BEFORE THE TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

FILING DETAILS

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IMMEDIATE APPEAL AGAINST TRIAL CHAMBER DECISION TO ORDER THE RELEASE OF ACCUSED IENG THIRITH

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I. INTRODUCTION

1. Pursuant to Rules 82(6), 104, 105, 106(2) and 107 of the Internal Rules[1], the Co-Prosecutors submit this immediate appeal ("Appeal") against the Trial Chamber's *Decision on Ieng Thirith's Fitness to Stand Trial* ("Impugned Decision").[2]

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, errors of fact and discernible errors in the exercise of the Trial Chamber's discretion; (3) the Impugned Decision should be annulled insofar as it orders the release of the Accused; (4) the Impugned Decision should be amended to require the Accused to remain in detention and undergo medical and other remedial treatment, subject to a review in six months; and (5) leave should be granted to the Co-Prosecutors to file supplementary written submissions in support of this Appeal.

II. ARGUMENT

A. The Appeal is admissible

3. 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. As argued below, the Impugned Decision effectively terminates the proceedings against the Accused Ieng Thirith ("the Accused").

    (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) requires that an immediate appeal filed 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; 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. The grounds of appeal set out below identify errors of law which invalidate the Impugned Decision, errors in the exercise of the Trial Chamber's discretion resulting in

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[1] Extraordinary Chambers of the Courts of Cambodia, Internal Rules (Rev. 8), as revised on 3 August 2011 ("Rules").

[2] **E138** Decision on Ieng Thirith's Fitness to Stand Trial, 17 November 2010.

prejudice to the Co-Prosecutors, and errors of facts occasioning a miscarriage of justice.

(d) Finally, the appeal has been filed with the Greffier of the Trial Chamber within 24 hours of the notification of the Impugned Decision as per Rules 106(2) and 107(3).

B. The Appeal meets the standard for appellate review

(i) The decision to order release effectively amounts to a termination of the proceedings and is based on an error of law

4. The Impugned Decision orders the severance of charges against the Accused from the indictment in Case 002; stays the proceedings against the Accused; and orders the release of the Accused subject to one condition, namely that she inform the Trial Chamber prior to any change of address.

5. The only provision made for recommencement of the proceedings against the Accused is the right purportedly granted to the Co-Prosecutors to periodically request her reassessment and the recommencement of proceedings upon a showing of a material change in circumstance. In order to exercise this right the Co-Prosecutors are directed to establish a "mechanism to monitor the ongoing health status of the Accused". This direction is without legal basis in the ECCC Law, Agreement or Rules or Cambodian Code of Criminal Procedure. The Co-Prosecutors have no authority to establish a monitoring mechanism for an Accused who has been released. Further, given that she has been "unconditionally" released there is no basis to require her to undergo any further treatment or testing even if requested by the Co-Prosecutors. Accordingly, the Co-Prosecutors will never be in a position to request a recommencement of the proceedings as they will never be able to show a material change in circumstance.

6. Effectively, therefore, this decision amounts to a termination of the proceedings. Considering that the three national judges effectively found that there is a "possibility that IENG Thirith's condition will improve" with appropriate medical and other care, there is no legal basis for the Trial Chamber to terminate the proceedings against her.

(ii) The finding that the Accused cannot be detained or confined, and the consequent order for release, is based on an error of law and fact and discernible error in the exercise of discretion

7. In the alternative, the Trial Chamber's finding that it no longer had jurisdiction to detain the Accused in the ECCC detention centre or elsewhere is based on an error of law. The Trial Chamber stated:

> *It follows from its finding of incapacity to stand trial, severance of all charges against the Accused ... pursuant to Internal Rule 89ter and*

the stay of proceedings against her in Case 002 that the Trial Chamber no longer has a basis to detain the Accused.[3]

8. The Trial Chamber failed to provide any legal basis for this finding and in particular failed to consider Rules 63, 64 and 82 which govern provisional detention.

