E138/1/7

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ជាតិ សាសនា ព្រះមហាក្សត្រ

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Nation Religion King
Royaume du Cambodge
Nation Religion Roi

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

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Supreme Court Chamber
Chambre de la Cour suprême

សំណុំរឿងលេខ: ០០២/១៩-កញ្ញា-២០០៧-អ.វ.ត.ក-អ.ជ.ស.ដ/អ.ជ.ត.ក(០៩)
Case File/Dossier N°. 002/19-09-2007-ECCC-TC/SC(09)

Before: **Judge KONG Srim, President**
Judge Motoo NOGUCHI
Judge SOM Sereyvuth
Judge Agnieszka KLONOWIECKA-MILART
Judge MONG Monichariya
Judge Chandra Nihal JAYASINGHE
Judge YA Narin

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DECISION ON IMMEDIATE APPEAL AGAINST THE TRIAL CHAMBER'S ORDER TO RELEASE THE ACCUSED IENG THIRITH

Co-Prosecutors
CHEA Leang
Andrew CAYLEY

Accused
IENG Thirith
NUON Chea
IENG Sary
KHIEU Samphan

Lawyers for the Accused
PHAT Pouv Seang
Diana ELLIS
SON Arun
Michiel PESTMAN
Victor KOPPE
ANG Udom
Michael G. KARNAVAS
KONG Sam Onn
Jacques VERGÈS
Arthur Vercken

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

THE SUPREME COURT CHAMBER of the Extraordinary Chambers in the Courts of Cambodia ("ECCC") is seised of an immediate appeal by the Co-Prosecutors[1] against the Trial Chamber's order to release the Accused, IENG Thirith, from the ECCC Detention Facility ("Impugned Decision");[2]

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.[3] 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,[4] 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,[5] 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-

[1] 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").
[2] Decision on IENG Thirith's Fitness to Stand Trial, 17 November 2011, E138.
[3] 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.

[4] Co-Prosecutors' Request for Stay of Release of Accused IENG Thirith, 18 November 2011, E138/1/2.
[5] Decision on Co-Prosecutors' Request for Stay of Release Order, 19 November 2011, E138/1/2/1.

Prosecutors filed their Supplementary Submissions on 22 November 2011, and the Defence filed their response on 28 November 2011.[6]

2. STANDARD OF APPELLATE REVIEW FOR IMMEDIATE APPEALS

3. Pursuant to Internal Rules 104(1) and 105(2), an immediate appeal may be based on one or more of the following three grounds:

   - An error on a question of law invalidating the decision;
   - An error of fact which has occasioned a miscarriage of justice; and
   - A discernible error in the exercise of the Trial Chamber's discretion, which resulted in prejudice to the appellant.

3. BACKGROUND

4. In order to assess the Accused's fitness to stand trial, the Trial Chamber appointed successively two groups of experts: the first, a geriatrician, Professor A. John Campbell (supported by psychiatrist Dr. KA Sunbaunat), followed by four psychiatrists, Dr. HOUT Lina, Dr. KOEUT Chhunly, Dr. Seena Fazel and Dr. Calvin Fones Soon Leng, who were requested to supplement the conclusions reached by Professor Campbell and to provide specialist psychiatric expertise. The Trial Chamber was seised of three separate reports prepared by these experts.[7] The Impugned Decision followed two hearings, which enabled oral presentation of the experts' reports and submissions by the parties in relation to their conclusions.

5. All five medical experts agreed that the Accused suffers from a dementing illness probably caused by Alzheimer's disease.[8] In his Follow-up Report, Professor Campbell recommended a trial of Donepezil, a drug prescribed for Alzheimer's disease that is effective in one third of patients treated.[9] The Psychiatric Experts' Report suggested that other measures may be beneficial to the Accused, including consistent and stable staffing, retaining a familiar environment, flexibility to accommodate her fluctuating abilities, physical exercise with

[6] Response by Defence for Madame Ieng Thirith to Co-Prosecutors Appeal Against the Trial Chamber's Decision of 17 November 2011, 28 November 2011, E138/1/5 ("Response").
[7] Report Prepared in Response to the Trial Chamber's Order Assigning Expert - E62/3 … Geriatric Expert Report – Mrs. IENG Thirith, 23 June 2011, E62/3/6 ("Expert Geriatrician's Report"); Follow Up Report Concerning Mrs. IENG Thirith in Accordance to Trial Chamber's Expertise Order E62/3, Dated 4 April 2011, 26 August 2011, E62/3/12 ("Follow-up Report of Geriatrician"); Expertise Report Prepared in Response to the Trial Chamber's Expertise Order Document Number E111, Dated 23 August 2011, 9 October 2011, E111/8 ("Psychiatric Experts' Report").
[8] Expert Geriatrician's Report, para. 40 ("moderately severe dementing illness, most probably Alzheimer's disease"); Psychiatric Experts' Report, para. 36 ("On balance, we would agree with a clinical diagnosis of Alzheimer's disease").
[9] Follow-up Report of Geriatrician, para. 8.

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

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."[12] 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."[13] 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 *89ter* and stays the proceedings against her."[14] 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 *89ter* and the stay of proceedings against her in Case 002 that the Trial Chamber no longer has a basis to detain the Accused."[15]

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.[16] The Majority Opinion by Judges NIL Nonn, YA Sokhan and YOU Ottara concluded that the Accused should be "provisionally released"[17] with "certain conditions"[18] and transferred to a hospital in order to receive the treatment recommended by the medical experts.[19] The Majority Opinion concluded that the Accused's fitness to stand trial should be reassessed after six months of such treatment.[20] The Majority Opinion relied on Article 223(11) of the Cambodian Code of

[10] Psychiatric Experts' Report, para. 38.
[11] *Ibid.*
[12] Impugned Decision, para. 59.
[13] Impugned Decision, para. 59
[14] Impugned Decision, para. 61.
[15] Impugned Decision, para. 61.
[16] Impugned Decision, para. 62.
[17] Impugned Decision, para. 66.
[18] Impugned Decision, para. 67.
[19] Impugned Decision, paras. 64-65.
[20] Impugned Decision, para. 66.

