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ជាតិ សាសនា ព្រះមហាក្សត្រ

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi



អង្គជំនុំជម្រះតុលាការកំពូល
Supreme Court Chamber
Chambre de la Cour suprême

សំណុំរឿងលេខ: ០០២/១៩-កញ្ញា-២០០៧-អ.វ.ត.ក-អ.ជ.ស.ដ/អ.ជ.ត.ក(១៦)
Case File/Dossier N°. 002/19-09-2007 ECCC-TC/SC (16)

**Before:** **Judge KONG Srim, President**
**Judge Chandra Nihal JAYASINGHE**
**Judge Agnieszka KLONOWIECKA-MILART**
**Judge MONG Monichariya**
**Judge Florence Ndepele Mwachande MUMBA**
**Judge SOM Sereyvuth**
**Judge YA Narin**

**Date:** **14 December 2012**
**Language(s):** **English/Khmer**
**Classification:** **PUBLIC**

# DECISION ON IMMEDIATE APPEAL AGAINST THE TRIAL CHAMBER'S ORDER TO UNCONDITIONALLY RELEASE THE ACCUSED IENG THIRITH

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**Accused**
IENG Thirith

**Guardian for the Accused**
IENG Vichida

**THE SUPREME COURT CHAMBER** of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea between 17 April 1975 and 6 January 1979 ("Supreme Court Chamber" and "ECCC", respectively) is seized of the "Immediate Appeal against Trial Chamber Decision on Reassessment of the Accused IENG Thirith's Fitness to Stand Trial Following the Supreme Court Chamber Decision of 13 December 2011", filed by the Co-Prosecutors on 14 September 2012 ("Immediate Appeal").[1]

## I. PROCEDURAL HISTORY

1. 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 of 13 December 2011"[2] ("Impugned Decision") in which it reaffirmed its previous conclusion that IENG Thirith remains unfit to stand trial due to a progressive, dementing illness (most likely Alzheimer's disease) and found that there appears to be no reasonable prospect that her cognitive impairment can be reversed. As a consequence, the Trial Chamber ordered its previous stay of proceedings to continue indefinitely and the immediate and unconditional release of the Accused.

2. Within 24 hours of the Impugned Decision, the Co-Prosecutors filed a request to stay the release order to the President of the Supreme Court Chamber,[3] together with a copy of their Immediate Appeal in which the Co-Prosecutors requested leave to file supplementary written submissions.[4]

3. On 16 September 2012, the President of the Supreme Court Chamber stayed the release order insofar as it orders that the Accused be unconditionally released and ordered that pending determination of the Immediate Appeal, the Accused be released as long as she informs the Court of her address, surrenders her passport and any travel documents, remains within the territory of Cambodia and respond to any summon issued by the Court.[5] The Accused was released from the ECCC Detention Facility on that day.

[1] E138/1/10/1/1.
[2] E138/1/10.
[3] Co-Prosecutors' Request for Stay of Release of Accused IENG Thirith, 14 September 2012, E138/1/10/1/2.
[4] Immediate Appeal, para. 3(b).
[5] Decision on Co-Prosecutors' Request for Stay of Release Order of IENG Thirith, 16 September 2012, E138/1/10/1/2/1.

4. On 17 September 2012, the Supreme Court Chamber granted leave to the Co-Prosecutors to file supplementary written submissions,[6] which they did on 28 September 2012.[7]

5. The Co-Lawyers for the Accused filed their Response on 8 October 2012,[8] and requested an oral hearing on the Appeal.

6. The Supreme Court Chamber granted the Defence request[9] and held an appeal hearing on 13 November 2012. In addition to hearing oral submissions from Prosecution and counsel for the Defence, the Supreme Court Chamber questioned the Accused and her general guardian, Mrs. IENG Vichida, who were both present.

## II. CONTEXTUAL BACKGROUND

7. Before summarizing the Impugned Decision and related submissions, it is instructive to recall the factual and procedural background from which they originate.

8. Following a request filed by the Defence for IENG Thirith on 21 February 2011 alleging that "the mental condition of the Accused [inhibits] the Defence in its ability to prepare for the forthcoming trial",[10] the Trial Chamber appointed two groups of experts to assess the Accused's fitness to stand trial: first, a Geriatrician (Professor A. John Campbell), supported by a psychiatrist (Dr. KA Sunbaunat), and then, four psychiatrists (Dr. HUOT Lina, Dr. KOEUT Chhunly, Dr. Seena Fazel and Dr. Clavin Fones Soon Leng).[11] The appointed experts conducted a series of tests between April and October 2011. They all concluded that the Accused suffered from "moderately severe dementing illness, most probably Alzheimer's disease".[12] The experts

[6] Decision on Co-Prosecutors' Request to File Supplementary Submissions on the Appeal Against the Release Order of IENG Thirith, 17 September 2012, E138/1/10/1/3/1.
[7] Co-Prosecutors' Supplementary Submissions, 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, 28 September 2012, E138/1/10/1/5 ("Co-Prosecutors' Supplementary Appeal Submissions").
[8] Defence Response to 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 and Co-Prosecutors' Supplementary Submissions, 8 October 2012, E138/1/10/1/5/3 ("Defence Response").
[9] Order Scheduling Appeal Hearing, 5 November 2012, E138/1/10/1/5/5.
[10] Defence Request for Appointment of a Neuropsychiatrist to Assess Madame IENG Thirith's Fitness to Stand Trial, 21 February 2011, E52, para. 36.
[11] Decision on IENG Thirith's Fitness to Stand Trial, 17 November 2011, E138, para. 1 ("First TC Fitness Decision").
[12] Geriatric Expert Report of IENG Thirith dated on 23 June 2011 in Response to Trial Chamber's Order Assigning Expert – E62/3, 23 June 2011, E62/3/6, para. 40 ("Expert Geriatrician's Report"); Follow Up Report Concerning Mrs. IENG Thirith in Accordance with Trial Chamber's Expertise Order E62/3, Dated 4 April 2011, 26 August 2011, E62/3/12 ("Follow-up Report of Geriatrician"). *See also* Expertise Report Prepared in Response to the Trial Chamber's Expertise Order Document Number E111, 23 August 2011, 9 October 2011, E111/8, para. 36 ("Psychiatric Experts' Report"), stating that "[o]n balance, we would agree with a clinical diagnosis of Alzheimer's disease".

noted that the trial of Donepezil, a drug prescribed for Alzheimer's disease that is effective in one third of patients,[13] coupled with occupational therapy, could possibly lead to a minor improvement of the Accused's cognitive functions.[14]

9. In a decision issued on 17 November 2011 ("First TC Fitness Decision"), the Trial Chamber unanimously declared the Accused unfit to stand trial. As a consequence, the Trial Chamber ordered the severance of the charges against the Accused, declared the proceedings against the Accused to be stayed and ordered the release of the Accused from detention. The Trial Chamber failed to reach an agreement as to whether the Accused should be ordered to seek further medical treatment or be unconditionally released. Three Judges were of the view that the Accused should be provisionally released with certain conditions and transferred to a hospital in order to receive treatments recommended by medical experts, based on Article 223(11) of the Code of Criminal Procedure of Cambodia ("CCP") and international jurisprudence.[15] The two other Judges were of the view that there is no legal basis to impose any conditions on the Accused's release or to order her hospitalization as the proceedings had been stayed without any reasonable prospect of resuming and concluded that unconditional release was the only option available.[16] In the absence of four affirmative votes, the Trial Chamber unanimously agreed that the consequence of such a disagreement was an unconditional release.

10. The Supreme Court Chamber, having considered the appeal by the Co-Prosecutors, set aside the Trial Chamber's release order on 13 December 2011.[17] The Supreme Court Chamber ordered additional treatment for the Accused to be carried out in a hospital or other appropriate facility, with an examination of the Accused to determine whether she is fit to stand trial to be conducted within six months from the start of treatment.[18] The decision of the Supreme Court Chamber was based on three main holdings.

11. Firstly, the Supreme Court Chamber found that "[t]he stay of proceedings ordered by the Trial Chamber is not a permanent disposition of the proceedings".[19] In particular, the Chamber held that:

[13] Follow-up Report of Geriatrician, para. 8.
[14] Psychiatric Experts' Report, para. 38.
[15] First TC Fitness Decision, paras 65-67.
[16] First TC Decision, para. 74-76.
[17] Decision on Immediate Appeal Against the Trial Chamber's Order to Release the Accused IENG Thirith, 13 December 2011, E138/1/7 ("First Appeal Decision"), Disposition.
[18] First Appeal Decision, Disposition.
[19] First Appeal Decision, para. 38.

> "A 'stay' refers to '[t]he postponement or halting of a proceeding, judgment, or the like' and to '[a]n order to suspend all or part of a judicial proceeding or a judgment resulting from that proceeding'. Where a stay of criminal proceedings is permitted, it functions as a response to certain long-lasting obstacles to the continuation of proceedings. Ultimately, where the obstacle is not removed, the state of suspension is lifted through the termination of proceedings upon the death or the lapse of statute of limitation, where the legal system so allows. (…) A consequential feature of stayed proceedings is that while the proceedings as such are on hold, the stay does not bar procedural actions aimed at removing the obstacle. Undertaking such actions is the obligation of the authority exercising jurisdiction over the case".[20]

12. Secondly, upon a survey of pertinent international jurisprudence and a limited survey of national jurisdictions, the Supreme Court Chamber held that:

> "(…) unconditional release is not the only option available to a criminal court where it has stayed or suspended proceedings due to an obstacle that might be removed in the future. Neither unfitness nor other serious obstacles to proceedings remove from the court's realm the application of measures, including continued detention, aimed at securing the presence of the accused at trial."[21]

13. Thirdly, the Supreme Court Chamber found that "considering the interests of justice in trying the accused, upon a finding of unfitness, remedial action must be undertaken in the light of a possibility, even slight, of a meaningful improvement."[22] Although it had been established that the possibility of cognitive improvement was remote, the Supreme Court Chamber found that in light of the expert opinion, the minority of the Trial Chamber erred in failing to exhaust all possible measures to improve the mental health of the Accused such that she could become fit to stand trial in the future.[23] The Chamber emphasized that "[w]hile long-term improvement might be impossible, the criminal process is only competent to concern itself with whether improvement is attainable for the period necessary to accommodate the subsequent adjudication."[24]

[20] First Appeal Decision, para. 18.
[21] First Appeal Decision, para. 25.
[22] First Appeal Decision, para. 29.
[23] First Appeal Decision, para. 37.
[24] First Appeal Decision, para. 37.

14. In determining what actions to take in relation to the unfit Accused, the Supreme Court Chamber pointed out that there were two objectives to be simultaneously pursued.[25] One was ensuring the presence of the Accused at the trial when it resumes, the second was to foster the improvement of her mental health by implementing the treatment recommended by the experts.[26] Exploring the option of imposing a less onerous measure than detention in order to achieve these objectives, the Supreme Court Chamber pointed out that judicial supervision under Article 223 of the CCP is applicable at the trial stage of the proceedings.[27] However, it found that:

> "While judicial supervision is potentially an option in this case, there is nothing in the Impugned Decision which would be of assistance to this Chamber in determining whether a factual basis exists to apply such supervision. As a result, this Chamber has no way of ascertaining whether the Accused is willing and capable (considering the impairment of her cognitive function found by the Trial Chamber) to undertake one of the 'obligation' during judicial supervision set out in Article 223 of the CCP. (…) Guarantees that the Accused will be able to fulfill her obligations associated with the judicial supervision would need to be submitted by persons close to the Accused and who are willing to assist the Accused to overcome her incapacity to give such guarantees on her own behalf and to act as her surrogates."[28]

The Chamber concluded that "until the Trial Chamber may find the above concerns attenuated, continued detention is warranted."[29] The Chamber decided that detention should take place in a hospital or comparable facility[30] and pointed out that such detention is subject to review pursuant to Internal Rule 82 upon request of the Accused.

15. Following the Supreme Court Chamber's decision and under the supervision of the Trial Chamber, the Accused was treated at the ECCC Detention Facility where she received a new treatment regime and medication based on the appointed experts' recommendations.

16. On 27 and 28 August 2012, the available experts undertook an examination of the Accused in order to determine whether the measures implemented by the treating physicians have improved her cognitive abilities such that she has become fit to stand trial. The experts concluded that "[t]here was no evidence (…) of any improvement after the introduction of rivastigmine and the

[25] First Appeal Decision, para. 41.
[26] First Appeal Decision, para. 41.
[27] First Appeal Decision, para. 46.
[28] First Appeal Decision, para. 47.
[29] First Appeal Decision, para. 48.
[30] First Appeal Decision, para. 42 and Disposition.

cognitive stimulation program", despite the fact that sufficient time had elapsed for these treatments to have worked if they were going to do so.[31] They recommended that these treatments be discontinued and stated that they were unaware of any other treatment that could improve the Accused's cognitive ability.[32] The experts concluded that the Accused suffers "from moderate to severe dementia".[33] In their view, the Accused's dementia has become more severe since 2011 and there has been a slight deterioration in her cognitive abilities over the last few months despite the new treatments.[34] The experts remain of the opinion that the Accused would have "considerable difficulties" in meeting the requisite criteria to be fit to stand trial.[35]

## III. IMPUGNED DECISION

17. Based on medical expert's findings that the Accused suffers from a progressive, dementing illness (most likely Alzheimer's disease), the Trial Chamber reaffirmed its prior conclusion that the Accused is unfit to stand trial as her 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. The Trial Chamber further found that there appears to be no reasonable prospect that the Accused could be fit to stand trial in the foreseeable future as all available measures presently capable of improving the Accused's cognitive function have been tried and the Accused is unlikely to improve spontaneously.[36] As a consequence, the Trial Chamber ordered its previous stay of proceedings to "continue indefinitely".[37] The Chamber clarified that "'indefinite' means that the stay of proceedings shall continue until and unless the Chamber orders their resumption against the Accused"[38] and that "the charges against the accused are not withdrawn."[39]

18. The Trial Chamber found that the continuation of the Accused's pretrial detention in the context where there appears to be no reasonable possibility that she may face trial in the foreseeable future would violate her internationally prescribed basic rights and ordered her immediate release from the ECCC Detention Facility. The Trial Chamber considered that detaining the

[31] Summary Expert Report on Mrs. IENG Thirith, 29 August 2012, E138/1/7/13/2 ("2012 Summary Expert Report"), para. 58.
[32] 2012 Summary Expert Report, paras 58-59.
[33] 2012 Summary Expert Report, para. 60.
[34] 2012 Summary Expert Report, para. 60.
[35] 2012 Summary Expert Report, para. 62.
[36] Impugned Decision, para. 24.
[37] Impugned Decision, para. 28.
[38] Impugned Decision, para. 28.
[39] Impugned Decision, para. 40.

