

DOCUMENTATION CENTER OF CAMBODIA

MAGAZINE: Searching for the Truth, August 2011

What Happens if an Accused at the ECCC is Found Not Fit to Stand Trial?

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I. The Threat Some Case 002 Accused May Not be Fit to Stand Trial

From the earliest negotiations leading to the creation of the Extraordinary Chambers in the Courts of Cambodia (ECCC), there have been concerns about the health of the accused in the Court's main trial, known as Case 002. The four accused—Nuon Chea, Ieng Sary, Khieu Samphan and Ieng Thirith—are all of advanced age and the possibility that some or all of them will not survive long enough to be judged has been an ever-present possibility. Already both Nuon Chea and Ieng Thirith have argued that they should be excused from trial due to failing health and Ieng Sary has requested special accommodations based on his ill health. Moreover, in a recent submission to the Court, Ieng Thirith's defence team stated that its members cannot "take instructions from" Mrs. Ieng and has therefore been formulating Mrs. Ieng's defence strategy without her input or assistance. Mrs. Ieng's national defence counsel Phat Pouy Seang confirmed that his client's mental health problems have become "more serious" over the past year and ECCC spokesman Lars Olsen has confirmed that further "expert assessment of Ieng Thirith's mental fitness to stand trial was needed." Thus, it appears entirely possible that the Trial Chamber could find one or more of the accused in Case 002 unfit prior to the start of trial proceedings. However, if one or more accused in Case 002 are found unfit, it is unclear what the result of such a decision would be in practical and legal terms.

II. How Fitness is Assessed at the International Level

Courts prosecuting international crimes have dealt with issues of the fitness of accused since the inception of modern international criminal law in the wake of World War II. At the Nuremberg International Military Tribunal (IMT) in Germany, concerns related to the fitness of three accused were raised. The Tribunal ordered fitness appraisals of accused Streicher, Krupp von Bohlen and Hess. The analysis by the IMT however, did not provide clear criteria for evaluating fitness, but involved posing sets of basic questions specific to the individual accused (e.g. is he "sane or insane") to medical consultants.

Fitness to stand trial at the international level was not again addressed at the international level until 2003 in the case of Prosecutor v. Strugar at the International Tribunal for the former Yugoslavia (ICTY) and shortly thereafter in the case of Prosecutor v. Josep Nahak at East Timor's Special Panels for Serious Crimes. These cases, unlike the IMT cases discussed above, provided clear standards to guide international courts in assessing the fitness of accused. According to Strugar and Nahak, the key determination to be made regarding fitness to stand trial is whether the accused can "exercise effectively his rights in the proceedings against him." The ICTY Appeals Chamber explained in Strugar that in order to effectively exercise his or her rights, an accused must be able to able to "meaningfully":

1. Plead
2. Understand the nature of the charges
3. Understand the course of the proceedings (i.e. follow the trial proceedings)
4. Understand the details of the evidence
5. Instruct counsel
6. Understand the consequences of the proceedings (i.e. judgment and possible incarceration)
7. Testify

Determining an accused's fitness thus entails a legal determination based on a consultative medical assessment. If it is more likely than not (referred to as the "balance of the probabilities") that the accused lacks sufficient capabilities, the Court will find him or her unfit to stand trial and the case cannot move forward until such time as the accused is rehabilitated.

III. Mental, Rather than Physical, Capabilities Key to Fitness Determinations

The requirement that the accused be fit to stand trial is intimately associated with minimum international fair trial standards. If an accused is considered unfit, he or she is considered legally incapable of participating in his or her own defence, making any prosecution of an unfit accused essentially a trial in absentia ("in the absence" of the accused). Trials in absentia are forbidden at the ECCC by Internal Rule 81[1] and Article 35 new of ECCC Law, which incorporates the fair trial rights enshrined in the International Covenant for Civil and Political Rights (ICCPR). Moreover, if an accused is legally unfit to stand trial, such a finding necessarily implicates other fair trial rights guaranteed by Article 35 new, such as an accused's rights to "communicate with counsel of their own choosing," "be tried in their own presence and to defend themselves in person" and "examine evidence against them."

As evidenced by the specific rights protected by the requirement of a legally fit accused and the Strugar requirement that an accused be able to “effectively exercise” these rights, the key determination in most competency inquiries at the international level is whether an accused retains the mental rather than physical capacity to proceed to trial. Accommodations can be readily made for accused with even severe physical limitations and thus physical impairments alone rarely result in the conclusion that an accused is legally unfit to stand trial. Indeed, accused with serious physical health problems have been routinely prosecuted for international crimes at the ICTY and other international courts, and Germany has prosecuted numerous geriatric former Nazis in its domestic criminal courts. Most recently, Ratko Mladic was found fit to be transferred to the Hague to face trial at the ICTY, despite being in poor physical health when captured after suffering an apparent stroke. The only accused found physically completely unfit to stand trial have suffered from terminal diseases with a life expectancy of mere months.

