

E138/1/10/1/5/3

**BEFORE THE SUPREME COURT CHAMBER OF THE
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

FILING DETAILS

Case No: 002/19-09-2007-ECCC/SC
Filed to: Supreme Court Chamber
Date of Document: 8 October 2012

Party Filing: Defence for Ieng Thirith
Original language: English

CLASSIFICATION

**Classification of the document
suggested by the filing party:** Public

Classification by Chamber:

Classification Status:

Review of Interim Classification:

Records Officer Name:

Signature:

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ORIGINAL DOCUMENT/DOCUMENT ORIGINAL	
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**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**

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SOM Sereyvuth
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I INTRODUCTION AND PETITION

1. On 13 September 2012, the Trial Chamber issued its 'Decision on Reassessment of Accused IENG Thirith's Fitness to Stand Trial following Supreme Court Chamber Decision on 13 December 2011' ('Impugned Decision').¹ The Trial Chamber unanimously found that Ieng Thirith ('Respondent') was suffering from a progressive, dementing illness (most likely Alzheimer's disease)² and reaffirmed that she was unfit to stand trial, continued its previous stay of proceedings against her in Case 002 indefinitely and ordered her immediate release from the ECCC Detention Facility.³
2. On 14 September 2012, the Co-Prosecutors ('Appellants') filed their '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' ('Appeal')⁴ with a concurrent request for a stay of the release of the Respondent.⁵ The Appellants request that the Impugned Decision be annulled insofar as the Trial Chamber found that it has no jurisdiction to order judicial supervision subject to legally-justifiable conditions and be amended to require the Respondent, if necessary through her legal guardian, to comply with the specific conditions proposed by them in order to appropriately safeguard the competing rights and legal interests engaged by her release from detention.⁶
3. On 14 September 2012, following an application by the Prosecutor of the Office of the Prosecutor of the Phnom Penh Municipal Court dated 13 September 2012 ('Prosecutor'), a decision rendered by the Phnom Penh Municipal Court of First Instance appointed Ieng Vichida as general guardian to the Respondent ('Guardianship Order').⁷

¹ TC Decision on Reassessment of Accused IENG Thirith's Fitness to Stand Trial following Supreme Court Chamber Decision of 13 December 2011, Document No. E138/1/10, 13 September 2012 ('Impugned Decision').

² *Ibid.*, para. 24.

³ *Ibid.*, p. 19.

⁴ 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, Document No. E138/1/10/1/1, 14 September 2012 ('OCP Appeal').

⁵ Co-Prosecutors' Request for Stay of Release of Accused Ieng Thirith, Document No. E138/1/10/1/2, 14 September 2012.

⁶ OCP Appeal, para. 19.

⁷ Decision of the Phnom Penh Municipal Court, Document No. E138/1/10/1/2/3.1, 14 September 2012.

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4. On 16 September 2012, the President of the Supreme Court Chamber ('SCC') ordered the release of the Respondent subject to conditions pending the determination of the Appeal.⁸
5. On 17 September 2012, the SCC filed its 'Decision on Co-Prosecutors' Request to File Supplementary Submissions on the Appeal Against the Release Order of IENG Thirith',⁹ in which it considered the Appeal was governed by the procedural regime set out in Internal Rules ('IRs') 107(2) and 108(4)(bis)(a).¹⁰
6. On 28 September 2012, the Appellants filed their 'Co-Prosecutors' Supplementary Submissions' ('Supplementary Submissions').¹¹
7. For the reasons set out below, the Respondent submits that:
 - i) The Trial Chamber did not err in law in finding that it had no jurisdiction over the Respondent to order judicial supervision subject to coercive conditions; did not err in law by failing to take into account available legal bases for the continuing judicial supervision with conditions; and further, did not err in law by ordering the release of the Respondent without coercive conditions.
 - ii) The Trial Chamber did not err in fact or in the exercise of its discretion in finding that conditions of judicial supervision would be unenforceable or impractical.

II BACKGROUND TO FINDING OF UNFITNESS

8. The Respondent hereby refers to the content of paras. 4-10 of its 'Response by Defence for Madame Ieng Thirith to the Co-Prosecutors Appeal Against the Trial Chamber's Decision of 17 November 2011',¹² in which is set out a brief summary of the medical history which led to the conclusion of the Trial Chamber that the Respondent was unfit to stand trial in 2011.

⁸ President of the SCC Decision on Co-Prosecutors' Request for Stay of Release Order of IENG Thirith, Document No. E138/1/10/1/2/1, 16 September 2012, pp. 3-4.

⁹ SCC Decision on Co-Prosecutors' Request to File Supplementary Submissions on the Appeal Against the Release Order of IENG Thirith, Document No. E138/1/10/1/3/1, 17 September 2012.

¹⁰ *Ibid.*, p. 3.

¹¹ Co-Prosecutors' Supplementary Submissions, Document No. E138/1/10/1/5, 28 September 2012.

¹² Response by Defence for Madame Ieng Thirith to Co-Prosecutors Appeal against the Trial Chamber's Decision of 17 November 2011, Document No. E138/1/5, 28 November 2011.

9. Following an appeal from the Appellants¹³ against the Trial Chamber's 'Decision on Ieng Thirith's Fitness to Stand Trial',¹⁴ the SCC directed the Trial Chamber, on 13 December 2011, to request additional treatment for the Respondent which might help improve her mental health so that she could become fit to stand trial.¹⁵ The Trial Chamber requested the court appointed psychiatric experts and Professor Campbell ('Medical Experts') to initiate such medical treatment.¹⁶
10. On 24 February 2012, the Medical Experts filed their 'Report concerning Mrs. Ieng Thirith in Response to Trial Chamber Request Dated 6 January 2012'.¹⁷ The Medical Experts acknowledged that all psychotropic medications that the Respondent had been taking had been reduced and then stopped and that '[n]o improvement in cognitive function was observed.'¹⁸ A trial of Donepezil was started on 8 November and had to be terminated on 11 November 2011 due to side effects, which led to the Respondent's admission to hospital.¹⁹ The Medical Experts concluded that the Respondent 'has moderate to severe cognitive impairment secondary to a dementing illness, most probably Alzheimer's disease with the likelihood also of a vascular component.'²⁰ They noted a progression in her dementia confirmed by a degradation in her cognitive function which 'was worse on testing on this assessment than in her earlier assessments'.²¹ The Medical Experts recommended a gradual reduction leading to the cessation of benzodiazepines, the introduction of daily Rivastigmine patches and that a structured cognitive stimulation programme should be put in place, but noted that 'it is unlikely that the recommendations [...] will lead to an improvement sufficient for her to participate in her own defence.'²²

¹³ Co-Prosecutors' Immediate Appeal Against Trial Chamber Decision to Order the Release of Accused Ieng Thirith, Document No. E138/1/1, 18 November 2011.

¹⁴ TC Decision on IENG Thirith's Fitness to Stand Trial, Document No. E138, 17 November 2011 ('First TC Decision on Fitness').

¹⁵ SCC Decision on Immediate Appeal against the Trial Chamber's Order to Release the Accused IENG Thirith, Document No. E138/1/7, 13 December 2011, p. 24 ('SCC Decision').

¹⁶ TC Memorandum entitled 'Request to Trial Chamber Experts following Supreme Court Chamber Decision on Appeal against Accused IENG Thirith's release (E138/1/7)', Document No. E138/1/7/1, 6 January 2012, paras. 3-4.

¹⁷ Report concerning Mrs. Ieng Thirith in Response to Trial Chamber Request Dated 6 January 2012, Document No. E138/1/7/4, 24 February 2012.

¹⁸ *Ibid.*, para. 7.

¹⁹ *Idem.*

²⁰ *Idem.*

²¹ *Idem.*

²² *Ibid.*, para. 8.

