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ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
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អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

អង្គជំនុំជម្រះសាលាដំបូង
Trial Chamber
Chambre de première instance

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Case File/Dossier No. 002/19-09-2007/ECCC/TC

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

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DECISION ON REASSESSMENT OF ACCUSED IENG THIRITH'S FITNESS TO STAND TRIAL FOLLOWING SUPREME COURT CHAMBER DECISION OF 13 DECEMBER 2011

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1. INTRODUCTION

1. Following the Co-Prosecutors' appeal of the Trial Chamber's Decision of 27 November 2011 declaring the Accused IENG Thirith unfit to stand trial and ordering her immediate release, the Supreme Court Chamber ("SCC") stayed the Accused's release and remitted the issue of her fitness to stand trial back to the Trial Chamber. In light of the SCC's order that all available measures to ensure the Accused's fitness to stand trial be exhausted, the court-appointed medical experts made recommendations regarding a renewed course of treatment. Immediately after implementation of these recommendations, the Trial Chamber ordered a reassessment of the Accused's fitness to stand trial. It issues this decision having considered the experts' re-assessment as well as the experts' testimony and submissions of the parties at a hearing on 30-31 August 2012.

2. PROCEDURAL HISTORY

2. On 17 November 2011, based on the unanimous conclusion of five court-appointed medical experts that the Accused IENG Thirith is suffering from a progressive, degenerative cognitive condition (probably Alzheimers Disease), the Trial Chamber found her to be unfit to stand trial.[1] The Chamber consequently severed all charges against the Accused IENG Thirith and stayed the proceedings against her. Following disagreement as to the consequences that should follow from these findings, the Trial Chamber adopted the outcome most favourable to the Accused and ordered her unconditional release.[2]

3. Following an appeal by the Co-Prosecutors on the issue of release, the Supreme Court Chamber on 13 December 2011 reversed the Trial Chamber's release order, finding that "unconditional release of an accused is not 'required' in the context of a reversible stay of proceedings."[3] It further held that not all possible measures had been explored to improve IENG Thirith's cognitive abilities, indicating that "the Trial Chamber should have first carefully assessed all interests at stake and given proper weight to all relevant factors" before releasing the Accused.[4] The SCC consequently set aside the Trial Chamber's order releasing

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1 Decision on IENG Thirith's Fitness to Stand Trial, E138, 17 November 2011 ("First Decision on Fitness to Stand Trial"), paras 52-53, 59.
2 First Decision on Fitness to Stand Trial, paras 79-81.
3 Decision on Immediate Appeal Against the Trial Chamber's Order to Release the Accused IENG Thirith, E138/1/7, 13 December 2011 ("SCC Decision on Immediate Appeal"), para. 25 (emphasis in original).
4 SCC Decision on Immediate Appeal, paras 30, 43.

the Accused and directed the Trial Chamber to impose additional treatment in consultation with the medical experts. It further ordered that "as long as the Accused remains detained, to carry out the detention of the Accused in a hospital or other appropriate facility" and urged the Trial Chamber "to be vigilant that any continued detention would not be for an unreasonably long period of time, in breach of internationally recognised human rights."[5]

4. Upon being requested by the Trial Chamber to formulate medically-appropriate recommendations to implement the SCC's decision, the medical experts subsequently identified two measures that may be capable of improving IENG Thirith's cognitive function: (1) a gradual reduction of Bromazepam (also known as Lexomil) and (2) the administration of a Rivastigmine patch.[6] Cognitive stimulation therapy (*i.e.* occupational therapy) was further recommended to supplement this regime, although it was noted that there is no clinical evidence to suggest that occupational therapy on its own is capable of reversing cognitive decline.[7] The medical experts indicated that 18 weeks of Rivastigmine therapy and 3 months of occupational therapy would be sufficient for any clinical benefits of this course of treatment to become apparent.[8]

5. One of IENG Thirith's treating physicians, Dr. CHAK Thida, reported that the Lexomil medication was reduced by a quarter every week beginning on 23 March 2012 and its use was discontinued entirely on 13 April 2012.[9] The Rivastigmine therapy began on 27 March 2012. IENG Thirith had accordingly been on this therapy for 18 weeks as of 31 July 2012.[10] As Cambodia possessed no trained occupational therapists, a Singaporean occupational therapist, Mr. Sudev SREEDHARAN, was appointed to formulate a detailed cognitive stimulation programme for the Accused.[11] On 3-4 May 2012, Mr. SREEDHARAN provided training to two Cambodian physiotherapists to enable them to carry out the Accused's occupational

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5 SCC Decision on Immediate Appeal, para. 30 and disposition.

6 Report Concerning Mrs. IENG Thirith in Response to Trial Chamber Request, E138/1/7/4, 24 February 2012, para. 8.

7 Response to Chamber inquiry regarding medical expert recommendations, E138/1/7/7, 21 March 2012.

8 Report Concerning Mrs. IENG Thirith in Response to Trial Chamber Request Dated 6 January 2012, E138/1/7/4, 24 February 2012 ("Expert Recommendations"), para. 8 (as later amended by Experts' response to inquiry regarding treatment duration of Rivastigmine and timeframe for reassessment of IENG Thirith's fitness to stand trial, E138/1/7/9, 3 April 2012, p. 2).

9 Semester Report from October 2011 to April 2012, E12/68/1.1, 3 May 2012, p. 2.

10 Implementation of experts' recommendations for cognitive stimulation programme – IENG Thirith, E138/1/7/10, 10 April 2012 ("Recommendations for cognitive stimulation programme"), p. 2.

11 Recommendations for cognitive stimulation programme, p. 2.

therapy.[12] This cognitive stimulation programme commenced on 28 May 2012 and ceased on 18 August 2012.

