

KRT TRIAL MONITOR

Case 002 ■ Special Report: Ieng Thirith's Fitness to Stand Trial ■ December 2012



Case of Ieng Thirith, Nuon Chea, Khieu Samphan and Ieng Sary

Asian International Justice Initiative (AIJI), a project of East-West Center and UC Berkeley War Crimes Studies Center

It is a complete a fantasy for this Court or, indeed, anyone to imagine for one minute that there is going to be any improvement in the mental health of the respondent such that will allow her to stand trial.

-- Diana Ellis, International Defense Counsel for Ieng Thirith

I. OVERVIEW

AIJI is publishing this report as a separate addendum to the regular weekly monitoring report in order to discuss the 13 November 2012 appeal hearing before the Supreme Court Chamber (SCC) on Accused Ieng Thirith's unconditional release from detention.¹ This report describes and analyzes the Chamber's decision, released on 14 December 2012, to agree to most parts of the Appeal.² In addition, this report's attention to the SCC's 13 November hearing and subsequent decision builds on the detailed summary and analysis found in the AIJI "Special Report on Ieng Thirith's Fitness to Stand Trial," which was published in November.³

Ieng Thirith, alias "Phea," was indicted on 10 September 2010 for crimes against humanity, genocide, and grave breaches of the Geneva Conventions of 1949. On 21 February 2011, however, Ieng Thirith's Defense Team filed for assessment of her fitness to stand trial.⁴ On 17 November 2011, after multiple hearings and expert evaluations, the Trial Chamber found Ieng Thirith unfit to stand trial on the basis of a mental condition.⁵ The Chamber severed her case

¹ The Supreme Court Chamber is made up of the following: Mr. KONG Srim, President (national); Mr. SOM Sereyvuth (national); Mr. MONG Monichariya (national); Mr. YA Narin (national); Ms. Florence Ndepele Mwachande MUMBA (Zambia); Ms. Agnieszka KLONOWIECKA-MILART (Poland); Mr. Chandra Nihal JAYASINGHE (Sri Lanka).

² Supreme Court Chamber. "Decision on Immediate Appeal Against the Trial Chamber's Order to Unconditionally Release the Accused IENG Thirith" (14 December 2012). E138/1/10/1/5/7 [hereinafter, **SUPREME COURT CHAMBER DECISION**].

³ CASE 002 KRT TRIAL MONITOR. "Special Report: Ieng Thirith's Fitness to Stand Trial" (November 2012). Available at <http://krtrialmonitor.files.wordpress.com/2012/11/special-report-it-ftst-final2.pdf>.

⁴ Defense for Ieng Thirith. "Defense Request for Appointment of a Neuropsychiatrist to Assess Madame IENG Thirith's Fitness to Stand Trial" (21 February 2011). E52. Par. 36.

⁵ Trial Chamber. "Decision on IENG Thirith's Fitness to Stand Trial" (17 November 2011). E138 [hereinafter, **TRIAL CHAMBER DECISION**]. pp. 29-30.

from the others in Case 002 to avoid delay of the other Defendants' trial, and ordered her immediate and unconditional release. The Office of the Co-Prosecutors (**OCP**) filed an immediate appeal,⁶ which the Supreme Court Chamber granted on 13 December 2011.⁷ The SCC ordered the Accused held, treated for her medical issues, and reassessed in six months as to whether she is fit to stand trial. This reassessment and the related hearings occurred between 27 to 31 August 2012.

On 13 September 2012, the Trial Chamber issued a final decision in favor of an indefinite stay of proceedings, calling for the Accused to be released immediately.⁸ The OCP appealed this decision on 14 September 2012, arguing that the Court should retain more supervision of the indicted defendant, even after her release.⁹ On 28 September 2012, the Prosecutors provided supplementary submissions to strengthen their appeal.¹⁰ On 16 September 2012, while still awaiting further submissions from the Parties, the Supreme Court Chamber decided not to stay Ieng Thirith's release, but the Court did place provisional conditions on her release.¹¹ The counsels for Ieng Thirith subsequently filed their application in response to the OCP appeal, along with supplementary submissions, asking for the immediate release of Ieng Thirith and without the provisional conditions temporarily attached by order of the SCC.¹²

