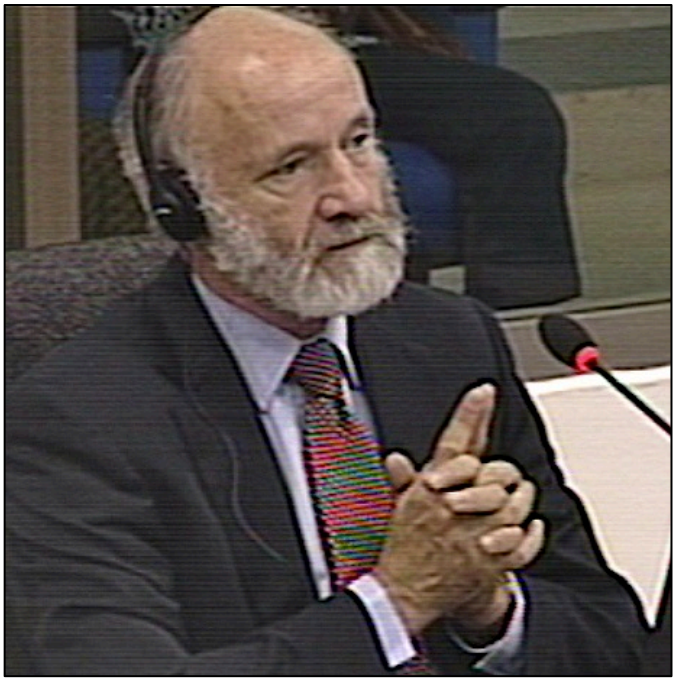
CAMBODIA TRIBUNAL MONITOR



Dr. A. John Campbell appears at the ECCC as one of three experts who testified on Friday to the mental health of accused Ieng Thirith.

Experts "Unanimous" that Ieng Thirith Has Dementia

By Mary Kozlovski

On Friday, August 31, 2012, a hearing was held on the accused Ieng Thirith's fitness to stand trial at the Extraordinary Chambers in the Courts of Cambodia (ECCC). Dr. Seena Fazel, Dr. Huot Lina, and Professor A. John Campbell were present as three experts appointed to further evaluate Ieng Thirith's health condition and fitness to stand trial. The Trial Chamber, prosecution, civil party lawyers, and the defense for Ieng Thirith questioned the experts. Parties made closing statements at the conclusion of testimony. Ieng Thirith was present in the holding cell from where Ieng Sary – Ieng Thirith's husband and co-accused in Case 002 – also observed proceedings.

In a June 2011 report, New Zealand-based geriatrician Dr. A. John Campbell found that Ieng Thirith has a "moderately severe dementing illness, most probably Alzheimer's disease."[1] In addition to Prof. Campbell, four psychiatric experts were appointed by the court to examine Ieng Thirith. Two of the experts – Drs. Fazel and Lina – previously gave testimony in October on Ieng Thirith's status.

[1] A June report by Dr. A. John Campbell on Ieng Thirith can be found at: http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E62_3_6_EN.PDF; Transcripts of preliminary hearings in August on fitness to stand trial can be found at: http://www.eccc.gov.kh/en/document/court/transcript-preliminary-hearing-fitness-stand-trial-29-august-2011; http://www.eccc.gov.kh/en/document/court/transcript-preliminary-hearing-fitness-stand-trial-30-august-2011; http://www.eccc.gov.kh/en/document/court/transcript-preliminary-hearing-fitness-stand-trial-31-august-2011;

The Trial Chamber ruled in November 2011 that Ieng Thirith was unfit to stand trial, severed the charges against her from the Case 002 indictment pursuant to Internal Rule 89*ter*[2], stayed proceedings against her and found they no longer had a basis for detaining her.[3] Trial Chamber judges diverged on the consequences of their finding that Ieng Thirith was unfit to stand trial. Trial Chamber President Nil Nonn, and Judges Ya Sokhan and You Ottara believed Ieng Thirith should be hospitalized for further treatment based on the experts' recommendations, pending a review of her competence to stand trial after six months. Judges Silvia Cartwright and Jean-Marc Lavergne said they would order Ieng Thirith's immediate and unconditional release, as her condition was "unlikely to improve" and there was no legal basis to order her hospitalization and treatment. The chamber decided that without an agreement on the issue, the only remedy was to order Ieng Thirith's unconditional release**.**

The prosecution appealed, requesting that the Supreme Court Chamber annul the decision to unconditionally release Ieng Thirith and order that she remain in detention and undergo further treatment with a review of her status after six months.[4] In December, the Supreme Court Chamber set aside the Trial Chamber's order to release Ieng Thirith and ruled that she should receive additional treatment as recommended by experts, with a review of her condition after six months to assess her fitness to stand trial.[5] Supreme Court Chamber Judge Chandra Nihal Jayasinghe of Sri Lanka dissented from the majority's opinion on the issue of Ieng Thirith's detention.[6]

Trial Chamber Questions Court-Appointed Experts

After calling the court to order on Friday, Trial Chamber President Nonn stated that certain reports would be provided to Professor Chak Thida in response to a request by the prosecution on Thursday, August 30, 2012, that she be given expert reports on Ieng Thirith's health.[7]

Trial Chamber Judge Silvia Cartwright took the floor and first clarified that Prof. Thida had been called to the court as a witness and was thus categorized differently from the court-appointed experts. Turning to these experts, assembled on the witness stand, Judge Cartwright requested they provide provided their views on Prof. Thida's testimony from Thursday.

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[2] ECCC Internal Rule 89*ter* on *Severance* – adopted February 23, 2011 – reads: "When the interest of justice so requires, the Trial Chamber may at any stage order the separation of proceedings in relation to one or several accused and concerning part or the entirety of the charges contained in an Indictment. The cases as separated shall be tried and adjudicated in such order as the Trial Chamber deems appropriate." ECCC Internal Rules (Rev. 8) may be found at: http://www.eccc.gov.kh/en/document/legal/internal-rules-rev8.

[3] The Trial Chamber's decision on Ieng Thirith's fitness to stand trial can be found at: http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E138_EN.PDF.

[4] The prosecution's immediate appeal against the Trial Chamber's decision to order the release of Ieng Thirith can be found at: http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E138_1_1_EN-1.PDF; the prosecution's supplementary submissions on their appeal can be found at: http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E138_1_4_EN-1.PDF.

[5] The Supreme Court Chamber's decision can be found at: http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E138_1_7_EN-1.PDF.

[6] The dissenting opinion of Supreme Court Chamber Judge Chandra Nihal Jayasinghe can be found at: http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E138_1_7.1_EN.PDF.

[7] When President Nonn was commenting on this request, the English translation was unclear. However, it appeared that certain reports were provided to Prof. Thida.

Speaking first, Dr. Seena Fazel reported that the experts had a very good rapport with Ieng Thirith, who was often friendly, smiling and happy to be interviewed, and they felt that there was no gender issue. He noted as an example that Ms. Thirith was "extremely hostile" to female guards during one interview earlier this week, and the following day she was very pleasant toward the same guards. Secondly, Dr. Fazel said that Prof. Thida's October 28 and November 9, 2011, reports stated, "Ieng Thirith does not recall an immediate memory," and when asked about this in the experts' interview with her, Prof. Thida said Ieng Thirith did not recall a conversation topic one to two minutes later. Dr. Fazel said the experts felt this was "abnormal" for someone of Ieng Thirith's age and indicated at least a "moderate degree of cognitive impairment."

Thirdly, Dr. Fazel said that while the Mini-Mental Statement Examination (MMSE)[8] was a small part of a broader diagnostic approach, Prof. Thida omitted a question on the day of the week that relates to orientation and added some questions – "She could say the pen and the watch again" – and the experts believed neither was consistent with published versions of the MMSE. In addition, Dr. Fazel said Prof. Thida substituted certain questions with easier or simpler ones, noting that the MMSE asks a person to write a sentence and in her testimony Prof. Thida interpreted this as Ieng Thirith writing the name of the physician, which Dr. Fazel said was not the same. Furthermore, Dr. Fazel said that another question about orientation of place – "What province are you currently in"[9] – was used by Prof. Thida in relation to Ieng Thirith's children, which does not accord with a patient's own interpretation or understanding of their orientation to place. Finally, Dr. Fazel said the experts did not find any evidence in Prof. Thida's reports that she addressed criteria relating to the ability to plea, though he noted this was not part of her assessment as a treating physician.

