



Ieng Thirith Appears in Court for Hearing on Prosecution Appeal

By Mary Kozlovski¹

On Tuesday, November 13, 2012, the Supreme Court Chamber of the Extraordinary Chambers in the Courts of Cambodia (ECCC) held a hearing to allow parties to make oral arguments on the prosecution’s appeal against defendant Ieng Thirith’s release conditions. The prosecution and defense lawyers for Ieng Thirith made submissions, after which Supreme Court Chamber judges questioned Ieng Thirith and her daughter and guardian, Ieng Vichida.

In a June 2011 report, New Zealand-based geriatrician Dr. A. John Campbell found that Ieng Thirith has a “moderately severe dementing illness, most probably Alzheimer’s disease.”² In addition to Prof. Campbell, four psychiatric experts were appointed by the court to examine Ieng Thirith. Two of the experts – Drs. Fazel and Lina – previously gave testimony in October on Ieng Thirith’s status. The Trial Chamber ruled in November 2011 that Ieng Thirith was unfit to stand trial, severed the charges against her from the Case 002 indictment pursuant to Internal

¹ Cambodia Tribunal Monitor’s daily blog posts on the ECCC are written according to the personal observations of the writer and do not constitute a transcript of the proceedings. Official court transcripts for the ECCC’s hearings may be accessed at <http://www.eccc.gov.kh/en/case/topic/2>.

² A June report by Dr. A. John Campbell on Ieng Thirith can be found at: http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E62_3_6_EN.PDF; Transcripts of preliminary hearings in August on fitness to stand trial can be found at: <http://www.eccc.gov.kh/en/document/court/transcript-preliminary-hearing-fitness-stand-trial-29-august-2011>; <http://www.eccc.gov.kh/en/document/court/transcript-preliminary-hearing-fitness-stand-trial-30-august-2011>; <http://www.eccc.gov.kh/en/document/court/transcript-preliminary-hearing-fitness-stand-trial-31-august-2011>;

Rule 89ter,³ stayed proceedings against her, and found they no longer had a basis for detaining her.⁴

Trial Chamber judges diverged on the consequences of their finding that Ieng Thirith was unfit to stand trial. Trial Chamber President Nil Nonn and Judges Ya Sokhan and You Ottara believed Ieng Thirith should be hospitalized for further treatment based on the experts' recommendations, pending a review of her competence to stand trial after six months. Judges Silvia Cartwright and Jean-Marc Lavergne said they would order Ieng Thirith's immediate and unconditional release, as her condition was "unlikely to improve" and there was no legal basis to order her hospitalization and treatment. The chamber decided that without an agreement on the issue, the only remedy was to order Ieng Thirith's unconditional release.

The prosecution appealed, requesting that the Supreme Court Chamber annul the decision to release Ieng Thirith unconditionally and order that she remain in detention and undergo further treatment with a review of her status after six months.⁵ In December 2011, the Supreme Court Chamber set aside the Trial Chamber's order to release Ieng Thirith and ruled that she should receive additional treatment as recommended by experts, with a review of her condition after six months to assess her fitness to stand trial.⁶ Supreme Court Chamber Judge Chandra Nihal Jayasinghe of Sri Lanka dissented from the majority's opinion on the issue of Ieng Thirith's detention.⁷

In August 2012, Dr. Fazel testified that he, Prof. Campbell, and Dr. Lina unanimously agreed that Ieng Thirith suffers from moderate to severe dementia and there were no other treatments available to improve her cognitive function.⁸ The Trial Chamber reaffirmed in September that Ieng Thirith was unfit to stand trial and ordered her immediate release, reminding her of certain obligations and making specific requests.⁹ The prosecution appealed,¹⁰ arguing that Ieng

³ ECCC Internal Rule 89ter on Severance – adopted February 23, 2011 – reads: "When the interest of justice so requires, the Trial Chamber may at any stage order the separation of proceedings in relation to one or several accused and concerning part or the entirety of the charges contained in an Indictment. The cases as separated shall be tried and adjudicated in such order as the Trial Chamber deems appropriate." ECCC Internal Rules (Rev. 8) may be found at: <http://www.eccc.gov.kh/en/document/legal/internal-rules-rev8>.

⁴ The Trial Chamber's decision on Ieng Thirith's fitness to stand trial can be found at:

http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E138_EN.PDF.

⁵ The prosecution's immediate appeal against the Trial Chamber's decision to order the release of Ieng Thirith can be found at: http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E138_1_1_EN-1.PDF; the prosecution's supplementary submissions on their appeal can be found at:

http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E138_1_4_EN-1.PDF.

⁶ The Supreme Court Chamber's decision can be found at:

http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E138_1_7_EN-1.PDF.

⁷ The dissenting opinion of Supreme Court Chamber Judge Chandra Nihal Jayasinghe can be found at:

http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E138_1_7.1_EN.PDF.

⁸ See CTM's accounts of ECCC hearings on August 30, 2012, and August 31, 2012, which are available at <http://www.cambodiatribunal.org/blog/2012/08/expert-begins-testimony-ieng-thirith%E2%80%99s-fitness-stand-trial> and <http://www.cambodiatribunal.org/blog/2012/08/experts-%E2%80%99Cunanimous%E2%80%9D-ieng-thirith-has-dementia>, respectively.

⁹ The Trial Chamber's "Decision on reassessment of accused IENG Thirith's fitness to stand trial following Supreme Court Chamber Decision of 13 December 2011 [Corrected 1]" can be found at:

http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E138_1_10_EN.pdf.

Thirith's release should be conditional and requesting a stay of her release until the Supreme Court Chamber (SCC) decided on the appeal. SCC President Kong Srim ordered that Ieng Thirith be provisionally released, pending a decision on the appeal.¹¹ The Ieng Thirith defense filed a response to the prosecution's appeal in October 2012.¹²

Supreme Court Chamber Opens Appeal Hearing

After the court was called to order, Supreme Court Chamber President Kong Srim noted that the hearing related to the co-prosecutors' immediate appeal against the Trial Chamber's decision on re-assessment of Ieng Thirith's fitness to stand trial dated September 13, 2012. He stated that oral arguments related only to grounds for release and how such grounds may be implemented and enforced.

