

BEFORE THE SUPREME COURT CHAMBER  
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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**IMMEDIATE APPEAL AGAINST DECISION ON REASSESSMENT OF ACCUSED  
IENG THIRITH'S FITNESS TO STAND TRIAL FOLLOWING THE SUPREME  
COURT CHAMBER DECISION OF 13 DECEMBER 2011**

**CO-PROSECUTORS' SUPPLEMENTARY SUBMISSIONS**

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**Filed by:**  
**Co-Prosecutors**  
 CHEA Leang  
 Andrew CAYLEY

**Distributed to:**  
**Supreme Court Chamber**  
 Judge KONG Srim, President  
 Judge SOM Sereyvuth  
 Judge A. KLONOWIECKA-  
 MILART  
 Judge MONG Monichariya  
 Judge C. N. JAYASIINGHE  
 Judge YA Narin  
 Judge SIN Rith  
 Judge F.N.M. MUMBA

**Copied to:**  
**Accused**  
 IENG Thirith

**Guardian for the Accused**  
 IENG Vichida

**Lawyers for the Defence**  
 PHAT Pouv Seang  
 Diana ELLIS

**Civil Party Lead Co-Lawyers**  
 PICH Ang  
 Elisabeth SIMONNEAU FORT

## I. INTRODUCTION

1. The Co-Prosecutors file these Supplementary Submissions (“Submissions”) as directed by the Supreme Court Chamber (“Chamber”) in its *Decision on Co-Prosecutors’ Request to File Supplementary Submissions on the Appeal against the Release Order of Ieng Thirith*.<sup>1</sup> Their purpose is solely to address evidence and supporting arguments that could not be sufficiently addressed in the Appeal itself. The present Submissions should be read in conjunction with the Co-Prosecutors’ Appeal.<sup>2</sup>
2. Following submission of the Appeal, the Co-Prosecutors were advised of a decision of the Phnom Penh Municipal Court, dated 14 September 2012, designating the daughter of the Accused, Dr Ieng Vichida, as general guardian for the Accused in accordance with Articles 24 *ff* and 1104 *ff* of the Civil Code of Cambodia.<sup>3</sup> The Co-Prosecutors understand from the decision of the Municipal Court that a request for commencement of guardianship was filed by Dr Ieng Vichida through the Office of the Prosecutor of the Phnom Penh Municipal Court on 13 September 2012, following the reassessment of the Accused’s mental state by the three experts designated by the Trial Chamber. The appointment of a general guardian remedies, to the extent possible, the stated inability of counsel for the Defence to take instructions from the Accused.<sup>4</sup> On this basis, the Co-Prosecutors consider that these Submissions, and all future legal submissions and decisions concerning the Accused should be copied to Dr Ieng Vichida.
3. In these Submissions, the Co-Prosecutors address the central issue on appeal, namely the imposition of measures of judicial supervision on the Accused.

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<sup>1</sup> **E138/1/10/1/3/1** Decision on Co-Prosecutors’ Request to File Supplementary Submissions on the Appeal against the Release Order of Ieng Thirith, 17 September 2012.

<sup>2</sup> **E138/1/10/1/1** Immediate Appeal against Decision on Reassessment of Accused Ieng Thirith’s Fitness to Stand Trial following the Supreme Court Chamber Decision of 13 December 2011, 14 September 2012 (“Appeal”).

<sup>3</sup> **E138/1/10/1/2/3.1** Civil Case File 1638 of 13 September 2012, Decision No. 288, 14 September 2012.

<sup>4</sup> **E1/12.1** Transcript, 20 October 2011 at p. 101; **E131/1/5** List of documents to be admitted before the Trial Chamber in connection with the witnesses and Civil Parties who may be called during the first three weeks of trial, 1 November 2011 at para. 3: “The Defence is currently unable to take instructions from the Accused”; **E131/3** Defence for Ieng Thirith’s notification regarding opening statement and oral testimony of the Accused at trial, 3 November 2011 at para. 3: “As previously indicated [...] the defence is unable to take instructions from the Accused due to her mental state and in particular her memory impairment.”

