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ជាតិ សាសនា ព្រះមហាក្សត្រ

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

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

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

អង្គជំនុំជម្រះតុលាការកំពូល

Supreme Court Chamber
Chambre de la Cour suprême

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Case File/Dossier N°. 002/19-09-2007-ECCC-TC/SC(16)

Before: Judge KONG Srim, President
Judge Chandra Nihal JAYASINGHE
Judge Agnieszka KLONOWIECKA-MILART
Judge MONG Monichariya
Judge Florence Ndepele Mwachande MUMBA
Judge SOM Sereyvuth
Judge YA Narin

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DECISION ON REQUESTS BY THE TRIAL CHAMBER AND THE DEFENCE FOR IENG THIRITH FOR GUIDANCE AND CLARIFICATION

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1. **THE SUPREME COURT CHAMBER** of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea between 17 April 1975 and 6 January 1979 (“Supreme Court Chamber” and “ECCC”, respectively) is seized of a motion filed before the Trial Chamber on 3 January 2013 by the Defence for IENG Thirith (“Defence”) requesting that the Trial Chamber provide clarification as to the implementation of the regime of judicial supervision imposed on IENG Thirith by the Supreme Court Chamber on 14 December 2012 (“Request” and “Decision on Supervision”, respectively).¹ The Trial Chamber forwarded the Request to the Supreme Court Chamber on 26 March 2013 (“Decision on Implementation”).²

2. In its Decision on Supervision, the Supreme Court Chamber ordered IENG Thirith to abide by the following measures of judicial supervision:

- (1) To inform the Trial Chamber or an official designated by it prior to any change of her current residential address;
- (2) Not to leave the territory of the Kingdom of Cambodia without the authorisation of the Trial Chamber;
- (3) To undergo six-monthly medical examinations by medical practitioners to be appointed by the Trial Chamber;
- (4) To make herself available for security checks to be performed by judicial police once a month, in order to verify compliance with the above-mentioned measures of judicial supervision. Alternatively, the Trial Chamber may accept that [IENG Thirith] provide, through her general guardian, a monthly report to the Trial Chamber or an official designated by it, attesting to the compliance with the above-mentioned measures of judicial supervision.³

3. The Supreme Court Chamber also ordered that IENG Thirith’s passport and her identification card be returned to her general guardian, with the condition that these not be used for the purpose of international travel, without prior authorisation from the Trial Chamber.⁴

4. In addition, the Supreme Court Chamber ordered the judicial police to conduct a monthly check at IENG Thirith’s home address, in order to (i) verify that she still resides at that address and has not left the country, and (ii) report any threat to her safety, in accordance with the

¹ IENG Thirith Defence Request for Clarification of the Execution of the Supreme Court Chamber’s ‘Decision on Immediate Appeal against the Trial Chamber’s Order to Unconditionally Release the Accused IENG Thirith’, E138/1/10/1/5/8, 3 January 2013; Decision on Immediate Appeal against the Trial Chamber’s Order to Unconditionally Release the Accused IENG Thirith, E138/1/10/1/5/7, 14 December 2012.

² Decision on the Implementation of the Supreme Court Chamber’s “Decision on Immediate Appeal against the Trial Chamber’s Order to Unconditionally Release the Accused IENG Thirith” E138/1/10/1/5/8, E138/1/10/1/5/8/1, 26 March 2013.

³ Decision on Supervision, pp. 45-46.

⁴ Decision on Supervision, p. 46.

obligation of the government of Cambodia to ensure her security and report to the Trial Chamber.⁵

5. The Supreme Court Chamber further directed the Office of Administration of the ECCC to provide all necessary administrative support to implement the Decision on Supervision, including by notifying it to the relevant Cambodian authorities, for their action.⁶

6. The Defence thereafter requested “the Trial Chamber to provide clarification as to the manner in which the regime of judicial supervision imposed on [IENG Thirith], as ordered by the Supreme Court Chamber [...] is going to be given effect”.⁷ In particular, the Defence sought detailed information as to the manner in which notifications are to be given,⁸ medical examinations are to take place,⁹ and security checks are to be performed.¹⁰

