



**ព្រះរាជាណាចក្រកម្ពុជា**  
**ជាតិ សាសនា ព្រះមហាក្សត្រ**

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

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

**អង្គជំនុំជម្រះសាលាដំបូង**  
Trial Chamber  
Chambre de première instance

**សំណុំរឿងលេខ: ០០២/១៩ កញ្ញា ២០០៧/អវតក/អជសដ**  
**Case File/Dossier No. 002/19-09-2007/ECCC/TC**

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**Before:** Judge NIL Nonn, President  
Judge Silvia CARTWRIGHT  
Judge YA Sokhan  
Judge Jean-Marc LAVERGNE  
Judge YOU Ottara

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**DECISION ON IENG THIRITH'S FITNESS TO STAND TRIAL**

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Andrew CAYLEY

**Accused**  
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IENG Sary  
IENG Thirith  
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## **1. INTRODUCTION**

1. In order to assess the Accused IENG Thirith's fitness to stand trial, the Trial Chamber appointed successively two groups of experts: the first, a geriatrician, Professor A. John Campbell (supported by psychiatrist Dr. KA Sunbaunat), followed by four psychiatrists, Dr. HOUT Lina, Dr. KOEUT Chhunly, Dr. Seena Fazel and Dr. Calvin Fones Soon Leng, who were requested to supplement the conclusions reached by Professor Campbell and to provide specialist psychiatric expertise. The Chamber is seised of two separate reports prepared by these experts.<sup>1</sup> The current decision follows two hearings, which enabled oral presentation of the experts' reports and submissions by the parties in relation to their conclusions.<sup>2</sup>

## **2. PROCEDURAL BACKGROUND**

2. On 21 February 2011, the IENG Thirith Defence filed a request for appointment of a neuropsychiatrist to assess the Accused IENG Thirith's fitness to stand trial, asserting that "the mental condition of the Accused [inhibits] the Defence in its ability to prepare for the forthcoming trial."<sup>3</sup> The Co-Prosecutors filed their response to the request on 1 March 2011, to which the IENG Thirith Defence replied on 7 March 2011.<sup>4</sup>

3. On 9 March 2011, the Trial Chamber informed the parties that in view of the various medical and psychiatric issues raised by all Accused requesting assessment of their fitness to stand trial, the Chamber intended to obtain a comprehensive assessment from a specialist geriatrician. The Chamber provided information concerning the geriatrician it intended to appoint, and invited the Defence teams for IENG Sary, IENG Thirith and NUON Chea to submit any questions or comment on particular medical or cognitive issues not already raised

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<sup>1</sup> Geriatric Expert Report of IENG Thirith Dated 23 June 2011 in Response to the Trial Chamber's Order Assigning Expert – E62/3, E62/3/6, 23 June 2011 ("Expert Geriatrician's Report"); Expertise Report Prepared in Response to the Trial Chamber's Expertise Order Document Number E111, Dated 23 August 2011, E111/8, 9 October 2011 ("Psychiatric Experts' Report").

<sup>2</sup> T., 29-30 August 2011 ("First Fitness Hearing"); T., 19-20 October 2011 ("Second Fitness Hearing").

<sup>3</sup> Defence Request for Appointment of a Neuropsychiatrist to Assess Madame IENG Thirith's Fitness to Stand Trial [...], E52, 21 February 2011 ("Request for Appointment of Neuropsychiatrist"), para. 36. Following a request of the Chamber, the ECCC Detention Facility officers had earlier provided observations regarding the physical and psychological condition of the four accused on 11 February 2011, noting that IENG Thirith did not appear to be adapting well to the conditions of detention (Memorandum from ECCC Detention Liaison Officer entitled "Request for confidential reports regarding the physical and psychiatric health of all four Accused (Case 002)", 11 February 2011, E31/1; *see also* Request for confidential reports regarding the physical and psychiatric health of all four Accused (Case 002), E31, 3 February 2011).

<sup>4</sup> Co-Prosecutors Response to IENG Thirith's Request for Appointment of a Neuropsychiatrist, E52/1, 1 March 2011; Defence Reply to OCP Response to Request for Appointment of a Neuropsychiatrist to Assess Madame IENG Thirith's Fitness to Stand Trial", E52/2, 7 March 2011.

in relation to accused whom they represent for the assistance of the expert in making his assessment.<sup>5</sup> The IENG Thirith Defence filed a list of questions and issues for the attention of the expert on 21 March 2011.<sup>6</sup>

4. On 4 April 2011, the Chamber appointed Professor A. John Campbell (“Expert Geriatrician”) to undertake a medical assessment of all Accused who wished to avail themselves of assessment, requesting him to prepare individualized reports in relation to each Accused.<sup>7</sup>

5. Following his assessment, Professor Campbell indicated in a letter to the Trial Chamber dated 13 May 2011 that during his clinical examination of the Accused IENG Thirith, he had noticed significantly greater cognitive impairment than had been previously observed by Professor KA Sunbaunat and Associate Professor Philip Brinded during their examination of the Accused in October 2009.<sup>8</sup> The Expert Geriatrician advised the Chamber that he required confirmation that his findings were not due to the testing of a person with a different cultural background, and recommended that Professor KA Sunbaunat perform a further assessment of the Accused.<sup>9</sup> On 9 June 2011, Professor KA submitted his report, in which he also concluded that the Accused IENG Thirith suffered from an impairment of cognitive function.<sup>10</sup> Following a request from the Trial Chamber that a number of contradictions in Professor

<sup>5</sup> Memorandum to Defence teams for IENG Sary, IENG Thirith and NUON Chea, E62, 9 March 2011.

<sup>6</sup> Defence for Madame IENG Thirith’s Questions for Geriatric Expert Professor Campbell, E62/2, 21 March 2011.

<sup>7</sup> Order Assigning Expert, E62/3, 4 April 2011 (“Order Assigning Expert Geriatrician”), paras 4, 6. In advance of his assessment, the Chamber provided the Expert with a list of all relevant medical information on the case file or held by Calmette Hospital or the ECCC Office of Administration (*see* Trial Chamber Memorandum to the Expert entitled “Categories of medical materials to be supplied in advance of your assessment of Accused NUON Chea, IENG Thirith and IENG Sary,” E62/3/1, 5 May 2011). The Accused KHIEU Samphan indicated that he did not wish to avail himself of this assessment (Order Assigning Expert Geriatrician, para. 4).

<sup>8</sup> Professor Campbell Letter to Trial Chamber, E62/3/3.1, 13 May 2011. In their Report of November 2009, Professors KA and Brinded had noted that IENG Thirith suffered from a mild age-related dementing process and that she became confused if questions were lengthy or if she found the emotional content of interview to be troubling (Deposition of Psychologic Expertise Concerning Mrs. IENG Thirith, B37/9/8, 2 December 2009 (“OCIJ Experts’ Report”), p. 8). They were then of the opinion that she was nonetheless able to compensate for this difficulty with the assistance of written material and that her mental capacities still enabled her participate in the proceedings with assistance from Counsel (OCIJ Experts’ Report, p. 9).

<sup>9</sup> Professor Campbell Letter to Trial Chamber, E62/3/3.1, 13 May 2011; *see also* Order for Further Assessment of IENG Thirith, E62/3/3, 24 May 2011 (noting the recommendation of Professor Campbell that a further assessment be undertaken by Dr. KA Sunbaunat and authorizing the latter to communicate with Professor Campbell and to have access to the ECCC Detention Facility for this purpose).

<sup>10</sup> Deposition of Psychologic Expertise Concerning Mrs. IENG Thirith, E62/3/6.1, 9 June 2011, p. 5 (concluding that the level of impairment is “most likely within the extreme limit of mild and the lowest limit of moderate cognitive impairment”).

KA's report be addressed, the Witness and Expert Support Unit ("WESU") provided several clarifications in relation to this report on 4 August 2011.<sup>11</sup>

6. On 23 June 2011, Professor Campbell's report regarding IENG Thirith was filed ("Expert Geriatrician's Report"). It concluded that IENG Thirith had a "moderately severe dementing illness, most probably Alzheimer's disease".<sup>12</sup> As the Expert Geriatrician considered that the Accused's drug regimen may have further impaired her cognitive function, he recommended a gradual reduction of these medications and re-assessment after this medication was withdrawn.<sup>13</sup> On 2 August 2011, the Accused's treating physicians at Calmette Hospital agreed that her psychotropic medications would be reduced and that she would be re-examined by Professor Campbell between 24 and 26 August 2011.<sup>14</sup>

7. On 27 June 2011, during the Initial Hearing, the Chamber requested the IENG Thirith Defence to file its observations on the Expert Geriatrician's Report by 18 July 2011, and the other parties by 25 July 2011.<sup>15</sup> In their submissions, the Defence for IENG Thirith concurred with Professor Campbell's conclusion that IENG Thirith is compromised in her ability to participate fully in a trial and to exercise her fair trial rights.<sup>16</sup> The Co-Prosecutors submitted that Professor Campbell, as a geriatrician, was not qualified to diagnose the specific illness suffered by the Accused and requested in consequence the appointment of two additional experts, with expertise and experience in relation to dementing disorders.<sup>17</sup>

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<sup>11</sup> Trial Chamber Requested Clarifications of the Expertise Report prepared by Professor KA Sunbaunat in response to Expertise Order E62/3/3, E62/3/6.2, 4 August 2011. Upon being provided with Professor KA's clarifications, Professor Campbell indicated that these did not impact upon his own conclusions or require any addendum to the Expert Geriatrician's Report (E-mail communication from Professor Campbell to WESU, E62/3/6.3, 8 August 2011).

<sup>12</sup> Expert Geriatrician's Report, para. 40.

<sup>13</sup> Expert Geriatrician's Report, paras 42-45 (recommending a "stepwise, gradual reduction of the [Accused's] psychotropic medication closely monitored by the Calmette Hospital clinic doctors who provide IENG Thirith's care" and in particular, gradual reduction of the drug clonazepam over a four week period, followed by a similar phased reduction of the drug quetiapine if the clonazepam reduction is tolerated).