II. PURPOSE OF THE 13 NOVEMBER 2012 SUPREME COURT CHAMBER HEARING

On 13 November, the Supreme Court Chamber heard arguments from the relevant Parties regarding the OCP's 14 September appeal and subsequent submissions against the Trial Chamber's decision to release Accused Ieng Thirith. The Parties agreed the Accused was unfit to stand trial, but disagreed about whether or not conditions should be imposed on Ieng Thirith's release, and, if so, how they should be implemented and enforced. In its 13 September decision, the Trial Chamber stated: "As the Trial Chamber's jurisdiction over the Accused is suspended, the Trial Chamber would also appear to lack a clear legal basis to impose coercive conditions or other forms of judicial supervision over the Accused upon release."¹³ The Prosecution asked the SCC to reject the Trial Chamber's finding, while the Ieng Thirith Defense argued in favor of the original ruling. After hearing submissions from each Party, the Judges had time to question the Accused and her daughter, Ieng Vichida, who serves as Ieng Thirith's legal guardian.¹⁴

⁶ Office of the Co-Prosecutors. "Immediate Appeal against Trial Chamber Decision to order the release of accused Ieng Thirith" (18 November 2011). E138/1/1.

⁷ Supreme Court Chamber. "Decision on Immediate Appeal against the Trial Chamber's Order to Release the Accused IENG Thirith" (13 December 2011). E138/1/7.

⁸ Trial Chamber. "Decision on Reassessment of Accused IENG Thirith's Fitness to Stand Trial Following Supreme Court Chamber Decision of 13 December 2011" (13 September 2012). E138/1/10 [hereinafter, **TRIAL CHAMBER DECISION ON REASSESSMENT**].

⁹ Office of the Co-Prosecutors. "Immediate Appeal against Decision on Reassessment of Accused IENG Thirith's Fitness to Stand Trial Following Supreme Court Chamber Decision of 13 December 2011" (14 September 2012). E138/1/10/1/1.

¹⁰ Office of the Co-Prosecutors. "Immediate Appeal against Decision on Reassessment of Accused IENG Thirith's Fitness to Stand Trial Following Supreme Court Chamber Decision of 13 December 2011 – Co-prosecutors' Supplementary Submissions" (28 September 2012). E138/1/10/1/5.

¹¹ Supreme Court Chamber. "Decision on Co-Prosecutors' Request for Stay of Release Order of IENG Thirith" (16 September 2012). E138/1/10/1/2/1.

¹² Defense for Ieng Thirith. "Defense Response to Co-Prosecutors Immediate Appeal against Decision on Reassessment of Accused IENG Thirith's Fitness to Stand Trial Following Supreme Court Chamber Decision of 13 December 2011 and Co-Prosecutors' Supplementary Submissions" (8 October 2012). E138/1/10/1/5/3.

¹³ **TRIAL CHAMBER DECISION ON REASSESSMENT**. Par. 33.

¹⁴ PHOU Povsun, Judge of the Phnom Penh Municipal Court, followed the **TRIAL CHAMBER DECISION ON REASSESSMENT** with an order to appoint IENG Vichida as general guardian of her mother, IENG Thirith, during her

III. ARGUMENTS PRESENTED BY THE PROSECUTION

National Assistant Co-Prosecutor, Ms. Song Chorvoin, presented the submissions of the OCP on appeal. She sought to explain that the Trial Chamber erred by releasing the Accused without conditions of judicial supervision, and she requested that the SCC impose six conditions, specifically that the Accused should:

1. Reside at a specified home address provided by her co-lawyers;
2. Make herself available for a weekly safety check by authorities or officials designated by the Trial Chamber;
3. Surrender her passport and identification card;
4. Refrain from directly or indirectly contacting the other co-accused, excluding her husband, Ieng Sary, and any witness, expert, or victim who will be heard by the Trial Chamber;
5. Not interfere with the administration of justice; and,
6. Undergo semi-annual medical examinations by practitioners appointed by the Trial Chamber.

In order to support the imposition of such conditions, the Prosecutor made submissions on the Trial Chamber's 13 September 2012 decision, which rejected the conditions as unenforceable and impractical, due to the Chamber's lack of legal basis to require them.