7. In its Decision on Implementation, the Trial Chamber rejected the Request, finding that it has no jurisdiction “to express an opinion on, or clarification of,” a decision of the Supreme Court Chamber.¹¹ The Trial Chamber then forwarded the Request to the Supreme Court Chamber “for guidance and further directions”.¹² Moreover, the Trial Chamber informed the Supreme Court Chamber of the measures which it intended to take in order to implement the Decision on Supervision, “subject to any further guidance” the Supreme Court Chamber may provide.¹³ In addition, the Trial Chamber presented its own request for clarification to the Supreme Court Chamber on a small number of matters, namely whether the periodic medical examinations are to be limited to IENG Thirith’s cognitive condition, and if not, who will fund the more general medical examinations, as well as what are the appropriate sanctions to be imposed in the event of a breach of the terms of IENG Thirith’s judicial supervision, and against whom such sanctions might be ordered.¹⁴

8. At the outset, the Supreme Court Chamber notes that there is no legal basis for the Trial Chamber to “forward[]” the present Request. In divesting itself of jurisdiction to dispose of the Request, the Trial Chamber relies on Article 606(1) of the Cambodian Code of Criminal

⁵ Decision on Supervision, p. 46.

⁶ Decision on Supervision, p. 46.

⁷ Request, para. 1. *See also* Request, paras. 7, 29.

⁸ Request, paras. 8, 24-28.

⁹ Request, paras. 9-14.

¹⁰ Request, paras. 15-23.

¹¹ Decision on Implementation, para. 6, p. 4.

¹² Decision on Implementation, para. 7, p. 4.

¹³ Decision on Implementation, paras. 7-8, p. 5.

¹⁴ Decision on Implementation, para. 9, p. 5.

Procedure,¹⁵ which provides that “[a]ny ambiguity in the interpretation of a judicial decision shall be referred to the court which made that decision”. In this respect, the Supreme Court Chamber notes that the Trial Chamber mischaracterizes the Request as constituting a petition for clarification of ambiguities in the interpretation of the Decision on Supervision. Rather, the Request is clear that it constitutes a petition for logistical specificity as to the Trial Chamber’s implementation of the Decision on Supervision. The manner in which the Trial Chamber intends to give effect to the orders contained in the Decision on Supervision can, by definition, only be expressed by the Trial Chamber. This is demonstrated in the Decision on Implementation itself, wherein the Trial Chamber informed the Supreme Court Chamber of the measures which it “envisages”¹⁶ taking in order to implement the Decision on Supervision. In this way, the Trial Chamber effectively granted the Request and provided the information sought by the Defence.

9. A review of the measures proposed by the Trial Chamber reflects that it is prepared to address the Defence’s concerns, and the said measures do not evince any *prima facie* unreasonableness. In particular, the Trial Chamber gave more specifics about the manner in which notifications are to be given,¹⁷ medical examinations are to take place,¹⁸ and security checks are to be performed.¹⁹ The Decision on Supervision is therefore sufficiently clear to elicit appropriate action and there is as such no basis or necessity for the Supreme Court Chamber to provide any further guidance.

10. As to the Trial Chamber’s own request for clarification, the Supreme Court Chamber considers that the questions posed similarly do not disclose any ambiguity in the Decision on Supervision, as primarily evidenced by the Trial Chamber’s ability to devise appropriate implementing measures and to make appropriate inferences. Whereas the Decision on Supervision provides the necessary framework for the measures imposed, its implementation has been delegated to the Trial Chamber, under whose supervision IENG Thirith remains, which is best placed to devise such logistical arrangements as appropriate, and which is duty-bound to fully implement the Decision on Supervision in good faith and in a timely manner. For this, it may be necessary for the Trial Chamber to issue implementing orders, consult the parties, and to coordinate with the Office of Administration for any necessary administrative support.

¹⁵ Decision on Implementation, para. 6, fn. 3.

¹⁶ Decision on Implementation, para. 8.

