

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

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**RESPONSE BY DEFENCE FOR MADAME IENG THIRITH TO CO-PROSECUTORS APPEAL
AGAINST THE TRIAL CHAMBER'S DECISION OF 17 NOVEMBER 2011**

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I INTRODUCTION

1. On 17 November 2011 the Trial Chamber issued its Decision on Ieng Thirith's Fitness to Stand Trial ('the Decision').¹ By the unanimous decision of the Trial Chamber, Ieng Thirith ('the Respondent') was found unfit to stand trial. The Trial Chamber ordered the charges against her on the indictment in Case 002 to be severed, pursuant to Internal Rule 89*ter*, and directed a stay of the proceedings. The Trial Chamber ordered her release with a direction to notify any change of address.² The Co-Prosecutors ('the Appellant') submitted an immediate appeal against this Decision on 18 November 2011 ('the Appeal')³, pursuant to Rules 82(6), 104, 105, 106(2) and 107 of the Internal Rules, with a concurrent request for a stay of the release of the Respondent.⁴
2. On 19 November 2011, the President of the Supreme Court Chamber stayed the release of the Respondent until the Supreme Court rules on the Appeal and, subsequently, issued directions regarding the filing of further documents.⁵ On 22 November 2011, the Appellant filed their Supplementary Submissions on Appeal concerning the release of the Respondent.⁶
3. For the reasons set out below the defence submits that:
 - i) The Appeal is not admissible via Rule 104(4)(a) as the Decision does not effectively terminate proceedings.

¹ TC, Decision on IENG Thirith's Fitness to Stand Trial, 17 November 2011, Document No. E138 ('TC Decision').

² *Ibid.*, pp. 29-30.

³ OCP, Immediate Appeal Against the Trial Chamber Decision to Order the Release of Accused Ieng Thirith, 18 November 2011, Document No. E138/1/1.

⁴ OCP, Co-Prosecutors' Request for Stay of Release of Accused Ieng Thirith, 18 November 2011, Document No. E138/1/2.

⁵ SCC, Decision on Co-Prosecutors' Request to File Supplementary Submissions and Direction regarding Appeal Filings, 21 November 2011, Document No. E138/1/3.

⁶ OCP, Co-Prosecutors' Supplementary Submissions on Appeal concerning the Release of Accused Ieng Thirith, 22 November 2011, Document No. E138/1/4.

- ii) The Decision should not be annulled as the Trial Chamber did not make an error in law invalidating the Decision; or an error of fact occasioning a miscarriage of justice or an error in the exercise of its discretion resulting in prejudice to the Appellant (Rule 105(2)).
- iii) Furthermore, the Trial Chamber did not make an error of law or discernible error in the exercise of its discretion in deciding how to proceed in the absence of a supermajority regarding whether conditions should be imposed on the Respondent's release.
- iv) In the premises, the Supreme Court should confirm the Decision of the Trial Chamber and order the unconditional release of the Respondent.
- v) Further the Supreme Court should direct that the stay of proceedings should lead to a discontinuance or termination of the proceedings against the Respondent.

II BACKGROUND TO FINDING OF UNFITNESS

2.1 Experts' Reports

- 4. In order to assess the Respondent's fitness to stand trial the Trial Chamber appointed Professor Campbell, a geriatrician, to provide a report.⁷ Following receipt of his Report (the Report),⁸ and at the request of the Co-Prosecutors,⁹ the Trial Chamber appointed four additional 'Psychiatric Experts' to provide a joint report to supplement the report of Professor Campbell.¹⁰ Professor Campbell provided an addendum to the Report on 26 August 2011¹¹ and the Psychiatric Experts filed their Joint Report on 9

⁷ TC, Order Assigning Expert, 4 April 2011, Document No. E62/3.

⁸ Report Prepared in Response to the Trial Chamber's Order Assigning Expert – E62/3, Geriatric Expert Report – Mrs IENG Thirith, 23 June 2011, Document No. E62/3/6 ('Professor Campbell Report').

⁹ OCP, Co-Prosecutors' Response to Geriatric Expert Report on Accused Ieng Thirith, 25 July 2011, Document No. E62/3/6/2.

¹⁰ Dr Hout Lina, Dr Koeut Chunly, Dr Seena Fazel and Dr Calvin Fones Soon Leung. See TC, Order Appointing Experts, 23 August 2011, Document No. E111.