Accused could not be justified on the "mere hypothesis that medical conditions which are currently irreversible may in the future be cured".[40] Moreover, the ECCC's legal framework provides no statutory basis to justify continued detention of the Accused in the present circumstances.[41]

19. The Trial Chamber rejected the Co-Prosecutors' request to order judicial supervision of the Accused, so that her release would be subject to coercive conditions imposed by the Court. It concluded, based on the *Judgment on the appeal of the Prosecutor against the decision of Trial Chamber 1 entitled "Decision on the release of Thomas Lubanga Dyilo"* (the "*Lubanga* Decision") issued by the Appeals Chamber of the International Criminal Court ("ICC"),[42] that the stay of proceedings entails that it "cannot exercise its jurisdiction over the Accused for the duration of the stay".[43] In the Trial Chamber's view, the jurisdiction of the court over the Accused is "suspended" during the stay.[44] As a consequence, the Chamber concluded that it "would (…) appear to lack a clear legal basis to impose coercive conditions or other forms of judicial supervision over the Accused upon release."[45] In addition, the Chamber factually distinguished the current case from other international cases relied upon by the Co-Prosecutors to support their request. Finally, it further noted that in light of IENG Thirith's medical condition, coercive conditions upon her release would, in any event, likely to be both practically and legally unenforceable.[46]

20. However, the Trial Chamber stated that it does not oppose many of the measures sought by the Co-Prosecutors.[47] In its Disposition, it reminded the Accused of her obligation pursuant to Internal Rule 35 not to interfere with the administration of justice; requested the Accused to remain within the territory of Cambodia and to inform the Court prior to any change of address; and undertook to consult with experts annually in relation to medical developments likely to reverse IENG Thirith's cognitive decline such that she would become fit to stand trial.

[40] Impugned Decision, para. 29.
[41] Impugned Decision, para. 30.
[42] *Prosecutor v. Lubanga*, ICC-01/04-01/06 OA 12, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the release of Thomas Lubanga Dyilo", Appeals Chamber, 21 October 2008 ("*Lubanga* Decision").
[43] Impugned Decision, para. 28.
[44] Impugned Decision, para. 33.
[45] Impugned Decision, para. 33.
[46] Impugned Decision, para. 37.
[47] Impugned Decision, para. 39.

## IV. SUBMISSIONS

21. The Co-Prosecutors request the Supreme Court Chamber to annul the Impugned Decision insofar as the Trial Chamber finds that it has no jurisdiction to order judicial supervision and to amend the Impugned Decision to require the Accused, through her guardian, to comply with the following conditions: (i) reside at a specified home address to be provided by her Co-Lawyers; (ii) make herself available for a weekly safety check by authorities or officials to be designated by the Trial Chamber; (iii) surrender her passport and identification card; (iv) not to contact, directly or indirectly, the other Co-Accused (excluding her husband, IENG Sary); (iv) not to contact, directly or indirectly, any witness, expert or victim who is proposed to be heard by the Trial Chamber and not interfere in the administration of justice; and (vi) undergo six-monthly medical examinations by medical practitioners to be appointed by the Trial Chamber.[48]

22. By their First Ground of Appeal, the Co-Prosecutors submit that the Trial Chamber erred in law by wholly suspending its jurisdiction over the Accused, or effectively divesting itself of such jurisdiction, in three aspects. Firstly, there is no legal basis in the ECCC Law or in Cambodian law for a trial court to divest itself of jurisdiction where the public action has not been terminated by operation of the law.[49] Secondly, the Trial Chamber misapplied the test set out by the ICC Appeals Chamber in the *Lubanga* Decision as its order of a "reversible and non-permanent stay" required it to first determine whether conditions for detention are met and, if not, whether release should be with or without conditions.[50] Thirdly, the Impugned Decision leaves the Accused in an unacceptable position of legal uncertainty and outside the protection from the Court, without any review as required by international human rights law.[51]

23. The Co-Prosecutors also submit that the Trial Chamber erred in law by failing to apply Article 223 of the CCP and Internal Rules 65 and 82 as legitimate legal bases for the imposition of judicial supervision or coercive conditions, as previously decided by the Supreme Court Chamber,[52] or to use its inherent powers (Second Ground of Appeal).[53]

24. Under their Third Ground of Appeal, the Co-Prosecutors submit that the Trial Chamber erred in law by ordering the unconditional release of the Accused in place of imposing justifiable

[48] Immediate Appeal, para. 10; Co-Prosecutors' Supplementary Appeal Submissions, para. 17.
[49] Immediate Appeal, para. 6(a).
[50] Immediate Appeal, para. 6(b).
[51] Immediate Appeal, para. 6(c).
[52] Immediate Appeal, paras 7-9.
[53] Immediate Appeal, para. 9.

conditions of judicial supervision. They submit that the proposed conditions are primarily designed to secure the presence of the Accused at any subsequent trial, but are also concerned with ensuring the integrity of the judicial proceedings, protecting victims and potential witnesses, protecting the Accused, and maintaining public order,[54] which are legitimate interests protected by Internal Rules 65(1), 82(2) and 63(3)(b), read in conjunction with Internal Rule 21,[55] and in the light of the practice of international tribunals.[56] In particular, the Co-Prosecutors contend that periodic assessments of the Accused's mental capacities are a natural and necessary extension of the Trial Chamber's decision to order an indefinite rather than a permanent stay of proceedings and of its undertaking to consult with experts annually regarding any advancements to treatment for progressive, dementing illnesses.[57] The Co-Prosecutors further assert that an order to reside at a specific address to be provided by her Co-Lawyers and a weekly visit by authorities or officials to be designated by the Trial Chamber will *inter alia* protect the safety of the Accused, maintain public order and ensure presence of the Accused if proceedings resume.[58] The surrender of her passport and identification card, subject to a possible return by the Trial Chamber if necessary for a specific purpose, will also contribute to guarantee that the Accused remains available if proceedings resume.[59] Finally, the Co-Prosecutors' submit that an order to refrain from contacting the Co-Accused, potential witnesses, experts, or victims, is necessary to protect the integrity and fairness of the proceedings and is already recognised under Internal Rule 35.[60] The Co-Prosecutors contend that these measures are both necessary and proportional in the circumstances of the current case.

25. Under their Fourth Ground of Appeal, the Co-Prosecutors submit that the Trial Chamber erred in fact or in the exercise of its discretion in finding that conditions of judicial supervision would be unenforceable or impractical. The underlying factual conclusion that the Accused would be unable to respect coercive conditions due to the impairment of her cognitive capacities cannot be reconciled with the Trial Chamber's "reminder" and "request" to the Accused in the disposition of the Impugned Decision.[61] The Co-Prosecutors highlight the fact that a guardian has been appointed[62] and request the Supreme Court Chamber to require the Accused, "through

[54] Co-Prosecutors' Supplementary Appeal Submissions, para. 5. *See also* paras 22, 24, 25, 27, 29.
[55] Immediate Appeal, paras 6-7.
[56] Immediate Appeal, paras 11-13.
[57] Co-Prosecutors' Supplementary Appeal Submissions, para. 29, citing Impugned Decision, Disposition.
[58] Immediate Appeal, paras 22-24.
[59] Co-Prosecutors' Supplementary Appeal Submissions, paras 25-26.
[60] Co-Prosecutors' Supplementary Appeal Submissions, para. 27.
[61] Immediate Appeal, para. 17.
[62] Co-Prosecutors' Supplementary Appeal Submissions, paras 2, 31.

her guardian", to comply with the specific conditions they propose to impose on the Accused's release.

26. In its Response, the Defence requests the Supreme Court Chamber to confirm the Impugned Decision and remove the provisional coercive conditions attached to IENG Thirith's release. The Defence argues that the Trial Chamber did not divest itself of jurisdiction, but rather acknowledged the limitation that should be placed on criminal jurisdiction in light of the legal and practical consequences of an indefinite stay which is, in this case, permanent and irreversible.[63] In the light of the Trial Chamber's finding that the Accused has no realistic prospect of improvement and given the experts' opinion that her condition will continue to deteriorate,[64] coercive conditions designed to ensure the attendance of the Accused at trial and the non-interference with the administration of justice have no justifiable legal basis and would not meet the *Lubanga* test.[65] As such, the conditions proposed by the Co-Prosecutors would constitute an unjustified infringement upon the Accused's fundamental rights.[66] Furthermore, the Accused remains under the protection of the Court as her security and safety fall under the Cambodian Government's responsibility pursuant to Article 24 of the ECCC Agreement.[67]

27. In any event, the Defence contends that the Accused will not be in a position to remember, comprehend and abide by any coercive condition imposed on her given her complete inability to retain new information and the fact that she is in a constant state of lacking awareness of her surroundings.[68] Further, the Defence contends that the appointment of a general guardian to the Accused will not assist in the enforcement of coercive conditions on the Accused's release as Cambodian civil law provides that the guardian's role is limited to protecting the property and providing medical care and general assistance to the person under guardianship;[69] it provides no legal basis for the imposition of coercive conditions on an appointed guardian.[70] The Defence takes issue with the process that lead to the appointment of the guardian by the Phnom Penh Municipal Court which, it says, was inaccurately reported by the Co-Prosecutors, and argues

[63] Defence Response, paras 29-30.
[64] Defence Response, para. 53.
[65] Defence Response, paras 33, 35.
[66] Defense Response, paras 51, 65-66.
[67] Defence Response, para. 37.
[68] Defence Response, para. 71.
[69] Defence Response, para. 79.
[70] Defence Response, para. 75.

that the use of this mechanism is an attempt by the Co-Prosecutors to circumvent the jurisdiction of the ECCC.[71]

## V. DISCUSSION

### A) Admissibility of the Immediate Appeal

28. The Co-Prosecutors submit that their Immediate Appeal is admissible under Internal Rule 104(4)(a) on the basis that the indefinite stay ordered by the Trial Chamber, given the disruptive consequences that it has on the course of the proceedings, has the "*effect* of terminating the proceedings".[72] They also submit that the Appeal is admissible under Internal Rule 104(4)(b) as it relates to the release of the Accused from the ECCC Detention Facility.[73] The Defence makes no submissions in these regards.

29. The Immediate Appeal challenges the Impugned Decision insofar as it rejected the Co-Prosecutors' request to subject the Accused's release from detention to coercive conditions, under a regime of judicial supervision. As this Appeal is in relation to conditions pertaining to the Accused's release by the Trial Chamber under Internal Rule 82, it falls within the ambit of Internal Rule 104(4)(b), which provides for a right of immediate appeal against a decision relating to detention or bail under Rule 82, and it is therefore admissible.

### B) Merits of the Immediate Appeal

#### 1. Standard of review

30. Pursuant to Internal Rules 104(1) and 105(2), an immediate appeal may be based on one or more of the following three grounds:
    - An error on a question of law invalidating the decision;
    - An error of fact which has occasioned a miscarriage of justice; and
    - A discernible error in the exercise of the Trial Chamber's discretion, which resulted in prejudice to the appellant.

[71] Defence Response, paras 72-75.
[72] Immediate Appeal, para. 4(a).
[73] Immediate Appeal, para. 4(b).

31. Given the four grounds of appeal raised by the Co-Prosecutors, the Supreme Court Chamber shall first examine whether the Trial Chamber erred in law by finding that it has no jurisdiction to impose judicial supervision of the Accused or coercive conditions on release (First and Second Grounds of Appeal). In the affirmative, the Chamber shall then examine whether the Trial Chamber erred in law by ordering unconditional release of the Accused in place of justifiable conditions of judicial supervision and erred in fact or in the exercise of its discretion in finding that conditions of judicial supervision would be unenforceable or impracticable (Third and Fourth Grounds of Appeal).

### 2. Whether the Trial Chamber erred in law by not applying, dismissing or failing to consider available legal bases for ordering judicial supervision of the Accused

32. The Supreme Court Chamber recalls that the Trial Chamber relied on the ICC Appeals Chamber decision in the *Lubanga* case to conclude that the "indefinite" stay of proceedings it ordered entails the "inability to exercise" or the "suspension of" jurisdiction over the Accused.[74] In arriving at this conclusion, the Trial Chamber seems to have adopted the distinction put forward in the *Lubanga* decision between a conditional and reversible stay of proceedings on the one hand, and a stay that is permanent and irreversible, on the other hand.[75] The Trial Chamber presumably placed the matter before it under the second category, *i.e.* in the situation of a stay which is permanent and irreversible, by finding that in the absence of medical treatment capable of improving the condition of the Accused, or likelihood that she will improve without treatment, the stay of proceedings shall continue indefinitely. From here the Trial Chamber construed its inability to exercise jurisdiction over the Accused for the duration of the stay.[76] Further, the Trial Chamber invoked the absence of "a clear legal basis", understood as explicit statutory authorization, required by international standards, to impose detention or other coercive conditions upon release.[77]

33. The Supreme Court Chamber notes, at the outset, the problematic conjunction of the Trial Chamber's finding of the lack of jurisdiction based on the reading of the *Lubanga* decision and the argument of the lack of "clear legal basis" for the application of coercive measures. The problem here is two-fold. First, there is a methodological uncertainty as to whether the Trial

[74] Impugned Decision, paras 28, 32-33, referring to *Lubanga* Decision, para. 36.
[75] Impugned Decision, para. 28 citing *Lubanga* Decision, para 36.
[76] Impugned Decision, para. 28, *in fine*.
[77] Impugned Decision, paras 21-23, 30, 32-33.

Chamber opted to innovate pursuant to Article 12 of the ECCC Agreement[78] by importing the concept of permanent stay as expressed in the *Lubanga* decision, or whether it remained grounded in Cambodian law and was interpreting existing provisions in light of international standards. Second, there is a question of normative relations between the Trial Chamber's findings. Having satisfied itself that it had no jurisdiction over the Accused, the Trial Chamber had no need to expect to find basis for the application of measures, whether coercive or not, as the lack of jurisdiction renders the question of measures moot. Indeed, the presence of statutory provision regulating the application of measures in the context of an accused who is unfit to stand trial would demonstrate the opposite, *i.e.* that the court has jurisdiction over the accused in the first place. The lack of statutory basis for the application of measures might be invoked as an *indicium* of the lack of jurisdiction – with this aspect the Supreme Court will deal *infra* in this decision – but it does not serve as a parallel argument.

