

BEFORE THE TRIAL CHAMBER  
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

**FILING DETAILS**

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

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**Distributed to:**

**Trial Chamber**  
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## I. INTRODUCTION

1. Pursuant to Rules 82(6), 104, 105, 106(2) and 107 of the Internal Rules (“Rules”),<sup>1</sup> the Co-Prosecutors submit this immediate appeal (“Appeal”) to the Supreme Court Chamber (“Chamber”) against 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* (“Impugned Decision”).<sup>2</sup>
2. For the reasons stated below, the Co-Prosecutors submit that (1) the Appeal is admissible; (2) the Impugned Decision meets the standard for appellate review in that it contains errors of law and an error of fact or discernible error in the exercise of the Trial Chamber’s discretion; (3) the Impugned Decision should be annulled insofar as the Trial Chamber divests itself of jurisdiction to order a continuation of judicial supervision subject to legally-justifiable conditions; and (4) the Impugned Decision should be amended to require the Accused, through any duly-appointed guardian or curator, to comply with specific conditions to appropriately safeguard the competing rights and legal interests engaged by her release from detention.
3. Concurrent to this Appeal, the Co-Prosecutors have filed:
  - (a) a request for stay of release to the President of the Chamber, as required by Rule 82(6) of the Rules; and
  - (b) a request to the Chamber for an extension of time to file supplementary written submissions within seven days of notification of the Impugned Decision.

## II. ARGUMENT

### A. The Appeal is admissible

4. The Appeal satisfies the requirements for admissibility as set out in Rules 104, 105 and 107. Specifically:
  - (a) Rule 104(4)(a) provides for a right of immediate appeal against decisions which have the *effect* of terminating the proceedings. This encompasses decisions ordering an indefinite stay of proceedings because, as the Chamber has held, the “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.”<sup>3</sup> Applying the Chamber’s

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<sup>1</sup> Extraordinary Chambers of the Courts of Cambodia, Internal Rules (Rev. 8), as revised on 3 August 2011 (“Rules”).

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

<sup>3</sup> E138/1/7 Decision on Immediate Appeal against the Trial Chamber’s Order to Release the Accused Ieng Thirith, 13 December 2011 (“First Appeal Decision”) at para. 15

jurisprudence, the Impugned Decision *effectively* terminates the proceedings against the Accused Ieng Thirith (“the Accused”), even though there remains a very remote prospect of resumption of the trial in the event that there is a change in the Accused’s medical condition.

- (b) Rule 104(4)(b) provides for a right of immediate appeal against decisions on detention and bail under Rule 82. The Impugned Decision orders the Accused’s release from the ECCC detention facility and, as such, is a decision under Rule 82.
- (c) Rule 105(2) prescribes that an immediate appeal must set out the grounds and arguments in support thereof. It provides that each ground of appeal shall (a) specify an alleged error on a question of law and demonstrate how it invalidates the decision; (b) specify a discernible error in the exercise of the Trial Chamber’s discretion which results in prejudice to the appellant; or (c) specify an alleged error of fact and demonstrate how it occasioned a miscarriage of justice. The grounds of appeal set out below identify errors of law which invalidate the Impugned Decision, and an error of fact occasioning a miscarriage of justice or, in the alternative, an error in the exercise of the Trial Chamber’s discretion resulting in prejudice to the Co-Prosecutors.
- (d) The appeal has been filed with the Greffier of the Trial Chamber within 24 hours of the notification of the Impugned Decision in accordance with Rules 106(2) and 107(3).

