION, par. 25. 14. Supported by several national jurisdictions, including those of Sri Lanka, Italy, South Korea, Zambia, Poland (SUPREME COURT DECISION, footnote 84. 15.).

<sup>86</sup> Ibid, par. 48. 23.

<sup>87</sup> The Supreme Court "established that the stay of proceedings ordered by the Trial Chamber is not a permanent disposition of the proceedings and that restrictive measures, including detention, are not inherently precluded during the stay, and ... concluded that the ECCC is obliged to exhaust all measures available to it which may help improve the Accused to become fit to stand trial..." (Ibid, par. 38. 19.)

such, the Chamber discussed the appropriate course of action if her condition was unlikely to improve and this discussion may become relevant if her condition does not to improve.

The international Trial Chamber Judges found that, while there is a legal basis for leng Thirith's continued detention, that basis is largely dependent on the possibility that she may become fit to stand trial in the future. If that is unlikely, international and Cambodian law support a presumption in favor of innocence and liberty.<sup>88</sup>

Furthermore, the Supreme Court Chamber noted that a "less onerous measure" (*i.e.* provisional release) is preferred if the objectives for continuing detention may be satisfied by such a measure.<sup>89</sup> The Chamber also noted "judicial supervision does not allow for the compulsory placement in a hospital or comparable facility for the duration of the judicial supervision."<sup>90</sup> As such, if the goal is no longer to monitor leng Thirith's care and mental condition as closely as possible, a form of release may be an option.<sup>91</sup>

leng Thirith's Defense Team argued for her immediate release on the 21 January 2011, because she had allegedly been held for an unlawful length of time in pre-trial detention.<sup>92</sup> According to the ICCPR and ECCC Law Establishing the Court, leng Thirith has the right to trial "without undue delay."<sup>93</sup> Internal Rule 21 (4) states that "proceedings before the ECCC shall be brought to a conclusion within a reasonable time." Particularly if there is little or no likelihood that she will recover sufficiently to stand trial, it makes little sense to continue to detain her.

Due the nature of the alleged crimes, leng Thirith may be in danger from people who would wish to take justice into their own hands, if she were released. Similarly, many members of the Cambodian and the international community would be upset if leng Thirith were, at this stage, to walk free. As such, there is a danger of major public protest or other issues of security and public order, if leng Thirith is released. Additionally, there may be concerns about her impact on society, if released. For example, Youk Chhang, a witness in Case 002, alleged that leng Thirith tried to intimidate his sister into pressing him to stop his investigations.<sup>94</sup>

The Chamber debated the issue of whether they have the responsibility to protect the Accused from such attacks, if such protection is not requested. The international Trial Chamber Judges found that, because leng Thirith's Defense had not requested protection for the Accused, the Chamber had no justification to impose such a measure.<sup>95</sup> The Supreme Court Chamber found that the Court must be concerned about the Accused's safety, and, therefore, the Trial Chamber must evaluate the level of possible threats against the Accused before deciding on future security measures.<sup>96</sup>

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<sup>88</sup> ICCPR, Articles 9(1) and 14(2); Cambodian Code of Criminal Procedure, Article 305; Internal Rule 82(1).

<sup>89</sup> SUPREME COURT DECISION, par. 45. 22.

<sup>90</sup> *Ibid*, par. 46. 22.

<sup>91</sup> When the Supreme Court Chamber ordered the Trial Chamber to carry out the appropriate medical care and assessment of leng Thirith's fitness to stand trial, the Chamber specifically cautioned that "the Trial Chamber must be vigilant [during this process] that any continued detention would not be for an unreasonably long period of time, in breach of internationally recognized human rights." (*Ibid*, par. 30. 17.)

<sup>92</sup> leng Thirith Defense. "Request for immediate release of madame leng Thirith" (21 January 2011). E21.

<sup>93</sup> ICCPR, Article 14 (3)(c); ECCC Law, Article 35new (c).

<sup>94</sup> Trial Chamber. Transcript of Trial Proceedings (1 February 2012). E1/37.1. lines 18-23. 110.

<sup>95</sup> TRIAL CHAMBER DECISION, par. 75. 26.

<sup>96</sup> SUPREME COURT DECISION, par. 47. 23.



