

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

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URGENT

IENG THIRITH DEFENCE REQUEST FOR IMMEDIATE RELEASE

Defence for Ieng Thirith:

PHAT Pov Seang
Diana ELLIS, QC

Supreme Court Chamber Judges:

KONG Srim, President
Motoo NOGUCHI
Agnieszka KLONOWIECKA-MILART
Chandra Nihal JAYASINGHE
SOM Sereyvuth
SIN Rith
YA Narin
MONG Monichariya
Florence MUMBA

Civil Party Co-Lead Lawyers:

PICH Ang
Elisabeth SIMONNEAU FORT

Co-Prosecutors:

CHEA Leang
Andrew CAYLEY

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I INTRODUCTION AND PETITION

1. The medical experts appointed by the Trial Chamber unanimously concluded on 29 August in their 'Summary Expert Report on Mrs. Ieng Thirith'¹ that Ieng Thirith suffers from a moderate to severe dementia.² They acknowledged that her dementing illness had become more severe since 2011.³ They concluded that Ieng Thirith remained unable to meaningfully assist in the preparation of her defence principally due to her impaired memory,⁴ and would have considerable difficulties in relation to fitness to plead and attend trial.⁵ They also emphasized that they have exhausted all available therapeutic measures and that there is currently no further treatment capable of improving her cognitive capacity.⁶
2. On 31 August 2012 in submissions to the Trial Chamber during the hearing on the issue of fitness of Ieng Thirith to stand trial, the Co-Prosecutors accepted that Ieng Thirith suffered from a progressive dementing illness (probably Alzheimer's disease) and that she remains unfit to stand trial and should be released from the ECCC Detention Facility.⁷ They invited the Trial Chamber to impose conditions upon release. The defence urged the Trial Chamber to confirm that Ieng Thirith was unfit to plead or stand trial and to allow her unconditional release.
3. On 13 September 2012, the Trial Chamber issued its 'Decision on Reassessment of Accused IENG Thirith's Fitness to Stand Trial following Supreme Court Chamber Decision on 13 December 2011' ('Trial Chamber Decision'),⁸ in which the Trial Chamber reaffirmed that accused Ieng Thirith is unfit to stand trial, continued its

¹ Summary Expert Report on Mrs. Ieng Thirith, Document No. E138/1/7/13/2, 29 August 2012.

² *Ibid.*, para. 60.

³ *Ibid.*, para. 61.

⁴ *Ibid.*, para. 62.

⁵ *Idem.*

⁶ *Ibid.*, para. 59.

⁷ Transcript of 31 August 2012, Document No. E1/119.1, pp. 102-103, 129.

⁸ Trial Chamber, Decision on Reassessment of Accused IENG Thirith's Fitness to Stand Trial following Supreme Court Chamber Decision on 13 December 2011, Document No. E138/1/10, 13 September 2012.

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previous stay of proceedings against her and consequently ordered her immediate release from the ECCC Detention Facility.⁹

4. On 14 September 2012, the Co-Prosecutors filed their 'Co-Prosecutors' Request for Stay of Release of Accused Ieng Thirith' ('Request for Stay'),¹⁰ in which, pursuant to Internal Rule 82(6), they request the President of the Supreme Court Chamber to stay the release of accused Ieng Thirith as ordered in the Trial Chamber Decision.¹¹ In their Request for Stay, the Co-Prosecutors argue that '[a]n immediate and urgent stay of the order for release is justified for the reasons set out in the Co-Prosecutors' Appeal against the Impugned Decision, a copy of which is appended to this Request.'¹²
5. On 14 September 2012, the Co-Prosecutors filed their 'Immediate Appeal against Decision on Reassessment of Accused Ieng Thirith's Fitness to Stand Trial following the Supreme Court Chamber Decision of 13 December 2011' ('OCP Appeal').¹³ In their Appeal, the Co-Prosecutors request the Supreme Court Chamber to (a) Find the instant appeal admissible in full; (b) Annul the Impugned Decision insofar as the Trial Chamber finds that it has no jurisdiction to order a continuation of judicial supervision subject to legally-justifiable conditions; and (c) Amend the Impugned Decision to require the accused (if necessary, through a guardian or a curator to be appointed by the national authorities), to comply with the specific conditions proposed by the Co-Prosecutors, in order to appropriately safeguard the competing rights and legal interests engaged by her release from detention.¹⁴

⁹ *Ibid.*, p. 19.

¹⁰ Co-Prosecutors' Request for Stay of Release of Accused Ieng Thirith, Document No. E138/1/10/1/2, 14 September 2012.

¹¹ *Ibid.*, para. 1.

¹² *Ibid.*, para. 2

¹³ Co-Prosecutors Immediate Appeal against Decision on Reassessment of Accused Ieng Thirith's Fitness to Stand Trial following the Supreme Court Chamber Decision of 13 December 2011, Document No. E138/1/10/1/1.