¹¹ Follow Up Report Concerning Mrs. Ieng Thirith in cordance to Trial Chamber's Expertise Order E62/3, Dated 4 April 2011, 26 August 2011, Document No. E62/3/12 ('Prof. Campbell Follow Up Report').

October 2011.¹² In summary, Professor Campbell concluded in his Report of 23 June 2011 that, on the basis of Respondent's history, examinations, CT head scans and blood tests, she suffered from a 'global cognitive impairment particularly evident in the domains of memory, speech, construction and frontal lobe function consistent with a dementing disorder,'¹³ which was primarily due to Alzheimer's disease.¹⁴ He stated that this 'moderately severe dementia' impaired the Respondent's ability to comprehend questions, to follow instructions, to recall events, to concentrate and to maintain a consistent line of thought.¹⁵

5. Professor Campbell considered that the Respondent's drug regime might be contributing to the impairment of her cognitive function and recommended a gradual reduction of three of her prescribed drugs to see if this improved her condition.¹⁶ The reduction commenced with the two benzodiazepine drugs and then the anti-psychotic medication. The Respondent was subsequently reassessed by Professor Campbell, with the assistance of Dr Chak Thida. They concluded that her cognitive impairment showed no improvement and thus her inability to participate in her defence was unchanged.¹⁷ Professor Campbell confirmed these opinions when he gave evidence at a preliminary hearing on the Respondent's fitness to stand trial from 29 August to 31 August 2011.¹⁸
6. On 9 October 2011, following a joint assessment of the Respondent, the Psychiatric Experts filed their joint report in which they concluded that the Respondent suffered from dementia, with a moderately impaired memory and a mild to moderate

¹² Expertise Report prepared in Response to the Trial Chamber's Expertise Order Document Number E111, dated 23 August 2011, 9 October 2011, Document No. E111/8 ('Psychiatric Expert Report').

¹³ Professor Campbell Report, para. 28.

¹⁴ *Ibid.*, para. 32.

¹⁵ *Ibid.*, para. 35.

¹⁶ *Ibid.*, paras. 42-45.

¹⁷ Professor Campbell Follow Up Report, paras. 6 and 8.

¹⁸ See Transcript of Preliminary Hearing on Fitness to Stand Trial, 29 August 2011, Document No. E1/8.1; Transcript of Preliminary Hearing on Fitness to Stand Trial, 30 August 2011, Document No. E1/9.1; Transcript of Preliminary Hearing on Fitness to Stand Trial, 31 August 2011, Document No. E1/10.1

impairment of her other cognitive abilities.¹⁹ They stated that the CT scans from 2007, 2009 and 2011 showed a progressive, generalized cerebral atrophy consistent with the diagnosis of dementia.²⁰ They agreed with Professor Campbell that the likely diagnosis was Alzheimer's disease²¹ and that the Respondent was at stage 5 on the 7-point scale (moderately severe cognitive decline).²² The Psychiatric Experts also unanimously agreed that the Respondent lacked the capacity to understand court proceedings or instruct her counsel and therefore ultimately felt that she was not fit to stand trial.²³ Their principle findings are set out at length at paragraphs 40 to 51 of the Decision.

7. Two of the Psychiatric Experts, Dr Huot Lina and Seena Fazel, gave evidence to the Trial Chamber, at a further hearing on the Respondent's fitness to stand trial, on 19 and 20 October 2011.²⁴ They reiterated the conclusions of their Joint Report and emphasised the progressive nature of the disease, commenting on how the clinical picture is one of 'gradual insidious decline' and the fact that Alzheimer's is not a reversible or treatable form of dementia.²⁵

2.2 The Trial Chamber Decision

8. The Trial Chamber considered the evidence and noted that all the experts concurred that the Respondent suffered from dementia, most likely Alzheimer's, and had a significant cognitive impairment, most notably in relation to her short term and long term memory.²⁶ They also noted that the Appellant accepted that the Respondent

¹⁹ Psychiatric Expert Report, para. 27.

²⁰ Psychiatric Expert Report, para. 35.

²¹ *Ibid.*, para. 36.

²² *Ibid.*, para. 36.

²³ *Ibid.*, paras. 43, 45 and 51.