President Srim said the Trial Chamber issued a new decision on September 13, 2012, finding Ieng Thirith unfit to stand trial, staying proceedings against her indefinitely, ordering that she be immediately released, and reminding the accused of obligations pursuant to ECCC Internal Rule



35. The prosecution appealed the decision and sought to delay Ieng Thirith's release on September 14, President Srim recounted, but the Supreme Court Chamber ordered that Ieng Thirith be released on September 16. Defense counsel for Ieng Thirith sought immediate and unconditional release of Ieng Thirith, President Srim added, noting that the prosecution filed supplementary submissions on September 28 and the Ieng Thirith defense replied on October 18. President Srim informed Ieng Thirith that, according to Internal Rule 21(1)(d), every person suspected or prosecuted shall be presumed innocent provided his or her guilt has not been established.

Pursuant to Internal Rule 108(5), the president continued, the "co-rapporteurs"¹³ submitted a report on the details of the Trial Chamber's decision on reassessment of Ieng Thirith's fitness to stand trial, following the Supreme Court Chamber's

¹⁰ The prosecution's "Immediate Appeal Against Decision on Reassessment of Accused Ieng Thirith's Fitness to Stand Trial Following the Supreme Court Chamber Decision of 13 December 2011" can be found at:

http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E138_1_10_1_1_EN.pdf; the "Co-Prosecutor's Supplementary Submissions" to this immediate appeal can be found at:

http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E138_1_10_1_5_EN.PDF.

¹¹ The "Decision on Co-Prosecutors' Request for Stay of Release Order of Ieng Thirith" can be found at:

http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E138_1_10_1_2_1_EN.pdf.

¹² The "Defence Response to Co-Prosecutors' Immediate Appeal against Decision on Reassessment of Accused IENG Thirith's Fitness to Stand Trial following the Supreme Court Chamber Decision of 13 December 2011 and Co-Prosecutors' Supplementary Submissions" can be found at:

http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E138_1_10_1_5_3_EN.PDF.

¹³ Internal Rule 108(5) reads: "The President of the Chamber shall appoint one international and one national judge to be co-rapporteurs for the appeal. The co-rapporteurs shall prepare a written report which shall set out the facts of the case, and the details of the decision being appealed. The report must be in sufficient detail to give the Chamber full information on the appeal. Such report will be attached to the case file." Supreme Court Chamber judges Som Sereyvuth and Agnieszka Klonowiecka-Milart were co-rapporteurs for this appeal.

decision on December 13, 2011:

- a. *Trial Chamber's decision* - The impugned decision reaffirmed that Ieng Thirith remains unfit to stand trial after additional treatments recommended by experts have been administered to her. Given that there is no reasonable prospect for the accused to regain competency in the foreseeable future, the Trial Chamber ordered an indefinite stay of proceedings. It concluded that its jurisdiction over the accused is suspended, so it lacks a clear legal basis to impose coercive conditions or other forms of judicial supervision over the accused upon release. The Trial Chamber therefore ordered the unconditional release of the accused.
- b. *Appointment of guardian* – On September 15, 2012, the Phnom Penh Municipal Court appointed Ieng Vichida, the accused's daughter, as general guardian.
- c. *Appeal by the co-prosecutors* – The co-prosecutors argues that the Trial Chamber erred by suspending its jurisdiction over the accused and releasing her without conditions of judicial supervision and requests that the SCC impose six conditions, specifically that the accused should: 1) reside at a specified home address provided by her co-lawyers; 2) make herself available for a weekly safety check by authorities or officials designated by the Trial Chamber; 3) surrender her passport and identification card; 4) refrain from directly or indirectly contacting the other co-accused – excluding her husband Ieng Sary – and any witnesses, experts, or victims who will be heard by the Trial Chamber; 5) not interfere with the administration of justice; and 6) undergo semi-annual medical examinations by practitioners appointed by the Trial Chamber.
- d. *Defense response* – The defense argues that the imposition of judicial supervision and coercive conditions has no legal justification and serves no rational purpose given the indefinite stay of proceedings, the absence of a reasonable prospect of the accused being tried, and her inability to remember, comprehend, or abide by any coercive conditions imposed on her. Further, the defense contends that the appointment of a general guardian to the accused will not assist in the enforcement of coercive conditions as this would fall outside the guardian's role under Cambodian civil law.

Before the prosecution began their submission, International Co-Lawyer for Ieng Thirith Diana Ellis interjected, stating that she had understood the hearing would commence with the chamber asking any questions of Ieng Thirith. Ms. Ellis explained that having spoken with Ieng Vichida, the defense understood it was difficult for their client to remain seated for a significant period of time, even a few minutes. President Srim queried if Ieng Thirith could remain seated for a few more minutes. There was a pause of several minutes, before Ms. Ellis informed the judges that it was difficult for Ieng Thirith to comprehend what she was being asked. She emphasized that Ieng Thirith would not be able to sit for long as she experiences physical problems from sitting in such a position and needs to lie down. Ms. Ellis noted that her client had also had little, if any, sleep, and suggested the judges speak with her earlier, rather than later.

President Srim instructed security guards to take Ieng Thirith to the holding cell downstairs, at which point Supreme Court Chamber Judge Agnieszka Klonowiecka-Milart emphasized that Ieng Thirith was not under detention or guard in the holding cell but that it was made available so she could lie down and be comfortable while watching the proceedings. “We are grateful for the facilities. We see it at the moment as a holding room, not a cell,” Ms. Ellis said.

Prosecution Makes Submissions on Appeal

National Assistant Co-Prosecutor Song Chhorvon firstly noted that the chamber had directed the prosecution to make submissions on the third and fourth grounds of their appeal against the Trial Chamber's decision. Ms. Chhorvon said she would first refer briefly to Trial Chamber's factual findings, then make submissions on the third ground of appeal – the Trial Chamber's refusal of six conditions on Ieng Thirith's release – before finally addressing the fourth ground of appeal, namely the Trial Chamber's finding that such conditions would be unenforceable or impracticable.