<sup>14</sup> On 5 August 2011, the ECCC Office of Administration informed the Trial Chamber that Calmette Hospital had commenced reduction of these psychotropic medications on 21 July 2011 (Communication with Calmette Hospital on Trial Chamber Request for Information on IENG Thirith's Treatment, E62/3/6/5, 5 August 2011); *see also* Communication between Professor Campbell and Calmette Hospital in relation to the expert medical report on IENG Thirith, E62/3/6/4, 5 August 2011; Transcript of Teleconference Meeting between Doctors of Calmette Hospital and Professor John Campbell, E62/3/6/4.4, 2 August 2011; Report on teleconference with Calmette Hospital doctors caring for IENG Thirith, E62/3/6/4.1, 2 August 2011 and Report on Teleconference Discussion Held on 2 August 2011 between Calmette Hospital's Health Staff and Prof. John Campbell on the Accused IENG Thirith's Medication Regime, E62/3/6/4.2, 3 August 2011.

<sup>15</sup> T., 27 June 2011, pp. 32-33.

<sup>16</sup> Comments by the Defence for Madame IENG Thirith on the Geriatric Expert Report of Professor Campbell, E62/3/6/1, 18 July 2011, paras 3, 12, 14 and 18.

<sup>17</sup> Co-Prosecutors' Response to Geriatric Expert Report on Accused IENG Thirith, E62/3/6/2, 25 July 2011, para. 21.

8. Following reassessment of the Accused, Professor Campbell filed a follow-up report on 26 August 2011, indicating that his conclusions regarding IENG Thirith's ability to participate in her defence were unchanged.<sup>18</sup> The Trial Chamber held a preliminary hearing on the fitness to stand trial of the Accused NUON Chea and IENG Thirith from 29 August 2011 to 31 August 2011.<sup>19</sup>

9. On 23 August 2011, the Trial Chamber appointed four psychiatric experts to supplement the conclusions reached by Professor Campbell regarding IENG Thirith's cognitive impairment.<sup>20</sup> The Trial Chamber invited the IENG Thirith Defence and the Co-Prosecutors to submit any questions or comment on particular medical or cognitive issues not already raised in relation to the Accused for the assistance of the Psychiatric Experts in making their assessment.<sup>21</sup> Questions and comments for consideration by these Experts were filed by both the IENG Thirith Defence and Co-Prosecutors on 2 September 2011.<sup>22</sup>

10. Following their assessment of the Accused, the Psychiatric Experts filed a joint report on the fitness of IENG Thirith to stand trial on 9 October 2011. The Psychiatric Experts concluded that IENG Thirith presently lacks sufficient understanding of court proceedings, that her abilities will fluctuate in view of her dementia and that measures to compensate for her diminished capacity (such as the provision of oral summaries of proceedings, and regular and continuous contact with Khmer-speaking lawyers throughout trial) are unlikely to improve her cognitive ability to the extent that she would have a sufficient understanding of the course of legal proceedings.<sup>23</sup>

11. On 19 and 20 October 2011, a hearing took place during which Drs. HUOT Lina and Seena Fazel (who were designated by the Psychiatric Experts to testify on behalf of all four Psychiatric Experts) were examined and the IENG Thirith Defence, Co-Prosecutors and the Civil Party Lead Co-Lawyers made submissions on the issue of IENG Thirith's fitness to

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<sup>18</sup> Follow Up Report Concerning Mrs. IENG Thirith in Accordance to Trial Chamber's Expertise Order E62/3, Dated 4 April 2011, E62/3/12, 26 August 2011 ("Follow-up Report of Geriatrician"), para. 8.

<sup>19</sup> Scheduling Order for Preliminary Hearing to Stand Trial, E110, 11 August 2011

<sup>20</sup> Order Appointing Experts, E111, 23 August 2011 ("Order Appointing Psychiatric Experts") (appointing Dr. HUOT Lina of Cambodia, Dr. KOEUT Chhunly of Cambodia, Dr. Seena FAZEL of the United Kingdom, and Dr. Calvin FONES SOON LENG of Singapore (collectively "Psychiatric Experts")).

<sup>21</sup> Order Appointing Psychiatric Experts, para. 11.

<sup>22</sup> Co-Prosecutors' Questions and Comments for Psychiatric Experts Regarding Accused IENG Thirith, E111/2, 2 September 2011; IENG Thirith Defence Questions and Comments for Experts in Accordance with Trial Chamber's Order Appointing Experts, E111/3, 2 September 2011.

<sup>23</sup> Expertise Report Prepared in Response to the Trial Chamber's Expertise Order Document Number E111, Dated 23 August 2011, E111/8, 9 October 2011 ("Psychiatric Experts' Report"), para. 51.

stand trial. The parties were invited by the Chamber to specifically address the following questions over the course of this hearing:

- i. May an accused be considered mentally unfit to stand trial if any one of the criteria for this determination identified in *Strugar* is found to be lacking, or must all criteria instead be viewed together when making this assessment?
- ii. Does the Accused IENG Thirith's impaired memory as identified by both Professor Campbell and the Psychiatric Experts render her unable to exercise her fair trial rights to the standard required by the *Strugar* test?
- iii. Does the degree of impairment identified by Professor Campbell and the Psychiatric Experts in relation to the Accused IENG Thirith's capacity to a) enter a plea, b) instruct counsel, c) testify, and d) understand the nature of the charges, course of the proceedings, details of the evidence and consequences of the proceedings indicate that she is unfit to stand trial, taking account of the fact that the Accused is represented and thus able to some extent to exercise these rights through counsel?
- iv. As found by the Experts, the nature of the Accused IENG Thirith's condition is degenerative and may entail ongoing delays to the proceedings due, for example, to the need for additional or ongoing medical testing or day-to-day fluctuations in her condition. Given the impact of these factors on the rights of the other Accused to an expeditious trial and the likely overall lengthening of proceedings in Case 002, do the parties consider it to be in the interests of justice that the Accused IENG Thirith be severed from these proceedings pursuant to Internal Rule 89ter (as an alternative to termination of the proceedings against her in the event of a finding of unfitness to stand trial)?
- v. What consequences for the Accused IENG Thirith would stem from a severance order pursuant to this Rule?<sup>24</sup>

### 3. SUBMISSIONS

12. The IENG Thirith Defence submits that the Accused is not fit to stand trial and that the proceedings against her should be discontinued.<sup>25</sup> The Expert Geriatrician's Report and the Psychiatric Experts' Report were substantially the same in their conclusions that the Accused IENG Thirith suffers from a dementing illness that is "moderately severe".<sup>26</sup> As she lacks the capacity to exercise her fair trial rights, it would be improper to require her to stand trial.<sup>27</sup>

13. In the absence of any one of the capacities identified in *Strugar*, the IENG Thirith Defence contends that the Accused must be found unfit.<sup>28</sup> IENG Thirith lacks both long-term and short-term memory and this affects each of the capacities in *Strugar*.<sup>29</sup> Use of counsel

<sup>24</sup> Scheduling Order for Hearings of 19 and 20 October 2011, E129, 10 October 2011, pp. 4-5.

<sup>25</sup> T., 20 October 2011, p. 90.

<sup>26</sup> T., 20 October 2011, pp. 90-92.

<sup>27</sup> T., 20 October 2011, pp. 93-94.

<sup>28</sup> T., 20 October 2011, p. 93.

<sup>29</sup> T., 20 October 2011, p. 97.

would not permit IENG Thirith to participate meaningfully in the proceedings against her because her memory impairment precludes her ability to instruct them regarding the conduct for which she is charged.<sup>30</sup>

14. If the Chamber instead finds that IENG Thirith is currently unfit to stand trial but that she may improve over time, her Defence submits that a review of her condition should be scheduled after any medication prescribed or treatment or management regime has been implemented.<sup>31</sup> In the interim, this “would require either IENG Thirith to be detained while this assessment is made, or otherwise provisional[ly] release[d]”.<sup>32</sup> Finally, the IENG Thirith Defence argues that the burden of proof lies with the Co-Prosecutors to demonstrate that the Accused is fit to stand trial.<sup>33</sup>

15. The Co-Prosecutors submit that the Trial Chamber cannot at this stage make a clear determination that IENG Thirith is unfit to stand trial.<sup>34</sup> They accept that IENG Thirith suffers considerable memory impairment, but note the Psychiatric Experts’ finding that she has met five of the seven capacities identified in *Strugar*.<sup>35</sup> The Co-Prosecutors submit that the Trial Chamber must exhaust all options before finding that IENG Thirith is unfit to stand trial.<sup>36</sup> They note that her restricted environment in the detention facility and the continued administration of one psychotropic drug may have contributed to her cognitive impairment.<sup>37</sup> Her cognitive condition may therefore improve upon complete withdrawal of the psychotropic medication and upon administration of additional medication as suggested by Professor Campbell.<sup>38</sup> The Co-Prosecutors further submit that her capacity may improve if prompted by photographs, videos and documents that are relevant to the proceedings.<sup>39</sup>

16. Although acknowledging that the complete absence of any one of the capacities identified by *Strugar* would render the Accused unable to effectively exercise her fair trial rights, the Co-Prosecutors submit that IENG Thirith’s capacities are not completely absent.<sup>40</sup> They assert that if IENG Thirith is found unfit, there is no basis for a termination of

<sup>30</sup> T., 20 October 2011, pp. 97, 101.

<sup>31</sup> T., 20 October 2011, p. 104.

<sup>32</sup> T., 20 October 2011, p. 104 (acknowledging nonetheless that her condition may be improved if she were placed in a more stimulating environment rather than continued confinement).

<sup>33</sup> T., 20 October 2011, pp. 86-89.

<sup>34</sup> T., 20 October 2011, p. 106.

<sup>35</sup> T., 20 October 2011, p. 107.

<sup>36</sup> T., 20 October 2011, p. 109.

