

002/19-09-2007-ECCC/TC

BEFORE THE TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

FILING DETAILS

Case No: 002/19-09-2007-ECCC/TC **Party Filing:** Co-Prosecutors

Filed to: Trial Chamber **Original Language:** English

Date of document: 4 September 2012

CLASSIFICATION

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

PUBLIC

Classification by Trial Chamber:

សាធារណៈ/Public

Classification Status:

Review of Interim Classification:

Records Officer Name:

Signature:



**OBSERVATIONS BY CO-PROSECUTORS ON JURISPRUDENCE
REFERRED TO BY COUNSEL FOR IENG THIRITH AT FITNESS TO STAND
TRIAL HEARING ON FRIDAY 31 AUGUST 2012**

Filed by:**Co-Prosecutors**

CHEA Leang
Andrew CAYLEY

Distributed to:**Trial Chamber**

Judge NIL Nonn, President
Judge Silvia CARTWRIGHT
Judge YA Sokhan
Judge Jean-Marc LAVERGNE
Judge YOU Ottara

Civil Party Lead Co-Lawyers

PICH Ang
Elisabeth SIMONNEAU FORT

Copied to:**Accused**

NUON Chea
IENG Sary
KHIEU Samphan
IENG Thirith

Lawyers for the Defence

SON Arun
Michiel PESTMAN
Victor KOPPE
ANG Udom
Michael G. KARNAVAS
KONG Sam Onn
Anta GUISSÉ
Arthur VERCKEN
Jacques VERGES
PHAT Pouy Seang
Diana ELLIS, QC

1. The Co-Prosecutors submit these observations to assist the Trial Chamber in its deliberations in determining the fitness of Ieng Thirith to stand trial and any consequential orders that may arise. In the course of closing submissions before the Chamber on Friday, 31 August 2012, Counsel for IENG Thirith submitted that her client should be released unconditionally. In support of that submission, she cited the case of *Prosecutor v. Radoslav Brdanin and Momir Talić*. Counsel stated:

- 2.

We have looked for any authorities which can assist the Trial Chamber in this respect, and perhaps a case of relevance and significance that we would cite is that of Brdjanin and Talić which is a case from the International Criminal Tribunal for Former Yugoslavia and its decision on a motion for provisional release of September 2002. And in that case, of particular significance, the Trial Chamber said that when assessing whether an accused should be released, the Trial Chamber must focus on the concrete situation of the individual applicant and, consequently, the provisions on provisional release cannot be applied in abstracto but must be applied with regard to the factual basis of the particular case.

And in that instance, the Trial Chamber went on to hold that a procedural measure should never be capricious or excessive, and if it's sufficient to use a more lenient measure then that must be applied. And the Court urged that weight should be attached to the presumption of innocence, the individual facts of the case, and the principle of proportionality, and that it was important to ensure the reputation of the tribunal was upheld. The Trial Chamber in that case held that after balancing the public interest, which included the interest of victims and witnesses who've cooperated with the prosecution, and the rights of detainees to be treated in a humane manner in accordance with the fundamental principles of respect to their inherent dignity and of the presumption of innocence, that it was convinced that the accused should be released with regard to the reality of his medical condition. And the Trial Chamber went on to say: "There can be no doubt that when the medical condition of the accused is such as to become incompatible with the state of continued detention, it's the duty of this tribunal and any court or tribunal to intervene on the basis of humanitarian law and provide the necessary remedies."

*And in that case, in due course, the accused was unconditionally released.*¹

3. The Co-Prosecutors note that the Counsel's representation as to the unconditional nature of the provisional release in *Talić* do not accord with the decision cited and provided by Counsel following the hearing. As the decision clearly illustrates, and, as the Senior

¹ Draft Transcript, 31 August 2012 at p.129 ln.23 – p.131 ln.9 (EN), p.14 ln.23 – p.126 ln.9 (FR), p.95 ln.17 – p.96 ln.17 (KH).

Assistant Prosecutor Abdulhak indicated in his oral submissions,² the accused Talić was released subject to numerous conditions.³

4. The Co-Prosecutors make this observation to ensure that the record of jurisprudence before the Trial Chamber is accurate.

Respectfully submitted,

Date	Name	Place	Signature
4 September 2012	YET Chakriya Deputy Co-Prosecutor	Phnom Penh	
	William SMITH Deputy Co-Prosecutor		

² Draft Transcript, 31 August 2012 at p.103 ln.2-13 (EN), p.96 ln.20 – p.97 ln.5(FR), p.73 ln.14-21(KH).
³ *Prosecutor v. Radoslav Brđanin and Momir Talić*, Case No. IT-99-36, Decision on the Motion for Provisional Release of the Accused Momir Talić (ICTY Trial Chamber II), 20 September 2002 at pp.13-16.