The Prosecutor went on to analyze the medical status of Ieng Thirith. The Trial Chamber found that the Accused suffered from some form of dementia. As such, she would be unable to testify at trial, instruct her counsel, or participate effectively in her own defense. Chorvoin Song explained: "The Co-Prosecutors and the Defense do not take issue with these findings, what emerges... however, is that Ieng Thirith has not lost all cognitive abilities... this is relevant to the issue of enforceability and practical application of the proposed restrictive measures." According to the Prosecutor, the Trial Chamber left open the unlikely possibility of "a change in circumstances in relation to Ieng Thirith." Therefore, the Prosecution argued, the prospect of the trial's resumption in the future cannot be wholly excluded.¹⁵

The Prosecutor submitted that, under applicable international jurisprudence, the Trial Chamber "erred by declining to undertake this balancing exercise [of rights and interests at stake] and finding instead that it had no legal basis to impose restrictive measures." Arguing for the OCP, Chorvoin Song addressed the three cases that the Trial Chamber had relied upon in its Decision: the *Talić* case from the International Criminal Tribunal for the Former Yugoslavia (ICTY), the *Djukić* case (ICTY), and the *Nahak* case from the Special Panels for Serious Crimes in East Timor (SPSC). In all three of these cases, the Court stayed proceedings against an accused person, but placed conditions upon the release of the accused. The ECCC Trial Chamber distinguished the facts of these cases from the circumstances of Ieng Thirith's case, and therefore placed no such conditions upon her release, but the Prosecution sought to convince the SCC otherwise, by highlighting similarities. The Prosecutor explained that both Talić and Djukić had been terminally ill, and even though resumption of trial was "extremely remote, the ICTY did not release them unconditionally, but imposed a set of restrictions on the accused." Chorvoin Song sought to rebut the TC conclusion that the ICTY believed the *Talić*

release from detention. The order is found in "Decision by Judge of the Phnom Penh Municipal Court" (14 September 2012). E138/1/10/1/2/3.1.

¹⁵ In making this argument, the national Prosecutor specifically referenced TRIAL CHAMBER DECISION ON REASSESSMENT. Pars. 24, 28, and 39.

case was “ongoing” after it had been severed from that of his co-accused. In fact, the Prosecutor argued, the SCC actually has greater impetus to provide conditions for leng Thirith’s release, because the Accused in this case has a “higher” prospect of returning to trial than Talić did, and the crimes with which she is charged “far exceed” in gravity Talić’s alleged crimes.

The Prosecution questioned the accuracy of the TC’s characterization of Djukić’s release as “practically unconditional.”¹⁶ Chorvoin Song argued that Djukić’s release had in fact been “subject to conditions, which the Chamber, in that case, described as ‘stringent’.” With reference to the *Nahak* case at the SPSC, the Prosecutor challenged the Trial Chamber’s conclusion that there was no legal justification for an order for restrictive conditions. Citing several specific paragraphs in the *Nahak* Decision, Chorvoin Song argued that the measures proposed by the OCP for leng Thirith’s release are similar to those ordered by the judge in *Nahak*.¹⁷

Chorvoin Song insisted that restrictions were “appropriate,” as long as measures restricting the individual’s rights and liberties “turn on the facts of each case” and are “proportionate to the aim sought.” Chorvoin Song submitted that the six measures proposed by the OCP would interfere minimally with leng Thirith’s liberty.¹⁸ The Prosecutor further challenged the Trial Chamber conclusion that the restrictive measures proposed would be difficult to enforce: “Whether the Accused could ultimately be penalized for a breach of a court order is not determinative of whether the order should be imposed in the first place.” The Prosecutor suggested that the appointment of leng Vichida as her mother’s guardian would better enable the Accused to fulfill her obligations to any imposed conditions, and thereby strengthen the enforceability of such measures.

As Chorvoin Song closed, she explained that the OCP has attempted to balance protection of the proceedings and the interests of victims against any restrictions on leng Thirith’s right to liberty. With even the slightest chance of the trial’s resumption under a reversible stay in the proceedings, the Prosecutor argued, “the Court has jurisdiction to issue such orders as may be necessary to safeguard the integrity of its proceedings.” The Prosecutor, asserting that the Court has jurisdiction and ought to issue these conditions, said: “In a case of this magnitude... there is a compelling public interest in maintaining judicial control over the Accused, until it becomes absolutely clear that no trial against her will ever take place.”

IV. ARGUMENTS PRESENTED BY THE DEFENSE

National counsel for leng Thirith, Mr. Phat Pouv Seang, began by requesting the Supreme Court Chamber to reject the OCP’s immediate appeal, and uphold the Trial Chamber’s “impugned” decision. He further requested the removal of the “coercive conditions, which were attached to the Respondent’s release while she awaited the hearing of the appeal.” The counsel argued that imposition of judicial supervision and coercive conditions have no legal justification given the indefinite nature of the stay in proceedings. Instead, they impose restrictions on the right to liberty of an individual who is “permanently” unfit to stand trial.¹⁹ He repeatedly stressed leng

¹⁶ TRIAL CHAMBER DECISION ON REASSESSMENT. Par. 36.