<sup>37</sup> T., 20 October 2011, p. 108.

<sup>38</sup> T., 20 October 2011, p. 118.

<sup>39</sup> T., 20 October 2011, pp. 109-110.

<sup>40</sup> T., 20 October 2011, p. 110.

proceedings against her, as Articles 7 and 8 of the Code of Criminal Procedure of Cambodia do not provide for the termination of proceedings based upon unfitness to stand trial.<sup>41</sup>

17. The National Co-Prosecutor submits that IENG Thirith is fit to stand trial and that the assistance of counsel will permit her to participate in proceedings.<sup>42</sup> She should not be released because she is well taken care of in the detention facility.<sup>43</sup> Further, questions may be raised in Case 002 that will require her response.<sup>44</sup>

18. The Civil Party Lead Co-Lawyers submit that IENG Thirith's behavior as described in the expert reports demonstrates that she is fit to stand trial.<sup>45</sup> Her denial of guilt and her refusal to discuss either the charges against her or the consequences of a conviction are consistent with the reaction of anyone charged with criminal offenses.<sup>46</sup>

19. In relation to question iv (above, paragraph 11), the IENG Thirith Defence submits that the case against the Accused must be severed and discontinued because the Accused's degenerative condition may entail ongoing delays to the proceedings.<sup>47</sup> They further contend that the Accused is not currently fit to instruct counsel, and additional time would be required to prepare her defence if she regained some degree of recollection. Even if the Accused is found fit to stand trial, she should therefore be severed from Case 002 in order to permit the expeditious trial of the other Accused.<sup>48</sup>

20. The IENG Sary Defence agrees that IENG Thirith must be severed from this case in order to allow the case to move forward in an expeditious manner.<sup>49</sup> Retaining IENG Thirith as a party to these proceedings is likely to entail disruptions to the trial schedule and prolong the first trial in Case 002.<sup>50</sup>

21. The NUON Chea Defence submits that severance of IENG Thirith from Case 002 may permit two cases to proceed simultaneously: the first a trial against those Accused capable of sitting for the entire length of trial sessions, and a second against those who are, by contrast,

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<sup>41</sup> T., 20 October 2011, pp. 116-117.

<sup>42</sup> T., 20 October 2011, pp. 119-123.

<sup>43</sup> T., 20 October 2011, p. 124.

<sup>44</sup> T., 20 October 2011, pp. 124-125.

<sup>45</sup> T., 20 October 2011, p. 126.

<sup>46</sup> T., 20 October 2011, pp. 129-130.

<sup>47</sup> T., 20 October 2011, pp. 102-103.

<sup>48</sup> T., 20 October 2011, p. 103.

<sup>49</sup> T., 20 October 2011, p. 84.

<sup>50</sup> T., 20 October 2011, p. 83.



“not fully fit” to stand trial.<sup>51</sup> On this basis, they submit that both IENG Thirith and NUON Chea should be severed from this case.<sup>52</sup>

22. The KHIEU Samphan Defence argues that it is premature to sever IENG Thirith from Case 002 pending a decision (including in relation to any appeal) on her fitness to stand trial.<sup>53</sup> IENG Thirith’s fitness to stand trial and severance are distinct legal questions, reflecting different rights, and must be considered separately.<sup>54</sup> The Trial Chamber must therefore first consider the issue of fitness to stand trial and await an appellate decision from the Supreme Court Chamber.<sup>55</sup> They further submit that it is in the interests of justice to try together all members of the alleged joint criminal enterprise in Case 002.<sup>56</sup> Severance at this time would also require substantial modification to the Closing Order and impact upon the parties’ pre-trial preparation and the conduct of proceedings.<sup>57</sup> Further, if IENG Thirith is immediately severed from the case but later found on appeal to the Supreme Court Chamber to be fit to stand trial, it is unclear how she could then be reintegrated into the proceedings.<sup>58</sup>

23. The Co-Prosecutors submit that concerns based on possible delay to Case 002 caused by IENG Thirith’s condition are speculative.<sup>59</sup> Delays will occur in any event because all of the Accused are elderly and may seek the adjournment of proceedings on medical grounds.<sup>60</sup>

24. The Civil Parties submit that it is for the Trial Chamber to decide whether the Accused IENG Thirith’s case must be severed from Case 002 in the interests of permitting the expeditious completion of trials against all remaining Accused.<sup>61</sup>

<sup>51</sup> T., 20 October 2011, pp. 84-85.

<sup>52</sup> T., 20 October 2011, p. 85; *see, however*, Decision on NUON Chea’s Fitness to Stand Trial, E115/3, 16 November 2011 (finding the Accused NUON Chea fit to stand trial).

<sup>53</sup> *Observations suite à l’ordonnance relative à la tenue d’une audience les 19 et 20 octobre 2011*, E129/4, 17 October 2011 (“KHIEU Samphan Observations”), paras 10, 12, 17.

<sup>54</sup> KHIEU Samphan Observations, paras 13, 15.

<sup>55</sup> KHIEU Samphan Observations, para. 30 (noting that failure to do so would infringe upon the Supreme Court Chamber’s competence).

<sup>56</sup> KHIEU Samphan Observations, para. 34.

<sup>57</sup> KHIEU Samphan Observations, para. 39.

<sup>58</sup> KHIEU Samphan Observations, paras 46-47, 50 (noting that rehearing of all witnesses who testified during IENG Thirith’s absence would not serve judicial economy and that KHIEU Samphan’s right to a trial without delay would not be infringed by a delay of up to five months pending an appeal decision on the fitness of IENG Thirith to stand trial).

<sup>59</sup> T., 20 October 2011, p. 117.

<sup>60</sup> T., 20 October 2011, p. 117.

<sup>61</sup> T., 20 October 2011, p. 131.

## **4. FINDINGS**

### **4.1. Applicable law**

25. Internal Rule 32 provides that the Chamber may order a medical, psychiatric or psychological examination by an expert for the purposes of determining whether an accused is physically and mentally fit to stand trial. Principles established at the international level indicate that

fitness or competence to stand trial is a matter which, although undoubtedly connected with the physical and mental condition of an accused person, is not confined to establishing whether a given disorder is present [...] but rather is better approached by determining whether [an accused] is able to exercise effectively his rights in the proceedings against him.<sup>62</sup>

26. In relation to the fair trial rights protected before the ICTY (which are in substance identical to those enshrined within the ECCC legal framework<sup>63</sup>), the *Strugar* case held that the appropriate approach to be adopted in determining fitness to stand trial is to evaluate the capacity of the accused

- 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>64</sup>

<sup>62</sup> *Prosecutor v. Pavle Strugar*, Decision re Defence Motion to Terminate Proceedings, ICTY Trial Chamber, Case No. IT-01-42-T, 26 May 2004 (“*Strugar* Decision”), para. 35; *see also* Article 12(1) of the Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes committed during the Period of Democratic Kampuchea (“ECCC Agreement”) and Article 33 new of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (“ECCC Law”) (“If [...] existing procedure[s] do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application [...] guidance may be sought in procedural rules established at the international level”).

<sup>63</sup> *See* Article 13 of the Agreement, referring to Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights (“ICCPR”); *see also* Internal Rule 21(1)(d); ECCC Law, Article 33 new (“[T]he trial court shall ensure trials are fair and expeditious [...] with full respect for the rights of the Accused [...]”) and Article 35 new of the ECCC Law (enshrining the right to be informed of the nature of the charges against him, to adequate time and facilities for the preparation of a defence, to communicate with counsel of his choice, to be tried without undue delay, to examine the evidence against him and to the free assistance to an interpreter).

<sup>64</sup> *Strugar* Decision, para. 36 (reflected in Order Appointing Psychiatric Experts, para. 2); *see also* *Prosecutor v. Strugar*, Judgement, ICTY Appeals Chamber (IT-01-42-A), 17 July 2008 (“*Strugar* Appeal Judgement”), para. 55 (“in assessing Strugar’s fitness to stand trial, the Trial Chamber correctly identified the non-exhaustive list of rights which are essential for determination of an accused’s fitness to stand trial”); *see also* *Deputy General Prosecutor for Serious Crimes v. Josep Nahak*, Findings and Order on Defendant Nahak’s Competence

27. The applicable standard in determining fitness to stand trial is that of “meaningful participation which allows the accused to exercise his fair trial rights to such a degree that he is able to participate effectively in his trial and has an understanding of the essentials of the proceedings.”<sup>65</sup> An accused’s fitness to stand trial should therefore turn on whether his capacities

viewed overall and in a reasonable and commonsense manner, [are] at such a level that is possible for [him or her] to participate in the proceedings (in some cases with assistance) and sufficiently exercise the identified rights.<sup>66</sup>

28. The ICTY Appeals Chamber has further emphasised that an accused represented by counsel cannot be expected to have the same understanding of the material related to his case as a qualified and experienced lawyer.<sup>67</sup> Even persons in good physical and mental health, but without advanced legal education and relevant skills, require considerable legal assistance, especially in cases of the factual and legal complexity of those tried by international tribunals. Accordingly, what is required for an accused to be deemed fit to stand trial is “a standard of overall capacity allowing for a meaningful participation in the trial, provided that he or she is duly represented by counsel”.<sup>68</sup> The availability of counsel may enable an accused to more adequately understand the evidence and the course and consequence of proceedings. While in a particular case, the availability of counsel “may well adequately compensate for any deficiency of a relevant capacity,” the use of counsel “requires, however, that the accused has the capacity to be able to instruct counsel sufficiently for this purpose.”<sup>69</sup> The effective exercise of an accused’s fair trial rights, even where represented, “may [therefore] be hindered, or even precluded, if an accused’s mental and bodily capacities, especially the ability to understand, *i.e.* to comprehend, is affected by mental or somatic disorder.”<sup>70</sup> The Accused must consequently possess “in each case [capacities] in a sufficient degree to enable the defence of the accused to be presented.”<sup>71</sup>

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to Stand Trial, Special Panel for Serious Crimes (Timor-Leste), Case No. 01A/2004, 1 March 2005 (“*Nahak Decision*”), para. 56.