## II. SUPPLEMENTARY SUBMISSIONS ON MEASURES OF JUDICIAL SUPERVISION

### A. Measures of judicial supervision serve legitimate public purposes beyond securing the presence of the Accused at trial

4. At paragraph 7 of the Appeal, the Co-Prosecutors submit that the Trial Chamber erred in law by failing to consider or apply Article 223 of the Cambodian Code of Criminal Procedure (“CCP”) as a “clear legal basis to impose coercive conditions or other forms of judicial supervision” over Accused Ieng Thirith “upon release”.<sup>5</sup> At paragraph 8 of the Appeal, the Co-Prosecutors further submit that the Trial Chamber erred in law in its dismissal of Rules 65 and 82 of the ECCC Internal Rules as providing a legal basis for the imposition of coercive measures on an accused who is not facing a reasonable prospect of being tried. The Co-Prosecutors submit, in addition, that the Trial Chamber not only disregarded a directly applicable point of law established by the Supreme Court Chamber,<sup>6</sup> but also fundamentally misunderstood the purpose and justification for the imposition of judicial supervision or other restrictive measures on release. In the Impugned Decision, the reasoning of the Trial Chamber suggests that the only objective of judicial supervision or conditional release of an Accused during a stay of proceedings is to ensure the Accused’s presence at trial upon its resumption,<sup>7</sup> therefore rendering the imposition of such restrictions or coercive measures in circumstances in which “there is no reasonable prospect that the Accused will be tried in the foreseeable future” legally unjustifiable.<sup>8</sup>
5. Whilst securing the presence of the Accused at any subsequent trial remains a primary purpose of measures of judicial supervision, the Co-Prosecutors submit that this is by no

<sup>5</sup> E138/1/10 Decision on Reassessment of Accused Ieng Thirith's Fitness to Stand Trial following Supreme Court Chamber Decision of 13 December 2011, 13 September 2012 ("Impugned Decision") at para. 33.

<sup>6</sup> E138/1/7 Decision on Immediate Appeal against the Trial Chamber’s Order to Release the Accused Ieng Thirith, 13 December 2011 (“First Appeal Decision”) at para. 45: “The Minority Opinion in the Impugned Decision stated that Article 223 of the CCP ‘pertain[ed] to judicial supervision as an alternative to pre-trial detention,’ and does not apply to unfit accused where the proceedings have been stayed ‘without any reasonable prospect of resuming.’ [...] The Supreme Court understands that the Minority Opinion did not necessarily mean that judicial supervision is never available to the Trial Chamber, but that it is not available in these particular circumstances. Nevertheless, the Supreme Court Chamber confirms the Majority Opinion that judicial supervision under Article 223 of the CCP is available to a trial court in Cambodia and to the Trial Chamber at the ECCC. Given that the trial court is undisputedly authorised to apply detention, it is logically, *a maiori ad minus*, authorized to apply a less restrictive measure. This understanding is confirmed by Internal Rule 82(2), which authorizes the Trial Chamber to order ‘release on bail,’ notwithstanding the lack of a provision on bail in Article 306 of the CCP. Notably, the term ‘bail order,’ as defined in the Glossary to the Internal Rules and used in Internal Rule 65, encompasses a variety of measures that may be imposed on an accused person in the place of detention, including orders such as those under Article 223 of the CCP” [internal references omitted]. *See also* para. 46.

<sup>7</sup> E138/1/10 Impugned Decision, *supra* note 5 at paras. 28, 33-36.

<sup>8</sup> E138/1/10 *Ibid.* at para. 33.

means the sole legitimate purpose served. The Trial Chamber’s interpretation fails to take into account the purpose of measures of judicial supervision authorised by the Cambodian and ECCC law. For instance, Article 223 of the CCP lists a number of obligations to which an Accused under judicial supervision can be subjected. Several of these conditions cannot be conceived as relating to securing the presence of the Accused at trial, but are rather concerned with ensuring the integrity of the judicial proceedings, deterring crime, protecting victims and potential witnesses and maintaining public order. These include obligations “not to go to certain places determined by the investigating judge;”<sup>9</sup> “not to receive or meet certain people identified by the investigating judge;”<sup>10</sup> “not to possess or bear any weapon [...]”<sup>11</sup> and “to refrain from certain specified professional activities.”<sup>12</sup>