11. After more than 20 weeks of Rivastigmine therapy and three months of cognitive stimulation program, the Respondent was reassessed on 27 and 28 August 2012. The Medical Experts unanimously concluded in their 'Summary Expert Report on Mrs. Ieng Thirith', later confirmed during a fitness hearing on 30-31 August 2012, that she suffers from a moderate to severe dementia.²³ They stated that there was no evidence of any improvement following the introduction of Rivastigmine and the cognitive stimulation programme and sufficient time had elapsed for these treatments to have worked if they were going to do so.²⁴ On the contrary, the Medical Experts noted a deterioration in the Respondent's cognitive abilities since 2011 in respect of memory, marked by lower scores in standardized tests, adverse behavioural symptoms and a reduction in her ability to attend to her personal care and daily functions.²⁵ The Medical Experts concluded that the Respondent remained unable to meaningfully assist in the preparation of her defence and would have considerable difficulties in relation to fitness to plead and fitness to stand trial.²⁶ They noted that they had exhausted all available therapeutic measures and that there is currently no further treatment capable of improving the Respondent's cognitive capacity.²⁷ The Medical Experts unanimously stated that there was no possibility that the dementia would improve and that they were not aware of any cases of improvement in people with a clear diagnosis of dementia where all other causes have been excluded.²⁸ They confirmed that dementia was a progressive disease so her condition will inevitably continue to deteriorate.²⁹ The disease involves the destruction of the cells of the brain which are not renewed.³⁰
12. All parties, except the Civil Parties, submitted that the Respondent was unfit to stand trial and should be released from detention.³¹ The defence requested that the Respondent be

²³ Summary Expert Report on Mrs. Ieng Thirith, Document No. E138/1/7/13/2, 29 August 2012, para. 60 ('Summary Expert Report').

²⁴ *Ibid.*, para. 58.

²⁵ *Ibid.*, para. 61; See Transcript of 30 August 2012, Document No. E1/118.1, p. 22; Transcript of 31 August 2012, Document No. E1/119.1, pp. 22, 29-30.

²⁶ Summary Expert Report, para. 62.

²⁷ *Ibid.*, para. 59; Transcript of 30 August 2012, p. 22; Transcript of 31 August 2012, p. 31.

²⁸ Transcript of 31 August 2012, p. 75.

²⁹ *Ibid.*, pp. 29-30, 51-52, 96.

³⁰ *Ibid.*, p. 96.

³¹ *Ibid.*, pp. 102-103, 129.

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released unconditionally.³² The Co-Prosecutors submitted that she should be released under a regime of judicial supervision with six specific conditions, namely:

- (i) to reside at a specified home address to be provided by her Co-Lawyers;
- (ii) to make herself available for a weekly safety check by authorities or officials to be designated by the Trial Chamber;
- (iii) to surrender her passport and identification card;
- (iv) not to contact, directly or indirectly, the other Co-Accused (excluding her husband, Ieng Sary);
- (v) 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
- (vi) to undergo six-monthly medical examinations by medical practitioners to be appointed by the Trial Chamber.³³

13. On 13 September 2012, the Trial Chamber issued the Impugned Decision in which it reaffirmed that the Respondent is unfit to stand trial and that there is no reasonable prospect that her cognitive impairment can be reversed as '[a]ll available measures presently capable of improving IENG Thirith's cognitive function have been tried' and, despite exhaustion of these measures, she remains unable to meaningfully exercise her fundamental fair trial rights.³⁴ The Trial Chamber ordered the immediate release of the Respondent as it considered it lacked the legal basis to justify her continued detention in the present circumstances, namely that there will not be a trial within the foreseeable and not-too-distant future.³⁵ For the same reasons, the Trial Chamber held that it lacked a clear legal basis to impose coercive conditions or other forms of judicial supervision over the Respondent upon release.³⁶ In any case, the Trial Chamber concluded that imposing conditions on the Respondent would likely be unenforceable, practically or legally, considering her mental health.³⁷ The Trial Chamber finally reaffirmed its findings that the Respondent is unfit to stand trial, continued its previous stay of proceedings indefinitely and ordered her immediate release from the ECCC Detention Facility.³⁸

³² *Ibid.*, pp. 129, 133-137.

³³ *Ibid.*, pp. 109-110.

³⁴ Impugned Decision, para. 24

³⁵ *Ibid.*, paras. 26-30.

³⁶ *Ibid.*, para. 33.

³⁷ *Ibid.*, para. 37.

³⁸ *Ibid.*, p. 19.



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III LEGAL PROVISIONS**3.1 ECCC and Cambodian Law**

14. IR 65(1) provides that the Co-Investigating Judges may order the release of a Charged Person from detention on bail and may impose such conditions as are 'necessary to ensure the presence of the person during the proceedings and the protection of others.' IR 65(6) provides that 'if the Charged Person violates any of the bail conditions in such an order, the Co-Investigating Judges may issue a warning or issue a provisional detention order in respect of the Charged Person.'
15. IR 82(1) states that the Accused shall remain at liberty whilst appearing before the Chamber unless provisional detention has been ordered in accordance with the IRs. IR 82(2) further provides that the Chamber may, at any time during the proceedings, order the release of an Accused, or where necessary release on bail, or detain the Accused in accordance with these IRs.'
16. IR 104(1) provides that the SCC shall decide an appeal against a judgment of the Trial Chamber on the following grounds:
- a) an error on a question of law invalidating the judgment or decision; or
 - b) an error of fact which has occasioned a miscarriage of justice.
- Additionally, it can also be based on a 'discernible error in the exercise of the Trial Chamber's discretion which resulted in prejudice to the appellant.' IR 104(4) states that decisions which have the effect of terminating the proceedings and decisions on detention and bail under Rule 82 may be subject to immediate appeal.
17. According to IR 105(2), the party filing an immediate appeal shall, in respect of each ground of appeal:
- a) specify an alleged error on a question of law and demonstrate how it invalidates the decision, or
 - 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".
18. Article 13 of the ECCC Agreement provides that the rights of the Accused enshrined in Articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR),



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including the right to a fair and public hearing and the right to be presumed innocent until proved guilty, 'shall be respected throughout the trial process.'

19. According to Article 24 of the ECCC Agreement, it is the responsibility of the Royal Government of Cambodia to 'take all effective and adequate actions which may be required to ensure the security, safety and protection of persons referred to in the present Agreement' and ensure the security of all Accused.
20. Article 33 new of the ECCC Law states that '[i]f [...] existing procedure[s] do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application [...] guidance may be sought in procedural rules at the international level.'
21. Article 223 of the Cambodian Code of Criminal Procedure (CCCP) permits an Investigating Judge to place a Charged Person under judicial supervision if 'the Charged Person is under investigation for an offence punishable by imprisonment'. Article 230 of the CCCP provides that 'if the charged person intentionally evades the obligations under judicial supervision, the judge can decide to provisionally detain the Charged Person.'
22. According to Article 24 of the Civil Code of the Kingdom of Cambodia (CCKC), the Court can declare the commencement of a general guardianship for a person 'who remains in an habitual condition of lacking the ability to recognise and understand the legal consequences of his actions due to mental disability.' Article 1028 of the CCKC provides that the general guardian shall manage the property of the person under general guardianship and Article 1039(1) states the Supervisor of the general guardian or the court may 'inspect the living conditions and health care of the person under general guardianship and the management of property'. Article 1043 enshrines the obligation of the general guardian to perform his/her duties with the care of a good manager.

3.2 International Law

23. Article 9(1) of the ICCPR enshrines the fundamental right to liberty and security of person including the right not to be subjected to arbitrary arrest or detention. It further stipulates that '[n]o one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.' Article 9(3) enshrines the right to be tried within reasonable time or to release. It further provides that '[i]t shall not



be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings'. Similarly, Article 5 of the European Convention on Human Rights (ECHR) provides for the protection of the right to liberty.