### **B. The Appeal meets the standard for appellate review**

#### ***(i) The Trial Chamber erred in law by wholly suspending its jurisdiction over the Accused, or effectively divesting itself of jurisdiction***

5. At paragraph 33 of the Impugned Decision, finding no legal basis to detain the Accused and staying the proceedings – positions with which the Co-Prosecutors have concurred<sup>4</sup> – the Trial Chamber held that it “would also appear to lack a clear legal basis to impose coercive conditions or other forms of judicial supervision over the Accused upon release.”<sup>5</sup> This reasoning rests upon the Trial Chamber’s finding that its “jurisdiction over the Accused is

<sup>4</sup> E1/119.1 Transcript, 31 August 2012 at p. 103, ln. 2-9: “The Co-Prosecutors consider that we’ve reached a stage, having exhausted the immediately available measures to improve Ieng Thirith’s cognitive functioning, where immediate recovery or recovery within a reasonable period of time is highly unlikely. It is therefore highly unlikely that she will face a trial again in any immediate or foreseeable period of time, and therefore the grounds for her continued detention, in our respectful submissions, no longer exist”; and p. 104, ln. 6-10: “The default position ... is that proceedings are stayed and [the] indictment is not withdrawn ...”

<sup>5</sup> E138/1/10 Impugned Decision, *supra* note 2 at para. 33.

suspended”,<sup>6</sup> and that it “can ... no longer exercise its jurisdiction”<sup>7</sup> over “an accused who faces no reasonable prospect of being tried [and] who has been released.”<sup>8</sup>

6. By wholly suspending its jurisdiction or effectively divesting itself of jurisdiction over the Accused in the present circumstances, the Co-Prosecutors submit that the Trial Chamber erred in law such as to invalidate the Impugned Decision, on the following grounds:
- (a) the Impugned Decision derogates from the ECCC Law and fundamental principles of Cambodian law, which afford no legal basis for a trial court to voluntarily divest itself of jurisdiction where the public action has not been terminated by operation of law;<sup>9</sup>
  - (b) the Impugned Decision erroneously applies the findings of the ICC Appeals Chamber in *Prosecutor v. Thomas Lubanga Dyilo* regarding the impossibility of detention in cases of “irreversible and permanent stays of proceedings”<sup>10</sup> to disallow the application of measures of judicial supervision to Accused Ieng Thirith.<sup>11</sup> In the Co-Prosecutors’ submission, the ICC case law would have required a prior factual finding by the Trial Chamber that the Accused was, in the words of the Chamber, “permanently unfit”.<sup>12</sup> The Trial Chamber made no such finding in this case. In fact the Trial Chamber has imposed an expressly *reversible and non-permanent* stay, by admitting the possibility of recovery through improved medical treatment,<sup>13</sup> and the possible resumption of trial.<sup>14</sup> In this context, a proper application of the *Lubanga* test requires a trial chamber to first inquire whether “conditions for continued detention are met” and if not, “to determine whether, in the particular circumstances of the case, *release should be with or without conditions ...*”.<sup>15</sup> The Trial Chamber errs in applying the first limb of the *Lubanga* test without proceeding to consider the second, which envisages the application of coercive conditions to an accused who is released from custody.

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<sup>6</sup> E138/1/10 *Ibid.*

<sup>7</sup> E138/1/10 *Ibid.*

<sup>8</sup> E138/1/10 *Ibid.*

<sup>9</sup> See e.g. Cambodian Code of Criminal Procedure, Arts. 7-8; cf. E138/1/7 First Appeal Decision, *supra* note 3 at para. 18: “Ultimately ... 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.”

<sup>10</sup> E138/1/10 Impugned Decision, *supra* note 2 at para. 19, citing *Prosecutor v. Thomas Lubanga Dyilo*, 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’, (ICC Appeals Chamber), 21 October 2008 at para. 36 (“Lubanga Detention Decision”).

<sup>11</sup> E138/1/10 Impugned Decision *Ibid.* at para. 33.

<sup>12</sup> Cf. E138/1/7 First Appeal Decision, *supra* note 3 at para. 40.

<sup>13</sup> E138/1/10 Impugned Decision, *supra* note 2, at para. 39: “The Chamber is nonetheless willing to consult annually with the experts to ascertain whether new treatments for progressive, dementing illnesses (in particular Alzheimer’s disease) have in the interim been approved which, in the experts’ opinion, are likely to reverse Ieng Thirith’s cognitive decline such that she would become fit to stand trial.”