6. Furthermore, the grounds on which the relevant ECCC provisions authorising restrictions on the liberty of an Accused are not limited to ensuring her presence at trial. Rule 65(1) provides that bail orders by the Co-Investigating Judges, or by the Trial Chamber under Rule 82(2), “shall [...] impose such conditions as are necessary to ensure the presence of the person during the proceedings *and the protection of others.*”<sup>13</sup> Rule 63, governing provisional detention, is also instructive here, given that the Trial Chamber appears in the Impugned Decision to view the policy and legal justifications behind conditional release as the same as those behind detention.<sup>14</sup> Rule 63(3)(b) allows provisional detention where the Co-Investigating Judges consider it to be a necessary measure to, *inter alia*, “prevent the Charged Person from exerting pressure on any witness or Victims, or prevent any collusion between the Charged Person and accomplices of crimes falling within the jurisdiction of the ECCC;”<sup>15</sup> “protect the security of the Charged Person; or preserve public order.”<sup>16</sup>

<sup>9</sup> Cambodian Code of Criminal Procedure, Article 223(3).

<sup>10</sup> *Ibid.*, Article 223(8).

<sup>11</sup> *Ibid.*, Article 223(10).

<sup>12</sup> *Ibid.*, Article 223(12).

<sup>13</sup> Rule 65(1) [emphasis added].

<sup>14</sup> After concluding that there is no legal basis for continued detention of the Accused, based on its finding that there is no reasonable possibility that she will become fit to stand trial in the foreseeable future, the Trial Chamber apparently jumps to the conclusion that there must therefore be no legal basis for the imposition of other coercive conditions or forms of judicial supervision upon her release, either; *see* E138/1/10 Impugned Decision, *supra* note 5 at paras. 29-30, 33.

<sup>15</sup> Rule 63(3)(b)(i). The link between this provision and Rule 35 is noteworthy, especially considering the Trial Chamber’s acceptance of the applicability of Rule 35 to the Accused IENG Thirith: E138/1/10 Impugned Decision, *supra* note 5 at para. 38.

<sup>16</sup> Rule 63(3)(b)(iv)-(v).

7. Finally, interpretative guidance in Rule 21 supports the view that fair trial rights can only be fully respected when viewed in light of all of the circumstances of the case, including not only the rights and interests of the Accused, but also those of the victims and other Parties to the proceedings,<sup>17</sup> the nature and gravity of the crimes alleged and the need to do justice,<sup>18</sup> the public interest in prosecution (which includes the goals of ending impunity, increasing public confidence in the administration of justice and promoting national reconciliation), and considerations of public order and security, among other factors.
8. For these reasons, as stated in the Appeal, the Co-Prosecutors respectfully submit that “[t]he Trial Chamber's error of law has resulted in its failure to properly exercise its jurisdiction by considering the full range of alternative measures, and conducting a balancing exercise between the rights of the accused and competing interests, including the need to safeguard the integrity of the proceedings, and provide for the protection victims and witnesses.”<sup>19</sup>

**B. A well-established legal test for restriction of fundamental human rights is applicable in the circumstances**

9. At paragraph 14 of the Appeal, Co-Prosecutors submit that:

*the imposition of restrictive conditions upon an accused unfit to stand trial and otherwise at liberty, while fully consistent with the jurisprudence and practice of international criminal tribunals, must additionally satisfy a general proportionality test for limitations of rights under international human rights law. As such, a chamber must be satisfied that any such condition is suitable, necessary and proportionate in the circumstances.*

The Co-Prosecutors refer to the test for proportionality of restrictive measures on provisional release as laid down by ICTY Trial Chambers in *Talić* and *Jokić*.<sup>20</sup>

10. The Co-Prosecutors further submit that a test of proportionality is applied consistently – by international criminal tribunals, international and regional human rights bodies, and several domestic legal systems – in relation measures restricting a suite of fundamental rights, not solely restrictions on the right to liberty. As the Supreme Court of Canada has

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<sup>17</sup> Rule 21(1)(a).

<sup>18</sup> Rule 21(2); E138/1/7 First Appeal Decision, *supra* note 6 at para. 28.

<sup>19</sup> E138/1/10/1/1 Appeal, *supra* note 2 at para. 8.