24. Article 14(2) of the ICCPR stipulates that, '[e]veryone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.'

IV SUBMISSIONS

25. It is respectfully submitted that there is no basis upon which to annul or amend the Impugned Decision.

4.1 The Trial Chamber did not Err in Law by Suspending its Jurisdiction over the Respondent

26. The Appellants submit that the Trial Chamber erred in law in deciding that it lacked a clear legal basis to impose coercive conditions or other forms of judicial supervision over the Respondent upon release based on its finding that its jurisdiction is suspended and that it cannot exercise its jurisdiction over 'an accused who faces no reasonable prospect of being tried [and] who has been released'.³⁹
27. Before addressing this ground of appeal, it is necessary to analyse the circumstances that led the Trial Chamber to conclude that its jurisdiction over the Respondent is suspended. In the Impugned Decision, the Trial Chamber noted that under national systems and according to the European Court of Human Rights' case law, 'the continued detention of an Accused who is unfit to stand trial can only be justified where there is a substantial likelihood that he or she may become fit to stand trial in the foreseeable future'.⁴⁰ The Trial Chamber acknowledged that the Respondent 'is unlikely to improve either spontaneously or with further treatment' and that there is 'no reasonable prospect that

³⁹ OCP Appeal, paras 5-6 referring to the Impugned Decision, para 33.

⁴⁰ Impugned Decision, para. 23; See also paras. 21-22.

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IENG Thirith's cognitive impairment can be reversed.⁴¹ It follows that 'the Trial Chamber's previously-ordered stay of proceedings in relation to the Accused shall continue indefinitely'.⁴² The Trial Chamber concluded that 'IENG Thirith's pre-trial detention [...] if continued on the entirely hypothetical basis of a potential trial' would violate her basic rights.⁴³ This position was endorsed by the Appellants when they recognised that it is unlikely that the Respondent will face a trial in the foreseeable future.⁴⁴ Furthermore, this is acknowledged in terms by the Appellants in their Appeal in that they contend that the Impugned Decision satisfies the provisions of Rule 104(4)(a) as a decision which has the effect of terminating the proceedings.⁴⁵

28. In the Appeal, the Appellants first argue that the Trial Chamber erred in law on the ground that 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.⁴⁶ The Appellants refer to Articles 7 and 8 of the CCCP as well as the SCC's Decision of 13 December 2011.
29. The Respondent contends that this interpretation of the Impugned Decision shows an unduly formalistic and erroneous approach of the Trial Chamber's reasoning. The Trial Chamber did not divest itself of jurisdiction but rightly acknowledged limitation which should be placed on the exercise of that criminal jurisdiction in the light of the legal and practical consequences of its Decision to stay the proceedings against the Respondent for an indefinite period of time.⁴⁷ The Trial Chamber showed a clear understanding of the procedural nature of the stay of proceedings whilst giving full recognition and weight to the circumstances of the case; the permanent nature of the Respondent's mental condition

⁴¹ *Ibid.*, para 24.

⁴² *Ibid.*, para 28.

⁴³ *Ibid.*, para 31.

⁴⁴ Transcript of 31 August 2012, p. 103.

⁴⁵ OCP Appeal, para. 4.

⁴⁶ OCP Appeal, paras. 6 and 6(a).

⁴⁷ See SCC Decision, para. 24: 'Nevertheless, even in such circumstances, "the Court is not necessarily permanently barred from exercising jurisdiction in respect of the person concerned, because the nature of the stay ordered by the Trial Chamber was conditional and reversible"' (emphasized by us), referring to *Prosecutor v Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06 OA 12, Judgement on the Appeal of the Prosecutor against the Decision of Trial Chamber I entitled "Decision on the release of Thomas Lubanga Dyilo", 21 October 2008, para. 37.

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and the inevitability of a further deterioration of her cognitive abilities in the light of the unequivocal medical opinions.⁴⁸ Therefore, the Trial Chamber rightly decided to indefinitely stay the proceedings against her.

30. The Appellants adopted a similar position when they argued that the stay ordered by the Trial Chamber in November 2011 led to an effective termination of the proceedings against the Respondent⁴⁹, which was then confirmed by the SCC.⁵⁰ The SCC, in its Decision, reviewed international and national jurisprudence on the issue and identified two variations of a stay of proceedings; a temporary and reversible stay that allows for remedial action to be undertaken and a permanent and irreversible stay where an accused is deemed permanently unfit.⁵¹ It is in the light of this differentiation that the Trial Chamber's finding of its inability to exercise jurisdiction must be assessed.
31. With reference to the aforementioned circumstances, the Respondent submits that Articles 7 and 8 of the CCCP are irrelevant to the present case as they deal with the causes that lead to the extinction of a criminal charge, whereas the Trial Chamber stayed the proceedings against the Respondent indefinitely. It should be noted that Articles 7 and 8 do not provide for the possibility of a permanent stay. The Trial Chamber clarified in terms that 'the charges against the Accused are not withdrawn and the present decision makes no determination of the guilt or innocence of the Accused'.⁵² For the same reasons, the Appellants' reference to the SCC's distinction between the stay of proceedings and their termination is irrelevant.
32. Secondly, the Appellants argue that the Trial Chamber erroneously applied the findings of the International Criminal Court (ICC) Appeals Chamber's judgement regarding the impossibility of detention in cases of "irreversible and permanent stays of proceedings" to disallow the application of measures of judicial supervision to Accused Ieng Thirith.⁵³ The Appellants further contend that a factual finding that the Respondent is permanently unfit is required prior to disallowing judicial supervision with conditions and that 'the

⁴⁸ Impugned Decision, paras. 26-31.

⁴⁹ Co-Prosecutors' Immediate Appeal against Trial Chamber Decision to Order the Release of Accused Ieng Thirith, paras. 3-6.

⁵⁰ SCC Decision, para 15.

⁵¹ *Ibid.*, paras. 16-31.

⁵² Impugned Decision, para. 40.

⁵³ OCP Appeal, para. 6(b), referring to Impugned Decision, para 19.



Trial Chamber has imposed an expressly reversible and non-permanent stay by admitting the possibility of recovery through improved medical treatment.⁵⁴

33. The Respondent contends that the Appellants are wrong. Firstly, the Trial Chamber took into consideration whether there was any realistic possibility of improvement or recovery and ruled that no such possibilities exist.⁵⁵ The Trial Chamber followed the SCC's previous direction to exhaust all measures reasonably available to improve the Respondent's condition. She did not respond to treatment but has continued to deteriorate. Consequently, the Trial Chamber concluded that all available treatments had been tried and deemed the Respondent realistically permanently unfit to stand trial in accordance with the unanimous opinion of the Medical Experts. There is not a single piece of evidence upon which the Trial Chamber could come to a contrary conclusion. It would be entirely speculative and without any medical foundation to conclude that the Respondent has any prospect of improvement in the foreseeable future. If, as the Chamber found, she has no realistic prospect of improving, then in reality detention and/or judicial supervision and coercive conditions designed to ensure the attendance of an Accused and the non-interference with the administration of justice have no justifiable legal basis. The imposition of conditions in such circumstances may be described as outside the jurisdiction of the Trial Chamber. In the exercise of its criminal jurisdiction, conditions are imposed to ensure the attendance of an Accused and to protect the public and have no relevance to the particular circumstances of the Respondent.
34. Contrary to the Appellants' assertion, the Trial Chamber's willingness to consult with the Medical Experts annually in order to enquire about the discovery of a potential cure for Alzheimer's disease cannot be characterised as 'admitting the possibility of recovery through improved medical treatment'.⁵⁶ In fact, as the Decision makes clear, its conclusions are premised on the fact that the Respondent will not become fit to stand trial. When asserting the indefinite nature of its stay of proceedings, the Trial Chamber does nothing more than define the formal legal nature of a stay of proceedings.⁵⁷ This finding does not affect the remainder of the Trial Chamber's findings in the current case,

⁵⁴ Idem.

⁵⁵ Impugned Decision, paras. 14, 24 and 29.