Ms. Chhorvon referred to paragraph 24 of the Trial Chamber's decision, where it finds that Ieng Thirith suffers from a dementing illness – most likely Alzheimer's disease – which causes long- and short-term memory loss, thereby preventing Ieng Thirith from sufficiently understanding the course of the proceedings to enable her to instruct her counsel adequately and participate effectively in her own defense.

The chamber further noted that it appeared unlikely that Ieng Thirith would be able to testify at trial, a position neither the prosecution nor the defense contested, Ms. Chhorvon affirmed, before stating that these findings suggest Ieng Thirith has not lost all cognitive ability. "While her memory is diminished, the chamber did not find that Ieng Thirith is unable, for example, to communicate with those around her or understand instructions given to her," Ms. Chhorvon said, adding that this point was relevant to the issue of enforceability and application of the proposed conditions.

In paragraph 24, the Trial Chamber found that there appeared to be no reasonable prospect that Ieng Thirith's cognitive impairment can be reversed, and thus the possibility of reversal could not be excluded, Ms. Chhorvon emphasized, which was reflected in the chamber's permitting the possibility of a resumption of proceedings. The prosecutor pointed out that in paragraph 28 of the decision, the Trial Chamber ordered the proceedings against Ieng Thirith stayed until and unless it orders their resumption. Furthermore, in paragraph 39, the chamber states that it is willing to consult annually with experts to ascertain if new treatments have become available, Ms. Chhorvon added. "These parts of the Trial Chamber's decision are important, in our submission, as they clearly reflect the chamber's acceptance of the submission we made on August 31, 2012, namely that while a change of circumstances in relation to Ieng Thirith remains unlikely, it cannot be entirely dismissed," she argued.

The prosecution asserted that while Ieng Thirith does not face a reasonable prospect of standing trial in the near future, she retains some cognitive capacities and the possibility of recovery and resumption of trial cannot be excluded.

Ms. Chhorvon reminded the judges that the prosecution had submitted that under applicable international jurisprudence, as they had ordered a reversible stay of proceedings, the Trial Chamber must consider whether restrictive conditions ought to be placed on Ieng Thirith's release. The prosecution argued that the Trial Chamber erred by declining to assess the balance of rights and interests at stake and concluding that it had no legal basis to impose restrictions. This finding was an "incorrect reading" of the applicable international case law, Ms. Chhorvon

asserted, referring to three cases: *Talić* (International Criminal Tribunal for the Former Yugoslavia, or ICTY), *Djukić* (ICTY), and *Nahak* (East Timor Special Panels for Serious Crimes). Ms. Chhorvon noted that the Trial Chamber had sought to distinguish these three cases from that of Ieng Thirith. The prosecution disagreed and submitted that the principles arising from these cases should have guided the chamber in their decision.

In *Talić* and *Djukić*, the defendants were both terminally ill and released – with no prospect of recovery – while proceedings against them were stayed, the prosecutor stated. Though aware that a resumption of trial was highly unlikely the ICTY imposed restrictions on the accused, Ms. Chhorvon said. She then addressed each case individually:

- *Talić (ICTY)* – The prosecution noted that the ECCC Trial Chamber distinguished the *Talić* case because there was a disagreement among experts about whether the accused was fit to stand trial. The prosecutor argued that the difference in opinion was only related to the defendant’s fitness in the short term and it was in any case irrelevant because fitness to stand trial was determined by the court, not the experts. Finally, Ms. Chhorvon affirmed, all three experts accepted that *Talić* was suffering from incurable cancer and his death was imminent.

Citing the ICTY Trial Chamber’s decision dated September 20, 2002, Ms. Chhorvon read:

The stark reality of *Talić*’s medical condition is that there is no escape for him from the natural consequence that his illness will ultimately bring about, because his condition is incurable and inoperable and can only deteriorate with or without treatment. The stark reality is that the odds in favor of his being alive a year from now are few indeed.

In again distinguishing *Talić* from the Ieng Thirith case, the ECCC Trial Chamber stated that in *Talić* the ICTY declined to make a final determination on fitness. The prosecutor argued that there was in fact no application to determine fitness and such was unwarranted given the defendant’s condition: a “rapidly developing terminal illness with an extremely short life expectancy.”

Furthermore, Ms. Chhorvon asserted, the Trial Chamber attempted to differentiate between the two cases by finding that *Talić*’s conditions were justified by a possible resumption of trial – a point also raised by counsel for Ieng Thirith in their appeal response. The prosecution suggested that arguing *Talić*’s distinction because of a reference to his trial as ongoing displayed an inaccurate reading of the decision. Instead, the reference to resumption should be understood by taking into account that *Talić* was indicted with another accused, Brđanin. By September 2002, the case was underway, *Talić* was diagnosed with terminal cancer, and a decision was reached to provisionally release him, Ms. Chhorvon explained, while on the same day the ICTY Trial Chamber severed the case against co-accused Brđanin to allow it to proceed and *Talić*’s case was stayed and never continued. The prosecutor asserted that *Talić*’s chances of a resumption of trial were remoter than Ieng Thirith’s at the time of the decision, and he died within nine months of his release.

Ms. Chhorvon submitted that the supposed distinctions between *Talić* and Ieng Thirith’s case were “artificial and unconvincing.” Though prospects for resuming trial were remote, the ICTY considered it prudent to impose measures to safeguard the integrity of the proceedings,

she said, noting that the situation resembled that of Ieng Thirith. The prosecutor said the evidence suggested that Ieng Thirith's physical health was good, and the prospect for a resumption of trial against her were higher than against Talić. "Finally, Ieng Thirith is charged with crimes whose gravity far exceeds the gravity of the crimes with which Talić was charged," she added.

