



**អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា**

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

**Request for Correction**

**ឯកសារដើម**

**ORIGINAL/ORIGINAL**

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**Case :** 002/19-09-2007-ECCC/SC

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**Reason for changes:**

Editorial errors in drafting which do not affect the substance of the Decision.

**Details:**

See attached track changes to pages 2, 4, 5, 7, 8, 15, 24, 25

Filed by: SCC

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Approved by Greffier (for originals): Christopher Ryan

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**THE SUPREME COURT CHAMBER** of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) is seised of an immediate appeal by the Co-Prosecutors<sup>1</sup> against the Trial Chamber’s order to release the Accused, IENG Thirith, from the ECCC Detention Facility (“Impugned Decision”);<sup>2</sup>

## **1. PROCEDURAL HISTORY**

1. In the Impugned Decision, the Trial Chamber unanimously found the Accused unfit to stand trial, ordered the severance of the charges against the Accused from the Indictment in Case 002, declared the proceedings against the Accused to be stayed, and ordered the release of the Accused from the ECCC Detention Facility in accordance with the remainder of the disposition of the Impugned Decision.<sup>3</sup> The Trial Chamber lacked four affirmative votes on whether it has the jurisdiction to impose conditions on the Accused’s release. However, the Trial Chamber unanimously agreed that the consequence of such disagreement is that the Accused shall be released in accordance with the disposition of the Impugned Decision.
2. Within 24 hours of the Impugned Decision, the Co-Prosecutors filed a request to stay such release order to the President of the Supreme Court Chamber,<sup>4</sup> together with a copy of their Immediate Appeal against such release order in which the Co-Prosecutors requested leave to file supplementary written submissions. On 19 November 2011, the President of the Supreme Court stayed the release order,<sup>5</sup> and on 21 November 2011 the Supreme Court granted leave to the Co-Prosecutors to file supplementary written submissions by 22 November 2011. The Co-

<sup>1</sup> Immediate Appeal against Trial Chamber Decision to Order the Release of Accused IENG Thirith, 18 November 2011, E138/1/1 (“Immediate Appeal”); Co-Prosecutors’ Supplementary Submissions on Appeal Concerning the Release of Accused IENG Thirith, 22 November 2011, E138/1/4 (“Supplementary Submissions”).

<sup>2</sup> Decision on IENG Thirith’s Fitness to Stand Trial, 17 November 2011, E138.

<sup>3</sup> Impugned Decision, p. 30:

REMINDS the Accused of her obligation pursuant to Internal Rule 35 to refrain from interference with the administration of justice, and in particular, interference with witnesses or potential witnesses before the ECCC;

DIRECTS the Accused to inform the Trial Chamber prior to any change of address; and

INFORMS the Co-Prosecutors that they may, upon their own motion, periodically request reassessment of the Accused IENG Thirith by any of the Experts appointed by the Chamber to assess her and may request the recommencement of proceedings against IENG Thirith at any stage upon a showing of a material change in circumstances. In order to achieve these objectives, the Co-Prosecutors shall establish a mechanism to monitor the ongoing health status of the Accused.

<sup>4</sup> Co-Prosecutors’ Request for Stay of Release of Accused IENG Thirith, 18 November 2011, E138/1/2.

<sup>5</sup> Decision on Co-Prosecutors’ Request for Stay of Release Order, 19 November 2011, E138/1/2/1.