⁵⁶ OCP Appeal, para. 6(b).

⁵⁷ Impugned Decision, para. 28.

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namely the absence of any chance of resumption of cognitive function sufficient to enable the Respondent to stand trial and the consequential and obligatory unconditional release of the Respondent. The Trial Chamber rightly held that it was not in a position to terminate the proceedings.⁵⁸

35. Thirdly, the Respondent submits that the Trial Chamber did not err in law in its application of the *Lubanga* test. On the contrary, the Trial Chamber diligently followed the *Lubanga* test. After assessing the consequences of the Respondent's permanent unfitness to stand trial,⁵⁹ the Trial Chamber rightly concluded that continued detention would violate the Respondent's basic human rights.⁶⁰ Thereafter, the Trial Chamber assessed the Appellants' request to attach conditions to the release of the Respondent and concluded that there was no legal basis for the imposition of such conditions.⁶¹
36. Lastly, the Appellants are of the view that an error in law occurred as the Impugned Decision places the Respondent in an unacceptable position of legal uncertainty as the Trial Chamber has suspended its jurisdiction over her without any review which is contrary to international human rights law.⁶² As previously argued, the Trial Chamber clearly sets out the legal and practical consequences of its assessment that the Respondent is and will remain unfit to stand trial, namely an indefinite stay of proceedings and the Respondent's immediate release without the imposition of conditions. Thus, the Respondent does not find herself in an unacceptably uncertain situation.
37. In addition, the Appellants fail to demonstrate how the Respondent is placed beyond the protection of the Court or what the scope and origin of this alleged protection is. Article 24 of the ECCC Agreement imposes upon the Cambodian Government the responsibility for and requirement to ensure the security, safety and protection of the Accused. The Respondent remains an Accused person before the ECCC.⁶³
38. The Respondent takes issue with the Appellants' view that international human rights law requires a review of the *status quo* following the issuance of the Impugned Decision. The

⁵⁸ See also First TC Decision on Fitness, paras. 61 and 64; SCC Decision, para. 18.

⁵⁹ Impugned Decision, paras. 26-31.

⁶⁰ *Ibid.*, para. 31.

⁶¹ *Ibid.*, paras. 32-39.

⁶² OCP Appeal, para 6(c).

⁶³ Impugned Decision, para 40.

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obligation to review is inherently linked to the right to remain at liberty during trial proceedings and to the right to be tried without undue delay; situations in which the position of the Respondent is substantially affected⁶⁴ and when there is a realistic chance of improvement or change.⁶⁵ This was recognised by the Appellants when asserting that the proposed regular medical examination would 'ensure that Ieng Thirith is not facing an indefinite period of restriction of her right to liberty.'⁶⁶

39. On the contrary, the Respondent submits that the Appellants' request to impose coercive conditions upon the Respondent on her release would create legal uncertainty. The fact that the Respondent suffers from moderate to severe cognitive impairment has been accepted by the Appellants and her condition will deteriorate. In view of this, the Appellants' argument that the imposition of coercive conditions is currently justified but needs regular review to prevent an 'indefinite period of restriction of her right to liberty' is incomprehensible. Further, there is no logic in the assertion of the Appellants that imposing a requirement that the Respondent resides at a specific home address⁶⁷ provides her with a greater degree of certainty concerning her continuing status as an Accused person. The Respondent submits that there is no error in law necessitating a partial annulment of the Impugned Decision.

4.2 No Error in Law by Not Applying, Dismissing or Failing to consider Continuing Available Legal bases for Judicial Supervision with Conditions

40. The Appellants submit that the Trial Chamber erred in law by not applying, dismissing or failing to consider available legal bases for the continuing judicial supervision of the Respondent with conditions pursuant to Article 223 of CCCP and IRs 63, 65 and 82.⁶⁸
41. Firstly, the Appellants argue that Article 223 of the CCCP provides a legal basis for imposing coercive measures after release and that the Trial Chamber failed to consider or apply such provision to the instant case.⁶⁹ However, the Trial Chamber considered the

⁶⁴ See *Antoine v UK*, Application No. 62960/00, 13 May 2003.

⁶⁵ See *Lubanga*, op. cit., para 37.

⁶⁶ Transcript of 31 August 2012, p. 110.

⁶⁷ OCP Supplementary Submissions, para. 22.

⁶⁸ OCP Appeal, paras. 7-9; OCP Supplementary Submissions, para. 4.

⁶⁹ OCP Appeal, para. 7; OCP Supplementary Submissions, para. 4.

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application of this provision in its Impugned Decision as the majority of the SCC held in 2011 that judicial supervision with conditions under Article 223 was permissible. The Trial Chamber found, taking into consideration the current circumstances of the case, especially that there was no reasonable prospect that the Respondent will be tried in the foreseeable future, that Article 223 was inapplicable.⁷⁰

42. In addition, the Appellants argue that the Trial Chamber erred in law when dismissing IRs 65 and 82 as inapplicable. The Appellants criticise the Trial Chamber for ‘automatically’ deciding that no measures alternative to detention can be considered and for failing to conduct a balancing exercise between the various interests at stake.⁷¹ The Respondent contends that, contrary to the Appellants’ assertion, the Trial Chamber has taken into consideration the measures that can be ordered under IRs 65 and 82, including the imposition of judicial supervision under conditions. Having taken into account the reasons for imposing such measures, the Trial Chamber considered that there is no legal justification for the imposition of conditions as provided for in the IRs when the proceedings against the Accused are stayed indefinitely and when there is no reasonable prospect of the Accused being tried;⁷² as is the position of the Respondent.⁷³
43. Lastly, the Appellants contend that the Trial Chamber should have considered the doctrine of inherent powers in order to enlarge its power to impose conditions of judicial supervision upon an Accused after a stay of proceedings has been ordered.⁷⁴
44. The notion of ‘inherent jurisdiction’ can be exercised when a determination on ‘incidental legal issues which arise as a direct consequence of the procedures of which the Tribunal is seized by reason of the matter falling under its primary jurisdiction’ needs to be made and ‘when no other court has the power to pronounce on the incidental legal issues, on account of legal impediments or practical obstacles.’⁷⁵ Accordingly, many international courts have exercised their inherent jurisdiction ‘where their statutory provisions did not expressly or by necessary implication contemplate their power to pronounce on the

⁷⁰ Impugned Decision, paras. 32-33.

⁷¹ OCP Appeal, para. 8.

⁷² Impugned Decision, para. 33.

⁷³ Transcript of 31 August 2012, pp. 129-137.

⁷⁴ OCP Appeal, para. 9.

⁷⁵ *In the Matter of El Sayed*, Case No. CH/AC/2010/02, Decision on Appeal of Pre-Trial Judge’s Order Regarding Jurisdiction and Standing, 10 November 2010, para. 45.

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matter.⁷⁶ Furthermore, inherent powers provide courts with a means of ensuring that an Accused is not deprived of his/her legal rights due to a lacuna in the law.

45. The Respondent submits that the doctrine of 'inherent powers' is not relevant in the present situation as a means to justify the imposition of coercive conditions. Firstly, the power to impose conditions or judicial supervision is expressly contained in Article 223 of CCCP and IRs 65 and 82 of the ECCC, as was recognised by the Trial Chamber in the Impugned Decision⁷⁷ and by the SCC⁷⁸ and the President of the SCC.⁷⁹ As a result, the question of imposing coercive conditions on release is not an incidental legal issue not provided for in the statutory provisions. The Trial Chamber exercised its jurisdiction based on an examination of the legal texts available to it and found that a legal basis for continued detention of or the imposition of coercive conditions upon release on the Respondent, in the current circumstances, was lacking. As a result, the Appellants' ground of appeal should be dismissed.
46. The Appellants argue that the Pre-Trial Chamber ('PTC') of the ECCC has used the doctrine of 'inherent powers' and that the Trial Chamber should have done so.⁸⁰ However, all the PTC Decisions referred to by the Appellants deal with procedural rights afforded to the parties to the proceedings in order to ensure the good administration of justice. They do not concern the question of whether to impose conditions on an Accused with the effect of limiting his/her substantive rights. These Decisions therefore cannot form a basis for arguing that the Trial Chamber should have applied such a doctrine.
47. Any interference with the Respondent's human rights, be it the right to liberty and security or the right to freedom of movement, results in a breach of those basic rights when the conditions of the legality principle have not been met.⁸¹ An interference based upon the application of 'inherent powers' would necessarily lead to a breach of the Respondent's human rights because the legal conditions are not met. In the alternative that the Chamber finds there is no specific provision within the ECCC's legal framework

⁷⁶ *Ibid.*, para. 46.