- *Djukić* – The prosecutor noted that the ICTY Trial Chamber deemed it necessary to place restrictions on Djukić's release, even though he was diagnosed as terminally ill during the pre-trial phase and later died within less than a month of his release. Ms. Chhorvon said the ECCC Trial Chamber simply found that the *Djukić* release was described in the *Talić* opinion as a practically unconditional release. Ms. Chhorvon contended that this was irrelevant and observed that Djukić experienced more modest conditions than Talić, which only reflected the fact that "each case turns on its own circumstances." "The indisputable fact is that Djukić's release was subject to conditions which the chamber in that case described as stringent," she added.
- *Nahak (Special Panels for Serious Crimes – East Timor)* – Ms. Chhorvon turned to the March 1, 2005, decision of the East Timor SCSR in the case of *Nahak*, where the accused was found unfit to stand trial due to a psychiatric condition and his trial was stayed. *Nahak* was subject to a series of restrictive conditions, which the ECCC Trial Chamber stated was given no legal justification, she noted. She contended that the judge in *Nahak* in fact asserted that the basis for restrictive measures was the remote possibility of a resumption of trial.¹⁴ Similarly to the current case, the prosecutor concluded, the judge in *Nahak* provided for the prosecution or defense to apply for a variation of the restrictive conditions should circumstances change.

Though jurisprudence in this area was limited, Ms. Chhorvon argued, the three aforementioned cases affirmed that in cases involving serious international crimes, where a reversible stay of proceedings has been applied and resumption of trial is unlikely, it was "appropriate" to consider the imposition of restrictive measures on an accused person who is being released. "What measures are appropriate will of course turn on the facts of each case," Ms. Chhorvon contended. "It cannot be said that once a stay has been ordered the Trial Chamber lacks jurisdiction to consider any restrictive orders." The prosecutor recognized that measures restricting the rights and liberties of an accused must be proportionate to the aim sought, noting that in the ICTY's decision in *Talić*, it was found that proportionate measures must be "suitable and necessary" and their degree and scope must remain in "reasonable relationship" to the target.¹⁵ "It is our submission that the six modest restrictive measures we have proposed meet these criteria," Ms. Chhorvon said.



¹⁴ Ms. Chhorvon said the finding could be located in paragraphs 157 – 164 of the decision.

¹⁵ Ms. Chhorvon cited paragraph 23 of the Trial Chamber's decision.

Moving on to the aims of the conditions, Ms. Chhorvon noted that the Trial Chamber seemed only concerned in its decision with safeguarding the accused's attendance at trial and reasoned that no measures can be imposed where there is no reasonable prospect of a trial in the foreseeable future,¹⁶ She argued that this was a "narrow reading" of the law, particularly given Internal Rule 63(3)(b), which outlines a range of interests that could form the basis of a detention order.

Ms. Chhorvon contended that the Trial Chamber's numerous "requests" to Ieng Thirith in its decision facilitate the prosecution's aims in imposing conditions, namely protecting witnesses and victims, ensuring the security of the accused, preserving public order, as well as ensuring Ieng Thirith's presence at any future hearings. Ms. Chhorvon stated that counsel for Ieng Thirith acknowledged in their appeal response that the concerns such as the need to protect victims and witnesses may form the basis of a judicial supervision order. "We have submitted that the Trial Chamber has the power to protect these interests by way of enforceable orders and that issuing requests to the accused which have no legal force is not the appropriate course of action," she said, adding that the prosecution's suggested measures minimally interfere with Ieng Thirith's right to liberty.

We submit that the imposition of these measures strikes a reasonable balance between, on the one hand, protecting the rights and interests of the victims and co-prosecutors to see justice done and, on the other hand, the need to minimize the restrictions on Ieng Thirith's freedom of liberty.

Mr. Chhorvon noted that the prosecution did not suggest the measures be applied indefinitely and a review at the conclusion of Case 002/01 would ensure that Ieng Thirith was not in a state of uncertainty.

Finally, Ms. Chhorvon addressed the implementation of the proposed measures. She recalled that the Trial Chamber doubted their practical or legal enforceability, the ability of the accused to form an intention to violate the conditions, and the possibility that penalties could be imposed on her in the event of a breach.¹⁷ Ms. Chhorvon submitted that the chamber committed an error of discretion in its approach.

"Whether the accused could ultimately be penalized for a breach of a court order is not determinative of whether the order should be imposed in the first place," she argued. The prosecutor contended that the purpose of such orders is to protect interests that require protection and there was no reason to believe that Ieng Thirith would be unable to comply. Her appointed guardian would assist the defendant, and the court need only consider consequences in the event of a breach, Ms. Chhorvon stated. She contended that Internal Rule 35 provided one avenue for dealing with a breach – which requires a willful and intentional act – and argued that such an occurrence could be cause for reviewing and strengthening the conditions. "By deciding not to impose any conditions now because there may be obstacles in imposing penalties for their breach, the Trial Chamber has improperly fettered its discretion in this matter," the prosecutor said.

¹⁶ Ms. Chhorvon cited paragraph 33 of the Trial Chamber's decision.

¹⁷ Ms. Chhorvon cited paragraph 37 of the Trial Chamber's decision.

Turning to the role of the guardian, Ms. Chhorvon recalled that the Phnom Penh prosecutor and Ieng Vichida filed a guardianship application on September 13, 2012; Ieng Vichida sought to care for her mother at her home and agreed to be subject to court orders. The prosecutor said the Ieng Thirith defense had argued that the prosecution tried to circumvent the court's jurisdiction by imposing conditions through the guardianship procedure. In response, Ms. Chhorvon stated that the Office of the Co-Prosecutors (OCP) was an entirely different body from the prosecutor's office at the Phnom Penh Municipal Court and Ieng Vichida had herself sought guardianship of her mother, was capable of exercising her rights, and agreed to abide by conditions set out by the Municipal Court. Ms. Chhorvon said she believed Ieng Thirith's defense counsel was consulted on this process and it would thus be "disingenuous" to imply that the prosecution's actions were done without their knowledge. "We have no standing before the domestic courts nor would we seek to frustrate our own appeal by pursuing proceedings in other judicial institutions," she added.