Criminal Procedure ("CCP")[21] and ICTY jurisprudence[22] as the legal basis for the "temporary hospitalization" of an accused person.[23]

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."[24] The Minority Opinion further states "there is no legal basis to impose mandatory orders to hospitalize arid treat" the Accused.[25] 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."[26] 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.[27] 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.[28]

9. The Trial Chamber then had to decide on the consequence of the failure to reach a supermajority[29] 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."[30] The interpretation most favorable to the Accused must be preferred,[31] and "liberty is considered the norm" and detention

[21] 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; . . ."
[22] Impugned Decision, para. 66 (citing *Prosecutor v. Kovačević*, IT-01-4212-1, "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 11*bis* with Confidential and Partly Ex Parte Annexes", 17 November 2006, paras. 23, 48).
[23] Impugned Decision, para. 66.
[24] Impugned Decision, para. 72.
[25] Impugned Decision, para. 74.
[26] *Ibid.*
[27] Impugned Decision, para. 75.
[28] Impugned Decision, para. 76.
[29] 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.

[30] Impugned Decision, para. 79.
[31] Impugned Decision, para. 80.

"is an extraordinary measure."[32] Furthermore, "[c]ontinued detention or forced confinement in circumstances where it is unclear whether a trial will ever be convened violates the Accused's right to a fair trial and to liberty."[33] Finally, the Trial Chamber stated:

> Absence of agreement on the conditions, if any, on release would otherwise have rendered the status of the Accused highly uncertain. If, as a result of this decision, IENG Thirith had instead been retained within the ECCC Detention Facility or subjected to enforced hospitalization, the possibility could also not have been excluded that her continued detention or the imposition of enforced hospitalization lacked a legal basis. To avoid this eventuality, the Trial Chamber has unanimously agreed that the only remedy in the circumstances IS unconditional release.[34]

5. SUBMISSIONS

10. In their Immediate Appeal, the Co-Prosecutors request that the Supreme Court Chamber annul the Impugned Decision insofar as it orders the release of the Accused, and to amend the Impugned Decision by ordering her to remain in detention and undergo medical or other remedial treatment, subject to a review in six months.[35] The Co-Prosecutors submit that the Trial Chamber erred in law by directing the Co-Prosecutors to "establish a mechanism to monitor the ongoing health status of the Accused."[36] Such a direction is without legal basis, according to the Co-Prosecutors. Secondly, the Co-Prosecutors submit that the Trial Chamber erred in law and fact and abused its discretion in concluding that it "no longer has a basis to detain the Accused." The Trial Chamber allegedly failed to consider the Internal Rules governing provisional detention, including Internal Rule 82(1), which contains the default rule that an Accused shall remain in detention until a decision is rendered, and Internal Rules 63 and 64, which determine when it is appropriate to release an accused from provisional detention.[37] The Trial Chamber also allegedly failed to correctly apply principles of international criminal and human rights law, which demonstrate that "continued detention or release subject to restrictive conditions is the *norm* where proceedings in international criminal cases are adjourned due to unfitness, and where there remains a possibility (even a remote one) that the Accused may regain capacity."[38] The Co-Prosecutors also submit that the Trial Chamber abused its discretion by ignoring its own medical experts' opinion that remedial measures may help

[32] *Ibid.*
[33] Impugned Decision, para. 80
[34] Impugned Decision, para. 81.
[35] Immediate Appeal, para. 2.
[36] Impugned Decision, p. 30.
[37] Immediate Appeal, paras. 8-11.
[38] Immediate Appeal, para. 13.

improve the Accused's condition.[39] 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."[40]

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.[41] 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.[42] 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.[43] 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.[44] 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.[45] 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.[46]

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.[47] 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

[39] Immediate Appeal, paras. 15-16.
[40] Immediate Appeal, para. 18.
[41] Supplementary Submissions, para. 3.
[42] Supplementary Submissions, para. 4.
[43] Supplementary Submissions, para. 9.
[44] Supplementary Submissions, para. 9.
[45] Supplementary Submissions, para. 20.
[46] Supplementary Submissions, paras. 24-25.
[47] Response, para. 21.

situation must instead be evaluated on a case-by-case basis.[48] 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."[49] 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.[50]

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."[51] 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.[52]

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

[48] Response, paras. 24-25.
[49] Response, para. 38.
[50] Response, para. 45.
[51] Supplementary Submissions, para. 4.
[52] Immediate Appeal, para. 5.

discontinue the proceedings."[53] The Defence also submits that the proceedings have not been terminated because the Co-Prosecutors have "the inherent ability to ask the Trial Chamber to reassess the accused and recommence the trial at any time."[54]

6.1.2. Discussion

15. Criminal proceedings are designed to arrive at a resolution of the question of criminal responsibility by way of judgment on the merits. A stay that does not carry a tangible promise of resumption effectively terminates the proceedings from continuing and bars arriving at a judgment on the merits. These disruptive consequences of a stay for the course of proceedings are grave enough to conclude that such a decision on stay must be subject to appeal. In these circumstances, the only reasonable reading of Internal Rule 104(4)(a) is that "decisions which have the effect of terminating the proceedings" include a decision to stay the proceedings where there is no prospect of resumption. This interpretation is confirmed by the specific choice of words in Internal Rule 104(4)(a) ("the *effect* of terminating the proceedings" as opposed to decisions simply "terminating the proceedings") as well as other criminal courts of international character that allow interlocutory appeals against a stay of proceedings.[55]