Next, Prof. Campbell said the diagnosis of dementia was very much "clinical"; he sought to detail the process the experts undertook to arrive at their diagnosis and how it may differ from Prof. Thida's method, noting that he had been assessing people with a probable diagnosis of dementia for over 30 years. The process, he explained, includes:

- *Initial interview* – "In that interview one establishes rapport, and as has been indicated we felt that we have had good rapport with Ieng Thirith in our assessments. But one also uses that initial interview to dig below the surface in what is not a very apparent testing way; to test memory in a way that does not seem a formal assessment of memory, and that's very important because many people with dementia preserve a good social façade. They can give the appearance of normality, which is not in actual fact so. When we have done this with Ieng Thirith inquiring, for example, about her family, we have found that

[8] In the Trial Chamber's "Decision on Ieng Thirith's fitness to stand trial" (November 17, 2011), the MMSE is described as "a common test for assessing cognitive impairment."
[9] Dr. Fazel noted that this question could be modified to asked what "state" or "region."

consistently she has problems with her memory of her family, where they are in the circumstances."

- *History* – "The second, very important, step in diagnosis is to get history from those who have seen the person over a longer time and see that person in their day-to-day activities. Now we have had the advantage of the earlier reports on Ieng Thirith. We have had the report of Professor Ka [Sunbaunat], who is Dean of the Faculty of Medicine at the University of Health Sciences here, and Dr. [Philip] Brinded in 2009 where they felt that Ieng Thirith had early dementia. We have also spoken with the guards and the doctors who see Ieng Thirith on a day-to-day basis. Now, when taking the history from these people it's important not just to rely on what they tell you – that is, comments about her behavior – but also ask about issues such as her function. And what we have found is that the guards report an increasing deterioration in Ieng Thirith's function. For example, when I first saw her, she was able to dress, but now a situation where she often dresses in an inappropriate manner – for example, putting on two lots of underwear. So that there has been a deterioration in her function and, of course, the development of urinary incontinence is also an indication of the deterioration, plus her lack of awareness of this."

- *Physical examination* – "The third step is the physical examination to ensure that there is no underlying physical, medical illness that may have affected her temporarily. And there has not been any evidence of that at any time when we have seen her on examination. … Also that is used to determine if there may be some underlying other condition that is causing the deterioration, for example a brain tumor, and there's been no evidence of that."

- *Testing* – "The fourth step is the formal testing using standardized instruments such as the MMSE. This is used to assess severity in part – although the severity can be also assessed, of course, by the person's functional deterioration – and also to determine progress to see if there is deterioration which would be consistent with dementia. And we have only administered that each time that she has been seen. We have only administered when we felt that she is cooperating with and willing to participate in the test and we have found a consistent deterioration over that time. Because it is a standardized test there is no place for substituting questions during it. The other issue of the naming of the pen and watch came up yesterday in Prof. Chak's testimony. When I look back on my records of May 2011, I note that she [Ieng Thirith] was actually able to identify the pen and the watch. So our MMSE tests over this time have shown a persistent, consistent deterioration, and they have been done not only by us but also by the people who were involved in her cognitive therapy program people with whom she had good rapport."

- *Laboratory investigations* – "The fifth step is the laboratory investigations and the radiology, in Ieng Thirith's case, the CT scanning. The purpose of these is not to determine the extent of the dementia or to confirm the diagnosis; it is to make sure there is no other condition that may be contributing to the memory impairment. And with the laboratory testing and the CT scanning there has not been shown to be any other condition – other than probably Alzheimer's, possibly with a component of multi-infarct dementia – that is contributing to her cognitive impairment. So that we have had no

> doubts over the time that we have been seeing her that there has been a deterioration in Ieng Thirith's cognitive function; that her cognitive impairment dementia may have been mild in 2009 but it has now progressed to the point where it is moderate to severe, as shown particularly with the deterioration in the formal testing and also with the deterioration in her function.

In response to Judge Cartwright, Dr. Lina agreed with his colleagues.

Judge Cartwright moved on to Prof. Thida's other comments, asking experts if they believed there was any cultural factor that impeded their ability to assess a Cambodian patient. Dr. Fazel said an awareness of cultural factors was important. The experts made considerable effort to consult individuals who care for Ieng Thirith and have known her for a long period of time and assessed her in conjunction with Cambodian colleagues to enable clarification on issues they did not understand, he explained.

In response to the judge's inquiry about Prof. Thida's use of the term "pre-dementia," Prof. Campbell noted that Prof. Thida was attempting to distinguish between those changes stemming from age and those from dementia. Prof. Campbell noted that changes from aging could include the ability to assimilate new information quickly and to do tasks against time but would not entail the impairment of past and recent memory observed in Ieng Thirith. "There is no doubt that this is no longer a mild cognitive impairment but is dementia," Prof. Campbell testified.

Judge Cartwright noted that more or less since November 2009, when Prof. Ka and Dr. Brinded issued their report – notwithstanding recent treatment with Rivastigmine, Ieng Thirith has been treated with medication associated more with mental, than physical, health and that a reduction in her psychotropic mediation had previously been recommended. She sought comment on a treating physician who does not believe their patient suffers from a mental illness but allows psychotropic medication to be administered. Prof. Campbell noted that Ieng Thirith's course of psychotropic drugs began in Thailand following her hip fracture, and he believed that problems then resulted from a delirium, to which people with early cognitive impairment can be more susceptible when suffering from an illness or injury. Prof. Campbell said he felt upon his examination that there was no ongoing need for the medications and that the Quetiapine[10] and sleeping tablets may be affecting Ieng Thirith's cognitive function. Prof. Campbell further testified that psychotropic drugs may be prescribed for people with dementia who exhibit behavioural problems but that it should be done "cautiously" as adverse effects could outweigh benefits. In response to Judge Cartwright, Prof. Campbell said if Ieng Thirith was his patient he would have started to wean her off such medications.

[10] This is believed to the correct spelling of this medication.

Judge Cartwright asked the three experts how Prof. Thida's professional qualifications measured against theirs. In response, the experts outlined their qualifications.

- *Dr. Fazel* – Began full-time psychiatry training in 1996 including a full-time attachment in "old age psychiatry," which involves learning about the diagnosis of dementia, supervision in the administration of standardized tests like the MMSE, and contact with patients suffering from early, mild, moderate, and severe dementia; undertook a postgraduate exam that over half of students in places such as the United Kingdom fail; completed a year of old age psychiatry sub-specialty training and three years of forensic psychiatry sub-specialty training, in which he was assessed annually; applied for consultancies in 2003; and completed eight years of formal psychiatric training overall.
- *Dr. Lina* – Began studying psychiatry formally in 2005 but has been familiar with the subject since 1993; participated in training from expert psychiatrists through the University of Oslo in Norway in 1995, which he completed in 1997; studied at the University of Health Sciences in Cambodia; has a degree in medical science[11]; and obtained a scholarship to study at Monash University in Australia where he obtained a Masters degree in Psychological Medicine over two and a half years.
- *Prof. Campbell* – Completed undergraduate training at University of Otago in New Zealand; completed specialist training in internal medicine leading to a postgraduate qualification of fellow of the Royal Australasian College of Physicians; undertook specialist training in old age medicine and geriatric medicine in New Zealand, England, and Canada; assumed a consultant post in New Zealand and undertook the research leading to a doctorate from the University of Otago, which included a study of the prevalence of dementia in the community; and appointed to an academic position at the University of Otago, half of which involves research and the other half teaching.

Judge Cartwright next inquired about the results of consultations with people close to Ieng Thirith. Dr. Fazel said the experts learned from various sources that there had been deterioration in Ieng Thirith's cognitive ability and function, including memory, but also escalating verbal abuse of guards, which has become increasingly inconsistent. Observations also included the onset of personal hygiene problems, particularly urinary incontinence and a lack of awareness of this issue, Dr. Fazel said. He further testified that the Singaporean occupational therapist who trained local professionals – and has experience working with older people and those with cognitive impairment – said he had "no doubt" Ieng Thirith suffered from "moderate to severe cognitive impairment" and he did not think his program had improved her cognitive function. Dr. Fazel said this was partly assessed by administration of the MMSE over a three-month period during which scores ranged from 12 and 14; the scores were slightly lower than those obtained in 2011.