¹⁷ The Trial Chamber’s view of the *Nahak* case is put forward in TRIAL CHAMBER DECISION ON REASSESSMENT. Par. 36. Chorvoin Song then referred to Paragraphs 157 to 164 of the *Nahak* case in her rebuttal of this view.

¹⁸ Chorvoin Song criticized the Trial Chamber’s issuance of requests to the Accused, “which have no legal force,” as an inappropriate course of action. Some of these requests are found in TRIAL CHAMBER DECISION ON REASSESSMENT. Par. 38.

¹⁹ Phat Pouv Seang stated: “the ECCC Chambers should act in accordance with the well-recognized principles designed to ensure that the respondent is not subject to arbitrary deprivation or limitation of her right to liberty without

Thirith's degenerative dementia in a concise rebuttal of the Prosecutors' justification for appeal: the Accused "is not fit to stand trial and will never become fit to stand trial," Counsel argued.

The Defense submitted that the requirements of Internal Rule 63 favor the presumption of innocence, thus the Trial Chamber, in its decision, "rightly held that, if there is no legal basis for continued detention of the respondent...there is no legal basis for the imposition of coercive conditions or any form of judicial supervision upon the Respondent's release."²⁰ Phat Pouy Seang referenced Internal Rule 65, subparagraph 1, which deals with release on bail, stating that the imposition of any conditions on release "presupposes that there will be a trial and the existence of a real risk that the Accused is going to fail to attend the trial and/or that others need protection."²¹ Counsel argued that neither risk is plausible in the instant case; moreover, judicial supervision for an indefinite period, in a case without prospect for trial, "is contrary to the Respondent's right to be tried within reasonable time."

Ms. Diana Ellis, international counsel for Ieng Thirith, continued the submission of the Defense by specifically addressing each of the proposed restrictive conditions, and considering their justification, implementation, and prospects for enforcement. Counsel noted that the conditions requested by the OCP are the kind "that are imposed in order to check and control the movements of an individual and to ensure there is no interference with the administration of justice." However, as Ms. Ellis went on to argue, "It is a complete fantasy for this Court or, indeed, anyone to imagine for one minute that there is going to be any improvement in the mental health of the Respondent such that will allow her to stand trial." Although these conditions are justified for Preventive Detention under Internal Rule 63.3 or for Bail under Internal Rule 65, they are arguably irrelevant to this case, because Ieng Thirith has been released from custody indefinitely, and there will most likely be no further trial. "This is not a balancing exercise," the counsel submitted, "This is a situation in which an accused, the Respondent, is no longer able to participate in trial proceedings, through no fault of her own." Ellis argued that any breach of judicial conditions on her release would have to be proven to be intentional, and consequently sanctioned. In light of the diminished mental capacity of the Accused, the counsel considered this both implausible and "repugnant."

Notwithstanding the grave nature of the alleged crimes, Ieng Thirith has the right to be presumed innocent, and the corresponding right to liberty, Ellis argued. "No Court should be in a position where it puts in place coercive measures which, it is clear on all the evidence, cannot be complied with. It makes a mockery of the whole system." The Defense rejected the Prosecution's view that the guardianship order would strengthen the enforceability of any judicial conditions. The counsel emphasized that the guardian's role should be "a protective function," not a coercive position to ensure the Accused responds more efficiently to court orders.

good and proper course justified by the applicable law. The relevant provisions in the case at hand are Internal Rules 63, 65, and 82, Articles 223 and 230 of the Cambodian Code of Criminal Procedure."

²⁰ Internal Rule 63.1 concerns Provisional Detention of a Charged Person and his or her rights, which include assistance of a lawyer and time to prepare defense. Rule 63.3 explains that Provisional Detention of a Charged Person may be ordered only in cases where it is necessary to prevent pressure on witnesses or victims; prevent collusion with accomplices; preserve evidence; ensure presence of the Charged Person during the proceedings; protect the security of the Charged Person; or, preserve public order.

²¹ Phat Pouy Seang derived this view from Internal Rule 65.1, which states, in full: "On their own motion, or at the request of the Co-Prosecutors, the Co-Investigating Judges may order that a Charged Person remain at liberty or be released from detention. They may order release from detention on bail. The order by the Co-Investigating Judges shall specify whether a bail bond is payable, and impose such conditions as are necessary to ensure the presence of the person during the proceedings and the protection of others. Any such order is subject to appeal."