34. Moreover, the Trial Chamber's conclusion about the lack of jurisdiction as being consequential to the finding of permanent unfitness of the Accused places it in contradiction with its other statements, which indicate operating under an assumption that the possibility of resuming the proceedings, albeit remote, was not totally forgone. In particular, the Trial Chamber's finding that "the stay of proceedings shall continue *until and unless the Chamber orders their resumption against the Accused*"[79] implies that the stay is conditional and has the potential to be lifted in the future. Furthermore, the Trial Chamber has adopted a series of measures aimed at ensuring that proceedings could resume in the unlikely event that the trying of the Accused becomes possible. To this end, the Trial Chamber, after acknowledging that medical advances continually occur in the medical sciences,[80] undertook to consult with experts every 12 months to ascertain if new treatment options or therapy have been discovered which are likely to restore the Accused's cognitive capacity.[81] The Trial Chamber further sought to ensure that the Accused remains available to the Court by requesting her to stay in the territory of Cambodia and inform the Court of her address.[82] Finally, the Trial Chamber "clarified" that the charges

[78] Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea, 6 June 2003 ("ECCC Agreement"), Art. 12 ("The procedure shall be in accordance with Cambodian law. Where Cambodian law does not deal with a particular matter, or where there is uncertainty regarding the interpretation or application of a relevant rule of Cambodian law, or where there is a question regarding the consistency of such a rule with international standards, guidance may also be sought in procedural rules established at the international level.")
[79] Impugned Decision, para. 28 (emphasis added).
[80] Impugned Decision, para. 29.
[81] Impugned Decision, para. 39 and Dispositive.
[82] Impugned Decision, Dispositive.

against the Accused were not withdrawn,[83] echoing its earlier holdings that the proceedings, although stayed, had not been terminated.[84] These pronouncements cannot be reconciled with relinquishing jurisdiction over the Accused.

35. The contradictions within the Trial Chamber's decision appear to take root in the simultaneous application of notions from different legal systems, which then lead to confusion regarding the legal consequences of its decision. At the outset, the Supreme Court Chamber notes that the notion of a "stay" of proceedings, which originates in the common law, is susceptible to receiving different interpretations depending on the legal regime in which it operates. In the context of this discussion, it shall therefore be seen as a term of art.[85] Determining its actual meaning and concrete legal consequences requires consideration of the specific features of the legal system in which it operates. As such, jurisprudence from other jurisdictions cannot be applied automatically without examining the systemic legal context.

36. While distinctions exist amongst various domestic legislations, it can generally be said that common law jurisdictions typically envisage two types of "stay". As highlighted by the ICC Appeals Chamber in its *Lubanga* Decision, there may be, first, a conditional and reversible stay of proceedings, where it remains possible for the obstacle to the continuation of proceedings to eventually be removed.[86] Second, there may be an absolute, irreversible or permanent stay, which amounts to termination of proceedings.[87] The paramount distinction between the two is the potential to remove the obstacle that led to the stay, such that there is a possibility, even if only remote, that the stay may eventually be lifted and the proceedings resume.[88] While jurisdiction over the accused may cease in the second situation,[89] it does not in the first.[90] The possibility for the court to order a stay, including such that amounts to termination of the criminal proceedings, stems from the principle of discretionary prosecution, which is applied in

[83] Impugned Decision, para. 40.
[84] First TC Fitness Decision, para. 64.
[85] First Appeal Decision, para. 18, referring to the Black Law Dictionary, 9th ed., 2009, p. 1548, sub "stay" ("A 'stay' refers to '[t]he postponement or halting of a proceeding, judgment, or the like' and to '[a]n order to suspend all or part of a judicial proceeding or a judgment resulting from that proceeding'").
[86] *Lubanga* Decision, paras 33, 37. *See also* para 80 ("If a trial that is fair in all respects becomes possible as a result of changed circumstances, there would be no reason not to put on trial a person who is accused of genocide, crimes against humanity or war crimes – deeds which must not go unpunished and for which there should be no impunity").
[87] *Lubanga* Decision, paras 33, 36 and 37. *See also* para. 81 ("A Chamber that has imposed a conditional stay must, from time to time, review its decision and determine whether a fair trial has become possible or whether, in particular because of the time that has elapsed, a fair trial may have become permanently and incurably impossible. In the latter case, the Chamber may have to modify its decision and permanently stay the proceedings.")
[88] *Lubanga* Decision, paras 33, 37 ("A conditional stay is neither an acquittal nor a final termination of the proceedings, but may be lifted in appropriate circumstances (…)"). *See also* First Appeal Decision, para. 25.
[89] *Lubanga* Decision, para. 36.
[90] *Lubanga* Decision, para. 37.

most common law jurisdictions.[91] Pursuant to this principle, the prosecutor has the power to drop or withdraw charges[92] and, similarly, the court has broader discretion to discontinue or terminate proceedings for reasons that are not necessarily set out in the law but are justified by other interests in the particular circumstances of a case.

37. Traditionally, most civil law jurisdictions have adopted the principle of legalism (or, otherwise, mandatory prosecution), pursuant to which the prosecution has no discretion to discontinue or ask for the discontinuation of a criminal action once it has been initiated[93] and the court, which has sole authority to terminate proceedings, can only do it for a reason specifically expressed in the law.[94] Applicability of the legalism principle to international criminal proceedings might be disputable, especially concerning the decision whether to prosecute or not; moreover, even in continental Europe it is subject to gradual erosion by the introduction of different instruments of diversion.[95] Still, the expression of this principle can be found in the trial phase, *inter alia* in the manner in which the civil law system approaches obstacles to the continuation of proceedings, such as unfitness to stand trial. The proceedings are typically put on hold, stayed or suspended, until the obstacle is removed. Unless explicitly provided for in the law, the "stay" does not amount to effective termination of proceedings and does not entail loss of jurisdiction over the accused. The Supreme Court Chamber notes that in the context of the civil law system, given that the original text of the law is usually not in English, the term "stay" is often used as a translation of another expression consecrated in the domestic legal system to denote such state of suspension.

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[91] MM. Merle and Vitu, *Traité de droit criminel*, T. II, 4th ed, Cujas, Paris, 1989 ("Merle and Vitu"), para. 280. *See also* emphatic expression of this principle in the context of England and Wales by the former Attorney General Sir Hartley Shawcross, who stated in 1951: "It has never been the rule in this country – I hope it never will be – that suspected criminal offences must automatically be the subject of prosecution" (House of Commons Debates, vol. 483, 29 January 1951, cited by M. Bohlander, *Principles of German Criminal Procedure (Studies in International and Comparative Law),* Hart Publishing, Oxford and Portland, 2012 ("Bohlander"), p. 26).

[92] Merle and Vitu, paras 278-279.

[93] In France, where it is *inter alia* applied, it is referred to as "le principe de légalité dans l'exercice des poursuites" (*see* Merle and Vitu, para. 283). Other civil law countries such as Germany, Italy, Greece and Spain traditionally apply the principle of legalism at an earlier stage (from the time of initiating the criminal action), mandating criminal prosecution at each incidence where there is indication of the commission of an act containing the material elements of a crime, unless the law specifically allows resigning from a criminal charge (Merle and Vitu, para. 280). *See*, for instance, para. 152(2) of the German Code of Criminal Procedure, which provides that "[OFFICIAL TRANSLATION] [e]xcept as otherwise provided by law, the public prosecution office shall be obliged to take action in the case of all criminal offences which may be prosecuted, provided there are sufficient factual indications". In Italy, the principle is established at the level of the Constitution. Art. 112 of the Italian Constitution states: "[OFFICIAL TRANSLATION] The public prosecutor has the obligation to institute criminal proceedings". This is also the case in Poland (Art. 10 of the Code of Criminal Procedure), in Russia (para. 21(2) of the Code of Criminal Procedure) and in Brazil (Art. 24 and 28 of the Code of Criminal Procedure).

[94] Merle and Vitu, paras 278-279, 283.

[95] *See* German Code of Criminal Procedure, para. 153; Polish Code of Criminal Procedure, Art. 387 (voluntary submission to punishment); Italian Code of Criminal Procedure, Art. 444 (*applicazione della pena su richiesta delle parti, "patteggiamento"*).

38. As previously noted by this Chamber, the law applicable before the ECCC does not foresee the possibility of terminating proceedings in a case of an accused found unfit to stand trial.[96] The causes of extinction of criminal action are explicitly listed in Article 7 of the CCP and are limited to the death of the accused, the expiry of a statute of limitations, the grant of an amnesty, the abrogation of the law and *res judicata*.[97] It follows that the court operating under the CCP has no authority to order termination for other reasons.[98] On the other hand, the CCP provides for the power to "suspend" or "stay" proceedings in certain circumstances of a lasting impediment in the conduct of the proceedings, such as the necessity to adjudicate an interlocutory question falling under the exclusive jurisdiction of another court[99] and when the accused did not appear at trial.[100] A consequential feature of stayed proceedings is that while the criminal action as such is on hold, the stay does not bar procedural actions aimed at removing the obstacle.[101] The CCP does not contemplate an autonomous legal category of a "permanent stay" or any situation other than a termination of proceedings whereupon the court's jurisdiction over the case before it would cease. These legislative choices considered, it would be more systemically consistent that the scarcity of regulation pertinent to obstacles to criminal proceedings in Cambodian law be remedied by analogy broadening the instances of "suspension" rather than broadening the instances of termination of proceedings. Thus, for example, the distinction between the two types of stay referred to by the ICC Appeals Chamber, *i.e.* impermanent and conditional stay *versus* the permanent and irreversible, and their consequences discussed in the *Lubanga* Decision, in order to be relevant for the ECCC, would need to be related to Cambodian criminal procedure's dichotomy between stay understood as suspension of proceedings for the duration of an obstacle *versus* the termination of proceedings in the circumstances determined by law.

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[96] First Appeal Decision, para. 18.
[97] *See also* Art. 8 of the CCP, providing additional causes of extinction of criminal actions, where it is "expressly provided for in separate laws".
[98] Art. 7 of the CCP states that "[t]he reasons for extinguishing a charge in a criminal action *are as follows*" (emphasis added), indicating that the list is exhaustive. In addition, the CCP, akin to the ECCC Internal Rules, specifically identifies the circumstances in which the Investigating Judge can dismiss a case, by issuing a non-suit order, and the trial Chamber may render a verdict of acquittal (Art. 247 and 350 of the CCP).
[99] CCP, Art. 343 and 345. As noted by the Supreme Court Chamber in the First Appeal Decision, at fn 59, the same original Khmer word is incorrectly translated into two English words "suspend" and "adjourn" in these two provisions. The meaning of the Khmer word is the same in both provisions and more closely matches the meaning of the English words "suspend" or "stay." Original Khmer language of the CCP distinguishes "suspension' or "stay' from "adjournment", which denotes a short-term interruption of the activity while the proceedings are continued. *See* Art. 340.
[100] CCP, Art. 310.
[101] First Appeal Decision, para. 18 and fn. 64.

39. In this legal context, the "indefinite stay" of proceedings ordered by the Trial Chamber can only be understood as previously defined by the Supreme Court Chamber, namely as having the effect of suspending the proceedings against the Accused until either the obstacle is removed so that proceedings can resume, or the proceedings are terminated for a reason specifically expressed in the law (*i.e.* ultimately at death).[102]

40. The Supreme Court Chamber has previously determined that the court retains jurisdiction to, *inter alia,* impose a regime of judicial supervision under Article 223 of the CCP during the time where proceedings are on hold,[103] including at the trial stage,[104] as it is currently the case. The Impugned Decision now puts forth the question whether these conclusions remain valid in a situation where, due to unfitness of the Accused, the suspension of proceedings is likely to last indefinitely. The question of how to deal with accused unlikely to ever become fit to stand trial is, indeed, complex. It creates a tension between the fundamental rights of the accused on the one hand (*e.g.* to be presumed innocent and to be tried within a reasonable time, as well as the rights to liberty and privacy) and the interests of justice on the other hand (*e.g.* in prosecuting the accused for serious crimes), including the interests of the victims to have the truth ascertained and pursue their civil claims.[105] In this context, the Supreme Court Chamber shall examine whether the solution drawn from Cambodian law and based in retaining jurisdiction over the Accused is compatible with her fundamental rights, or whether international standards or general principles of law would rather require the termination of the proceedings, or yet another *sui generis* response. To that end, the Chamber has conducted a survey of the rules and practice established at the international level, as well as domestic practice. As more amply discussed below, this survey shows that legislators and courts have struggled to find concrete solutions to deal with accused unfit to stand trial, especially when the prospect of a trial is remote, and that various approaches have thus far been developed. These can be grouped into three broad categories: 1) to suspend the proceedings without terminating them, with an option to employ measures aimed at facilitating the resumption; 2) to bring the proceedings to a conclusion by deciding whether the accused committed the act with which he has been charged, with an option to impose a range of measures aimed at protecting the accused and the public; 3)

[102] First Appeal Decision, para. 18.
[103] First Appeal Decision, para. 25 ("Neither unfitness nor other serious obstacles to proceedings remove from the court's realm the application of measures (…) aimed at securing the presence of the accused at trial.") *See also*, para. 25 ("As demonstrated at the ICC, as well as at the *ad hoc* international criminal tribunals, unconditional release of an accused is not 'required' in the context of a reversible stay of proceedings. This is confirmed by several national jurisdictions.") and para. 38 ("restrictive measures (…) are not inherently precluded during the stay").
[104] First Appeal Decision, paras 45-46.
[105] First Appeal Decision, para. 28.

to terminate the criminal proceedings and deal with the matter pursuant to mental health provisions or the like.

