

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

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**CO-PROSECUTORS' SUPPLEMENTARY SUBMISSIONS ON APPEAL
CONCERNING THE RELEASE OF ACCUSED IENG THIRITH**

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I. INTRODUCTION AND PROCEDURAL HISTORY

1. On 17 November 2011, the Trial Chamber decided to sever the charges against Accused Ieng Thirith in Case 002; to stay the proceedings against her; and to order her released from custody on condition that she inform the Trial Chamber prior to any change of address.¹
2. On 18 November 2011, the Co-Prosecutors filed their *Immediate appeal against the Trial Chamber decision to order the release of Accused Ieng Thirith* (the “Appeal”)² and their concurrent *Request for stay of release of Ieng Thirith*.³ On 19 November 2011, in accordance with Rule 82(6),⁴ the President of the Supreme Court Chamber (“Chamber”) stayed the release of Accused Ieng Thirith until the Chamber renders in decision on the Appeal.⁵
3. On 21 November 2011, the Chamber also granted, in part, the Co-Prosecutors’ request to file these supplementary submissions, allowing one (1) day for this purpose. The present submissions are filed on 22 November 2011, within the time limit afforded by the Chamber. Their purpose is solely to address evidence and supporting arguments that *could not be sufficiently addressed* in the Appeal itself, given the extremely short timeframe provided in the Rules. The present submissions should be read in conjunction with the Appeal.

II. SUPPLEMENTARY SUBMISSIONS ON EFFECTIVE TERMINATION OF PROCEEDINGS AS AN ERROR OF LAW

4. In paragraph 5 of the Appeal, the Co-Prosecutors submit that the proceedings against the Accused have been effectively terminated as the Co-Prosecutors will never be in a position to request recommencement of the proceedings. The Impugned Decision adopts mandatory language requiring that, “...the Co-Prosecutors *shall* establish a mechanism to monitor the ongoing health status of the Accused.”⁶ Where proceedings have been stayed, rather than terminated, the competence to impose and monitor conditions restricting the liberty of the accused rests solely with the Trial Chamber, subject to judicial control on appeal. This competence flows from the properly-established jurisdiction of the Trial Chamber over the Accused when “seised by an

¹ E138 Decision on Ieng Thirith’s fitness to stand trial, 17 November 2011 (the “Impugned Decision”).

² E138/1/1 Immediate appeal against the Trial Chamber decision to order the release of Accused Ieng Thirith, 18 November 2011.

³ E138/1/2 Co-Prosecutors’ request for a stay of release of Accused Ieng Thirith, 18 November 2011.

⁴ Extraordinary Chambers of the Courts of Cambodia, Internal Rules (Rev. 8), as revised on 3 August 2011 (“Rules”).

⁵ E138/1/3 Decision on Co-Prosecutors’ request to file supplementary submissions and direction regarding appeal filings, 21 November 2011 at p. 2.

⁶ E138 Impugned Decision (dispositive part), *supra* note 1 at p. 30 [emphasis added].

Indictment from the Co-Investigating Judges or the Pre-Trial Chamber.”⁷ Legal systems in the civil law tradition, including Cambodia and France, recognise that a tribunal is seised both *in rem* and *in personam* – the tribunal has jurisdiction over all the facts presented in the Closing Order and exercises jurisdiction only over persons specified therein. However, it also *must exercise jurisdiction* over those persons.⁸

5. Where proceedings have been stayed at the trial stage, the Co-Prosecutors remain an adversarial party to the proceedings against the Accused.⁹ Therefore, it would be wholly improper for the Co-Prosecutors to exercise any *proprio motu* powers related to restrictions on her liberty. The Co-Prosecutor’s only coercive measure under the Rules is the Rule 51 power to order the judicial police to take a suspect into custody for the purposes of inquiry. Any such detention is strictly limited to a 72-hour period and subject to numerous protections for the rights of the Accused. No other basis can be found in the ECCC legal architecture to authorise and lawfully regulate the power ostensibly conferred on the Co-Prosecutors in the Impugned Decision.
6. For the Trial Chamber to delegate any aspect of its competence over the Accused to the Co-Prosecutors falls foul of both the guarantee of the separation of powers between prosecution and adjudication under Rule 21(1)(a), and the requirement of effective control by competent “judicial authorities” under Rule 21(2). Indeed, any system for monitoring the health of the Accused with a view to recommencing criminal proceedings must either depend on the exercise of coercive measures to compel an Accused to submit to medical tests or be wholly ineffective. This amplifies the Co-Prosecutors’ submission that the Trial Chamber effectively terminates the proceedings against the Accused, and that the Impugned Decision is invalidated by this error of law.