Ellis concluded by challenging the Prosecution's reading of the aforementioned international jurisprudence. The Defense sought to distinguish these cases by arguing that the two ICTY cases involved terminal illness, which assuredly would cause death but also leave open the possibility of remission and further time for a resumption of trial. Additionally, Talić and Djukić did not suffer a loss of mental capacity to the point where a trial could not take place had they recovered. The third case, from the SPSC, related to a treatable psychotic illness, which differs greatly from dementia (an illness of progressive deterioration that further inhibits mental ability as time progresses). Defense counsel framed Ieng Thirith's situation as unique among international cases, and thereby argued that the SCC found itself "essentially making law in this area." She pled for the Court to be "true to the rights of an accused," arguing that "there is something entirely unacceptable and, indeed, repugnant in a civilized society, to impose coercive and restrictive conditions on an individual who has no capacity." The Defense asked the Court to reject the OCP appeal, and uphold the Trial Chamber decision calling for Ieng Thirith's unconditional release.

V. QUESTIONS ASKED OF IENG THIRITH AND HER DAUGHTER

Following the conclusion of the Parties' submissions on the appeal, the Judges of the Supreme Court Chamber asked Ieng Thirith a number of questions about her current health and the possible consequences of any conditions imposed upon her release. When asked by the President about her current state, Ieng Thirith stated, "I am fine. I am very well... I have been better because the host receives me well and I am well-assisted because they know the kind of medicine I should take. They help me recover and I feel better now." When Judge Mumba asked her about friends abroad, she stated: "It is just normal I have some friends abroad... They protect me, they think of me, and they are also respected by their neighbors because they never treated me as someone who has committed any wrongdoings." In response to questioning by Judge Klonowiecka-Milart, Ieng Thirith appeared not to understand the question fully, but she did not seem to find regular medical or security checks bothersome. She also stated at one point, "I don't want to be left alone."

Ieng Thirith's general guardian and daughter, Ieng Vichida then answered questions posed by the Judges of the SCC. She explained to the President that she and her mother live in the same house, she visits with her mother regularly, assisting with meals and medical treatment. In response to questions from Judge Klonowiecka-Milart, Ieng Vichida reassured the Court that she would be ready to assist her mother to respond to Court summons, if issued. She doubted that there would be any need for the Accused to go abroad, due to her limited mobility at her age. When asked about the friends abroad that her mother mentioned in Court, Ieng Vichida informed the Court that she was unsure what her mother meant by that: "I think it was a mere speech by her." Following persistent questioning, it became clear that Ieng Vichida does not expect any change of address, nor any need for Ieng Thirith's identification card or passport. Ieng Vichida could not foresee issues with regular medical or security checks, and she explained that Ieng Thirith does not communicate well already, so the matter of her talking to a co-Accused is not an issue.

When given the chance to make final comments, Ieng Thirith took the floor only to ask, "Who is the Accused, really?" and then, "I'm not fully informed of this," to which the President responded, "The Chamber takes that you do not get the point." Ieng Vichida closed the day's hearing by reminding the Court of the extent of her mother's dementia, which, she said, renders Ieng Thirith unable to remember anything, recognize her own children, or maintain a healthy state of physical fitness.

The President informed the Parties that the ruling on the appeal would be made “in due course, in writing,” as he adjourned the proceedings.

VI. TRIAL MANAGEMENT

There were few, if any, noticeable trial management issues that took place during the day’s hearing in the Supreme Court Chamber. There were no noticeable language or translation issues, and courtroom interactions between Parties and with the Chamber were respectful and calm.

At the start of proceedings, there appeared to be confusion about the order of the submissions. Ellis asked that her client be questioned first before the Parties’ submissions, due to her frail health and fatigue. However, the President instead ordered that she be taken to the holding cell²² until called for questioning, so that she might rest. When the Court called her back in the late morning for questioning, Ellis felt it necessary to remind the Chamber that her client might arrive tired and unable to respond fully to questions. Although it took some time for Ieng Thirith to appear in the courtroom, she was able to answer questions without any sign of fatigue.