<sup>20</sup> *Prosecutor v. Talić*, IT-99-36-T, Decision on the motion for provisional release on the accused Momir Talić (ICTY Trial Chamber), 20 September 2002, at para 23; citing *Prosecutor v. Jokić*, IT-02-53-PT, Decision on Request for provisional Release of accused Jokić, 28 March 2002, at para 18.

observed: “Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups.”<sup>21</sup> Jurisprudence from the Appeals Chambers of the *ad hoc* tribunals provides ample examples of the application of a proportionality test to situations concerning fundamental fair trial rights. For instance, in *Stanišić and Simatović*, the Appeals Chamber found that,

*An accused appearing before the International Tribunal is entitled to certain minimum guarantees [...] [including] the right “to be tried in his presence.” [...] This right, however, is not absolute. An accused can waive or forfeit the right to be physically present at trial. For example, under Rule 80(B) of the Rules [...], the Trial Chamber may order the removal of an accused from the courtroom and continue the proceedings in the absence of the accused if the accused has persisted in disruptive conduct, following a warning that such conduct may warrant the removal. [...] The Appeals Chamber has further found that this Rule is not limited to intentional disruptions. However, in assessing a particular limitation on a statutory guarantee, such as the right to be physically present at trial, the Appeals Chamber bears in mind the proportionality principle, pursuant to which any restriction on a fundamental right must be in service of a sufficiently important objective and must impair the right no more than is necessary to accomplish the objective.*<sup>22</sup>

11. In *Milošević*, the ICTY Appeals Chamber, in finding that the Trial Chamber had made a fundamental error of law by failing to recognize that any restrictions on the right to self-representation “must be limited to the minimum extent necessary to protect the Tribunal’s interest in assuring a reasonably expeditious trial”,<sup>23</sup> said

*When reviewing restrictions on fundamental rights such as this one, many jurisdictions are guided by some variant of a basic proportionality principle: any restriction of a fundamental right must be in service of “a sufficiently important objective,” and must “impair the right... no more than is necessary to accomplish the objective.”*<sup>24</sup>

12. The ICTR Appeals Chamber has also emphasized the importance of the proportionality principle in all contexts where rights are concerned. In *Zigiranyirazo*, the Chamber noted that the right to be present was not an absolute right, as it can be waived or forfeited by the

<sup>21</sup> *R. v. Oakes* [1986] 1 S.C.R. 103 at para. 70 (Supreme Court of Canada).

<sup>22</sup> *Prosecutor v. Jovica Stanišić and Franko Simatović*, IT-03-69-AR73.2, Decision on Defence Appeal of the Decision on Future Course of Proceedings (ICTY Appeals Chamber), 16 May 2008 at para. 6.

<sup>23</sup> *Prosecutor v. Slobodan Milošević*, IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defence Counsel (ICTY Appeals Chamber), 1 November 2004, para. 17.

<sup>24</sup> *Ibid.*

Accused in a number of situations, including where the Trial Chamber decides to remove a persistently disruptive accused, or seeks to avoid other substantial trial disruptions.

*In assessing a particular limitation on a statutory guarantee, the Appeals Chamber bears in mind the proportionality principle, pursuant to which any restriction on a fundamental right must be in service of a sufficiently important objective and must impair the right no more than is necessary to accomplish the objective. The explicit exception provided by Rule 80(B) and the ICTY Appeals Chamber's reference to "substantial trial disruptions" provide a useful measure by which to assess other restrictions on the right to be present at trial.<sup>25</sup>*

13. International human rights instruments binding on Cambodia and the ECCC, as well as regional and international human rights bodies, also adopt a proportionality test for limiting fundamental rights and freedoms. For instance, the International Covenant on Civil and Political Rights prohibits restrictions on certain rights, such as freedom of movement, "except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the [...] Covenant."<sup>26</sup> The United Nations Human Rights Committee has observed that "it is not sufficient that [...] restrictions [imposed on the rights in the ICCPR] serve the permissible purposes; they must also be necessary to protect them."<sup>27</sup> As the Committee notes,

*Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.<sup>28</sup>*

14. The European Court of Human Rights (ECtHR) has also held that "[t]here must be a reasonable relationship of proportionality between the means employed and the aim

<sup>25</sup> *Prosecutor v. Protais Zigiranyirazo*, ICTR-2001-73-AR73, Decision on Interlocutory Appeal (ICTR Appeals Chamber), 30 October 2006 at para. 14. See also, for example, *Prosecutor v. Théoneste Bagosora and Anatole Nsengiyumva*, ICTR-98-41-A, Judgment (ICTR Appeals Chamber), 14 December 2011 at para. 59, where the Appeals Chamber discusses a chamber's duty to consider alternative solutions in making a decision to limit an Accused's rights, noting that it must make a serious effort to mitigate the prejudice to the Accused in imposing any restrictions.