III. SUPPLEMENTARY SUBMISSIONS ON SCOPE OF COMPETENCE TO RESTRICT THE LIBERTY OF THE ACCUSED

(i) *As an error of law invalidating the Impugned Decision*

7. In reference to paragraphs 7 to 14 of the Appeal, the Trial Chamber based its decision granting the Accused unconditional release on the principle of strict construction of criminal law and interpretation of criminal law most favourable to the accused,¹⁰ on “general principles of international criminal and human rights law”¹¹ and the right to liberty under Article 9 of the ICCPR. At the outset, the Co-Prosecutors affirm that the

⁷ Rule 79(1).

⁸ Jean Pradel, *Procédure pénale* (13th edition), ss. 837, 846.

⁹ *Ibid.*, s. 164, where the author notes: “...le parquet...est donc *partie* au **procès** pénal, non juge” and specifies the scope of powers of the prosecution.

¹⁰ E138 Impugned Decision, *ibid.* at para. 80.

¹¹ E138 Impugned Decision, *ibid.* at para. 79.

Chamber has specified that “the Internal Rules shall be interpreted so as to always safeguard the interests of the Accused”,¹²

8. Consistent with Article 9 of the ICCPR, the right to liberty of a person accused of core international crimes, and against whom proceedings have been stayed, is not absolute. The appropriate approach is best reflected in procedural rules established at the international level and the practice of the *ad hoc* and internationalised criminal tribunals. This jurisprudence clearly establishes that a temporary stay of proceedings against an Accused may be warranted in case of the most serious illness, but that unconditional release, withdrawal of a charging document or termination is the exception rather than the norm, even where there is absolutely no prospect of improvement of the underlying medical condition.
9. The Trial Chamber was unanimous in holding that the necessary consequence of a stay of proceedings is that it “no longer has any basis to detain the Accused.”¹³ In making this finding, the Trial Chamber gave only general and limited consideration to procedural rules established at the international level. As a result, the Trial Chamber wholly diverged from the jurisprudence and practice of other international and internationalised criminal tribunals, where unfitness to stand trial *usually does not* lead to an effective termination of proceedings through unconditional release, but rather leads to a temporary stay of proceedings subject to the imposition of strict measures of judicial control. Such measures have been applied even in the case of evidently *terminal* illnesses, not only “progressively degenerative conditions”¹⁴ such as those facing the Accused.
10. By way of illustration, in *Dukić*, the ICTY Trial Chamber stated:

*no matter how critical the medical reasons cited may be, nothing in the Statute or the Rules authorises the withdrawal for those reasons of an indictment for major crimes which the International Criminal Tribunal must judge, and that, consequently, no grounds exist for granting leave to the Prosecutor to withdraw that indictment.*¹⁵
11. Similarly in *Talić*, though the Accused was granted provisional release as a result of a terminal illness, proceedings were not terminated until after his death.¹⁶ In *Kovačević*,

¹² E50/3/1/4 *Ibid.* at para. 31.

¹³ E138 Impugned Decision, *supra* note 1 at para. 61.

¹⁴ E138 Impugned Decision, *ibid.*

¹⁵ *Prosecutor v Dorđe 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.

¹⁶ *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.

the defendant was found unfit to stand trial on psychiatric grounds, but a defence motion to dismiss the indictment was denied.¹⁷

12. The same principle has also been applied by the Special Panels for Special Crimes in Timor-Leste. In *Nahak*, the Special Panel held:

*a determination that a defendant is not competent to stand trial is not a defence to the charges against him. Rather, it operates as a bar to the commencement or continuation of his trial ... a defendant's trial can commence even after a period of suspension, should the defendant's unfitness prove to be temporary.*¹⁸