*A first solution: to suspend the proceedings and continue to exercise jurisdiction*

41. A number of domestic jurisdictions, mainly civil law countries such as Germany,[106] Italy,[107] Poland,[108] Russia,[109] Netherlands,[110] Albania,[111] Bosnia[112] and Argentina,[113] but also other countries such as Singapore,[114] India,[115] Botswana,[116] Israel[117] and Honduras,[118] have adopted a

[106] In German Law, both the Code of Criminal Procedure and the Criminal Code contain indications that proceedings against unfit accused are not terminated and that the court continues to exercise jurisdiction over the accused. *See inter alia* Section 71(1) of the Criminal Code (stating that "[Translation by Prof. Dr. Michael Bohlander, published by the Federal Ministry of Justice] [t]he court may make an independent mental hospital order or a custodial addiction treatment order if criminal proceedings are impracticable because the offender is insane or unfit to plead"); Section 81g(4) of the Code of Criminal Procedure (which allows the court to order collection and analysis of DNA sample from the accused in cases where the accused "[Translation by Brian Duffett and Monika Ebinger, published by the Federal Ministry of Justice] was not convicted merely on the grounds that (…) he is unfit to stand trial on the grounds of insanity"); and Section 78c)(11) of the Criminal Code (which states that statutes of limitation are interrupted by "the provisional judicial dismissal of the proceedings due to the unfitness to plead of the indicted and any order of the judge or public prosecutor issued after such a dismissal of the proceedings for the purposes of reviewing the fitness of the indicted accused to plead").

[107] In Italy, proceedings are suspended upon finding of unfitness unless and until the accused is to be acquitted or discharged. A guardian *ad litem* is appointed. An evaluation is done every six months and suspension is lifted if the accused becomes fit. Conditions can be imposed on the Accused's release, for a limited period of time, where necessary to prevent a risk of flight, of committing other crimes or tampering with evidence. Where the accused needs psychiatric care, treatment can be ordered under mental health statutes (Italian Criminal Procedure Code, Art. 71, 72, 73 and 274).

[108] In Poland, Art. 22 of the Code of Criminal Procedure states that, where the defendant cannot participate in the proceedings because of a mental or another serious illness, the proceedings shall be suspended for the duration of the obstacle. Pursuant to Art. 255, suspension of proceedings does not preclude the application of provisional measures, including bail, apt to ensure the accused's availability for trial.

[109] In Russia, Art. 238(1)(2) and 253 of the Code of Criminal Procedure explicitly provides that, at trial, proceedings must be suspended where "[Translation provided by Legislationonline] the accused is seriously ill, which is confirmed by a medical conclusion"). Unfitness to stand trial is not one of the cause of termination of criminal action, which are explicitly listed in the Code (*see inter alia* Art. 239, 24-28 and 212). The Court continues to exercise jurisdiction over the accused (*see inter alia* art. 97 of the Criminal Code, which provide for the possibility to impose compulsory measures of a medical nature, including commitment to a hospital, where the defendant has "caught mental derangement" after committing the crime such that it would become "impossible to impose or execute punishment" and where the defendant poses a threat to himself or others).

[110] Article 16 of the Dutch Code of Criminal Procedure states that a prosecution will be suspended when a person is not capable of understanding the scope of the prosecution due to a lack of development or a pathological disturbance of his mental faculties.

[111] In Albania, proceedings are suspended, a tutor is appointed, and the Court may order temporary hospitalisation in a psychiatric institution for treatment. The decision of suspension is revoked when it results that the mental condition of the defendant allows his conscious participation in the proceedings or when the defendant must be found innocent or the case must be ceased. (Code of Criminal Procedure of Albania, Art. 44(2), 45(1) and 46(1))

[112] In Bosnia, proceedings are adjourned and the accused shall be sent to "the body responsible for issues of social care". The proceedings shall "continue" if the accused becomes fit, and the charges will be dismissed if the crimes become time barred. (Criminal Procedure Code of Bosnia and Herzegovina, Art. 388)

[113] In Argentina, if during the proceedings the accused becomes incapacitated, the Tribunal will suspend the case. The suspension of proceedings will halt the investigation/delivery of judgement from the time of the order. (Code of Criminal Procedure of Argentina, as amended 2011, art. 77)

[114] In Singapore, proceedings against accused who remain unfit to stand trial after a three months period of observation and, if available, treatment in a psychiatric institution, are stayed, with possibility of resumption at any time. The accused can be released on bail if the "offense is bailable" and if there is "sufficient security being given that (a) he will be properly taken care of; (b) he will be prevented from injuring himself or any other person; (c) he will appear in court

solution similar to the one proposed above, by electing to put the proceedings on hold (the language varies among the various states, including stay, suspension, postponement and adjournment) when accused are found to be unfit to stand trial, without making any distinction between those who are permanently unfit and those for whom there is a reasonable prospect of a trial being held. During the time when proceedings are on hold, national laws generally provide for the possibility of imposing a range of measures aimed at ensuring resumption of the proceedings and protecting their integrity. These typically include periodic medical evaluations of the accused's condition, accompanied, as necessary, by either detention in a mental health facility or a prison, or release with conditions. Some States also provide for the appointment of a guardian or similar regime of protection. In particular, this solution has also been adopted by French courts, in the system where, similarly to the Cambodian procedure, there is no legal provision dealing with the situation of an accused unfit to stand trial, and where trial proceedings against unfit accused were suspended.[119] Even in a case where the facts made it unlikely that the proceedings could ever resume, proceedings were not terminated and the French Court of Cassation stated that notwithstanding the lack of specific provision dealing with a situation where the appellant is unfit to participate in the proceedings, the court should

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when required or before such officer as the court appoints for that purpose; and (d) any other conditions that the court may determine will be met. Otherwise, "the court shall report the case to the Minister who may, in his discretion, order the accused to be confined in a psychiatric institution, or any other suitable place of safe custody and the court shall give effect to that order." A relative or friend may request that the accused be released under his/her care if the Court is satisfied that the conditions for release mentioned above can be met. (Criminal Procedure Code of Singapore, Sections 246-256)

[115] A similar solution has been retained in India, where proceedings are postponed, with a possibility of resuming at any time should the accused becomes fit to stand trial. The accused may be released on bail if the "offense is bailable' and on sufficient security that the accused is "properly taken care of and shall be prevented from doing injury to himself or to any other person, and for his appearance when required", or be detained in "safe custody" in such place and manner as the Court sees fit. The accused may be released in the custody of a friend or relative if the State Government is satisfied that the accused will "(a) be properly taken care of and prevented from doing injury to himself or to any other person; (b) be produced for the inspection of such officer, and at such times and places, as the State Government may direct and; (c) (…) be produced when required before such Magistrate or Court (Indian Code of Criminal Procedure, Sections 328-332).

[116] In Botswana, the trial against an unfit accused is postponed, with a possibility to resume at any time (Botswana Criminal Procedure and Evidence (Amended) Act, 1997, Art. 158, 161(1 and 2)).

[117] In Israel, criminal proceedings against unfit accused are "suspended", with the possibility of being reinstated. There is a possibility for the Court to pass a verdict on the guilt of the accused, if the accused so demands or if the Court has special reasons to do so (Israel Criminal Procedure Law (1982), Section 170). The accused can be committed to hospitalisation under the "criminal track" and, eventually, under the "civil track" (Treatment of Mentally Ill Persons Law, 1955, Section 6(A); Treatment of Mentally Ill Persons Law, 1991, Section 15). *See also John Doe v. District Psychiatric Board for Adults*, Israeli Supreme Court, January 22, 2003, CrimA 3854/02 (stating that proceedings are "suspended" and distinguishing the hospitalization under the "criminal track" and the "civil track").

[118] The same holds true in Honduras where, under Art. 105 of the Code of Criminal Procedure, as amended in 2002, if the accused is unfit and unable to participate in the process, the proceedings will be suspended until the accused regains the ability to participate.

[119] B. Bouloc, *Droit penal general,* Dalloz, 20th ed, 2007, p. 363; F. Desportes and F. Le Gunehec, *Droit pénal général*, Economica, 9th ed., 2002, p. 589; Crim. Cass. 10 June 1985 (The Court of Cassation found that a closing order and a summons to appear at trial were validly issued at a time where the accused was "insane" but that the trial proceedings had to be suspended until the accused recovered his mental capacities, which happened in this case).

take the necessary measures to ensure that the rights of the parties and the interests of justice are preserved.[120]

42. The suspension of proceedings in relation to accused whose condition makes it unlikely that they will ever face trial have been challenged before domestic courts, as well as before the European Court of Human Rights.

43. Most directly on point, the Italian Constitutional Court has been seized of a challenge against a provision which required the subjection of a permanently unfit accused to periodic medical evaluations.[121] The Applicant argued that the Criminal Procedure Code, which provides for periodic reassessments of an accused's fitness to stand trial every six months but has no explicit provision governing cases in which fitness is not recoverable, violated his fair trial guarantees because the continuous suspension and reassessment contemplated by the provision essentially caused him to be on trial for the remainder of his life.[122] The Applicant submitted that irreversible mental illness should result in the termination of criminal action, as it does upon an accused's death.[123] In declining to hear the Application, the Italian Constitutional Court distinguished the rationale for the legal consequences of chronic mental disease from the legal consequences of death by pointing out that the latter can be established with certainty whereas the former is based on a prognosis dependent on current scientific knowledge and susceptible to deceptive behavior by the accused.[124] The Court further reasoned that the basis for terminating proceedings at death is an imperative which derives from the notion that criminal liability adheres to the individual, whereas the basis for staying proceedings when an accused is mentally unfit derives from a procedural principle protecting the right of the accused to defend

[120] Crim. Cass. 5 June 1997, Bull. Crim. 228, p. 761 (After lodging an appeal against his criminal conviction before the Appeals Chamber, the Appellant had a stroke and, as a consequence, his mental capacities were permanently diminished to such a degree that he was deemed unfit to instruct his counsel and to participate in the appellate proceedings. Despite the fact that the Appellant's condition was permanently affected, the proceedings were not terminated but suspended.) The Supreme Court Chamber also notes the pragmatic approach adopted by the Tribunal de Grande Instance de Paris in the case of Jacques Chirac where, upon Mr. Chirac's request, it proceeded in his absence. *See Ministère public v. Roussin et consorts*, Case no. 9834923017, Tribunal de Grande Instance de Paris, "Jugement", 15 December 2011 (A few days before the opening of the trial, Jacques Chirac's lawyer filed an expert report stating that Mr. Chirac's mental condition was severely impaired, probably due to Alzheimer's disease, so he would not be able to testify during his trial. Together with this report, Chirac's lawyer filed a letter from his client expressing his wish to be tried and requesting the trial to be held in his absence, while he would be represented by his lawyer. The Judge accepted the request, pursuant to Art. 411 of the Code of Criminal Procedure, so the trial was held without Chirac being present. Mr. Chirac was convicted of 2 years suspended term in prison. He did not appeal his conviction.)
[121] Ordinanza N. 289/2011, Corte Constituzionale, 9 November 2011 ("Ordinanza N. 289/2011").
[122] Ordinanza N. 289/2011, pp 3, 5.
[123] Ordinanza N. 289/2011, p.3.
[124] Ordinanza N. 289/2011,p.3.

himself.[125] Furthermore, the Court concluded that periodic reassessments are necessary to provide an avenue for the case's reactivation.[126]

44. A similar issue has been challenged before the Supreme Court of Canada in *R v. Demers*. The legal regime applicable at the time under the Criminal Code provided for continuous treatment or periodic assessment of an accused who had been found unfit to stand trial, with an option to either detain the accused (in a prison or mental health facility) or release with conditions. A constitutional challenge was brought before the Supreme Court of Canada on the basis that the absence of a possibility of an absolute discharge (or release without condition) for permanently unfit accused violated *inter alia* the right to liberty enshrined in the Canadian Charter of Rights and Freedoms. The Supreme Court of Canada found that "[a] permanently unfit accused will never become fit, nor will he or she ever be tried. Such individuals will be subject to anxiety, concern and stigma because of the criminal proceedings that hang over them indefinitely."[127] The Court took particular issue with the absence of periodic psychiatric evaluations that would have allowed for tailoring the conditions on the accused's release. It went on to find that by not allowing for the possibility of an absolute discharge for permanently unfit accused, the challenged provision violated the accused's right to liberty:

> "In our view, Part XX.1 Cr. C. fails to deal fairly with the permanently unfit accused who are not a significant threat to public safety. Society's interest in bringing accused persons to trial cannot be accomplished, nor can society's interest in treating the accused fairly. The regime fails to provide for an end to the prosecution. Permanently unfit accused are subject to indefinite conditions on their liberty, of varying degrees of restrictiveness, resulting from the disposition orders of the Review Board or the court, who do not even have the power to order a psychiatric assessment in order to adapt a disposition to meet the permanently unfit accused's current circumstances. Thus, the failure of the regime to provide for the permanently unfit accused, combined with the continued subjection of an unfit accused to the criminal process, where there is clear evidence that capacity will never be recovered, renders the entire scheme under Part XX.1 overbroad as it relates to permanently unfit accused who do not pose a significant threat to the safety of the public."[128]

While the Supreme Court of Canada favours termination of proceedings in case of permanent unfitness, it nevertheless emphasized that a stay (which amounts to termination under Canadian Law) is not automatic, even for permanently unfit accused, and that various factors shall be

[125] Ordinanza N. 289/2011, p.3.
[126] Ordinanza N. 289/2011, p. 4.
[127] *R. v. Demers*, [2004] 2 S.C.R. 489 ("*R. v. Demers*"), para. 53.
[128] *R. v. Demers*, para. 55.

taken into consideration prior to adopting this "drastic" measure, including the gravity of the charges:

> "In deciding whether or not to grant a stay, courts will have to consider such factors as the nature of the accusation, the time since the offence, later conduct, initial and current medical evaluations, whether the accused is taking medication required to eliminate the risk, as well as all other relevant information and circumstances of the accused. Also, as mentioned by this Court in *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391, at para. 92, it will also be appropriate at this stage "to balance the interests that would be served by the granting of a stay of proceedings against the interest that society has in having a final decision on the merits". This balancing recognizes that the administration of justice is best served by staying the proceedings where the affront to fairness and decency is disproportionate to the societal interest in the subjection of the accused to criminal proceedings: *R. v. Conway*, [1989] 1 S.C.R. 1659, at p. 1667."[129]

45. Orders to suspend proceedings in cases where the accused were unlikely to ever become fit to stand trial were also challenged before the European Court of Human Rights ("ECtHR"), *inter alia* as a violation of the right to be tried within a reasonable time enshrined in Article 6(1) of the European Convention of Human Rights ("ECHR"). In *Krakolinig v. Austria*, the applicant was found unfit to stand trial after he had a heart attack, which left him on a "poor state of health", with little prospect of improvement in the near future.[130] The Austrian Court stayed the proceedings against him but rejected his request for termination as "the applicant's state of health alone did not constitute a reason to terminate criminal proceedings against him".[131] In declaring the application inadmissible, the ECtHR found that although out of the accused's control, his state of health was "without doubt the objective reason for the resulting length of the proceedings."[132] The Court made it clear that "a breach of the reasonable time requirement under Article 6 can only be found when such delays are attributable to the domestic courts."[133] Importantly for the present discussion, it further observed that "Article 6 does not give a right to have criminal proceedings terminated on account of the accused's state of health."[134] In *Nichitaylov v. Ukraine*, criminal proceedings against the applicant were suspended for "an indefinite period of time" by the regional courts due to the applicant's lack of fitness to stand trial, which resulted from his complete and permanent blindness and deafness. The ECtHR

[129] *R. v. Demers*, para. 64.
[130] *Krakolinig v. Austria*, ECtHR, App. No. 33992/07, Decision on Admissibility, 10 May 2012 ("*Krakolinig* Decision"), paras 7 and 10.
[131] *Krakolinig* Decision, para.13.
[132] *Krakolinig* Decision, para. 27.
[133] *Krakolinig* Decision, para. 27.
[134] *Krakolinig* Decision, para. 27.

noted that "although the hypothetical possibility of resuming the proceedings exists, there seems to be no intention at the present time to continue them".[135] Eventually, although the ECtHR ultimately concluded that the applicant's right to be tried within a reasonable time had been violated in this case as the proceedings leading to the suspension were found to be unreasonably long, it did not consider that the period where proceedings were suspended contributed to the violation.[136] This jurisprudence demonstrates that the ECtHR does not take issue under Article 6(1) with national legislations which allow indefinite suspension of the proceedings against permanently unfit accused.