²⁴ See Transcript of Hearing on Specification of Civil Party Reparations Awards and Accused Ieng Thirith's Fitness to Stand Trial, 19 October 2011, Document No. E1/11.1; Transcript of Hearing on Specification of Civil Party Reparations Awards and Accused Ieng Thirith's Fitness to Stand Trial, 20 October 2011, Document No. E1/12.1.

²⁵ Transcript of 19 October 2011, p. 129 and p.130.

²⁶ TC Decision, para. 52.

suffered from considerable memory impairment.²⁷ Furthermore, the Chamber pointed out that all of the experts had considered the possibility that the Respondent could have attempted to feign cognitive impairment but found it unlikely that she was. The tests took this factor into account.²⁸

9. The Trial Chamber agreed with the experts that, as a result of her long term and short term memory loss, the Respondent would be unable to understand the course of the proceedings sufficiently to enable her to adequately instruct counsel and effectively participate in her defence, thereby compromising her fundamental fair trial rights.²⁹ As a result, it declared her unfit to stand trial, severed her case from that of the co-accused, stayed proceedings against her, and unanimously held that it no longer had any basis to detain the Respondent.³⁰

10. The Trial Chamber, however, was divided in its opinion as to the consequences that should flow from its decision; the three national judges were of the view that the Respondent should be compulsorily detained in hospital and undergo medical treatment/therapy for a defined period of time,³¹ whilst the international judges were of the opinion that the Respondent should be unconditionally released.³² Notwithstanding this internal dissent the Trial chamber agreed unanimously that, in absence of agreement on whether the Trial Chamber has jurisdiction to impose conditions upon her release, the Respondent should be released from detention without conditions, save a direction to notify any change of address.³³

²⁷ TC Decision, para. 15 referring to Transcript of 20 October 2011, p. 107.

²⁸ Psychiatric Expert Report, para. 34; Transcript of 29 August 2011, p. 138; Transcript of 30 August 2011, p. 54.

²⁹ TC Decision, para. 59.

³⁰ TC Decision, paras. 61, 62 and 77.

³¹ TC Decision, paras. 63-67.

³² TC Decision, paras. 69-77.

³³ TC Decision, paras. 81-82 and findings.

III LEGAL PROVISIONS

3.1 Admissibility and Grounds of Appeal

11. Internal Rule 104(4) states that the following decisions of the Trial Chamber are subject to immediate appeal:

- (a) decisions which have the effect of terminating proceedings.
- (b) decisions on detention and bail under Rule 82.

12. Furthermore, in accordance with Rule 104(1) and Rule 105, an appeal against a judgment or decision of the Trial Chamber shall be decided by the Supreme Court on the following grounds only:

- (a) an error on a question of law invalidating the judgment or decision
- (b) an error of fact which has occasioned a miscarriage of justice, or
- (c) a discernible error in the exercise of the Trial Chamber's discretion which has resulted in prejudice to the appellant

3.2 Relevant Legal Provisions

13. The following provisions are relevant:

Article 4 of the Agreement between the United Nations and the Government of Cambodia - Decision Making

1. The judges shall attempt to achieve unanimity in their decisions. If this is not possible, the following shall apply:

- a. A decision by the Trial Chamber shall require the affirmative vote of at least four judges;
- b. A decision by the Supreme Court Chamber shall require the affirmative vote of at least five judges.

2. When there is no unanimity, the decision of the Chamber shall contain the views of the majority and the minority.

Article 13 of the Agreement between the United Nations and the Government of Cambodia - Rights of the accused

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

Article 33 new of the ECCC Law

If [...] existing procedure[s] do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application [...] guidance may be sought in procedural rules at the international level.

Article 223 of the Code of Criminal Procedure of the Kingdom of Cambodia

An investigating judge may place a charged person under judicial supervision if the charged person is under investigation for an offence punishable by imprisonment.

Article 9 of the International Covenant on Civil and Political Rights states:

1. 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.

Article 8 of the European Convention on Human Rights states:

1. Everyone has the right to respect for his private and family life, his home and his correspondence...

IV ADMISSIBILITY OF THE CO-PROSECUTORS' APPEAL

14. It is submitted that the Trial Chamber's Decision to order the unconditional release of the Respondent does not effectively amount to a termination of proceedings and therefore the Appellant's appeal under Rule 104(4)(a) is not admissible.

