

## **Supreme Court Chamber Determines that Ieng Thirith’s Release Is Subject to Judicial Supervision**

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December 18, 2012

The Extraordinary Chambers in the Courts of Cambodia’s (ECCC) final ruling on the consequences of accused Ieng Thirith’s lack of fitness to be tried has now been issued. In September, the Trial Chamber determined for a second time that 80-year-old Ieng Thirith must be unconditionally released from detention after finding her unfit for trial due to moderate to severe dementia likely caused by Alzheimer’s disease.<sup>1</sup> Because the Prosecution appealed the decision only with regard to the conditions of release, the Supreme Court Chamber (SCC) immediately authorized her release from detention subject to provisional conditions.<sup>2</sup> The SCC has now ruled on the appropriateness of imposing judicial supervision on Ieng Thirith when there is negligible prospect that she will ever be brought to trial.

The Trial Chamber first ordered Ieng Thirith’s unconditional release in November 2011 after finding her unfit on the eve of trial, severing her charges from her Case 002 co-defendants and staying the proceedings against her.<sup>3</sup> Its ruling was overturned by the SCC, which ordered her continued detention for six months in an effort to “exhaust all measures available to it which may help improve the Accused to become fit to stand trial.”<sup>4</sup>

In August 2012, three experts testified that Ieng Thirith’s mental condition had deteriorated further. The Trial Chamber found that there was “no reasonable prospect that [her] cognitive impairment can be reversed,” and, though not withdrawing the charges, stayed the proceedings against her “indefinitely” — “meaning that the stay of proceedings shall continue until and unless the Chamber orders their resumption against the accused.” The Chamber determined that because the stay is permanent, it “cannot exercise its jurisdiction over the Accused for the duration of the stay” and also lacks “a clear legal basis to impose coercive conditions or other forms of judicial supervision” on her during this period. It therefore ordered her released unconditionally, while “requesting” her to remain within Cambodia and to inform the Court of any change of address, and also agreeing “to consult annually with the experts to ascertain whether new treatments ... have been approved which ... are likely to reverse [her] cognitive decline such that she would become fit to stand trial.”<sup>5</sup>

On appeal, the Prosecution argued that the Trial Chamber erred by “effectively divesting itself of

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<sup>1</sup> Decision on Reassessment of Accused Ieng Thirith’s Fitness to Stand Trial Following Supreme Court Chamber Decision of 13 December 2011 (Sept. 13, 2012). *See* Expert Commentary on Legal Filings: Decision to Release Accused Ieng Thirith from Detention (Sept. 17, 2012), at <http://www.cambodiatribunal.org/commentary/expert-commentary-legal-filings>.

<sup>2</sup> Decision on Co-Prosecutors’ Request for Stay of Release Order of Ieng Thirith (Sept. 16, 2012).

<sup>3</sup> Decision on Ieng Thirith’s Fitness to Stand Trial (Nov. 17, 2011).

<sup>4</sup> Decision on Immediate Appeal Against the Trial Chamber’s Order to Release the Accused Ieng Thirith, ¶ 38 (Dec. 13, 2011).

<sup>5</sup> Decision on Reassessment of Accused Ieng Thirith’s Fitness to Stand Trial Following Supreme Court Chamber Decision of 13 December 2011, ¶¶ 24, 28, 33, 39-40 (Sept. 13, 2012).

jurisdiction” and again asked that six conditions be imposed on her release:

- (1) to reside at a specified home address to be provided by the Co-Lawyers;
- (2) to make herself available for a weekly safety check by authorities or officials to be designated by the Trial Chamber;
- (3) to surrender her passport and national identification card;
- (4) to not contact directly or indirectly other co-accused (excluding her husband, Accused Ieng Sary);
- (5) to not contact directly or indirectly any witness, expert or victim who is proposed to be heard before the Trial Chamber and to not to interfere with the administration of justice; and
- (6) to undergo six-monthly medical examinations by medical practitioners to be appointed by the Trial Chamber.<sup>6</sup>

In its ruling, the SCC identified two inherent contradictions in the Trial Chamber’s determination that it cannot exercise jurisdiction over Ieng Thirith after release because the stay of proceedings is permanent: (1) its finding that proceedings could be resumed should she later be found fit, and (2) its agreement to undertake steps to ascertain periodically if there had been advances in medical science making resumption possible.<sup>7</sup>

The SCC also noted that, unlike common law courts, civil law courts such as the ECCC have no discretion to discontinue criminal actions once they have been initiated, except for reasons specifically set forth in the law: “The law applicable before the ECCC does not foresee the possibility of terminating proceedings in a case of an accused found unfit to stand trial” but does foresee the possibility of issuing stays “for the duration of an obstacle” to the continuation of proceedings.<sup>8</sup>