⁷⁷ Impugned Decision, paras. 32-33.

⁷⁸ SCC Decision, paras. 45-47.

⁷⁹ President's Decision on Co-prosecutors' Request for Stay of Release Order of IENG Thirith, p. 3.

⁸⁰ OCP Appeal, para. 9.

⁸¹ See Article 5(1) of the ECHR. Similarly, see Article 2 of Protocol No. 4 to the ECHR.

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providing a sufficient basis to impose conditions upon release in the circumstances of the case, such imposition cannot be justified by relying on the notion of 'inherent powers'. Thus, the Respondent submits that there is no error in law necessitating an amendment of the Impugned Decision.

4.3 No Error in Law by Ordering Unconditional Release

48. The Respondent submits that the Trial Chamber did not err in law when ordering the immediate release of the Respondent and refusing to impose judicial supervision.

a) *Distinction between 'Unconditional Release' stricto sensu and 'Immediate Release' under Non-Coercive Measures*

49. The Appellants argue that the Trial Chamber ordered the Respondent's 'unconditional' release.⁸² It is submitted that the Appellants fail to differentiate between an 'unconditional' release *stricto sensu* and an 'immediate release' under non-coercive measures, as ordered by the Trial Chamber. The Trial Chamber declared that imposing coercive conditions on the Respondent would be practically or legally unenforceable.⁸³ However, the Trial Chamber reminded the Respondent of her obligation pursuant to IR 35, requested her to refrain from communicating with the media and to remain within the territory of the Kingdom of Cambodia.⁸⁴
50. The Trial Chamber suggested a scheme of non-coercive measures which were to be applicable on the Respondent's release. This scheme is of a more elaborated nature than the measures adopted in November 2011 when the Trial Chamber actually ordered the Respondent's unconditional release.⁸⁵ The release ordered by the Trial Chamber in its Impugned Decision amounts to a 'practically unconditional' release.⁸⁶

⁸² OCP Appeal, paras. 10-16.

⁸³ Impugned Decision, para. 37.

⁸⁴ *Ibid.*, p. 19.

⁸⁵ See First TC Decision on Fitness, paras. 79-81.

⁸⁶ Similarly, see *Prosecutor v. Brdanin and Talic*, Case No. IT-99-36-T, Decision on the Motion for Provisional Release of the Accused Momir Talic, 20 September 2002, para. 32 referring to *Prosecutor v. Djukic*, Case No. Case IT-96-20-T, Decision Rejecting the Application to Withdraw the Indictment and Order for Provisional Release, 24 April 1996, p. 4.

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b) No Justification for Imposing Judicial Supervision

51. The Respondent contends that there is no legal justification for imposing a regime of judicial supervision.
52. In its 2011 Decision, the SCC identified two objectives to be simultaneously pursued when deciding whether to continue detention or to order the conditional release of an Accused. The first objective is to secure the presence of the Accused at trial, as soon as it resumes.⁸⁷ The second objective 'is to foster the improvement of the mental health of the Accused'.⁸⁸
53. The Respondent submits that the first of these objectives is not relevant as there is no requirement to secure the presence of the Respondent for trial because there is no reasonable prospect that she will ever be tried. The circumstances have changed significantly since 2011. The Respondent was prescribed medication and provided with a cognitive stimulation programme in order to improve her cognitive abilities. It was recognised in 2011 that there was little likelihood that the dementia would be improved and that should any improvement be observed it would only be temporary in nature. In the event, the Medical Experts found that the treatments failed to bring about any improvement but they noted further deterioration. There is currently no other available treatment that could boost the Respondent's cognitive functioning. The Medical Experts stressed that her condition will continue to deteriorate as Alzheimer's disease is a progressive and degenerative disorder, which involves the destruction of brain cells that will never be replaced.⁸⁹ They testified that there are no known cases of improvement of persons with a clear diagnosis of dementia once all the possible treatments in terms of drugs and medicines have been explored.⁹⁰ New and potentially beneficial drugs have to be tested in clinically trials over many years before they can be made available. Recently, two major drug trials for Alzheimer's disease, that were late-stage dementia clinical trials, have reported disappointing results and were halted. As a result, several

⁸⁷ SCC Decision, para. 41.

⁸⁸ *Ibid.*, paras. 41-42.

⁸⁹ Transcript of 31 August 2012, pp. 51, 96.

⁹⁰ *Ibid.*, p. 75.



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Pharmaceutical Companies have withdrawn their investment in research which has shown no success.⁹¹ The assertion that some new treatment might be found in the Respondent's lifetime, as rightly recognised by the Trial Chamber,⁹² is no more than speculation. The Court cannot deal in hypothetical situations.

54. The second objective cannot be met as the Respondent's cognitive function cannot be improved, even temporarily. Since the hearing in 2011, all possible measures have been undertaken in a commendable manner in order to attempt to improve her mental health.⁹³ As rightly stated by the SCC, 'the criminal process is only competent to concern itself with whether improvement is attainable for the period necessary to accommodate the subsequent criminal adjudication.'⁹⁴ The Respondent submits that there is incontrovertible evidence that no improvement is attainable. Therefore, this justification for imposing conditions upon release no longer exists.
55. Because there is no reasonable prospect of the Respondent becoming fit to stand trial in the foreseeable future, the Trial Chamber ordered an indefinite stay of the proceedings.⁹⁵ In reality, this stay will not be reversed. The Appeals Chamber in *Lubanga* clearly stated that 'if a permanent and irreversible stay of the proceedings is imposed the Accused person will have to be released because continued detention would not be in connection with the exercise of criminal jurisdiction by the Court.'⁹⁶ The Appeals Chamber only envisaged the imposition of judicial supervision when the stay is conditional and when further developments would make it likely that it might be lifted in the not-too-distant future.⁹⁷
56. Therefore, there is no longer any justification for imposing judicial supervision on the Respondent. The Trial Chamber did not err in law in deciding that it 'lack[ed] a clear

⁹¹ See 'Drug giants give up on Alzheimer's cure', *The Independent*, 19 September 2012 (available at <http://www.independent.co.uk/life-style/health-and-families/health-news/drug-giants-give-up-on-alzheimers-cure-8153606.html>); See also 'Trials for Alzheimer's drug halted after poor results', *The New York Times*, 6 August 2012 (available at http://www.nytimes.com/2012/08/07/business/alzheimers-drug-trials-halted.html?_r=1&).

⁹² Impugned Decision, para. 29.

⁹³ See SCC Decision, para. 38 in which the SCC held that 'the ECCC is obliged to exhaust all measures available to it which may help improve the Accused to be become fit to stand trial'.

⁹⁴ *Ibid.*, para. 37.

⁹⁵ Impugned Decision, para. 28.

⁹⁶ *Lubanga*, op. cit., para. 36.

⁹⁷ *Ibid.*, para. 37.