15. The Trial Chamber expressly stated that proceedings have been stayed and not terminated or discontinued and did not accede to the Defence submission to discontinue the proceedings.³⁴ Consequently, whether the stay is *likely* to be permanent or not, it has not brought proceedings to an end³⁵ and the Chamber remains seized of the indictment. Blacks' Law Dictionary provides definitions of the following terms:

Stay – 1. The postponement or halting of a proceeding, judgment, or the like. 2. An order to suspend all or part of a judicial proceeding or a judgment resulting from that proceedings.³⁶

³⁴ 20th October Defence Closing Submission Transcript

³⁵ TC Decision, paras. 61, 64 and 78.

³⁶ Blacks' Law Dictionary (West Group, 2004), 8th edition, p. 1453.

Termination - 1. The act of ending something. 2. The end of something in time or existence; conclusion or discontinuance.³⁷

16. The Appellant acknowledges that the proceedings against the Respondent remain 'at least nominally, ongoing',³⁸ and that there is a distinction between 'staying' and 'terminating' proceedings, as they state in their Supplementary Submission that 'where proceedings have been stayed, rather than terminated...'³⁹ and 'where proceedings have been stayed at the trial stage, the Appellant remains an adversarial party to the proceeding.'⁴⁰
17. In addition, the Appellant retains the inherent ability to ask the Trial Chamber to reassess the accused and recommence the trial at any time and, therefore, proceedings have not 'effectively been terminated.' In particular the Appellant can request the appointment of additional experts, re-examination or further medical tests by virtue of Rules 31 and 32 and the Trial Chamber may hold a trial management meeting at any time in accordance with Rule 79. Consequently, the Trial Chamber's 'stay' does not amount to a 'termination' of the proceedings pursuant to Internal Rule 104(4)(a).
18. Further, the Trial Chamber informed the 'Co-Prosecutors that they may, of their own motion, periodically request reassessment of Ieng Thirith...'⁴¹ thus indicating that the matter was not concluded by the stay. The Appellant could establish a 'mechanism to monitor the ongoing health status of the accused' if permitted to do so on an application to the Trial Chamber. If, which is not conceded, there was any uncertainty or ambiguity in the wording used by the Trial Chamber to so 'inform' the Respondent, this error is not such to affect the substance of the Trial Chamber's reasoning or invalidate the Decision.

³⁷ *Ibid.*, p. 1511.

³⁸ Co-Prosecutors Appeal, para. 11.

³⁹ Co-Prosecutors Supplementary Submissions, para. 4.

⁴⁰ Co-Prosecutors Supplementary Submissions, para. 5.

⁴¹ TC Decision, p. 30.

V SUBMISSIONS

19. It is respectfully submitted that there is no basis upon which to annul the Trial Chamber's decision and the Respondent should therefore be unconditionally released forthwith.

5.1 No Error in Law

20. The Appellant submits that the Trial Chamber's Decision to grant the unconditional release of the Respondent was based on an error of law, in particular a failure to consider Rules 63, 64 and 82, which govern provisional detention, and a divergence from international jurisprudence concerning the consequence of a finding of unfitness to stand trial.⁴²

21. The Respondent submits that, for the reasons outlined below, the Trial Chamber made no errors of law invalidating the decision and was right to conclude that it has no legal basis to detain the Respondent in circumstances where proceedings have been stayed without any reasonable prospect being resumed.⁴³

22. The Respondent contends that Rules 63 and 64 are applicable to the pre-trial stage before the Co-Investigating Judges and not to proceedings before the Trial Chamber. Unlike Rule 64, which explicitly states that the Co-Investigating Judges shall order release 'where the requirements of provisional detention *set out in Rule 63* do not apply,' Rule 82 makes no specific reference to this provision; rather it confers a wide discretion on the Trial Chamber to order the release of an accused whenever it sees fit, which inferentially must include the situation where proceedings are stayed or adjourned.

⁴² Co-Prosecutors Appeal, paras. 8-14; Co-Prosecutors Supplementary Submissions, paras. 7 -18.

⁴³ TC Decision, paras. 61, 72 and 77.