While courts have readily addressed the needs of accused with physical limitations, they have struggled to assess the fitness of accused with reduced mental capacities. Courts have struggled with the subjective nature of mental health evaluations, determining the minimum degree of mental capacity necessary for an accused to “effectively exercise” his or her rights and also with what to do with accused who are found indefinitely mentally unfit to stand trial. These challenges are exemplified by the ICTY cases of Strugar and Prosecutor v. Vladimir Kovacevic. In Strugar, the Trial Chamber eventually determined that the accused, who suffered from a variety of mental and physical health issues, was fit to stand trial, but required extensive tests and expert evaluations of the accused before reaching a conclusion as to fitness. Conversely, ICTY Trial Chamber I concluded that Kovacevic was unfit to stand trial due to unspecified mental health issues (later described as “paranoid psychosis”). Specifically, the Chamber found that Kovacevic was unable to plead, understand the charges against him, understand the course of the proceedings, understand the significance of the evidence, instruct counsel, understand the consequences of the proceedings, or testify. In other cases involving unfit accused who were provisionally released, such accused died shortly after release, providing a final resolution to the issue. Kovacevic however, was found indefinitely unfit, yet was not terminally ill.

The primacy of minimum mental capabilities in legal fitness evaluations raises special concerns at the ECCC related to Ieng Thirith. Mrs. Ieng has been known for her loud outbursts for years, but her behaviour has seemingly become much more erratic in recent years. Moreover, Mrs. Ieng’s behaviour during recent ECCC hearings has vacillated between aggression, confusion and disinterested silence. This behaviour, along with the recent statements of Mrs. Ieng’s defence team mentioned above, raise serious concerns regarding the mental health of Ieng Thirith. These concerns are heightened by the history of mental illness in Mrs. Ieng’s family. Ieng Thirith’s elder sister, Khieu Ponnary, is widely believed to have suffered from schizophrenia. Khieu Ponnary was Pol Pot’s first wife and a prominent intellectual in pre-Khmer Rouge Cambodia. She was French-educated along with her sister and considered a leading teacher and scholar in Cambodia. However, sometime prior to 1975, Khieu Ponnary’s mental health began to

deteriorate and she withdrew from public life. Khieu Ponnary eventually was cared for by Ieng Thirith and Ieng Sary until her death and may have suffered from serious mental health problems for upwards of thirty years when she died in 2003.

IV. The Effect of Being Found Unfit to Stand Trial

In theory, the result of finding an accused unfit to stand trial is simple. At both international tribunals and in most national criminal courts, custody of an unfit accused is typically transferred to a suitable treatment facility, where he or she receives medical attention until such time as fitness is restored. During the interim, the trial process remains merely suspended, with the expectation that, if and when the accused becomes fit, the proceedings will resume immediately where they left off. For example in Kovacevic, the ICTY found the accused indefinitely unfit to stand trial “without prejudice to any future criminal proceedings against him should his mental health condition change.”

In reality, however, it is rare that an accused suffers from a short-term, non-terminal affliction resulting in temporary, curable unfitness to stand trial. More often, a legally unfit accused suffers from a protracted or degenerative illness, with no cure or end in sight other than eventual death. For example, at the IMT, accused Krupp von Bohlen, a German war industrialist who was accused of using concentration camp internees as slave labour at his factories during World War II, was declared unfit to stand trial in shortly after his indictment in 1945. Von Bohlen had suffered a debilitating stroke in 1941 leaving him bedridden and partially paralyzed. After indicting Von Bohlen, but prior to arresting him, the IMT appointed consultative US military physicians who opined that Von Bohlen was “not mentally competent to stand trial” and had “lost all capacity for memory, reasoning or understanding of statements made to him.” The physicians also opined that Von Bohlen could not be transported to the Tribunal for trial without endangering his life. Von Bohlen was never arrested but remained under indictment until his death in 1950.