46. The solution of suspending or temporarily staying proceedings against accused unfit to stand trial and continuing to exercise jurisdiction has thus far been favored by the *ad hoc* international tribunals, which had no provision dealing with accused unfit to stand trial in their constitutive documents or procedural rules. The International Military Tribunal at Nuremberg, the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the Special Panels for Serious Crimes in East Timor have retained jurisdiction over all accused found unfit to stand trial thus far, including to impose conditions on release aimed at ensuring the accused's presence at trial, protection of others and preventing interference with the administration of justice, even in circumstances where proceedings were unlikely to ever resume. In particular, the International Military Tribunal severed and suspended the trial against Gustav Krupp von Bohlen, a defendant suffering from severe cognitive and physical impairment, but ordered the charges to be retained on the docket in case the accused regained capacity to be tried by the tribunal, which never happened.[137] At the ICTY, the Trial Chamber in *Djukic* refused to withdraw the indictment as requested by the Defence and the Prosecution, despite the "inevitable mental decline" resulting from the accused's terminal illness. The ICTY Trial

[135] *Nichitaylov v. Ukraine,* ECtHR, App. No. 36024/03, Judgment, 15 January 2010 (*Nichitaylov* Decision), para. 36.
[136] *Nichitaylov* Decision, para. 36. *See also*: *Antoine v. United Kingdom*, ECtHR, App. No. 62960/00, Decision on Admissibility, 13 May 2003 ("*Antoine* Decision"), p. 11 ("the question of whether the applicant is tried within a reasonable time will depend on an examination of the period between the first concrete step taken to institute another trial which can be regarded as substantially affecting the applicant's position and the conclusion of those proceedings").
[137] Order of the Tribunal Granting Postponement of Proceedings Against Gustav Krupp von Bohlen, 15 November 1945, reproduced in *Trial of the Major War Criminals before the International Military Tribunal*, Nuremberg, 1947 ("*Trial of the Major War Criminals*"), pp 20-21. When the Indictment was served upon Krupp, the Accused was bedridden at his family home in Bluhbach, Austria. The doctors called upon to examine him found that he was incapable of travelling without serious risks to his health (*Certificate of Service on Defendant Gustav Krupp von Bohlen*, 23 October 1945, reproduced in *Trial of the Major War Criminals*, p. 118). Proceedings were suspended just after the issuance of the Indictment, and the Accused was never brought to the International Military Tribunal nor detained (*see inter alia*: *Answer for the United States to the Motion Filed on Behalf of Gustav Krupp von Bohlen*, 12 November 1945, reproduced in *Trial of the Major War Criminals*, pp 134-138, where the United States representative states that "[i]t appears that Krupp should not be arrested and brought to the court room for trial"). The accused remained at liberty and died in 1950 (*see* US Holocaust Museum website at http://www.ushmm.org/wlc/en/article.php?ModuleId=10007117).

Chamber found that nothing in the ICTY Statute or Rules authorized a withdrawal and cited similar occurrences at the Nuremberg and Tokyo trials in which indictments were not withdrawn against terminally ill indictees.[138] The Chamber found that the extreme gravity of the condition of the accused mandated his release on humanitarian grounds, but considered that "given the fact that the indictment against him shall stand, such an exceptional measure must be accompanied by stringent conditions to ensure, if necessary, the appearance of the accused".[139] Even though it may be argued whether conditions imposed on Djukic upon release were indeed "stringent" or, as cited by the Trial Chamber, the release was "practically unconditional",[140] this difference of opinion does not diminish the similarity of the *Djukic* decision, whereupon Djukic had been obliged to report his address, submit periodic medical reports on his condition and respond to court summons, if his medical condition so permits, to the facts of the present case. In a slightly different context,[141] the ICTY Trial Chamber ordered the provisional release of Talic based on his terminal illness and rapidly declining health, which was found to be incompatible with detention at the ICTY detention facility. Despite that "stark reality" that the accused's condition would only deteriorate and ultimately bring about his demise,[142] stringent conditions on release were imposed in part to ensure his future presence at trial in the unlikely event that he recovered, including to "reside and remain at all times at the address in Belgrade", "remain within the confines of the municipality of Belgrade" and to "contact once a day the local police in Belgrade which will maintain a log and report (...) at the end of each month."[143] These cases demonstrate that even terminal condition of the accused does not remove the accused from the court's jurisdiction. They also confirm the practice of imposing measures which are similar to the set requested by the Co-Prosecutors.

[138] *Prosecutor v. Djukic*, IT-96-20-T, Decision Rejecting the Application to Withdraw the Indictment and Order for Provisional Release, Trial Chamber, 24 April 1996 ("*Djukic* Decision"). Proceedings were terminated a few months later upon the death of the Accused (*Prosecutor v. Djukic*, IT-96-20-T, Order Terminating Appeals Proceedings, Appeal Chambers, 29 May 1996).
[139] *Djukic* Decision, p. 4.
[140] Impugned Decision, para 36, referring to *Prosecutor v. Talić*, IT-99-36-T, Decision on the motion for provisional release on the accused Momir Talić, Trial Chamber, 20 September 2002 ("*Talić* Decision"), para. 32.
[141] In this case, the Trial Chamber was seized of a request by the accused to be released on account that his health was incompatible with detention. As such, the ICTY Trial Chamber did not make any finding on the accused's fitness to stand trial. Instead, the Chamber severed the proceedings against the accused from the ones of his co-accused on the day of his release and nothing happened in the case until the death of the accused, upon which proceedings were terminated.
[142] *Talić* Decision, p. 6 ("The stark reality of Talić's medical condition is that there is no escape for him from the natural consequence that his illness will ultimately bring about because his condition is incurable and inoperable and can only deteriorate with or without treatment. The stark reality is that the odds in favour of his being alive a year from now are few indeed.")
[143] *Talić* Decision, Disposition.

47. The Special Panels for Serious Crimes of the Dili District Court in East Timor also elected to "suspend" the proceedings against accused Joseph Nahak,[144] whom it had found unfit to stand trial on account that his mental disturbance made him a "severely limited person".[145] Although there was no indication that the accused could recover and become fit to stand trial in the foreseeable future, the Panel emphasized that the determination is made at a particular point in time and is subject to change so the trial may resume should the unfitness be proven to be temporary.[146] Relying on Article 135.4 of the Rules of Procedure and Evidence of the ICC, the Panel held that "the lack of fitness to stand trial is not an absolute defense but a mere bar to prosecution, the rule makes clear that a defendant deemed unfit to stand trial shall be subject to periodic review and possible re-examination. If, at a later point, the Panel "is satisfied that the accused has become fit to stand trial," then proceedings may resume. The Panel ordered that the accused remain subject to the bail conditions that had already been imposed on him before his fitness assessment, namely: (1) to report to the nearest police station; (2) to refrain from contacting or intimidating the victims or their families; (3) to remain in East Timor; and (4) to be present at all judicial proceedings.[147]

48. The ICC is the first international tribunal to have adopted specific rules on fitness to stand trial. It appears to have adopted a position similar to that of the *ad hoc* tribunals, by electing to "adjourn" proceedings against accused unfit to stand trial "until the obstacle cease to exist" and to review the case every 120 days, unless there are reasons to do otherwise.[148] The ICC rules do not contemplate a special solution for an eventuality of permanent unfitness.

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[144] *Prosecutor v. Nahak*, Case No. 1A/2004, Special Panels for Serious Crimes; District Court of Dili, Findings and Order on Defendant Nahak's Competence to Stand Trial, 1 March 2005 ("*Nahak* Decision"), p. 54 and paras 155-158.
[145] *Nahak* Decision, paras 150-151.
[146] *Nahak* Decision, paras154, 157 and "Order".
[147] *Prosecutor v. Barros, Mendonca, and Nahak*, Case No. 01/2004, Special Panels for Serious Crimes; District Court of Dili, Decision on Prosecutor's Request for Pre-Trial Detention, 17 March 2004, para. 5.
[148] Rule 135(4) of the Rules of Procedure and Evidence of the ICC provides: "Where the Trial Chamber is satisfied that the accused is unfit to stand trial, it shall order that the trial be adjourned. The Trial Chamber may, on its own motion or at the request of the prosecution or the defence, review the case of the accused. In any event, the case shall be reviewed every 120 days unless there are reasons to do otherwise. If necessary, the Trial Chamber may order further examinations of the accused. When the Trial Chamber is satisfied that the accused has become fit to stand trial, it shall proceed in accordance with rule 132." The Pre-Trial Chamber I recently stated that when an accused is unfit to stand trial, "criminal proceedings must be adjourned until the obstacle ceases to exist" (*Prosecutor v. Gbagbo*, ICC-02/11-01/11, Decision on the fitness of Laurent Gbagbo to take part in the proceedings before this Court, Pre-Trial Chamber I, 2 November 2012, para. 43.)

*A second solution: the "special verdict"*

49. A different approach has been developed in the United Kingdom[149] and adopted by a number of common law countries such as Hong Kong,[150] Zambia[151] and, with some variations, Australia,[152] where criminal proceedings against unfit accused (permanently or not, there is generally no distinction) are brought to a conclusion by authorizing courts or a jury to determine whether the accused has committed the crime charged or, at least, its *actus reus*. In the affirmative, the criminal courts are competent to order a variety of measures, typically including commitment in a mental health institution or a prison (for treatment or not), nomination of a guardian or a similar regime of protection, conditional release or unconditional release. This latter option of unconditional release is explicitly excluded for serious crimes such as murder in the United Kingdom.[153] Insofar as the laws of the United Kingdom are concerned, these measures are seen as a means to ensure the protection of the public against individuals who are deemed dangerous on account of the acts that they have committed, rather than punishment.[154] The criminal proceedings are stayed indefinitely but there is a possibility for the prosecution to

[149] In the United Kingdom where this model was first adopted, upon a finding of unfitness to stand trial (permanent or not, there is no distinction), the trial shall not proceed and a jury is empanelled to determine, by a "special verdict", if the accused "did the act or made the omission charged against him" (Section 4A of the Criminal Procedure (Insanity) Act 1964). Upon a finding that the accused committed the *actus reus* of the crime charged, various orders can be made, including admission to a hospital, a guardianship order, supervision and treatment order or absolute discharge (Section 5 of the Criminal Procedure (Insanity) Act 1964).

[150] Hong Kong, Criminal Procedure Ordinance Cap. 221, Sections 75, 76 and Schedule 4(3) and (4) (2000).

[151] Zambia Criminal Procedure Code, Cap. 88, Art. 161-166.

[152] In Australia, under the Division 6 of the Crimes Act (Commonwealth), applicable to offenses against the Commonwealth, if a court finds the defendant unfit to stand trial, the court must first determine whether or not there is a *prima facie* case that the defendant committed the offence. If so, and the defendant is unlikely to become fit within twelve months, the court must: (1) detain the defendant in a hospital subject to treatment, (2) detain the defendant in a place other than a hospital, including a prison, (3) release the defendant with conditions, or (4) release the defendant unconditionally. Conditional release can only be ordered for a maximum of three years and detention may not exceed the length of the maximum period of imprisonment that could have been imposed if the accused had been convicted of the charged offense (Commonwealth Crimes Act 1914, Sections BA, BC, B6). A similar regime is applicable in *inter alia* the State of Victoria. In Victoria, if a defendant is found unfit to stand trial, a jury, after a special hearing (which is analogous to a trial), can return one of three verdicts: (1) not guilty of the offence charged; (2) not guilty of the offence because of mental impairment; (3) the accused committed the offence charged or an offence available as an alternative. If the jury returns either verdict (2) or (3), the court must either declare that the person is liable to supervision (under a custodial or a non-custodial supervision order), or release the person unconditionally. A supervision order is for an indefinite period, but subject to annual reviews and a major review at the end of the "nominal sentence" (the date set by the court based on the sentence the defendant would have received if they were found guilty of the offence) (*See* Sections 17-18 and 26-28 of the Crimes (Mental Impairment and Unfitness to be Tried) Act).

[153] United Kingdom, Section 5 of the Criminal Procedure (Insanity) Act 1964.