¹⁴ *Ibid.*, p. 10.

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6. The defence for Madame Ieng Thirith hereby respectfully requests the President of the Supreme Court Chamber to order the immediate release of the accused Ieng Thirith.

II LEGAL PROVISIONS

2.1. ECCC Law

7. Article 33 new of the ECCC Law states:

The Extraordinary Chambers of the trial court shall ensure that trials are fair and expeditious and are conducted in accordance with existing procedures in force, with full respect for the rights of the accused and for the protection of victims and witnesses. If these existing procedure do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application or if there is a question regarding their consistency with international standard, guidance may be sought in procedural rules established at the international level.

The Extraordinary Chambers of the trial court shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights.

[...]

Conditions for the arrest and the custody of the accused shall conform to existing law in force.

8. Article 35 new of the ECCC Law recognizes the presumption of innocence of all accused persons.

9. Article 13 of the Agreement between the United Nations and the Government of Cambodia stipulates:

1. The rights of the accused enshrined in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights [ICCPR] shall be respected throughout the trial process. Such rights shall, in particular, include the right to a fair and public hearing; to be presumed innocent until proved guilty

10. Internal Rule 2 stipulates:

Where in the course of ECCC proceedings, a question arises which is not addressed by these IRs, the Co-Prosecutors, Co-Investigating Judges or the Chambers shall decide in accordance with Article 12(1) of the Agreement and Articles 20 new, 23 new, 33 new or 37 new of the ECCC Law as applicable, having particular attention to the fundamental principles set out in Rule 21 and the applicable criminal procedural laws. In such a case, a proposal for amendment of these IRs shall be submitted to the Rules and Procedure Committee as soon as possible.

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11. Internal Rule 21 states:

1. The applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims and so as to ensure legal certainty and transparency of proceedings, in light of the inherent specificity of the ECCC, as set out in the ECCC Law and the Agreement. In this respect:
 - a) ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties. They shall guarantee separation between those authorities responsible for prosecuting and those responsible for adjudication;
 - b) Persons who find themselves in a similar situation and prosecuted for the same offences shall be treated according to the same rules;
 - c) The ECCC shall ensure that victims are kept informed and that their rights are respected throughout the proceedings; and
 - d) Every person suspected or prosecuted shall be presumed innocent as long as his/her guilt has not been established. Any such person has the right to be informed of any charges brought against him/her, to be defended by a lawyer of his/her choice, and at every stage of the proceedings shall be informed of his/her right to remain silent.
2. Any coercive measures to which such a person may be subjected shall be taken by or under the effective control of the competent ECCC judicial authorities. Such measures shall be strictly limited to the needs of the proceedings, proportionate to the gravity of the offence charged and fully respect human dignity.
3. No form of inducement, physical coercion or threats thereof, whether directed against the interviewee or others, may be used in any interview. If such inducements, coercion or threats are used, the statements recorded shall not be admissible as evidence before the Chambers, and the person responsible shall be appropriately disciplined in accordance with Rules 35 to 38.
4. Proceedings before the ECCC shall be brought to a conclusion within a reasonable time.

12. Internal Rule 63(3) states:

The Co-Investigating Judges may order the Provisional Detention of the Charged Person only where the following conditions are met:

- a) There is well founded reason to believe that the person may have committed the crime or crimes specified in the Introductory or Supplementary Submission; and
- b) The Co-Investigating Judges consider Provisional Detention to be a necessary measure to:
 - i) prevent the Charged Person from exerting pressure on any witnesses or Victims, or prevent any collusion between the Charged Person and accomplices of crimes falling within the jurisdiction of the ECCC;
 - ii) preserve evidence or prevent the destruction of any evidence;
 - iii) ensure the presence of the Charged Person during the proceedings;
 - iv) protect the security of the Charged Person; or
 - v) preserve public order.

13. Internal Rule 64(1) states:

At any time during a Charged Person's detention, either on their own motion or at the request of the Co-Prosecutors, the Co-Investigating Judges shall order a Charged Person's release where the requirements of Provisional Detention set out in Rule 63 above are no longer satisfied. Where the Co-Investigating Judges are considering the matter on their own motion, they shall seek the Co-Prosecutors opinion before making the order. Any such order is subject to appeal.

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14. Internal Rule 82 stipulates:

1) The Accused shall remain at liberty whilst appearing before the Chamber unless Provisional Detention has been ordered in accordance with these IRs. Where the Accused is in detention at the initial appearance before the Chamber, he or she shall remain in detention until the Chamber's judgment is handed down, subject to sub-rule 2.

2) The Chamber may, at any time during the proceedings, order the release of an Accused, or where necessary release on bail, or detain an Accused in accordance with these IRs. The Chamber shall so decide after hearing the Co-Prosecutors, the Accused and his or her lawyers.