¹⁷ Decision on Implementation, para. 8 (Section 3.1.1.(a)).

¹⁸ Decision on Implementation, para. 8 (Section 3.1.2.(a)-(b)).

¹⁹ Decision on Implementation, para. 8 (Section 3.1.3.(a)).

11. In the interest of avoiding any further delays, however, the Supreme Court Chamber therefore confirms that the six-monthly medical examinations are aimed at periodical verification of what occasioned the finding of IENG Thirith's unfitness to stand trial, that is, her impaired cognitive condition.²⁰ The Decision on Supervision is clear on this point, namely that the examinations are aimed at ascertaining whether IENG Thirith's cognitive condition has improved or worsened and to assess the need for treatment.²¹ There is no reasonable basis to infer that the medical examinations should exceed this purpose.²²

12. As to the Trial Chamber's request for clarification in relation to "appropriate sanctions", the Supreme Court Chamber notes that this is a hypothetical question, unrelated to any ambiguity in the Decision on Supervision. There is therefore no explicit basis for the Supreme Court Chamber to address this issue. Nonetheless, the Supreme Court Chamber notes that similar processes for the clarification or determination of legal issues are not uncommon at the international level.²³ On this basis, the Supreme Court Chamber considers that, where the interests of justice so require, it may grant a request for legal guidance.

13. The Supreme Court Chamber notes that issues raised by the Trial Chamber are governed by, and involve the application of codified Cambodian law, that the Trial Chamber is presumed

²⁰ Decision on Implementation, para. 9 (Section 3.2.1.(a)).

²¹ *See, in particular*, Decision on Supervision, para. 67 ("At this stage where the Accused has just been released from the ECCC detention facility, medical assessments would allow to verify that the Accused's condition is genuine, to monitor any change in such and to provide for the possibility of administering new treatments if such become available.").

²² The Trial Chamber suggests that confusion arises from the wording of paragraph 68 of the Decision on Supervision concerning IENG Thirith's "generally frail condition". *See* Decision on Implementation, para. 9 (Section 3.2.1.(a)). A reading of paragraph 68 as a whole makes it clear that the Supreme Court Chamber's reference to IENG Thirith's general medical condition is part of a balancing exercise between IENG Thirith right to privacy and the interest in subjecting her to periodic medical examinations of her cognitive condition. The Supreme Court Chamber therefore makes such reference in order to explain that the court-ordered six-monthly medical examinations concerning her specific cognitive condition would be minimally intrusive given that she is already in need of other medical assistance related to her general health.

²³ *See* Rules 68(G) and 176bis(A) of the Rules of Procedure and Evidence of the Special Tribunal for Lebanon; Rule 72 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone; *Prosecutor v. Thomas Lubanga Dyilo*, Clarification, 14 May 2007, Case No. ICC-01/04-01/06-904 (OA 8) *and, in the same case*, Appeals Chamber's Clarification, 19 October 2006, Case No. ICC-01/04-01/06-590 (OA 4); *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2, Decision on Defence Motion to Clarify, 15 January 1999; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54, Decision on Motion by Prosecution for Clarification or Alternative Relief, 25 January 2002; *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84, Decision on Motion for Clarification of the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings and for Extension of Time, 22 November 2005. Common law practice also provides for appeals 'by way of case stated', which is a statement of facts prepared by one court for the opinion of another n a appoint of law. The process of appeal takes place pursuant to a request made by a lower court at the behest of the parties. The process has been used on a number of occasions before English and Welsh courts. *See, e.g.*, *Chambers v. DPP* [2012] EWHC 2157; *DPP v. Bayer* [2004] 1 Cr. App. Rep. 493. Similar processes are also found in the Republic of Ireland (*see* Courts (Supplemental Provisions) Act 1961, s. 52), New Zealand (Summary Proceedings Act 1957, s. 104; *Radhi v. Police* [2013] NZHC 163), and Australia (*see* Federal Court of Australia Act 1976, s. 26). In addition, national courts in the European Union are able to request clarification on points of EU law from the European Court of Justice. *See* Article 267 of the Treaty on the Functioning of the European Union.