The judge inquired whether Ieng Thirith's ability to speak or write in other languages indicated anything about her health condition. Prof. Campbell said comments from Ieng Thirith's guards suggested that she commonly responded in English but that has become less frequent. Prof. Campbell said that while she retained language skills, it was probably to a lesser degree than previously.

[11] The dates of Dr. Lina's study at the University of Health Sciences and the attainment of his medical degree were unclear in the English translation.

In response to a query from Judge Cartwright about the experts' finding that Ieng Thirith could maintain concentration and not tire, Dr. Fazel said this indicated there was no obvious physical illness and clarified that the experts did not test Ieng Thirith when she was tired or lacking in concentration. Dr. Fazel said he did not believe it was directly relevant to her diagnosis because maintaining attention and concentration was not the same as memory – one of the main criteria examined along with functions such as attention, concentration, short-term and long-term memory, and executive functioning, which relates to judgment and control.

Ieng Thirith (left) accompanies a group of foreign delegates, along with her husband, Ieng Sary (speaking at center) during the period of Democratic Kampuchea. (Source: Documentation Center of Cambodia)

Next, Judge Cartwright sought views on whether Ieng Thirith may be feigning illness. Firstly, Prof. Campbell noted the experts were conscious of the possibility but saw no indication of this while administering tests. Ieng Thirith looked "genuinely bemused" with questions she could not answer and was unable to complete a more demanding numerical test, which would have required a "sophisticated feigning." Prof. Campbell said Ieng Thirith's behavior and functioning has deteriorated consistently, which would be more difficult to feign over a prolonged period.

Judge Cartwright noted the *Strugar*[12] criteria and submissions that suggested experts had not fully understood them, referencing a prosecution submission that argued an accused person's ability to sufficiently comprehend the course of proceedings should be interpreted as the ability to understand the charges, the role of parties, and the development of proceedings. She inquired if such an interpretation would alter their consideration of the criteria. Dr. Fazel said the issue had always centered on the ability to follow proceedings. With Ieng Thirith's short-term memory

[12] According to the Trial Chamber's "Decision on Ieng Thirith's fitness to stand trial" (November 17, 2011), the *Strugar* criteria outline the "appropriate approach to be adopted in determining fitness to stand trial" as evaluating 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.

impairment and inability to weigh information heard during the course of proceedings, as well as comment and consult with her counsel on it, Dr. Fazel believed, she would have significant problems meeting that criterion.

Judge Cartwright observed that another submission had stated that Ieng Thirith was fit to participate in person as she could listen, speak, remain seated or standing – though not for prolonged periods, and analyze right from wrong and as her cognitive function was not completely impaired. Dr. Fazel said the experts had never contested Ieng Thirith's physical ability to be present in court, but due to cognitive issues, she would have problems with a number of the criteria such as following the proceedings, instructing counsel, and testifying.

Regarding whether experts had sufficient historical data to chronicle progression of Ieng Thirith's illness, Dr. Fazel said they believed there had been a progression and would describe the current level of dementia as "moderate to severe," compared with "moderate" in 2011 and Prof. Ka and Dr. Brinded's 2009 assessment of "mild." Dr. Fazel said this progression could be partly observed in MMSE scores, which went from between 15 and 18 in 2011 to between 11 and 14 in 2012, excluding the score of 24 from Prof. Thida's MMSE test, which experts did not believe was administered correctly. Prof. Campbell added that there was clear historical evidence of deterioration – beginning with the 2009 assessment – in testing and in function. He had also observed deterioration in cognitive ability over the course of his examination of Ieng Thirith, which had not altered with treatment, he reported.

Judge Cartwright cited a comment in the experts' report that they believed Ieng Thirith "clearly suffers from dementia" and sought confirmation that the experts were certain of their conclusions and that there was no other recommended treatment. Prof. Campbell said the experts were "quite firm" in their opinion that Ieng Thirith has significant dementia, available treatments had been tried to no effect, and there would be no advantage in trying other medications or remedies. In response to a query from Judge Cartwright, Prof. Campbell said there were no other treatments likely to become available that would alter Ieng Thirith's situation. The medications prescribed thus far were only effective in about a third of patients; they may take the person back to where they were six months ago and slow clinical progression but not the inevitable progression of the illness, Prof. Campbell testified. "There are certainly no agents available that would improve her to the situation where she was able to assist with her own defense," he concluded.

Dr. Fazel commented on the issue of feigning, noting that it would be difficult to feign a change in and indifference to personal hygiene, namely Ieng Thirith's urinary incontinence. He reported that people feigning usually maintain a consistent approach, while Ieng Thirith exhibited day-to-day fluctuations in her hostility toward detention facility staff and responses to questions about memory. "On the first day we interviewed Ieng Thirith, she couldn't remember the name of her husband, and on the second day she could," Dr. Fazel testified.

Taking over from Judge Cartwrights, Trial Chamber Judge Jean-Marc Lavergne inquired about the nature and standing of the MMSE, to which Prof. Campbell noted the MMSE was used internationally and did not include culturally inappropriate questions, and the scoring in other tests used showed a consistent impairment. Prof. Campbell said the MMSE showed change over time that was consistent with their other findings on Ieng Thirith. Judge Lavergne further asked

if Prof. Thida's rationale for amending the MMSE in her examination was sufficient. Dr. Fazel said he felt it made no sense to omit a question related to orientation in time and did not seem appropriate to put simpler questions to someone of high intelligence like Ieng Thirith. He further noted that if administering the MMSE to someone who could not read or write, for example, one would score it out of a different total but would not adapt the instrument in a way that has not been validated in research.

Prosecution Examines Medical Experts

International Senior Assistant Co-Prosecutor Tarik Abdulhak began by querying experts on the MMSE, quoting from a document issued by the National Ageing Research Institute[13] in Victoria, Australia, asking if the experts would consider listed examples of adaptations to the MMSE appropriate in a cross-cultural setting. Prof. Campbell said such adaptations were considered unnecessary because Ieng Thirith handled the questions in the standardized MMSE. In response to Mr. Abdulhak, Prof. Campbell noted that a variation in score by a few digits might occur in someone with cognitive impairment and may reflect the level of tiredness or cooperation. He also reiterated that the experts had been careful to test Ieng Thirith when she was cooperative and able to undertake the test.

Mr. Abdulhak cited the comment of a Singaporean occupational therapist that there had been "no noticeable change" in Ieng Thirith's cognitive abilities since the cognitive remediation program that began in May, questioning how this could be reconciled with a gradual decline observed in the testing scores. Prof. Campbell explained that Alzheimer's disease progressed slowly and one would not expect significant change over a three-month period. Experts were looking for a sign of improvement over that time period through the program and a Rivastigmine patch, Prof. Campbell testified. He also told Mr. Abdulhak that the occupational therapist saw Ieng Thirith once and subsequently worked based on reports of other people, whom Prof. Campbell believed he had trained to administer the MMSE.

Mr. Adbulhak quoted from the expert report, which noted that Ieng Thirith had experienced a slight deterioration in cognitive ability over the past few months, most clearly observed in aggressive behavior toward female staff. Mr. Abdulhak asked if such behavior could be explained by an order for Ieng Thirith's release that was issued by the Trial Chamber in November 2011, but subsequently reversed. Dr. Fazel said the verbally aggressive behavior was inconsistent – depending on the gender of the staff, for example – and if it purely resulted from

[13] Mr. Abdulhak quoted from the document as follows: "The MMSE is a cognitive screening tool that has commonly been reported to have cultural and educational biases. Questions most commonly modified in overseas studies to make the MMSE more culturally and linguistically relevant, or relevant to those less educated include [examples]." The National Ageing Research Institute can be found at: http://www.mednwh.unimelb.edu.au/

her anger at being detained, one would expect it to be directed at all staff. Prof. Fazel noted that Ieng Thirith was also inconsistent in her behaviour toward female guards and it had been indicated that before 2011, she accused staff of stealing things from her room, suggesting a deterioration of her judgment and social control.