Ms. Chhorvon noted that the Ieng Thirith defense had requested the court remove the restrictions imposed by the Municipal Court as part of the decision on the appointment of a guardian, which would be beyond the ECCC's jurisdiction. "As the Pre-Trial Chamber noted in its December 3, 2007, decision on Duch's appeal against the provisional detention order, the ECCC has no power to review decisions of regular Cambodian courts," the prosecutor stated. If Ieng Thirith or her guardian contested the terms of the Municipal Court decision, she contended, they could seek its variation and were entitled to an appeal of the decision within two weeks of its issuance. Ms. Chhorvon noted that under articles 1105 and 110 of the Cambodian Civil Code, the current guardian could apply for the appointment of an additional guardian.¹⁸

The prosecutor recalled that in paragraph 79 of their appeal response, the Ieng Thirith defense argued that the prospect of sanctioning a guardian for a lack of compliance is without a legal basis. "The guardian has a duty to assist the accused in complying with her legal obligations provided the guardian has discharged that duty and, of course, no sanctions would be imposed on her for a failure by Ieng Thirith to comply with court orders," Ms. Chhorvon affirmed.

Ms. Chhorvon argued that the appointment of a guardian would facilitate the imposition of the prosecution's proposed measures, as the guardian would also assist Ieng Thirith in fulfilling her obligations generally. The guardianship creates a "contact point" through whom the court can communicate with Ieng Thirith and through whom instructions can be given to Ieng Thirith's counsel. Ms. Chhorvon observed that Ieng Thirith complied with the summons for today's hearing and Ieng Vichida had also attended to assist the chamber, demonstrating how guardianship can operate effectively.

In conclusion, Ms. Chhorvon asserted that though the likelihood of a resumption of trial was remote, it could not be excluded and while a reversible stay of proceedings is in place, the court has jurisdiction to issue necessary orders to preserve the integrity of the proceedings. The prosecution concluded:

In a case of this magnitude, where the accused is charged with some of the worst crimes known to humanity which affected literally millions of people, there is a compelling public interest in

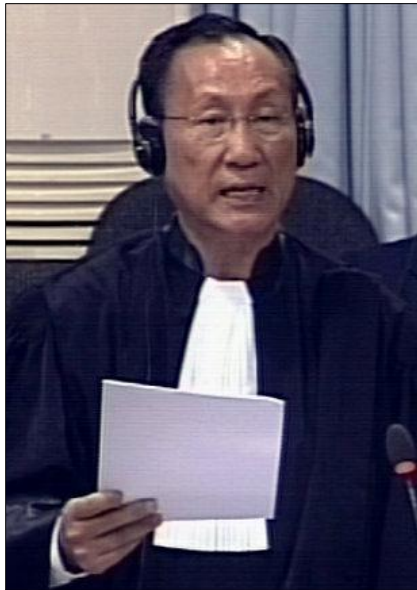
¹⁸ Ms. Chhorvon's comment was unclear in the English translation.

maintaining judicial control over the accused, until it becomes absolutely clear that no trial against her will ever take place. It is also appropriate to maintain that judicial control in order to provide certainty for the accused. We submit that the Trial Chamber has erred by concluding that it had no jurisdiction to consider or impose restrictive measures and by failing to weigh Ieng Thirith's right to liberty against all of the other rights and interests which are affected by the chamber's decision. We submit that the very limited conditions we have proposed will effectively safeguard the rights and interests of victims and the integrity of these proceedings while minimally restricting Ieng Thirith's right to liberty.

Defense for Ieng Thirith Responds to Prosecution

National Co-Lawyer for Ieng Thirith Phat Pouv Seang requested that the Supreme Court Chamber reject the prosecution's immediate appeal against the Trial Chamber's decision on reassessment of Ieng Thirith's fitness to stand trial dated September 13, 2012, and all of their supplementary submissions. The defense further requested the removal of conditions on Ieng Thirith's release, while she awaits a decision on the prosecution's appeal.

Mr. Pouv Seang argued that the Trial Chamber was correct to order the immediate and unconditional release of Ieng Thirith and noted that the relevant legal principles and framework regarding to the accused's liberty were outlined in the defense's appeal response. "We submit that even though judicial supervision is less draconian than pre-trial detention, it necessarily imposes restrictions on the right to liberty of an individual and therefore should only apply where



it is ordered on a sound legal basis," he argued. The defense further asserted that the ECCC chambers should act to ensure that the accused is not subject to arbitrary deprivation or limitation of her right to liberty without proper cause justified under the law.¹⁹

The defense lawyer stated that Ieng Thirith was "permanently unfit to stand trial," suffered from moderate to severe dementia – probably Alzheimer's disease – which was diagnosed in 2011, but has been developing over a number of years. Court-appointed experts unanimously held that Ieng Thirith's condition had not improved and had in fact deteriorated despite additional treatment, Mr. Pouv Seang recounted.

"There is no evidential basis upon which this court can conclude that the respondent will ever become fit to stand trial," he added, noting that the Trial Chamber had stayed proceedings against Ieng Thirith indefinitely and severed the charges against her from Case 002/01. Mr. Pouv Seang asserted that the prosecution implicitly accepted that Ieng Thirith will never be fit to stand trial when they said the impugned decision satisfied the provisions of Internal Rule 104(4)(a) as a decision that has the effect of terminating the proceedings. He also recalled that the prosecution stated Ieng Thirith was unlikely to stand trial in the foreseeable future. Mr. Pouv Seang argued that there was effectively a termination of proceedings, though no formal legal mechanism existed to permit it

¹⁹ Mr. Pouv Seang said the relevant provisions were ECCC Internal Rules 63, 65, and 83 and Article 223 and 230 of the Cambodian Code of Criminal Procedure.

in the case of unfitness to stand trial within the court's jurisdiction. Measures that restrict the liberty of the accused have no justifiable legal basis or authority, Mr. Pov Seang affirmed.