6. Having implemented all recommendations for further medical treatment, the Chamber requested the five medical experts previously appointed by the Chamber to re-assess IENG Thirith, explaining that it was compelled to undertake this assessment at the first available opportunity once all measures recommended by the experts had been tried for the medically prescribed period.[13] All available experts (Professor A. John CAMPBELL, Dr. Seena FAZEL, and Dr. HUOT Lina) were requested to reassess IENG Thirith on 27-28 August 2012 and to submit a consolidated, joint summary report following their reassessment, to enable presentation and adversarial discussion of their findings during a hearing scheduled for 30-31 August 2012.[14]

7. Following a review of all relevant medical data produced since the Trial Chamber's assessment of IENG Thirith's fitness to stand trial in November 2011, as well as interviews of Detention Facility personnel and caregivers, the experts examined the Accused IENG Thirith on 27 and 28 August 2012. The experts provided their conclusions to the Trial Chamber in a summary report dated 29 August 2012 and testified on 30-31 August 2012.[15]

3. PRIOR ASSESSMENTS OF THE ACCUSED'S FITNESS TO STAND TRIAL AND EXPERT'S CONCLUSIONS UPON REASSESSMENT

8. Since being seised of Case 002, the Trial Chamber has ordered numerous expert assessments of IENG Thirith's mental and physical health in order to ascertain her fitness to stand trial. Each of these assessments identified significant cognitive impairment.[16] When the Trial Chamber evaluated her fitness to stand trial on 17 November 2011, it noted the

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[12] Report on Cognitive Stimulation Training Conducted at ECCC on 3-4 May 2012, E138/1/7/12, 11 May 2012 ("Cognitive Stimulation Training Report") (recommending therapy five times per week and fortnightly follow-up discussions between the trainees and the occupational therapist).

[13] Scheduling of reassessment and hearing on fitness of IENG Thirith to stand trial, E138/1/7/13, 22 June 2012 ("Scheduling Memorandum"), p. 2.

[14] Scheduling Memorandum, p. 2.

[15] Summary Expert Report on Mrs. IENG Thirith, E138/1/7/13/2, 29 August 2012 ("Medical Experts' Reassessment"); T., 30-31 August 2012.

[16] Geriatric Expert Report of IENG Thirith Dated 23 June 2011 in Response to the Trial Chamber's Order Assigning Expert – E62/3, E62/3/6, 23 June 2011 ("Expert Geriatrician's Report"); Expertise Report Prepared in Response to the Trial Chamber's Expertise Order Document Number E111, Dated 23 August 2011, E111/8, 9 October 2011 ("Psychiatric Experts' Report"); Report Concerning Mrs. IENG Thirith in Response to Trial Chamber Request Dated 6 January 2012 ("Report on Experts' Recommendations"), E138/1/7/4, 24 February 2012 and Medical Experts' Reassessment.

consistent diagnosis of the five court-appointed experts that IENG Thirith suffers from moderate to severe dementia, likely caused by Alzheimer's disease, and concluded that she was unfit to stand trial.[17] The medical experts' reassessment of 29 August 2012 and several interim reports clearly show that notwithstanding the additional medical treatment ordered by the SCC, IENG Thirith's cognitive impairment has not improved and, in fact, has worsened since she was assessed by the experts in September 2011.[18]

9. In their report of 24 February 2012, the experts maintained their diagnosis of "moderate to severe cognitive impairment secondary to a dementing illness, most probably Alzheimer's disease."[19] They noted that IENG Thirith had no recollection of any previous meetings with them and that her answers were often unrelated to questions.[20] She also could not recall details of her family or how many children she had. She scored 12 out of 30 on one measure for evaluating cognitive function, namely the Mini-Mental State Examination ("MMSE").[21] The experts considered that IENG Thirith's cognitive function was worse on this testing than previously and that the history given by her caregivers was consistent with the progression of her dementia. There was no evidence of feigned deterioration.[22]

10. In his report of 11 May 2012, the occupational therapist noted that IENG Thirith was "pleasant and welcoming" but that she could not remember how many children she had or their names.[23] Nor could she recall the day, date or year.[24] He administered a MMSE and noted that IENG Thirith scored 12 out of 30 on this assessment but noted that his trainees could not continue the assessment on the second day of the training, as the Accused was distressed and agitated.[25]

11. In their report submitted to the Chamber on 29 August 2012 following their most recent reassessment of the Accused, the medical experts concluded that IENG Thirith's dementia had become more severe since 2011 and that her cognitive abilities had deteriorated slightly

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17 First Decision on Fitness to Stand Trial, paras 52-59.
18 Medical Experts' Reassessment, para. 61; T., 31 August 2012, pp. 23, 29, 41.
19 Report on Experts' Recommendations, para. 7.
20 Report on Experts' Recommendations, para. 7.
21 Report on Experts' Recommendations, para. 7. IENG Thirith had previously scored 14/30, 15/30 and 18/30 of the MMSE, whereas a score of 23/30 or less is considered indicative of impairment (Expertise Report Prepared in Response to the Trial Chamber's Expertise Order Document Number E111, Dated 23 August 2011, E111/8, 9 October 2011, para. 21).
22 Report on Experts' Recommendations, para. 7.
23 Cognitive Stimulation Training Report, p. 1.
24 Cognitive Stimulation Training Report, p. 1.
25 Cognitive Stimulation Training Report, p. 2 ("[s]he was screaming and felt that there were insects crawling on her").

despite the Rivastigmine and cognitive stimulation treatments.[26] This deterioration was illustrated by a pattern of declining scores on the MMSE, performed by a variety of trained professionals, in addition to evidence that she now suffers from hallucinations and is unaware of her incontinence.[27] The experts had reported that IENG Thirith had initially scored 14, 15 and 18 out of 30 possible points on the MMSE (which, in conjunction with other factors, is indicative of moderate to severe dementia).[28] However, between May and August 2012, in separate tests performed by an occupational therapist and two physiotherapists, IENG Thirith scored 11-14 out of 30.[29] After the course of treatment was completed, she performed even more poorly when examined by the medical experts, scoring as low as 7 and 9 on the MMSE, with less than 10 indicating severe impairment.[30]

12. The experts further observed memory decline, noting that she did not recognize the assessing team on the second day of the examination and that she would forget what she had said a few minutes previously.[31] She also did not recall that her mother was no longer alive, denied that she had children and, at times, did not recognize her husband.[32] On this basis, the experts concluded that the Accused's dementing illness had progressed and that IENG Thirith remained unable to meaningfully assist in the preparation of her defence principally due to her impaired memory.[33] In addition to confirming that IENG Thirith continues to suffer from a moderate to severe dementing illness, the experts further emphasised that they have exhausted all available therapeutic measures and that there is currently no further treatment capable of improving the Accused's cognitive capacity.[34]

13. Shortly before the experts' testimony, one of the Accused's treating physicians, Dr. CHAK Thida, filed an unsolicited report with the ECCC Office of Administration suggesting

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[26] Medical Experts' Reassessment, para. 61.