<sup>65</sup> *Strugar Appeal Judgement*, para. 55.

<sup>66</sup> *Strugar Appeal Judgement*, para. 55.

<sup>67</sup> *Strugar Appeal Judgement*, para. 60.

<sup>68</sup> *Strugar Appeal Judgement*, para. 60.

<sup>69</sup> *Strugar Decision*, para. 22.

<sup>70</sup> *Strugar Decision*, para. 23.

<sup>71</sup> *Strugar Decision*, para. 24.

29. A Trial Chamber, having assessed all pertinent material before it and all relevant factors, must be in possession of sufficient information upon which to base its decision.<sup>72</sup> The Chamber may, in determining fitness to stand trial, also rely on its own observations of an accused during the proceedings.<sup>73</sup>

30. The ICTY jurisprudence has further noted that a Trial Chamber “needs medical facts in order to make certain legal determinations. With regard [however] to the specific methodology to be employed [by an expert in assessing an accused], including [which] medical tests to be administered, [...] this is a matter to be determined by the court-appointed expert.”<sup>74</sup> Minor discrepancies between reports or other alleged defects that do not affect an overall conclusion on fitness to stand trial do not warrant the appointment of further expertise.<sup>75</sup>

#### **4.2. Expert Qualifications**

31. Professor A. John Campbell is an expert in the field of geriatric medicine (the care of elderly persons).<sup>76</sup> His expertise, which is recognized both in his home country of New Zealand and internationally, encompasses dementia and Alzheimer’s disease.<sup>77</sup>

32. The Psychiatric Experts appointed by the Chamber are experts in the field of psychiatric medicine.<sup>78</sup> Drs. HUOT Lina and KOEUT Chhunly are qualified psychiatrists, practicing at

<sup>72</sup> *Edouard Karemera, Matthieu Ngirumpatse & Joseph Nzirorera v. Prosecutor*, Decision on Appeal Concerning the Severance of Matthieu Ngirumpatse, ICTR Appeals Chamber, Case No. ICTR-98-44-AR73.16, 19 June 2009, para. 19 (noting that “in practice, Trial Chambers generally consider various professional opinions before taking an important procedural decision arising from an accused’s medical condition which may impact the course of a trial”).

<sup>73</sup> *Strugar* Decision, para. 51 (considering as relevant comments by the accused which appeared to be “collected, relevant, well-structured and comprehensive,” his apparent understanding of the evidence, note-taking, attentiveness and reaction to matters of greater interest to him, appearing to follow proceedings and raising concerns when he could not (for instance, due to technical problems)); see also *Prosecutor v. Florencio Tacaqui*, Judgment, Case No 20/2001, 9 December 2004, pp. 8-9; *Nahak* Decision, para. 120.

<sup>74</sup> *Prosecutor v. Jovica Stanišić and Franko Simatović*, Decision on Urgent Defense Request for Further Submissions of Psychiatric Medical Expert and Decision on Defense Motion to Redact Medical Reports, Case No. IT-03-69-PT, 6 August 2009, para. 15 (further noting that “the Chamber expects all reporting doctors, within their respective areas of expertise, use all information pertinent to the diagnosis of the Accused in their reports”).

<sup>75</sup> Although further examinations have been ordered where material discrepancies between the views of medical experts affect the conclusions reached, adequate reasons must exist to justify any enquiry (see e.g. *Prosecutor v. Vladimir Kovačević*, Public Version of the Decision on Accused’s Fitness to Enter a Plea and Stand Trial, ICTY Trial Chamber, Case No. IT-01-42/2-I, 12 April 2006, para. 17; Decision on Nuon Chea’s Appeal Regarding Appointment of an Expert, D54/V/6, 22 October 2008, paras 32-34).

<sup>76</sup> Summary of Expert Witness Qualifications, Professor Campbell, E62.1, 9 March 2011; see also T., 29 August 2011, p. 10.

<sup>77</sup> T., 29 August 2011, pp. 34-34, 38-39.

<sup>78</sup> Order Appointing Psychiatric Experts, para. 1.

the Khmer Soviet Friendship Hospital in Phnom Penh.<sup>79</sup> Dr. Calvin Fones Soon Leng is a practicing psychiatrist in Singapore and has published in the area of geriatric psychiatry.<sup>80</sup> Finally, Dr. Seena Fazel is a Clinical Senior Lecturer in Forensic Psychiatry at Oxford University and has published in the areas of dementia, cognitive impairment, and the assessment of capacity.<sup>81</sup>

#### **4.3. Professor Campbell's Report and Testimony**

33. In his 23 June 2011 report, Professor Campbell found that "IENG Thirith has a global cognitive impairment particularly evident in the domains of memory, speech, construction and frontal lobe function consistent with a dementing disorder."<sup>82</sup> He concluded that "IENG Thirith has a moderately severe dementia which does impair her ability to comprehend questions, to follow instructions, to recall events, to concentrate and to maintain a consistent line of thought."<sup>83</sup> He described dementia as "a chronic and progressive impairment of cognitive function (including memory), most commonly caused by Alzheimer's disease".<sup>84</sup> Professor Campbell further noted that a CT head scan of 2 June 2011 of IENG Thirith, which "show[ed] generalized cerebral atrophy consistent with age or Alzheimer's disease", was consistent with this diagnosis.<sup>85</sup>

34. Professor Campbell also observed that following a hip fracture in January 2006, for which the Accused required surgery, clinical notes indicate that the Accused experienced symptoms of hallucinations, dizziness and an inability to sleep. All experts concur that IENG Thirith was at this time likely suffering from temporary post-operative delirium, an isolated incident unrelated to her current degenerative condition.<sup>86</sup>

<sup>79</sup> Curriculum Vitae of Dr. KOEUT Chhunly, E111.1; Curriculum Vitae of Dr. Lina HUOT, E111.2. The latter also completed post-graduate education in forensic psychiatry (T., 19 October 2011, p. 79).

<sup>80</sup> Curriculum Vitae of Dr. Calvin FONES SOON LENG, E111.3, January 2011.

<sup>81</sup> Curriculum Vitae of Dr. FAZEL, E111.4.

<sup>82</sup> Expert Geriatrician's Report, para. 28.

<sup>83</sup> Expert Geriatrician's Report, para. 34.

<sup>84</sup> T., 29 August 2011, pp. 35-36, 116; T., 30 August 2011, pp. 11, 46; *see also* T., 30 August 2011, pp. 9, (further explaining that in consequence of this condition, memory loss generally commences with a lack of recall of more recent events, becoming progressively worse and impacting also long-term memory).

<sup>85</sup> Follow-up Report of Geriatrician, para. 7; *see also* T., 29 August 2011, pp. 130, 134; T., 30 August 2011, p. 4 and Expert Geriatrician's Report, para. 31.

<sup>86</sup> Expert Geriatrician's Report, para. 9 and T., 30 August 2011, pp. 70-71; *see also* Psychiatric Experts' Report, para. 26 (agreeing with Professor Campbell that IENG Thirith likely experienced post-operative delirium in 2006 and that this did not provide evidence that she was then suffering from a clinical dementia or other severe mental illness); T., 29 August 2011, p. 129 and T., 19 October 2011, p. 88 (noting that her delirium was treated at the time and that the Accused suffered no further psychotic symptoms).

35. Following his examination of IENG Thirith, Professor Campbell concluded that the Accused's recent memory was moderately impaired and that her recall of details of her past was vague and often inaccurate.<sup>87</sup> He noted, for example, that she did not know the correct date and had difficulty recalling any details of her time spent living in France. She could also provide few details concerning her immediate family, and much of the information she did provide was erroneous. She believed, for example, that she has only adopted children.<sup>88</sup> IENG Thirith also had difficulty understanding the purpose of her consultation with Professor Campbell,<sup>89</sup> who further noted that IENG Thirith sometimes became disoriented or lost in the ECCC Detention Facility, despite this being a confined space with which she was familiar.<sup>90</sup>

36. During his assessment, Professor Campbell administered a Mini-Mental Status Examination ("MMSE"), a common test for assessing cognitive impairment, which showed that the Accused was unable to provide correct responses to questions such as the name of the building where she was and her age.<sup>91</sup> She was able to place the numbers on a clock face, but was not able to draw the hands of the clock.<sup>92</sup>

37. Although Professor Campbell considered that a decrease in the psychotropic medication that IENG Thirith was taking might improve function, a significant improvement in consequence of this reduction was unlikely.<sup>93</sup> Two psychotropic medications had been gradually reduced prior to Professor Campbell's reassessment of the Accused, but had produced no improvement in IENG Thirith's cognitive function.<sup>94</sup> Professor Campbell further indicated that a trial of a drug (Donepezil) as a treatment for Alzheimer's disease might also be considered.<sup>95</sup> However, he cautioned that this drug was shown to be effective in only about

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<sup>87</sup> T., 29 August 2011, pp. 130, 136, 137; *see also* Expert Geriatrician's Report, paras. 17, 19 and Follow-up Report of Geriatrician, para. 6.

<sup>88</sup> Expert Geriatrician's Report, para. 19.

<sup>89</sup> Expert Geriatrician's Report, para. 15.

<sup>90</sup> Expert Geriatrician's Report, para. 13.

<sup>91</sup> Expert Geriatrician's Report, paras 17, 24, 25.

<sup>92</sup> Expert Geriatrician's Report, para. 25.

<sup>93</sup> Expert Geriatrician's Report, paras. 35, 44.

<sup>94</sup> As of 23 June 2011, IENG Thirith was taking 1 mg of clonazepam and 100 mg of quetiapine daily and bromazepam two to four times per week (Expert Geriatrician's Report, para. 42). She had stopped taking clonazepam and bromazepam entirely, and reductions of the dosage of quetiapine had commenced, by mid-August 2011 (Report on the teleconference with Calmette Hospital doctors caring for IENG Thirith, E62/3/6/4.1, 2 August 2011; T., 30 August 2011, p. 61). By the time the Psychiatric Experts interviewed IENG Thirith, the quetiapine dose had been reduced by one half (T., 19 October 2011, p. 110); *see also* Follow-up Report of Geriatrician, para. 6 and T., 29 August 2011, pp. 119, 124.