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legal basis to impose coercive conditions or other forms of judicial supervision over the Accused upon release.’⁹⁸

c) No International Practice to Impose Judicial Supervision

57. The Appellants contend that there is a legal basis under international jurisprudence and practice to consider the imposition of restrictive conditions upon the provisional release of an Accused when the continued detention of the latter has been ruled out.⁹⁹
58. The cases cited by the Appellants,¹⁰⁰ in order to justify the existence of such international practice, deal with inherently different factual circumstances and therefore cannot be relied upon to support their submission in the present case. In *Kovacevic*, at the request of the defence, the Chamber ordered the Accused’s provisional release to allow him to receive adequate treatment in a specialized institution on the basis that Rule 65 requirements were met, namely that the Accused would appear at trial. The medical experts held that such treatment could potentially improve his conditions and it is on this basis that the Trial Chamber suspended the proceedings for six months as there was a possibility for a trial to take place in the near future.¹⁰¹ Similarly in *Talic*, also at the request of the defence, the Chamber ordered Talic’s provisional release on the grounds that his medical condition was ‘incompatible with a state of continued detention’.¹⁰² The Chamber attached coercive conditions to his release as there was a chance that he would become fit to stand trial in the foreseeable future and in order not to prejudice his on-going trial.¹⁰³ In *Djukic*, the Chamber provisionally released the Accused on humanitarian grounds as his detention was incompatible with his medical condition. The Chamber imposed minimal conditions upon his release to ensure his appearance at trial.¹⁰⁴ Finally in *Stanisic*, the Chamber ordered the provisional and conditional release

⁹⁸ Impugned Decision, para. 33.

⁹⁹ OCP Appeal, para. 11.

¹⁰⁰ OCP Appeal, paras. 11-12, footnote 32.

¹⁰¹ *Prosecutor v. Kovacevic*, Case No. IT-01-42/2-I, Decision on Provisional Release, 2 June 2004, p. 2.

¹⁰² *Brdanin and Talic*, op. cit., para. 32.

¹⁰³ *Ibid.*, para. 34.

¹⁰⁴ *Djukic*, op. cit., p. 4.



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of both Stanistic and Simatovic.¹⁰⁵ Stanistic was suffering from a severe depression and as a result the Chamber adjourned the proceedings for a minimum of three months.¹⁰⁶ Simatovic was released because of the postponement of the start of the trial.¹⁰⁷ In due course the trial of both Stanistic and Simatovic was resumed and both were ordered to return to the ICTY Detention Facility.¹⁰⁸

59. As noted by the Trial Chamber,¹⁰⁹ none of the above mentioned cases provides a legal basis or support for imposing a release under coercive conditions due to the lack of similarity with the Respondent's case. The fact that an Accused is suffering from a terminal illness does not automatically mean that he will not be fit to stand trial. Similarly, the fact of mental illness per se does not exclude the real possibility of the condition being treated. None of the cases cited is of an Accused suffering from dementia which has the unique feature of being progressive and degenerative in its impact of the cognitive functions and not amenable to treatment. Each request for release must be fact-based and needs to be decided with regard to all the circumstances of that case.¹¹⁰ As a result, it is meaningless to assert that a 'practice' exists in international law to impose restrictive conditions upon release. Fair practice requires the merits of each case to be considered in accordance with the law.
60. The Appellants submit that the Trial Chamber 'fundamentally misunderstood the purpose and justification for the imposition of judicial supervision' in that it suggested that the only objective of judicial supervision during a stay of proceedings is to ensure the Respondent's presence at the trial upon its resumption.¹¹¹ At the same time, the Appellants claim that 'securing the presence of the Accused at any subsequent trial

¹⁰⁵ *Prosecutor v. Stanistic and Simatovic*, Case No. IT-03-69-PT, Decision on Provisional Release, 26 May 2008, paras. 65-66.

¹⁰⁶ *Ibid.*, para. 62.

¹⁰⁷ *Ibid.*, para. 66.

¹⁰⁸ See *Prosecutor v. Stanistic and Simatovic*, Case No. IT-03-69-PT, Decision on Prosecution Motion for Revocation of Jovica Stanistic's Provisional Release and Re-Assessment of his Health and Revocation of Franko Simatovic's Provisional Release, 24 April 2009, pp. 6-8.

¹⁰⁹ Impugned Decision, para. 37.

¹¹⁰ See *Prosecutor v. Hadzihasanovic et al.*, Case No. IT-01-47-PT, Decision Granting Provisional Release to Amir Kubura, 19 December 2001, para. 7; *Prosecutor v. Boskoski and Tarculovski*, Case No. IT-04-82-AR65.1, Decision on Interlocutory Appeal from Trial Chamber Decision Denying Johan Tarculovski's Motion for Provisional Release, 4 October 2005, para. 7.

¹¹¹ OCP Supplementary Submissions, para. 4.

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remains a primary purpose of measures of judicial supervision [...] [but] is by no means the sole legitimate purpose served.’¹¹²

61. The Respondent recognises that, in addition to securing the presence of an Accused at trial, judicial supervision may also be justified as a means to protect others, especially victims and witnesses. Both requirements are cumulative and not disjunctive.¹¹³ This is general practice before the ECCC¹¹⁴ and international criminal tribunals.¹¹⁵ This is due to the fact that the nature and security demanded is related to the grounds on which the detention on remand is based, namely that a trial is going to take place.¹¹⁶ However the Appellants fail to acknowledge that without a subsequent trial taking place or realistically being likely to take place, there is no legal basis for imposing conditions upon release. Accordingly, the Appeals Chamber in *Lubanga* held that a Chamber can impose judicial supervision in a situation where further developments since the imposition of a conditional stay make it likely that the stay might be lifted in the not-too-distant future.¹¹⁷ This is not the case in the present instance where the Respondent has been found permanently unfit and it is acknowledged that the trial proceedings against her will never be resumed. In imposing coercive measures the Trial Chamber exercises its criminal jurisdiction to ensure the attendance of an Accused at trial and the protection of others. As the adjective employed by the Appellants implies, the measures are punitive in nature.
62. Furthermore, the Trial Chamber did not err in law and fact, as asserted by the Appellants, by mischaracterising the effect of a decision in the *Talic* case.¹¹⁸ Firstly, the fact that the

¹¹² *Ibid.*, para. 5.

¹¹³ *Prosecutor v. Nsengimana*, Case No. ICTR-01-69-I, Decision on Nsengimana’s Motion for the Setting of a Date for a Pre-Trial Conference, a Date for the Commencement of Trial, and for Provisional Release, 11 July 2005, para. 17 citing *Prosecutor v. Delalic et al.*, Case No. IT-96-21-T, Decision on Motion for Provisional Release filed by the Accused Zejnil Delalic, 25 September 1996, para. 1.

¹¹⁴ IR 65 stipulates that the Co-Investigating Judges may order bail and ‘impose such conditions as are necessary to ensure the presence of the person during the proceedings and the protection of others.’

¹¹⁵ Rule 65(C) of the ICTY Rule of Procedure and Evidence as amended on 28 August 2012; Rule 65(C) of the ICTR Rule of Procedure and Evidence as amended on 1 October 2009; Rule 65(B) of the Special Court for Sierra Leone Rules of Procedure and Evidence as amended on 31 May 2012; See also *Prosecutor v. Boskoski and Tarculovski*, Case No. IT-04-82-AR65.4, Decision on Johan Tarculovski’s Interlocutory Appeal on Provisional Release, 27 July 2007, para. 14; *Prosecutor v. Norman et al.*, Case No. SCSL-04-14-T, Fofana – Decision on Application for Bail Pursuant to Rule 65, 5 August 2004, para. 62.

¹¹⁶ P. Van Dijk, F. Van Hoof, A. Van Rijn and L. Zwaak (eds.) *Theory and Practice of the European Convention on Human Rights* (Intersentia Antwerpen Oxford, 2006), pp. 497-498.

¹¹⁷ *Lubanga*, op. cit., para. 37.

¹¹⁸ OCP Appeal, para. 13, footnote 41.