6.2. Merits of the Immediate Appeal

6.2.1. Procedural consequences of the stay of proceedings

16. The reason given by the Trial Chamber for its decision to stay the criminal proceedings against the Accused was its finding that she is unfit to stand trial.[56] The Trial Chamber did not provide the legal basis for its decision to stay the proceedings. Neither did the Trial Chamber determine the procedural consequences of the stay, beyond a finding that, through the combined effect of the Accused's current unfitness, the severance of the charges against the Accused from the Indictment in Case 002, and the stay, it no longer had a legal basis to detain the Accused.[57] The Trial Chamber also unanimously stressed that the stay did not entail the termination of the

[53] Response, para. 15.
[54] Response, para. 17.
[55] See, *e.g.*, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2582, "Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled 'Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU'", App. Ch., 8 October 2010, paras. 55-62.
[56] Impugned Decision, para. 80 ("The Trial Chamber has unanimously agreed that IENG Thirith is unfit to stand trial and has in consequence stayed proceedings against her.")
[57] Impugned Decision, para. 61.

proceedings against the Accused.[58] The Supreme Court shall therefore begin its review on the merits of the Immediate Appeal by considering the nature and legal consequences of the stay of proceedings ordered by the Trial Chamber.

17. The ECCC Agreement, ECCC Law, and Internal Rules do not provide for a "stay of proceedings" before the ECCC. Cambodian criminal procedure provides for the power to "suspend" or "stay" proceedings in circumstances where there is a lasting impediment to the continuation of the proceedings, such as the necessity to adjudicate an interlocutory question concerning the presence of a material element of crime that falls under the exclusive jurisdiction of another court,[59] and when the accused does not appear for trial.[60] Cambodian law, however, does not provide for the effects of a stay of proceedings on the exercise of rights, obligations, and competencies during the stay. Absent specific authorization in the CCP, the basis for and effects of a stay of proceedings can be nonetheless carefully interpreted through analogy and in guidance from practice at the national[61] and international level,[62] in accordance with ECCC Agreement, Articles 12, 13(1), and ECCC Law, Article 33 new.

18. A "stay" refers to "[t]he postponement or halting of a proceeding, judgment, or the like" and to an "[a]n order to suspend all or part of a judicial proceeding or a judgment resulting from that proceeding."[63] Where a stay of criminal proceedings is permitted, it functions as a response to certain long-lasting obstacles to the continuation of the proceedings. Ultimately, where the obstacle is not removed, the state of suspension is lifted through the termination of proceedings upon the death or lapse of statute of limitation, where the legal system so allows. Irrespective of

[58] Impugned Decision, para. 64 ("Again, we [national judges] concur with that holding and note that, according to our international colleagues, the proceedings were stayed and not terminated.")
[59] CCP, Articles 343, 345. The same original Khmer word is used in these two provisions, and closely matches the meaning of the English words "suspend" or "stay." The original Khmer language of the CCP distinguishes "suspension" or "stay" from "adjournment," the latter denoting a short-term interruption of the activity while the proceedings are continued (see Article 340 of the CCP).
[60] CCP, Article 310.
[61] See, *e.g.*, Article 306 of the South-Korean Criminal Procedure Act (mandating the stay of proceedings if the accused is found mentally unfit to stand trial; proceedings can be resumed upon appointment of a legal representative pursuant to Article 26); Articles 374(2) and 375(1) of the Sri Lankan Code of Criminal Procedure Act (stipulating that if the accused is of unsound mind and consequently incapable of making his defence, the court shall postpone the proceedings); Articles 70, 71 and 72 of the Italian Code of Criminal Procedure (foreseeing a stay of proceedings where an accused is found unfit to stand trial; a mandatory reassessment of the accused's conditions must be conducted by the competent judicial authority at least every six months); and Article 22 of the Polish Code of Criminal Procedure (stating that, where the defendant cannot participate in the proceedings because of a mental or another serious illness, the proceedings shall be suspended for the duration of the obstacle).
[62] See especially *Prosecutor v. Lubanga*, ICC-01/04-01/06-1486, "Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled 'Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008'", App. Ch., 21 October 2008, para. 82, footnotes 6-8 (providing examples from the ICTY and ICTR where "a stay of the proceedings of a non-permanent nature has been imposed").
[63] Black's Law Dictionary, 9th ed., 2009, p. 1548, *sub* "stay".

what the premises for ordering a stay might be in concrete circumstances, the resulting state of stay frustrates the very nature and purpose of proceedings. A consequential feature of stayed proceedings is that while the proceedings as such are on hold, the stay does not bar procedural actions aimed at removing the obstacle.[64] Undertaking such actions is the obligation of the authority exercising jurisdiction over the case. This obligation is based in the duty to prosecute, the presumption of innocence, fairness relating to the right to trial within a reasonable time, and in the economy of proceedings.

19. Regarding the duty to prosecute, due to the gravity of core international crimes *vis-à-vis* limited resources, the prosecution at international criminal courts is not legally required to prosecute all persons suspected of crimes falling within the court's jurisdiction. As a result, the prosecution may need to apply a higher threshold of credible evidence than it otherwise would in proceedings at the national level.[65] Nonetheless, once a person has been charged, international criminal courts have gone to great lengths to ensure that every possibility to prosecute the accused is exhausted, including where the accused suffers from a serious medical condition. In *Djukić*, for example, medical experts reported that the accused was in the final stages of a terminal disease.[66] The ICTY provisionally released the defendant "solely for humanitarian reasons," while specifically rejecting the Prosecution and Defence requests to withdraw the indictment.[67] Indictments were also not terminated where the accused person had severe medical conditions, such as paraplegia[68] or a mental condition which had seen no improvement

[64] See, eg, Article 345 of the CCP ("If an interlocutory question is raised and admitted by the court, the court shall adjourn the hearing and set the time for the objecting party to clarify the issue with the competent court."). See also Article 310 of the CCP (obligating the court to issue an order of apprehension of the accused).
[65] *Prosecutor v KAING Guek alias Duch,* 001/18-07-2007-ECCC-TC, Trial Judgement, para. 24, footnote 33.
[66] *Prosecutor v. Djordje Djukić*, IT-96-20-T, "Decision Rejecting the Application to Withdraw the Indictment and Order for Provisional Release," T. Ch., 24 April 1996, pp. 3-4:

> **CONSIDERING** that General Djukić is suffering from an incurable illness which, in the opinion of the medical experts, is in its terminal phase, . . . **CONSIDERING** that the extreme gravity of the current medical condition of General Djukić is not compatible with any form of detention and that the palliative care which his condition requires, or will require, justifies a different environment.