Noting the “tension” between the fundamental rights of an accused who was unlikely to ever be tried and “the interests of justice ... in prosecuting the accused for serious crimes,” the SCC conducted a thorough review “of the rules and practice established at the international level, as well as domestic practice” to determine whether the application of international standards would nevertheless require the termination of proceedings.<sup>9</sup> Among its findings was that “[t]he solution of suspending or temporarily staying proceedings against accused unfit to stand trial and continuing to exercise jurisdiction has thus far been favored by the *ad hoc* international tribunals[,]” the Special Panels for Serious Crimes in East Timor, the International Criminal Court, and a number of domestic jurisdictions including France—whose code provided the model for Cambodia’s procedural rules.<sup>10</sup>

Overall, the SCC found, “it remains exceptional that proceedings against permanently unfit accused are terminated and that courts forfeit jurisdiction over them, especially in cases involving serious crimes.” This “allows the courts to take measures that are deemed necessary

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<sup>6</sup> 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, ¶¶ 6, 10 (Sept. 14, 2012).

<sup>7</sup> Decision on Immediate Appeal Against the Trial Chamber’s Order to Unconditionally Release the Accused Ieng Thirith, ¶ 34 (Dec. 14, 2012).

<sup>8</sup> *Id.* ¶¶ 36-38.

<sup>9</sup> *Id.* ¶¶ 40-41.

<sup>10</sup> *Id.* ¶¶ 41-48.

and appropriate in the circumstances to make possible the resumption of proceedings, if the opportunity arises[,]” as both the medical condition of the accused and medical science are “variable in time” and “subject to human error and deceptive behavior of the accused.”<sup>11</sup>

For all these reasons, the SCC ruled that “[t]he Trial Chamber committed an error of law in concluding that the ECCC is prevented from exercising jurisdiction over the Accused during the indefinite stay of the proceedings against her whereas such conclusion finds no support either on the applicable law before the ECCC or on the practice established at the national or international level.”<sup>12</sup>

The SCC next considered the Trial Chamber’s finding that there was no “clear legal basis” for judicial supervision during the stay of proceedings. It first noted “that the suspension of proceedings does not bar the court from undertaking procedural actions and applying measures to ensure the resumption and integrity of proceedings.” Then it found a formal basis for such measures in general rules related to detention and judicial supervision in the Cambodian Criminal Procedure Code and the ECCC Internal Rules.<sup>13</sup>

As a consequence, in its view, “the core problem resulting from the indefinite stay of proceedings due to lasting unfitness of the Accused for the question of measures of judicial supervision is not the lack of jurisdiction or legal basis, but rather the question of the necessity and proportionality of these measures in the current circumstances” — an issue never considered by the Trial Chamber. The SCC noted that, because the conditions of judicial supervision requested by the Prosecutors restrict fundamental rights protected by the International Covenant on Civil and Political Rights:

[I]t is not sufficient that the restrictions have a formal statutory basis ...: a court may only impose such measures as are necessary to protect legitimate interests and conform to the principle of proportionality by being appropriate to achieve their protective function, being the least intrusive instrument amongst those which might achieve the desired result and being proportionate to the interest to be protected[.]<sup>14</sup>

As there is little prospect of Ieng Thirith being found fit and brought to trial, only those measures having “minimal practical impact” on her can be considered proportionate. However, “practical impact” must be determined with reference to the fact that, as a person who is unfit for trial, she is incapable of fully exercising her rights. Moreover, the SCC agreed with the Prosecutors that neither Ieng Thirith’s inability to abide by judicial conditions as a consequence of her mental impairment, nor the difficulty of enforcing them against her, mean that they cannot be applied, for example, through her daughter who is her appointed guardian.<sup>15</sup>

With regard to the specific measures requested by the Prosecutors, the SCC ruled:

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<sup>11</sup> *Id.* ¶ 52.

<sup>12</sup> *Id.* ¶ 53.

<sup>13</sup> *Id.* ¶ 54.

<sup>14</sup> *Id.* ¶¶ 57-58.

<sup>15</sup> *Id.* ¶¶ 60, 62-64.

- Bi-annual medical evaluations to verify the genuineness of her condition and its progress are both appropriate and foreseen by the Cambodian Code;
- To carry out medical examinations, it is necessary that Ieng Thirith be ordered to remain in Cambodia and to supply her address to the Court;
- It would be disproportionate to take her passport and ID as “it participates to the dignity of the Accused to have her identification documents”;
- Minimally intrusive monthly checks on her residence by the judicial police are appropriate both to ensure that she is abiding by the conditions of her release and to monitor her security;
- It is unnecessary to prohibit her from interfering with the administration of justice because this is “a universal obligation”; and
- There is no genuine threat that she will interfere with witnesses in Case 002 due to the stay of proceedings against her and her diminished cognitive state.<sup>16</sup>

The Trial Chamber is now tasked with reviewing these conditions every 12 months to ensure that Ieng Thirith “is not subject to arbitrary restrictions on her right to privacy and freedom of movement.”<sup>17</sup> Unless there is a change in her medical condition, this will likely be the last word from the ECCC on this matter.

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<sup>16</sup> *Id.* ¶¶ 67-80.

<sup>17</sup> *Id.* ¶ 81.