[27] Medical Experts' Reassessment, paras 43-44 (noting the report by the Chief of the ECCC Detention Facility, as confirmed by the physiotherapists, that IENG Thirith thought that someone was physically present in her mosquito net and that sometimes this was a human being and other times was a child or a skull. The Chief of the Detention Facility, her female guards, and the physiotherapist (all Cambodians) also reported that she has recently become incontinent of urine, is unaware of this and denies it when asked) and para. 61 (considering hallucinations to be "another marker of progression" in her dementia).

[28] Psychiatric Experts' Report, para. 21.

[29] Medical Experts' Reassessment, paras 42, 61; T., 31 August 2012, pp. 23, 29, 77-78.

[30] Medical Experts' Reassessment, para. 48.

[31] Medical Experts' Reassessment, para. 49 (when reminded, the Accused would deny saying what she had said).

[32] Medical Experts' Reassessment, para. 46, 50. IENG Sary, the Accused's husband, also verified that her memory has worsened over the past year (Medical Experts' Reassessment, para. 45).

[33] Medical Experts' Reassessment, paras 53, 56 and 61.

[34] Medical Experts' Reassessment, paras 59-60.

that the Accused suffered no cognitive impairment or mental illness.[35] On 30 August 2012, the Chamber called Dr. CHAK Thida as a witness, in order to permit the Chamber and the experts to examine the basis of her conclusions.

4. SUBMISSIONS

14. All parties except the Lead Co-Lawyers acknowledge, on the basis of the experts' conclusions and testimony, that the Accused IENG Thirith suffers from a progressive, dementing illness (most likely Alzheimer's disease) and that she remains unfit to stand trial. The Co-Prosecutors and IENG Thirith Defence further agree that there is no likelihood of the Accused becoming fit to stand trial in the foreseeable future, and thus, that there is no realistic possibility that she will ever be tried before the ECCC. In consequence, both parties agree that the Accused should be released from the ECCC Detention Facility.[36]

15. Although acknowledging that there are no longer grounds for the Accused's continued detention, the Co-Prosecutors nonetheless propose six conditions for her release, namely:

(1) That she reside at a specified home address;

(2) That she make herself available for weekly safety checks by authorities or officials appointed by the Trial Chamber;

(3) That she surrender her passport and national identification;

(4) That she not contact directly or indirectly other co-accused (except for her husband, IENG Sary);

(5) That she not contact directly or indirectly any witness, expert or victim who is proposed to be heard before the Trial Chamber and not to interfere with the administration of justice; and

(6) That she undergo examination by medical practitioners appointed by the Trial Chamber every six months, with the first to be undertaken in March 2013.

16. The Co-Prosecutors suggest that these conditions could be reconsidered at the end of Case 002/02 and thus, that they do not constitute measures which indefinitely deprive the Accused of her liberty.[37] They further submit that a guardian or curator should be appointed

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[35] Medical report for IENG Thirith by CHAK Thida, E12/78.1, 12 July 2012; Medical report for IENG Thirith by CHAK Thida, E12/83.1, 14 August 2012 (unsigned reports sent by facsimile on 29 August 2012). Since first meeting IENG Thirith on 16 February 2011, Dr. CHAK Thida claims to have examined the Accused once a month and to have produced 11 medical reports (T., 30 August 2012, pp. 38-39). However, only six of these reports have been made available to the Trial Chamber (*see* Psychiatric Mental Status Examination, E17/1/2.4, 16 February 2011; Semester Report from October 2011 to April 2012, E12/68/1.1, 3 May 2012; Medical report of IENG Thirith, E138/1/7/4.3, 14 November and 9 December 2011; Medical report for IENG Thirith by CHAK Thida, E12/78.1, 12 July 2012; Medical report for IENG Thirith by CHAK Thida, E12/83.1, 14 August 2012).

[36] T., 31 August 2012, pp. 102-103, 129.

[37] T., 31 August 2012, pp. 110-111.

for the Accused pursuant to the Cambodian Civil Code.[38] Although acknowledging that the Accused's cognitive state may make it impracticable or legally impossible to sanction any breach of these conditions, the Co-Prosecutors contend that their breach could result instead in measures such as a warning (whether to the Accused or her guardian).[39] The IENG Thirith Defence counter that as the Trial Chamber's jurisdiction over the Accused would cease following a determination that she will not be tried by the ECCC, the Trial Chamber would lack any legal basis to impose conditions on her release.[40]

17. On the basis of Dr. CHAK Thida's conclusions, and contrary to the Co-Prosecutors' position, the Civil Party Lead Co-Lawyers request the appointment of a new group of experts. They contend that any new group of experts should include women and Khmer speakers, on grounds that the medical experts appointed by the Trial Chamber were unable to overcome cultural and linguistic barriers with the Accused, without indicating how this occurred in practice or how it invalidated the experts' conclusions.[41] The Chamber notes, to the contrary, that the international experts were aware of the need to adjust for cultural factors, for instance by seeking the assistance of Khmer translators, doctors and nurses. The medical experts (one of whom was a Cambodian psychiatrist) also relied on extensive informant history from Cambodians who were engaged in the daily care of Ms. IENG Thirith, including her female guards, a physiotherapist, and the Chief of the Detention Facility.[42] The Chamber considers that the medical experts adequately accommodated cultural and language differences in completing their examination and therefore rejects the Lead Co-Lawyers' request.