<sup>95</sup> Follow-up Report of Geriatrician, para. 8(ii).

one third of people who take it and that any such improvement was likely to be “modest at best.”<sup>96</sup>

38. While noting that Professors KA and Brinded had examined IENG Thirith in 2009 and concluded that she suffered from only mild cognitive impairment, Professor Campbell considered that IENG Thirith’s condition had progressed since they had examined her.<sup>97</sup> Although of the opinion that until all measures were attempted to improve function, it could not be definitively said that IENG Thirith would be unable to participate in her defence, Professor Campbell considered that written notes or other techniques to aid recall would be unlikely to assist IENG Thirith in overcoming her impaired memory.<sup>98</sup> He was also of the opinion that she was not feigning dementia.<sup>99</sup>

39. In consequence, Professor Campbell concluded that it would be difficult for the Accused IENG Thirith to understand the nature of the charges against her or to follow the proceedings, to understand witness statements from events taking place 35 years prior, to instruct her counsel, or to testify in her own defence.<sup>100</sup>

#### **4.4. Psychiatric Expert Report and Testimony**

40. Although satisfied with the report and testimony provided by the Expert Geriatrician, the Chamber considered it prudent to seek a complementary assessment from a related field of medical expertise. The Psychiatric Experts appointed by the Trial Chamber on 23 August 2011 examined IENG Thirith on 12 and 13 September 2011.<sup>101</sup>

41. Following their assessment of the Accused, the Psychiatric Experts also concluded that IENG Thirith has a clinical diagnosis of dementia, characterized by a moderate impairment of her memory, and a mild to moderate impairment of her other cognitive abilities.<sup>102</sup> In

<sup>96</sup> Follow-up Report of Geriatrician, para. 8(ii) (further noting that if troublesome side-effects developed, the drug would have to be stopped).

<sup>97</sup> T., 29 August 2011, pp. 130, 143. A one-page report by Dr. CHAK Thida of Calmette Hospital, dated 17 February 2011, concluded that IENG Thirith’s concern about her health condition “shows no symptom of irregularity in her psychological status” (Psychiatric Mental Status Examination, E17/1/2.4, 17 February 2011 (“CHAK Thida Report”)); *see also* T., 30 August 2011, p. 89 (explaining these divergent assessments on grounds that “there is considerable variation in the way that IENG Thirith presents and relates to the people who are interviewing her, and we may be seeing [...] a fluctuation in her condition”).

<sup>98</sup> T., 29 August 2011, p. 143 (noting she had difficulties in using written notes in his interview with her).

<sup>99</sup> T., 29 August 2011, p.138; T., 30 August 2011, p.54.

<sup>100</sup> T., 30 August 2011, pp. 62-65, 67.

<sup>101</sup> Psychiatric Experts’ Report, para. 5.

<sup>102</sup> Psychiatric Experts’ Report, para. 27 (describing the Accused’s impairment as a “serious handicap to independent living”).

examining IENG Thirith, they performed three types of tests: (1) a mental state examination to evaluate mood, speech, and psychotic symptoms; (2) some specific cognitive tests, including the MMSE; and (3) other tests to measure executive function, judgment, and reasoning.<sup>103</sup> This third set of tests was supplemented by tests to evaluate the Accused's short-term and long-term memory.<sup>104</sup>

42. Following these tests and an examination of her clinical history, the Psychiatric Experts found that the Accused had a poor recollection of many events in her life.<sup>105</sup> She could not, for example, remember how many children she had, where they lived or what they did, although she did recall that she had a daughter.<sup>106</sup> Nor could she remember the name of her mother or siblings.<sup>107</sup> On subsequent visits of the Psychiatric Experts, and while remembering one interpreter, IENG Thirith could not recall the Experts' names or their roles.<sup>108</sup> As part of the MMSE, the Accused was asked to remember three unrelated objects but was unable to do so.<sup>109</sup> The Experts concluded that the Accused's long-term memory was impaired, although some memory was preserved, and that her short-term memory was also poor.<sup>110</sup> They further noted that the Accused's memory had apparently worsened over the course of the last two years.<sup>111</sup>

43. The Experts noted, however, that IENG Thirith performed better in some respects on the second day of examination than on the first day.<sup>112</sup> For example, she was able to spell a word in English on the second day but not on the first day and remembered the name of the school she attended only on the second day.<sup>113</sup> Although noting that one report from 17 February 2011 was more optimistic regarding the Accused's cognitive functions, the Experts noted that it had provided no details as to how these tests of cognition were conducted and it was therefore difficult to evaluate the reliability of this report.<sup>114</sup>

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<sup>103</sup> T., 19 October 2011, pp. 90-93.

<sup>104</sup> T., 19 October 2011, p. 93.

<sup>105</sup> Psychiatric Experts' Report, para. 9.

<sup>106</sup> Psychiatric Experts' Report, paras. 9, 18.

<sup>107</sup> Psychiatric Experts' Report, para. 31.

<sup>108</sup> Psychiatric Experts' Report, para. 24.

<sup>109</sup> T., 19 October 2011, p. 91.

<sup>110</sup> Psychiatric Experts' Report, paras 24, 30.

<sup>111</sup> Psychiatric Experts' Report, para. 17, 19 (noting that "Dr. Chamroeun of Calmette Hospital ... felt that over the last two years, IENG Thirith's memory had worsened, and he remarked that she has started to complain about forgetting" and that IENG Sary stated that he had noticed a "great change – she keeps forgetting things").

<sup>112</sup> T., 19 October 2011, pp. 90-91.

<sup>113</sup> T., 19 October 2011, pp. 90-91, 101.

<sup>114</sup> T., 19 October 2011, p. 99 (referring to CHAK Thida Report).



44. The Psychiatric Experts also found the CT head scans to be consistent with dementia or age-related changes.<sup>115</sup> Following consultation with a radiologist, the Psychiatric Experts considered that the CT head scans from 2007, 2009 and 2011 showed a progressive, generalized cerebral atrophy, confirming the diagnosis of dementia.<sup>116</sup>

45. The Psychiatric Experts agreed with Professor Campbell that the likely diagnosis was Alzheimer's disease.<sup>117</sup> On a 7-point scale, they estimated the Accused IENG Thirith to be at stage 5 ("early dementia: moderately severe cognitive decline") and noted that the disease will lead to a gradual decline over time in her memory and function.<sup>118</sup> They emphasized that IENG Thirith's abilities will fluctuate over time and this was to be expected given the diagnosis of dementia.<sup>119</sup>

46. As to possible effects of reduction of the Accused's psychotropic medications, the Psychiatric Experts noted that there is no indication that this has improved IENG Thirith's memory.<sup>120</sup> Any benefits to be gained from the reduction of these drugs would have most likely already been observed and any further reduction in medication is unlikely to lead to any marked improvement.<sup>121</sup> Further, Alzheimer's disease is not a reversible or treatable form of dementia.<sup>122</sup> The potential drug treatment for Alzheimer's disease identified by Professor Campbell would only provide for small improvements and such improvements are limited to a minority of individuals who take it. Further, it is unclear whether this drug is available in Cambodia or whether it could be administered locally.<sup>123</sup>

47. The Psychiatric Experts found that IENG Thirith nonetheless maintained an awareness of her environment, demonstrated some ability to maintain concentration and engage in interviews, and was able to respond to questions over a sustained period.<sup>124</sup> Her physical health was not considered to be a factor affecting her fitness to stand trial.<sup>125</sup>

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<sup>115</sup> Psychiatric Experts' Report, para. 35.

<sup>116</sup> Psychiatric Experts' Report, para. 35.

<sup>117</sup> Psychiatric Experts' Report, para. 36 (also evaluating vascular dementia as a possible alternative diagnosis, but noting that "the clinical picture is one of a gradual insidious decline", and thus more consistent with Alzheimer's disease than vascular dementia). The Psychiatric Experts further noted that the latter may, on occasion, coexist with Alzheimer's disease (T., 20 October 2011, p. 36).

<sup>118</sup> Psychiatric Experts' Report, para. 36.

<sup>119</sup> Psychiatric Experts' Report, para. 51.

<sup>120</sup> Psychiatric Experts' Report, para. 17,

<sup>121</sup> Psychiatric Experts' Report, para. 37.

<sup>122</sup> T., 19 October 2011, p. 129.

<sup>123</sup> Psychiatric Experts' Report, para. 37.

<sup>124</sup> Psychiatric Experts' Report, para. 27(iii), 29, 32.

<sup>125</sup> T., 20 October 2011, pp. 40, 62.

48. When questioned regarding the possibility that the Accused may have attempted to feign mental incapacity, the Psychiatric Experts explained that the standard tests that are applied in assessing capacity, and the methodologies used by the Psychiatric Experts in assessing the Accused, were designed to exclude this possibility.<sup>126</sup> In the opinion of the Psychiatric Experts, this explanation was therefore unlikely.<sup>127</sup>

49. Based on the criteria identified in *Strugar*, the Psychiatric Experts concluded that the Accused did possess the capacity to enter a plea, to understand the charges against her, to understand the details of the evidence, and to testify.<sup>128</sup> Although initially stating that she had not been charged with anything, IENG Thirith later explained that she understood very well the difference between guilty and not guilty and asserted that she had “never killed anyone”.<sup>129</sup> She also later mentioned that crimes against humanity are “really severe”, that it meant the whole population of the country vanished and that genocide referred to the “whole population”.<sup>130</sup> She also demonstrated some capacity to understand the consequences of the proceedings: appearing, for instance, to show awareness at one point during the assessment that if found to be mentally unfit, she could not be prosecuted.<sup>131</sup>

50. With regard, however, to the Accused’s capacity to understand the course of the proceedings, the Psychiatric Experts concluded that

IENG Thirith’s cognitive impairment would compromise the ability to understand what was said in court, reason and weigh information, and comment intelligibly on it. Specifically, it was our view that she would not be able to retain information from any statement made in court long enough to be able to comment on them intelligibly. In addition we were of the opinion that her taking notes would not improve her capacity to a level that would be sufficient for the purposes of understanding the course of proceedings.<sup>132</sup>

51. In addition, the Psychiatric Experts were of the opinion that the Accused would not be able to instruct her counsel:

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<sup>126</sup> Psychiatric Experts’ Report, para. 34; T., 20 October 2011, p. 29 (explaining, for instance, that informant history from prior treating physicians, care-givers, and detention facility staff was used to confirm the Experts’ diagnosis).