Mr. Abdulhak quoted from a May 3, 2012, report that included a Modified Barthel Index, in which the Singaporean occupational therapist gave Ieng Thirith the highest scores in relation to toilet use and bladder control. But, he noted, a change in bladder control in July moved the score from 10 to 8, as noted in the August 2012 report. In response, Dr. Fazel said individuals caring for Ieng Thirith informed them that the issue of incontinence had been obvious over the last month. Mr. Abdulhak noted that a therapist questioned Ieng Thirith about her urinary incontinence and was told by her that someone had poured water on her bed. The prosecutor asked the experts if this could indicate a sense of shame or embarrassment. Dr. Fazel said that affected people do try to maintain a social front. Prof. Campbell testified that he believed it was likely that the incontinence occurred overnight and Ieng Thirith may have been embarrassed or may have forgotten and was not aware of it. He further stated that they believed Ieng Thirith does not notify guards to deal with such issues.

In response to Mr. Abdulhak, Prof. Campbell confirmed that a discontinuation of treatment with Rivastigmine had been recommended, as when there is no evidence of benefit after three months continuing the medication is pointless. Mr. Abdulhak cited a study in the *New England Journal of Medicine,* which involved a sample of 430 patients who met standardized criteria – with MMSE scores between 5 and 13 – for probable or possible moderate or severe Alzheimer's disease who had been prescribed Donepezil continuously for at least three months. He noted that the study appeared to conclude that in such patients "continued treatment with Donepezil was associated with cognitive benefits that exceeded the minimum clinically important difference and with significant functional benefits over the course of 12 months." Prof. Campbell indicated the experts were familiar with the study. Mr. Abdulhak said he believed the study involved patients whose clinicians were considering stopping Donepezil and found that if the drug was administered for six weeks after the three-month mark, one would not see improvement but there may be improvement later.

In response to a query from the prosecutor, Prof. Campbell said when looking at how such drugs work, there was no good reason why there should be improvement at six months and not at three months. Mr. Abdulhak asked if Prof. Campbell disagreed with the study's findings, to which he said the experts felt it would not be beneficial to continue administering given the extent of deterioration since the start of treatment. Dr. Fazel noted the quality and importance of the study but said he believed it found a two-point improvement on the MMSE, which would not be sufficient to assist Ieng Thirith in meeting certain criteria. Dr. Fazel also noted that the effects of different drugs over time could vary and the specific evidence on Rivastigmine suggested that three months was the point at which one sees progress. "This study is saying that even if you assume - which I think is an assumption – that these medications act in similar ways, you will get a two-point increase in the MMSE," Dr. Fazel said.

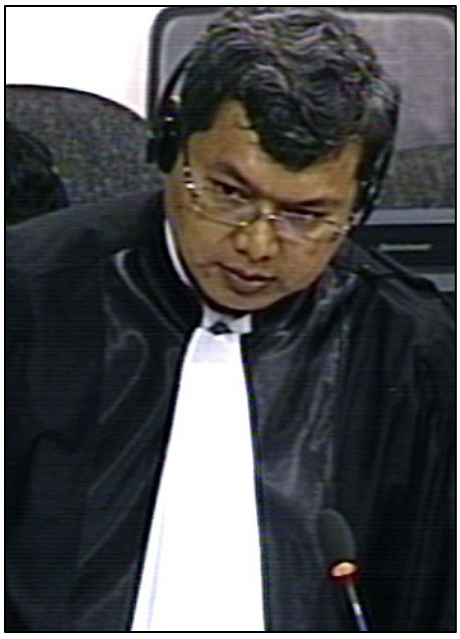
When Mr. Abdulhak asked how Ieng Thirith had coped with Rivastigmine, Dr. Fazel said it had been administered as a skin patch, there were believed to have been no side effects, and she had

been compliant with the medication. Prof. Campbell said there had not been evident adverse effects from Rivastigmine, though he conceded the effects could be subtle, such as increased paranoia or irritability. Mr. Abdulhak sought confirmation that their medical opinion was that Rivastigmine treatment should stop, as it would not have an appreciable cognitive benefit. Prof. Campbell confirmed this summary.

In response to whether further treatment and supervision of Ieng Thirith would be required, Prof. Campbell said there would be little value in continuing cognitive behavioral therapy and noted that if there is a sudden decline after discontinuing Rivastigmine and other agents, they could be reintroduced, but this would only return the patient to the state before the medication was stopped. Prof. Campbell said Ieng Thirith would need ongoing nursing support with her dress and daily activities, and the experts did not feel she could live independently without such assistance. He said the provision of such care depended on the ability of family and availability of community services, and if neither were available, the patient would require care within a home with nursing support. Dr. Fazel said he felt there did not necessarily have to be specialized nursing support, as it could be provided within the home if possible.

Experts Questioned by Civil Party Lawyers

National Civil Party Lead Co-Lawyer Pich Ang began by inquiring about Dr. Fazel's and Prof. Campbell's knowledge of Cambodia. In response to Mr. Ang's questions, Prof. Campbell said he had visited Cambodia four times and assessed Ieng Thirith over two days on each occasion, noting that he had been supported by Cambodian staff – usually doctors – in his interviews with Ieng Thirith. Dr. Fazel said he had visited three times and assessed Ieng Thirith twice, for two days on each occasion, with a total of six separate interviews. Dr. Fazel said he had not interviewed a Cambodian patient before and had read about the country's history and culture but would not consider himself an expert on cultural issues. Prof. Campbell further noted that experts were apprised of Ieng Thirith's educational background and level of intellectual function.



When asked by Mr. Ang how often they had administered tests to Ieng Thirith, Prof. Campbell said he had administered the MMSE on every occasion he examined her – commonly on both days of a two-day examination – though he stated that the importance of the MMSE should not be overemphasized. Dr. Fazel said he had been involved in administering the test to Ieng Thirith four times, either through or jointly with his Cambodian colleagues. In response to a query from Mr. Ang, Prof. Campbell confirmed that the same questions were repeated on separate occasions to determine if there was change over time, and said he had attempted other tests but Ieng Thirith could not cooperate with them. Mr. Ang asked if the repetition could have allowed Ieng Thirith to guess the questions and answers. Prof. Campbell countered that if Ieng Thirith had learned from repeated questioning, one would expect an improvement in her score, and noted there were significant gaps

between tests apart from those conducted on consecutive days. Prof. Campbell testified that there was no evidence of improvement or relearning from Ieng Thirith doing the tests and there was a decrease in her score over time. Dr. Fazel added that when he was involved in testing on consecutive days, Ieng Thirith could not recall the tests administered on the first day.

In response to question about a potential feigning of illness, Dr. Fazel reiterated that the experts did not think this was a possibility, and Ieng Thirith's answers to questions were consistent with information obtained from other sources and at other stages when she was not being assessed. When asked if the test was modified in light of Ieng Thirith's educational background, Dr. Fazel said the only minor change was the use of the French word "monde" instead of the English word "world" for the MMSE question that requires people to spell a word backward, which was consistent with international guidelines on the MMSE. Dr. Fazel noted that Ieng Thirith could spell the word forwards, but not backwards.

Mr. Ang asked if many people were present when they were assessing Ieng Thirith. Dr. Fazel said there were usually more than two people present, including a translator and members of the assessing team, but Prof. Campbell explained that the experts were aware of the need to ensure the group was not too imposing and additional people were kept in the background as much as possible. Prof. Campbell testified that fluctuations in Ieng Thirith's responses were not related to the number or nature of people involved in the assessment. Dr. Lina said that although multiple people were present during interviews efforts were made to establish a rapport with Ieng Thirith, to ensure that she was relaxed, and to behave properly in front of her. Dr. Lina reported that Ieng Thirith was not uncomfortable with the number of visitors, was welcoming and asked guards to bring in chairs for them to sit on. He said Ieng Thirith appeared to try her best to respond to questions.

Mr. Ang asked if there were differences in rapport with Ieng Thirith between Cambodian and foreign doctors, citing Prof. Thida's previous testimony that Ieng Thirith did not respond to questions put by Prof. Campbell but later replied to the same questions put by Prof. Thida. Dr. Lina said such problems had been observed occasionally, but it was not person-specific and depended on Ieng Thirith's mood. Prof. Campbell said he observed no change in Ieng Thirith when he examined her through an interpreter from when she was questioned by a Cambodian doctor and, in his records of his interview with Ieng Thirith at which Prof Thida was present, Ieng Thirith identified the pen and watch correctly when he asked her.[14]

International Civil Party Lead Co-Lawyer Elisabeth Simmoneau Fort sought explanation from the experts on why it was important not to modify MMSE questions. Dr. Fazel said that when measuring progress, it is important to have a consistent set of questions. Furthermore, he explained, the evidence base has used a standardized approach to identify scores that relate to levels of impairment – which involves using the standardized questions – meaning that practitioners must administer the MMSE as it applied internationally in order to assess a degree of impairment.