<sup>26</sup> International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (entered into force: 23 March 1976), Article 12(3).

<sup>27</sup> United Nations, International Human Rights Instruments, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, HRI/GEN/1/Rev.6, 12 May 2003, at p. 176, para. 14.

<sup>28</sup> *Ibid.*

sought to be realised by any measure,”<sup>29</sup> and has adhered to this test across its decisions. ECtHR jurisprudence provides for three elements to be taken in account when applying the proportionality test: (1) legality, (2) legitimacy, (3) necessity in the democratic society.<sup>30</sup> The condition of legality requires that any restriction have a basis in domestic law, which must be compatible with the European Convention on Human Rights (ECHR). The legitimacy component refers to the justification for the proposed limitation on an individual’s or group’s right(s).<sup>31</sup> The ECtHR has summarised “necessity” as follows:

*(a) the adjective 'necessary' is not synonymous with 'indispensable,' neither has it the flexibility of such expressions as 'admissible,' 'ordinary,' 'reasonable,' or 'desirable; (b) the Contracting States enjoy a certain but not unlimited margin of appreciation in the matter of the imposition of restrictions, but it is for the Court to give the final ruling on whether they are compatible with the Convention; (c) the phrase 'necessary in a democratic society' means that, to be compatible with the Convention, the interference must, inter alia, correspond to a 'pressing social need' and be 'proportionate to the legitimate aim pursued'.*<sup>32</sup>

15. While the Co-Prosecutors continue to support the release of Ieng Thirith from detention, they request the Chamber to uphold her release subject to conditions of judicial supervision, which should not be framed as mere requests. The Co-Prosecutors will demonstrate that each of these measures satisfy the applicable legal test for restriction of the Accused’s rights to liberty and privacy as *suitable, necessary and proportionate* in the circumstances. Furthermore, the proposed measures are neither capricious nor excessive, and the Co-Prosecutors have sought to ensure that the conditions proposed are the least restrictive available.

<sup>29</sup> *Pressos Compania Naviera S.A. and Others v. Belgium* [1995] ECHR 47i, Application No. 17849/91 (ECtHR) at para 38.

<sup>30</sup> Katrougalos, Georges and Daphne Akoumianaki, “L’application du principe de proportionnalité dans le champs des droits sociaux,” Paper for the World Congress of the International Association of Constitutional Law, Mexico, 6-10 December 2010, p. 13.

<sup>31</sup> “Legitimate interests include national security; territorial integrity and public safety; the economic well-being of the country; the prevention of disorder or crime; the protection of health or morals; the protection of the rights, freedoms, and reputation of others; the prevention of disclosure of information received in confidence; and the impartiality of the judiciary”: Abiola, Sara, “Limitation Clauses in National Constitutions and International Human Rights Documents: Scope and Judicial Interpretation,” Research Memorandum prepared for the Open Society Institute’s Public Health Program Law and Public Health Initiative, 26 April 2010, p. 12.

<sup>32</sup> *Silver et al. v. United Kingdom (A/61)* [1983] 5 EHRR 347, 376 (citing *Handyside v. United Kingdom (A/24)* [1979-80] 1 EHRR 737, 754-55) (ECtHR).