<sup>127</sup> T., 19 October 2011, p. 106 (noting that had the Accused intended to deceive the Psychiatric Experts as to the extent of her cognitive impairment, it would be unlikely, for instance, to observe improved performance in tests administered across different days).

<sup>128</sup> Psychiatric Experts’ Report, paras 41, 42, 44, 47.

<sup>129</sup> Psychiatric Experts’ Report, para. 41.

<sup>130</sup> Psychiatric Experts’ Report, para. 42.

<sup>131</sup> Psychiatric Experts’ Report, para. 46.

<sup>132</sup> Psychiatric Experts’ Report, para. 43.

[W]e are of the view that Ieng Thirith would have considerable difficulty in assisting in the preparation of her defence 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.<sup>133</sup>

#### **4.5. Trial Chamber's Assessment of IENG Thirith's Fitness To Stand Trial**

52. The Trial Chamber notes that all experts have, in relation to the Accused IENG Thirith, reached a consistent diagnosis of dementia most likely caused by Alzheimer's disease.<sup>134</sup> All concur that the Accused suffers significant cognitive impairment, most clearly in relation to her short-term and long-term memory. The clinical record shows that IENG Thirith is unable to recall basic personal information, including details of her immediate family.<sup>135</sup> The experts have explained that a score of 23/30 or less on the MMSE (a test of cognitive ability) is indicative of impairment, and that IENG Thirith scored, successively, 14/30, 15/30 and 18/30 on this test during multiple assessments conducted by the experts between June and October 2011.<sup>136</sup> While acknowledging the possibility that IENG Thirith could attempt to feign cognitive impairment in view of the consequences of a finding of incapacity, all experts considered it unlikely that IENG Thirith could falsely present with dementia.<sup>137</sup>

53. Finally, all experts agreed that the Accused IENG Thirith suffers from a progressive and degenerative illness.<sup>138</sup> It is therefore clear that IENG Thirith's long-term and short-term memory are already limited and that her condition will continue to deteriorate over time.<sup>139</sup> While Professor Campbell recommended the trial of another drug treatment for Alzheimer's disease, all experts concurred that there was only a small likelihood of this drug producing any improvement in her condition, and further, that administration and monitoring of this medication may prove difficult within the Cambodian context.<sup>140</sup> Recommended reductions in

<sup>133</sup> Psychiatric Experts' Report, para. 45.

<sup>134</sup> Psychiatric Experts' Report, para. 27; Expert Geriatrician's Report, paras 32, 34; *see also* T., 29 August 2011, pp. 35-36, 38 and Psychiatric Experts' Report, para. 36 (finding that IENG Thirith's CT head scans were consistent with this diagnosis and showed progressive brain atrophy from 2007-2011).

<sup>135</sup> Psychiatric Experts' Report, paras. 9, 18, 31; T., 29 August 2011, p. 137; T., 19 October 2011, pp. 113-114; Expert Geriatrician's Report, paras 19, 20.

<sup>136</sup> Psychiatric Experts' Report, para. 21; Expert Geriatrician's Report, para. 11 (noting that a clinic doctor at Calmette Hospital recorded a score of 23-24/30 a year ago but that the experts were unable to verify this result).

<sup>137</sup> Psychiatric Experts' Report, para. 34; T., 29 August 2011, p. 138; T., 30 August 2011, p. 54.

<sup>138</sup> T., 29 August 2011, p. 140; Psychiatric Experts' Report, para. 36.

<sup>139</sup> T., 29 August 2011, p. 116; T., 30 August 2011, pp. 9, 11, 46; Psychiatric Experts' Report, paras. 35 and 51.

<sup>140</sup> Follow-up Report of Geriatrician, para. 8 (ii); Psychiatric Experts' Report, para. 37; T., 20 October 2011, p. 76.

the psychotropic medications taken by IENG Thirith have already been implemented in significant part, but have not resulted in any improvement in her memory.<sup>141</sup>

54. The issue before the Chamber is whether the degree of cognitive impairment identified by the experts, when measured against the criteria outlined in *Strugar*, precludes the possibility of a fair trial. In evaluating the Experts' conclusions regarding the factors relevant to this assessment, the Chamber notes that many of the capacities identified in *Strugar* are interrelated or overlapping.

***4.5.1. Testifying, pleading, and understanding the nature of the charges and the details of the evidence***

55. Professor Campbell opined that IENG Thirith would have difficulty testifying in her own defence and that she did not appear to understand the nature and consequences of the proceedings.<sup>142</sup> By way of illustration, he noted that IENG Thirith could not recall the "first hearing" in Case 002 (presumably the initial hearing, held in June 2011), had no memory of the charges, and to the contrary, expressed a belief that there were "no accusations against me."<sup>143</sup> He noted, however, that there was considerable variation in IENG Thirith's presentation and that her condition tended to fluctuate over time.<sup>144</sup>

56. By contrast, the Psychiatric Experts noted that, when faced with specific questions as to the meaning of guilt or innocence, IENG Thirith appeared to exhibit some understanding.<sup>145</sup> There was also evidence that she retained some long-term memory and was able to respond to questions.<sup>146</sup> She was able, for instance, to explain the meaning of crimes against humanity and genocide in lay terms and to deny that she was guilty of such charges.<sup>147</sup> The Psychiatric Experts further noted that IENG Thirith, at one stage of the assessment, appeared to show awareness of the consequences of her being found unfit to stand trial.<sup>148</sup> The Psychiatric Experts therefore considered that she possessed some understanding that she was accused and

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<sup>141</sup> Follow-up Report of Geriatrician, para. 6; Psychiatric Experts' Report, para. 17, T., 19 October 2011, p. 110 and T., 29 August 2011, pp. 119, 124 and 138 (noting that although the Accused continues to take a reduced dose of one psychotropic medication, reduction of this medication had resulted in no discernible improvement and concluding that elimination of this drug was unlikely to result in any improvement to her cognitive function).

<sup>142</sup> T., 30 August 2011, pp. 64-65.

<sup>143</sup> Expert Geriatrician's Report, para. 22.

<sup>144</sup> T., 30 August 2011, p. 89; *see also* Psychiatric Experts' Report, para. 51 (similarly observing IENG Thirith's fluctuating abilities due to her dementia).

<sup>145</sup> Psychiatric Experts' Report, para. 41.

<sup>146</sup> Psychiatric Experts' Report, para. 30.

<sup>147</sup> Psychiatric Experts' Report, para. 42.

<sup>148</sup> Psychiatric Experts' Report, paras 46-47.

of what she was accused. In consequence, they concluded that IENG Thirith retained some capacity to enter a plea, to understand the charges and the details of the evidence against her, and to testify.<sup>149</sup>

57. The Trial Chamber agrees with the Psychiatric Experts that the Accused IENG Thirith may still possess some capacity to enter a plea, to understand the charges against her, to understand the details of the 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. This would need to be weighed by the Chamber when assessing her evidence and credibility were the Accused to testify at trial.<sup>150</sup>

#### ***4.5.2. Understanding of the course of proceedings and instructing counsel***

58. The most significant factor highlighted by all experts concerns IENG Thirith's impaired memory and the impact of this impairment on her understanding of the course of the proceedings and her ability to instruct counsel. In order to effectively exercise her fair trial rights, it is crucial that the Accused be able to follow the testimony sufficient to provide relevant information to counsel for the preparation of her defence.

59. The Trial Chamber agrees with the experts that IENG Thirith's long-term and short-term memory loss ensures that the Accused would be unable to understand sufficiently the course of the proceedings to enable her to adequately instruct counsel and effectively participate in her own defence. As 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.

#### **4.6. Consequences of IENG Thirith's unfitness to stand trial**

60. Although the Trial Chamber acknowledges the gravity of the crimes for which the Accused is charged, it has also found IENG Thirith to be incapable of exercising her right, enshrined in the ECCC legal framework, to an effective defence. Trial and continued detention of an Accused who lacks capacity to understand proceedings against her or to

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<sup>149</sup> Psychiatric Experts' Report, paras 20, 41, 42, 44, 46-47 (noting also that the Accused was able to withstand two hours of questioning without appearing tired).

<sup>150</sup> *Strugar* Decision, para. 49 (noting evidence that there was some impairment of Strugar's capacity to testify due to problems with memory and concentration, but concluding that this was a matter to be considered in assessing the weight and credibility of the Accused's testimony).

meaningfully participate in her own defence would not serve the interests of justice. Nor would this comply with the international standards that bind this Chamber pursuant to the ECCC Law and Agreement and which also constitute fundamental fair trial guarantees applicable before all Cambodian courts.<sup>151</sup>

61. IENG Thirith has been diagnosed as suffering from a progressive, degenerative illness. The Chamber accepts the unanimous opinion of all experts that IENG Thirith's condition will likely deteriorate over the course of what is likely to be a complex and lengthy trial. Therefore, retaining the case against IENG Thirith in Case 002 would likely jeopardize the rights of all remaining Accused in Case 002 to an expeditious trial, scheduled to begin on 21 November 2011.<sup>152</sup> The Trial Chamber therefore determines it to be in the interests of justice to sever the charges against the Accused IENG Thirith in Case 002 pursuant to Internal Rule 89*ter* and stays the proceedings against her. It follows from its finding of incapacity to stand trial, severance of all charges against the Accused IENG Thirith pursuant to Internal Rule 89*ter* and the stay of proceedings against her in Case 002 that the Trial Chamber no longer has a basis to detain the Accused.