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[14] Prof. Thida gave an account of this interview in her August 30, 2012, testimony, available at: http://www.cambodiatribunal.org/blog/2012/08/expert-begins-testimony-ieng-thirith%E2%80%99s-fitness-stand-trial

At this point, Ms. Simmoneau Fort addressed her questions to Dr. Lina, asking him if he had used the MMSE for Cambodian patients. Dr. Lina first noted that he had administered the MMSE with patients at the hospital in which he worked, which was a different context to that of Ieng Thirith. Dr. Lina said in the case of Ieng Thirith – who is knowledgeable, speaks French and English, and has worked in a high-profile position – the test was not modified and was applied it in its entirety. He explained that the MMSE could be applied differently depending on the context and the patient and noted that any modification had to be approved by the competent authorities.[15] In response to several inquiries from the counsel, Dr. Lina testified that there was no issue with translating certain terms in the test given to Ieng Thirith and that while Cambodian culture was traditionally strict, there was no rule to limit the examination of a female patient by a male doctor.

Ms. Simmoneau Fort asked if there were any chances for improvement or if the experts could cite any instances of improvement in dementia once all possible treatment options have been explored. Prof. Campbell said he was aware of no such cases; the possibilities were explored in Ieng Thirith's case and no improvement was observed. "What we have seen is consistent with progressive Alzheimer's disease," Prof. Campbell concluded. Dr. Fazel said he was not aware of any cases of improvement in people with a clear diagnosis of dementia, where all other causes have been excluded. Dr. Lina concurred with his colleagues.

Defense for Ieng Thirith Commences Examination

National Co-Lawyer for Ieng Thirith Phat Pouv Seang began by asking the experts to comment on the scores in their testing of Ieng Thirith and those scores from Prof. Thida's testing. Dr. Fazel said the questions and scoring system employed by Prof. Thida were incorrect and if her tests were rescored using correct criteria, a score of 15 – as opposed to 24 – would be reached, which is not completely at odds with the scores reached by experts over the past two years. When Mr. Pouv Seang asked about findings on Ieng Thirith's cognitive ability, Dr. Fazel said they believed her cognitive abilities have deteriorated and there has been no alteration in their assessment of her ability to instruct counsel.

Mr. Pouv Seang inquired about Prof. Thida's comment that Ieng Thirith could accurately read a newspaper in a foreign language. Prof. Campbell commented that they did not know how Prof. Thida conducted her testing, but he noted that people caring for Ieng Thirith indicated she was not taking in what she read. He explained that it was a question of how much people with dementia can retain and understand what they read. He further remarked that without knowing about what Prof. Thida was questioning Ieng Thirith, it was difficult to comment on whether Ieng Thirith could understand what she was reading, though, he contended, it was likely that she could not.

[15] The English translation of Dr. Lina's response was unclear in parts.

In response to questions from Mr. Pouv Seang about a section in their report on treatment, Prof. Campbell said that Ieng Thirith was on several other medications, including for cardiac disease and gastrointestinal problems, but is not currently on any psychotropic medications. Prof. Campbell said the expert report stated that, in the absence of a physical re-examination, Ieng Thirith's medications are not affecting her cognitive function.

Finally, Mr. Pouv Seang sought the experts' final assessment on Ieng Thirith's current mental and physical fitness. Dr. Fazel testified:

> We came to the unanimous view that Ms. Ieng Thirith suffers from a moderate to severe dementia, that she has no acute physical health problems to our knowledge, and that as we've stated, we do not believe there are any other treatments that are available to improve her cognitive functioning.

International Co-Lawyer for Ieng Thirith Diana Ellis, noting that the experts had examined the World Health Organization's *Diagnostic Guidelines of the International Classification of Diseases 10th ed.* (ICD-10), sought confirmation that the ICD-10 lists standardized guidelines that assist in diagnosing dementia and its stage of progression. Dr. Fazel said the guidelines are used internationally to arrive at diagnoses and their staging – specifically allowing for dementia – and he believed they had been developed from the 1960s onwards by panels of experts who weigh available evidence and formulate the best practice for standardizing diagnoses.

Ms. Ellis then cited four guidelines and inquired about each in relation to Ieng Thirith's health status. On "loss of memory," Ms. Ellis summarized the experts as characterizing, based on what they learned about Ieng Thirith, that she had severe memory decline based on ability to retain new information and only fragments of past memory. Dr. Fazel confirmed this summary. On the "decline in cognitive abilities such as judgement and thinking," Ms. Ellis described the findings as classifying Ieng Thirith with a significant decline in that cognitive ability. Dr. Fazel agreed, noting that the criterion entailed a range of cognitive abilities related to judgment, thinking, and associated behaviors. Noting the guideline that requires decline in memory, judgment, and thinking to have been existent for at least six months, Ms. Ellis asked if the experts found this criterion was satisfied. Dr. Fazel concurred. On the final guideline for dementia – "the absence of clouding of consciousness" – Ms. Ellis sought clarification on if this referred to a person's awareness of their environment. Prof. Campbell said the criterion helped to distinguish dementia from delirium, a short period of confusion related to an illness and in which the level of awareness fluctuates considerably. Prof. Campbell noted that there was no fluctuation with Ieng Thirith, who has been constantly confused by questions and unable to recall things properly. Ms. Ellis asked if Ieng Thirith also fulfils the criterion in that she constantly lacks awareness of her surroundings. Prof. Campbell concurred, adding that Ieng Thirith had been "fully alert" with no clouding of consciousness throughout testing.

Turning to Ieng Thirith's regime of medication, Ms. Ellis began by asking if Quetiapine and Clonazepam – which were prescribed to Ieng Thirith – are both antipsychotic medications. Prof. Campbell said that Quetiapine is used as an antipsychotic drug, but Clonazepam is used as a sedative – in the same group as Valium or Diazepam[16] – and can be prescribed when a patient suffers from considerable anxiety. Ms. Ellis inquired whether the prescription of Clonazepam to

[16] These are believed to the correct spellings of these medications.

Ieng Thirith in Bangkok in December 2004, along with other medications, might indicate a very early stage of development of a form of dementia. Prof. Campbell said that anybody can suffer an episode of delirium relating to a physical illness, but it was "possible" because people with early dementia are pre-disposed to delirium accompanying a physical illness.

Ms. Ellis noted that during the period of Ieng Thirith's detention from December 20, 2007, to July 27, 2011, the dosages of Quetiapine and Clonazepam varied, with 2mg of Clonazepam and 150mg of Quetiapine prescribed in December 2010, and the same dose of Clonazepam in July 2011 but a reduction in Quetiapine to 100mg. She inquired if such a change in medication would be made as a result of certain symptoms. Prof. Campbell said he recommended a gradual reduction in medication after first examining Ieng Thirith and that such drugs are occasionally given to people with dementia when their behavior becomes agitated or aggressive but must be used cautiously because of potential adverse effects.

Ms. Ellis queried whether it was particularly important to have observations from those who care for Ieng Thirith on a daily basis as well as her doctors. Dr. Fazel said this information was "vital," particularly as people with dementia can present a social façade and one interview conducted without collecting such data could be misleading.

Citing an October 2011 report, Ms. Ellis asked if the consultation with Drs. Koeut Chhunly and Chamroeun, from Calmette Hospital – who felt there was a "significant decline" in Ieng Thirith's memory, Ms. Ellis said – contributed to the participation of Cambodian physicians in the assessment. Dr. Fazel concurred and reiterated that a Cambodian psychiatrist found, along with Dr. Brinded, in 2009 that Ieng Thirith had mild dementia.

