



ECCC Trial Chamber Hearing of 19-20 October 2011:

Initial Civil Party Reparation Claims and Fitness of Ieng Thirith to Stand Trial

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From 19-20 October 2011, the Extraordinary Chambers in the Courts of Cambodia (ECCC) Trial Chamber (TC) held a hearing to discuss initial reparations requests from Civil Parties and hear arguments from all Parties regarding Ieng Thirith's fitness to stand trial and the results of supplementary expert reports related thereto.

Civil Party Initial Reparations Requests

Discussion of Effects of Rule 89ter Division of Case 002 Barred

Although substantive trial hearings in Case 002 are not scheduled to begin until 21 November, the TC sought to hear "initial specifications of the substance and mode of implementation for each reparation sought" according to ECCC Internal Rule 80bis(4).¹ The purpose of this rule is to ensure reparations requested are "collective and moral" in nature, as required by ECCC Internal Rule 23quinquies.²

As an initial matter, the Civil Party lawyers expressed their disappointment with the timing of the hearing, as the Case 001 Appeals Judgment has not been released and it is also currently unclear what impact the recent division of Case 002 ordered by the Trial Chamber pursuant to Rule 89ter³ will have on Civil Party participation and reparations requests.

The Civil Parties also noted that they could not provide the Trial Chamber with a detailed set of finalized requests prior to the hearing because they are still contacting newly admitted Civil Parties and anxiously awaiting the Appeals Judgment in Case 001, which will establish important precedent for reparations claims in Case 002.

¹ Internal Rule 80bis(4) allows the Trial Chamber to "direct the Lead Co-Lawyers, within a deadline determined by the Chamber, to provide initial specification of the substance of the awards they intend to seek within the final claim for collective and moral reparation."

² Internal Rule 23quinquies(2) requires that reparations requests be made in a single consolidated submission which describes: (a) the awards sought; (b) how the awards address specified harms suffered by Civil Parties and whether specific sub-sets of Civil Parties would particularly benefit; and (c) the "single, specific mode of implementation" sought.

³ The Trial Chamber recently ordered Case 002 divided into a series of trials, with each trial limited in scope. The first Case 002 trial is scheduled to concern the first wave of forced evacuations from Cambodia's cities to rural areas from April 17, 1975 until mid-1976. See *ECCC Case 002*, Severance Order Pursuant to Rule 89ter, TC Doc. No. E124 (22 Sept. 2011).

After noting these limitations, the Civil Party lawyers argued that regardless of the Trial Chamber's comments to the contrary in its separation order, the division of Case 002 into a series of trials will necessarily have a serious and direct effect on reparations. Specifically, the Civil Party lawyers sought clarification on how the Trial Chamber intends to deal with the requirement under Rule 23*quinquies* that reparations requests must "address the harm suffered" in light of the limited scope of the first Case 002 trial.

This issue however, was not taken up by the Trial Chamber and Chamber President Nil Nonn cut this avenue of argument by the Civil Parties short, reminding the Civil Party lawyer to limit comments strictly to providing specific information on reparations requests being sought.

The Trial Chamber's stance on this issue does place Civil Parties in an uncertain position. This is because the Chamber has provided no specific information as of yet regarding how the limited scope of the first Case 002 trial will not necessarily accordingly limit the scope of available reparations. For example, if the Civil Parties seek reparations related to a specific crime site included in Case 002 generally, but not in the first trial therein, it is unclear how provision of such reparations would "address the harm suffered," by victims of crimes covered by the first Case 002 judgment. Further clarification on this point by the Trial Chamber will be necessary moving forward in order for Civil Parties to understand the scope of their rights and shape their reparations requests accordingly.

Nonetheless, the Civil Parties moved onto a summary of some of the substantive reparations awards they plan to request in Case 002.

Overview of Current Civil Party Reparations Requests

At this juncture, the Civil Parties have submitted four categories of reparations requests:

1. Remembrance and Memorialization Requests;
2. Rehabilitation and Health Services;
3. Documentation and Education; and
4. Other Projects.

The Civil Parties elaborated on each of these general categories, providing an overview of projects currently being considered.