The Court’s time allocations to the Parties were well balanced and efficiently managed. The President never had to remind a Party of any time constraint, and arguments presented by the Parties never ran too long. With the exception of a brief deliberation by the Judges outside the courtroom, the proceedings continued without interruption from 9:47am to 12:52pm. Although this departed from the Trial Chamber’s typical schedule (which includes morning, lunch, and afternoon adjournments), the Supreme Court Chamber was able to complete all of its tasks by midday. The unusual schedule caused some concern in the public gallery, where there was uncertainty about when to escort the Cambodian villagers attending the hearing out to eat lunch. As it happened, they were quickly escorted out of the gallery during the brief deliberation that took place from 12:05 to 12:18. So informal was this break for deliberations that, upon returning to the bench and seeing a now emptied public gallery, the President remarked to his neighboring colleague, in Khmer, “Oh, they’ve all disappeared!” The full hearing on the appeal concerning conditions for Ieng Thirith’s release concluded after three hours and five minutes.

VII. SUPREME COURT CHAMBER DECISION OF 14 DECEMBER 2012

On 14 December, the Supreme Court Chamber announced its decision concerning the OCP’s “Immediate Appeal against Decision on Reassessment of Accused IENG Thirith’s Fitness to Stand Trial Following Supreme Court Chamber Decision of 13 December 2011.” Overturning the TC Decision, the SCC decided to subject Ieng Thirith’s release to judicial supervision, and elected to impose a number of conditions, although not all of those requested by the Prosecutors. In its Decision, the Supreme Court noted the admissibility of the OCP appeal, and addressed each of the arguments advanced by the Prosecution and the Defense in various submissions.

In its Decision, the SCC first dismissed the Trial Chamber’s finding that there was no “clear legal basis” to order any restrictive measures on the released Accused. The SCC suggested that the

²² Judge Klonowiecka-Milart followed up the President’s order to allow Ieng Thirith to rest in the “holding cell” for part of the proceeding by reassuring the defense counsel that her client “is not under detention. The holding cell is used solely for the purpose of her convenience, and the Accused is not under guard there.” In response, international counsel Diana Ellis thanked the Judge for the facilities, saying, “We see it at the moment as a holding room, and not a cell.”

Trial Chamber's reliance on the *Lubanga* decision of the International Criminal Court failed to properly ground the 13 September 2012 Decision ("Decision on Reassessment of Accused IENG Thirith's Fitness to Stand Trial Following Supreme Court Chamber Decision of 13 December 2011") in Cambodian law.²³ The SCC then noted a contradiction between the Trial Chamber's conclusion on its lack of jurisdiction, and other statements in the TC Decision that acknowledge the remote possibility of a resumption of proceedings.²⁴ The Supreme Court Chamber concluded that the Court's jurisdiction over the Accused does not cease, because of the possibility, however remote, that proceedings could still conceivably resume.²⁵ Reaffirming the Court's legal basis to order restrictive measures on Ieng Thirith, the SCC clarified that any stay in proceedings within the ECCC is inherently impermanent and conditional, for the duration of an obstacle. This must be distinguished, they concluded, from a wholesale termination of proceedings.²⁶

The SCC was not convinced that Ieng Thirith's degenerative condition rendered the stay of proceedings unique and distinguishable from other international cases where a stay has been issued. The Court looked to other civil law systems for persuasive guidance on the matter, included rulings by the French Court of Cassation. The SCC observed that other courts made no distinction between stays granted to those likely to be permanently unfit for trial (such as Ieng Thirith), and stays granted to those with more of a prospect for trial to resume.²⁷ The conclusion the SCC drew from this jurisprudence was that, even where an accused is unlikely to be able to return to trial, it is proper to retain jurisdiction over the accused, rather than terminate the case entirely.

Addressing arguments made about the *Djukić* and *Talić* cases, the SCC concluded that the similarities between these cases "demonstrate that even terminal condition of the accused does not remove the accused from the court's jurisdiction. They also confirm the practice of imposing measures which are similar to the set requested by the Co-Prosecutors."²⁸ The SCC further took note of the fact that, in the *Nahak* case, the SPSC found that a permanently unfit accused person may still remain subject to certain judicially imposed conditions if he were to become fit to stand trial once more. The SCC Decision also took note of practices in certain national legal systems, which allow for a special determination of guilt²⁹ or for termination of proceedings.³⁰ The SCC nonetheless ruled:

²³ SUPREME COURT CHAMBER DECISION. Par. 33. The SCC cites Article 12 of the ECCC Agreement: "The procedure shall be in accordance with Cambodian law. Where Cambodian law does not deal with a particular matter, or where there is uncertainty regarding the interpretation or application of a relevant rule of Cambodian law, or where there is a question regarding the consistency of such a rule with international standards, guidance may also be sought in procedural rules established at the international level."