Ms. Ellis asked if Ieng Thirith's believing that someone was sleeping above her indicated hallucinations. Dr. Fazel said the experts found it was "abnormal" but they would likely want to examine the incident in more detail. He explained that Ieng Thirith either misinterpreted a mosquito net as being a human being, skull, or child or hallucinated, but either possibility is abnormal. Ms. Ellis referred to a note by the occupational therapist from Singapore, reporting that when he was conducting training Ieng Thirith became distressed because she believed she had insects crawling over her. The counsel then noted a section in the experts' findings where they cited a report from the guards that Ieng Thirith had spoken of someone being physically present in her mosquito net for a few months. She inquired if such observations indicate a problem with hallucinations. Dr. Fazel said there was a broad problem with perception, but there are specific definitions of "illusion," "misinterpretation," and "hallucination." He did remark that they would call both incidents "abnormal" perceptions. Noting the experts' view that a "correct" scoring of Prof. Thida's MMSE test would be 15, Ms. Ellis asked if this would bring Ieng Thirith within a significant degree of cognitive impairment. Dr. Fazel confirmed that international guidelines suggest a score below 23 is abnormal, and

between 10 and 20 indicates a "moderate degree of cognitive impairment." He agreed with Ms. Ellis that this would support what Prof. Thida mentioned about Ieng Thirith being unable to remember the topic of conversation one or two minutes after it started.

In response to a query about a study the prosecution cited that was published in the *New England Journal of Medicine,* Dr. Fazel said the experts' understanding of the study was that the improvement was no higher than two points on the MMSE if a treatment period was extended for the drug used. Dr. Fazel noted the study did not apply to Rivastigmine and they did not believe two points would improve Ieng Thirith's cognitive ability to the extent that she could sufficiently participate in proceedings.

Ms. Ellis asked if the experts observed a July 12, 2012, note that Mr. Mean[17] reported that Ieng Thirith could not walk far and needed to be reminded to bathe, dress, and eat, and if the observation was in line with their findings, noting that this report came the day Prof. Thida administered the MMSE to produce a score of 24. Dr. Campbell said they had not seen the note, but it is consistent with what they were told by Mr. Mean and more in line with the 12 to 15 score range on the MMSE.

In response to further statements posed by Ms. Ellis, Dr. Fazel confirmed that the issues the experts raised were typical of dementia and they found Ieng Thirith would have difficulty with fitness to plead and fitness to stand trial. He also confirmed that though Ieng Thirith had a basic understanding of crimes against humanity as involving "doing wrong and murderous killing" and genocide as "destroying a group or race," she did not comprehend the subtleties of the offenses. Responding to Ms. Ellis' queries, Dr. Fazel confirmed Ieng Thirith did not indicate during interviews this week that she understood she was in a detention center awaiting trial for grave offenses. When the counsel asked if experts believed that when Ieng Thirith did not give a consistent answer to a question she simply did not understand it, Dr. Fazel agreed.

Furthermore Dr. Fazel agreed with Ms. Ellis' statements that Ieng Thirith lacks the capacities to exercise her fair trial rights at this stage of her illness; that there is no known treatment that would alter her situation; that her condition will worsen due to the destruction of cells in her brain; and that any expert in court would not be able to say that Ieng Thirith's condition would improve in any meaningful way in the future.

Ms. Ellis asked the experts if Ieng Thirith could live in a family environment provided she receive care from someone with sufficient knowledge to support her and does not require daily medical input. Dr. Fazel concurred. Prof. Campbell added that Ieng Thirith would require ongoing support – by family or external parties – because she would be unable to manage her own physical needs. He also said that if some of Ieng Thirith's behavior worsens she might not be able to be managed at home. Though Ieng Thirith will not require daily medical care, her conditions would need to be regularly reviewed, he concluded.

Finally, Ms. Ellis inquired briefly if the standardized MMSE to which the *New England Journal of Medicine* study referred was the same test mentioned in court. Prof. Campbell said the parties

[17] This is believed to be one of the therapists. The spelling of his name was unclear in the English translation.

could assume that. The defense team for Ieng Thirith concluded their questioning of the experts. President Nonn thanked the experts for their assistance.

Civil Parties Request Accused's Presence in Courtroom

Ms. Simmoneau Fort requested the presence of Ieng Thirith in the courtroom for closing statements by the parties, unless there was a legal reason for her not to be present. After a brief discussion among judges, President Nonn said it was not necessary for Ieng Thirith to be present and she had been ordered to remain in the holding cell.

Guidelines for Closing Statements Addressed

Judge Cartwright noted that the Trial Chamber wished parties to address three topics in their closing statements:

- Does the party have any submissions suggesting that the decision that Ieng Thirith is unfit to stand trial should be reviewed?
- If the decision that Ieng Thirith is unfit to stand trial were to stand, does the party have any submissions on the issue of her continuing detention?
- Does the party propose any conditions on Ieng Thirith's release from detention? If so, what is the legal basis for that submission?

Prosecution Delivers Closing Statement on Ieng Thirith's Fitness to StandTtrial

Mr. Abdulhak firstly addressed the questions posed by Judge Cartwright, stating that the prosecution believes the evidence confirms Ieng Thirith is unfit to stand trial, as she suffers from moderate to severe dementia and her cognitive function is affected such that she cannot currently exercise her fair trial rights. The prosecution felt that available measures had been exhausted to improve Ieng Thirith's status, with imminent recovery and ability to face trial unlikely. Thus, there are no longer grounds for Ieng Thirith's continued detention. However, Mr. Abdulhak said, the prosecution believes that proportionate conditions should be imposed and would provide written submissions on the legal basis for this submission, if the Chamber wished.

Mr. Abdulhak asserted that under international law, a finding of unfitness to stand trial cannot result in termination of proceedings against an accused, an argument, he contended, that is supported by statutes and rules of the International Criminal Court (ICC), international jurisprudence, and the ECCC's own rules; under the various jurisdictions it is common for proceedings to be stayed, with no indictments withdrawn and with further deliberations on any appropriate measures. Citing paragraph 19 of the December 13, 2011, Supreme Court Chamber decision on the appeal against the Trial Chamber's order to release the accused,[18] Mr. Abdulhak noted that the Chamber had reviewed decisions made at the international level, when considering whether compulsive measures can be ordered against an accused. He quoted from the Supreme Court Chamber's decision:

> Neither unfitness nor other serious obstacles to proceedings remove from the court's realm the application of measures including continued detention aimed at securing the presence of the

[18] The Supreme Court Chamber's decision on appeal against the Trial Chamber's order to release Ieng Thirith is found at: http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E138_1_7_EN-1.PDF

> accused at trial. ... Moreover unconditional releases seem only to be exceptionally applied on humanitarian grounds in cases of a par excellence terminal condition.

Mr. Abdulhak cited relevant cases at the international law in support of his argument:

- *Nahak (International Criminal Tribunal for the Former Yugoslavia, or ICTY)* – Mr. Abdulhak noted that the court in the *Nahak* case arrived at a finding of unfitness to stand trial and suspended the proceedings. The court did not relate that decision to ongoing treatment or "any foreseeable event that would lead to a resumption of the trial." The court noted that resumption was a remote possibility and ordered a series of restrictive measures detailed in a separate earlier decision dated March 17, 2004.

- *Kovačević (ICTY)* – Mr. Abdulhak noted that there was a finding of unfitness to stand trial due to mental illness and there was an order for provisional release subject to a range of restrictive measures, including those aimed at protecting the integrity of proceedings and the evidence and ensuring that the accused did not abscond.

- *Djukić (ICTY*) – Mr. Abdulhak explained that in the *Djukić* case the accused was terminally ill from cancer. The prosecution applied to withdraw the indictment, and the Trial Chamber refused, noting that a withdrawal of indictment – effectively a termination of proceedings – was not permitted at the international level. The court imposed a number of restrictive measures on the accused. The Appeals Chamber terminated the case on May 29, 1996, following the accused's death. Mr. Abdulhak said this case reflected the approach taken by the Supreme Court Chamber on the issue.

- *Talić (ICTY)* – Mr. Abdulhak noted that the *Talić* case also involved a terminally ill accused. This decision was rendered on September 20, 2002. The Chamber noted in a section titled "Application of the law to the facts" that "there can be no doubt that Talić is suffering from an incurable and inoperable, locally advanced carcinoma, which presently is estimated to be at Stage III-B with a rather unfavourable prognosis of survival, even on short term." The accused eventually died, but in provisionally releasing him, the ICTY Trial Chamber imposed an extensive range of restrictive measures.

Mr. Abdulhak said the prosecution submitted that Internal Rule 82(2) provides that the Chamber may at any time during proceedings order the release of an accused or, when necessary, release on bail or detain an accused. He explained that the Chamber would then turn to Rule 65, dealing with bail orders that can be issued by the Co-Investigating Judges (CIJs). Mr. Abdulhak cited Rule 65(1), which provides that the court may order release from detention on bail, shall specify whether a bail bond is payable, and, significantly, impose necessary conditions to ensure the presence of the person during the proceedings and the protection of others.