13. Following a finding of unfitness, the majority of cases have favoured the ordering of medical treatment in order to allow the accused to regain fitness to stand trial once again. In *Stanišić*, the trial was adjourned due to the physical and mental unfitness of the Accused, who the Trial Chamber described as “gravely ill”.¹⁹ Notwithstanding its determination that “the period prior to ... commencement [of proceedings] is uncertain and indeterminate,”²⁰ the Trial Chamber ordered the hospitalisation of the accused and regular updates from his doctors.²¹
14. In *Kovačević*, the Accused suffered from a potentially indeterminate mental disorder. The Trial Chamber found that “treatment – apart from providing relief to someone who is in need of and entitled to treatment – is also necessary ... in order to ascertain whether the Accused, after receiving adequate treatment, would be capable of standing trial in the future.”²²
15. ICTY jurisprudence establishes that in granting a temporary stay of proceedings for medical reasons, a Trial Chamber should not be focused exclusively on the liberty interest of the Accused, but in ensuring the Accused receives proper medical treatment in the most conducive environment to recovery. As noted above, this was the approach taken even when an accused was *unlikely* to recover.
16. In *Stanišić*, though the accused was held to be unfit, the Trial Chamber issued an order to the court-appointed psychiatrist to examine the accused at the UNDU in The Hague

¹⁷ *Prosecutor v Vladimir Kovačević*, Case No. IT-01-42/2-I, Decision on Defence “Request for Certification for Interlocutory Appeal of ‘Decision on Defence Motion to Dismiss the Indictment’ from 1st September 2006” (ICTY Trial Chamber) 27 September 2006.

¹⁸ *Deputy General Prosecutor for Serious Crimes v Josep Nahak*, Case No. 01A/2004, Findings and Order on Defendant Nahak’s Competence to Stand Trial (Special Panels for Serious Crimes (Timor-Leste)) 1 March 2005 at paras. 155-157.

¹⁹ *Prosecutor v Jovica Stanišić*, Case No. IT-03-69-T, Decision on Provisional Release (ICTY Trial Chamber), 26 May 2008 at para. 60.

²⁰ *Ibid.* at para. 62.

²¹ *Ibid.* at para. 68(1)(d)(viii) and (2).

²² *Ibid.* at p. 1.

and report to the Chamber every three weeks.²³ It was only after a subsequent application for provisional release that the Trial Chamber allowed the accused to be released to the municipality of Belgrade, primarily for the purposes of medical treatment. Similarly, in *Strugar*, though there was an undisputed finding that the accused needed medical treatment,²⁴ the Appeals Chamber rejected an application for medical treatment that was made outside of the Tribunal's provisional release regime. In neither case was the defendant provisionally released until they could prove that they met the requirements under the Rules and that their release was medically justified.

17. In *Mrđa* the Trial Chamber noted that International Human Rights Law stipulates that, de jure pre-trial detention should be the exception and not the rule. However it stated, with regard to the ICTY's Rules of Evidence and Procedure, that:

*Unlike national courts the Tribunal does not have its own coercive power to enforce its decisions, and for this reason pre-trial detention seems de facto to be rather the rule at the Tribunal. Additionally, one must take into account the fact that the full name of the Tribunal mentions "serious" crimes only. Nevertheless, leaving the aforementioned human rights unchanged but applying them specifically for the purposes of an international criminal court, Rule 65 of the Rules allows for provisional release. Any system of mandatory detention on remand is per se incompatible with Article 5(3) of the [European] Convention. In view of this, the Trial Chamber must interpret Rule 65 of the Rules not in abstracto but with regard to the factual basis of the single case and with respect to the concrete situation of the individual applicant.*²⁵

18. This approach is also consistent with the margin of appreciation afforded to States under international human rights law more generally, when assessing the legality of mandatory confinement and treatment of persons with mental illness. The European Court of Human Rights has recognised that confinement of a person to a medical facility for treatment need not be justified solely by the therapeutic needs of the person. Confinement mandated by domestic law will not amount to arbitrary detention where the person needs "supervision and control" for other reasons, such as prevention of harm to others.²⁶ Such factors, among others, are enshrined in the provisions regulating

²³ *Prosecutor v Jovica Stanišić*, Case No. IT-03-69-T, Decision on Provisional Release (ICTY Trial Chamber) 26 May 2008 at para. 8, citing Hearing of 20 May 2008.

²⁴ *Prosecutor v Pavle Strugar*, Case No. IT-01-42-A, Decision on "Defence Motion: Request for Providing Medical Aid in the Republic of Montenegro in Detention Conditions", (ICTY Appeals Chamber), 8 December 2005.