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assessment and advice from a physiotherapist when needed, as well as support for participation in activities she enjoy.<sup>10</sup> In addition, “a structured cognitive stimulation programme” and continued treatment of co-existent medical conditions may lead to some improvement.<sup>11</sup>

#### **4. IMPUGNED DECISION**

6. The Trial Chamber agreed with the medical experts that “IENG Thirith’s long-term and short-term memory loss ensures that the Accused would be unable to understand sufficiently the course of the proceedings to enable her to adequately instruct counsel and effectively participate in her own defence.”<sup>12</sup> Since “she is unable to exercise these fundamental fair trial rights meaningfully, and in accordance with the international standards set forth in the *Sirugar* Decision,” the Trial Chamber considered it had “no alternative but to declare her to be unfit to stand trial.”<sup>13</sup> As the Accused’s condition would “likely jeopardize the rights of all remaining Accused in Case 002 to an expeditious trial,” the Trial Chamber unanimously “determine[d] it to be in the interests of justice to sever the charges against the Accused IENG Thirith in Case 002 pursuant to Internal Rule 891er and stays the proceedings against her.”<sup>14</sup> The Trial Chamber then considered that it “follows from its finding of incapacity to stand trial, severance of all charges against the Accused IENG Thirith pursuant to Internal Rule 891er and the stay of proceedings against her in Case 002 that the Trial Chamber no longer has a basis to detain the Accused.”<sup>15</sup>
7. The Trial Chamber could not reach four affirmative votes on whether or not the Accused should be ordered to seek medical treatment or be released without condition.<sup>16</sup> The Majority Opinion by Judges NIL Nonn, YA Sokhan and YOU Ottara concluded that the Accused should be “provisionally released”<sup>17</sup> with “certain conditions”<sup>18</sup> and transferred to a hospital in order to receive the treatment recommended by the medical experts.<sup>19</sup> The Majority Opinion concluded that the Accused’s fitness to stand trial should be reassessed after six months of such treatment.<sup>20</sup> The Majority Opinion relied on Article 223(11) of the Cambodian Code of

<sup>10</sup> Psychiatric Experts’ Report, para. 38.

<sup>11</sup> *Ibid.*

<sup>12</sup> Impugned Decision, para. 59.

<sup>13</sup> Impugned Decision, para. 59.

<sup>14</sup> Impugned Decision, para. 61.

<sup>15</sup> Impugned Decision, para. 61.

<sup>16</sup> Impugned Decision, para. 62.

<sup>17</sup> Impugned Decision, para. 66.

<sup>18</sup> Impugned Decision, para. 67.

<sup>19</sup> Impugned Decision, paras. 64-65.

<sup>20</sup> Impugned Decision, para. 66.

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Criminal Procedure (“CCP”)<sup>21</sup> and ICTY jurisprudence<sup>22</sup> as the legal basis for the “temporary hospitalization” of an accused person.<sup>23</sup>

8. In their Minority Opinion, Judges Silvia CARTWRIGHT and Jean-Marc LAVERGNE considered that there is no “factual basis to suggest that the Accused may in future recover sufficiently to be found fit to stand trial.”<sup>24</sup> The Minority Opinion further states “there is no legal basis to impose mandatory orders to hospitalize and treat” the Accused.<sup>25</sup> In particular, according to the Minority Opinion, Article 223(11) of the CCP “does not apply to the Trial Chamber after it has determined an accused to be unfit to stand trial and where proceedings have been stayed.”<sup>26</sup> The Minority Opinion distinguishes the ICTY case relied on in the Majority Opinion on the basis that both parties in that case agreed that the Accused needed urgent medical care.<sup>27</sup> The present case, by contrast, involves a progressive, degenerative condition that is unlikely to improve, and the Defence has not requested hospitalization. The Minority Opinion concludes that the only available solution is unconditional release.<sup>28</sup>

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9. The Trial Chamber then had to decide on the consequence of the failure to reach a supermajority<sup>29</sup> on whether or not conditions should be imposed on the Accused’s release. Without guidance in the ECCC Law, the ECCC Agreement, or Cambodian domestic law, and without guidance from other international criminal tribunals, the Trial Chamber “had recourse to general provisions of international criminal and human rights law.”<sup>30</sup> The interpretation most favorable to the Accused must be preferred,<sup>31</sup> and “liberty is considered the norm” and detention

<sup>21</sup> Impugned Decision, para. 66. Article 223(11) of the CCP states: “Judicial supervision has the effect of subjecting a charged person at liberty to one or more of the following obligations: . . . to undergo a medical examination and/or treatment under the medical supervision in the hospital; . . .”