[154] The House of Lords clarified that the "special verdict" does not involve the determination of a criminal charge as the jury has the power to acquit but not to convict. The procedure cannot lead to punishment. (*R. v. H. and the Secretary of the Home Department*, Judgement of 30 January 2003, at paras 16 and 18, referred to by the ECtHR in *Antoine* Decision, pp. 5-6.) The European Court further stated that the essential purpose of these proceedings is "to consider whether the applicant had committed an act the dangerousness of which would require a hospital order in the interests of the protection of the public".

reactivate them.[155] In the views of the European Court of Human Rights, the criminal proceedings are "for practical purposes terminated" and it cannot be considered that the charges remain pending, although there is a theoretical possibility for the prosecution to reactivate the case.[156] However, the situation is slightly different in Australia, as the accused, when committed to a mental health facility or another appropriate facility such as a prison, is deemed to have served a nominal sentence and therefore a permanent stay is ordered.[157]

*A third solution: providing for the possibility of terminating proceedings in case of permanent unfitness*

50. A limited number of States have adopted specific provisions in their legislation to address the particular situation of accused found to be permanently unfit to stand trial and provided for the possibility of terminating criminal proceedings. Termination of proceedings with cessation of jurisdiction over the accused is envisaged in Canada and Serbia.[158] In Canada, it is not, however, automatic and it is subject to the Court's determination that the accused does not pose a threat to the public and that termination is in the interest of justice, taking into account, *inter alia*, the interests in prosecuting the accused for the crime charged.[159] In other countries such as Chile,[160] Kosovo,[161] Liberia[162] Sierra Leone[163] and Tanzania,[164] termination is typically

[155] United Kingdom, Schedule 1 of the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991, para. 4(1).
[156] *Antoine* Decision. (In this case, a "special verdict" determined that the applicant, who suffered from paranoid schizophrenia, committed the act of murder with which he had been charged, so criminal proceedings were "stayed indefinitely" and the accused was committed to a hospital. The Applicant alleged violation of *inter alia* Art. 6(1) of the ECHR (right to be tried within a reasonable time) on the basis that the charges against him had not yet been determined. The Court found the Application inadmissible on the ground that while it was theoretically possible that the Secretary of State might later deem the applicant fit to plead and re-institute proceedings, this may never in fact happen.)
[157] Australian Crimes Act (Commonwealth), section 20(BC)(8).
[158] In Serbia, the trial may be deferred to a specific date when the accused is temporarily unfit to stand trial. If the mental disability or disorder is permanent, the indictment is dismissed (Serbia Criminal Procedure Code (2011), Art. 387 and 416).
[159] Canada has recently added to its legislation the possibility of staying permanently proceedings against accused who are not likely to ever become fit to stand trial if it is in the interests of justice, in response to the Supreme Court decision in *R. v. Demers*. Pursuant to the amendment to the Criminal Code, a verdict of unfit to stand trial may ultimately lead to a stay of proceedings (which amounts to termination of proceedings and mandates unconditional release) if the Court is satisfied that a) the accused is not likely to ever become fit to stand trial; b) the accused does not pose a significant threat to the safety of the public; and c) a stay is in the interests of the proper administration of justice. In order to determine whether a stay of proceedings is in the interests of the proper administration of justice, the court shall consider *inter alia* the nature and seriousness of the alleged offence and the salutary and deleterious effects of the order for a stay of proceedings. (Canadian Criminal Code, Section 672.851(7)-(8)).
[160] The Code of Criminal Procedure of Chile distinguishes curable and incurable disease leading to unfitness. In the case of curable disease, a stay is ordered while incurable mental illness leads to the dismissal of the case. The accused is released unconditionally if his freedom does not pose a threat to himself or others; otherwise, the court refers the matter to the relevant health authority for further action (Code of Criminal Procedure of Chile, Art. 686).
[161] In Kosovo, if the unfitness is a result of temporary disorder, "the investigation shall be suspended or the main trial shall be adjourned". If the defendant is unfit to stand trial as a result of permanent mental disorder, the court shall issue a decision to dismiss the proceedings, but these may be resumed at request of the prosecutor if "reasons for the rendering of such ruling cease to exist". In either instance, the court may subsequently request initiation of proceedings

associated with the possibility of further action under mental health statutes, such as commitment to a mental health facility.

51. Termination of proceedings, although far from automatic, appears to be a possibility in the United States, if the circumstances of the case so justifies. At the federal level, termination of proceedings is not explicitly envisaged in the law, which provides for the commitment of all unfit defendants to an institution, "until the accused shall be mentally competent to stand trial or until the pending charges against him are disposed of according to law."[165] In keeping with the US Constitution, this law has been construed to require that where the defendant is found incapable of proceeding to trial, is not likely to regain capacity in the future, and is not committed on account of threat to public safety, the state must either institute civil commitment proceedings under the law applicable to all citizens or release the defendant.[166] The US Supreme Court in *Jackson v. Indiana* suggested that termination of proceedings may be an available option depending on the circumstances of the case.[167] This option is explicitly envisaged in the legislation of a number of states, where courts are afforded the discretionary power to terminate proceedings against accused who face little prospect of being ever tried.[168] Termination is,

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for committal to a healthcare institution under the Law of Law on Non-Contentious Proceedings if there are grounds to believe that the defendant will endanger the life or health of another person. (Regulation No. 2004/34 - On Criminal Proceedings Involving Perpetrators With a Mental Disorder, adopted by the United Nations Interim Administration Mission in Kosovo, Art. 9.1-9.4; Kosovo Provisional Criminal Procedure Code, Art. 103(3)).

[162] In Liberia, if a court considers that so much time has passed since the commitment of an incompetent accused that it would be unjust to resume criminal proceedings, the charges are dismissed. The accused is then released or, if his mental condition so warrants, is further committed to an appropriate institution (Liberia Criminal Procedure Law, 1969, Art. 6.3).

[163] In Sierra Leone, upon certification by a designated authority or practitioner that "the mental balance of the accused would be jeopardized by the strain of a trial, the proceedings against the accused shall not be continued unless the Attorney General informs the court that he considers it essential in the public interest for the trial to proceed" (Sierra Leone Criminal Procedure Act, Art. 78(1)). Upon such discontinuance, the accused is discharged and thereafter subject to the provisions of the relevant mental health acts "to the same extent as a mental patient against whom no proceedings have been brought." (Sierra Leone Criminal Procedure Act, Art. 78(2)).

[164] In Tanzania, there is no specific provision for accused permanently unfit to stand trial but the Criminal Procedure Act envisages the possibility for the prosecution to "discontinue" the charges, with the consequence that the accused could either be eligible to an unconditional discharge or "discharged" of the criminal charges and dealt with under the Mental Diseases Act. There remains a possibility to reinstate the criminal action. (Criminal Procedure Act, 2002, Art. 21).

[165] 18 U.S.C. ss 4244 to 4246. Many US states have enacted similar provisions (*see Jackson v. Indiana*, 406 U.S. 715, 738 (1972) ("*Jackson* Judgment"), p. 12).

[166] *Jackson* Judgment, p. 738: "We hold, consequently, that 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 the 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".

[167] *Jackson* Judgment, p. 740 (suggesting that the dismissal of charges against an incompetent accused may be warranted under the Sixth and Fourteenth Amendment right to a speedy trial or the denial of due process).

[168] *See, e.g.* Alaska Statute § 12.47.100 (2012) (providing for the dismissal of charges against a permanently unfit accused and ordering the institution of civil commitment procedures pursuant to AS §§ 47.30.700 – 47.30.915); Idaho Statutes § 18-212 (2000) (permitting the court to dismiss charges against an unfit accused if the court determines that "so much time has elapsed (…) since the commitment of the defendant that it would be unjust to resume the criminal

however, not automatic[169] and it remains possible, at least in some states, to order certain measures on release where justified by the case.[170] The flexibility of US federal and state courts to determine whether to dismiss the charges or impose measures upon release in such cases reflects the broad discretion of prosecutors and judicial officials inherent under the US common law system.

52. In the light of the foregoing, the Supreme Court Chamber finds that among various responses to unfitness to stand trial, the practice uniform to the degree of forming a general principle of law is that accused who are unfit to stand trial are not subject to regular processes capable of bringing about a criminal conviction. However, it remains exceptional that proceedings against permanently unfit accused are terminated and that courts forfeit jurisdiction over them, especially in cases involving serious crimes. The mere fact that proceedings remain pending against unfit accused charged with serious crimes, even if permanently unfit, is generally not considered as a disproportionate infringement upon the accused's fundamental rights, in particular, the right to be tried within a reasonable time. As stated by the Supreme Court of Canada, when proceedings are not terminated and as long as the indictment is outstanding, "the criminal justice system maintains jurisdictional control over the accused found unfit to stand

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proceedings"); Hawaii Revised Statutes § 705-406 (2001) (granting the court authority to dismiss the charges against a defendant that lacks capacity in the interests of justice); New Jersey Revised Statute § 2C: 4-6 (2012) (requiring the court to hold a hearing to decide whether to dismiss the charges or hold them in abeyance where an unfit defendant fails to regain competency within three months of court-ordered commitment).

[169] For instance, in a New York federal case considering a defendant who had been in detention for mental incapacity and who was permanently unfit to stand trial, the court required his release, but stated that "this court does not purport in more general terms to 'dismiss' or otherwise erase the indictment. If the State should ever undertake to bring relator to trial, today's decision is not meant to foreclose (however much it may predict defeat of) a prosecution claim that such proceedings are consistent with the right to a speedy trial." *U.S. ex rel. von Wolfersdorf v. Johnston*, 317 F.Supp. 66, S.D.N.Y(1970)). *See also Greenwood v. U.S.*, 350 U.S. 366, 375 (1956) (recognizing that the present state of knowledge and therapy regarding mental disease is that science has not reached finality of judgment as it relates to recovery and permanence of incapacity, and holding that a small likelihood of recovery of an unfit defendant does not irretrievably frustrate the federal power to prosecute).

[170] This is the case *inter alia* in Illinois: *People v. Ealy*, 365 NE 2d 149, Ill. App. Ct, 1st Dist. (1977), p. 12 (discussing holding in *Jackson*: "But just what does *Jackson v. Indiana* require? Does it require defendant's release, either outright or unconditional, or a release subject to the statutory provisions of section 5-2-2 and the requirements for bail? Section 5-2-2 makes clear that an unfit, uncommittable defendant may be released on bail or recognizance 'under such conditions as the court finds appropriate, which may include, but need not be limited to requiring the defendant to submit to or to secure treatment for his mental condition. (…) In our opinion Jackson v. Indiana does not prohibit the trial court from considering sections 110-5(a) and 110-10(a) in determining the conditions under which the defendant may be released on bail"). *See also* Hawaii Revised Statute § 705-406 (2001) (permitting the release of an unfit accused "on conditions the court determines necessary"); Iowa Code § 812.6 (2001) (authorizing the court to require an unfit accused to undergo outpatient mental health treatment as a condition of release); Virginia Code § 19.2-169.3 (2009) (granting the court power to appoint a legal guardian for an unfit accused as a condition of release), as well as *People v. Lang*, 391 N.E.2d 350, 352, Ill. App. Ct. (1979) ("If the defendant is not ordered hospitalized in such hearing, the Department of Mental Health and Developmental Disabilities shall petition the trial court to release the defendant on bail or recognizance, under such conditions as the court finds appropriate, which may include, but need not be limited to requiring the defendant to submit to or to secure treatment for his mental condition.")

trial because that person is subject to a criminal accusation and pending proceedings".[171] Jurisdiction is justified by the interests of justice to prosecute the accused, against whom it has been established that there is sufficient evidence to initiate prosecution or a trial, as in the current case. Concretely, it allows the courts to take measures that are deemed necessary and appropriate in the circumstances to make possible the resumption of proceedings, if the opportunity arises. In this regard, it is noted that unfitness to stand trial is evaluated on the basis of the condition of the accused and the medical science at a given time. Not only are both variable in time but also the assessment, especially when it concerns the mental condition, is subject to human error and deceptive behavior of the accused.[172] For these reasons, many of the world's legal systems and the practice at the international level authorize the application of specific measures such as may be necessary in the circumstances to leave open the possibility of resumption. The question boils down to what measures, if any, are necessary and proportionate when the accused faces little prospect of ever being tried.[173]

53. For all these reasons, the Supreme Court Chamber considers that the Trial Chamber committed an error of law in concluding that the ECCC is prevented from exercising jurisdiction over the Accused during the indefinite stay of the proceedings against her whereas such conclusion finds

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[171] *R. v. Demers*, para. 22. *See also* para. 23 ("the criminal process is validly engaged and its hold on the accused found unfit to stand trial is established"); and para. 21 (quoting R.D. Schneider in "Mental Disorder in the Courts: Absolute Discharge for Unfits?" (2000), 21 *For the Defence* 36, at p. 38: "The fitness rules were established to ensure that a prosecution not proceed where an accused is not able to adequately responds to the state. The rules are in place to protect the accused. While it is true that an accused may be 'permanently unfit', surely that status accompanied by the presumption of innocence (…) is preferable to either proceeding against the unfit accused or terminating the outstanding charges.")

[172] The risks associated with a forfeiture of jurisdiction over accused due to the unstability or fallibility of experts' assessment is illustrated by cases which paradoxical outcomes received gloomy notoriety. For instance, the Chamber notes the case of Ernest Saunders, a British businessman who was sentenced to five years of imprisonment for a handful of corporate-related crimes, namely false accounting, conspiracy and theft. Saunders appealed the decision and obtained a reduction of sentence which allowed his immediate release on the ground that he was suffering from severe mental illness (*R. v. Saunders*, Court of Appeal, 16 May 1991, transcripts published by Marten Walsh Cherer in *The Independent,* 17 May 1991). His clinical condition was assessed by an expert who found, upon tests and clinical examination, that not only did the appellant suffer from a form of senile dementia but also had a considerable degree of brain atrophy (pp. 2-3 of the decision). Immediately after his release, Mr. Sanders has been reported to have recovered completely from his alleged mental disease and continued to work in the business field for several years. (J. Warner, "Ernest Saunders: Out of Jail and Back in Business", *The Independent*, 18 May 1996; *Id.*, "Ronson: Ernest's Alzheimer's Was My Idea", *The Independent*, 6 June 2009; M. Verdin, "Guinness Four Fail in Fight for Acquittal", BBC News Online, 21 Dec 2001). *See also* "Incompetency to Stand Trial", 81 *Harv. L. Rev.* 454, December 1967 (suspicion "that a defendant is malingering" requires expert psychiatric testimony in order to ensure a comprehensive diagnosis of the accused's mental condition, illustrating the inherent risk of deception in diagnosing mental disorders in part on an accused's behaviour).

[173] The ICC Appeals Chamber, in *Lubanga* relied upon by the Trial Chamber, found that absent a permanent or irreversible stay, the prospect for the resumption of proceedings is rather a factor that is taken into consideration when determining whether to release the accused, conditionally or otherwise; it does not affect the Court's jurisdiction to impose restrictive measures on release (*Lubanga* Decision, para. 37).

no support either on the applicable law before the ECCC or on the practice established at the national or international level.