1. Remembrance and Memorialization

Under the heading of remembrance and memorialization, the Civil Parties mentioned the following projects:

- Commemoration of the names of victims of the Khmer Rouge;
- The provision of spaces for grieving and meditation;
- The creation of an annual memorial day dedicated to remembrance and recognition of crimes suffered by Khmer Rouge victims;
- Building stupas and/or monuments designed as tributes to victims of the Khmer Rouge, including possibly, monuments dedicated to special classes of victims (e.g. victims of forced marriage); and

- Preservation of the crimes sites included in the Case 002 Closing Order to serve as historical and remembrance sites.

2. Rehabilitation/Health Services

Under the heading of rehabilitation and health services, the Civil Parties mentioned the following projects:

- The creation of a health center specifically dedicated to providing assistance to elderly victims;
- The provision of mental health services to victims;
- Access to health services for low-income Cambodians and victims; and
- Facilitation of self-help groups, focused on bringing victims of specific crimes together.

3. Documentation and Education

Under the heading of documentation and education, the Civil Parties mentioned the following projects:

- The preservation of Khmer Rouge documents and their use to teach the history of the Khmer Rouge period in Cambodia in order to educate future generations and prevent the perpetration of future atrocities in Cambodia;
- Incorporating the ECCC experience and judgments into the current Khmer Rouge history curriculum as a legacy of the Court; and
- The creation of museums and libraries dedicated to the history of the Khmer Rouge period in Cambodia which are freely open to the public and provide spaces for reflection and discussion.

4. Other Projects

Under the heading of “other projects”, the Civil Parties mentioned the following projects:

- The creation of a historical book that commemorates victims with a registry, produced both physically and online;
- Publication of the names of Civil Parties in the Case 002 Judgment; and
- Activities aimed at assisting specific victim groups, such as Cham Muslims or Vietnamese-Cambodians forcibly deported from Cambodia by the Khmer Rouge.

The Civil Parties also discussed implementation processes and reiterated their desire to have a trust fund created which can manage voluntary monetary donations to fund reparations activities. The Civil Parties also noted that while they acknowledge they cannot make specific requests of the Royal Government of Cambodia (RGC) for reparations, they will necessarily have to include the RGC in some way during the implementation of any approved activities. For example, the government must be approached for building permits for physical memorial projects.

The Civil Parties also appeared to cause some consternation among several national ECCC lawyers by proposing a project to assist forcibly deported Vietnamese-Cambodians to apply for Cambodian citizenship. The negative comments by several national lawyers had a definite ethno-nationalistic tint to them, as the lawyers stated that ethnic Khmer-Cambodians were the vast majority of victims of the Khmer Rouge and there should be no distinctions made between victims, who are all human beings. To this observer however, the lawyers appeared to simply bristle at the possibility of ethnic Vietnamese victims of the Khmer Rouge being given special

recognition or treatment. These comments expose possible future issues at the ECCC related to genocide charges, which have only been alleged in relation to the treatment of Vietnamese-Cambodians and Cham Muslims due to the specialized intent requirement of the crime. It is possible that many ethnic Khmer Cambodians will feel that their suffering is being marginalized because Khmer people are not considered victims of genocide, but solely crimes against humanity.

Ieng Thirith's Fitness to Stand Trial

On the afternoon of 19 October, the Trial Chamber shifted gears and turned to the issue of Ieng Thirith's fitness to stand trial. The hearing consisted of questioning of consultative psychological experts and arguments by the Parties. This issue has been prominent in recent months, as Ieng Thirith's fitness has been put in serious doubt as a result of her Alzheimer's diagnosis.⁴ In its scheduling order, the Trial Chamber listed the topics it wished to explore during the hearing, including:

- i. May an accused be considered mentally unfit to stand trial if any one of the criteria for this determination identified in *Strugar*^[5] 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 89^{ter} (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?⁶

⁴ During the Trial Chamber's previous hearing on the fitness of Ieng Thirith and Nuon Chea, it was revealed that Ieng Thirith was been diagnosed with Alzheimer's disease by expert geriatrician Physician John Campbell. See, Randle DeFalco, *ECCC Trial Chamber Fitness Hearing: Ieng Thirith and Nuon Chea*, CTM Blog (1 Sept. 2011), available at <http://www.cambodiatribunal.org/blog/2011/09/eccc-trial-chamber-fitness-hearing-ieng-thirith-and-nuon-chea>.