to know. Pursuant to the rules of statutory interpretation, legal provisions ought to be interpreted in such a way that they may have effect.²⁴ It is all the more important considering that judicial supervision constitutes a less restrictive measure to detention and as such, in accordance with the Cambodian Constitution, should be considered by the court even *proprio motu* in respect of any detained person, as soon as the circumstances permit.²⁵ Therefore, as a matter of general significance, and in the interest of avoiding any further delays or undue negation of the application of judicial supervision to an accused, the Supreme Court Chamber will accommodate the Trial Chamber's search for guidance. The Supreme Court Chamber stresses, however, that it may only answer the Trial Chamber's question in abstract terms of applicable law.

14. The Supreme Court Chamber recalls that “any eventual difficulty in enforcing sanctions against [IENG Thirith] should she not adhere to obligations imposed by the court does not vacate the obligation as such.”²⁶ Violations of conditions of judicial supervision may entail multiple consequences under Rule 35 of the Internal Rules and under Cambodian law on criminal procedure.²⁷ In the material sense, responsibility for such violations is not conditioned upon being fit to stand trial or even possessing the capacity for civil actions, but upon the practical ability to comprehend and control one's actions at the time of impugned act or omission.²⁸ Nor does a finding of unfitness or incapacitation have the effect of exempting an accused from any future judicial process.²⁹ Issues of fitness and representation in such future cases need to be

²⁴ See, e.g., *Lampkins v. Commonwealth*, 4 Va. App. 709, 607 S.E.2d 722 (2005): “It is a well-established rule of construction that a statute ought to be interpreted in such a manner that it may have effect, and not found to be vain and elusive”, quoting *McFadden v. McNorton*, 193 Va. 455, 461, 69 S.E.2d 445, 449 (1952).

²⁵ Despite this, the Trial Chamber appears to continue to struggle with the application of judicial supervision in the present case. See Decision on Immediate Appeal against the Trial Chamber's Order to Release the Accused IENG Thirith, E138/1/7, 13 December 2011, paras. 44-48.

²⁶ Decision on Supervision, para. 62.

²⁷ See, e.g., Article 230 of the Cambodian Code of Criminal Procedure (“If the charged person intentionally evades the obligations of judicial supervision, the judge can decide to provisionally detain the charged person regardless of the prescribed term of imprisonment for the offense and even though the charged person has already been provisionally detained for the maximum period [...] Provisional detention decided under this Article may not exceed 4 months for an adult and 2 months for a minor.”).

²⁸ See, *per analogiam*, Article 31 of the Cambodian Criminal Code (“A person who, at the time he or she committed an offence, was suffering from a mental disorder which destroyed his or her capacity to reason, shall not be criminally responsible. A person who, at the time he or she committed an offence, was suffering from a mental disorder which diminished his or her capacity to reason, shall still be criminally responsible. However, the court shall take this into account when it decides the penalty. A person who, at the time he or she committed an offence, was suffering from a mental disorder resulting from the consumption of alcohol, drugs, or prohibited substances, shall still be criminally responsible.”).

²⁹ This principle is shared by major legal systems. Under French law, for instance, criminal liability must be determined on a case-by-case basis, regardless of whether an accused has been found unfit to stand trial in other proceedings, or whether he or she is under guardianship. See Article 122-1 of the French Criminal Code. See also Bernard Bouloc, *Droit pénal général*, Paris, Dalloz, 20th ed., 2007, para. 420, stating: “*Il n'existe pas en droit pénal de présomption de trouble psychique ou neuro-psychique comme en droit civil où, en cas de mise en tutelle d'un incapable majeur, tous les actes passés après le jugement d'ouverture de la tutelle sont nuls de plein droit, même s'ils ont été passés dans un intervalle lucide. Que le délinquant soit en tutelle ou non, interné dans un asile d'aliénés*”.

considered autonomously, whereas facts established in these prior proceedings are considered on their probative value.