54. Having confirmed in the preceding paragraphs that the ECCC retains jurisdiction over the Accused during the indefinite stay of proceedings, the Supreme Court Chamber will now consider the Trial Chamber's second argument against the application of judicial supervision, that is, the contention of a lack of a "clear legal basis". As a starting point, the Supreme Court reiterates that the suspension of proceedings does not bar the court from undertaking procedural actions and applying measures to ensure the resumption and integrity of proceedings. For instance, the court would need to take actions necessary in order to remove the obstacle to the proceedings (*e.g.,* obtain a waiver of immunity, apprehend the accused); to preserve evidence (*e.g.,* inventory and store or release material evidence, protect or discontinue protection of witnesses); to ensure the presence of the accused before the court (*e.g.,* through detention or bail) and, eventually, to undertake evidentiary activities of unique opportunity. Absent any indication to the contrary, these actions need to be undertaken pursuant to the general rules on the matter. Accordingly, the formal legal basis for the application of detention and other measures during the stay of proceedings are provisions of Chapter 3 of the CCP and Internal Rules 63, 65 and 82.

55. In particular, the regime of judicial supervision under Article 223 of the CCP remains available during the time where proceedings are on hold, including at the trial stage. For the eventuality that the placement of Article 223 in the CCP could still cause any doubt as to its application at trial,[174] the Supreme Court Chamber emphasizes that in addition to the *maiori ad minus* argument supporting the trial court's authority to apply this measure,[175] there are explicit provisions that foresee the application of judicial supervision during the trial stage: Article 290 *in fine* provides that the trial court has the authority to determine whether the judicial supervision ordered at the pre-trial stage should continue on to the trial, whereas Article 352 provides that when the judgment is issued, judicial supervision ends. Moreover, the Internal Rules provide the possibility for the Trial Chamber of releasing the accused "on bail".[176] The Supreme Court Chamber notes that the Internal Rules, by using the expression "bail order" in their English version, may suggest a legal concept different from judicial supervision, especially when looking at it from a common law perspective. The French and Khmer versions, however,

[174] First TC Fitness Decision, para. 74; First Appeal Decision, para. 25.
[175] First Appeal Decision, paras 45-46.
[176] Internal Rules 82(2) and 65.

use the expression "judicial supervision". When looking at how the Internal Rules describe the "bail order" – namely a judicial order that an Accused remain at liberty or be released from detention, pending trial judgement, on condition that he or she pay a bail bond and/or respect specific conditions set out in the order[177] – it is clear that it refers to the same concept as the one described under Article 223 of the CCP.[178]

56. The Supreme Court Chamber notes that legally permissible purposes for which judicial supervision may be ordered – namely to ensure the accused's presence at trial; prevent risks to witness or victims; prevent collusion with accomplices; preserve evidence; protect the security of the accused and preserve public order[179] – are inextricably connected to the necessity of criminal proceedings. The entirety of Chapter 3 of the CCP, entitled "Security Measures", demonstrates that the purpose and object of security measures do, in fact, anticipate that there will be a trial and seeks to prevent interference in advance of the trial. Outside the context of criminal proceedings, *e.g.*, upon dismissal of the case, none of the reasons could constitute an autonomous basis for the imposition of judicial supervision. That said, whereas the nexus with the criminal proceedings is indispensable, the Defence's contention that measures of judicial supervision are only allowed where the supervision is concurrently applied to ensure the presence of the Accused at trial[180] is too far-going. Other statutorily authorised reasons can be applied notwithstanding the objective of securing the presence of the Accused. Whether the given measure constitutes a permissible restriction of the rights of the accused will be dependent on the circumstances of the case.

57. In conclusion, the core problem resulting from the indefinite stay of proceedings due to lasting unfitness of the Accused for the question of measures of judicial supervision is not the lack of jurisdiction or legal basis, but rather the question of the necessity and proportionality of these measures in the current circumstances. This issue has not been considered by the Trial Chamber; it therefore falls upon the Supreme Court Chamber to decide it.

[177] Internal Rules, Glossary, and Rule 65(1).
[178] First Appeal Decision, para. 45.
[179] Internal Rule 65(1) (allowing to impose "such conditions as are necessary to ensure the presence of the person during the proceedings and the protection of others"), read in conjunction with Internal Rule 63(3)(b); Art. 223 of the CCP, read in conjunction with Art. 205.
[180] Defence Response, para. 61.

### 3. Whether the Trial Chamber erred in law by ordering unconditional release of the Accused in place of justifiable measures of judicial supervision and erred in fact or in the exercise of its discretion in finding that such measures would be unenforceable or impracticable

58. Although less stringent than detention, the measures of judicial supervision requested by the Co-Prosecutors still restrict fundamental rights of the accused including, *inter alia*, the right to freedom of movement and privacy, protected under Articles 12 and 17 of the International Covenant on Civil and Political Rights ("ICCPR"). Therefore, it is not sufficient that the restrictions have formal statutory basis as discussed above: a court may only impose such measures as are necessary to protect legitimate interests and conform to the principle of proportionality by being appropriate to achieve their protective function, being the least intrusive instrument amongst those which might achieve the desired result and being proportionate to the interest to be protected.[181] The proportionality requirement considers the relationship between the restriction's scope and its objectives.[182] Accordingly, measures of judicial supervision may never be capricious or excessive; where a more lenient measure is possible instead of judicial supervision, or among conditions foreseen under the regime of judicial supervision, that measure must be applied.[183] Judicial supervision decisions are fact-intensive and considered on an individual basis.[184] In this respect, the Supreme Court Chamber notes that the regime of judicial supervision available under Article 223 of the CCP and Internal

[181] *General comment No. 27: ICCPR Article 12*, CCPR/C/21/Rev.1/Add.9, 2 November 1999, para. 14. *See also General Comment No 31:The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add. 13, 26 May 2004, para. 6 ("Where such restrictions [on the rights] are made, States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights."); PTC 14 & 15, Decision on Khieu Samphan's Appeal Against Order Refusing Request for Release and Extension of Provisional Release Order, Pre-Trial Chamber, 3 July 2009, C26/5/26, para. 91 ("suitable, necessary, and reasonably related to the objective of the condition"), citing *Prosecutor v. Prilić*, IT-04-74, Order of Provisional Release of Slobodan Praljak, Trial Chamber, 30 July 2004, paras 14-16; *Prosecutor v. Blagojević*, IT-02-53-PT, Decision on Request for Provisional Release of Accused Jokić, Trial Chamber, 28 March 2002, para. 18; *Prosecutor v. Hadžihasanović*, IT-01-47-PT, Decision Granting Provisional Release to Enver Hadžihasanović, Trial Chamber, 19 December 2001, para. 8.

[182] *Silver v. United Kingdom*, ECtHR, App. No. 5947/72; Judgment, 25 March 1983, para. 97, citing *Handyside v. United Kingdom* (A/24) [1979-80] 1 EHRR 737, 754-55.

[183] *Talić* Decision, para. 23.

[184] First Appeal Decision, para. 30; SC 04, Decision on Immediate Appeal by KHIEU Samphan on Application for Release, Supreme Court Chamber, 6 June 2011, E50/3/1/4, para. 54 ("To what extent risks may be attenuated by measures not based in detention must be evaluated by the Trial Chamber upon a proper examination of all relevant factors"). *See also, inter alia: Prosecutor v. Boškoski and Tarčulovski*, IT-04-82-AR65.1, Decision on Johan Tarčulovski's Interlocutory Appeal on Provisional Release, Appeals Chamber, 4 October 2005, para. 7 ("Decisions on motions for provisional release are fact-intensive and cases are considered on an individual basis. In light of their factual complexity, each motion for provisional release is analysed in the light of the particular circumstances of the individual accused."); *Prosecutor v. Bemba*, ICC-01/05-01/08 (OA), Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo against the Decision of Pre-Trial Chamber III entitled "Decision on Application for Interim Release", Appeals Chamber, 16 December 2008, para. 55 (noting that detention or release may be justified upon an analysis of all factors taken together).

Rule 65 is flexible enough to allow for balancing the various interests at stake and design a regime as appropriate in the circumstances.

59. In the current case, where the Accused is indicted for the most serious crimes known to mankind, including Grave Breaches of the Geneva Conventions, Crimes Against Humanity and Genocide, there is a pressing social need to ensure that reasons to suspend the proceedings remain valid, *i.e.* to ascertain whether the Accused remains unfit to stand trial. The general theoretical possibility of resumption is already envisaged by the legal framework which does not allow dismissing the proceedings based on unfitness. On the facts of the case, such possibility could be predicated upon the following factors: limited confidence in the expert opinion; degree of probability/margin of error in the expert opinion; possibility of the Accused recovering in the future; prospect of progress in treatment methods. Notwithstanding the difference of medical opinions adduced in trial,[185] this Chamber has no reason to doubt the quality of the opinion that has been obtained by the Trial Chamber from court-appointed experts and the accuracy of their diagnosis that the Accused suffers from a dementing illness which renders her unfit to stand trial. It further accepts the experts' opinion that the prospect for improvement of the Accused's condition, given her age, is minimal. However, the Chamber recalls that medical science is not exact and is subject to evolution. The inherent limitation of medical science, and, in particular, the disciplines relevant to this case, is illustrated by the fact that after one and half year of observation and treatment the expert conclusion is still on the level of probability, "*most likely* Alzheimer disease". The potential of medical science is illustrated by the example of still unexplored area of pharmacological treatment. It is recalled that that the experts previously recommended the application of the Donepezil drug which was reported to have 33% effectiveness in Alzheimer patients. While this treatment was not administered after the Accused showed intolerance to it,[186] it does not preclude the future finding of a formula that will be better tolerated and available for administration. The Trial Chamber itself has acknowledged this possibility by undertaking to consult with experts every year to verify if new treatments are available.[187]

60. Hence, the Supreme Court Chamber considers that measures of judicial supervision are necessary to ensure that the condition of the accused is monitored. The minimal prospect of a

[185] Impugned Decision, paras 13 and 25 (referring to the unsolicited report of Dr. CHAK Thida and her testimony before the Trial Chamber to the effect that the Accused suffers "no cognitive impairment or mental illness.")
[186] Report concerning Mrs. IENG Thirith in Response to Trial Chamber Request dated 6 January 2012, E138/1/7/4, 24 February 2012, para. 7.
[187] Impugned Decision, para. 39.

trial causes, however, that only measures that have a minimal practical impact on the Accused's rights can be considered proportionate in the present circumstances. On the other hand, what practically plays a role in the consideration is that an accused who is genuinely permanently unfit to stand trial because of a mental condition is, as a rule, in real and practical terms, incapable of exercising the fullness of his or her rights.

61. The Chamber emphasises that it shall take into account the fact that the Accused's mental impairment and dementing mental illness raise serious concerns as to her ability to voluntarily abide by measures of judicial supervision that would require her direct cooperation. Indeed, this aspect was stressed in the First Appeal Decision.[188] In this regard, the Defence submits that the Accused's severe memory decline entails that she "will not be in a position to remember, comprehend and abide by any coercive condition imposed on her".[189] Although the Trial Chamber's findings concerning the Accused's mental state were limited to determining whether the Accused was fit to stand trial, the Impugned Decision and the experts reports filed before the Trial Chamber indicated that the Accused suffers from moderate to severe cognitive impairment[190] impairing her ability to comprehend questions, follow instructions, recall events, concentrate and maintain a consistent line of thought.[191] Her short-term and long-term memory is impaired.[192] For example, the Accused was unable to remember her address.[193] There are also indications of disorientation, even in confined spaces with which the Accused is familiar.[194] At the hearing before this Chamber, the Accused appeared disoriented and had difficulty to comprehend questions asked by the Court.

62. That being said, the Supreme Court Chamber agrees with the Co-Prosecutors that any eventual difficulty in enforcing sanctions against the Accused should she not adhere to obligations imposed by the court does not vacate the obligation as such. Rather, such situation calls for practical arrangements that seek to attenuate the risk of disobeying the order. In the light of the information mentioned in the precedent paragraphs, any regime of judicial supervision shall be crafted in order to favour as much as possible measures that require little involvement, if any,

[188] First Appeal Decision, para. 47.
[189] Defense Response, para. 71.
[190] Impugned Decision, paras 8-9, 11, 24; First TC Fitness Decision, paras 44, 45, 53.
[191] First TC Fitness Decision, para. 33.
[192] Impugned Decision, paras 9, 12; First TC Fitness Decision, para. 53.
[193] Summary Expert Report on Mrs. IENG Thirith, 29 August 2012, E138/1/7/13/2, para. 50.
[194] First TC Fitness Decision, paras 35, 36.

from the Accused or where assistance to the Accused can reasonably be provided.[195] In the absence of any guarantee of cooperation from the Accused, additional safeguards may also be warranted to facilitate and ensure respect of court imposed obligations.

63. The Chamber notes that the Accused's daughter, IENG Vichida, has been appointed as a general guardian to the Accused by the Municipal Court of Phnom Penh on 14 September 2012, under the Civil Code of Cambodia.[196] In particular, the Accused has been placed "under the general care" of her guardian,[197] on the basis that she "lack[s] the ability to recognize and understand the legal consequences of [her] action due to mental disability".[198] Under the Civil Code of Cambodia, the role of the guardian encompasses taking care of the person under guardianship, including of her livelihood and medical treatment, as well as her property.[199] Among other things, the general guardian is specifically obligated to "strive to provide the best possible medical care for the person under general guardianship."[200] The Supreme Court Chamber concedes that the detailed regulation of the role of the guardian in the Civil Code is focused on assistance to the incapable person in the area of asset management and provision of medical care. This focus is because relations in the private sphere are the most frequent and the most needful of assistance in the circumstances of incapacity. The purpose of the guardian institution is nonetheless broader and, in accordance with the definition, is that of a general care, lawfully benefiting the person under guardianship. As such, guardian duties include assisting the person under guardianship in the fulfilment of public law obligations, and does not exclude obligations arising in the area of criminal law.[201]

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[195] This Chamber has previously determined that the level of cooperation it may expect from the accused shall be taken into consideration (First Appeal Decision, para. 46). It shall take into account its realistic ability to enforce any necessary condition (*see inter alia*: *Prosecutor v. Bemba*, ICC-01/05-01/08 (OA 2), Judgment on the Appeal of the Prosecutor against Pre-Trial Chamber II's 'Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa', Appeals Chamber, 2 December 2009, para. 109).