**C. The measures of judicial supervision sought by the Co-Prosecutors are suitable, necessary and proportionate in the circumstances**

16. As stated in the Appeal, the Co-Prosecutors provide, in the current Submissions, “[a] detailed legal review of the conditions of judicial supervision” in order to “demonstrate their suitability, necessity and proportionality in light of the fundamental rights and legal policy objectives enshrined in the applicable law before the ECCC.”<sup>33</sup>
17. Whilst accepting that there are no longer grounds to continue the detention of Accused Ieng Thirith, the Co-Prosecutors submit that the Accused should remain under a regime of judicial supervision and be granted provisional release under six conditions to be *ordered* by the Trial Chamber:
- (1) to reside at a specified home address to be provided by her Co-Lawyers;
  - (2) to make herself available for a weekly safety check by authorities or officials to be designated by the Trial Chamber;
  - (3) to surrender her passport and identification card;
  - (4) not to contact, directly or indirectly, the other Co-Accused in Case 002 (excluding her husband, Accused Ieng Sary);
  - (5) not to contact, directly, or indirectly, any witness, expert or victim who is proposed to be heard by the Trial Chamber, and not to interfere in the administration of justice; and
  - (6) to undergo six-monthly medical examinations by medical practitioners to be appointed by the Trial Chamber.<sup>34</sup>
18. First, in order to demonstrate the overall proportionality of the measures of judicial supervision proposed by the Co-Prosecutors, the Chamber may wish to refer to **three annexes** to the present Submissions.
19. **Annex 1** provides a chronological overview of key fitness to stand trial cases for which detailed chronological data is available. Four cases are drawn from the ICTY, one from the Special Panels for Serious Crimes (Timor-Leste), which have already been addressed extensively in oral and written submissions. One ECtHR case, *Nichitalyov v. Ukraine*, has not been canvassed previously, and concerns domestic criminal proceedings against an accused found unfit to stand trial on grounds of “complete and permanent blindness and deafness” where “the hypothetical possibility of resuming the proceedings exists [but]

<sup>33</sup> E138/1/10/1/1 Appeal, *supra* note 2 at para. 16.

<sup>34</sup> E138/1/10/1/1 *Ibid.* at para. 10; E1/119.1 Transcript, 31 August 2012 at p. 103.

there seems to be no intention at present to continue them”.<sup>35</sup> In this judgment, concerning the right to a “hearing within a reasonable time” under Article 6(1) of the ECHR, the ECtHR establishes that any period of re-opening of criminal proceedings for the purpose of “confirming the grounds for suspension, namely the unfitness of the applicant” is to be *excluded* from the calculation of the length of proceedings. The annexed chart illustrates the lapse of time at each stage of the proceedings, including initial medical evaluations and medical reviews, and indicates the disposition of each case.

20. **Annex 2** lists in detail the restrictive measures ordered by the Chambers of international criminal tribunals concerning accused that had been granted either provisional release or conditional detention on grounds of serious illness, including those with more remote prospects of recovery than the Accused Ieng Thirith. The scope of conditions imposed upon similarly-situated accused further demonstrates the overall proportionality of the conditions sought by the Co-Prosecutors. By way of overview, **Annex 3** summarises the conditions imposed in these same cases.
21. Second, the Co-Prosecutors address the suitability, necessity and proportionality of each of these measures proposed.

Condition 1: The Accused Ieng Thirith should be required to reside at a specified home address to be provided by her Co-Lawyers.

22. This condition has a number of objectives, including protecting the safety of the Accused, maintaining public order<sup>36</sup>, and ensuring the presence of the Accused at trial, should proceedings be resumed in the future, which remains a remote possibility acknowledged by the Trial Chamber.<sup>37</sup> Given the notoriety of the Accused and the history of safety risks to the Co-Accused in Case 002,<sup>38</sup> the requirement that the Accused provide her current address to the Court is a minimally-invasive step that the Trial Chamber can take to limit the risk of flight and monitor her safety once released. Furthermore, this condition ensures

<sup>35</sup> *Nichitaylov v. Ukraine*, Application No. 36024/03, 15 October 2009 (ECtHR) at para. 36.

<sup>36</sup> Cf. **C20/I/27** Decision on Appeal against Provisional Detention Order of Ieng Thirith, 9 July 2008, paras. 64-72, where the Pre-Trial Chamber found that “the perceived threat to security is not illusory” (para. 70); and **C20/4** Order on extension of provisional detention, 10 November 2008 at para. 33, where the Co-Investigating Judges found that “it is not excessive, considering the gravity of the crimes charged against the Charged Person, to conclude that a decision to grant release within the fragile context of today’s Cambodia could provoke protests of indignation which could lead to violence.”