[67] *Prosecutor v. Djordje Djukić*, IT-96-20-T, "Decision Rejecting the Application to Withdraw the Indictment and Order for Provisional Release", T. Ch., 24 April 1996, pp. 3-5.
[68] *Prosecutor v. Milan Simić,* IT-95-9/2, "Order of the President on the Application for the Early Release of Milan Simić", President, 27 October 2003, p. 2 ("Milan Simić is a paraplegic confined to a wheelchair and requires assistance on a daily basis").

for years.[69] The ICTY has terminated the proceedings against accused persons upon their deaths.[70]

20. A related question is whether, during a stay of criminal proceedings, measures of compulsion can be ordered against an accused with a serious medical condition. At the ICTY, measures to secure the presence of accused persons before the court were applied notwithstanding their ill-health. For example, in *Radoslav Brdanin and Momir Talić*, Talić was "suffering from an incurable and inoperable locally advanced carcinoma . . . estimated to be at stage III-B with a rather unfavourable prognosis of survival even on short term."[71] Trial Chamber II ordered Talić to be provisionally released, subject to "stringent conditions," on humanitarian grounds, namely, his ill-health. His "release" was effected directly into the custody of Yugoslav officials and then into a form of "house arrest."[72] Clearly, the term "release" used by the ICTY did not mean freeing the accused, but rather was a technical term denoting termination of detention under the jurisdiction of the ICTY and relinquishing control over the accused in favour of Yugoslav authorities who had furnished guarantees of continued control. The Chamber explained the nature of the release as follows:

> The Trial Chamber believes that the circumstances are such that the imposition of a controlled residence requirement for the time being will be sufficient. This Trial Chamber believes that such a measure would for all intents and purposes be tantamount to what would technically be classified as house arrest, at least in so far as freedom of movement is concerned and [...] can still be considered as a *form of detention*.[73]

21. In *Stanišić and Simatović*, the Appeals Chamber of the ICTY granted the request by the Defence for Jovica Stanišić to adjourn the trial for a minimum of three months and to reassess his state of health before determining when the trial should commence.[74] The Trial Chamber then provisionally released the accused with conditions, including that the accused be taken to a

[69] *Prosecutor v. Vladimir Kovačević,* IT-01-42/2-1, "Public Version of the Decision on Accused's Fitness to Enter a Plea and Stand Trial", T. Ch. I, 12 April 2006; *Vladimir Kovačević*, "Decision on Appeal against Decision on Referral Under Rule 11*bis*", App. Ch., 28 March 2007, para. 24 ("The Defence recalls that the Appellant has been diagnosed with paranoid psychosis and that on this basis he was found not to be fit to stand trial.").
[70] *Prosecutor v. Djordje Djukić*, IT-96-20-T, "Order Terminating the Appeal Proceedings", App. Ch., 29 May 1996; *Prosecutor v. Momir Talić*, IT-99-36/1-T, "Order Terminating Proceedings against Momir Talić", T. Ch. II, 12 June 2003.
[71] *Prosecutor v. Radoslav Brdanin and Momir Talić*, IT-99-36-T, "Decision on the Motion for Provisional Release of the Accused Momir Talić", T. Ch. II, 20 September 2002, para. 27.
[72] *Prosecutor v. Radoslav Brdanin and Momir Talić*, IT-99-36-T, "Decision on the Motion for Provisional Release of the Accused Momir Talić", T. Ch. II, 20 September 2002, para. 35.
[73] *Prosecutor v. Radoslav Brdanin and Momir Talić*, IT-99-36-T, "Decision on the Motion for Provisional Release of the Accused Momir Talić", T. Ch. II, 20 September 2002, para. 35 (emphasis added). On 12 June 2003, the case against Talić was terminated due to his death on 28 May 2003.
[74] *Prosecutor v. Jovica Stanišić and Franko Simatović*, IT-03-69-AR73.2, "Decision on Defence Appeal of the Decision on Future Course of Proceedings", App. Ch., 16 May 2008, para. 22.

hospital in Belgrade, assessed, and, if necessary, admitted for treatment under conditions which may have included "admission to a secure or closed section of said hospital." Alternatively, in the event that Stanišić was not admitted to a hospital, he was to report at the police station on a daily basis.[75]

22. In *Vladimir Kovačević*, Trial Chamber I at the ICTY suspended the proceedings for six months and ordered the accused's provisional release subject to specified conditions, including:

> (1) the Accused shall submit to treatment in the mental health facility in the Republic of Serbia and Montenegro determined by its Government;
>
> (2) the Accused shall not leave the premises of the mental health facility, unless this is part of his treatment and only after receiving the consent of the Chamber; . . .[76]

Here again, "provisional release" is a term of art, not referring to liberating the accused, but rather to the ceasing of detention by the ICTY in favour of a detention-type measure to be implemented outside the jurisdiction of the ICTY.