62. Despite the Trial Chamber's unanimous agreement on all of the above, the Chamber has failed to reach agreement as to whether it should order IENG Thirith to seek medical treatment, or whether she should instead be released without condition. Therefore, two separate opinions follow on the issue of release.

#### **4.7. Opinion of Judges NIL Nonn, YA Sokhan and YOU Ottara**

63. In principle we concur with our international colleagues, especially with the conclusion that IENG Thirith is unfit to stand trial. The present state of IENG Thirith is of such a nature that the purpose a criminal trial becomes meaningless. The integrity of the proceedings and the dignity of a human being preclude the trial of an accused who is in a defenceless

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<sup>151</sup> See Article 13 of the Agreement (referring to Articles 14 and 15 of the ICCPR); Internal Rule 21(1)(d); ECCC Law, Article 33 new and Article 35 new of the ECCC Law; see also, Constitution of the Kingdom of Cambodia (1993), adopted by the Constitutional Assembly and signed by the President on 21 September 1993, Article 31 and Code of Criminal Procedure of the Kingdom of Cambodia, Article 149 and Article 318.

<sup>152</sup> See *Prosecutor v. Strugar and Kovačević*, Decision on the Prosecutor's Motion for Separate Trial and Order to Schedule a Pre-Trial Conference and the Start of the Trial Against Pavle Strugar, ICTY Trial Chamber, Case No. IT-01-42-PT, 26 November 2003 (granting severance in relation to one accused where medical examination of Kovačević was unlikely to be completed within a reasonable time, the trial of Strugar was ready to commence, and where failure to sever would have jeopardized the latter's right to an expeditious trial).

position.<sup>153</sup> This is the fundamental understanding of the fair trial rights enshrined in Article 35(new) of the ECCC Law. The Trial Chamber has therefore concluded that IENG Thirith lacks the capacity to understand the proceedings against her and that she could not participate meaningfully in her own defence. We concur with the conclusion that a continuation of the proceedings against her at this time would not serve the interest of justice.

64. We are, however, unable to find an agreement with our learned colleagues on the consequences of that conclusion. 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.<sup>154</sup> Again, we concur with that holding and note that, according to our international colleagues, the proceedings were stayed and not terminated. However, we are unable to agree that IENG Thirith be immediately released from the ECCC Detention Facility.<sup>155</sup> We are not of the opinion that such a conclusion should be drawn at this stage. Rather, we should first consider whether there is any possibility that IENG Thirith's condition could improve in the future which would permit her eventually to stand trial. In that respect we note that the medical experts noted the following in paragraph 38 of their report:

We have been asked to advise on whether there are any other treatments or measures that would be beneficial to IENG Thirith's mental state and cognitive functioning. The following *may* be beneficial: consistent 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, 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 physical health would be important to maintain. *The continued treatment of co-existent medical conditions will improve her prognosis.* (emphasis added) 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 of her living conditions could be sought. However, we do not believe that such intervention is urgent as IENG Thirith maintains a reasonable level of independent living, and appears to receive appropriate help as and when it is required from detention staff.

65. It follows that the medical experts are of the view that IENG Thirith's situation could improve if she receives a programme of cognitive stimulation administered by a professional.

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<sup>153</sup> See also *Deputy General Prosecutor for Serious Crimes v. Joseph Nahak*, Case No. 01A/2004, Findings and Order on Defendant Nahak's Competence to Stand Trial, 1 March 2005, para. 48.

<sup>154</sup> Majority Decision, para. 61.

<sup>155</sup> Majority Decision, para. 76.

In addition, the medical experts noted that “continued treatment of co-existing medical conditions will improve her prognosis.” Therefore there is a possibility that IENG Thirith’s condition will improve. It should be noted that, contrary to the statement of the medical experts, there are a number of occupational therapists and institutions in Cambodia that could be engaged to help to achieve this end. In accordance with our mandate, we have to ensure that an accused person does not evade justice if there is a chance that an accused person may be fit to stand trial in the future. Therefore we are of the opinion that IENG Thirith should receive the treatment and measures proposed in paragraph 38 of the Psychiatric Experts’ Report.

66. We note that the Psychiatric Experts stated that “structured cognitive stimulating programmes” are not currently available in Cambodia, but in our opinion an expert could be engaged by the Office of Administration. As it is unlikely that the treatment will be effective in the ECCC Detention Centre, she must be either provisionally released in order to receive such treatment at home or in a hospital. We are, however, of the opinion that a hospitalisation of IENG Thirith is preferable, as it ensures that her treatment is effective and professionally monitored. This would ensure greater chances of an improvement in her condition and that she would eventually be able to stand trial. We would impose this hospitalisation and treatment on a temporary basis, more specifically for six months, at which point we would have her competence to stand trial re-assessed by an expert. The legal basis for such a temporary hospitalisation is provided for in Article 223 (11) of the Code of Criminal Procedure of the Kingdom of Cambodia which provides that a charged person may be required to “undergo medical examination and/or treatment under medical supervision in the hospital.” Moreover, we note that such an order for the hospitalisation of an accused is supported by the jurisprudence of the ICTY, as in the *Kovačević* case a Trial Chamber similarly ordered that the Accused “shall be submitted to treatment in the mental health facility [...]”. This order continued until such time the Chamber referred the Accused’s case to the Serbian national authorities.<sup>156</sup>

67. Therefore, the Office of Administration, in our opinion, should be ordered to transfer the Accused IENG Thirith to a hospital and to ensure that she receives the treatment as proposed by the Psychiatric Experts. Following these measures and after six months we would reassess IENG Thirith’s competence to stand trial. During hospitalization, we would impose certain

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<sup>156</sup> *Prosecutor v. Kovačević*, IT-01-42/2-I, Decision on Provisional Release, 2 June 2004; *Prosecutor v. Kovačević*, IT-01-42/2-I, Decision on Defence Motion to Dismiss the Indictment, 1 September 2006, para. 2; *Prosecutor v. Kovačević*, IT-01-42/2-I, Decision on Referral of Case Pursuant to Rule 11bis with Confidential and Partly Ex Parte Annexes, 17 November 2006, paras 23, 48.



conditions on the accused, including orders to: (1) refrain from contacting or intimidating victims, witnesses, or their families; (2) remain in the Kingdom of Cambodia; (3) be present at all judicial proceedings to which she may be called in the future; (4) refrain from contacting any media or otherwise interfering with the administration of justice. Furthermore, we would task the Royal Government of Cambodia with ensuring the Accused's security during her hospitalisation in accordance with Article 24 of Agreement between Royal Government of Cambodia and United Nation.

68. In all other respects, we agree with our international colleagues.

**4.8. Opinion of Judges Silvia CARTWRIGHT and Jean-Marc LAVERGNE**

69. We write separately because we differ from the national judges as to the consequences of the finding that IENG Thirith is unfit to stand trial.

70. We begin by emphasizing that IENG Thirith's condition is unlikely to improve, notwithstanding the extensive efforts made by her treating doctors and as documented by the court-appointed experts. All experts agreed that IENG Thirith suffers from Alzheimer's disease, a degenerative condition that results in dementia. The experts all considered an alternative diagnosis of vascular dementia but determined that for clinical reasons, a diagnosis of Alzheimer's disease was more likely. The Psychiatric Experts noted that the "gradual insidious decline" noted by them "was more consistent with Alzheimer's disease than vascular dementia", further commenting that Alzheimer's disease is not a reversible or treatable form of dementia.<sup>157</sup>

71. Although the experts agreed on the diagnosis of Alzheimer's disease, all reviewed the current treatment that IENG Thirith is receiving. They agreed that the reduction of psychotropic medication was an appropriate clinical decision by her treating doctors. Following a period of reduction of these psychotropic medications, however, no improvement was noted in IENG Thirith's cognitive state. Professor Campbell, while suggesting a trial of Donepezil, noted that it has been found to be of benefit in only 30 percent of those treated with it. It would not reverse her condition but might lead to some improvement in memory.

72. All experts agreed that the only remaining remedial measures would be to begin a course of occupational therapy, and to provide her with a more stimulating environment than the

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<sup>157</sup> Psychiatric Experts Report, para. 36; T., 19 October 2011, p. 129.

current detention facilities allow.<sup>158</sup> Occupational therapy is not a professional skill currently practiced in Cambodia, so is not an available remedial measure. In the opinion of all experts, a more stimulating environment might be achieved were she to be released to her home. However, they did not suggest at any stage that she would recover. Further, none of these measures, whether medical or therapeutic, will reverse or treat effectively her current level of dementia (noted by the psychiatric experts to be stage 5 on a 7 point scale or “early dementia: moderately severe cognitive decline” and degenerative). For these reasons, we agree with our national colleagues that IENG Thirith is unfit to stand trial but disagree that there is any factual basis to suggest that the Accused may in future recover sufficiently to be found fit to stand trial.

73. Where we differ relates to the coercive measures that our colleagues wish to impose as conditions of her release. Our national colleagues propose that IENG Thirith should be released from ECCC detention, but would order that she be admitted to hospital immediately upon her release. As there are no such medical experts in Cambodia, the Office of Administration should locate a foreign expert qualified to provide a structured cognitive programme for her and her competence to stand trial should be reviewed by the Trial Chamber in six months time. In addition, the national colleagues would order that IENG Thirith undergo medical treatment and would require the Royal Government of Cambodia to be responsible for her security in accordance with Article 24 of the Agreement between the Royal Government of Cambodia and the United Nations.