5. APPLICABLE LAW

18. The standard for determining whether an Accused is fit to stand trial was identified by the Trial Chamber as "meaningful participation which allows the accused to exercise [her] fair trial rights to such a degree that [she] is able to participate effectively in [her] trial and has an

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[38] The basis for the appointment of a guardian or curator in relation to persons of diminished capacity in Cambodia is Sections 24-30 of the Cambodian Civil Code. This Code forms no part of the ECCC's jurisdiction under its legal framework (*see* Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, 10 August 2001 with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006), Articles 2 new, 3 new, 4-8 and Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodia Law of Crimes Committed During the Period of Democratic Kampuchea, signed 6 June 2003 and entered into force on 29 April 2005, Article 9 (setting forth the ECCC's jurisdiction)).

[39] T., 31 August 2012, pp. 113-115.

[40] T., 31 August 2012, pp. 128-129.

[41] T., 31 August 2012, pp. 122-123.

[42] T., 31 August 2012, pp. 122-123.

understanding of the essentials of the proceedings".[43] This standard was not appealed or reversed by the SCC, whose analysis instead principally concerned the issue of whether the release of the Accused ordered by the Trial Chamber was appropriate following its conclusion that she was unfit to stand trial.

19. On the issue of release, the majority of the Supreme Court Chamber placed particular reliance on the procedural framework contained in paragraphs 36 and 37 of the decision of the International Criminal Court ("ICC") in *Lubanga*.[44] Proceedings in that case were stayed in consequence of the Prosecution's failure to disclose a significant body of exculpatory evidence to the Accused, and not following any allegation of unfitness to stand trial.[45] In assessing circumstances in which an Accused should be detained or released following breach by the Prosecution of their fair trial obligations (and reflecting the possibility that violations of this type are capable of being remedied and the trial resumed), the ICC stated:

> 36. It is evident that detention under articles 60 and 58 (1) of the [ICC] Statute must be related to the exercise of criminal jurisdiction over persons suspected of having committed crimes under the jurisdiction of the Court. Therefore, in the ordinary course of events, if a permanent and irreversible stay of the proceedings is imposed the accused person will have to be released because continued detention would not be in connection with the exercise of criminal jurisdiction by the Court.
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> 37. The matter is different, however, when the proceedings have only been stayed conditionally, as in the present case. A conditional stay is neither an acquittal nor a final termination of the proceedings, but may be lifted in appropriate circumstances [...]. Therefore, the Court is not necessarily permanently barred from exercising jurisdiction in respect of the person concerned. The Trial Chamber expressly recognised this in stating that the stay it imposed was capable of being lifted in the future [...]. For that reason,

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[43] First Decision on Fitness to Stand Trial, para. 27 (*citing Prosecutor v. Strugar*, Judgement, ICTY Appeals Chamber (IT-01-42-A), 17 July 2008 ("*Strugar* Appeal Judgement"), para. 55); *see also Prosecutor v. Pavle Strugar*, Decision re Defence Motion to Terminate Proceedings, ICTY Trial Chamber, Case No. IT-01-42-T, 26 May 2004 ("*Strugar* Decision on Fitness"), para. 35; *Deputy General Prosecutor for Serious Crimes v. Josep Nahak*, Findings and Order on Defendant Nahak's Competence to Stand Trial, Special Panel for Serious Crimes (Timor-Leste), Case No. 01A/2004, 1 March 2005 ("*Nahak* Decision"), para. 56.

[44] *Lubanga*, ICC-01/04-01/06-1487, "Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled 'Decision on the release of Thomas Lubanga Dyilo'", ICC Appeals Chamber, 21 October 2008 ("*Lubanga* Detention Decision").

[45] *Lubanga,* ICC-01/04-01/06-1487, Decision on the consequence of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, ICC Trial Chamber, 13 June 2008, paras 93-94 (noting that the Chamber found it necessary to impose a stay of proceedings because in consequence of the Prosecution's breach of their obligations, it was at that stage "impossible to piece together the constituent elements of a fair trial"). Trial of this Accused eventually resumed and judgment against him rendered on 14 March 2012 (*Lubanga*, ICC-01/04-01/06-1487, Judgment pursuant to Article 74 of the Statute, ICC Trial Chamber, 14 March 2012, para. 10; *see also, Lubanga*, ICC-01/04-01/06-2690, Decision on the "Defence Application Seeking a Permanent Stay of the Proceedings", ICC Trial Chamber, 7 March 2011 (redacted), paras 195, 199, 205 (noting that prosecutorial misconduct does not always require a permanent stay of proceedings because the alleged failings can often be remedied during the course of the trial .)).

> once a Chamber has ordered a conditional stay of the proceedings, the unconditional release of the person concerned is not the inevitable consequence. Instead, the Chamber will have to consider all relevant circumstances and base its decision on release or detention on the criteria in articles 60 and 58 (1) of the [ICC] Statute. In particular, the necessity of the continued detention [...] will have to be assessed carefully. [...] [T]he Chamber should take into account that the trial has been conditionally stayed, not permanently terminated. If the conditions for continued detention are not met, the Chamber will have to determine whether, in the particular circumstances of the case, release should be with or without conditions [...] *When deciding on detention or release (with or without conditions), the Chamber will have to consider [...] whether further developments since the imposition of the conditional stay make it likely that the stay might be lifted in the not-too-distant future.* At the same time, the Chamber must be vigilant that any continued detention would not be for an unreasonably long period of time, in breach of internationally recognised human rights. If a Chamber concludes that the continued detention, or the release only with conditions, is justified, it will have to review such a decision at short intervals.[46]

20. On this basis, the Supreme Court Chamber by a majority concluded that "before releasing the Accused the Trial Chamber should have first carefully assessed all interests at stake and given proper weight to all relevant factors."[47] The majority decision of the Supreme Court Chamber further noted that "although the Trial Chamber did not determine the standard of proof that it adopted for assessing the prospect of improving the condition of the Accused, the standard appears to have been unduly high for the purpose of this particular consideration [*i.e.* whether or not the Accused should have been released]."[48]

21. Concerning this standard, the US Supreme Court in *Jackson v. Indiana* (cited with approval by the SCC) found that if there is no substantial probability that an Accused will attain capacity to stand trial in the foreseeable future, he or she must be released.[49] Other national systems have also held that indefinite detention in these circumstances, or even detention with periodic review, is contrary to an Accused's basic rights.[50] For example, the

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[46] *Lubanga* Detention Decision, paras 36-37 (emphasis added). The italicized portion of paragraph 37 of the *Lubanga* Decision was omitted within the SCC's citation of this paragraph.