Mr. Abdulhak said that while the case is not terminated – though the trial is suspended – there is a theoretical possibility of a resumption of trial. While no cure for Ieng Thirith's illness was known, he contended, one may well be found. The imposition of certain conditions would ensure the accused does not abscond or interfere with ongoing proceedings, the integrity of the proceedings is protected. and the Trial Chamber exercises judicial supervision over an individual who remains subject to an indictment. Mr. Abdulhak stressed the prosecution's awareness that

the restriction of right to liberty is an exception, should not be ordered lightly, cannot be indefinite, and must be reasonable and proportionate. He noted six conditions the prosecution deemed appropriate, stating that Ieng Thirith should:

- Be ordered to reside at a specified home address, which would be provided by her counsel to the court;
- Make herself available for a weekly safety check by the authorities, or officials to be appointed by the Trial Chamber;
- Be required to surrender her passport and identity card;
- Be directed not to contact – directly or indirectly – the other co-accused, excluding her husband Ieng Sary;
- Be ordered not to contact – directly or indirectly – any witness, expert, or victim who is proposed to be heard by the court, and also directed not to interfere directly in any way with the administration of justice before this court; and
- Be ordered to undergo a medical examination every six months by a medical practitioner to be appointed by the court with the first such examination to be undertaken in March 2013.

Mr. Abdulhak asserted that final condition would ensure that the Chamber monitor Ieng Thirith's medical condition and that she would not face an indefinite restriction of her liberty. In relation to enforcement, Mr. Abdulhak noted that Ieng Thirith's cognitive impairment would make it difficult for her to comply with the conditions without assistance. Mr. Abdulhak said a potential solution was provided in the recently enacted Civil Code of Cambodia that provides in Articles 24 and 28 for the appointment of a guardian or curator to assist a person who is unable to recognize and understand the legal consequences of their actions.

Citing the *Talić* court's decision that provisional release measure must be proportionate, the prosecutor noted that at the international level, detention cannot continue indefinitely and there is an overriding right to trial without undue delay. On the question of how to ensure that right, Mr. Abdulhak said there had not yet been an undue delay and the definition of "reasonable" depended on the circumstances of a case, its complexity, and the diligence with which the court has acted. Mr. Abdulhak argued that the court has acted diligently in the present case, including dealing with the issue of fitness to stand trial expeditiously. He maintained that Ieng Thirith's rights had been protected and if her release is ordered, her rights will be less restricted. He concluded as follows:

> We say that we have simply not reached a threshold where one could submit that an undue delay has taken place. Ultimately, Your Honors may revisit the issue, and an appropriate point in time may be at the conclusion of the proceedings of Case 002/02. That provides a definite point of time for Ieng Thirith at which she can expect a reconsideration of these conditions. … Under the rules she also has the right to apply for a variation of the conditions or the termination should there be a change in the circumstances.

Judge Cartwright posed questions about the prosecution's submission, starting with what possible sanctions were available for non-compliance in the procedures in the Cambodian Civil Code. Mr. Abdulhak replied that the prosecution would argue that a failure to comply with an order of the court could be dealt with as an interference with the administration of justice under

ECCC Internal Rule 35. He noted that a range of orders might be imposed, such as warnings, directions to a guardian, and perhaps ultimately a review of the conditions. Judge Cartwright asked if it was fair to summarize that sanctions would likely fall on the guardian, but if they fell on the accused, it might lead to her being placed back in detention, despite being ruled unfit. Mr. Abdulhak said the guardian assumes the legal interest of the accused, but if Ieng Thirith breached orders independently of the guardian's advice or assistance, the Chamber could consider appropriate measures. Mr. Abdulhak said the prosecution did not necessarily follow that Ieng Thirith would be placed back in detention, but rather that the chamber could consider more restrictive measures such as house arrest.

Judge Cartwright reasoned that suggesting such consequences for Ieng Thirith while conceding that she does not have the mental capacity to stand trial seemed to be "an absurd outcome." "If she were breaching conditions imposed on her, there can be no inference of a deliberate breach of those conditions given her medical condition as you have conceded it," Judge Cartwright maintained. Mr. Abdulhak argued that the issue did not turn on whether the breach was deliberate or whether the Chamber wanted to exercise punitive measures but, instead, whether the measures would then become necessary to safeguard the integrity of the proceedings.

Judge Cartwright inquired about the requested condition of a "weekly safety check." Mr. Abdulhak confirmed that it would be a check for both Ieng Thirith's safety and that of the public, noting that court rules provide for a detention order to protect the accused and release conditions could follow along the same lines. He asserted that witnesses or victims could also be protected, recalling that Ieng Thirith had exhibited aggressive behaviour on occasion. Judge Cartwright noted the condition of a regular six-monthly medical examination, asking if the prosecution was proposing that this involve expert opinion or the continued medical checks by Prof. Thida. Mr. Abdulhak responded that the prosecution was not suggesting the medical assessment be for the purposes of reassessing fitness; rather, the purpose of this requirement is in the interests of the accused, in that she would benefit from ongoing medical treatment, and would also assist the court.

Finally, after noting that Ieng Thirith has been in detention for about four years at this time and that the prosecution seems to favour her release, Judge Cartwright asked if the prosecution had considered whether a longer period of detention would still meet the standards as set by other international tribunals. She also inquired whether the prosecution agreed with the proposal for Ieng Thirith's immediate release with conditions to follow. Mr. Abdulhak replied that he was not authorized to respond to the second question but pointed out that, at the ICTY and ICTR (International Criminal Tribunal for Rwanda), accused persons are often held in detention for stretches exceeding Ieng Thirith's period of detention. Mr. Abdulhak said he could recall cases ranging from five to 10 years at the international tribunals and further commented that if Ieng Thirith were released now, her detention would cease within less than five years.

Civil Party Lawyers Make Closing Statement at Fitness Hearing

Contending that the experts' testimony had not been consistent, Mr. Ang cited the findings and testimony of the experts and Prof. Thida and focused on MMSE tests, noting that Dr. Fazel and Prof. Campbell used standardized tests but Dr. Lina said tests could be modified. He argued that foreign experts must have knowledge of language and culture before being able to properly

administer such a test on a Cambodian patient. He noted that Ieng Thirith was highly educated and asserted that she could craft her responses to suit her needs; he argued that the experts should have modified the questions to suit such circumstances.

In contrast, Mr. Ang insisted, Prof. Thida, while not as highly educated as the other professors, has "plausible" experience and is familiar with Cambodian culture and traditions, something that was missed in the preparation of foreign experts. Mr. Ang said language played a role in communicating with Ieng Thirith – citing the experts' discussion of Ieng Thirith's sense that someone was in her mosquito net – and impacted on findings, noting also that Dr. Lina corrected the Khmer interpretation of the term "dementia." "When the communication had to go through interpreting we can call into question the result of the finding," Mr. Ang argued. He also took note of the fact that all of the experts who came to assess Ieng Thirith are male, the environment was not inviting, and Ieng Thirith was more comfortable being interviewed by Prof. Thida. Furthermore, Mr. Ang said, 40 civil parties supported the method used by Prof. Thida, which was "suitable" and amended to fit the Cambodian context. Mr. Ang submitted that a group of doctors – comprised of more women – should administer tests on Ieng Thirith and more experts be appointed to reassess her condition.

Ms. Simmoneau Fort endeavoured to respond to the judges' questions, noting that Mr. Ang's request to appoint new experts made the answer to the first question clear. Referring to the issue of detention in the event of another finding of unfitness, Ms. Simmoneau said the consolidated group of civil parties and their clients have a "deep conviction and desire" to see the trial conclude with all four accused having been tried, for a guilty verdict to be arrived at, and for the court to do its best to reach such a judgment. She maintained that the civil parties agreed that fair trial rights should be applied and enforced, and while they could not speak to expert medical evidence, they did not wish to see any violation of the rights of parties. On the third question, Ms. Simmoneau Fort answered, the position of the civil parties accorded with that of the prosecution and they would like such measures to be ordered. She said civil party lawyers deferred to the Chamber with respect to the legal basis.