15. Any act objectively consisting of a violation of the terms of judicial supervision would therefore need to be tested for the presence of subjective elements. In the case of a person with impaired cognitive function, the defence of lack of comprehension of such terms is indeed very likely, but cannot be taken for granted. Therefore, while sanctions are available under the Cambodian Code of Criminal Procedure, their imposition in practice will require an assessment of questions of liability, as well as of necessity and proportionality in the given circumstances. As for recourse under Rule 35 of the Internal Rules, even in the absence of subjective elements, if the violation of measures of judicial supervision can be deemed to constitute conduct objectively amounting to interference with the administration of justice, measures of an administrative nature may be ordered in order to cease such interference or prevent its re-occurrence.³⁰

ou en liberté, dans tous les cas, il appartient au juge répressif de décider s'il était ou non sous l'empire d'un trouble psychique ou neuro-psychique au moment où il a commis l'infraction. La détermination de la perte du libre arbitre est donc une question de fait, laissée à l'appréciation et à la décision souveraine des juges du fond." However, before a judgement on the merits can be issued on a criminal offense against an accused under guardianship, the accused must undergo a medical evaluation to determine his or her criminal liability at the time the offense was committed. See Article 706-115 of the French Code of Criminal Procedure. In addition, Articles 706-113, 114 and 116 of the French Code of Criminal Procedure ensure effective legal representation of an incapacitated accused facing criminal charges, and state that an *ad hoc* guardian may be appointed by the Investigating Judge or the Prosecutor if there are reasons to believe that the guardian participated in the commission of the offense. Similarly, under German law, decisions rendered by a court in a certain trial proceedings generally only bind the parties of the respective trial, and do not establish a fact for all prospective future trials. The respective court may utilize the former decision as an indicator for its decision in a new trial, but this does not exempt the judge from examining the circumstances prevailing at the time of the new decision. See Bundesgerichtshof, 17 June 2008, 4 StR 77/08, NStZ 2008, 685 and Bundesgerichtshof, 09 March 2010, 4 StR 640/09, NStZ 2010, 529. A guardian appointed for an incapacitated person remains a general guardian in criminal proceedings and is therefore responsible for the hiring of a defence lawyer. See *Schwab*, in: Muenchener Kommentar, BGB. Sect. 1896, para. 101. In England and Wales, passive legal capacity irrespective of fitness to plead is even more outright in that if the judge finds that the defendant is unfit to plead, the jury will decide whether the defendant did the act or made the omission charged against him. See Section 4A, Criminal Procedure (Insanity) Act 1964. See also Legal Guidance on mentally disordered offenders of the Crown Prosecution Service and discussion on Diversion and Public Interest Considerations in prosecuting of the mentally disordered. Under the Mental Capacity Act 2005, the "court may make such [...] orders or give such directions, and confer on a deputy such powers or impose on him such duties, as it thinks necessary [for the purpose of managing and administering the patient's property and affairs, extending in particular to] [...] the conduct of legal proceedings in [the patient's] name or on [the patient's] behalf".

³⁰ See Decision on NUON Chea's Appeal against the Trial Chamber's Decision on Rule 35 Applications for Summary Action, E176/2/1/4, 14 September 2012, paras. 44 ("[O]ther than criminal acts covered by Cambodian law, the framework of Rule 35 encompasses the power to 'take measures necessary to ensure the integrity of proceedings, which ultimately maintain respect for justice'. [...] [I]t is reasonable to interpret Rule 35 as applicable to a wider set of corrective responses that are administrative in nature. [...] These administrative sanctions still must comport with the basic principles of necessity and proportionality") and 45 ("The Supreme Court Chamber considers, however, that Rule 35 also serves the overarching goal of ensuring an effective and fair trial. In this respect, the duty of the court is not just to punish the interference with the administration of justice, but also to stop on-going interference and prevent its potential occurrence. [...] It is therefore reasonable to construe, *a majori ad minus*, that the ECCC may resort to the procedures under Rule 35 to apply not only the *sensu stricto* punitive