[47] SCC Decision on Immediate Appeal, para. 30.

[48] SCC Decision on Immediate Appeal, para. 29.

[49] SCC Decision on Immediate Appeal, para. 25, footnote 84, *citing Jackson v. Indiana*, 406 U.S. 715, 738 (1972): "[A] person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than a reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future. If it is determined that this is not the case, then the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant. Furthermore, even if it is determined that the defendant probably soon will be able to stand trial, his continued commitment must be justified by progress toward that goal."

[50] *See R v. Jabanardi* (1983) 50 ALR, 147; *see also Criminal Code*, R.S.C., 1985, c. C-46, ss. 672.54, 672.55(1), 672.58 (Canada) (permitting court-imposed treatment of an accused for a specified period not exceeding sixty days for the purpose of making the accused fit to stand trial after which continued psychiatric treatment only permitted with consent of the accused and where considered to be reasonable, necessary and in

Federal Court of Australia evaluated the lawfulness of the detention of a defendant who had no real possibility of ever becoming fit to stand trial. It specifically rejected a detention order with six-monthly reviews, holding:

> any suggestion that a person could be held in custody for many years, without trial or any possibility of trial, simply because a charge has been laid against him which he will never be well enough to answer, is so repugnant to our legal system's protection of the right to freedom that it would require clear evidence of legislative intention before it could be accepted.[51]

22. As the SCC has noted, the Cambodian legal system is also protective of the right to liberty and contains a presumption in favour of release of an Accused pending trial.[52] A fundamental requirement of international human rights norms is also that any deprivation of liberty must be supported by well-founded reasons established by law.[53] In this regard, the European Court of Human Rights ("ECtHR") has held that the reasons for pre-trial confinement may become attenuated over time and that in such circumstances the person concerned should be released.[54] It has held that the gravity of the charges, the public reaction to them, and the severity of a possible sentence can be taken into account in determining to detain an Accused, but these reasons cannot by themselves justify long periods of detention.[55] Furthermore, the rationale for continued detention must be balanced against the risk of an unreasonably long or indefinite deprivation of liberty.[56]

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the Accused's interests); Mental Health Act 1983, ss. 36(1), 37 (United Kingdom) (permitting remand of an Accused to hospital for treatment for up to twelve weeks where an accused is suffering from a mental disorder which makes detention in a hospital for medical treatment appropriate, and appropriate medical treatment is actually available).

[51] *R v. Jabanardi*, 50 ALR 147 at 151-52 (citing with approval *Jackson v. Indiana*).

[52] SCC Decision on Immediate Appeal, para. 39; *see also* Internal Rule 63(3), 82(1) and Cambodian Code of Criminal Procedure, Articles 205, 306.

[53] European Convention on Human Rights, Article 5; *see also* International Covenant on Civil and Political Rights, Article 9; American Convention on Human Rights, Article 7 and African Charter on Human and People's Rights, Article 6.

[54] *Letellier v. France*, Judgement, ECtHR (no. 12369/86), 26 June 1991, para. 39.

[55] *Khudoyorov v. Russia*, Judgement, ECtHR (no. 6847/02), 8 November 2005, para. 180; *Letellier v. France*, Judgement, ECtHR (no. 12369/86), 26 June 1991, para. 51.

[56] SCC Decision on Immediate Appeal, para. 24. International human rights courts have uniformly held that unreasonably long pre-trial detention violates an Accused's fundamental rights, including in cases concerning very serious or particularly complex crimes; *see e.g. Labita v. Italy*, Judgement, ECtHR Grand Chamber (no. 26772/95), 6 April 2000, paras 154, 161, 164 (holding pre-trial detention of two years and seven months in a case concerning 46 alleged members of a Mafia type organization unreasonably long); *Soria Valderrama v. France*, Judgment, ECtHR (no. 29101/09), 26 January 2012, para. 30 (finding detention of four years and eight months to be *prima facie* unreasonable and needing to be justified by especially compelling reasons); *Piechowicz v. Poland,* Judgment, ECtHR (no. 20071/07), 17 April 2012, paras 188, 197; *Todorov v. Ukraine,* Judgment, ECtHR (no. 16717/05), 12 January 2012, paras 61- 64; *Case of Suárez-Rosero v. Ecuador*, Judgment, I/A Court H.R., November 12, 1997, (Merits), para. 73 (holding four-year long preventive detention "far exceeds the reasonable time contemplated in the American Convention"); *Anthony Briggs Trinidad and Tobago,* Inter-American Commission on Human Rights, Report 44/99 (Case 11.815), 15 April 1999, para. 55; Although

23. As the above jurisprudence shows, the continued detention of an Accused who is unfit to stand trial can only be justified where there is a substantial likelihood that he or she may become fit to stand trial in the foreseeable future (and thus, where there is a reasonable prospect of that individual being tried without undue delay).

6. FINDINGS

6.1. Findings on the Accused's fitness to stand trial following the experts' reassessment

24. The Trial Chamber is in receipt of consistent and unanimous findings by multiple experts that the Accused suffers from a progressive, dementing illness (most likely Alzheimer's disease) and that she is unlikely to improve either spontaneously or with further treatment. On the basis of the experts' findings, the Trial Chamber reaffirms its prior conclusion that IENG Thirith's long-term and short-term memory loss ensures that she would be unable to understand sufficiently the course of proceedings to enable her to adequately instruct counsel and to effectively participate in her own defence. Following the most recent expert assessment, it appears that the Accused would further be unlikely to be able to testify at trial.[57] All available measures presently capable of improving IENG Thirith's cognitive function have been tried. As the Accused, despite the exhaustion of these measures, remains unable to meaningfully exercise her fundamental fair trial rights, the Chamber reaffirms its earlier finding that the Accused is unfit to stand trial. There further appears to be no reasonable prospect that IENG Thirith's cognitive impairment can be reversed.