9. Rule 82(1) sets out the default position that an Accused who is in detention at the initial hearing shall remain in detention pending judgment. Rule 82(2) provides for the Trial Chamber to order the release of an Accused or the release on bail "in accordance with these IRs." The Co-Prosecutors submit that the provisions of Rules 63 and 64 should apply given that they contain the substantive criteria for provisional detention.

10. Rule 64 provides for release from provisional detention where "the requirements of Provisional Detention set out in Rule 63 … are no longer satisfied." These requirements include a "well founded reason to believe that the person may have committed the crime or crimes specified in the Introductory or Supplementary Submission" and a belief that the provisional detention is necessary to: prevent witness or victim intimidation; preserve or prevent destruction of evidence; ensure the Accused's presence at trial; protect the security of the Accused; or preserve public order.

11. In this case, the Trial Chamber has purported to *stay* the proceedings against the Accused. The proceedings remain, at least nominally, ongoing. Accordingly, the only basis for release from provisional detention would be if the provisional detention conditions, set out in Rule 63, were no longer satisfied. The Trial Chamber did not even address these conditions in the Impugned Decision not to mention demonstrate that they were no longer satisfied. Nor did it consider the proper exercise of its discretion in relation to Rules 63, 64 and 82.

12. The Trial Chamber also failed to correctly apply general principles of international criminal and human rights law in arriving at the conclusion that "continued detention of forced confinement in circumstances where it is unclear whether a trial will ever be convened violates the Accused's right to a fair trial and to liberty".[4]

13. On the contrary, international rules and jurisprudence demonstrate that continued detention or release subject to restrictive conditions is the *norm* where proceedings in international criminal cases are adjourned due to unfitness and where there remains a possibility (even if a remote one) that the Accused may regain capacity. Indeed, the International Criminal Tribunal for Yugoslavia (ICTY) has ordered confinement and/or release subject to other restrictive conditions even in cases of terminal illness. In *Talić*, the Trial Chamber found that the accused's condition "*is incurable* and inoperable and

[3] Impugned Decision at para. 61.
[4] Impugned Decision at para. 80.

can only deteriorate with or without treatment.[5] Nonetheless it did not terminate the proceedings against the Accused until his death,[6] instead ordering him "to reside and remain at all times at [his] address in Belgrade, except for occasional visits for tests, medical treatment and therapy, as may be required."[7] Similarly in *Đukić*, the Trial Chamber found that the accused was "suffering from an incurable illness which, in the opinion of the medical experts, is in its terminal phase."[8] The Trial Chamber placed "stringent conditions" on the Accused, requiring him to notify the Registry of any change of address, to send regular medical reports, and to respond to summonses if his condition were to improve.[9]

14. The ICC Rules of Evidence and Procedure support this approach, requiring proceedings to be adjourned if the accused is found to be unfit and for fitness to be reviewed within 120 days unless there are "reasons to do otherwise. [10] There is no provision for release of the accused during this defined period of adjournment.

15. The finding that the ECCC has no jurisdiction to detain the Accused and that to do so would violate her fair trial rights clearly assumes that the Accused's condition will never sufficiently improve to enable her to stand trial. As such, the finding is based on an error of fact in that it ignores the opinion of the experts that medical and other remedial measures may result in an improvement in the Accused's condition. For example, the experts testified:

Transcript, 30 August 2011, E1/9.1, p.93 [professor Campbell]

A. What I'm really saying is there is that until we've explored all possibilities and tried all measures to try and improve function, we cannot be definite that she will not be able to participate in her defence.
As I said, I think it's unlikely, but for her sake, this should be tried.

Q. And do you consider that it would be appropriate for you to conduct a reassessment following the trial period that you've recommended?
A. Should that be the wish of the Court, then -- the Chamber,

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5 *Prosecutor v. Radolav Brđanin & Momir Talić*, Case No. IT-99-36-T, Decision on the Motion for Provisional Release of the Accused Momir Talić (ICTY Trial Chamber) 20 September 2002 at 6 (emphasis added).