16. The Supreme Court Chamber emphasises that the regime of judicial supervision over IENG Thirith was crafted with consideration of the difficulties that she could face in comprehending and abiding by it.³¹ For this reason, the Supreme Court Chamber favoured “as much as possible measures that require little involvement, if any, from [IENG Thirith] or where assistance to [her] can be reasonably provided” in addition to imposing “safeguards [...] warranted to facilitate and ensure respect of court[-]imposed obligations.”³² Particular consideration was given to the fact that IENG Thirith’s appointed guardian (her daughter, IENG Vichida) expressed her willingness to assist IENG Thirith in abiding by the court-imposed measures. Against this background, the Supreme Court Chamber further recalls that “guardian duties include assisting the person under guardianship in the fulfilment of public law obligations, and does not exclude obligations arising in the area of criminal law.”³³ Concretely, where the Trial Chamber requires IENG Thirith’s availability for any reason, e.g. for court-ordered medical examinations, it may issue orders for her appearance, which the guardian is then obligated to facilitate. Such orders result in IENG Thirith being legally considered as a “detainee”,³⁴ whereupon a person facilitating her (hypothetical) escape could be held criminally responsible.³⁵ Also, if the Trial Chamber loses trust in IENG Thirith’s current guardian for any reason, it may address the municipal court to assist in replacing the guardian with another, or appointing an additional guardian or a supervisor to the guardian.³⁶ In any event, the focus in the present case should not be on hypothetical sanctions, but on taking advantage of IENG Thirith’s and her guardian’s willingness to cooperate with the ECCC.

17. Lastly, the Supreme Court Chamber recalls that the regime of judicial supervision may be modified where the circumstances so require. In this regard, Section 7 of the Cambodian Code of Criminal Procedure, “Judicial Supervision”, grants the court wide discretion in devising such

measures (sanctions) but also undertake other corrective responses that are non-punitive in nature and do not require the finding of culpability (intent), in order to safeguard the right to a fair trial”).

³¹ Decision on Supervision, para. 62.

³² Decision on Supervision, para. 62.

³³ Decision on Supervision, para. 63.

³⁴ See Article 560(2) of the Cambodian Criminal Code (“A person is considered a detainee when he or she: [...] is about to be or is being brought before a judicial authority at the end of the custody or pursuant to an order to bring or an arrest warrant”).

³⁵ See Article 544 of the Cambodian Criminal Code (“Providing the perpetrator, co-perpetrator, instigator or accomplice to a felony with: (1) accommodation; (2) a hiding-place; (3) the means of existence; or (4) any other means of evading a search or an arrest; shall be punishable by imprisonment from one to three years and a fine from two million to six million Riels. However, the following persons are exempted from penalty: (1) the ascendant and descendant, and the brothers and sisters of the perpetrator, co-perpetrator, instigator or accomplice to the felony; (2) the spouse of the perpetrator, co-perpetrator, instigator or accomplice to the felony.”).

³⁶ Decision on Supervision, para. 64, referring to Articles 1105(3), 1108 and 1110 of the Cambodian Civil Code.

supervisory arrangements as appropriate at any given time.³⁷ Accordingly, should the present arrangements in cooperation with the guardian prove unsatisfactory, the Trial Chamber may seek to amend them.³⁸

18. For the foregoing reasons, the Supreme Court Chamber

REMANDS the Defence's Request to the Trial Chamber, with instruction to implement the Decision on Supervision without any further delay; and,

GRANTS the Trial Chamber's request for clarification insofar as it pertains to the issue of the law.

Phnom Penh, 31 May 2013

President of the Supreme Court Chamber



³⁷ See also Rule 65 of the Internal Rules, which governs bail orders and provides for wide competence to “impose such conditions as are necessary to ensure the presence of the person during the proceedings and the protection of the others.”

³⁸ For example, under Article 223(5) of the Cambodian Code of Criminal Procedure, the power to order the appearance of a person under judicial supervision, and thereby the power to effectively monitor their whereabouts, may be delegated to “any person”.