<sup>14</sup> E138/1/10 *Ibid.* at para. 28: “... the Trial Chamber’s previously-ordered stay of proceedings in relation to the Accused shall continue indefinitely. In this context, “indefinite” means that the stay of proceedings shall continue *until and unless the Chamber orders their resumption* against the Accused” [emphasis added].

<sup>15</sup> Lubanga Detention Decision, *supra* note 10 at para. 37.

(c) the Impugned Decision places the Accused in an unacceptable position of legal uncertainty, whereby she has been duly charged and brought to trial for serious criminal offences,<sup>16</sup> but is now ostensibly beyond the primary jurisdiction and protection of the Court which has suspended her trial, and will remain in that state without any review as required by international human rights law.

**(ii) *The Trial Chamber erred in law by not applying, dismissing or failing to consider available legal bases for the continuing judicial supervision of the Accused, with conditions***

**(a) *The Trial Chamber should have considered and applied Article 223 of the Cambodian Code of Criminal Procedure***

7. At paragraph 32 of the Impugned Decision, the Trial Chamber refers to the holding of the Chamber<sup>17</sup> confirming that continuing judicial supervision of an accused at the trial stage was available pursuant to Article 223 of the Cambodian Code of Criminal Procedure (“CCP”).<sup>18</sup> This holding expressly and exclusively applies to accused *who are not detained*:

*As is clear from Art. 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.*<sup>19</sup>

At paragraph 33 of the Impugned Decision, however, the Trial Chamber diverges from this holding, by not considering or applying Article 223 as a “clear legal basis to impose coercive conditions or other forms of judicial supervision”<sup>20</sup> over Accused Ieng Thirith “upon release”.<sup>21</sup> The Co-Prosecutors submit that the Trial Chamber erred in law by concluding that, due to the fact that detention was no longer available, no other less coercive measures can be considered or ordered. The Trial Chamber’s failure to apply a directly applicable point of law established by a higher judicial instance has invalidated the Impugned Decision.

**(b) *The Trial Chamber erred in dismissing Internal Rules 65 and 82 as inapplicable***

<sup>16</sup> E138/1/10 Impugned Decision, *supra* note 2 at para. 40: “...the Chamber nonetheless clarifies that charges against the Accused are not withdrawn...”

<sup>17</sup> In E138/1/7.1 Separate Dissenting Opinion of Judge Nihal Jayasinghe, 13 December 2011, the learned Judge does not express any view on the availability of judicial supervision for accused released from detention.

<sup>18</sup> E138/1/10 Impugned Decision, *supra* note 2 at para. 32, citing First Appeal Decision, *supra* note 3 at para. 45.

<sup>19</sup> E138/1/7 First Appeal Decision, *supra* note 3 at para. 46.

<sup>20</sup> E138/1/10 Impugned Decision, *supra* note 2 at para. 33.

<sup>21</sup> E138/1/10 *Ibid.*

8. At paragraph 33 of the Impugned Decision, the Trial Chamber held that Rules 65 and 82 of the Internal Rules cannot provide a legal basis for the imposition of coercive measures on an accused who is not facing a reasonable prospect of being tried.<sup>22</sup> The Chamber has interpreted Rules 65 and 82 to authorise restrictive measures as alternatives to detention.<sup>23</sup> The Trial Chamber errs in dismissing the applicability of Rules 65 and 82 in the present circumstances. The fact that detention is no longer the appropriate legal response to the Accused Ieng Thirith's situation does not automatically lead to the conclusion that no alternative measures can be considered. In the words of the Chamber, "[g]iven that the trial court is undisputedly authorized to apply detention, it is logically, *a maiori ad minus*, authorized to apply a less restrictive measure."<sup>24</sup> The Trial Chamber's error of law has resulted in its failure to properly exercise its jurisdiction by considering the full range of alternative measures, and conducting a balancing exercise between the rights of the accused and competing interests, including the need to safeguard the integrity of the proceedings, and provide for the protection victims and witnesses.