25. Although noting the contrary conclusions of Dr. CHAK Thida, the Chamber notes that on 31 August 2012 and in their report, the experts outlined a number of specific methodological, factual and analytical shortcomings in Dr. CHAK Thida's reports and subsequent testimony.[58] For example, and while noticing some loss of memory, Dr. CHAK Thida concluded that the Accused exhibited no sign of mental illness.[59] Dr. CHAK also denied that IENG Thirith suffered from urinary incontinence and hallucinations, even though

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periods of pre-trial detention before the *ad hoc* tribunals have frequently been lengthy, in all cases cited by the Co-Prosecutors, trial of the Accused was on-going or has in fact occurred. No example cited concerned an Accused retained in detention despite no prospect of trial in the foreseeable and not too distant future. (*see* Table of Cases where detention of the accused before ICTY and ICTR has lasted 5-10 years, E138/1/9.1, 10 September 2012).

[57] Medical Experts' Reassessment, para. 62.

[58] Medical Experts' Reassessment, para. 40; T., 31 August 2012, pp. 77.

[59] T., 30 August 2012, pp. 24, 26-27, 29, 31 and 36.

this was independently verified by those responsible for her daily care.[60] Although Dr. CHAK recorded an MMSE score of 24 out of 30 for IENG Thirith in July 2012, the experts noted that this was inconsistent with eight other MMSE scores from 2011 and 2012.[61] The experts further noted that Dr. CHAK administered the MMSE incorrectly by substituting a number of standardized questions for others which were less demanding.[62] This test is standardized, based on internationally-accepted guidelines, and change to it was both unnecessary and served to invalidate the results obtained.[63] Dr. CHAK also appeared to misapply the test designed to assess orientation in time and failed to gather informant histories.[64] Although alleging that her evaluation was more likely to be correct because of a superior rapport with IENG Thirith as a woman and a Khmer speaker, there was no indication of a lack of rapport between the experts and the Accused, or indeed that the Accused responded more favourably to persons of her own gender and culture.[65] Dr. CHAK in any case agreed that there had been no improvement of IENG Thirith's cognitive function over the past few months.[66] For these reasons, the Chamber does not consider Dr. CHAK's report or subsequent testimony to cast doubt on the experts' conclusions.[67]

6.2. Consequences of IENG Thirith's unfitness to stand trial

26. Following reassessment of the Accused as ordered by the Supreme Court Chamber, and the experts' consistent findings in relation to the Accused's cognitive impairment, the

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[60] Medical Experts' Reassessment, paras 43-44 (noting reports by the Chief of Detention Facility, female guards and physiotherapist that IENG Thirith suffers from incontinence and apparent hallucinations). Although Dr. CHAK Thida claimed that Professor Campbell did not properly describe Accused's ability to recognize a pen, later consultation with notes suggested that this assertion was incorrect (T., 31 August 2012, p. 8). In addition, she failed to take informant histories (Medical Experts' Reassessment, para. 40).

[61] Medical Experts' Reassessment, para. 40.

[62] Medical Experts' Reassessment, para. 40 (indicating that if correctly rescored, IENG Thirith would have scored a maximum of 15 out of 30 on the MMSE administered by Dr. CHAK); T., 31 August 2012, pp. 4-5, 77-78.

[63] T., 31 August 2012, p. 69. Further, Dr. CHAK appeared to contradict herself by indicating that as the Accused is highly intelligent and educated, there was no need to adjust the test to take account of her educational level and thus no barrier to applying the standardized version of the test (T., 30 August 2012, pp. 45).

[64] Medical Experts' Reassessment, para. 40.

[65] T., 30 August 2012, pp. 32-33, 80; T., 31 August 2012, pp. 3, 6, 65-66 (indicating that the experts developed a good rapport with the Accused, and that the Accused behaved with intermittent hostility toward the Cambodian female staff of the Detention Facility). Further, the Cambodian psychiatrist, Dr. HOUT Lina, concurred with the findings of the other international experts (T., 31 August 2011, pp. 11, 56).

[66] Medical Experts' Reassessment, para. 40.

[67] T., 30 August 2012, pp. 49-50. Although stating that she has experience with Alzheimer's disease, Dr. CHAK Thida was unable to specify the nature and depth of this experience. By contrast, each of the experts possess decades of training and experience in the practice of forensic psychiatry, geriatric medicine and psychiatry respectively (T., 31 August 2012, pp. 15-21); *see also* Curriculum Vitae of Seena FAZEL, E111.4; Curriculum Vitae of Dr. HUOT Lina, E111.2 and Summary of Expert Witness Qualifications, Professor Campbell, E62.1, 9 March 2011.

Chamber has reaffirmed its conclusion of November 2011 that the Accused IENG Thirith is unfit to stand trial. The Accused has been retained in detention since that date and confronts no reasonable prospect of facing trial in the foreseeable future. Further, the release of the Accused from detention is currently unopposed by either the Co-Prosecutors or the Defence. The Trial Chamber therefore revisits the rationale provided by the SCC for her continued detention in the light of these circumstances.

27. The Supreme Court Chamber's initial rationale for IENG Thirith's continued detention was based on the consideration that further treatment recommended by the medical experts might render her fit to stand trial.[68] That treatment has since been implemented and the medical experts have reaffirmed that IENG Thirith suffers from a progressive, dementing illness (most likely Alzheimer's disease). This condition has worsened over the last year despite the implementation of additional measures that sought to reverse her cognitive decline. The medical experts have further indicated that no other treatment methods are likely to improve the fitness of the Accused such that she is likely to become fit to stand trial.[69]

28. Although the experts concluded in November 2011 that there was only a negligible likelihood of any treatment improving IENG Thirith's condition, the SCC majority decision held that remedial action must be undertaken in light of the possibility, even slight, of a meaningful improvement.[70] In the absence of other available medical treatment capable of improving her cognitive function, or likelihood that she will improve without treatment, the Trial Chamber's previously-ordered stay of proceedings in relation to the Accused shall continue indefinitely.[71] In this context, "indefinite" means that the stay of proceedings shall continue until and unless the Chamber orders their resumption against the Accused. The

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[68] SCC Decision on Immediate Appeal, paras 40-41 (noting the possibility of additional treatment rendering the Accused fit to stand trial and finding a "necessity to ensure the presence of the Accused at trial, as soon as it resumes"). The SCC consequently considered that the original ground for the Accused's detention provided by the Trial Chamber on 16 February 2011 (namely to ensure her presence at trial) remained "valid and relevant" (*see* Decision on the Urgent Applications for Immediate Release of NUON Chea, KHIEU Samphan, and IENG Thirith, 16 February 2011, E50, para. 41 (applying Internal Rule 63(3)(b)(iii)).