²⁴ TRIAL CHAMBER DECISION ON REASSESSMENT. Par. 40.

²⁵ The Supreme Court Chamber additionally cited Article 223 of the Cambodian Code of Criminal Procedure to allow a "regime of judicial supervision... during the time where proceedings are on hold."

²⁶ SUPREME COURT CHAMBER DECISION. Par. 38. Whereas the ICC Appeals Chamber's *Lubanga* Decision dichotomizes stays of proceedings between "impermanent and conditional stay *versus* the permanent and irreversible," the distinction related to the Cambodian Code of Criminal Procedure – and thus that of the ECCC – is "suspension of proceedings for the duration of an obstacle *versus* the termination of proceedings in the circumstances determined by law." Such circumstances "are explicitly listed in Article 7 of the Cambodian Criminal Procedure and are limited to the death of the accused, the expiry of a statute of limitations, the grant of an amnesty, the abrogation of the law, and *res judicata*."

²⁷ *Ibid.* Par. 41. In the following paragraphs, the Decision goes on to cite the jurisprudence of the Italian Constitutional Court, the Supreme Court of Canada, the European Court of Human Rights, and the International Military Tribunal at Nuremberg.

²⁸ *Ibid.* Par. 46.

²⁹ *Ibid.* Par. 49.

³⁰ *Ibid.* Pars. 50-51.

It remains exceptional that proceedings against permanently unfit accused are terminated and that courts forfeit jurisdiction over them, especially in cases involving serious crimes... Jurisdiction is justified by the interests of justice to prosecute the accused, against whom it has been established that there is sufficient evidence to initiate prosecution or a trial, as in the current case. Concretely, it allows the courts to take measures that are deemed necessary and appropriate in the circumstances to make possible the resumption of proceedings, if the opportunity arises... The question boils down to what measures, if any, are necessary and proportionate when the accused faces little prospect of ever being tried.

The SCC determined that the Trial Chamber erred in concluding that the ECCC had no jurisdiction over Ieng Thirith during the indefinite stay of proceedings against her. In doing so, the Supreme Court Chamber referred not only to international jurisprudence, but also to the Court's Internal Rules (63, 65, and 82) and Chapter Three of the Cambodian Code of Criminal Procedure.³¹ This portion of the SCC's Decision closed with the finding that the indefinite nature of the stay in proceedings does not undermine the Court's jurisdiction or legal basis to place conditions on an accused's release, but it does necessitate inquiry into the "necessity and proportionality" of any measures placed.³²

According to the SCC's reasoning, any condition imposed on the Accused during the stay of proceedings must be necessary, proportional, and "the least intrusive instrument." The Court found that any measure that places judicial supervision on the Accused's release from detention, no matter how small, still restricts "fundamental rights of the accused including, *inter alia*, the right to freedom of movement and privacy." Accordingly, the Court may only impose conditions that achieve their function while minimizing restrictions on Ieng Thirith's rights.³³ The Court sought to take a pragmatic approach to determining which measures should apply to Ieng Thirith's condition. The Supreme Court clarified that its pressing needs are to monitor whether the Accused remains unfit to stand trial, to ensure she stays within the Court's jurisdiction, and to ensure that she does not interfere with the continuity of the other trial in Case 002. Additionally, the SCC addressed concerns from the Defense that Ieng Thirith's condition rendered her incapable of actually complying with the Court's conditions of release.³⁴

The SCC ruled in favor of the OCP request for regular medical examinations of the Accused every six months, concluding that these would serve "the purpose of removing the obstacle in the proceedings," without improperly restricting her right to privacy.³⁵ Therefore, the Supreme Court Chamber ordered that Ieng Thirith must undergo such evaluations, but it made clear that the regular reports sent to the Trial Chamber would not require any subsequent reevaluation of her fitness. Such a determination was left to the Trial Chamber as it receives the reports in the future.

³¹ Ibid. Par. 54.

³² Ibid. Par. 57.

³³ Ibid. Par. 58.

³⁴ Ibid. Pars. 61-65. The Chamber stated that it considers the appointment of the Accused's daughter, Ieng Vichida, as her guardian to be "a positive step" to assist the Accused in abiding by measures of judicial supervision and in her general care.

³⁵ Ibid. Pars. 67-68. As justification for the use of medical evaluations, the SCC notes its specific mention in Article 223 of the Cambodian Code of Criminal Procedure, as well as by other courts. At the international level, the Decision cited the *Talić* Decision, as well as others from the ICTY.