3) The Accused, or his or her lawyers, may request the Chamber to release him or her either orally during a hearing, or by written application submitted to the Greffier of the Chamber. If the request for release is made orally, the Greffier of the Chamber shall note it on the record of the proceedings. If the request is made in writing, the Greffier shall note the date of receipt on the application, and forward it immediately to the President of the Chamber. The Chamber shall decide after hearing the Co-Prosecutors, the Accused and his or her lawyers. It shall decide as soon as possible and in any event no later than 30 (thirty) days after receiving the oral request or application, unless circumstances justify a greater period.

15. Internal Rule 104*bis* states that '[i]n the absence of any specific provision, the rules that apply to the Trial Chamber shall, *mutatis mutandis*, also apply to the Supreme Court Chamber.'

2.2. International Legal Standards

16. Article 9(1) of the International Covenant on Civil and Political Rights holds that:

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

17. Article 5 of the European Convention on Human Rights states:

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

- (a) the lawful detention of a person after conviction by a competent court;
- (b) the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law;
- (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent Legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

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(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

18. Article 6 of the European Convention further states:

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

III Admissibility and Submissions

19. The defence argues that the present request is admissible.

20. The defence contends that the continued detention of the accused under the present circumstances violates her basic rights. The Trial Chamber recognized this in its

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decision.¹⁵ It held that '[i]n the current circumstances, continued detention would violate the internationally proscribed protections against indefinite detention and the right to a trial without undue delay.'¹⁶

21. According to Internal Rule 104*bis*, '[i]n the absence of any specific provision, the rules that apply to the Trial Chamber shall, *mutatis mutandis*, also apply to the Supreme Court Chamber.' The defence underlines that Internal Rule 82(3) allows the defence to request the immediate release of an accused person at any time. In addition, the defence contends that international standards acknowledge the imminent importance of the right to remain at liberty. Therefore, these standards guarantee that the right of any accused person to request his/her immediate release when the detention appears illegal and therefore violates his/her right to remain at liberty. International standards and the principle of habeas corpus require that, at all times, a Court has jurisdiction to ensure that an individual is not illegally detained and that such a request is dealt with immediately and diligently. As a result, the defence considers the present request made before the President of the Supreme Court Chamber admissible.

22. The Co-Prosecutors' position, expressed both at the oral hearing on 31st August 2012 and in their appeal, is that there is no legal basis to detain the accused in the present circumstances¹⁷ and that there are no longer grounds to continue the detention of accused Ieng Thirith.¹⁸ Nevertheless, they request the President of the Supreme Court Chamber to stay her immediate release pursuant to Internal Rule 82(6). This is an unambiguous contradiction and should lead to the immediate release of the accused.

23. In addition, in their Request for Stay, the Co-Prosecutors argue that an immediate and urgent stay of the order for release is justified for the reasons set out in the Co-

¹⁵ Trial Chamber Decision, paras. 29, 31.

¹⁶ *Ibid.*, para. 31.

¹⁷ OCP Appeal, para. 5, referring to Transcript of 31 August 2012, Document No. E1/119.1, p. 103.

¹⁸ OCP Appeal, para. 10.

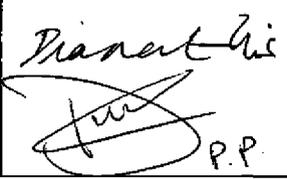
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Prosecutors' appeal against the Impugned Decision.¹⁹ However, the Co-Prosecutors, in their OCP Appeal, failed to provide any reasons or justifications for such an immediate and urgent stay of the Trial Chamber's order to release her. In particular, they have failed to justify why such detention is necessary for the period during which the Supreme Court Chamber is assessing and deciding on the OCP Appeal.

24. The defence submits that no justification has been advanced for the continuation of the detention of Ieng Thirith, a mentally unfit person, while waiting for the decision of the Supreme Court Chamber.
25. Given the urgency of the current situation, and the fact that the President of the Supreme Court Chamber has to decide on the Request for Stay before Sunday 16 September, 11.02am, the defence hereby submits the present request to immediately release Ieng Thirith to the President of the Supreme Court.

IV CONCLUSION

26. The defence respectfully requests the President of the Supreme Court Chamber to:
- (a) To find the defence request admissible;
 - (b) To deny the Co-Prosecutors Request for Stay of Release;
 - (c) To order the immediate release of Ieng Thirith.

| Party | Date | Name Lawyers | Place | Signature |
|-----------------------------------|----------------------|---------------------------------------|---------------|---|
| Co-Lawyers for Ieng Thirith | 14 September 2012 | PHAT Povv Seang Diana ELLIS, QC | Phnom Penh |  P.P. |

¹⁹ OCP Request for Stay, para. 2.