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Trial Chamber held that there was a disagreement between the medical experts on the fitness to stand trial of *Talic* rather than to remain in detention, does not invalidate the Impugned Decision nor does it occasion a miscarriage of justice as this particular detail is irrelevant to the overall outcome of the Impugned Decision. Secondly, the Appellants wrongly submit that the Trial Chamber distinguished the restrictive conditions imposed on *Talic* on the grounds of the ‘possibility that he may eventually stand trial’ whereas the ICTY Trial Chamber imposed conditions fully cognisant that *Talic* would not be alive by the time his trial ended. In fact, the ICTY Chamber decided that conditions were ‘necessary and appropriate’ to ensure that the on-going trial was in no way prejudiced,¹¹⁹ to ensure that he received all medical treatments he required¹²⁰ and, most importantly, to ensure that the requirements of Rule 65 governing release were observed, including securing his eventual presence at trial.¹²¹ On this particular aspect, the ICTY Chamber held that in the event he recovered sufficiently to resume attending trial, conditions needed to be enforced.¹²² Thus the Appellants misrepresent the *Talic* decision and no error in law or fact was made by the Trial Chamber.

63. It is submitted by the Appellants that ‘[u]nconditional release seems only to be exceptionally applied on humanitarian grounds in cases of a *par excellence* terminal condition’ and that the Impugned Decision made no finding on humanitarian grounds that could provide a sufficient legal basis for release without coercive conditions.¹²³ The Respondent reasserts that the release ordered by the Trial Chamber is not an unconditional release but an immediate release with non-coercive measures.¹²⁴ In any case, the rationale behind the imposition of conditions, as stated by the SCC in the same paragraph quoted by the Appellants,¹²⁵ is to secure the presence of the Accused at trial. The significant point to be noted is that a terminal illness does not *per se* prevent an Accused from being fit to plead and/or to stand trial. A terminally ill person may survive

¹¹⁹ *Brdanin and Talic*, op. cit., paras. 34-35.

¹²⁰ *Ibid.*, para. 36.

¹²¹ *Ibid.*, paras. 36, 39.

¹²² *Ibid.*, paras. 40, 42.

¹²³ OCP Appeal, para. 13, citing SCC Decision, para. 25.

¹²⁴ See paras. 49-50 of the present Response.

¹²⁵ SCC Decision, para. 25.

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for many years. Hence, as noted by the Appellants,¹²⁶ terminally-ill Accused persons have been granted provisional release subject to coercive conditions with the view to a trial taking place. The justification for the unconditional release of the Respondent on humanitarian grounds derives from her inability to stand trial. Thus the Appellants' argument should be dismissed.

d) The Coercive Measures Proposed are Not Proportionate, Not Suitable and Not Necessary

64. The Appellants argue that, under international human rights law, limitation of rights can be justified if the measures taken are suitable, necessary and proportionate in the circumstances. The Appellants further submit that the imposition of restrictive conditions upon the release of an Accused unfit to stand trial satisfies this 'proportionality test'.¹²⁷
65. The Respondent submits that the Trial Chamber lacks any legal basis to impose coercive conditions upon the Respondent's release for the reasons already set out. As a result, any conditions imposed would necessarily be disproportionate.
66. Further, the Appellants have failed to demonstrate how imposing coercive conditions in the current circumstances is suitable. It cannot be deemed suitable to limit the fundamental human rights of the Respondent by imposing coercive conditions where the stark reality is that she will never recover from dementia and thus the trial proceedings will never resume. The Respondent notes that the conditions proposed by the Appellants are, in fact, intrinsically connected to the criminal trial being held in the foreseeable future and therefore designed to ensure the presence of the Respondent at trial.¹²⁸ The protection of others alone cannot justify the imposition of coercive conditions upon release, especially as no concrete danger is identified by the Appellants¹²⁹ and there is no evidence to indicate that the Respondent has the ability to act independently in her daily

¹²⁶ OCP Appeal, para. 13.

¹²⁷ OCP Appeal, paras. 14-15; OCP Supplementary Submissions, paras. 10-14.

¹²⁸ See OCP Supplementary Submissions, paras. 22, 24, 25, 29.

¹²⁹ In assessing whether the Accused poses a danger to any victim, witness or other person, the ICTY Trial Chamber held that the situation cannot be looked at *in abstracto*: a concrete danger needs to be identified. See *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-PT, Decision on Ramush Haradinaj's Motion for Provisional Release, 6 June 2005, para. 22 citing *Prosecutor v. Prlic et al.*, Case No. IT-04-74-AR65.1, AR65.2, AR65.3, Decision on Motions for Reconsideration, Clarification, Request for Release and Applications for Leave to Appeal, 8 September 2004, para. 28.

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life. The Respondent recalls that '[p]rocedural measures should never be capricious or excessive.'¹³⁰ Coercive measures should not be used punitively against the Respondent whose illness prevents her being tried. The contrary would amount to a violation of her presumption of innocence as enshrined in Article 14(2) of the ICCPR.

67. Furthermore, the Appellants have not demonstrated how imposing coercive conditions is necessary and proportionate in the current circumstances. The Appellants maintain that the overall proportionality of the conditions is demonstrated in three Annexes attached to the Supplementary Submissions in which the Appellants compare the length of the trial proceedings and the conditions of judicial supervision imposed in a number of cases where the issue of fitness to stand trial has been raised.¹³¹ This fails to take account of the fact based nature of such decisions.
68. Article 9 of the ICCPR enshrines the Respondent's fundamental right to liberty which may be restricted only where it is necessary and where the measure being imposed is proportionate to the aim it seeks to achieve. As previously submitted, coercive conditions upon release are imposed in order to ensure that the Accused will be present at trial. The envisaged target, if one follows the proportionality test held in *Jukic*, is to secure such presence.¹³² When there is no prospect of a trial ever being held, as in this case, imposing conditions will inevitably be unnecessary and disproportionate.
69. Finally, the Appellants assert but do not identify the Trial Chamber's alleged 'abuse of discretion' nor how it prejudices them. By this omission, the Appellants have failed to provide the Chamber with the arguments in support of the ground of appeal as provided in Rule 105(2) and therefore such ground must be dismissed.

¹³⁰ *Prosecutor v. Blagojevic et al.*, Case No. IT-02-53-PT, Decision on Request for Provisional Release of Accused Jokic, 28 March 2002, para. 18.

¹³¹ OCP Supplementary Submissions, para. 18.

¹³² K. Khan and R. Dixon *Archbold: International Criminal Courts Practice, Procedure and Evidence* (Thomson Reuters and Sweet & Maxwell, 3rd ed., 2009), p. 373: 'The ultimate aim of pre-trial detention is to ensure that the accused will appear for trial.'



4.4 No Error in Fact Occasioning a Miscarriage of Justice or in the Exercise of the Trial Chamber's Discretion which resulted in Prejudice to the Appellants

70. The Trial Chamber did not err in fact or in the exercise of its discretion when finding that conditions of judicial supervision would be unenforceable or impractical.

a) Practically and Legally Unenforceable Coercive Conditions

71. The Medical Experts stated that the Respondent is suffering, *inter alia*, from a severe memory decline characterized by the complete inability to retain new information and that she is in a constant state of lacking awareness of her surroundings.¹³³ This diagnosis leads to the conclusion that the Respondent will not be in a position to remember, comprehend and abide by any coercive condition imposed on her. The Appellants implicitly recognise this when stating that 'there will be a degree of difficulty on her part in complying with these conditions without some assistance'.¹³⁴ The Respondent submits that it is contrary to the interests of fairness and justice to seek the imposition of coercive conditions in circumstances where it is acknowledged by the parties that she cannot, due to an illness over which she has no control, adhere to them and for which there is no rational purpose.

72. As an alternative remedy, the Appellants advanced to the Trial Chamber the possibility of appointing a guardian to ensure that the conditions imposed on her are respected.¹³⁵ Following the issuance of the Impugned Decision, on 13 September 2012, the Prosecutor of the Office of the Prosecutor of the Phnom Penh Municipal Court, who is also Deputy Prosecutor at the ECCC, applied to the Phnom Penh Municipal Court for the appointment of Ieng Vichida, the Respondent's daughter, as her general guardian with a condition that the Respondent resides within the territory of the Kingdom of Cambodia and informs the ECCC's Office of Administration in advance of any change of the Respondent's

¹³³ Summary Expert Report, para. 60.