The SCC also ruled on the OCP's requests that leng Thirith surrender her passport and identification card, report her current address and any subsequent changes to that address, and submit to regular police checks.³⁶ In order to facilitate official Court contact with the Accused in the future, the SCC ordered her, through her guardian, to provide her address and inform the Court of any change of address. She was not prohibited from changing residence, so long as she agreed to remain within Cambodian national borders, unless otherwise granted express permission from the Court. As the Chamber noted, Cambodian authorities remain obliged to ensure the personal safety of the Accused. The SCC ordered monthly checks at her residence by judicial police, in order to verify that she still resides at the address provided to the Court,³⁷ however, the Court found it unnecessary and disproportionate to retain leng Thirith's passport and identification card. The Court ordered that leng Thirith should have these papers returned to her, considering that "it participates to the dignity of the Accused" to have such access to her documents. The Chamber concluded that these new conditions of release minimally restricted leng Thirith's freedom of movement, while ensuring she would continue to be available to the Court.

The OCP had requested that the Accused be compelled to refrain from contacting the other Co-Accused, Nuon Chea and Khieu Samphan, or any witness or victim involved with the trial proceedings. The Chamber declined to pass any such order, on the grounds that such measures, which may have been necessary in 2008, were no longer of concern in light of the Accused's cognitive "impairment."³⁸

The final order of the Supreme Court Chamber sought to ensure that leng Thirith remains protected from arbitrary restrictions on her rights. It provided that the Trial Chamber will – annually, or upon request – review the measures of judicial supervision to confirm that they remain "suitable, necessary, and proportional."³⁹

³⁶ Ibid. Pars. 71-72. The Chamber understood that the requested conditions aimed to ensure that the Accused remains available to the Court and within its jurisdiction, but it also clarified its view that leng Thirith's risk of flight has decreased greatly since her initial detention. The SCC noted that the unlikelihood of a return to trial rendered leng Thirith with less incentive to flee, as did the debilitation and incapacity that has come of her current condition.

³⁷ Ibid. Par. 75. The Chamber asked that the monthly check also produce a brief report, mainly on any change in the Accused's situation. It additionally suggested that the Accused, through her guardian, could send the report herself each month.

³⁸ Ibid. Pars. 77-80.

³⁹ Ibid. Par. 81.

Unless specified otherwise,

- the documents cited in this report pertain to *The Case of Nuon Chea, Ieng Sary, Ieng Thirith and Khieu Samphan* before the ECCC;
- the quotes are based on the personal notes of the trial monitors during the proceedings;
- the figures in the *Public Attendance* section of the report are only approximations; and
- photos are courtesy of the ECCC.

Glossary of Terms

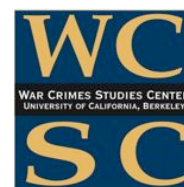
Case 001	<i>The Case of Kaing Guek Eav alias “Duch”</i> (Case No. 001/18-07-2007-ECCC)
Case 002	<i>The Case of Nuon Chea, Ieng Sary, Ieng Thirith and Khieu Samphan</i> (Case No. 002/19-09-2007-ECCC)
CPC	Code of Criminal Procedure of the Kingdom of Cambodia (2007)
CPK	Communist Party of Kampuchea
CPLCL	Civil Party Lead Co-Lawyer
DK	Democratic Kampuchea
ECCC	Extraordinary Chambers in the Courts of Cambodia (also referred to as the Khmer Rouge Tribunal or “KRT”)
ECCC Law	Law on the Establishment of the ECCC, as amended (2004)
ERN	Evidence Reference Number (the page number of each piece of documentary evidence in the Case File)
FUNK	National United Front of Kampuchea
GRUNK	Royal Government of National Union of Kampuchea
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IR	Internal Rules of the ECCC Rev. 8 (2011)
KR	Khmer Rouge
OCIJ	Office of the Co-Investigating Judges
OCP	Office of the Co-Prosecutors of the ECCC
RAK	Revolutionary Army of Kampuchea
VSS	Victims Support Section
WESU	Witness and Expert Support Unit



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* AIJI is a collaborative project between the East-West Center, in Honolulu, and the War Crimes Studies Center, University of California, Berkeley. Since 2003, the two Centers have been collaborating on projects relating to the establishment of justice initiatives and capacity-building programs in the human rights sector in South-East Asia. The Program is funded by the Open Society Foundation, the Foreign Commonwealth Office of the British Embassy in Phnom Penh, and the Embassy of Switzerland in Bangkok.

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