<sup>37</sup> **E138/1/10/1/1** Appeal, *supra* note 2 at para 6(b).

<sup>38</sup> See e.g. **C26** Provisional Detention Order (Khieu Samphan), 17 December 2007 at para. 3: “...acts of revenge that could place the personal security of the Charged Person at risk, as shown by the violence to which he was subjected in 1991 at the time of his return to Phnom Penh”.

that the Trial Chamber will remain aware of the whereabouts of the Accused so as to be able to notify her in case of a change in available treatment for dementia and a subsequent resumption of proceedings. Not only does this ensure the Accused's presence at trial in the event that it is required, but it also provides the Accused and her guardian with a greater degree of certainty concerning her continuing status as an Accused person before the ECCC. The condition does not place too heavy a burden on the Accused and does not restrict her freedom of movement or liberty, as she would simply be required, through her guardian, to keep the Trial Chamber informed of the location of her current residence.

23. Her guardian is not prevented from changing her place of residence, in accordance with the guardian's duty to "strive to provide the best possible medical care"<sup>39</sup> for the Accused as well as the guardian's general duty of care.<sup>40</sup> It is therefore submitted that this condition is suitable for achieving its purported objectives, is the least restrictive measure possible to achieve those objectives, and that its impact on the rights and freedoms of the Accused is proportionate to the importance of achieving its objectives of safety, public order and legal certainty.

Condition 2: The Accused Ieng Thirith should be required to make herself available for a weekly safety check by authorities or officials to be designated by the Trial Chamber.

24. This second condition is also aimed at maintaining public order and protecting the personal safety of the Accused, as it enables the authorities to monitor her continuing presence on the territory of Cambodia, her safety and her well-being on a regular basis. As it requires nothing more of the Accused than making herself available for a visit by the authorities once a week, any burden it may place upon her is outweighed by the interests this condition seeks to protect. The Co-Prosecutors recall that the Co-Investigating Judges found, in connection with the provisional detention of the Accused in 2007, that, "a decision to leave the Charged Person at liberty would, in the fragile context of today's Cambodian society, risk provoking protests of indignation which could lead to violence and perhaps imperil the very safety of the Charged Person...".<sup>41</sup> Furthermore, the condition does not significantly limit the rights of the Accused, especially when any potential restrictions caused by this condition are balanced against the policy objectives which necessitate the imposition of such a condition.

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<sup>39</sup> Civil Code of Cambodia, Article 1119(2).

<sup>40</sup> Civil Code of Cambodia, Article 1129(1).

<sup>41</sup> C20 Provisional Detention Order (Ieng Thirith), 14 November 2007 at para. 6.

Condition 3: The Accused Ieng Thirith should be required to surrender her passport and identification card

25. The condition of surrendering her passport and identification card provides a guarantee to the victims, civil parties, and to the Office of the Co-Prosecutors that Ieng Thirith will not leave Cambodia if a resumption of proceedings becomes possible in the future. It further allows for the Cambodian public and the international community to be reassured that the Accused will not be able to evade justice, and further demonstrates that, as the Trial Chamber emphasised in the Impugned Decision, “the charges against the Accused are not withdrawn and the present decision [to release her] makes no determination of the guilt or innocence of the Accused in relation to the charges brought against her in Case 002,”<sup>42</sup> as it is a necessary step to protect the future possibility of a resumed trial.
26. The condition of surrendering her passport and identification card does limit the Accused’s freedom of movement to an extent, but does so by the least restrictive means. The Trial Chamber retains the discretion to return these documents to the Accused’s guardian for specific purposes – such as any overseas medical treatment that may be required. The Co-Prosecutors recall, in this regard, that there is no basis in the Agreement, the ECCC Law or the Internal Rules for the Trial Chamber to *compel* the presence of an Accused who is outside the territorial jurisdiction of Cambodia, save by the relatively uncertain means of invitations for assistance addressed to third States.<sup>43</sup>

Conditions 4 and 5: The Accused Ieng Thirith should be prohibited from contacting, directly or indirectly, the other Co-Accused (excluding her husband, Accused Ieng Sary), any witness, expert or victim who is proposed to be heard by the Trial Chamber, and from interfering in the administration of justice

27. These conditions are necessary to protect the integrity and fairness of the ongoing proceedings in Case 002. The Trial Chamber has already recognised that such obligations are already binding upon the Accused under Rule 35, and has reaffirmed their importance.<sup>44</sup> Given that the Accused would not be restricted from contacting her husband, the Accused Ieng Sary, her right to privacy or family life is not obstructed in any way by the imposition of such a condition.