6 *Prosecutor v. Radolav Brđanin & Momir Talić*, Case No. IT-99-36-T, Order Terminating the Proceedings against Momir Talić (ICTY Trial Chamber) 12 June 2003.

7 *Ibid*, p. 9.

8 *Prosecutor v. Đorđe Đukić*, Case No. IT-96-20-T, Decision Rejecting the Application to Withdraw the Indictment and Order for Provisional Release (ICTY Trial Chamber) 24 April 1996 at 3.

9 *Ibid*, at 4.

10 ICC Rules of Procedure and Evidence, Doc. No. ICC-ASP/1/3 (Part. II-A), Adopted 09/09/2002, Entry into Force 09/09/2002, Article 135(4).

then yes, I would be prepared to.

Q. And as I draw to a close, then in light of the recommendations you've made and the continuing treatment, would it be fair to say that the current conclusions are interim?

A. I think they are in that there is change and there is also the evaluation by the other experts as well. So in terms of my own conclusions, they, I feel, could not be finalized until all possible measures have been tried.

Transcript, 20 October 2011, E1/12.1, p.53 [Drs Fazel and Lina]

I think you also commented that her living conditions in detention mean that the range of activities she participates in are limited and restricted; is that correct?
MR. FAZEL:
A. Yes.
Q. Might that be contributing to her overall psychological wellbeing and her cognitive functioning as it is now?
MR. FAZEL:
A. Yes, that may well be contributing because, as we've said,
20 cognitive stimulation is an important part of trying to at least
21 slow down the rate of cognitive decline.

Transcript, 20 October 2011, E1/12.1, p.54 [Drs Fazel and Lina]

You testified earlier, Dr. Fazel, that you would defer to [Professor Campbell] on issues of treatment. So is it fair to say that you agree with him that this treatment should be attempted?
MR. FAZEL:
A. I think I would simply say I would not disagree with him, with the caveat that I don't have experience of treating individuals with donezepil. So I would not disagree.

16. Given the seriousness of the charges faced by the Accused, it was a discernible error of discretion for the Trial Chamber to fail to exhaust all possible options to improve the Accused's condition, as recommended by the experts.

(iii) The decision on how to proceed in the absence of a supermajority involved an error of law and/or a discernible error in application of discretion

17. The Impugned Decision notes that article 14(1) of the ECCC law requires that Trial Chamber decisions require the affirmative vote of four judges (a supermajority) but that there is no guidance in the ECCC Law, Agreement or Rules as to the consequences of an absence of a supermajority. The Trial Chamber chose to turn to "fundamental

international standards" in order to assist it to resolve the substantive question. In doing so, it has arrived at a wholly contradictory and untenable position whereby the minority position of the international judges on the substantive question has prevailed over the majority position. This amounts to an error of law and / or exercise of discretion.

18. A review of the rules relating on appeals before the Pre Trial Chamber and the Supreme Court Chamber demonstrates that the usual course in cases of a lack of supermajority is for the lower decision to stand. In other words, the usual course is for the *status quo* to prevail and in this case would have favoured the maintenance in detention. In order to minimise any period of legal uncertainty for the Accused arising from the lack of disagreement the Trial Chamber could have exercised its discretion to call for written submissions on the parties on both the substantive and procedural questions on which it disagreed.

II. REQUEST

19. In light of the foregoing, the Co-Prosecutors request the Supreme Court Chamber to:

    (a) annul the Impugned Decision insofar as it orders the unconditional release of the Accused; and

    (b) amend the Impugned Decision by ordering the Accused to remain in detention and to undergo medical and other remedial treatment as recommended by the medical experts, subject to review in six months.

20. The Co-Prosecutors further request leave to file supplementary written submissions in support of this Appeal within seven (7) days. Given the extremely short timeframe applicable under the Rules for the filing of this Appeal, not all the supporting arguments and evidence could be sufficiently addressed in this Appeal.

Date	Name	Place	Signature
18 November 2011	CHEA Leang Co-Prosecutor	Phnom Penh	[signature]
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