## **VI. August 2012 Review of Ieng Thirith's Status**

### **A. The Experts' Findings**

The Trial Chamber heard a new analysis of Ieng Thirith's fitness to stand trial on 30-31 August 2012,<sup>97</sup> and issued its decision on 13 September 2012.<sup>98</sup> There were essentially three possible outcomes of this hearing: 1) that she was found fit and summoned to trial; 2) that she was found unfit but continued to be held in detention on the grounds of safety (to herself and to the public); 3) that she was found unfit and released, conditionally or unconditionally. In the latter two options, the Chamber could choose to allow the indictment to stand against her, or to withdraw the indictment.

The Trial Chamber reviewed written reports from four medical experts and heard those four in court: three Expert Witnesses who had testified previously regarding Ieng Thirith's mental capacities, and one new witness, Dr. Chak Thida. The two groups presented widely disparate findings.

Dr. John Campbell, Dr. Seena Fazel and Dr. Huot Lina found that "there was no evidence of improvement. We felt actually that there was a deterioration" in Ieng Thirith's condition. Specifically, these experts found that Ieng Thirith did not recall topics even one or two minutes after they were discussed; they noted that this is not a sign of aging but rather of cognitive impairment. Furthermore, these three doctors do not believe there are any available treatments for her condition.

Dr. Chak Thida found that Ieng Thirith had sufficient mental capacities, if she were questioned in a sensitive way. She found that Ieng Thirith's condition might be in a "pre-dementia state," but not yet in a state of severity. Dr. Chak Thida based her findings on the results of the MMSE<sup>99</sup> test, which was used by all doctors at each stage of testing Ieng Thirith's capacities. Dr. Chak Thida found that the Accused scored 24 out of 30 possible points. This is far higher than the other doctors' findings in recorded examinations, where Ieng Thirith never scored above 18. Dr. Chak Thida felt that she was able to elicit better responses that more accurately showed Ieng Thirith's mental capacity because she was both Cambodian and female, and so was able to develop a better rapport with the Accused.

The other three doctors argued that Dr. Chak Thida did not administer the test correctly, but rather asked questions inconsistently and made some questions easier. This made it impossible to compare each exam that Dr. Chak Thida administered, and made her findings understandably different from those of the other experts.

Dr. Chak Thida admitted that the way that she administered the MMSE was influenced by the fact that Ieng Thirith is a suspect in Case 002. She felt that Ieng Thirith would not cooperate with them if she knew this was an assessment of her memory and her fitness to stand trial, so she had to be a bit careful in her questioning. The other three experts countered that they believed it would be difficult to feign dementia: when people do this, they generally remain consistent in what they do and do not remember, whereas Ieng Thirith is quite inconsistent.

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<sup>97</sup> Trial Chamber. "Scheduling of reassessment and hearing on IENG Thirith fitness to stand trial" (22 June 2012). E138/7/13. p. 2.

<sup>98</sup> Trial Chamber. "Decision on Reassessment of Accused IENG Thirith's Fitness to Stand Trial Following Supreme Court Chamber Decision of 13 December 2011" (13 September 2012). E138/1/10 [hereinafter, **TRIAL CHAMBER REASSESSMENT DECISION**].

<sup>99</sup> Mini-Mental State Exam

Further, the experts stated that it would be difficult to pretend indifference to a decline in personal hygiene, specifically urinary incontinence.

## **B. The Parties' Arguments**

Based on these findings, the Prosecution, Civil Parties and Ieng Thirith Defense Team each gave their position on the issue. The Prosecution agreed with the court-appointed medical experts that Ieng Thirith is unfit to stand trial and unlikely to be fit to stand trial in the immediate future; as such, the OCP suggested a conditional release that would protect her and others' safety, as well as monitor her medical condition and allow the Court leverage if she attempts to interfere with the work of the Court.<sup>100</sup>

The Civil Parties supported Dr. Chak Thida's findings and argued that the manner Dr. Chak Thida administered the test was more appropriate in the Cambodian context. The CPLs requested that more female, Cambodian doctors be appointed to reassess Ieng Thirith's condition.