23. Regarding the specific issue of detention of an accused person during a stay of proceedings, the case of *Prosecutor v. Thomas Lubanga Dyilo* before the ICC is instructive. On 13 June 2008, Trial Chamber I at the ICC stayed the proceedings in *Lubanga* because "the non-disclosure of certain documents by the Prosecutor to the defence made a fair trial impossible."[77] On 2 July 2008, Trial Chamber I ordered the unconditional release of the Accused.[78] On appeal, the Appeals Chamber decided that the Trial Chamber's decision to release Lubanga was erroneous because:

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[75] *Prosecutor v. Jovica Stanišić and Franko Simatović*, IT-03-69-PT, "Decision on Provisional Release", T. Ch. III, 26 May 2008, para. 68(1)(d)(xiii)-(xiv), affirmed on appeal, IT -03-69-AR6S.4, "Decision on Prosecution Appeal of Decision on Provisional Release and Motions to Present Additional Evidence Pursuant to Rule 115", App. Ch., 26 June 2008.

[76] *Prosecutor v. Vladimir Kovačević*, IT-01-42/2-I, "Decision on Provisional Release", T. Ch. I, 2 June 2004, p. 3. Only 22 months later, the Trial Chamber I found that Kovačević "does not have the capacity to enter a plea and to stand trial, without prejudice to any future criminal proceedings against him should his mental health condition change." (IT-01-42/2-I, Public Version of the "Decision on Accused's Fitness to Enter a Plea and Stand Trial", T. Ch. I, 12 April 2006, p. 12). Subsequently, the Trial Chamber I rejected the Defence motion to dismiss the indictment. (IT-01-42/2-I, "Decision on Defence Motion to Dismiss the Indictment", T. Ch. I, 1 September 2006, and IT-01-42/2-I, "Decision on Defence Request for Certification for Interlocutory Appeal of 'Decision on Defence Motion to Dismiss the Indictment' from 1st September 2006", 27 September 2006 (denying request for certification to appeal the decision denying the Defence motion to dismiss the indictment). The case was ultimately referred to the authorities of the Republic of Serbia (IT-01-42/2-I, "Decision on Appeal against Decision on Referral Under Rule 11*bis*", App. Ch., 28 March 2007).

[77] *Lubanga*, ICC-01/04-01/06-1486, "Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled 'Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008'", App. Ch., 21 October 2008, para. 6.

[78] *Lubanga*, ICC-01/04-01/06-1418, "Decision on the release of Thomas Lubanga Dyilo", T. Ch. I, 2 July 2008, paras. 30-36.

> [T]he Trial Chamber, when ordering the unconditional release of Mr. Lubanga Dyilo, failed to take the conditional character of the stay it had imposed properly into account. This led the Trial Chamber to fail to consider all the options that were at its disposal and to assume erroneously that the unconditional release of Mr. Lubanga Dyilo was 'inevitable'.[79]

24. Importantly for the present case, the ICC Appeals Chamber held that Trial Chamber I did not err in concluding that, at the time it decided to stay the proceedings, "there was no prospect that a fair trial could be held."[80] Nevertheless, even in such circumstances, "the Court is not necessarily permanently barred from exercising jurisdiction in respect of the person concerned" because the nature of the stay ordered by the Trial Chamber was conditional and reversible.[81] Therefore:

> [O]nce a Chamber has ordered a conditional stay of the proceedings, the unconditional release of the person concerned is not the inevitable consequence. Instead, the Chamber will have to consider all relevant circumstances and base its decision on release or detention on the criteria in articles 60 and 58 (1) of the Statute. In particular, the necessity of the continued detention (see article 58 (1) (b) of the Statute) will have to be assessed carefully. With specific reference to article 58 (1) (b) (i) of the Statute, the Chamber should take into account that the trial has been conditionally stayed, not permanently terminated. If the conditions for continued detention are not met, the Chamber will have to determine whether, in the particular circumstances of the case, release should be with or without conditions (see article 60 (2), third sentence, of the Statute) . . . At the same time, the Chamber must be vigilant that any continued detention would not be for an unreasonably long period of time, in breach of internationally recognised human rights (. . . , which generally provides for the right to a trial within a reasonable time). If a Chamber concludes that the continued detention, or the release only with conditions, is justified, it will have to review such a decision at short intervals.[82]

25. The above international case law indicates that unconditional release is not the only option available to a criminal court where it has stayed or suspended proceedings due to an obstacle that might be removed in the future. Neither unfitness nor other serious obstacles to proceedings remove from the court's realm the application of measures, including continued detention, aimed at securing the presence of the accused at trial. Concerning the accused whose fitness to stand trial was questioned or lacking, the replacement of detention with mandatory treatment was deemed instrumental for the goal of resuming proceedings. Moreover, unconditional release seems only to be exceptionally applied on humanitarian grounds in cases of a *par excellence*

[79] *Lubanga*, ICC-01/04-01/06-1487, "Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled 'Decision on the release of Thomas Lubanga Dyilo'", App. Ch., 21 October 2008, para. 31.
[80] *Lubanga*, ICC-01/04-01/06-1487, "Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled 'Decision on the release of Thomas Lubanga Dyilo'", App. Ch., 21 October 2008, para. 32.
[81] *Lubanga*, ICC-01/04-01/06-1487, "Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled 'Decision on the release of Thomas Lubanga Dyilo'", App. Ch., 21 October 2008, para. 37.
[82] *Lubanga*, ICC-01/04-01/06-1487, "Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled 'Decision on the release of Thomas Lubanga Dyilo'", App. Ch., 21 October 2008, para. 37.

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."[83] 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.[84]

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,"[85] they agreed to the disposition in the Impugned Decision, which reads in part:

> **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.[86]

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,"[87] the stay of proceedings might, in theory, be lifted in the future should the Accused recover sufficient capacity to enable her to stand trial.

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[83] Impugned Decision, para. 80.
[84] 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).
[85] Impugned Decision, para. 78.
[86] Impugned Decision, p. 30.
[87] Impugned Decision, para. 78.