<sup>42</sup> E138/1/10 Impugned Decision, *supra* note 5 at para. 40.

<sup>43</sup> Rule 5(1).

<sup>44</sup> E138/1/10 Impugned Decision, *supra* note 5 at para. 38.

28. Furthermore, this condition has a clear basis in the Rule 35 as well as Cambodian Law.<sup>45</sup> Therefore, this condition places no greater a burden on the Accused Ieng Thirith than that which is already placed on any other citizen of Cambodia by the ECCC Internal Rules.

Condition 6: The Accused Ieng Thirith should be required to undergo six-monthly medical examinations by medical practitioners to be appointed by the Trial Chamber

29. The final condition proposed by the Co-Prosecutors necessarily follows from the indefinite rather than permanent nature of the stay of proceedings imposed by the Trial Chamber in the Impugned Decision. Given the Trial Chamber's: (1) acceptance that a change in the circumstances of the Accused's mental health and cognitive abilities would impact her ability to stand trial and thus potentially trigger a resumption of proceedings; and (2) willingness to annually consult with the medical experts about any advancements in medicine or treatment for dementia,<sup>46</sup> it is clear that regular, up-to-date assessments of the Accused's health and fitness must be inherent conditions of an indefinite stay of proceedings. Such assessments are further necessary for the annual consultation with the medical experts to have any meaning, as the experts would undoubtedly need to remain informed of the Accused's current state of health to be able to advise the Trial Chamber as to any relevant medical advances. A semi-annual medical examination of the Accused is therefore a suitable and reasonable method of ensuring that the conditions of the stay are met, and thus that the stay continues to be warranted. As illustrated in **Annex 1**, international criminal tribunals have generally required periodic medical reviews following provisional release. Nonetheless, a point in time may well be reached when a trial chamber would find that such periodic reviews should conclude.
30. Additionally, the proposed condition is limited to an examination by a medical practitioner, and does not purport to force the Accused to undergo treatment of any kind without the consent of her guardian. Medical examination (and indeed treatment) is a competent measure of judicial supervision under Cambodian law.<sup>47</sup> As an ICTY Trial Chamber observed in *Talić*:

*In accordance with the ICTY case law, it would be extremely damaging to the institutional authority of the Tribunal were the Chamber to disregard the stark reality of the Accused's medical*

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<sup>45</sup> See generally, Criminal Code of Cambodia, Book 4, Title 2.

<sup>46</sup> **E138/1/10** Impugned Decision, *supra* note 5 at para. 39.

<sup>47</sup> Cambodian Code of Criminal Procedure, Article 223(11).



*condition and ignore the fact that it is a Tribunal created to assert, defend and apply humanitarian law.*<sup>48</sup>

Therefore, the Co-Prosecutors respectfully submit that this final condition on the Accused Leng Thirith's release satisfies the proportionality test, as it is suitable, necessary, and its impact is proportionate to the significance of the objective of monitoring the conditions of an indefinite stay of proceedings.

### III. REQUEST

31. For these supplementary reasons, as requested in the Appeal, the Chamber should:
- (a) find the instant Appeal admissible in full;
  - (b) annul the Impugned Decision insofar as the Trial Chamber finds that it has no jurisdiction to order a continuation of judicial supervision subject to legally-justifiable conditions; and
  - (c) amend the Impugned Decision to require the Accused, through her guardian, to comply with the specific conditions proposed by the Co-Prosecutors, in order to appropriately safeguard the competing rights and legal interests engaged by her release from detention.

Respectfully submitted,

Date	Name	Place	Signature
28 September 2012	CHEA Leang Co-Prosecutor	Primož Križan	
	William SMITH Deputy Co-Prosecutor		

<sup>48</sup> *Prosecutor v. Momir Talić*, *supra* note 20 at p. 6.