⁵ *Prosecutor v. Strugar*, Judgment, Case No. IT-01-42-A (17 July 2008).

⁶ Scheduling Order, Trial Chamber, ECCC Doc. No. E129, pp. 4-5 (10 Oct. 2011).

These planned topics of conversation suggest that the Trial Chamber seriously doubts that Ieng Thirith is currently fit to stand trial and are actively searching for the best way forward. This portion of the hearing opened with questioning of the two expert witnesses by the Trial Chamber Judges. After Judge Non elicited an overview of the professional credentials of the two expert witnesses testifying on behalf of all four assigned experts, Judge Sylvia Cartwright took over questioning. During the first phase of questioning, Judge Cartwright elicited an overview of the process followed by the experts and their general conclusions. The experts examined Ieng Thirith on three occasions in September and consulted all other available information on her condition. To a large degree, the experts echoed the opinions and findings of previous consultative geriatrician John Campbell and thus, tended to confirm his Alzheimer's diagnosis.

All necessary symptoms of Alzheimer's disease were present in Ieng Thirith according to the experts' shared opinion. The experts did note that on one occasion Ieng Thirith appeared substantially focused and capable, though even on this occasion she evinced a tendency to stray from the topic of conversation and make confusing comments.

The experts also opined that Ieng Thirith's memory is declining and she currently has difficulty identifying close family members, such as her children, mother and her husband and co-accused, Ieng Sary, whom she referred to as her brother to the experts.

The experts also concluded that it is "very unlikely" that Ieng Thirith could be feigning dementia. They explained that they believe so because Ieng Thirith's abilities varied and even improved at times during their various examinations of her. The experts' opined that an intentional attempt to feign dementia would involve a consistent pattern of poor performance on evaluative tests, rather than fluctuation, especially involving periods of improved performance. The experts did however, note that it is impossible to be "one hundred percent certain" that Ieng Thirith is not feigning dementia.

The experts also opined that Ieng Thirith's dementia has progressed since 2009. The experts recommended that the staff caring for Ieng Thirith should be cognizant of her fluctuating abilities and moods and facilitate activities which she tends to enjoy, such as receiving a daily newspaper and seeing visitors.

The experts were asked to consider five points and comment on them in the order appointing them:

1. Does Ieng Thirith have the ability to understand the charges against her?
2. Does Ieng Thirith have an adequate level of understanding of court procedures on a general level?
3. Does Ieng Thirith have the ability to instruct counsel?
4. Does Ieng Thirith have the ability to testify?
5. Does Ieng Thirith have the ability to understand the consequences of a potential conviction?

1. Understanding the Charges

The experts opined that Ieng Thirith does have the capacity to understand the charges against her in a general and limited way. This is because over the course of the interviews Ieng Thirith made statements that demonstrated an understanding of the charges. For example, on one occasion she noted that crimes against humanity are especially serious. Ieng Thirith also made other general comments about murder, genocide, torture and religious persecutions that showed some minimal understanding of key legal concepts related to the charges she currently faces. However, it was clear that any understanding of legal concepts Ieng Thirith retains is rudimentary at best.

2. Understanding Court Proceedings

Regarding the second inquiry, the experts found that Ieng Thirith had considerable difficulty understanding the nature of the proceedings and especially the adversarial nature thereof. The experts opined that Ieng Thirith was not able to understand and retain information long enough to process it and react accordingly. Thus, the experts concluded that Ieng Thirith does not currently have the ability to understand court proceedings. This would make her presumptively unfit to stand trial according to the international standards laid out in *Strugar*.

3. Ability to Instruct Counsel

The experts found that as a general matter, Ieng Thirith was able to cooperate with her lawyers, whom she believes are assisting her. Nonetheless, the experts further opined that Ieng Thirith would have considerable difficulty with her memory and communication skills that would render it quite difficult for her to actively participate in her own Defense.