28. Notwithstanding the unanimity within the Trial Chamber on the possibility, albeit remote, that the Accused might become fit to stand trial, the Trial Chamber attached no conditions to the stay, thus foregoing any effort in the direction of resuming the proceedings against the Accused. Such an outcome is irreconcilable with the interests of justice from all points of view, including the accused, prosecution, civil parties, and Cambodian society as a whole. This Chamber agrees with the Co-Prosecutors' that there exists a strong public interest ("countervailing rights and legal interests affected")[88] to prosecute the Accused. This Court's very existence and its perseverance through the negotiation process as an idea and its subsequent operation as an institution are a testament to the great public interest in the prosecution of the persons and crimes within its jurisdiction and to prevent impunity and foster national reconciliation. Given the advanced stage of proceedings, where charges against the Accused have been confirmed by the Pre-Trial Chamber, there is a compelling public interest to prosecute the Accused. Moreover, as the Accused has pleaded not guilty, there is, at least in abstract, legal interest on the part of the Defence based, *inter alia*, in the presumption of innocence, in appealing against the stay of proceedings. There is also an interest on the part of the victims to have the truth ascertained and to pursue their civil claims.

29. Given these various interests in trying the case, upon a finding of unfitness a court must undertake remedial action. Yet a mechanism aimed at removing the obstacle to the proceedings against the Accused is strikingly absent from the Impugned Decision. In particular, the Trial Chamber failed to provide any details as to how it would periodically review the stay to determine whether the Accused has become fit to stand trial. Instead, the Trial Chamber purported to delegate its responsibility to the Co-Prosecutors when it "informed" them that they "shall establish a mechanism to monitor" the obstacle to the proceedings, namely, "the ongoing health status of the Accused."[89] Once seized with the Closing Order, the Trial Chamber alone has the authority to establish and implement such a mechanism, as the Trial Chamber alone has the jurisdiction over the Accused.[90] The Trial Chamber's delegation of this function to the Co-

[88] Supplementary Submissions, para. 25.
[89] Impugned Decision, p. 30.
[90] At the international level, only the bench can order a suspension and only the bench has the authority to monitor the accused while provisionally released and resume the proceedings when it finds that the accused is fit to stand trial. See, *e.g.*, *Prosecutor v. Vladimir Kovačević*, IT-01-42/2-I, "Decision on Provisional Release," T. Ch. I, 2 June 2004, p. 2:

> **DETERMINED** to remain apprized of the medical condition of the Accused during his provisional release and the initial period of treatment, for which reason the Chamber requires to be provided with *reports every second month* by the treating medical staff at the mental health facility, as well as *a full review* of the Accused's mental condition, to be carried out after six months by medical experts other than the treating medical staff.

Prosecutors goes against the very grain of both the spirit of the CCP and the relevant procedures established at the international level. Moreover, although the Trial Chamber did not determine the standard of proof that it adopted for assessing the prospect of improving the condition of the Accused, the standard appears to have been unduly high for the purpose of this particular consideration. The Supreme Court Chamber holds that, considering the interest of justice in trying the accused, upon a finding of unfitness, remedial action must be undertaken in the light of a possibility, even slight, of a meaningful improvement.[91]

30. In conclusion, the Supreme Court Chamber finds that the Trial Chamber erred in law in making the sweeping conclusion that "the above fundamental international standards require the unconditional release of the Accused IENG Thirith."[92] Such a conclusion is not substantiated by the practice at the national or international level. The question of security measures needs to be evaluated according to the specific circumstances of the case and within the applicable legal framework. Thus, before releasing the Accused the Trial Chamber should have first carefully assessed all interests at stake and given proper weight to all relevant factors. At the same time, the Trial Chamber must be vigilant that any continued detention would not be for an unreasonably long period of time, in breach of internationally recognized human rights.

31. Having established the aforesaid, the Supreme Court Chamber shall now turn to examine, on the facts of the case, whether the Trial Chamber erred in not providing for a remedial action aimed at the removal of the obstacle to the proceedings and whether the Trial Chamber erred in finding non-applicability of security measures.

6.2.2. Whether the Trial Chamber erred in releasing the Accused unconditionally

32. It is clear that the disagreement between the Majority and Minority Opinions in the Impugned Decision over whether the Accused should be released with or without conditions is rooted in their disagreement over and the legal value attached to whether or not the Accused, with additional treatment, may in the future become fit to stand trial. It is therefore appropriate for the Supreme Court to first examine the latter issue before deciding whether the Accused should remain in detention or be released with or without conditions.

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[91] *Prosecutor v. Vladimir Kovačević*, IT-01-42/2-I, "Decision on Provisional Release," T. Ch. I, 2 June 2004, p. 1 (ordering provisional release with conditions on medical grounds while "**NOTING** that in the said Reports, it is also recommended that the Accused be offered treatment urgently in a mental health facility in a BCS-speaking environment, which *may potentially improve the condition of the Accused . . .*" (emphasis added)).
[92] Impugned Decision, para. 80.

33. Professor A. John Campbell, one of the medical experts appointed by the Trial Chamber, recommended for the Accused a trial of a medication called Donepezil. The Co-Prosecutors note that this recommendation was made with no disagreement from the four appointed Psychiatrists, and thus should have been endorsed by the Trial Chamber.[93] In response, the Accused argues that the Trial Chamber's decision not to implement a trial of Donepezil was "well-founded and based on a number of factors," including:

> the progressive nature of the illness; the remote prospect of the drugs producing any significant improvement in her condition which would, in any event only be temporary; the difficulty in monitoring and administering the drug in Cambodia and the fact that the reduction in the Benzodiazepine medication had not had any effect in improving the Respondent's memory.[94]

34. Professor Campbell described Donepezil as being "effective in only about one third of people who take it" with the likelihood of fostering improvement being "modest at best."[95] The Psychiatrists opined that the use of Donepezil "would only provide for small improvements [which] are limited to a minority of individuals who take it,"[96] with one of these experts, Dr. Fazel, stating that he does not disagree with Professor Campbell's recommendation of the use of Donepezil.[97] This is hardly a ringing endorsement.[98]