Citing Internal Rule 65(1), he noted that conditions might be imposed following an accused's release on bail if necessary to ensure the accused's presence during the proceedings and the protection of others. Mr. Pov Seang submitted that a tribunal should favor release at the earliest possible stage with the least intrusive conditions in order to satisfy the requirements of Internal Rule 63.²⁰

In the present case, Mr. Pov Seang argued, the requirement of necessity was not fulfilled. The Trial Chamber rightly held that if there is no legal basis for continued detention of the accused – based on the finding that there is no reasonable prospect of her becoming fit to stand trial in the near future – then there is no legal basis for imposition of coercive conditions or forms of judicial supervision. “Because there is no prospect of a trial being held ever, imposing these six conditions would amount to a restriction of the respondent's rights to liberty not provided by law,” Mr. Pov Seang submitted. The defense counsel noted that Internal Rule 65(1) provided for judicial supervision in order to ensure the presence of the accused person at trial or to protect others, and Article 223 of the Cambodian Code of Criminal Procedure also presupposed a reasonable prospect of a trial.

Mr. Pov Seang said that in the *Talić* case, the Trial Chamber held that it was necessary to recall the rationale for provisional release, which is linked to the rationale for the imposition of detention on remand. Accordingly, “imposing conditions presupposes that there will be a trial, and the existence of a real risk that the accused is going to fail to attend the trial and/or that others need protection,” he contended. “These two cumulative requirements are not met.” Mr. Pov Seang concluded that the prosecution's suggestion that imposing judicial supervision was necessary to safeguard the integrity of the proceedings and to serve public purposes “should be rejected as having no legal basis.”

Ms. Ellis continued the defense's submission by correcting the prosecution, stating that the defense did not suggest in their response that the court had jurisdiction to interfere with a municipal court order and they did not advance any such argument. Ms. Ellis affirmed that addressing the prosecution's appeal required examining the proposed conditions, the reasons advanced to justify them, and the manner in which it is suggested the accused complies with such conditions – namely, how they are “implemented and enforced.”

Firstly, Ms. Ellis reminded the court that Ieng Thirith was elderly and mentally incapacitated – which must be in the forefront of the chamber's minds – and experts unanimously found that she was suffering from dementia. “They are all of one voice,” Ms. Ellis affirmed. “The condition is incurable, irreversible and the prognosis is one of increasing incapacity. It is a genuine condition, not faked.”

Ms. Ellis said it was a tribute to the court that the Supreme Court Chamber's December 13, 2011, decision lead to a program of medication and cognitive therapy for Ieng Thirith, but this

²⁰ Mr. Pov Seang's comment was unclear in the English translation.

regrettably did not alleviate Ieng Thirith's condition and there was actually deterioration, most significantly in memory. Ms. Ellis contended:

It is completely wrong of the appellants to say that there is evidence before this court that the respondent could communicate intelligibly with anyone. The evidence on the contrary was that she didn't recognize her nearest and dearest, she didn't remember individuals from one hour to the next, she couldn't orientate herself, she couldn't focus, and she couldn't respond to questions.

Ms. Ellis noted that there was no mechanism in the court's jurisprudence to acknowledge when an individual becomes unfit to stand trial such that it allows for the termination of proceedings.

There is no reference to mental incapacity and it is, we submit, for that reason that the Trial Chamber has been forced into a position of relying on the mechanism whereby it could stay the proceedings for an indefinite period. But we submit that it is a complete fantasy for this court or, indeed, anyone to imagine for one minute that there is going to be any improvement in the mental health of the respondent such that will allow her to stand trial.

Ms. Ellis recounted the evidence that there was no further treatment to improve Ieng Thirith's condition for more than a few months and it was "a complete fallacy" to suggest that she might become engaged in the trial process. Against this background, Ms. Ellis submitted, the chamber must consider the proposed conditions.

The defense counsel reiterated that the prosecution fully understood that there would be no trial as this point formed part of their justification for appeal, namely that the result of the Trial Chamber's findings was an effective termination of proceedings. Ms. Ellis said the prosecution's proposed conditions were of the kind to check and control the movements of an individual to ensure there is no interference with the administration of justice, such as those imposed under Article 223 of the Cambodian Code of Criminal Procedure and ECCC Internal Rule 65 on bail conditions.



"What is the objective that the appellants seek to achieve?" Ms. Ellis inquired. She cited paragraph 5 of the prosecutor's supplementary submissions dated September 28, 2012, in which the prosecution accepts that they are primarily attempting to secure the presence of the accused, should there be a future trial. The prosecutors say they wish to preserve the integrity of the proceedings, protect others, prevent pressure on witnesses or victims, protect the accused, and preserve public order, all of which can be found under Internal Rule 63(3) at the point when an accused is to be held in preventive detention, Ms. Ellis observed. "We submit the truth and the reality behind these objectives is to ensure the attendance of the respondent at a future trial and to ensure there is no disruption with the administrative process," Ms. Ellis contended, adding that while these were "worthy objectives," there was no evidence they were necessary.

Ms. Ellis observed that the public handled the Trial Chamber's ruling of unconditional release with sophistication and understanding, doubtless appreciating the grounds for the decision. "We

submit that the appellants have sought to rely on the inherent power in the realization that under the internal rules of this court ... these conditions sought do in fact anticipate attendance at a trial and that there should be no interference in advance of that trial,” Ms. Ellis argued. She submitted it was “entirely erroneous” for the prosecution to characterize the situation as a balancing exercise, when it was actually a case where an accused is no longer able to participate in proceedings through no fault of her own.

If conditions were imposed, any breach would have to be proven to have been intentional, Ms. Ellis stated. “It is entirely repugnant to a system of justice for there to be the imposition of conditions which can never be met through no fault of the individual concerned and which can then, if breached, be met by sanctions,” she said. Ms. Ellis held that no court should impose coercive measures when it is evidenced that they cannot be complied with. “It makes a mockery of the whole system.” Despite the gravity of the offences with which Ieng Thirith is charged, she is nevertheless presumed innocent and has a right to liberty that should only be displaced with adequate reason, Ms. Ellis affirmed.