23. If, which is not accepted, the Trial Chamber ought to have considered the provisions of Rules 63 and 64, this does not invalidate its decision to release the Respondent which was taken against a background of evidence that the detention of the Respondent might be an aggravating factor contributing to her cognitive impairment.⁴⁴ Furthermore, that there was considerable uncertainty as to whether the Respondent would improve sufficiently to stand trial. Neither the national nor the international judges was in favour of continued detention. The disagreement was as to whether the Respondent should be compulsorily hospitalized for a period of months, in order to receive treatment. Rule 63(3) sets out the conditions which have to be met before provisional detention can be ordered. There is no condition which provides for compulsory hospitalization for an accused to obtain medical treatment. The national judges, in their opinion as to the consequences which should flow from the Trial Chambers decision had recourse to Article 223(11) of the Code of Criminal Procedure of the Kingdom of Cambodia.⁴⁵ It is respectfully submitted that this Article deals with an investigating judge imposing judicial supervision on a charged person and is not applicable to the current state of affairs. In all the circumstances, continuing detention would violate the Respondent's Right to a fair trial and liberty (Article 9 (3) ICCPR).⁴⁶

24. Further, contrary to the Appellant's assertions,⁴⁷ the Respondent submits that international rules and jurisprudence do not demonstrate that restrictive conditions are the norm in circumstances where proceedings against an accused are stayed because of an accused's unfitness to stand trial. Although the Appellant refers to *Dukić*,⁴⁸ *Talić*,⁴⁹ *Stanišić*⁵⁰ and *Kovacević*⁵¹ as examples of cases where proceedings were not

⁴⁴ See paras. 38-41 of this Response.

⁴⁵ TC Decision, para. 66.

⁴⁶ TC Decision, para. 80.

⁴⁷ Co-Prosecutors Appeal, paras. 13-14; See also Co-Prosecutors Supplementary Submissions, paras. 8-18.

⁴⁸ *Prosecutor v. Djukić*, Case No. IT-96-20-T, Decision rejecting the Application to withdraw the Indictment and Order for Provisional Release, 24 April 1996.

⁴⁹ *Prosecutor v. Talić*, Case No. IT-99-36-T, Decision on the Motion for Provisional Release of the Accused Momir Talić, 20 September 2002.

terminated following findings of unfitness,⁵² this does not, it is submitted, lend any support to the argument that the Chamber erred in law in their decision to release the Respondent from detention.

25. The Respondent contends that a decision to release an accused (with or without conditions) following a finding of unfitness must be made on a case-by-case basis as each case turns on its own facts. This was recognized in the *Talić* case, where it was stated that a Trial Chamber, when assessing whether an accused should be released, must 'focus on the concrete situation of the individual applicant' and consequently that the provisions on provisional release 'cannot be applied *in abstracto* but must be applied with regard to the factual basis of the particular case'.⁵³ Rulings rendered by international tribunals do not demonstrate a 'norm'. They provide assistance only to the extent that they identify individual situations and the decisions taken by the judges in the light of the particular health issues of the accused persons and the prognosis for improvement.

26. In any event, in the cases of both *Talić* and *Dukić*, the defendants were not detained in custody nor hospitalized; rather they were released to their home addresses, albeit with conditions attached.⁵⁴ At no point did the Trial Chambers at the International Criminal Tribunal for former Yugoslavia request detention to be maintained, as the Appellant erroneously states in the Appeal.

27. It is respectfully submitted that the Respondent's medical condition can be distinguished from that of the accused in the cases referred to by the Appellant. Significantly, in both *Talić* and *Dukić* the accused were suffering from terminal physical conditions, not a progressive degenerative mental illness, as in the present

⁵⁰ *Prosecutor v. Stanišić*, Case No. IT-03-69-T, Decision on Provisional Release, 26 May 2008.

⁵¹ *Prosecutor v. Kovacević*, Case No. IT-01-42/2-I, Public Version of the Decision on Accused's Fitness to Enter a Plea and Stand Trial, 12 April 2006.

⁵² Co-Prosecutors Appeal, para. 13; Co-Prosecutors Supplementary Submissions, paras. 10, 11, 13, 14.

⁵³ *Prosecutor v. Talić*, para. 21.

⁵⁴ *Prosecutor v. Talić*, pp. 13-14 and *Prosecutor v. Dukić*, pp. 4-5.

case. Also *Talić* may be distinguished from other cited cases in that provisional release was sought after the trial had commenced.