[69] Medical Experts' Reassessment, para. 59.

[70] First Decision on Fitness to Stand Trial, para. 53 (citing the experts' conclusion that "[t]here was only a small likelihood of this drug [Donezepil] producing any improvement in her condition"); *cf.* SCC Decision on Immediate Appeal, paras 29, 38 and 40 (citing the ICTY Trial Chamber's recommendation that an unfit Accused be offered treatment because it "may potentially improve" his condition); *see also* SCC Decision on Immediate Appeal, para. 35 (describing a 33% possibility that Donepezil could improve IENG Thirith's cognitive function as "a probability that should not be dismissed"). Donepezil was administered on 8-11 November 2011, but was discontinued because it caused vomiting, a recognized side-effect of the drug (Expert Recommendations, p. 3; *see also* T., 31 August 2012, p. 52-53).

[71] *cf. Strugar* Decision on Fitness, para. 27 (addressing the possibility that the Accused's medical incapacity might have been only temporary and capable of being remedied ("[I]n some cases a temporary unfitness may be remedied with treatment so that the trial could continue after a delay or interruption")).

consequence of this is that the Trial Chamber cannot exercise its jurisdiction over the Accused for the duration of the stay.[72]

29. Although advances are continually made in medical science and the possibility cannot be excluded that a cure for progressive, dementing illnesses (in particular, Alzheimer's disease) may eventually be found, this is entirely speculative and cannot provide the justification either for depriving a medically unfit accused of liberty or for imposing indefinite detention. Were a chamber to hold to the contrary, release following a finding of unfitness to stand trial could never be ordered, based on a mere hypothesis that medical conditions which are currently irreversible may in the future be cured. As there appears to be no reasonable possibility that the Accused IENG Thirith may recover her cognitive function such that she will be fit to stand trial in the foreseeable future, the Trial Chamber finds that the Accused's continued detention under the present circumstances would therefore violate her basic rights.

30. Further, the ECCC's legal framework provides no statutory basis to justify continued detention of an accused in the present circumstances. The provisions of the ECCC Internal Rules cited by the Co-Prosecutors concern provisional detention or pre-trial release on bail, both of which presuppose that there will be a trial within the foreseeable and not-too-distant future.

31. In the current circumstances, continued detention would violate the internationally proscribed protections against indefinite detention and the right to a trial without undue delay. Whilst acknowledging the seriousness of the charges in the Closing Order, the Trial Chamber considers IENG Thirith's pre-trial detention of over 4 years 10 months, if continued on the entirely hypothetical basis of a potential trial, would violate these basic rights.[73] For these reasons, the Chamber orders the Accused's immediate release.

6.3. Measures requested by the Co-Prosecutors upon release

32. In support of its order for the continued detention of the Accused, the Supreme Court Chamber by a majority held that judicial supervision with conditions pursuant to Article 223 of the Cambodian Code of Criminal Procedure was permissible, concluding that "[as] the

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[72] *Lubanga* Detention Decision, para. 36.

[73] SCC Decision on Immediate Appeal, para. 24 *(quoting Lubanga* Detention Decision, para. 37 (*citing* ICCPR, ECtHR, American Convention on Human Rights and African Charter on Human and Peoples' Rights)); *see also,* Written Record of Initial Appearance of IENG Thirith, E3/664, 12 November 2007.

Trial Court is undisputedly authorized to apply detention, it is logically, *a maiori ad minus*, authorized to apply a less restrictive measure".[74]

33. Following its conclusion that there is no reasonable prospect that the Accused will be tried in the foreseeable future and having stayed proceeding against her indefinitely, the Trial Chamber lacks a legal basis to detain the Accused and is therefore compelled to order her release. 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. The Co-Prosecutors rely by analogy on Internal Rules 65 and 82 (which concern bail and provisional detention). These provisions cannot provide the basis for continuing, coercive measures against an accused who faces no reasonable prospect of being tried, who has been released, and against whom the Trial Chamber can therefore no longer exercise its jurisdiction.[75] The Co-Prosecutors instead cite a number of international precedents to justify the imposition of conditions on IENG Thirith's release, many of which dealt with factual circumstances different from the present.[76] The IENG Thirith Defence counter that this international jurisprudence reinforces the conclusion that post-release conditions on the Accused would lack a legal basis.[77]

34. In *Kovačević*, the ICTY Trial Chamber ordered that the Accused be provisionally released to undergo medical treatment "in order to ascertain whether the Accused, after receiving adequate treatment, would be capable of standing trial in the future."[78] The purpose of the provisional release was to permit medical treatment "until such time as the Chamber can make a final determination on his fitness to stand trial."[79] Whilst the possibility of a future trial in *Kovačević* may have justified conditions on his release, this is inapplicable in the present circumstances, where all treatment options to improve IENG Thirith's cognitive function have been exhausted and the Trial Chamber has made a final determination on her fitness.

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74 SCC Decision on Immediate Appeal, para. 45.
75 T., 31 August 2012, pp. 107-108.
76 T., 31 August 2012, pp. 104-105.
77 T., 31 August 2012, p. 136.
78 *Prosecutor v. Vladimir Kovačević*, IT-01-42/2-I, "Decision on Provisional Release," 2 June 2004 ("*Kovačević* Decision on Provisional Release"), p. 1.
79 *Kovacevic* Decision on Provisional Release, p. 2.

35. In *Talić*, there was disagreement among the medical experts as to whether the Accused Talić was unfit to stand trial.[80] Whilst declining to make a final determination on the issue of fitness, the ICTY Trial Chamber provisionally released the Accused on grounds that his medical condition was "incompatible with a state of continued detention."[81] Conditions imposed on his release were also justified by the possibility that he may eventually stand trial, and the Trial Chamber further noted that the Accused consented to the imposition of these measures.[82] By contrast, the proceedings against the Accused IENG Thirith have been indefinitely stayed and her Defence objects to the imposition of post-release conditions.

