

Separate Dissenting Opinion of Judge Nihal JAYASINGHE

1. I have carefully considered the views of my learned colleagues on the Supreme Court Chamber. While I agree that the Immediate Appeal is admissible under Internal Rule 104(4)(a), in addition to Internal Rule 104(4)(b) read together with Internal Rule 82(6), I respectfully dissent from the Majority's Opinion that the Accused should remain detained.
2. On 17 November 2011, the Trial Chamber found the Accused, IENG Thirith, unfit to stand trial, severed the charges against her from the indictment in Case 002, stayed the proceedings against her, and released her without condition from the ECCC Detention Facility. The Co-Prosecutors have asked the Supreme Court to only set aside the last of these holdings of the Trial Chamber.
3. It is my view that prior to the Impugned Decision, the *status quo* was that the Accused was detained pursuant to Internal Rule 63(3)(b)(iii).¹ In the Impugned Decision, however, the Trial Chamber unanimously replaced the *status quo* with unconditional release when it concluded that it "no longer has a basis to detain the Accused."² The Trial Chamber was unable to reach a supermajority decision as to whether it may order the Accused to be compulsorily detained and treated in a hospital setting, or whether she shall instead be released without condition. The Trial Chamber found that in the absence of a supermajority on such issue, the Accused shall be released from the ECCC Detention Facility in accordance with the disposition. Absent four affirmative votes to impose conditions on the Accused's release, the default solution is the *status quo*, which by that time had been replaced with unconditional release.³

¹ Case No. 002/19-09-2007/ECCC/TC, Decision on the Urgent Applications for Immediate Release of NUON Chea, KHIEU Samphan, and IENG Thirith, T. Ch., Doc. E50, 16 February 2011, para. 41.

² Impugned Decision, para. 61.

³ Response, para. 43.

4. In the disposition of the Impugned Decision, the Trial Chamber “DIRECTS the Accused to inform the Trial Chamber prior to any change of address.”⁴ This direction does not mean that, technically, the Trial Chamber ordered the conditional release of the Accused. This “direction” from the Trial Chamber was for administrative purposes only and cannot seriously be construed as a meaningful restriction on the liberty of the Accused. The whereabouts of an accused person who is unconditionally released must be known should the court need to contact him/her. The Trial Chamber proceeded to “inform” the Co-Prosecutors that they “may, upon their own motion, periodically request reassessment of the Accused IENG Thirith by any of the Experts appointed by the Chamber to assess her and may request the recommencement of proceedings.”⁵ Even without such “information” from the Trial Chamber, the Co-Prosecutors have such rights. Such “information” therefore does not affect the unconditional nature of the Accused’s release as ordered by the Trial Chamber. Regarding the Trial Chamber’s additional “information” to the Co-Prosecutors that they “shall establish a mechanism to monitor the ongoing health status of the Accused,” I differ from my colleagues in that I understand such information to be a lawful delegation of the Trial Chamber’s authority to the Co-Prosecutors. Such delegation does not mean that the Trial Chamber abdicated its duty. The Defence correctly notes that the Co-Prosecutors “could establish a ‘mechanism to monitor the ongoing health status of the accused’ *if permitted to do so on an application to the Trial Chamber.*”⁶ It is my opinion that the Trial Chamber required the Co-Prosecutors to reestablish some *modus* to give effect to the direction of the court. If the Accused does not comply with the Co-Prosecutors attempt to “monitor” her health, then the Co-Prosecutors may make an appropriate application to the Trial Chamber. In summary, then, the Accused was released by the Trial Chamber without any restrictions on her liberty, that is, without condition.

⁴ Impugned Decision, p. 30.

⁵ Impugned Decision, p. 30.

⁶ Response, para. 18 (emphasis added).

5. The Trial Chamber was divided over the consequences that follow from the finding that the Accused is unfit to stand trial. The Majority and Minority Opinions agreed that the Accused is unfit to stand trial. The Majority Opinion agreed that “the present state of IENG Thirith is of such a nature that the purpose a criminal trial becomes meaningless,” and the Trial Chamber had therefore unanimously concluded “that IENG Thirith lacks the capacity to understand the proceedings against her and that she could not participate meaningfully in her own defence.”⁷ The Majority concurred that a continuation of the proceedings against the Accused, at the present time, would not serve the interest of justice. However, the Majority went on to state that it was unable to find an agreement with the Minority as to the consequences of that conclusion. In relying on medical opinion, the Majority were of the view that IENG Thirith’s condition could be improved if she received treatment recommended by the medical experts. In addition, the Majority observed that the medical opinion indicates that “continued treatment of co-existing medical conditions would improve her prognosis.”⁸ Therefore the Majority felt that there was a possibility that IENG Thirith’s condition would improve. They went on to state that it is unlikely that the treatment will be effective in the ECCC Detention Facility, and that she must be provisionally released in order to receive such treatment in a hospital.⁹
6. The Minority Opinion also took the view that all the Experts agreed that the only remaining remedial measures would be to begin a course of occupational therapy and to provide her with a more stimulating environment than the current detention facility allowed.¹⁰ The Minority noted that in the opinion of all the Experts a more stimulating environment might be achieved if she were released to her home; however there was no suggestion that at any stage she would recover. The Minority Opinion therefore detracted from the Majority insofar as they did not agree that “there is any factual basis to suggest that the Accused may in the future recover sufficiently

⁷ Impugned Decision, para. 63.