Moving to the issue of guardianship, Ms. Ellis held that a guardian could not assume responsibility for compliance and the rules indicated that the individual upon whom the conditions are imposed must be able to comply. A guardian has legal authority to care for the personal and property interests of a person in need of protection who is unable to safeguard their own interests, Ms. Ellis observed. She argued that the guardian was not intended to ensure that coercive measures were abided by. Ieng Vichida was vested with the authority to look after her mother due to her incapacity, she continued, noting that under Article 24 of the Code of Civil Procedure, an order can only be made where the person is in a habitual condition, lacking the ability to comprehend the legal consequences of her actions due to mental disability. “It is under that article that the guardianship order has been made,” she added.

At this point, Ms. Ellis stated that the manner in which the guardianship order was dealt with was “unfortunate and inappropriate.” The application was not instigated by Ieng Vichida but after the approach of National Deputy Co-Prosecutor Yet Chakriya, who is also a prosecutor at the Phnom Penh Municipal Court, Ms. Ellis explained. She noted that the prosecutor made the guardianship application, which, though done after speaking with Ieng Thirith’s counsel, was completed at a “wholly inappropriate” time, namely on September 10, before the Trial Chamber issued its September 13 order for the unconditional release of Ieng Thirith. “That very same day, the prosecutor – that is, deputy prosecutor of this court – went to the municipal court, and there provided the documents that led to the appointment of Vichida as guardian,” Ms. Ellis continued.

“The decision to appoint [Ieng Vichida] was made on the basis that it was said by the prosecutor ‘[Ieng Thirith] is permanently lacking the ability to understand and judge the possible legal action to do ... with cognitive impairment and so the prosecutor requested general guardianship consistent with the application of Ieng Vichida,’” Ms. Ellis stated, noting that Ieng Vichida’s request sought only to be able to care for her mother in her home. Ms. Ellis argued that there had been a “worrying confusion of positions” and that the prosecutor should have complied with Article 22 of the Code of Civil Procedure and waited until the outcome of the pending appeal before suggesting further action.

Furthermore, Ms. Ellis submitted, the court was not permitted to use the guardian to impose conditions on the accused and must instead be satisfied that Ieng Thirith understood the nature of the conditions, her obligations under the conditions, and the potential consequences of her failure to comply with them.

Ms. Ellis submitted that none of the three cases cited by the prosecution – *Talić*, *Djukić*, and *Nahak* – were relevant to the present situation, because they involved two instances of terminal illness and one instance of psychiatric illness. A terminal illness will cause death, Ms. Ellis noted, but it was unclear as to whether there will be remission and if so, for how long. Ms. Ellis argued that in neither *Talić* nor *Djukić* was there any indication that the defendants lacked the capacity to understand the proceedings or were physically infirm to the point where a trial could not take place. She added in relation to the *Nahak* case that psychotic illness was very different from dementia – marked by progressive decline – and could often be treated, which had been proposed for Nahak; however, due to certain other events, the court stopped sitting and the outcome of the case was unknown. “It is clear from the jurisprudence that in matters to do with fitness to stand trial each case turns on its own facts,” Ms. Ellis concluded.

We submit that the important principle for this court, who is essentially making law in this area, is to be true to the rights of an accused – that is, the presumption of innocence – to acknowledge the right to liberty, and to accept that whatever the gravity of the crime, there is something entirely unacceptable and indeed repugnant in a civilized society to impose coercive and restrictive conditions on an individual who has no capacity to understand what’s being imposed upon her and no capacity to decide whether to abide by the conditions or not. Therefore, we submit that the decision of the Trial Chamber, that there should be unconditional release, should be upheld by your honors in this court.

Ieng Thirith Responds to Questions from Judges

At this point, President Srim inquired if Ieng Thirith²¹ could respond to questions from the Supreme Court Chamber. After a lengthy pause, Ieng Thirith was brought into the courtroom and President Srim noted that the delay was due to the health status of Ieng Thirith, who was fatigued and weak. He explained that Ieng Thirith could request to be excused from the courtroom and remain in the holding cell if she so wished.



President Srim began by asking Ieng Thirith how she was feeling and if she had felt better since being released. Ieng Thirith replied that she was “fine” and “very well” and that “the host” had received her well and knows what kind of medicine she should be taking to help her recover.

Reserve Supreme Court Chamber Judge Florence Ndepele Mwachande Mumba inquired if Ieng Thirith was prepared to attend court if asked to do so in the future. Ieng Thirith stated that she had been ill and “in the forest” and her illness remained. When asked if she had a permanent address in Cambodia, Ieng Thirith responded that “at the new place” she was treated and followed “them” to that location. “I have some

²¹ Portions of Ieng Thirith’s comments were unclear in the English translation.

friends abroad,” Ieng Thirith said. “They are professors, mainly professors, or school teachers. And they are very nice people. They protect me; they think of me. And they are also respected by their neighbors because they never treated me as someone who has committed any wrongdoings. From my young age until the time I graduated at French school, I had been very much loved by the French teachers.”

Judge Mumba asked Ieng Thirith if she saw any reason to leave Cambodia and go abroad. Ieng Thirith stated in response that she did not because at home there were educated Cambodian people who helped her with whatever she needed:

Indeed, I would like to make sure that I still speak my foreign language because everyone agrees that they would like to help me to remember the language I have acquired. And they note that Cambodia is a small country with small population, so they are happy about what I have learned and they are happy because what I’ve learned so far I still remember it.

When asked if she was undergoing medical treatment or tests, Ieng Thirith responded, “At the place where I stay, there is service and they know my condition.” She described how people stayed to help because sometimes after working long hours she did not wish to eat her meals. Ieng Thirith explained that after they convinced her to eat, she recovered and could read books more carefully and communicate better. “Everyone says that they are doing their best to make sure that I recover,” Ieng Thirith stated.

Next, Judge Klonowiecka-Milart inquired if Ieng Thirith was aware of security guards in the vicinity. Ieng Thirith replied:

I can see that everyone can agree with me that there is no security personnel. I think I live a normal life here in Cambodia because I don’t think I would be treated as someone who requires security or protection, and for those who can speak Khmer, they can come and approach me and talk to me because I understand English significantly. So they note that I can speak a foreign language.