74. The international judges consider that there is no legal basis to impose mandatory orders to hospitalize and treat IENG Thirith. Our national colleagues point to Article 223(11) of the Code of Criminal Procedure of the Kingdom of Cambodia (“CCP”) as the basis of the Trial Chamber’s alleged power to impose hospital-based treatment. We consider this provision to be inapplicable to the present circumstances. Article 223 pertains to judicial supervision as an alternative to pre-trial detention.<sup>159</sup> It does not apply to the Trial Chamber after it has determined an accused to be unfit to stand trial and where proceedings have been stayed

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<sup>158</sup> T., 20 October 2011, p. 53 (Dr. Fazel agreed that IENG Thirith’s living conditions in detention might be contributing to her overall psychological well-being and cognitive functioning because “cognitive stimulation is an important part of trying to at least slow down the rate of cognitive decline”); *see also*, T., 29 August 2011, p. 20 (Professor Campbell stated that “[o]ne of the difficulties has been that the environment over the last few years has been so undemanding that IENG Thirith has not been tested in terms of daily living activity to any great degree”); and T., 29 August 2011, p. 131 (noting that the lack of stimulation in the detention centre was unhelpful in trying to maintain intellectual function).

<sup>159</sup> Article 230, CPP.

without any reasonable prospect of resuming. The ECCC legal framework in our view therefore does not provide the Trial Chamber with authority to impose conditions of judicial supervision on the Accused.

75. Our national colleagues also point to the *Kovačević* case in support of mandatory hospitalization of the Accused. In that case, the Accused Kovačević sought provisional release from detention before the ICTY to enable him to seek psychiatric treatment in his home country of Serbia.<sup>160</sup> Further, and unlike the present case, both parties agreed that Kovačević was in urgent need of treatment in a mental health facility.<sup>161</sup> By contrast, the Trial Chamber has found that IENG Thirith suffers from a progressive, degenerative condition and that her condition is unlikely to improve even with treatment. Furthermore, the IENG Thirith Defence has not requested that the Accused be hospitalized and placed under the protection of the Royal Government of Cambodia. The Trial Chamber has therefore not been provided with any basis to justify measures such as compulsory hospitalization and treatment, security provisions that ensure her confinement in a hospital, or to any other form of judicial supervision.<sup>162</sup> We therefore cannot agree with any decision which places these conditions on her release.

76. Considering the above, we would order the immediate release of IENG Thirith without any conditions, subject to Internal Rule 82(6).

#### **4.9. Consequence of Separate National and International Opinions on the Issue of Conditions upon Release**

77. The Trial Chamber judges are unanimously of the view that as IENG Thirith is unfit to stand trial and that the proceedings against her shall be stayed. They further agree that she cannot, as a result, remain in detention in the ECCC Detention Facility. However, the national Trial Chamber judges wish to impose conditions on her release and in particular, seek to order her compulsory confinement and treatment in a hospital, with a view to re-evaluating her condition in six months.

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<sup>160</sup> *Prosecutor v. Kovačević*, ICTY Trial Chamber (Case No. IT-01-42/2-I), Decision on Provisional Release, 2 June 2004, p. 1.

<sup>161</sup> *Prosecutor v. Kovačević*, ICTY Trial Chamber (Case No. IT-01-42/2-I), Public Version of the Decision on Accused's Fitness to Enter a Plea and Stand Trial, ICTY Trial Chamber, 12 April 2006, para. 10.

<sup>162</sup> Paragraph 21(2) of the Internal Rules. There was no expert evidence that IENG Thirith is a danger to herself or to others and therefore security measures are not required for that purpose. In any event, the ECCC legal framework contains no provisions enabling it to consider factors such as these, which are not part of the jurisdiction of criminal courts, but are instead found in legislation applied by administrative courts or courts having civil jurisdiction when a person requires compulsory treatment.

78. As all medical experts concur that the Accused will not recover sufficient capacity to enable her to stand trial in the future, the Trial Chamber international judges consider that the stay of proceedings ordered by the Chamber is likely to be permanent. Without any reasonable likelihood of a trial of the Accused taking place, the international judges consider that they have no justification for the continued detention or application of other coercive measures against IENG Thirith.<sup>163</sup> The ECCC therefore lacks any basis to retain the Accused in custody or to otherwise issue coercive measures against her. The only available remedy, in the view of the international judges, is unconditional release, subject to a request by the Co-Prosecutors to stay the release order and lodge an immediate appeal in accordance with Internal Rule 82(6).

79. The results of a lack of agreement as to the consequences of the above dissent bear emphasising. The absence of agreement on whether the Trial Chamber has the jurisdiction to impose conditions on the Accused IENG Thirith has resulted in the absence of a supermajority in accordance with Article 14(1)(a) of the ECCC Law. In accordance with this provision, a decision of the Trial Chamber requires the affirmative vote of at least four judges.<sup>164</sup> However, the Trial Chamber has further failed to find agreement on the consequences which follow from this absence of a supermajority. The outcome in cases where there is a failure to agree on the consequences of a disagreement are, however, not stipulated in the ECCC Law or Agreement.<sup>165</sup> Given the uniqueness of this supermajority provision to the ECCC, there is also no available international precedent or equivalent principle within Cambodian domestic law. The Trial Chamber judges have therefore had recourse to general provisions of international criminal and human rights law to determine the outcome of this decision for the Accused IENG Thirith.<sup>166</sup>

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<sup>163</sup> See further Decision on the Urgent Applications for Immediate Release of NUON Chea, KHIEU Samphan, and IENG Thirith, E50, 16 February 2010, para. 41 (indicating that IENG Thirith has been detained for the sole purpose of ensuring her presence at trial).

<sup>164</sup> Article 14(1)(a) new of the ECCC Law provides: (1). The judges shall attempt to achieve unanimity in their decisions. If this is not possible, the following shall apply: (a). a decision by the Extraordinary Chamber of the trial court shall require the affirmative vote of at least four judges.

<sup>165</sup> Rule 98(4) provides, in connection with verdicts, that a failure to reach unanimity requires the acquittal of the accused; see further Case File 001/18-07-2007/ECCC/TC, Decision on the Defence Preliminary Objection Concerning the Statute of Limitations of Domestic Crimes, E187, 26 July 2010, para. 56 (finding unanimously that the failure to reach an agreement on whether the statute of limitations for national crimes had expired “create[d] a barrier to the continuation of prosecution against the Accused for domestic crimes before the Trial Chamber of the ECCC”).

<sup>166</sup> See Article 12(1) of the ECCC Agreement and Article 33 new of the ECCC Law (“If [...] existing procedure[s] do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application [...] guidance may be sought in procedural rules established at the international level”).

80. In absence of guidance within the ECCC legal framework, the Trial Chamber has found that the above fundamental international standards require the unconditional release of the Accused IENG Thirith, subject to Internal Rule 82(6). First, the Trial Chamber notes that in the event of conflicting interpretations of legal provisions, the strict construction of criminal statutes requires that the interpretation most favourable to the Accused must be preferred.<sup>167</sup> As, pursuant to the presumption of innocence, liberty is considered the norm, detention is an extraordinary measure which must only be imposed in accordance with procedures established by law.<sup>168</sup> The Trial Chamber has unanimously agreed that IENG Thirith is unfit to stand trial and has in consequence stayed proceedings against her. Continued detention or forced confinement in circumstances where it is unclear whether a trial will ever be convened violates the Accused's right to a fair trial and to liberty.<sup>169</sup>

81. The Trial Chamber has therefore ordered the unconditional release of the Accused IENG Thirith. Absence of agreement on the conditions, if any, on release would otherwise have rendered the status of the Accused highly uncertain. If, as a result of this decision, IENG Thirith had instead been retained within the ECCC Detention Facility or subjected to enforced hospitalization, the possibility could also not have been excluded that her continued detention or the imposition of enforced hospitalization lacked a legal basis. To avoid this eventuality, the Trial Chamber has unanimously agreed that the only remedy in the circumstances is unconditional release.

82. It should be emphasised that a finding of unfitness to stand trial is not a finding on the guilt or innocence of the Accused IENG Thirith.

**FOR THE FOREGOING REASONS, THE TRIAL CHAMBER:**

**FINDS** the Accused IENG Thirith unfit to stand trial;

**ORDERS** the severance of the charges against the Accused IENG Thirith from the indictment in Case 002 pursuant to Internal Rule 89ter;

**DECLARES** the proceedings against the Accused IENG Thirith in Case 002 to be stayed;

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<sup>167</sup> See e.g., *Prosecutor v. Zejnil Delalić et al*, IT-96-21-T, Judgement, 16 November 1998, para. 413 ("The effect of strict construction of the provisions of a criminal statute is that where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of construction fail to solve, the benefit of the doubt should be given to the subject and against the legislature which has failed to explain itself. This is why ambiguous criminal statutes are to be construed *contra proferentem*"); see further Article 14(2) of the ICCPR.

<sup>168</sup> Article 9, International Covenant on Civil and Political Rights ("ICCPR").

<sup>169</sup> Article 9 (3), ICCPR.

**FURTHER DECLARES** that it is unable to reach a unanimous decision as to whether the Trial Chamber may order IENG Thirith to be compulsorily detained and treated in a hospital setting or whether she shall instead be released without condition;

**FINDS** that in the absence of agreement on whether the Trial Chamber has the jurisdiction to impose conditions on her release, the Accused IENG Thirith shall be released from the ECCC Detention Facility in accordance with this disposition;

**ORDERS** the release of the Accused IENG Thirith from the ECCC Detention Facility;

**REMINDS** the Accused of her obligation pursuant to Internal Rule 35 to refrain from interference with the administration of justice, and in particular, interference with witnesses or potential witnesses before the ECCC;

**DIRECTS** the Accused to inform the Trial Chamber prior to any change of address; and

**INFORMS** the Co-Prosecutors that they may, upon their own motion, periodically request reassessment of the Accused IENG Thirith by any of the Experts appointed by the Chamber to assess her and may request the recommencement of proceedings against IENG Thirith at any stage upon a showing of a material change in circumstances. In order to achieve these objectives, the Co-Prosecutors shall establish a mechanism to monitor the ongoing health status of the Accused.

Phnom Penh, 17 November 2011  
President of the Trial Chamber