*(c) The Trial Chamber should have considered the doctrine of inherent powers*

9. The doctrine of inherent powers allows a chamber to "determine incidental legal issues which arise as a direct consequence of the procedures of which the Tribunal is seised by reason of the matter falling under its primary jurisdiction."<sup>25</sup> Jurisdiction over these ancillary issues is considered necessary to "ensure a good and fair administration of justice."<sup>26</sup> This doctrine has been relied on extensively by international tribunals to exercise jurisdiction in areas not specifically enumerated by relevant statutes and rules.<sup>27</sup> The use of the doctrine has become so widely accepted that it has evolved into "a customary rule of international law."<sup>28</sup> Indeed, the applicability of the doctrine of inherent powers to the cases before the ECCC has been

<sup>22</sup> E1/119.1 Transcript, 31 August 2012, *supra* note 4 at pp. 107-108.

<sup>23</sup> E138/1/7 First Appeal Decision, *supra* note 3 at para. 45.

<sup>24</sup> E138/1/7 *Ibid.*

<sup>25</sup> *In the Matter of El Sayed*, CH/AC/2010/02, Decision on Appeal of Pre-Trial Judge's Order Regarding Jurisdiction and Standing (STL Appeals Chamber), 10 November 2010 at para. 45 ("El Sayed").

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

<sup>27</sup> See e.g. *Prosecutor v. Stanković*, Case No. IT-96-23/2, Decision on Rule 11Bis Referral (ICTY Appeals Chamber), 1 September 2005 at para. 51; *Prosecutor v. Norman et al.*, Case No. SCSL-2003-09-PT, Decision on the Applications for a Stay of Proceedings and Denial of Right to Appeal (SCSL Appeals Chamber), 4 November 2003, at para. 27; *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/AC, Decision on the Pre-Trial Judge's Request Pursuant to Rule 68(G) (STL Appeals Chamber), 29 March 2012 at para. 17; *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-PT, Decision on Severance of André Rwamakuba and Amendments of the Indictment (ICTR Trial Chamber III), 7 December 2004 at para. 22.

<sup>28</sup> *El Sayed*, *supra* note 25 at para. 47.

recognised and applied in multiple decisions of the Pre-Trial Chamber.<sup>29</sup> In the Co-Prosecutors' submission, the inherent powers of a trial chamber extend to the power to impose reasonably necessary and proportionate conditions of judicial supervision upon an accused whose trial has been suspended, especially where the chamber accepts, as a matter of fact, that a possibility exist (however remote) that the trial may resume. Insofar as any conditions imposed restrict internationally-recognised human rights, the Co-Prosecutors submit that a chamber must be satisfied that such conditions amount to *justifiable limitations* upon those rights.

**(iii) *The Trial Chamber erred in law by ordering unconditional release of the Accused in place of justifiable conditions of judicial supervision***

10. The Co-Prosecutors have previously submitted that there are no longer grounds to continue the detention of Accused Ieng Thirith.<sup>30</sup> Instead, the Co-Prosecutors submitted that Ieng Thirith should remain under a regime of judicial supervision and be granted provisional release under six conditions to be ordered by the Trial Chamber: (1) to reside at a specified home address to be provided by her Co-Lawyers; (2) to make herself available for a weekly safety check by authorities or officials to be designated by the Trial Chamber; (3) to surrender her passport and identification card; (4) not to contact, directly or indirectly, the other Co-Accused (excluding her husband, Accused Ieng Sary); (5) not to contact, directly, or indirectly, any witness, expert or victim who is proposed to be heard by the Trial Chamber, and not to interfere in the administration of justice; and (6) to undergo six-monthly medical examinations by medical practitioners to be appointed by the Trial Chamber.<sup>31</sup>
11. Where continued detention of an accused is ruled out, a compelling legal basis exists in international jurisprudence and practice to consider the imposition of restrictive conditions