The judge pressed further on whether it would bother Ieng Thirith if security checks were imposed on her. The defendant replied that foreigners surround the place where she lives:

Our neighbors were of the view that their children were educated so wherever they had difficulty we assisted them and my Cambodian compatriots also assisted me a lot. As such, our French friends who resided close to me assisted all Cambodians, the Cambodians who have suffered from illnesses. So they were very helpful, they help us a lot.

Finally, Judge Klonowiecka-Milart inquired if Ieng Thirith liked to receive visitors or whether she preferred to be alone. She responded, “I don’t want to be left alone. When I came to work downstairs there were people, foreigners, who came to work with me. ... They came to work with me, these people.”

Judges Question Ieng Thirith’s Daughter and Guardian

Following an adjournment, President Srim posed questions to Ieng Vichida. Ms. Vichida stated that she resided with Ieng Thirith and had close contact to her about three times a week. She explained that she assisted Ieng Thirith during meal times, with her medical treatment, and by encouraging her do to physical activity. Ms. Vichida said that she traveled to the provinces for work but had never been abroad.



Judge Klonowiecka-Milart noted that it was clear the court may at some point require the presence of Ieng Thirith and inquired if Ms. Vichida would be prepared to assist her in responding to such summons. Ms. Vichida affirmed that she would. When asked if she foresaw an occasion where Ieng Thirith would need to go abroad, Ms. Vichida responded that she did not believe so, as her mother was elderly and has difficulty with her mobility. “I think it was a mere speech by her,” Ms. Vichida said, referring to Ieng Thirith’s statement that she had friends abroad who could protect and take care of her.

Under questioning from Judge Klonowiecka-Milart, Ms. Vichida stated that Ieng Thirith may need to change address if she gets tired and bored with her current location, but she did not foresee this and if such was the case, she could inform the court of the change.

Referring to Ieng Thirith’s identification card, Judge Klonowiecka-Milart sought clarification on whether withholding the card – which was currently held in the court’s possession – had caused difficulties. Ms. Vichida explained that they did not envisage the need for the ID card and Ieng Thirith’s doctors – the treating doctors from the court – had never asked for it and it was not necessary in order to be admitted into the hospital. When asked if Ieng Thirith would need an ID card to claim a parcel from someone from France, for example, Ms. Vichida replied that an ID card would be needed for that purpose but no foreign friends sent her gifts or medicine.

“There is very little property left over from my mother so we do not have any problem with this, and, in some circumstances, we do not need such identification card,” Ms. Vichida, adding that she did not believe Ieng Thirith’s passport was needed.

Supreme Court Chamber Judge Som Sereyvuth inquired about Ieng Thirith’s medical treatment. Ms. Vichida stated that Ieng Thirith received treatment in accordance with prescriptions that were ordered for her. When asked if she foresaw any issue with the court requiring Ieng Thirith to undergo medical examinations, Ms. Vichida responded, “Currently her mental status is not stable, it remains fluctuating, and sometimes we need to bring her to the hospital for treatment. So it depends on her condition, and I am not in the position to be able to say much about this.” In response to another question, Ms. Vichida said her expertise was general, and she had no expertise in psychology.

After this response, Supreme Court Chamber Judge Mong Monichariya inquired if Ms. Vichida was certain that her mother had no communication with other defendants. Ms. Vichida

responded that her mother was “mentally challenged” and “doesn’t know everyone very clearly,” let alone being able to communicate with them. Judge Monichariya asked if Ieng Thirith had ever expressed resentment to her co-accused, to which Ms. Vichida said she had not. She also confirmed that she could ensure Ieng Thirith refrained from communicating with the co-accused – with the exception of her husband – or witnesses and victims.

Finally, Judge Klonowiecka-Milart asked if it would be problematic for Ms. Vichida or her mother to endure regular security checks. Ms. Vichida responded:

Perhaps it cannot be done, as I already indicated that my mother is mentally challenged. This morning we were late when we left home because sometimes she did not want to leave home and it proves to be quite [a] challenge to meet her and at the same time, since I have other commitments, I do not remain with her all the time. And she is cared by some of her grandchildren, so I can see that it is quite challenging for such things to be conducted.

Parties Comment Briefly on Ms. Vichida’s Response

After International Senior Assistant Co-Prosecutor Tarik Abdulhak told the chamber they could make brief submissions based on the additional information from Ms. Vichida, Ms. Ellis interjected, requesting that the chamber examine closely the answers they were given and perhaps inquire of Ms. Vichida whether the responses given by Ieng Thirith were accurate and reliable. She asserted that Ieng Vichida stated that it was not accurate that Ieng Thirith had friends abroad involved in her life.

“There is a well-known condition which causes people who have gaps in their knowledge and memory to confabulate, and that was well documented by Prof. Campbell,” Ms. Ellis said. She argued that it would be wrong not to attempt to establish the accuracy of the answers provided and suggested that the court ascertain from Ms. Vichida if her mother was aware of relationships or of the fact that she was in court. “If you are to evaluate the answers you’re being given to the questions you posed, we submit these are fundamental questions that must inform the view that you take,” Ms. Ellis stated. Mr. Abdulhak argued that the chamber was perfectly able to assess Ieng Thirith’s ability to communicate with them, to understand questions and respond and it would be inappropriate to require Ms. Vichida to testify on the accuracy of her responses.

President Srim stated that the chamber would take the statements of the accused and the guardian into consideration. He then allowed Ieng Thirith 10 minutes to speak, if she wished to. There appeared to be some confusion, during which President Srim asked – “Mrs. Ieng Thirith, who is the accused really?” prompting laughter in the chamber. The floor was eventually given to Ms. Vichida to make final remarks. Ms. Vichida responded:

I do not have much to say. I just wish to indicate that my mother is in the state of dementia and she cannot remember anything at all. Sometimes she would address her children as brothers, sisters ... and we note that her physical fitness is also at a very weak state. As her daughter I am doing my best to make sure that she can deal with this, and I thank you, the president and your honors, for coordinating and helping to ensure that my mother can attend the proceedings today and allow her to also retire to a holding cell when she feels needed.

After noting that a written ruling on the appeal would be made in due course, President Srim adjourned the appeal hearing.