<sup>22</sup> Impugned Decision, para. 66 (citing *Prosecutor v. Kovačević*, IT-01-42/12-1, “Decision on Provisional Release”, 2 June 2004; *Prosecutor v. Kovačević*, IT-01-42/2-1, “Decision on Defence Motion to Dismiss the Indictment”, 1 September 2006, para. 2; *Prosecutor v. Kovačević*, IT-01-42/2-I, “Decision on Referral of Case Pursuant to Rule 11bis with Confidential and Partly Ex Parte Annexes”, 17 November 2006, paras. 23, 48).

<sup>23</sup> Impugned Decision, para. 66.

<sup>24</sup> Impugned Decision, para. 72.

<sup>25</sup> Impugned Decision, para. 74.

<sup>26</sup> *Ibid.*

<sup>27</sup> Impugned Decision, para. 75.

<sup>28</sup> Impugned Decision, para. 76.

<sup>29</sup> See Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006), Article 14(1):

The judges shall attempt to achieve unanimity in their decisions. If this is not possible, the following shall apply: a) a decision by the Extraordinary Chamber of the trial court shall require the affirmative vote of at least four judges; b) a decision by the Extraordinary Chamber of the Supreme Court shall require the affirmative vote of at least five judges.

<sup>30</sup> Impugned Decision, para. 79.

<sup>31</sup> Impugned Decision, para. 80.

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improve the Accused's condition.<sup>39</sup> Finally, the Co-Prosecutors submit that the Trial Chamber erred in law and/or abused its discretion on the issue of the consequence of the lack of supermajority on whether or not to impose conditions on the Accused's release. The Co-Prosecutors argued that "the usual course is for the *status quo* to prevail and in this case would have favoured the maintenance in detention."<sup>40</sup>

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11. On 22 November 2011, the Co-Prosecutors filed their Supplementary Submissions to address issues that could not be sufficiently covered in the Immediate Appeal.<sup>41</sup> On the first appeal ground, the Supplementary Submissions argue that the authority to "monitor the on-going health status of the Accused" is solely within the competence of the Trial Chamber, and that it was inappropriate for the Trial Chamber to delegate this duty to the Co-Prosecutors.<sup>42</sup> On the second ground of appeal, the Co-Prosecutors submit that, upon finding an accused unfit to stand trial, the standard practice at the ICC and other *ad hoc* tribunals is to order a temporary stay of proceedings rather than unconditional release, even in cases involving degenerative or terminal conditions.<sup>43</sup> The Trial Chamber therefore "wholly diverged from the jurisprudence and practice of other international and internationalized criminal tribunals" by ordering the Accused's unconditional release.<sup>44</sup> The Supplementary Submissions also restate that the Trial Chamber erred in fact and law by disregarding the expert testimony concerning the possible improvement of the Accused's condition.<sup>45</sup> The Co-Prosecutors allege that the Trial Chamber failed to give proper weight to the countervailing rights affected by the Accused's release, such as "the legal interests and safety of victims, witnesses and the community," as well as the legal interest of the international community in prosecuting serious violations of international law.<sup>46</sup>

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12. In their Response, the Defence submits that the Trial Chamber rightly concluded that it no longer had a legal basis to detain the Accused, given that proceedings against her had been stayed with no reasonable prospect of being resumed.<sup>47</sup> Upon closer analysis, the Defence argues that the international cases submitted by the Co-Prosecutors do not demonstrate that detention or confinement is the norm when an accused is found unfit to stand trial, and that each

<sup>39</sup> Immediate Appeal, paras. 15-16.

<sup>40</sup> Immediate Appeal, para. 18.