28. In *Stanišić*, the accused, although hospitalized, did not suffer from a degenerative illness, such as dementia, and had the prospect of eventually being determined fit to stand trial (which he was in due course). Accordingly, the Appellant derives no support from the cited cases for the proposition that the Respondent should remain in detention or be released with strict conditions.⁵⁵
29. Additionally, the case of *Kovacević*, as the international judges of the Trial Chamber point out,⁵⁶ can be distinguished from the present case as the accused sought provisional release from detention to enable him to seek psychiatric treatment and, unlike in these proceedings, both parties agreed that he was in urgent need of treatment in a mental health facility.⁵⁷
30. The Respondent maintains that the Trial Chamber did not err in failing to follow the approach set out in the Rules of the International Criminal Court given that these specifically refer to an *adjournment* rather than a stay in proceedings.⁵⁸ Furthermore, there is nothing in the Decision of the Trial Chamber as it stands which prevents the Appellant from requesting the court to review the Respondent's condition.
31. Accordingly, the request to keep the Respondent in detention is unjustified and unduly restrictive, and punitive. The comments made in the case of *Talić* are pertinent and are relied on by the Respondent. It was stated that procedural measures 'should never be capricious or excessive. If it is sufficient to use a more lenient measure, that

⁵⁵ Co-Prosecutors Supplementary Submissions, para. 13.

⁵⁶ TC Decision, para. 75.

⁵⁷ *Prosecutor v. Kovacević*, para. 10.

⁵⁸ See ICC Rules on Procedure and Evidence, Rule 135.

measure must be applied’;⁵⁹ significantly, it is noted that provisional detention should not be used a punitive measure. Therefore, it is submitted that the Respondent should be released unconditionally.

5.2 No Error of Fact occasioning a Miscarriage of Justice and/or no Error in the Exercise of the Trial Chamber’s Discretion

32. In coming to its decision to release the Respondent from detention and not impose a trial of Donepezil and/or a treatment regime, the Appellant is wrong to suggest that the Trial Chamber *ignored* the opinion of the experts that medical and other remedial measures might result in an improvement in the Respondent’s condition.⁶⁰

33. It is submitted that the Trial Chamber clearly and demonstrably took the experts’ opinions carefully into consideration when reaching its Decision⁶¹ and in doing so had regard to the likelihood of any measures meaningfully improving the Respondent’s condition and to the overall prognosis. It is for the Trial Chamber to consider and weigh up the evidence before it and reach a conclusion. In particular, the Trial Chamber considered all of the evidence relating to the effectiveness of the proposed medication, Donepezil, and of any other therapies available and was entitled to conclude that, if any benefit accrued, it would be short term and ultimately not cause the Respondent to be fit to stand trial.⁶² This was a proper and reasoned exercise of its discretion based on all the available evidence.

34. In any event, it is clear from international jurisprudence that a court is not bound to follow expert testimony, for example the Special Panel for Serious Crimes⁶³ stated in *Nahak* that:

⁵⁹ *Prosecutor v. Talić*, para. 23 citing *Prosecutor v. Jokić*, Case No. IT-02-53-PT, Decision on Request for Provisional Release of Accused Jokić, 28 March 2002, para. 18.

⁶⁰ Co-Prosecutors Appeal, para. 15; Co-Prosecutors Supplementary submissions, para. 19 (emphasis added).

⁶¹ TC Decision, paras. 46, 53, 64 -68 and 71 -73.

⁶² TC Decision, para. 53.

⁶³ Dili District Court East Timor, The Special Panel for Serious Crimes.

'In cases where an expert witness testifies, the court must decide what weight to give to his or her testimony but is not bound by the expert's opinion concerning competence. This is because a decision with respect to competence is a legal and not a scientific determination.'⁶⁴

35. The Appellant incorrectly states that the Chamber's decision not to impose a trial of Donepezil was made on the basis that this medication is not available in Cambodia.⁶⁵ The Respondent points out that this was not the sole, or determinative reason, underlying the Chamber's decision, which comprehensively took into account the opinions of the experts, as outlined below.