35. Nevertheless, this Chamber cannot disregard Professor Campbell's position that a trial of Donepezil "needs to be tried."[99] Professor Campbell's opinion of a statistical 33% effectiveness is indicative of a probability that, from the point of view of the various interests in trying the case, should not be dismissed. The Chamber agrees with Professor Campbell that "until we've explored all possibilities and tried all measures to try and improve function, we cannot be definite that she will not be able to participate in her defense."[100]

36. In addition to Dr. Campbell's recommendation of a trial of Donepezil, the Psychiatrists stated that the following may be beneficial to the Accused:

[93] Supplementary Submissions, para. 20.
[94] Response, para. 37.
[95] Impugned Decision, para. 37.
[96] Impugned Decision, para. 46.
[97] Transcript 20 October 2011, p. 54 (lines 6-8).
[98] See also Transcript 19 October 2011, p. 111, (lines 8-17).
[99] Transcript 29 August 2011, p. 138, (lines 15-16).
[100] Transcript 30 August 2011, p. 92, (lines 16-19).

> [C]onsistent and stable staffing; retaining a familiar environment; flexibility to accommodate her fluctuating abilities; physical exercise, with assessment and advice from a physiotherapist when needed; and support for participation in activities she enjoys. In addition, a structured cognitive stimulation programme may be helpful (but needs to be undertaken with those who are trained and supervised). Furthermore, the treatment of her knee and back pain and the regular monitoring of her physical health would be important to maintain. The continued treatment of co-existent medical conditions will improve her prognosis. We note there are no occupational therapists currently in Cambodia, but if there were, an assessment of her activities of daily living would be helpful and advice on any environmental modifications to hear living conditions could be sought.[101]

37. Considering these medical experts' findings, and noting that the determination of fitness to stand trial is a legal matter, the Supreme Court Chamber finds that not all possible measures to improve the mental health of the Accused have been explored. While long-term improvement might be impossible, the criminal process is only competent to concern itself with whether improvement is attainable for the period necessary to accommodate the subsequent criminal adjudication. The Supreme Court accordingly holds that the Trial Chamber erred by failing to exhaust the concrete possibility that has a basis in expert recommendation to improve the mental health of the Accused.

38. Having established that the stay of proceedings ordered by the Trial Chamber is not a permanent disposition of the proceedings and that restrictive measures, including detention, are not inherently precluded during the stay, and having further concluded that the ECCC is obliged to exhaust all measures available to it which may help improve the Accused to be become fit to stand trial, the Supreme Court will now address the Co-Prosecutors' request that the Accused remain in detention and undergo medical and other remedial treatment, subject to a review in six months.[102]

39. The Supreme Court Chamber notes that the Cambodian legal system is fundamentally protective of the right to liberty. Under Cambodian law, a defendant's liberty is subject to a test for provisional detention.[103] Within the context of the ECCC, the right to liberty is subject to this same test's modification as set out in the Internal Rules.[104] Article 9 of the International Covenant on Civil and Political Rights ("ICCPR") guarantees the right to liberty, and specifically the requirement of legality and the prohibition of arbitrariness. Deprivation of liberty is not allowed except on such grounds and in accordance with procedures established by

[101] Psychiatric Experts' Report, para. 38. The Supreme Court notes that the Majority Opinion in the Impugned Decision is of the view that there are a number of occupational therapists and institutions in Cambodia that could be engaged (see Impugned Decision, para. 65).
[102] Immediate Appeal, para. 2.
[103] Article 205 of the CCP.
[104] Internal Rules 63(3), 82.

law.[105] A person detained under criminal charges shall be tried within a reasonable time or shall be released, and it shall not be a general rule that persons awaiting trial shall be detained in custody.[106] Likewise, in the system of the European Convention on Human Rights ("ECHR"), the presumption is in favour of release and its jurisprudence is therefore relevant.[107] Accordingly, Internal Rule 82(1), and Articles 305–307 of the CCP on which it is based, must be read in the light of the right to liberty. The several consequences that stem from this have already been established by this Chamber.[108]

40. In the present case, the Trial Chamber had previously ordered the detention of the Accused on the basis that detention was necessary to "ensure the presence of the [Accused] during the proceedings."[109] There is no indication from the Impugned Decision that the Trial Chamber re-examined and attempted to invalidate its earlier findings regarding the existence of a factual basis for the Accused's provisional detention. Rather, as held above, the Trial Chamber erroneously concluded that it no longer had a legal basis to detain the Accused as a result of its findings of incapacity, severance, and stay of proceedings. The Supreme Court has also held above that, before concluding that the Accused is permanently unfit, the Trial Chamber must exhaust all measures reasonably available to it that may help improve the Accused to become fit to stand trial. There is a possibility that the treatment recommended by the medical experts will produce a successful outcome. In such a case, the stay of proceedings will be lifted and the proceedings will be resumed as soon as practically possible.

41. Accordingly, there are two objectives to be simultaneously pursued. One is the remaining necessity to ensure the presence of the Accused at trial, as soon as it resumes. A parallel objective is to foster the improvement of the mental health of the Accused, and for this purpose additional treatment and rehabilitation programs have been recommended. Regarding the first objective, the Supreme Court finds that the original ground for detaining the Accused, to ensure her presence during the proceedings, remains valid and relevant. There is no indication that the finding of her present unfitness has completely or permanently removed the risk of her becoming unavailable for future proceedings. On the contrary, considering the present

[105] Article 9(1) of the ICCPR.
[106] Article 9(3) of the ICCPR.
[107] See, *e.g.*, *Kudła v. Poland*, 30210/96, "Judgment", ECtHR Grand Chamber, 26 October 2000, paras. 110 *et seq.*
[108] Decision on Immediate Appeal by KHIEU Samphan on Application for Release, 6 June 2011, E50/3/1/4, paras. 47-48.
[109] Decision on the Urgent Applications for Immediate Release of NUON Chea, KHIEU Samphan, and IENG Thirith, 16 February 2011, E50, para. 41 (applying Internal Rule 63(3)(b)(iii)).

deficiencies with the Accused's memory, there is even a greater risk that she may render herself unavailable for trial, without even being accountable for a failure to respond to a summons.