<sup>41</sup> Supplementary Submissions, para. 3.

<sup>42</sup> Supplementary Submissions, para. 4.

<sup>43</sup> Supplementary Submissions, para. 9.

<sup>44</sup> Supplementary Submissions, para. 9.

<sup>45</sup> Supplementary Submissions, para. 20.

<sup>46</sup> Supplementary Submissions, paras. 24-25.

<sup>47</sup> Response, para. 21.

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situation must instead be evaluated on a case-by-case basis.<sup>48</sup> The Trial Chamber gave full weight to the experts' findings regarding the Accused's possible improvement, and it correctly ordered her unconditional release in light of "the progressive nature of the [Accused's] condition and the [small] likelihood of her ever becoming fit to stand trial."<sup>49</sup> Finally, the Response submits that the Trial Chamber did not err in law in deciding how to proceed in the absence of a supermajority, as the Trial Chamber's approach was consistent with that taken in a similar situation in Case 001.<sup>50</sup>

## 6. FINDINGS

### 6.1. Admissibility of the Appeal

#### *6.1.1. Parties' Submissions*

13. The Co-Prosecutors submit that their Immediate Appeal is admissible under Internal Rule 104(4)(a) and (b). Regarding Internal Rule 104(4)(a), the Co-Prosecutors submit that the Impugned Decision effectively terminates the proceedings against the Accused because "the Co-Prosecutors will never be in a position to request recommencement of the proceedings."<sup>51</sup> Specifically, the Co-Prosecutors argue that the Trial Chamber had no legal basis to "inform" them that they "shall establish a mechanism to monitor the ongoing health status of the Accused." Given that the Accused has been unconditionally released:

[T]here is no basis to require her to undergo any further treatment or testing even if requested by the Co-Prosecutors. Accordingly, the Co-Prosecutors will never be in a position to request a recommencement of the proceedings as they will never be able to show a material change in circumstance.<sup>52</sup>

14. In their Response, the Defence does not contest that the Immediate Appeal is admissible under Internal Rule 104(4)(b). However, the Defence submits that the Immediate Appeal is not admissible under Internal Rule 104(4)(a) because the Impugned Decision did not effectively terminate the proceedings. The Impugned Decision "expressly stated that proceedings have been stayed and not terminated or discontinued and did not accede to the Defence submission to

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<sup>48</sup> Response, paras. 24-25.

<sup>49</sup> Response, para. 38.

<sup>50</sup> Response, para. 45.

<sup>51</sup> Supplementary Submissions, para. 4.

<sup>52</sup> Immediate Appeal, para. 5.

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terminal condition. In the present case, the Trial Chamber referred only to unspecified “general provisions of international criminal and human rights law” as the basis for its conclusion that “the above fundamental international standards require the unconditional release of the Accused IENG Thirith.”<sup>83</sup> On the contrary, as demonstrated at the ICC, as well as at the *ad hoc* international criminal tribunals, unconditional release of an accused is not “required” in the context of a reversible stay of proceedings. This is confirmed by several national jurisdictions.<sup>84</sup>

26. In the present case, the obstacle to the continuation of the proceedings against the Accused is the Trial Chamber’s finding that she is presently unfit to stand trial. The Trial Chamber unanimously considered that this obstacle was conditional in nature in that it might be removed in the future. By preferring to order the Accused to be transferred to a hospital to undergo medical treatment, the Majority Opinion in the Impugned Decision considered that the stay of proceedings could be lifted if the Accused’s condition sufficiently improves. Although the Minority Opinion considered that “the stay of proceedings ordered by the Chamber is likely to be permanent,”<sup>85</sup> they agreed to the disposition in the Impugned Decision, which reads in part:

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**INFORMS** the Co-Prosecutors that they may, upon their own motion, periodically request reassessment of the Accused IENG Thirith by any of the Experts appointed by the Chamber to assess her and may request the recommencement of proceedings against IENG Thirith at any stage upon a showing of a material change in circumstances. In order to achieve these objectives, the Co-Prosecutors shall establish a mechanism to monitor the ongoing health status of the Accused.<sup>86</sup>

27. “Informing” the Co-Prosecutors that they “may request the recommencement of proceedings against IENG Thirith” presupposes the possibility that the obstacle that gave rise to the stay might be removed in the future. According to the Minority Opinion, then, although there is no “reasonable likelihood of a trial of the Accused taking place,”<sup>87</sup> the stay of proceedings might, in theory, be lifted in the future should the Accused recover sufficient capacity to enable her to stand trial.

<sup>83</sup> Impugned Decision, para. 80.

<sup>84</sup> See, e.g., Article 376(2) of the Sri Lankan Code of Criminal Procedure Act (providing for the possibility for the accused to be confined in a mental hospital or other suitable place of safe custody, if he or she is found to be of unsound mind and incapable of making his defence and if the case is one in which bail may not be taken or sufficient security is not given); Articles 73 and 286 of the Italian Code of Criminal Procedure (empowering the judge to order the accused’s provisional confinement into a psychiatric facility, adopting all measures deemed necessary to prevent the risk of flight); Article 101 of the South-Korean Criminal Procedure Act (stipulating that the court may suspend the execution of detention and place the defendant, *inter alia*, into protective institutions); Sections 17, 160-167 of Zambia’s Criminal Procedure Code Act; *Jackson v. Indiana*, 406 U.S. 715 (1972); Article 255 of the Polish Code of Criminal Procedure (providing that suspension of proceedings does not preclude the application of provisional measures, including detention or bail, apt to ensure the accused’s availability for trial).

<sup>85</sup> Impugned Decision, para. 78.

<sup>86</sup> Impugned Decision, p. 30.

<sup>87</sup> Impugned Decision, para. 78.

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the Trial Chamber to institute the treatment recommended by the medical experts and to review the medical condition of the accused within six months, this being a reasonable period of time to determine whether there is a prospect that the Accused will regain her fitness to stand trial in the near future. As concerns the continued detention, it is subject to review pursuant to Internal [Rule 82](#) according to general principles.

## **7. DISPOSITION**

### **FOR THE FOREGOING REASONS, THE SUPREME COURT CHAMBER:**

**GRANTS** the Co-Prosecutors' Immediate Appeal based on Internal Rule 104(4)(b);

**SETS ASIDE** the Trial Chamber's order to release the Accused from the ECCC Detention Facility, including the Trial Chamber's "information" to the Co-Prosecutors that "the Co-Prosecutors shall establish a mechanism to monitor the ongoing health status of the Accused";

**DIRECTS** the Trial Chamber:

- (1) To request, in consultation with appropriate medical expert(s), additional treatment for the Accused which may help improve her mental health such that she could become fit to stand trial, to be carried out in a hospital or other appropriate facility in Cambodia and payable by the ECCC;
- (2) To order, pursuant to Internal Rule 32, that the Accused undergo a medical, psychiatric, and/or psychological examination by an expert(s) to determine whether she is fit to stand trial, such examination to be conducted no later than six (6) months from the commencement of the treatment referred to in (1);
- (3) To determine without delay the Accused's fitness to stand trial after receipt of the expert examination referred to in (2);
- (4) As long as the Accused remains detained, to carry out the detention of the Accused in a hospital or other appropriate facility, as determined by the Trial Chamber;



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(5) To provisionally detain the Accused in the ECCC Detention Facility until necessary arrangements for the commencement of the treatment referred to in (1) and (4) are completed; and

**DIRECTS** the Office of Administration to provide all necessary administrative support to implement this decision.

Judge JAYASINGHE attaches a separate dissenting opinion.

**Phnom Penh, 13 December 2011**  
**President of the Supreme Court Chamber**

**Kong Srim**