36. Professor Campbell stated in evidence that he had recommended a trial of the drug Donepezil, however, he cautioned that it was only shown to be effective in about one third of people who take it and that it was possible 'but unlikely'⁶⁶ that there would be any significant improvement in cognitive ability. Furthermore, he stated that any such improvement was likely to be 'modest at best'⁶⁷ after which the decline in the Respondent's condition will continue.⁶⁸ In respect of anything else that could be done to improve the situation, he also stated that 'it is unlikely that any moves would - psychosocial moves would improve the situation and the increase in stimulation or activity'.⁶⁹ Similarly, the Psychiatric Experts agreed that Donepezil would only lead to small improvements and these are limited to a minority of individuals who take it.⁷⁰ They also expressed concerns about the potential side effects of the drug and temporary nature of any improvement.⁷¹

37. Ultimately, the Trial Chamber's unanimous decision not to implement a trial of Donepezil was well-reasoned and based on a number of factors; namely the

⁶⁴ *Prosecutor v. Nahak*, Case No. 01A/2004, Findings and Order on Defendant Nahak's Competence to Stand Trial, 1 March 2005, para. 120.

⁶⁵ Co-Prosecutors Supplementary Submissions, para. 21.

⁶⁶ Transcript of 30 August 2011, pp. 91-92.

⁶⁷ Prof. Campbell Follow Up Report, para. 8(ii).

⁶⁸ Transcript of 29 August 2011, p. 140 and Transcript of 30 August 2011, p. 66.

⁶⁹ Transcript of 30 August 2011, p. 94.

⁷⁰ Psychiatric Expert Report, para. 37.

⁷¹ Transcript of 20 October 2011, pp. 75-76.

progressive nature of the illness; the remote prospect of the drugs producing any significant improvement in her condition which would, in any event only be temporary; the difficulty in monitoring and administering the drug in Cambodia and the fact that the reduction in the Benzodiazepine medication had not had any effect in improving the Respondent's memory.⁷²

38. Consequently, the decision not to impose conditions upon the Respondent on release, such as treatment or therapy, was neither an error of fact nor an improper exercise of the Trial Chamber's discretion where it is evident that it took into account the progressive nature of the Respondent's condition and the likelihood of her ever becoming fit to stand trial. The International Judges set out the unfortunate position as follows:

'In the opinion of all experts, a more stimulating environment might be achieved were she to be release to her home. However, they did not suggest at any stage that she would recover. Further, none of these measures, whether medical or therapeutic, will reverse or treat effectively her current level of dementia (noted by the psychiatric experts to be stage 5 on a 7 point scale or "early dementia: moderately severe cognitive decline" and degenerative).'⁷³

39. Furthermore, it is submitted that the Trial Chamber properly took into account the experts' evidence regarding the detrimental effect of detention on the Accused condition and the fact that none of the experts considered that a hospital environment was necessary or appropriate for her. In this regard, the Trial Chamber heard evidence from Professor Campbell that the restricted environment within the Detention Centre was felt to have adversely affected the Respondent's condition. In his first Report he stated that one of the factors affecting the Respondent's cognitive function was her 'restricted environment and stimulation.'⁷⁴ At the preliminary hearing on fitness to stand trial, he gave evidence that the progressive nature of the Respondent's disorder 'needs to be taken in conjunction with the circumstances that she was in over that 18-

⁷² TC Decision, paras. 46 and 53. In fact the Trial Chamber erroneously referred to the initial reduction being to anti-psychotropic medication when this was only commenced after Benzodiazepine reduction was well under way.

⁷³ TC Decision, para. 72.

⁷⁴ Prof. Campbell Report, para. 32.

month to 2-year period where those circumstances, or lack of outside stimulation, the pressures that she was under, incarceration, will also have added to the cognitive function, her mood, as well.’⁷⁵ This aspect was acknowledged by the Appellant in their closing submissions.⁷⁶

40. The Psychiatric Experts also opined that treatment is only likely to have any real effect on the Respondent’s condition in a less restricted environment, as opposed to detention or hospitalization.⁷⁷ For example, Dr Fazel stated that:

‘....And there are other things which may be beneficial but are more difficult, I think, to implement in the current setting, and that is physical exercise some people find beneficial, and an activity which stimulates her mind, which is called conscious stimulation in jargon, I think is simply put more simply is really an activity -- any activities, often in a group setting, which stimulate an individual’s thinking and reasoning and use of their memory and other related activities...’⁷⁸

41. In addition, it should be noted that, whilst the Respondent has been hospitalized on many occasions during her 4 year period of detention on account of physical health problems, it has never been suggested that she should be receive in-patient treatment for her dementia. If the Supreme Court Chamber were to agree with the Appellant on the need to ‘exhaust all possibilities’,⁷⁹ then it must surely follow from this that release from the restricted environment of detention is necessary in order do everything possible to improve the Respondent’s condition. Any additional mental stimulation of the Respondent through photographs, videos and documents, does not require hospitalization. It could be better achieved in a home environment.