Ieng Thirith's Defense argued that four teams of experts had already conducted tests, Ieng Thirith is not and will not be fit to stand trial, and, therefore, the Court should release her unconditionally. The Defense rejected the OCP's suggestion of conditional release and argued that detention is only appropriate in order to ensure the attendance of a defendant at trial. Since the charges have been stayed and attendance at trial is no longer relevant, she should be released unconditionally, the Defense argued.

## **C. The Legal and Practical Concerns**

As the Court had already discussed, there are a variety of legal justifications and practical reasons why it may retain the Accused in detention, including ensuring her presence at trial, protecting her from public anger, and protecting the public from her interference. However, there were also a variety of legal and practical reasons to continue to hold Ieng Thirith in detention. First, there was no secure mental facility in Cambodia where Ieng Thirith could be both detained and treated. Furthermore, it was questionable whether the Court had the power to continue to hold Ieng Thirith indefinitely without a trial and finding of guilt; there were similar issues with ordering compulsory treatment when it was no longer relevant for a carriage of justice. Additionally, if the Court found Ieng Thirith fit to stand and called her to trial, the Court was likely to face financial and logistical difficulties to hearing Ieng Thirith's case.<sup>101</sup>

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<sup>100</sup> The OCP's six conditions are: 1) that Ieng Thirith reside at a specific, recorded address; 2) that authorities conduct a weekly safety check of her home; 3) that she surrender her passport and ID card; 4) that she not contact any other Accused except her husband, Ieng Sary; 5) that she not contact any witness, expert or victim who may be heard in Court; 6) that she submit to a regular medical examination by a court-appointed doctor every 6 months. The OCP suggested that if she breached these conditions, a more restrictive measure, such as house arrest, might be considered.

<sup>101</sup> Cambodian judges were not paid October 2011 to March 2012, and all Cambodian staff of the Court remained unpaid January to March of 2012. This is not the first time in the Court's history that this has happened. (Phnom Penh Post. "Cash Crunch at Khmer Rouge Tribunal." 18 January 2012. <<http://www.phnompenhpost.com/index.php/2012011954035/National-news/cash-crunch-at-kr-tribunal.html>>, accessed 23 July 2012.)

#### **D. The Most Recent Decision**

On 13 September 2012, the Trial Chamber issued a judgment on Ieng Thirith's fitness to stand trial.<sup>102</sup> The Chamber found Ieng Thirith unfit to stand trial, affirmed the indefinite stay of proceedings against her, and released her with limited conditions.<sup>103</sup> The Chamber supported a presumption in favor of liberty, particularly in a case such as this, where detention is no longer necessary to ensure that the Accused will appear in Court.

Ieng Thirith was released immediately from the ECCC Detention Facility, but, pursuant to Internal Rule 35,<sup>104</sup> must refrain from any interference with the administration of justice, particularly interference with witnesses, experts or victims before the ECCC and Accused other than her husband, Ieng Sary.<sup>105</sup> She was further requested to refrain from communicating with the media pertaining to the ECCC, to remain within the Kingdom of Cambodia, and to inform the ECCC Office of Administration of any change of address. The Chamber rejected the OCP's other restrictions.

However, the Chamber emphasized that "the charges against Ieng Thirith are not withdrawn and this does not constitute a determination of guilt or innocence of the Accused."<sup>106</sup> Furthermore, the Chamber does plan to consult with medical experts annually, beginning March 2013 and continuing throughout the ECCC's existence, to discuss if any new treatments have been approved that may improve Ieng Thirith's condition. As such, it is possible that Ieng Thirith's trial may recommence at a later date.

#### **VII. The Most Recent Appeal**

The Co-Prosecutors issued an immediate appeal of the Trial Chamber's decision, arguing that the Chamber erred in law by issuing an unconditional release of the Accused, and requesting that the Chamber impose more stringent conditions on the release of the Accused.<sup>107</sup> In particular, the OCP would like the Chamber to continue to dictate and impose medical treatments for Ieng Thirith. The Defense responded to this appeal on 8 October 2012, asking the Supreme Court Chamber to reject the appeal in its entirety and remove all coercive conditions currently attached to Ieng Thirith's release.<sup>108</sup> The Defense further requested an oral hearing on the issues. The Supreme Court Chamber will hear arguments on this appeal and "enter into discussion with the guardian to the Accused, Ms. Ieng Vichida," on 13 November 2012.<sup>109</sup>

#### **VIII. Additional Legal Issues: Dealing with a Lack of a Supermajority**

As noted in this report, the Trial Chamber Judges were originally split on the issue of whether or not Ieng Thirith might be able to recover sufficiently to stand trial, and whether the Chamber could order medical treatment on her in order to aid her recovery. The three Cambodian

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<sup>102</sup> TRIAL CHAMBER REASSESSMENT DECISION.