36. Although the Special Panels in the Courts of East Timor imposed conditions on the release of a mentally unfit accused, it provided no legal justification for continuing those measures after the case had been adjourned *sine die*.[83] An ICTY Trial Chamber also provisionally released the Accused Djukić, having found that he suffered from an incurable illness and would suffer an "inevitable mental decline".[84] Although it imposed some minimal conditions on his release (such as a requirement to report his address, submit periodic medical reports on his condition and to respond to a court summons if his medical condition permits), the *Talić* Decision later characterized Djukić's release as "practically unconditional."[85]

37. None of the above cases therefore support the imposition of coercive conditions on release in circumstances such as the present. However, they do show that certain measures have accompanied release, where appropriate in the circumstances of the case. In view of the Accused IENG Thirith's medical state, coercive conditions are in any case likely to be practically or legally unenforceable. It is doubtful, for instance, whether the Accused would be capable of forming an intention to violate conditions, or that penalties could properly be imposed against her in the event of their breach. Having been released from detention on grounds of mental incapacity, it is impracticable (as the Co-Prosecutors acknowledge) that the

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[80] *Prosecutor v. Radoslav Brđjanin and Momir Talić*, Decision on the Motion for Provisional Release of the Accused Momir Talić, ICTY Trial Chamber II (IT-99-36-T), 20 September 2002 ("*Talić* Decision on Provisional Release"), paras 2, 9.

[81] *Talić* Decision on Provisional Release, para. 32.

[82] *Talić* Decision on Provisional Release, para. 34, 42.

[83] *Prosecutor v. Nahak,* Findings and Order on Defendant Nahak's Competence to Stand Trial, Dili District Court (Case no. 01A/2004), 1 March 2005 ("*Nahak* Fitness Decision"), paras 162-163 (*noting* that it was "appropriate" to continue substitute restrictive measures).

[84] *Prosecutor v. Djordje Djukić*, Decision Rejecting the Application to Withdraw the Indictment and Order for Provisional Release, ICTY Trial Chamber (IT-96-20-T), 24 April 1996 ("*Djukić* Decision on Provisional Release"), p. 3.

[85] *Talić* Decision on Provisional Release, para. 32 (in relation to *Djukić* Decision on Provisional Release, p. 4).

Accused could face the prospect of renewed detention for violating conditions that she may lack the capacity either to understand or to comply with.[86]

38. Whilst for the above reasons, coercive conditions are impracticable and unenforceable in the present context, the Chamber nonetheless does not oppose many of the measures sought by the Co-Prosecutors upon release. For example, the obligation on the Accused not to interfere with the administration of justice by refraining from direct or indirect contact with any witness, expert, or victim proposed to be heard by the Chamber, or Accused other than her husband IENG Sary, already exists pursuant to Internal Rule 35 and is reaffirmed by the Chamber. The Chamber also considers it appropriate to request the Accused IENG Thirith to refrain from communicating with the media regarding proceedings in Case 002.

39. The practical difficulty and costs entailed by continuing periodic reassessments of the Accused's cognitive fitness – coupled with the experts' indication that IENG Thirith's condition is incurable and irreversible – suggest that six-monthly re-examination by court-appointed experts would not be warranted. The Chamber is nonetheless willing to consult annually with the experts to ascertain whether new treatments for progressive, dementing illnesses (in particular Alzheimer's disease) have in the interim been approved which, in the experts' opinion, are likely to reverse IENG Thirith's cognitive decline such that she would become fit to stand trial. These consultations will occur annually, commencing in March 2013, and will continue for the duration of the ECCC's existence.

40. Whilst trial proceedings against the Accused IENG Thirith are indefinitely stayed in consequence of the above, the Chamber nonetheless clarifies that the charges against the Accused are not withdrawn and the present decision makes no determination of the guilt or innocence of the Accused in relation to the charges brought against her in Case 002.

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[86] Nor would it appear feasible or reasonable to apply such penalties against a guardian or curator, if appointed in accordance with the Cambodian legal framework, on grounds that Sections 1104-1139 of the Cambodian Civil Code are designed to protect the property of a physically or mentally incapacitated individual and to provide medical care. They are not intended to ensure compliance with restrictions placed on the liberty of these persons imposed in criminal proceedings.

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER:

REAFFIRMS the findings of the Trial Chamber that the Accused IENG Thirith is unfit to stand trial;

CONFIRMS the severance of the charges against the Accused from the indictment in Case 002 pursuant to Internal Rule 89*ter*;

CONTINUES its previous stay of proceedings against the Accused IENG Thirith in Case 002 indefinitely;

CONSEQUENTLY ORDERS the immediate release of the Accused IENG Thirith from the ECCC Detention Facility;

REMINDS the Accused of her obligation pursuant to Internal Rule 35 to refrain from interference with the administration of justice, and in particular, interference with witnesses, experts or victims before the ECCC (including Accused other than her husband IENG Sary), and further requests the Accused to refrain from communicating with the media in relation to proceedings before the ECCC;

REQUESTS that the Accused remain within the territory of the Kingdom of Cambodia and that she or her guardian inform the ECCC Office of Administration prior to any change of address;

NOTES that the Trial Chamber possesses no jurisdiction pursuant to the Cambodian Civil Code to appoint a guardian or curator in respect of the Accused, which is instead within the exclusive competence of the Cambodian domestic courts;

UNDERTAKES to consult with the experts annually, commencing in March 2013 and continuing for the duration of the ECCC's existence, to ascertain whether new treatment options or therapy for progressive, dementing illnesses (in particular Alzheimer's disease) have been discovered which in their professional opinion are likely to restore the Accused's cognitive capacity such that she may become fit to stand trial;

REJECTS all other measures sought by the Co-Prosecutors;

DENIES the request of the Lead Co-Lawyers to appoint a new panel of experts; and

NOTES that this decision is appealable in accordance with the ECCC Internal Rules and applicable law.

Phnom Penh, 13 September 2012
President of the Trial Chamber

Nil Nonn