5.3 There was no Error of Law or Discretion in the Decision on how to proceed in Absence of a Supermajority.

⁷⁵ Transcript of 30 August 2011, p. 60; See also Transcript of 29 August 2011, pp. 106-107 and p. 131.

⁷⁶ Transcript of 20 October 2011, p. 108.

⁷⁷ Transcript of 19 October 2011, pp. 112-113.

⁷⁸ Idem.

⁷⁹ Co-Prosecutors Supplementary submission, para. 25; Transcript of 20 October, p. 109.

42. The Supreme Court should reject the Appellant's argument that the fact that the International Judges' position on the substantive question on the consequences of unfitness of the Accused has prevailed over the three Cambodian Judges amounts to an error in law and/or an exercise of discretion.⁸⁰
43. It is relevant and significant to note the Trial Chamber was unanimous on the question of whether the Respondent should be released from the Detention Centre; both the national and international judges were of the view that the Respondent should no longer stay in provisional detention.⁸¹ Furthermore, the Trial Chamber as a whole (and not a minority) decided that, in view of the absence of a supermajority decision on the consequences of the unfitness of the Respondent, she could not remain in detention in the ECCC Detention Facility⁸² and should be released unconditionally.⁸³
44. In the absence of a supermajority and of any guidance from the ECCC Laws and Internal Rules⁸⁴, the Trial Chamber should take its decision in a manner most favourable to the Respondent. The Trial Chamber rightly decided that between enforced confinement in a hospital and unconditional release, unconditional release was most favourable to the Accused as, pursuant to the presumption of innocence, liberty is the norm and detention or hospitalization under compulsion is the exception.⁸⁵
45. An example of where the Trial Chamber failed to obtain a supermajority (on the question on the Statute of Limitations for Domestic Crimes in Case 001) occurred in the *Duch* Case. There the Chamber concluded that the absence of the required majority 'creates a barrier to the continuation of the prosecution against the Accused

⁸⁰ Co-Prosecutors Appeal, paras. 17-18.

⁸¹ TC Decision, para. 77.

⁸² TC Decision, para. 77.

⁸³ TC Decision, paras. 80-81.

⁸⁴ Article 4 of the Agreement is silent on the consequences of a failure to reach a supermajority.

⁸⁵ TC Decision, para. 80.

for domestic crimes before the Trial Chamber,⁸⁶ therefore upholding the interpretation most favourable to the Accused.

46. In the premises, it is therefore submitted that the Respondent should be released unconditionally.

5.4 If, contrary to the Respondent's Submission the Decision is Annulled or Amended, the Respondent should still be Released from Detention subject to Conditions

47. It is the Respondent's principle submission that she should be unconditionally released. In the event that the Supreme Court does not so order, it is submitted that the justice of the situation will be met by releasing the Respondent subject to the following conditions:

- a) to reside at an address(es) notified to the Trial Chamber on a 'strictly confidential' basis;
- b) to undergo any such treatment as the Court so orders for a defined period of time, following which there should be an independent assessment of her mental condition undertaken by an expert not involved in any current treatment.
- c) to be provided with the security services protection pursuant to Article 24 of the Agreement for the duration of the treatment period.

VI CONCLUSION

48. The Respondent respectfully requests the Trial Chamber to:

- a. Allow an oral hearing of the Appeal

⁸⁶ Case No. 001/18-07-2007/ECCC/TC, TC, Decision on the defence preliminary objection concerning the statute of Limitations of Domestic Crimes, 26 July 2010, Document No. E187, para. 56.

- b. Reject the Appeal in its entirety, release the Respondent unconditionally and direct that the stay of proceedings should lead to a discontinuance or termination of the proceedings against her.
- c. In the alternative, release the Respondent with the conditions outlined above and order a further review of her condition in no more than six months' time undertaken by an expert independent of the treating doctors.

Party	Date	Name Lawyers	Place	Signature
Co-Lawyers for Ieng Thirith	28 November 2011	PHAT Pou Seang Diana ELLIS, QC	Phnom Penh	