<sup>103</sup> *Ibid*, 19.

<sup>104</sup> Internal Rule 35, particularly (d)(e).

<sup>105</sup> Per Internal Rule 35.

<sup>106</sup> TRIAL CHAMBER REASSESSMENT DECISION, par. 40, 18.

<sup>107</sup> Co-Prosecutors. "Immediate appeal against decision on reassessment of accused Ieng Thirith's fitness to stand trial following the Supreme Court Chamber decision of 13 December 2011" (14 September 2012). E138/1/10/1/1.

<sup>108</sup> Ieng Thirith Defense. "Defense response to Co-Prosecutors' immediate appeal against decision on reassessment of accused Ieng Thirith's fitness to stand trial following the Supreme Court Chamber decision of 13 December 2011 and Co-Prosecutors' supplementary submissions" (8 October 2012). E138/1/10/1/5/3.

<sup>109</sup> Trial Chamber. "Order Scheduling Appeal Hearing" (5 November 2012). E138/1/10/1/5/5.

Judges felt there was a chance she could improve and wanted to order medical treatment. The two international Judges thought there was no basis to think she might recover, and so there was no basis to order medical treatment. The Trial Chamber was unclear on how to deal with this lack of supermajority.<sup>110</sup> The Chamber eventually decided that with such disagreement, the “strict construction of criminal statutes requires that the interpretation most favorable to the Accused must be preferred.”<sup>111</sup> Therefore, Chamber must find in favor of the interpretation most favorable to the Accused, and must presume innocence and default to the right to liberty. Thus, the Trial Chamber ordered Ieng Thirith’s immediate and unconditional release. The Supreme Court Chamber subsequently overruled that part of the Trial Chamber decision because, like the Cambodian Trial Chamber Judges, they thought it was possible that Ieng Thirith might recover sufficiently to stand trial, and therefore all measures should be attempted. However, the Supreme Court Chamber refrained from addressing the matter of the procedure adopted by the Trial Chamber in dealing with the absence of supermajority.

**Unless specified otherwise,**

- the documents cited in this report pertain to *The Case of Nuon Chea, Ieng Sary, Ieng Thirith and Khieu Samphan* before the ECCC;
- the quotes are based on the personal notes of the trial monitors during the proceedings;
- the figures in the *Public Attendance* section of the report are only approximations; and
- photos are courtesy of the ECCC.

**Glossary of Terms**

Case 001	<i>The Case of Kaing Guek Eav alias “Duch”</i> (Case No. 001/18-07-2007-ECCC)
Case 002	<i>The Case of Nuon Chea, Ieng Sary, Ieng Thirith and Khieu Samphan</i> (Case No. 002/19-09-2007-ECCC)
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)
ERN	Evidence Reference Number (the page number of each piece of documentary evidence in the Case File)
FUNK	National United Front of Kampuchea
GRUNK	Royal Government of National Union of Kampuchea
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
OCIJ	Office of the Co-Investigating Judges
OCP	Office of the Co-Prosecutors of the ECCC
RAK	Revolutionary Army of Kampuchea
VSS	Victims Support Section
WESU	Witness and Expert Support Unit

<sup>110</sup> ECCC LAW, Article 14(1)(a) requires the affirmative vote of at least four judges at the Trial stage, and six at the Supreme Court level. However, there are no provisions in the ECCC Law or Agreement stipulating how to deal with a lack of supermajority. Furthermore, this is an unusual provision for an international court, so there are not international precedents. (TRIAL CHAMBER DECISION, par. 79. 28.)

<sup>111</sup> TRIAL CHAMBER DECISION, par. 80. 29.



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