4. Ability to Testify

The experts opined that Ieng Thirith could generally understand and answer questions most times. Nonetheless, the experts also noted that this did not mean that the answers she provided would be on point and coherent. Thus, it appears that Ieng Thirith could possibly follow the procedure of questioning, but it would be very unlikely that she could provide answers of any evidentiary value.

5. Understanding the Consequences of a Conviction

Ieng Thirith was able to understand the consequences of being found “mad” (i.e. insane) when she showed an article stating that she has dementia. However, she refused to answer or discuss potential prison sentences. The experts were unsure whether her refusal was due to a lack of understanding or a mix of confusion and anger regarding the crimes she is accused of.

The “Finely Balanced” Conclusion of the Experts: Ieng Thirith is Unfit to Stand Trial

The conclusion drawn by the experts is that the Court’s decision regarding Ieng Thirith’s fitness will be a “finely balanced one,” (i.e. close call) but that on the “balance of the probabilities,” their unanimous opinion is that Ieng Thirith lacks sufficient mental capabilities to proceed to trial at this point in time. Also, the experts further concluded that potential treatment options are “unlikely” to render Ieng Thirith fit at any time in the future.

Judge Cartwright then asked questions related to potential future scenarios. Upon this questioning, the experts opined that Ieng Thirith’s conditions would likely interrupt the Case 002 trial should she be found fit because her cognitive abilities would fluctuate and she would need a large amount of assistance from her lawyers.

The experts further opined that it would be beneficial to review Ieng Thirith's cognition approximately every three months to assess the degree of change in her condition. This would also necessarily slow Case 002 trial proceedings.

After Judge Cartwright finished the general questioning of the experts, the other Trial Chamber judges were given an opportunity to pose additional questions.

The experts were asked about the degree of Ieng Thirith's decline since 2009 and responded that it appears to have been "some progression" but that there is no way of being certain the pace at which any one individual will decline once diagnosed with Alzheimer's disease. The experts did state that there is "evidence of decline" in Ieng Thirith's condition.

The experts also affirmed that Alzheimer's disease will invariably result in a general decline marked by increased dementia and noted that they have tested for other possible, reversible causes of dementia and found no evidence of such alternative possible causes.

The experts were also asked to comment on Ieng Thirith's signs of paranoid behavior. The experts stated that they found no evidence of delusions (defined by them as "fixed, unshakeable false beliefs") and that the comments made by Ieng Thirith interpreted as potential paranoia could be interpreted as normal responses (e.g. calling a co-accused a "traitor").

The first day of the hearing ended with the case against Ieng Thirith doubtful at best.

The second day of the hearing started with Ieng Thirith absent from the courtroom. Ieng Thirith's Defense counsel stated that she was unable to be present due to her health conditions, but that she had waived her right to be present at the hearing. The Chamber noted the waiver and gave the floor to the Defense to continue questioning of the experts.

Upon questioning by the Defense, the experts confirmed that their conclusions were substantially similar to those of Dr. Campbell. The experts also explained that after following Dr. Campbell's advice and cutting the number of medications Ieng Thirith has been receiving, there have been no significant changes in her cognitive functions.

The experts also observed that Ieng Thirith's cognitive function has apparently "moderately declined" since previous testing.

The experts clarified that although they believed Ieng Thirith could be marginally capable of fulfilling some of the *Strugar* fitness requirements,⁷ they were of the opinion that Ieng Thirith does not have the capacity to understand and follow the proceedings against her at the ECCC, primarily due to her memory deficiencies.

⁷ For an overview of the international requirements for fitness to stand trial, as laid out in *Strugar*, see Randle DeFalco, *What Happens if an Accused at the ECCC is Found Not Fit to Stand Trial?*, SEARCHING FOR THE TRUTH: MAGAZINE OF THE DOCUMENTATION CENTER OF CAMBODIA (24 Aug. 2011).

The questioning also shed light on some of the strange behaviors Ieng Thirith has exhibited in the recent past. During the interviews, Ieng Thirith thought that one of the Cambodian doctors was a family member and she made confused and strange comments during the evaluations at times as well.