²⁵ *Ibid.*

²⁶ *Witold Litwa v Poland*, no. 26629/95 (Sect. 2), ECHR 2000-III at para. 60; *Hutchinson Reid v United Kingdom*, no. 50272/99, [2003] ECHR 94 (20 February 2003) at para. 51.

provisional release, which, in the Co-Prosecutors' submission, the Trial Chamber failed to properly consider.²⁷

- (ii) *As an error of fact occasioning a miscarriage of justice and an discernible error in the exercise of discretion*
19. In reference to paragraphs 15 and 16 of the Appeal, where expert evidence has established even a possibility of improvement in the medical condition of the Accused through additional mental stimulation, occupational therapy or a course of medication, as in this case, a Trial Chamber's discretion to assess the evidentiary value of expert testimony²⁸ cannot properly extend to disregarding the reliable testimony of its own expert witnesses on a medical assessment core to that expert's professional competence.
20. In this instance, an expert has recommended, with no disagreement from others, that a three-month trial of *donepezil* should be attempted to determine if it will improve the condition of the Accused, and that any improvement may be achieved over a horizon of one, two or more years.²⁹ The Trial Chamber erred both in fact and in the exercise of its discretion in disregarding this expert assessment.
21. The Chamber appears to have concluded that a trial of *donepezil* would not be feasible, on the basis that this medication is not available in Cambodia. This finding simply does not follow from Professor Campbell's evidence. The Professor recommended a trial of this medication having visited Cambodia twice and having held extensive discussions with the medical team which has treated the Accused since 2007. In making the recommendation for a trial of *donepezil*, Professor Campbell was aware of the nature of the medical services available in Cambodia, and in particular at the ECCC. To the extent that Dr. Fazel and Dr. Lina expressed any reservations as to the use of *donepezil*, these reservations must be assessed against the fact that they acknowledge in their report that they have limited experience with this medication and that they stated in oral testimony that they would not disagree with Dr. Campbell on such matters.³⁰ Furthermore, it is not clear why, even if *donepezil* is not available in Cambodia, and/or if the experience in its use is limited, this could not be overcome by acquiring the medication from abroad and contracting an expert such as Professor Campbell to oversee its administration. In any event, in circumstances where no actual practical

²⁷ E138/1/1 Appeal, *supra* note 2 at paras. 9-11.

²⁸ See *Prosecutor v Pavle Strugar*, Case No. IT -99-36-T, Decision on prosecution's submission of statement of expert witness Ewan Brown (ICTY Trial Chamber), 3 June 2003 at p. 4; *Prosecutor v Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Defence motion for exclusion of portions of testimony of expert witness Dr. Alison des Forges (ICTR Trial Chamber), 2 September 2005 at para. 19.

²⁹ E1/9.1 Transcript, 30 August 2011 at p. 67.

³⁰ E1/12.1 Transcript, 20 October 2011 at p. 54.

impediments were raised by any of the experts to the trial of the medication in the present circumstances, and where no attempt had been made to administer the treatment, it was unreasonable for the Chamber to conclude that this avenue was not available.

22. The Trial Chamber further erred in failing to take into account the improvements in the Accused's cognitive functioning which would likely flow from the alleviation of other possible causes or aggravating factors. The evidence before the Chamber shows that Accused's *current* detention conditions provide limited intellectual stimulation,³¹ and Dr Fazel testified that "cognitive stimulation is an important part of trying to at least slow down the rate of cognitive decline."³² Clearly, the use of a structured program of intellectual stimulation and rehabilitation is a reasonable measure which should be attempted, in combination with a trial of *donepezil*, both because it may enable the Accused to participate in the proceedings, and because it is in her own best interests. The Cambodian judges of the Trial Chamber were also unanimous in finding that occupational therapy is, in fact, a profession practiced in Cambodia – contrary to what is stated in report of Dr. Fazel and Dr. Lina,³³ and the finding of the international judges.³⁴
23. The Chamber also failed to give sufficient weight to the following factors in its factual assessment of the Accused's prospects for recovery:
- (a) The fact that the Accused's performance may be improved with the use of documents and other aids to refresh her memory, and with rehearsal³⁵ (the evidence clearly indicates that the Accused performs better in repeated examinations).³⁶
 - (b) The fact that the Accused retains the ability to communicate, understand information conveyed to her, and express herself with appropriate answers, including in English and French;³⁷ and
 - (c) The fact that the Accused retains an ability to discuss matters she has read in newspapers, and understand their importance.³⁸

³¹ E1/12.1 Transcript, 20 October 2011 at pp. 52-53.