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<sup>29</sup> **D14/1/2** Order Suspending the Enforcement of the "Order on International Co-Prosecutor's Public Statement Regarding Case File 003", 13 June 2011 at para. 4; **A190/I/20** Decision on Khieu Samphan's Appeal Against the Order on Translation Rights and Obligations of the Parties, 20 February 2009 at para. 36; **A190/II/9** Decision on Ieng Sary's Appeal Against the Order on Translation Rights and Obligations of the Parties, 20 February 2009 at para. 31; **D158/5/1/15** Decision on Appeal Against the Co-Investigating Judges' Order on the Charged Person's Eleventh Request for Investigative Action, 18 August 2009 at para. 33; **C22/I/68** Decision on Application for Reconsideration of Civil Party's Right to Address Pre-Trial Chamber in Person, 28 August 2008 at para. 25; **C5/45** Decision on Appeal Against Provisional Detention Order of Kaing Guek Eav alias "DUCH", 3 December 2007 at paras. 9-12; **D55/I/13** Decision on Civil Party Co-Lawyers' Joint Request for Reconsideration, 25 February 2009 at para. 9; **D164/4/9** Decision on Request to Reconsider the Decision on Request for an Oral Hearing on the Appeals PTC24 and PTC25, 20 October 2009 at para. 12; **D130/9/20** Decision on Request to Reconsider the Decisions on Requests for Leave to File Amicus Curiae Briefs, 23 November 2009 at para. 12.

<sup>30</sup> **E1/119.1** Transcript, 31 August 2012, *supra* note 4 at p. 103.

<sup>31</sup> **E1/119.1** *Ibid.*

upon the provisional release of an accused.<sup>32</sup> Conditions already applied by the international tribunals in comparable cases are similar and, in certain cases, more restrictive to those submitted by the Co-Prosecutors at the oral hearing of 31 August 2012.<sup>33</sup>

12. For example, an ICTY Trial Chamber ordered the Accused Talić, who was terminally ill and not facing a resumption of trial, to reside and remain at all times at the address in Belgrade he provided to the Tribunal, except for occasional visits for tests, medical treatment and therapy.<sup>34</sup> The ICTY also ordered the Accused Simatović to report each day to the police in Belgrade at a local police station to be designated by the Ministry of Justice.<sup>35</sup> The Accused Stanišić was ordered to surrender his passport to the Ministry of Justice<sup>36</sup> in addition to not having any contact with the co-Accused in the case<sup>37</sup> and with any victim or potential witness.<sup>38</sup> Finally, the ICTY Trial Chamber ordered the Accused Đukić, who was suffering from an incurable terminal illness, to report any changes of address, send periodic medical reports on his condition to the Tribunal, and respond to any summons.<sup>39</sup>
13. The Trial Chamber dismisses this international jurisprudence and practice on the basis of differences in “factual circumstances”.<sup>40</sup> The Co-Prosecutors submit that the Trial Chamber errs in law and fact on this point, including by mischaracterising the effect of some of the decisions.<sup>41</sup> The central legal principle crosscutting this jurisprudence remains, in the words of the Chamber: “*Unconditional release* seems only to be *exceptionally applied on humanitarian grounds* in cases of a *par excellence* terminal condition” (emphasis added).<sup>42</sup> In the Co-Prosecutors’ submission, the Impugned Decision makes no finding of humanitarian grounds

<sup>32</sup> *Prosecutor v. Vladimir Kovačević*, IT-01-42/2-I, Decision on Provisional Release (ICTY Trial Chamber), 2 June 2004 at p. 3; *Prosecutor v. Momir Talić*, IT-99-36-T, Decision on the Motion for Provisional Release of the Accused Momir Talić (ICTY Trial Chamber), 20 September 2002 at pgs. 13-14; *Prosecutor v. Đorđe Đukić*, IT-96-20-T, Decision Rejecting the Application to Withdraw the Indictment and Order for Provisional Release (ICTY, Trial Chamber), 24 April 1996 at p. 5; *Prosecutor v. Jovica Stanišić and Franko Simatović*, IT-03-69-PT, Decision on Provisional Release (ICTY Trial Chamber), 26 May 2008 at para. 68(2)(d).

<sup>33</sup> **E1/119.1** Transcript, 31 August 2012, *supra* note 4 at p. 109.