42. The second objective results from the medical experts' evidence that the administration of a trial of Donepezil together with other treatment could be explored in order to help improve her mental health. It is unclear from the case file whether or not hospitalization would be indispensable for such additional treatment. In any event, to pursue the objective of fostering improvement in a meaningful way, the continued detention of the Accused needs to be in a hospital or comparable facility (Judge JAYASINGHE dissenting). The latter location could be, *inter alia*, achieved at the ECCC Detention Facility upon appropriate modifications. A hospital or comparable facility would allow for the administration of the recommended treatment in a professional, monitored manner, and in a court-controlled environment in order to ensure the effectiveness of the treatment as well as in order to protect the rights of the Accused.

43. The case file indicates that the Accused's detention in a hospital or comparable facility will not pose a threat or serious problem to her mental or physical health. The Accused is clearly not in a health condition that is incompatible with continued detention. The suggested additional treatment is therefore not based on an urgent medical need but on the need to pursue the possibility of improving her mental condition. For these reasons, the present case is distinguishable from the international case law where the criminal tribunal granted provisional release to the accused for either medical or humanitarian reasons.[110]

6.2.3. Whether the Trial Chamber erred in not applying judicial supervision

44. As already held by this Chamber:

> The fundamental principle governing pre-trial detention is that of presumption in favour of release. Courts assessing the lawfulness of provisional detention must accordingly evaluate all reasons warranting detention, and weigh them against the basic right to personal liberty. As the European Court of Human Rights has held, continued detention can be justified only as long as there are "specific indications of a genuine … public interest" which outweighs the presumption of liberty. In doing so, to adduce a general risk of flight, absconding, or obstructing proceedings does not suffice unless it is grounded upon specific circumstances of the given case, which bar release even if subject to bail conditions.[111]

[110] See, *e.g.*, *Prosecutor v. Vladimir Kovačević*, above.
[111] Decision on Immediate Appeal by KHIEU Samphan on Application for Release, 6 June 2011, E50/3/1/4, para. 56.

45. A question arising in the present case is whether the objectives for continuing detention could be achieved through a less onerous measure, namely judicial supervision under Article 223 of the CCP. 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."[112] The Defence concurs with this reading of Article 223.[113] 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 authorized 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.

46. Accordingly, this Chamber finds that there is a legal basis in Cambodian law for judicial supervision at the trial stage of the proceedings. This Court may impose conditions on such supervision including but not limited to the undergoing of "a medical examination and/or treatment under the medical supervision in a hospital."[114] However, the Supreme Court Chamber notes that judicial supervision does not allow for the compulsory placement in a hospital or comparable facility for the duration of the judicial supervision. As is clear from Article 223 of the CCP itself, judicial supervision has the effect of subjecting an accused person at liberty to one or more of the enumerated conditions, which may include certain restrictions on liberty but not incarceration. Similar to bail, judicial supervision requires cooperation from the accused, failing which bail or judicial supervision may be revoked and detention ordered.[115] If an accused is not to be physically free to opt for hospitalization, then the measure applied is detention and not judicial supervision.

[112] Impugned Decision, para. 74.
[113] Response, para. 23.
[114] Article 223(11) of the CCP.
[115] Internal Rule 65(6) and Article 230 of the CCP.

47. While judicial supervision is potentially an option in this case, there is nothing in the Impugned Decision which would be of assistance to this Chamber in determining whether a factual basis exists to apply such supervision. As a result, this Chamber has no way of ascertaining whether the Accused is willing and capable (considering the impairment of her cognitive function found by the Trial Chamber) to undertake one of the "obligations" during judicial supervision set out in Article 223 of the CCP. Furthermore, a mere statement from the Accused that she is willing to undergo a treatment and undertake other obligation(s) would be insufficient considering the mental incapacity associated with her condition. Guarantees that the Accused will be able to fulfill her obligations associated with the judicial supervision would need to be submitted by persons close to the Accused and who are willing to assist the Accused to overcome her incapacity to give such guarantees on her own behalf and to act as her surrogates. Another obstacle to applying judicial supervision is the concern for the Accused's safety, including the need for the Trial Chamber to evaluate the level of possible threats against the Accused and to decide on appropriate security measures. Absent a showing that these conditions could be met, this Chamber is unable to apply judicial supervision.

48. The Chamber's inability to make a determination of whether the mental requirements for judicial supervision can be met by the Accused reinforces the Chamber's earlier finding that continued detention of the Accused is warranted by the interest to "ensure the presence of the [Accused] during the proceedings." This finding is further strengthened by the impairment of the Accused's short-term memory, which, in the context of conditional release or judicial supervision, may prevent her from remembering the very existence of her consent to the conditions of the release and in the context of unconditional release may expose her to a threat to her security. For all these reasons, until the Trial Chamber may find the above concerns attenuated, continued detention is warranted.

6.2.4. Duration of the measures

49. The Supreme Court Chamber notes Professor Campbell's recommendation for a three month trial of Donepezil.[116] While the Supreme Court Chamber is ill-equipped to make medical findings on its own initiative, it notes that the medical literature even recommends a minimum six month trial of the medication.[117] On balance, the Supreme Court Chamber decides to order

[116] Follow-up Report of Geriatrician, para. 8(ii).
[117] Bengt Winblad *et al.*, "Donepezil in patients with severe Alzheimer's disease: double-blind, parallel-group, placebo-controlled study", *Lancet*, 2006:367, pp. 1057-65.

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;

(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