Accused Rudolf Hess, a higher profile Nazi figure, also raised issues of mental competency at the IMT. Counsel for Hess requested an evaluation of the accused, arguing that he had “completely lost his memory.” Evaluating physicians filed three reports which concluded that Hess was sane, but had suffered memory loss due to “hysteria.” In a surprise turn, Hess declared himself fit to stand trial at his fitness hearing and claimed that he had been feigning amnesia for tactical reasons. Nonetheless, doubts lingered, even among the case’s prosecuting attorneys, regarding Hess’s true capacity to stand trial until his eventual suicide in prison in 1987.

The Kovacevic case at the ICTY is also illustrative of the difficulty in assessing mental competence to stand trial and finding an appropriate resolution for an unfit accused. Kovacevic was indicted in March of 2001 and initially found unfit to stand trial in June of 2004, when he was granted an initial provisional release for a period of six months in order to travel to Serbia and Montenegro to receive medical treatment. Only following an

extension of this provisional release and numerous tests and expert reports was Kovacevic declared indefinitely unfit to stand trial in April of 2006. In November of 2006, the ICTY granted the prosecution's request that Kovacevic be transferred to Serbia, where he could be prosecuted domestically should he ever become fit to stand trial. At this time Kovacevic was transferred to a secure wing of the Military Medical Academy in Belgrade for inpatient treatment. Serbian prosecutors indicted Kovacevic in the District Court of Belgrade in July of 2007. The Court however, found that Kovacevic continued to be unfit to stand trial in November of 2007 and he remained in the custody of the Medical Academy. Since this time, there have been no announcements of additional plans to prosecute Kovacevic and it is likely that he will remain in the custody of the Medical Academy indefinitely, possibly until his eventual death.

The legal odyssey of Vladimir Kovacevic demonstrates the challenges facing courts tasked with trying individuals accused of extremely grave crimes who suffer from long-term debilitating health problems. These challenges are amplified within the context of the ECCC, as Cambodia suffers from a lack of medical facilities generally and an extreme lack of mental health facilities specifically. Perversely, this lack is one of the major legacies of the Khmer Rouge regime, which destroyed the country's medical infrastructure and systematically murdered the nation's health care professionals.

V. Possible Outcomes if Accused are Found Unfit to Stand Trial at the ECCC

Unconditional release is a rare and extreme outcome when an accused is found unfit to stand trial. Von Bohlen was never taken into custody because he was already bedridden and senile when indicted by the IMT and never regained his faculties before his death in 1950. Comparably, at the ICTY, accused Dorde Dukic was indicted and then released by the Tribunal in late April of 1996 because he suffered from terminal cancer. The Tribunal allowed Dukic to return to Serbia to be with his family and reserved the right to prosecute him should he have a miraculous recovery. Dukic died less than three months after his release on July 3, 1996. The cases of Von Bohlen and Dukic are the exceptional in that they involve completely incapacitated accused with terminal prognoses.

When an accused is found unfit to stand trial, but their condition is not terminal—at least in the short term—courts typically transfer the accused to the custody of a suitable treatment facility pending their rehabilitation to legal fitness. Thus, theoretically, if any accused at the ECCC is found unfit to stand trial, he or she should be transferred to the custody of an appropriate medical facility for treatment until such time that his or her fitness is restored. This custody can last indefinitely, as exemplified by the case of Vladimir Kovacevic.

In reality however, it may be impossible for an unfit accused to be rehabilitated to fitness and thereafter returned to trial at the ECCC for three reasons. First, a suitable medical facility may not exist in Cambodia, especially if an accused is found to suffer from mental health issues. Second, due to the advanced age of all accused in Case 002 it is doubtful that fitness could be restored, even if world-class medical treatment is provided.

Instead, it is highly likely that any accused found to be unfit to stand trial will remain legally incapacitated until his or her eventual death. Finally, the ECCC is a temporary judicial organ with a limited mandate and in the unlikely event that a Case 002 accused returns to fitness after being declared unfit; the Court may simply no longer exist to prosecute the accused.

Realistically, if an accused is found unfit at the ECCC, the most probable outcome is that he or she will be provisionally released with significant restrictions placed on his or her liberty. Such release would likely be to the custody of a medical treatment facility. Once such a release occurred however, the chances that an unfit accused would be returned to the ECCC to face trial appear extremely slim. Instead, due to their advanced age, it is more likely that the health of the accused would degenerate, rather than regenerate, eventually resulting in death without being tried. This process could be protracted, especially in the case of Ieng Thirith, whose mental health has deteriorated according to her counsel. It is rare that the mental faculties of individuals with degenerative mental health disorders improve over time. Nonetheless, individuals living with debilitating mental health problems, such as Ieng Thirith's sister, Khieu Ponnary, often survive for many years without regaining any mental capacity.