Finally, Ms. Simmoneau Fort insisted that regardless of the Trial Chamber's final decision, it is important that clear explanations be provided to civil parties respecting the Chamber's findings.

> It is only if the Chamber is able to fully explain the foundational basis of its decision that the civil parties will be left with the impression that their rights will have been respected, and that they will be in position to understand this finding of justice to which they have taken part.

Ieng Thirith Defense Makes Final Arguments

Mr. Pouv Seang began by addressing some of the points raised by the prosecution and civil party lawyers. Firstly, Mr. Pouv Seang said the request by civil party lawyers for another team of experts was unacceptable after four such teams had already assessed Ieng Thirith's health status starting from 2009, in accordance with standardized tests such as the MMSE. He asserted that

the MMSE tests were administered properly and there was no need to cause further delay by appointing additional experts. Mr. Pouv Seang noted that well-qualified experts had prepared reports, while the report by Prof. Thida had many shortcomings, including that she relied in her reports on information from nurses.[19] Further, Mr. Pouv Seang found it "strange" that Prof. Thida said she did not smell any bad odors when she visited Ieng Thirith because female guards who sometimes escorted Ieng Thirith to the toilet mentioned that two or three times a week they had to have her mattress and other things cleaned. Mr. Pouv Seang also said he was unconvinced that female doctors had to attend to female patients and said what was of importance was a physician's psychiatric expertise.

In response to the prosecution's six conditions, Mr. Pouv Seang stated that the defense felt Ieng Thirith would feel pressured if she were under "constant watch" in accordance with conditional release. Mr. Pouv Seang contended that Ieng Thrith should be released unconditionally into the care of her family, whom the defense believes can ensure that her health does not deteriorate.

Taking over from her colleague, Ms. Ellis responded to the Trial Chamber's questions, firstly by arguing that the decision that Ieng Thirith is unfit – which is not contested by prosecution – should be confirmed and further noting that in light of the expert evidence, Ieng Thirith is unfit to plead and to stand trial at this stage. She said Ieng Thirith's detention should therefore cease and the accused be unconditionally released from the detention facility. "We submit that there is no longer any legal basis for her detention or [for] release subject to conditions," Ms. Ellis insisted.

Ms. Ellis noted that the CIJs set in motion the inquiry into the mental health of Ieng Thirith, which stemmed from information from the detention facility that her behavior was changing. Ms. Ellis summarized that after this decision, Prof. Ka and Dr. Brinded deemed Ieng Thirith to be suffering from a mild cognitive impairment in November 2009. In February 2011, the defense requested that Ieng Thirith be examined as to her fitness to stand trial, following an apparent deterioration in her behavior and functioning. Three days after this request Prof. Thida was appointed as Ieng Thirith's doctor, Ms. Ellis said. Prof. John Campbell found Ieng Thirith last year to be suffering from what he believed was Alzheimer's disease. In response, the Trial Chamber appointed more experts – all considered as having sufficient knowledge though some with greater knowledge than others – to assess Ieng Thirith. A conclusion was reached last year that Ieng Thirith was unfit to stand trial, Ms. Ellis noted, but since the Supreme Court Chamber's decision was issued, there had been a "significant and impressive" effort put into Ieng Thirith's medical treatment. Ms. Ellis declared that attempts to improve Ieng Thirith's cognitive state had failed. "She, sadly, is one of the two-thirds who do not respond to any form of treatment," Ms. Ellis said.

> Further assessments at the beginning of this year and now this week have caused the doctors to conclude that she suffers from moderate to severe dementia, that she is cognitively impaired to the extent that she cannot exercise her fair trial rights. She cannot meaningfully participate in her own trial and the doctors – all now very familiar with the *Strugar* standard and the capacities – have found she is unable to meaningfully participate in any aspect of her trial.

[19] The English translation of Mr. Pouv Seang's statement was unclear in this section.

Ms. Ellis noted the nature of Ieng Thirith's condition is such that she will not improve – with or without treatment – because brain cells used in her cognitive functioning have died and cannot be regenerated. "As a result it matters not how long anyone waits. Ieng Thirith will simply deteriorate further. She will never get better and she will not remain stable," Ms. Ellis argued. She argued that any possible future medications or treatments – such as that involving stem-cell research – that could improve her condition would require years of testing, and no evidence had been put before the Chamber that any such treatment will be available in the near future. "We submit that to do justice to the evidence in this case, the time has come to confirm that she is not in a position to be tried and will never be so," Ms. Ellis stated.

On that point, Ms. Ellis further argued that as Ieng Thirith's mental health prevents her from participating in a trial there is no justification for her continued detention. Ms. Ellis cited Article 5 of the European Convention on Human Rights (ECHR) as enshrining the right to liberty – which has been recognized by the Supreme Court Chamber – and is linked to the presumption of innocence.[20] The presumption of innocence and right to liberty are superseded by detention when circumstances justify it, she noted, explaining that fundamental to provisions governing detention[21] is the need to ensure attendance of an accused at the trial. Ieng Thirith was detained in November 2007 as the CIJs – supported by the Pre-Trial Chamber – deemed her to be at risk of non-attendance and that there might be interference with witnesses and some public disorder if she were not detained. Ms. Ellis contended, though, that if there was to be no trial, detention was "entirely without foundation and unlawful." Imposing conditions on an individual presupposes that they will otherwise fail to attend their trial, Ms. Ellis argued.

Ms. Ellis declared that the prosecution's submission of six conditions made "no factual sense" and had no discernable legal authority. "It is particularly difficult to comprehend the application for conditions of this nature against a background where the prosecutors have accepted that she is unfit to stand trial and accept that she should not be held in detention," Ms. Ellis said.

Citing a decision on a motion for provisional release in the Talić case from September 2002, Ms. Ellis noted that the Trial Chamber in that case found that when assessing if an accused should be released, it should focus on the circumstance of the individual applicant, and provisions for provisional release must be applied according to the facts of the case. The Talić court held that procedural measures should not be "capricious or excessive"; a more lenient measure should be applied if it is found to be sufficient; weight should be attached to presumption of innocence and proportionality; and the tribunal's reputation should be upheld. Ms. Ellis explained that, on balance, the court ruled the accused should be released due to his medical condition:

> The Trial Chamber went on to say there can be no doubt that when the medical condition of the accused is such as to become incompatible with a state of continued detention, it is the duty of this tribunal – and any court or tribunal – to intervene on the basis of humanitarian law and provide the necessary remedies.

Ms. Ellis noted that the accused was eventually unconditionally released in that case.

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[20] Ms. Ellis cited ECCC Law and ECCC Internal Rule 21. The Internal Rules (Rev. 8) may be found at: http://www.eccc.gov.kh/en/document/legal/internal-rules-rev8.
[21] Ms. Ellis cited ECCC Internal Rules 63 and 68.

Referring to the *Kovačević* case, Ms. Ellis said the accused was returned to the former Yugoslavia, but the court did not determine he had deteriorated to a point where proceedings could not be resumed. Ms. Ellis noted that in the cases mentioned by the prosecution the presence of a terminal illness was not adequate to conclude that there would be no trial. In circumstances where an accused was dying, rather, the court has ruled on humanitarian grounds that they be released unconditionally, Ms. Ellis stated.

> What we submit in this case is that the proper approach is to look at the humanitarian law considerations, to look at the reality of the situation, and to appreciate that Ieng Thirith does not at this stage need conditions. There is no legal basis to impose conditions and her release should be unconditional, so that she is in a position to return to live with her family where she can be cared for in the most appropriate way. Anyone who has been in this court over the last two days and listened to the evidence that has been given by the experts must have difficulty in considering the six proposed conditions of the prosecutor and understand how they have any sense in the context of what is now fully understood about the cognitive functioning and behavior of Ieng Thirith. We are … mindful of the concerns of the civil parties and of the victims in this case, but the overriding responsibility of this Trial Chamber, we submit, is to act in accordance with fair trial procedures, recognized international humanitarian law, and to prohibit the imposition of any condition which would be contrary to sense or law and is without a legal foundation.

The defense for Ieng Thirith concluded their closing statement.

President Nonn said the Trial Chamber would render a decision on Ieng Thirith's fitness to stand trial "in due course." He adjourned the hearing, with regular proceedings in Case 002 against accused Nuon Chea, Khieu Samphan, and Ieng Sary set to resume on Monday, September 3, 2012 at 9 a.m.