After the Defense concluded its questioning, the Prosecution had an opportunity to question the experts. The Prosecution, as with Dr. Campbell, explored whether any condition other than Alzheimer's could be responsible for Ieng Thirith's dementia symptoms. The Prosecution asked whether "dementia" can be "cured." The experts explained that in the Khmer language there is no specific word for dementia and so the word for "insane" or "mental problems" is used instead. This oversimplification necessitated by the limitations of the Khmer language can cause confusion because in medical fields, dementia is a broad term which can be a symptom of numerous different underlying causes. Some of these conditions can be cured, but there was no evidence of any causal factor regarding dementia other than Alzheimer's. This confusion over terminology may be adding to the general skepticism Cambodian observers appear to retain regarding whether Ieng Thirith is truly unfit to stand trial.

The experts further opined that there are limited ameliorative steps which can be taken to improve Ieng Thirith's memory and cognition, but these steps are a far cry from being a cure. This is because the cause of Alzheimer's is unknown and the disease causes damage and death of brain cells, thereby impairing cognition.

Following the Prosecution the Civil Parties asked several questions, mostly focusing on fluctuations in Ieng Thirith's cognitive state and the degree to which she can still communicate with her lawyers.

Following questioning, each Party presented its position to the Trial Chamber regarding Ieng Thirith's general fitness and the five specific questions posed by the Chamber.

The Defense teams for Ieng Sary and Nuon Chea both expressed serious doubts that Ieng Thirith is fit to stand trial and were supportive of the possibility of severing Ieng Thirith from Case 002, citing their clients' right to an expeditious trial. Nuon Chea's lawyer also requested that his case be severed from Case 002, so that the trial can move slower in order to accommodate Nuon Chea's claimed medical limitations.

As for Ieng Thirith's position, lead co-lawyer Diana Ellis summarized by arguing that the medical evidence is "unequivocal" and demonstrates Ieng Thirith is unfit to stand trial.

The Prosecution's summation was a mild surprise, arguing that the Trial Chamber cannot presently come to a firm decision about Ieng Thirith's fitness. Instead, the Prosecution argued that the medical evidence provides "indicia of difficulties" should Ieng Thirith be brought to trial, but that there is a chance her condition will improve. The Prosecution argued that currently, "we do not know how quickly that disease has progressed" and that "it appears" Ieng Thirith's current cognitive deficiencies "may be overcome."

The Civil Parties argued that Ieng Thirith should be found fit and proceed to trial, relying primarily on some of the statements Ieng Thirith apparently made to the experts during their evaluations of her. The Civil Party lawyers argued that Ieng Thirith demonstrated an understanding of the charges she is facing, an understanding of the current evaluation of her fitness that is ongoing and that Ieng Thirith could communicate effectively with her Defense counsel.

Conclusion

Despite the late and seemingly half-hearted protestations of the Civil Parties and Prosecution, the Trial Chamber judges appeared to be leaning heavily towards finding Ieng Thirith unfit to stand trial. Much of the questioning centered on demonstrating the practical disadvantages of keeping Ieng Thirith as part of the main Case 002 trial and hearing arguments about whether Ieng Thirith should be removed to a separate case. If this happens, it is extremely doubtful that Ieng Thirith will ever proceed to trial. The ECCC has only one Trial Chamber and if the Court is serious about expediting Case 002 proceedings, Ieng Thirith's potential trial would not occur until presumably after the close of the first Case 002 trial. By this time, one would assume that any doubt as to Ieng Thirith's fitness would be erased by the progression Alzheimer's disease and she would be firmly unfit to stand trial. Thus, it appears that the Trial Chamber may simply remove Ieng Thirith from Case 002 to expedite matters, as this action would allow the case to continue on schedule for opening arguments on 21 November regardless of whether the Trial Chamber has reached a final determination regarding Ieng Thirith's fitness and a resolution to her custody. Answers to lingering questions should be provided by the ECCC shortly, as it is pressed to resolve all pre-trial matters quickly ahead of opening arguments in Case 002.

END.