<sup>34</sup> *Prosecutor v. Momir Talić*, *supra* note 32 at p. 13

<sup>35</sup> *Prosecutor v. Jovica Stanišić and Franko Simatović*, *supra* note 32 at para. 68(2)(d)(xii)

<sup>36</sup> *Ibid.* at para. 68(2)(d)(ii)

<sup>37</sup> *Ibid.* at para. 68(2)(d)(v)

<sup>38</sup> *Ibid.* at para. 68(2)(d)(vi)

<sup>39</sup> *Prosecutor v. Đorđe Đukić*, *supra* note 32 at p. 5

<sup>40</sup> **E138/1/10** Impugned Decision, *supra* note 2 at para. 33.

<sup>41</sup> In particular: (1) the Trial Chamber notes a “disagreement among the medical experts” as to the Accused’s fitness to stand trial in *Talić* (**E138/1/10** Impugned Decision, *supra* note 2 at para. 35). In fact, the disagreement concerned the Accused’s fitness to remain in detention pending debate on a motion, not his fitness to stand trial which, in any case, would be a legal determination for the Chamber, not medical experts; (2) the Trial Chamber distinguishes the restrictive conditions imposed in *Talić* on the grounds of the “possibility that he may eventually stand trial”. The ICTY Trial Chamber imposed conditions fully cognisant that Talić would not be alive by the time his trial ended (see *Talić*, *supra* note 32 at para. 32).

<sup>42</sup> **E138/1/7** First Appeal Decision *supra* note 3 at para. 25.



or of a *par excellence* terminal condition afflicting Accused Ieng Thirith that could provide a sufficient legal basis for release without justifiable coercive conditions. On the contrary, the jurisprudence establishes that terminally-ill accused – whose likelihood of recovery would have been more remote than that of Accused Ieng Thirith – were still granted provisional release subject to conditions such as those requested by the Co-Prosecutors.<sup>43</sup>

14. The Co-Prosecutors have previously submitted that the imposition of restrictive conditions upon an accused unfit to stand trial and otherwise at liberty, while fully consistent with the jurisprudence and practice of international criminal tribunals, must additionally satisfy a general proportionality test for limitations of rights under international human rights law.<sup>44</sup> As such, a chamber must be satisfied that any such condition is *suitable, necessary* and *proportionate* in the circumstances. As the ICTY Trial Chamber held in *Talić*:

*When interpreting Rule 65 [governing bail orders] the general principle of proportionality must be taken in account. A measure in public international law is proportionate only when it is (1) suitable, (2) necessary and when (3) its degree and scope remain in a reasonable relationship to the envisaged target. The Chamber added that procedural measures should never be capricious or excessive. If it is sufficient to use a more lenient measure, that measure must be applied.*<sup>45</sup>

15. A similar limitation of rights test is applied to restrictions upon fundamental human rights across the constitutional provisions and apex court jurisprudence of civil law,<sup>46</sup> common law<sup>47</sup> and mixed legal systems.<sup>48</sup>
16. The Co-Prosecutors submit that in declining to assess and balance “all the interests at stake and give proper weight to all relevant factors”<sup>49</sup> when deciding upon the unconditional release of Accused Ieng Thirith, the Trial Chamber erred in law and abused its discretion in a manner that prejudices the Co-Prosecutors. A detailed legal review of the conditions of judicial supervision sought by the Co-Prosecutors will demonstrate their suitability, necessity and

<sup>43</sup> *Prosecutor v. Momir Talić and Prosecutor v. Đorđe Đukić, supra*. note 32.

<sup>44</sup> **E1/119.1** Transcript, 31 August 2012, *supra* note 4 at p. 111, ln. 7 and p. 103, ln. 12-13.

<sup>45</sup> *Prosecutor v. Momir Talić, supra* note 32 at para 23; citing *Prosecutor v. Dragan Jokić*, IT-02-53-PT, Decision on Request for provisional release of Accused Jokić, 28 March 2002 at para 18.