¹³⁴ Transcript of 31 August 2012, p.110.

¹³⁵ *Ibid.*, pp. 110-111.

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address.¹³⁶ On 14 September, the Municipal Court of Phnom Penh granted the request and ordered aforementioned conditions to attach to the Guardianship Order.¹³⁷

73. In their Supplementary Submissions, the Appellants state that they were advised of the Guardianship Order following their submission of Immediate Appeal and assert that a request for commencement of guardianship was filed by Ieng Vichida through the Office of the Prosecutor of the Phnom Penh Municipal Court.¹³⁸ This is an erroneous and inaccurate representation of the facts. Some days prior to the Decision of the Trial Chamber, the Prosecutor initiated the application to appoint a general guardian and made a specific request for Ieng Vichida to fill in an application to this effect, to be submitted to the Phnom Penh Municipal Court.
74. The Prosecutor's request to impose conditions upon the guardian was not known to the Respondent nor the proposed guardian who was not present when the application was made. Only when the Decision has been issued on 13 September 2012 did the Prosecutor lodge the application for a general guardianship order in the Municipal Court.
75. By acting in this way, the Appellants have sought to circumvent the jurisdiction of the ECCC, and more specifically the SCC. They have used a civil procedure, designed to safeguard the interests of a vulnerable person, as a device to ensure that they succeeded in obtaining coercive conditions once it was apparent that the Trial Chamber had ruled contrary to their submissions. At the very time when the Decision of the Trial Chamber was pending and it was understood that an appeal would be lodged by the Respondent or the Appellant, a procedure was embarked upon in another court with a civil jurisdiction intended to render irrelevant and redundant the outcome of any appeal to the SCC. The family of the Respondent had given no indication of a desire to put in place a guardianship order. They were prepared to take responsibility for the care of the Respondent. In any event, the Respondent submits that the Cambodian Civil Code provides no legal basis for the imposition of coercive conditions on an appointed guardian.

¹³⁶ Decision of Phnom Penh Municipal Court, p. 1.

¹³⁷ *Ibid.*, p. 3.

¹³⁸ OCP Supplementary Submissions. para. 2.



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76. The Respondent submits that the Appellants were wrong to make an application in the terms described to the Phnom Penh Municipal Court and furthermore that the said court should have declined to deal with the application at a time when the matter was not urgent and was to be the subject of an appeal to the SCC, which the Appellants cannot have failed to appreciate as they lodged the appeal on 14 September 2012.
77. The Trial Chamber rightly concluded that coercive conditions would be legally unenforceable because the application of sanctions on the Respondent or a guardian in a case of non-compliance was not feasible or reasonable.
78. The practice before international tribunals¹³⁹ and national systems,¹⁴⁰ including before the ECCC,¹⁴¹ indicates that failure of an Accused to comply with the conditions attached may result in a return to custody. Given the Respondent's current medical condition and the indefinite stay of proceedings, it would be contrary to humanitarian law and absurd to place her back in detention. In any event, an Accused must have 'intentionally' evaded the obligations attached to judicial supervision in order to be placed in pre-trial detention, as stated in Article 230 of the CCCP. The Appellants fail to indicate how the Respondent, given her cognitive impairment, will ever be found to have intentionally breached a condition imposed on her.
79. Furthermore, a court-appointed guardian cannot be held responsible for a failure by the person under guardianship to comply with the coercive conditions of judicial supervision. Her role, according to Cambodian law, is to protect the property of the person under guardianship¹⁴² and to provide medical care and general assistance to the person.¹⁴³ As the Trial Chamber rightly observed, the appointment of a guardian is not intended to ensure compliance with conditions imposed on an Accused in criminal proceedings.¹⁴⁴ Therefore, the prospect of sanctioning a guardian of the Respondent for a lack of compliance with the conditions imposed on the Respondent is without a legal basis.

¹³⁹ E.g. *Prosecutor v. Milan Simic*, Case No. IT-95-9-PT, Decision on Provisional Release of the Accused, 26 March 1998, p. 5; *Deputy General Prosecutor v. Sisto Barros aka Xisto Barros, Cesar Mendonca and Josep Nahak*, Case No. 01/2004, Decision on Prosecutor's Request for Pretrial Detention, 17 March 2004, para. 55.

¹⁴⁰ See Article 230 of CCCP; See also Article 141-2 of the French Code of Criminal Procedure.

¹⁴¹ IR 65(6).

¹⁴² Article 1028(1) of the Cambodian Civil Code.

¹⁴³ *Ibid.*, Article 1039(1).

¹⁴⁴ Impugned Decision, para. 37, footnote 86.

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80. The Appellants further argue that the finding that coercive conditions are practically and legally unenforceable is in contradiction with the Trial Chamber's 'request' and 'reminder' in the Impugned Decision.¹⁴⁵ By reminding the Respondent of the pre-existing obligation of non-interference with the administration of justice, the Trial Chamber did not create new coercive conditions applicable solely in the case of the Respondent any more then requesting her not to communicate with the media.
81. The Trial Chamber recognised it would be unlawful and unreasonable to impose new coercive conditions on the Respondent given her cognitive impairment.

b) A Regular Assessment of the Respondent's Mental Health is Unjustifiable

82. The Appellants argue that the Trial Chamber erred in the exercise of its direction and occasioned a miscarriage of justice, causing prejudice to the Appellants, in finding that 'practical difficulty and costs entailed by continuing periodic reassessments of the Accused's cognitive fitness, coupled with the finding that her condition is incurable and irreversible, do not justify regular medical assessments of the Accused.'¹⁴⁶
83. The Respondent submits that the Appellants fail to demonstrate how the alleged abuse of discretion causes prejudice to them. By failing to do so, the Appellants do not substantiate it and the ground of appeal must therefore be dismissed.
84. There is no doubt that the Respondent suffers from a progressive, degenerative illness and that her condition has now become incurable. In the absence of any treatment capable of improving her cognitive ability, an order for regular mandatory assessments of her cognitive fitness lacks legal or factual basis. By acknowledging the Medical Experts' conclusions, the Impugned Decision has a sufficient evidentiary basis and does not occasion a miscarriage of justice.
85. In addition, the Respondent submits that imposing a medical assessment for the Respondent's benefit does not fall within the ambit of the aforementioned applicable IRs

¹⁴⁵ OCP Appeal, para. 17.

¹⁴⁶ OCP Appeal, para. 18.

as such medical assessments neither aim at ensuring the presence of the Accused during the proceedings nor at protecting others.

86. As a result, the Trial Chamber's decision not to order the Respondent to undergo a medical examination by medical practitioners to be appointed by the Court on a regular basis has an ample evidentiary basis and does not occasion a miscarriage of justice nor does it show an error in the exercise of the Trial Chamber's discretion.

V REQUEST FOR AN ORAL HEARING

87. It is submitted that the issues raised in the Appeal are of fundamental importance and should properly and most appropriately be addressed during an oral hearing which will provide the parties with the opportunity to respond to the facts as alleged in this application and the applicable law in more detail. The Respondent therefore requests the SCC to schedule a hearing for this matter.

VI CONCLUSION

88. The Respondent respectfully requests the Trial Chamber to:
- Allow an oral hearing of the Appeal;
 - Reject the Appeal in its entirety and confirm the Trial Chamber Impugned Decision;
 - Remove the coercive conditions currently attached to Ieng Thirith's release.

Party	Date	Name Lawyers	Place	Signature
Co-Lawyers for Ieng Thirith	8 October 2012	PHAT Pouy Seang Diana ELLIS, QC	Phnom Penh	PHAT Pouy Diana Ellis