

Decision to Release Accused Ieng Thirith from Detention
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Ieng Thirith, one of four Khmer Rouge senior leaders charged by the Extraordinary Chambers in the Court of Cambodia (ECCC), was released from custody Sunday after being found unfit for trial due to moderate to severe dementia, likely caused by Alzheimer’s disease. Late last week, the ECCC Trial Chamber ruled that eighty-year-old Thirith, the only female indicted by the Court to date, must be unconditionally released from detention while remaining under indictment.¹ The Prosecution appealed the decision only with regard to the conditions of her release. The Supreme Court Chamber (SCC) found it unnecessary to detain her while the appeal is being considered and released her subject to provisional conditions.² It now has three months³ to determine the appropriate conditions of release in a case of dementia — an issue of first impression for mass crimes courts.

After extensive medical analysis and several hearings, last November the Trial Chamber found Ieng Thirith “unable to understand sufficiently the course of the proceedings to enable her to adequately instruct counsel and effectively participate in her own defense,”⁴ rendering her unfit under the International Criminal Tribunal for the Former Yugoslavia’s *Strugar* fitness criteria. It therefore severed her charges from the Case 002 indictment and released her unconditionally. The SCC overruled the decision, finding that in the interests of justice, “upon a finding of unfitness, remedial action must be undertaken in the light of a possibility, even slight, of a meaningful improvement.”⁵ In an effort to “exhaust all measures available to it which may help improve the Accused to become fit to stand trial,” the SCC ordered Ieng Thirith’s continued detention for six months for additional treatment.⁶

Last month, three medical experts reassessed her condition and found that her mental health had worsened. Her treating physician disagreed and filed an unsolicited report suggesting that Ieng Thirith suffers only from normal memory loss attributable to old age. These contradictory findings were discussed during adversarial hearings. The experts cast doubt on the methodology and diagnosis of the treating physician, who had argued that she had better insight because she was female, Cambodian, and had an ongoing rapport with Ieng Thirith. Based on the opinion of the treating physician, Civil Parties asked for the appointment of additional experts, including women and Khmer speakers who may be able to “overcome cultural and linguistic barriers with

¹ Decision on Reassessment of Accused Ieng Thirith’s Fitness to Stand Trial following Supreme Court Chamber Decision of 13 December 2011 (Sept. 13, 2012).

² Decision on Co-Prosecutors’ Request for Stay of Release Order of Ieng Thirith (Sept. 16, 2012).

³ Decision on Co-Prosecutor’s Request to File Supplementary Submissions on the Appeal Against the Release Order of Ieng Thirith, at 3 (Sept. 17, 2012).

⁴ Decision on Immediate Appeal against the Trial Chamber’s Order to Release the Accused Ieng Thirith, ¶ 6 (Dec. 13, 3011) (quoting the Trial Chamber).

⁵ *Id.* at ¶ 29.

⁶ *Id.* at ¶ 38. The SCC suggested that she be sent to a hospital but noted that the ECCC’s own detention facility could also be modified for her treatment, a recognition of the reality that there are no mental health centers in Cambodia offering inpatient care.

the Accused.”⁷

In contrast, based on the expert opinions both the Defense and Prosecution agreed that she is unfit to stand trial and should be released from the ECCC detention facility. However, while the Defense seeks her unconditional release, the Prosecution has asked that six conditions be imposed:

- (1) That she reside at a specified home address;
- (2) That she make herself available for weekly safety checks by authorities or officials appointed by the Trial Chamber;
- (3) That she surrender her passport and national identification;
- (4) That she not contact directly or indirectly other co-accused (except for her husband, IENG Sary);
- (5) That she not contact directly or indirectly any witness, expert or victim who is proposed to be heard before the Trial Chamber and not to interfere with the administration of justice; and
- (6) That she undergo examination by medical practitioners appointed by the Trial Chamber every six months, with the first to be undertaken in March 2013.⁸

The Trial Chamber rejected the Civil Parties’ request, finding that the medical experts “adequately accommodated cultural and language difficulties in completing their examination” and that her physician’s report did not cast doubt on their conclusions.⁹ It determined that all available measures had been taken to improve her mental state, yet she remains unable to exercise her fair trial rights and unfit for trial. The Trial Chamber therefore ruled that proceedings should be stayed “indefinitely” — “until and unless the Chamber orders their resumption against the Accused.”¹⁰ Although the Trial Chamber said that there “appears to be no reasonable prospect” that her mental decline could be reversed, it noted that advances in the care of Alzheimer’s were possible and agreed to consult with experts on an annual basis to see if new treatments become available that could reverse her mental decline.¹¹

With regard to the conditions requested by the Prosecution, the Trial Chamber found it “cannot exercise its jurisdiction over the Accused for the duration of the stay” and must immediately release her unconditionally because (1) it now lacks a legal basis to impose coercive conditions and (2) her mental state makes such conditions impracticable and unenforceable.¹²

On appeal, the Prosecution argued that the Trial Chamber erred by “effectively divesting itself of jurisdiction.” It asserted that, by admitting the possibility of medical advances and thus improvement, the stay was not in fact permanent but reversible. As a consequence, the Chamber should have first determined if continued detention was appropriate and then considered, if in the

⁷ Sept. 13 Decision, ¶ 17.

⁸ *Id.* at ¶ 15.

⁹ *Id.* at ¶¶ 17, 25.

¹⁰ *Id.* at ¶ 28.

¹¹ *Id.* at ¶¶ 24, 39.

¹² *Id.* at ¶¶ 24, 33, 37-38.

“particular circumstances of the case,” release with or without conditions was warranted.¹³ Instead, after determining that detention was unavailable, it erroneously found that coercive measures could not be considered or ordered.

Some insight into how the Supreme Court may rule on the appropriateness of coercive conditions may be found in its December 2011 decision. In it, the SCC considered international precedent and found that “unconditional release is not the only option available to a criminal court where it has stayed proceedings due to an obstacle that might be removed in the future.”¹⁴ Moreover, it found in Cambodian law a legal basis for judicially supervised release.¹⁵ Most significantly, the SCC found it “irreconcilable with the interests of justice” that the Trial Chamber had considered its stay of proceedings temporary and capable of being lifted if her condition improved, yet attached no conditions to it, “thus foregoing any effort in the direction of resuming the proceedings against the Accused.”¹⁶ The outcome of the SCC’s upcoming ruling may therefore hinge on whether or not it agrees with the Prosecution that the Trial Chamber’s decision admits the possibility that, at least in theory, Ieng Thirith could someday be brought to justice.

The SCC’s order to free Ieng Thirith after nearly five years in provisional detention makes clear that it will uphold the release portion of the Trial Chamber’s decision and rule only on the narrow grounds raised by the Prosecution. Although Khmer Rouge survivors are distressed at this outcome after waiting over 30 years for justice, many accept that it is both appropriate and an important model of fair trial rights protection for domestic Cambodian courts.¹⁷

¹³ 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, ¶ 6 (Sept. 14, 2012).

¹⁴ December SCC Decision, ¶ 25.

¹⁵ *Id.* at ¶¶ 45-46 (citing CCP art. 223).

¹⁶ *Id.* at ¶ 28.

¹⁷ *Selected Popular Reactions to Ieng Thirith’s Release*, compiled by the Documentation Center of Cambodia Magazine Team, edited by Eng Kok-Thay and Ly Sok-Kheang, *SEARCHING FOR THE TRUTH MAGAZINE* (Sept. 2012).