<sup>46</sup> *Werkfernverkehr*, BVerGE, 16, 147 (181), 22 May 1963; *Erdölbevorratung*, BVerGE, 30, 292, (316), 16 March 1971; *Vethandlungsunfähigkeit des angeklagten*, BVerGE, 51, 324 (345), 19 June 1979 (Federal Constitutional Court of Germany).

<sup>47</sup> New Zealand Bill of Rights Act 1990, s. 5.

<sup>48</sup> *R. v. Oakes* [1986] 1 S.C.R. 103 at para. 70 (Supreme Court of Canada); Constitution of the Republic of South Africa 1996, s. 36; *Hansen v. R*, File No. SC58/2005, Judgment, 20 February 2007, reported as [2007] N.Z.S.C. 7, (2007) 8 H.R.N.Z. 222 (New Zealand Supreme Court).

<sup>49</sup> **E138/1/7** First Appeal Decision, *supra* note 3 at 30.

proportionality in light of the fundamental rights and legal policy objectives enshrined in the applicable law before the ECCC.<sup>50</sup>

**(iv) *The Trial Chamber erred in fact or in the exercise of its discretion in finding that conditions of judicial supervision would be unenforceable or impractical***

17. At paragraph 37 of the Impugned Decision, the Trial Chamber finds that coercive conditions are “likely to be practically or legally unenforceable”<sup>51</sup> on account of Accused Ieng Thirith’s current mental state and the likelihood that she would be incapable of forming intentions to violations such conditions or face penalties for their breach. Nonetheless, in the dispositive part of the Impugned Decision, the Trial Chamber proceeds to remind the Accused of her obligations under Rule 35 and to request her to desist from communicating with the media in relation to proceedings before the ECCC.<sup>52</sup> The Co-Prosecutors respectfully submit that the underlying factual finding cannot logically sustain the “reminder” and “request” in the disposition of the Impugned Decision.
18. At paragraph 39 of the Impugned Decision, the Trial Chamber also finds that “practical difficulty and costs entailed by continuing periodic reassessments of the Accused's cognitive fitness”<sup>53</sup> – coupled with the finding that her condition is incurable and irreversible – do not justify regular medical assessments as requested by the Co-Prosecutors in oral submissions.<sup>54</sup> The Co-Prosecutors submit that the Trial Chamber reached this finding without an evidential basis, occasioning a miscarriage of justice, or discernibly erred in the exercise of its discretion occasioning prejudice. The history of these proceedings amply demonstrates that the ECCC has been able to arrange medical treatment and assessments in accordance with the highest international standards, and the Office of Administration has not protested against the application of any measures on the basis of costs involved. In any event, the six-monthly assessments sought by the Co-Prosecutors would not entail any significant additional costs as they could be conducted by the Khmer-Soviet Friendship Hospital under the current contractual arrangements with the ECCC.

<sup>50</sup> The Co-Prosecutors have sought leave for extension of time to file supplementary submissions on appeal, in part, to provide the Chamber with more detailed legal analysis on this point.

<sup>51</sup> E138/1/10 Impugned Decision, *supra* note 2 at 37.

<sup>52</sup> E138/1/10 *Ibid.* at p. 19.

<sup>53</sup> E138/1/10 *Ibid.* at para. 39.

<sup>54</sup> E1/119.1 Transcript, 31 August 2012, *supra* note 4 at pp. 109-110.

### III. REQUEST

19. In light of the foregoing, the Co-Prosecutors respectfully request the Supreme Court Chamber to:
- (a) find the instant Appeal admissible in full;
  - (b) annul the Impugned Decision insofar as the Trial Chamber finds that it has no jurisdiction to order a continuation of judicial supervision subject to legally-justifiable conditions; and
  - (c) amend the Impugned Decision to require the Accused (if necessary, through a guardian or curator to be appointed by the national authorities), to comply with the specific conditions proposed by the Co-Prosecutors, in order to appropriately safeguard the competing rights and legal interests engaged by her release from detention.

Respectfully submitted,

Date	Name	Place	Signature
14 September 2012	CHEA Leang Co-Prosecutor	Phnom Penh	
	Andrew CAYLEY Co-Prosecutor		