³² *Ibid.* at p. 53

³³ E138 Impugned Decision, *supra* note 1 at para. 65.

³⁴ E138 Impugned Decision, *ibid.* at para. 72..

³⁵ *Ibid.* at p. 46.

³⁶ *Ibid.* at pp. 42-44.

³⁷ *Ibid.* at pp. 46-48.

³⁸ *Ibid.* at pp. 48-49.

(iii) *As a discernible error in the exercise of discretion causing prejudice*

24. In reference to paragraphs 17 and 18 of the Appeal, the Co-Prosecutors submit that the exercise of discretion by the Trial Chamber to impose restrictive conditions on the Accused against whom proceedings have been stayed must, in addition to the considerations in Rule 21(2), rest upon a balancing of the individual right to liberty; the legal interests and safety of victims, witnesses and the community;³⁹ and the duty of the State and the legal interest of the international community in the proper prosecution of those responsible for core international crimes.⁴⁰
25. In particular, by failing to exhaust the possibilities, however remote, for an improvement in the Accused's condition, the Trial Chamber did not give sufficient weight to the countervailing rights and legal interests affected. The fundamental principles of international customary law embody the need to exhaust all possible alternatives when balancing the rights of the Accused with the Cambodian people's "inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led...to the perpetration of those crimes."⁴¹ The Trial Chamber has a fundamental duty to administer justice in cases of mass atrocities like those of the scale cited in the Closing Order.⁴²
26. Having considered the rights and legal interests involved, and in addition to hearing the parties, any period of legal uncertainty for the Accused arising from a stay of proceedings could also have been minimised by requiring medical assessment on a fixed schedule, allowing requests for review of detention conditions at the initiative of both the Accused and the Prosecution, and setting a limited period for the recommended course of medical and remedial treatment (including treatment with *donezepil* and occupational therapy), prior to further *proprio motu* review by the Trial Chamber.

³⁹ C11/53 Decision on Civil Party Participation in Provisional Detention Appeals, 20 March 2008 at para. 31; see also Article 33 new ECCC Law; Rule 21(1)(c); Rule 29.


⁴⁰ D427/1/30 Decision on Ieng Sary's Appeal against Closing Order, 11 April 2011 at para. 143.

⁴¹ See Principle 2 of Report of the independent expert to update the Set of principles to combat impunity, UN Commission on Human Rights, Diane Orentlicher, E/CN.4/2005/102/Add.1, 8 February 2005.

⁴² *Supra* note 41 at Principle 19. See also Question of the Punishment of War Criminals and of Persons who have Committed Crimes against Humanity (Question of Punishment), adopted December 15, 1969, G.A. Res. 2583(XXIV), 24 U.N. GAOR Supp. (No. 30) at 58, U.N. Doc. A/RES/2583(XXIV) (1969); Question of Punishment, adopted December 15, 1970, G.A. Res. 2712(XXV), 25 U.N. GAOR Supp. (No. 28) at 78-79, U.N. Doc. A/RES/2712(XXV) (1970); Question of Punishment, adopted December 18, 1971, G.A. Res. 2840(XXVI), 26 U.N. GAOR Supp. (No. 29) at 88, U.N. Doc. A/RES/2840(XXVI) (1971) (noting refusal to cooperate with justice in such circumstances as contrary to norms of international law); Rome Statute of the International Criminal Court (Rome Statute), A/CONF.183/9, July 17, 1998, entered into force July 1, 2002, Preamble; U.N. Human Rights Comm., General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant on Civil and Political Rights, paras. 15 & 18, U.N. Doc. CCPR/C/21/Rev.1/Add. 13 (May 26, 2004) (noting the need for a violation of a right to be coupled with an appropriate remedy, and including as a remedy "bringing to justice the perpetrators of human rights violations").

27. Accordingly, as requested in the Appeal, the Supreme Court Chamber should annul the unconditional release of the Accused; order the Accused undergo medical and other remedial treatment and review the condition of the Accused within six months.

Respectfully submitted,

Date	Name	Place	Signature
22 November 2011	CHEA Leang Co-Prosecutor	Phnom Penh	
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