⁸ Impugned Decision, para. 65.

⁹ Impugned Decision, paras. 66-67.

¹⁰ Impugned Decision, para. 72.

to be found fit to stand trial.”¹¹ The Minority Opinion also did not agree with the Majority’s view that the Accused should be released from the ECCC Detention Facility and admitted into a hospital.

7. The question to be determined on an analysis of the foregoing is whether the Accused, in light of the expert medical opinion, should be released unconditionally or should be confined to a hospital. In my opinion, the answer to that question depends on whether or not there is a reasonable prospect that the Accused will become fit to stand trial in the foreseeable future. For that answer, we must turn to the expert medical evidence adduced before the Trial Chamber. Of course, a court of law need and should not slavishly follow whatever opinion a medical expert gives. At the same time, however, a court must be realistic and should be careful not to arrive at a solution that is at odds with the medical evidence.
8. The factual disagreement between the Majority and Minority opinions in the Impugned Decision was whether “there is any factual basis to suggest that the Accused may in future recover sufficiently to be found fit to stand trial.”¹² The Majority Opinion answered in the affirmative¹³ and the Minority Opinion answered in the negative.¹⁴ While an appellate court must pay due respect to factual findings made by the lower court, the division between the judges of the Trial Chamber on this central factual issue means that the Supreme Court Chamber cannot avoid addressing the matter.
9. All experts agreed that the Accused “suffers from Alzheimer's disease, a degenerative condition that results in dementia.”¹⁵ I am of the view that the Minority Opinion is correct that there is no factual basis to suggest that the Accused may in future recover sufficiently to be found fit to stand trial. Notwithstanding the potentially “significant benefit”¹⁶ that a trial of Donepezil may provide to the Accused, and that “sometimes

¹¹ Impugned Decision, para. 72.

¹² Impugned Decision, para. 72.

¹³ Impugned Decision, paras. 64-65.

¹⁴ Impugned Decision, para. 72.

¹⁵ Impugned Decision, para. 70.

¹⁶ T. (EN), 30 August 2011, p. 65.

people can be maintained for a longer period on the medication; a year or two or more,”¹⁷ all five medical experts agreed that a trial of Donepezil cannot and will not prevent the Accused from continuing to deteriorate cognitively.¹⁸

10. It must be understood at this stage that when the unanimous opinion of the Trial Chamber takes the view that a criminal trial becomes meaningless because the Accused is unable to stand trial, and the continuation of proceedings against the Accused would not serve the interest of justice, the continued detention in a hospital becomes inexplicable or incompatible with the reasoning. The medical opinion is that her condition is permanent and will continue to degenerate with the passage of time, with only a remote chance of marginal and temporary improvement. Taking the medical opinion in its totality, the only conclusion that is available is that the Accused is unable and will likely remain unable to stand trial. It would be an erosion of her rights to detain her in a hospital or any other facility on the hypothesis that her condition is likely to improve. I am therefore of the opinion that any form of detention would be contrary to the evidence, to common sense, and to the fair trial rights of the Accused. The Accused should be released without conditions.

11. Finally, it is my considered view that when the Trial Chamber ordered the severance of charges against the Accused from the indictment, it brought to a close all proceedings against the Accused. However, it is not to say that no further proceedings could be initiated against her. It is open to the Co-Prosecutors’ to apply to the Trial Chamber, or for the Trial Chamber on its own initiative, to reopen the proceedings on a later date depending on her fitness. If reopened, these proceedings are ‘proceedings *de novo*’ and do not assail the integrity of the Trial Chamber.

¹⁷ T. (EN), 30 August 2011, p. 67.

¹⁸ T. (EN), 29 August 2011, p. 140; T. (EN), 30 August 2011, pp. 65-66; T. (EN), 30 August 2011, p. 66; T. (EN), 19 October 2011, pp. 128-29.

12. In conclusion, I hold that the Co-Prosecutors' Immediate Appeal against the Trial Chamber's decision to unconditionally release the Accused is not maintainable and must be dismissed.

Phnom Penh, 13 December 2011
Judge of the Supreme Court Chamber



Nihal JAYASINGHE