[196] Phnom Penh Municipal Court, Decision, No. 288, 14 September 2012 E/138/1/10/1/2/3.1 ("Guardian Decision"), p. 3; Civil Code of Cambodia, Art. 24 and 1105-1135.

[197] Civil Code of Cambodia, Art. 25.

[198] Civil Code of Cambodia, Art. 24.

[199] Civil Code of Cambodia, Art. 1119(1).

[200] Civil Code of Cambodia, Art. 1119(2). *See also* Art. 1125 providing for the possibility to "inspect the living conditions and health care of the person under general guardianship"

[201] For instance, in the French system, where the guardianship provisions under the Civil Code of Cambodian find their origins, a recent amendment to the Code of Criminal Procedure provides that criminal proceedings must be notified to the guardian of the accused and that the latter can consult the case file (French Code of Criminal Procedure, Art. 706-113).

64. The ECCC, obviously, would have no power to sanction IENG Vichida within the regime of the CCP for a breach of obligation by her mother.[202] The only sanctions the court system has against the guardian are those foreseen in the civil law, such as replacing the guardian with another person or appointing an additional guardian or a supervisor to the guardian.[203] Nonetheless, the Chamber sees her appointment as a guardian to the Accused as a positive step to assist the Accused in abiding by measures of judicial supervision that the Chamber may consider to impose. The Supreme Court Chamber had suggested already on the occasion of the First Appeal Decision that engaging a person close to the Accused to assist her in meeting requirements of judicial supervision would have been instrumental in lifting her detention.[204] The present appointment of a guardian goes further than this suggestion and, from the point of view of these proceedings, is helpful but not necessary. Therefore, the Defence's criticisms regarding the appointment of the guardian are not only misplaced but also irrelevant. What is relevant for the present case is that the daughter of the Accused has declared her willingness to fully cooperate with the Court. To that end, Ms. IENG Vichida has appeared before this Chamber during the hearing held on 13 November. She has affirmed that she resides with the Accused approximately three days a week, and that she assists the Accused with her daily routine, including medical treatment.[205] She has shown her willingness to assist her mother in responding to summons and, if the needs to change address arises, to inform the Court of this change.[206] Also, she did not object *per se* to the execution of safety checks but raised concerns as to her ability to do so on a weekly or regular basis, given her personal engagements.[207]

65. Finally, it is noted that since the Accused's release on 16 September, the Accused and her guardian have cooperated with the Court and abide by the provisional measures ordered by the President in its Order on Request for Stay, without any problem being encountered. In particular, the Accused has informed the court of her address and not changed it, has remained in Cambodia and has responded to the summons issued by the Court for the hearing on 13 November. Furthermore, there appear to have been no threat to the Accused's safety upon her release, and there is no evidence that public order has been disturbed.[208]

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[202] Contemplated in terms of apparent unfeasibility and unreasonableness in the Impugned Decision, fn 86.
[203] Civil Code of Cambodia, Art. 1105(3), 1108 and 1110.
[204] First Appeal Decision, para. 47.
[205] Transcripts, 13 November 2012, E138/1/10/1.2, p. 53.
[206] Transcripts, 13 November 2012, E138/1/10/1.2, pp 54-56.
[207] Transcripts, 13 November 2012, E138/1/10/1.2, p. 62.
[208] A risk to public order if the accused remained at liberty has been identified in the past and has been a ground for pre-trial detention of the Accused (Provisional Detention Order, Co-Investigating Judges, 14 November 2007, C20 ("*IENG Thirith* Original Detention Order"), para. 6; PTC 02, Decision on Appeal against Provisional Detention Order of IENG Thirith, Pre-Trial Chamber, 9 July 2008, C20/I/27 ("*IENG Thirith* 2008 PTC Decision"), paras 66-71; Order on

66. Against this background, the Chamber shall now examine the measures of judicial supervision proposed by the Co-Prosecutors.

*Medical Evaluations*

67. The Co-Prosecutors propose that the Accused undergo six-monthly medical examinations in order to determine whether any change in circumstances could trigger a resumption of proceedings.[209] At this stage where the Accused has just been released from the ECCC detention facility, medical assessments would allow to verify that the Accused's condition is genuine, to monitor any change in such and to provide for the possibility of administering new treatments if such become available. In this regards, the Chamber notes that medical evaluations is a measure of judicial supervision specifically envisaged in the Cambodian Code of Criminal Procedure.[210] It is also regularly imposed in cases of accused unfit to stand trial, either by court orders or by the law.[211] It serves the purpose of removing the obstacle in the proceedings and, at the same time, the purpose of ensuring the presence of the Accused before the court.

68. The Chamber acknowledges that psychological evaluation for dementia and cognitive function, primarily consisting of memory tests and general personal questions,[212] impact on the

Extension of Provisional Detention, Co-Investigating Judges, 10 November 2008, C20 ("*IENG Thirith* 2008 Extension Order"), para. 33; Order on Extension of Provisional Detention, Co-Investigating Judges, 10 November 2009,C20/8, ("*IENG Thirith* 2009 Extension Order"), paras 25-26; Closing Order Detention Decision, para. 1623; PTC 144 & 145, Decision on IENG Thirith's and Nuon Chea's Appeals against the Closing Order: Reasons for Continuation of Provisional Detention, Pre-Trial Chamber, 21 January 2011, D427/2/13 (" IENG *Thirith* January 2011 Decision"), para. 5). The situation is different now that the Accused has been released, on the basis of her unfitness to stand trial. Measures have been taken to inform the public about the reasons for this decision and it appears to have been generally well understood and received amongst Cambodian population. For example, the Trial Chamber released redacted versions of the relevant expert reports publicly. Further, the ECCC Public Affairs Section published a special edition of the Court Report devoted exclusively to the Accused's release (http://www.eccc.gov.kh/en/articles/special-edition-case-002-release-IENG-thirith) and answered frequently asked questions concerning the Accused's release on the ECCC website (http://www.eccc.gov.kh/en/articles/frequently-asked-questions-related-release-IENG-thirith). Public information remains the best way, in the circumstances, to ensure protection of public order.

[209] Co-Prosecutors' Supplementary Appeals Submissions, para. 29.

[210] CCP, Art. 223(11).

[211] At the international level, medical evaluations have been imposed as a condition of release in a number of cases involving accused unfit to stand trial. *See Talić* Decision, p. 9 (ordering the accused to comply with monthly assessments by medical specialist); *Prosecutor v. Kovačević*, IT-01-42, "Decision on Provisional Release", Trial Chamber, 2 June 2004, Disposition (ordering medical evaluations every second month to the Trial Chamber to keep the Chamber apprised of the Accused's medical condition); *Prosecutor v. Stanišić and Simotović*, IT-03-69-PT, "Decision on Provisional Release", Trial Chamber, 26 May 2008, Para. 68(2) (ordering doctors treating the accused to assess and report to Trial Chamber during duration of his stay). This is also common practice at the national level, as more amply discussed above.

[212] 2012 Summary Expert Report, paras 46-51 (detailing the methodology utilized by the experts to assess the accused's level of cognitive impairment).

Accused's right to privacy.[213] However, it considers that, at this stage, they are minimally intrusive. The Accused, due to her generally frail condition, has the need of medical care. To the extent the medical evaluation may result in diagnosing illnesses and recommending treatments, there is also congruence of interest of the Accused and the interest of justice in the need for continually updated information regarding the mental health of the Accused.

69. The Supreme Court therefore orders that the Accused undergo medical evaluation every six months. Following the assessment, a report shall be made to the Trial Chamber for its review and further action, if a change in circumstances is noted. This Chamber clarifies that it is not envisaged that the Trial Chamber would reassess the Accused's fitness every six months, but rather that it will evaluate whether it is necessary to conduct such evaluation, in the light of the medical reports that will be provided.

*Surrender of Passport and Identification Card, Obligation to Report Current and Any Change in Address, and Police Checks*

70. The Co-Prosecutors request a number of conditions aimed at ensuring that the Accused remains available to the Court and does not flee its jurisdiction, namely that the Accused be ordered to surrender her passport and identification card; reside at the address provided by her Co-Lawyers;[214] and undergo weekly safety checks by court-designated officials.[215]

71. The Chamber notes that a number of factors have been considered in the past as indicative of potential risk that the Accused may render herself unavailable to the Court, and have served as a basis to place her under provisional detention. These include the Accused's means,[216] including a residence abroad;[217] the limited number of extradition agreements between Cambodia and other countries;[218] the gravity of the charges and the possibility of life imprisonment;[219] the Accused's network of supporters in influential positions both within Cambodia and in foreign

[213] ICCPR, Art. 17 (providing that "[n]o one shall be subjected to arbitrary or unlawful interference with his privacy"). *See inter alia MG v. Germany*, Human Rights Committee, Communication No. 1482/2006, 2 September 2008, CCPR/C/93/D/1482/2006, para. 10.1; M. Nowak, *U.N. Covenant on Civil and Political Rights – CCPR Commentary*, Engel Publisher, Strasbourg, 1993, p. 295.
[214] Co-Prosecutors' Supplementary Appeals Submissions, para. 25.
[215] Co-Prosecutors' Supplementary Appeals Submissions, para. 24.
[216] *IENG Thirith* Original Detention Order, para. 8; *IENG Thirith* 2008 PTC Decision, para. 56; *IENG Thirith* 2008 Extension Order, para. 28; Decision on Urgent Applications for Immediate Release of NUON Chea, KHIEU Samphan and IENG Thirith, Trial Chamber, 16 February 2011, E50 ("TC February 2011 Release Decision"), para. 41.
[217] *IENG Thirith* Original Detention Order, para. 8.
[218] *IENG Thirith* Original Detention Order, para. 8; *IENG Thirith* 2008 Extension Order, para. 28.
[219] *IENG Thirith* Original Detention Order, paras 8-9; *IENG Thirith* 2008 PTC Decision, para. 53; *IENG Thirith* 2008 Extension Order, para. 28; TC February 2011 Release Decision, para. 41.

countries;[220] the stage of proceedings, namely the Closing Order, confirmation of indictment, and temporary stay pending medical treatment undertaken in an effort to render the Accused fit to stand trial.[221]

72. The Supreme Court Chamber considers that the risk of flight previously identified has been considerably attenuated by a number of new elements. First, the Accused's incentive to deliberately flee the jurisdiction of the Court is attenuated by the indefinite stay of proceedings, and the unlikelihood of a trial.[222] Indeed, the Supreme Court is unaware of any attempts to flee the jurisdiction of the court since the Accused was released on 16 September 2012. On the contrary, she has duly appeared before this Chamber when summoned. During the hearing before this Chamber, the Accused and her guardian have clearly expressed their intention to remain in Cambodia and this Chamber has no reason to doubt that these statements were not genuine.[223] Moreover, the Accused's current condition, which the Chamber was able to appreciate during the hearing, makes it highly unlikely that she would be capable, even if she wanted to, to leave the country by herself or to otherwise go in hiding.

73. The Chamber considers it necessary to remain informed of the Accused's whereabouts so it can contact her if required in the future, and ensure that the medical evaluations it has ordered can be conducted. To that end, the Accused, through her guardian, shall provide her address to the Court and inform it prior to any change of address. In this regards, the Chamber notes that the Phnom Penh Municipal Court already ordered the Accused's guardian to report the Accused's address to the ECCC.[224] The Accused is free to change her residence within the territory of Cambodia as long as the court is given advance notice. Furthermore, the Chamber notes that while the Court has the means to exercise jurisdiction over the Accused when she is within the

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[220] *IENG Thirith* 2008 PTC Decision, paras 54-55.
[221] Closing Order Detention Decision, para. 1623; *IENG Thirith* January 2011 Decision, para. 5; First Appeal Decision, paras 42 (the treatment would be undertaken to foster the Accused's availability for trial) and 47 (to ensure that the Accused undergoes treatment and does not absent herself).
[222] An accused has less incentive to flee when faced with the possibility of trial, as opposed to an imminent trial (PTC 152, Decision on IENG Sary's Appeal against the Closing Order's Extension of his Provisional Detention, Pre-Trial Chamber, 21 January 2011, D427/5/10 ("*IENG Sary* January 2011 Decision"), para. 36 (noting that confirmation of the indictment reinforces justifications for detention). Similarly, the gravity of the crimes and possible sentence are often taken into consideration, although not determinant (*see inter alia* SC04, Decision on Immediate Appeal by KHIEU Samphan on Application for Release, Supreme Court Chamber, 6 June 2011, E50/3/1/4, ("*KHIEU Samphan* June 2011 Decision"), para. 40; *Prosecutor v. Popović*, IT-05-88-AR65.2, Decision on Interlocutory Appeal of Trial Chamber's Decision Denying Ljubomir Borovčanin Provisional Release, Appeals Chamber, 1 March 2007, para. 14 ("the incentives to flee might decrease over time; in other cases these incentives might stay the same; and in still other cases, these incentives might shift enough to affect materially the approach taken in earlier provisional release decisions regarding the same accused").
[223] Transcripts, 13 November 2012, E138/1/10/1.2, pp 49 (IENG Thirith) and 54-55, 59 (IENG Vichida).
[224] Guardian Decision, p. 3.

territory of Cambodia as it can count on its judicial police[225] as well as on the cooperation of the Cambodian government,[226] it is much more difficult to do so if the Accused is abroad. In this case, it would need to rely upon the cooperation of foreign states, most of which have no treaty of cooperation with Cambodia.[227] Hence, it is necessary to order the Accused to remain in the territory of Cambodia, unless specifically authorized by this Court to leave the country.

74. The Chamber considers however that it is not necessary and would be disproportionate to retain the Accused's identification card and her passport. Although the Accused's guardian showed no opposition for the Court to keep these documents and did not identify any immediate need for these,[228] the Chamber considers that it participates to the dignity of the Accused to have access to her identification documents and that it is not warranted in the current circumstances to deprive the Accused of such. The Accused's passport and identification card shall be given back and kept by the Accused's general guardian, with the specification that they should not be used for the purpose of travelling outside Cambodia without the Court's authorisation.

75. Further, in the absence of express guarantees from the Accused that she will abide by the measures of judicial supervision mentioned above,[229] the Chamber considers it appropriate to order checks to be conducted at her residence by the judicial police once a month, in order to verify compliance with these conditions.[230] These checks should be minimally intrusive and

[225] Internal Rule 15.
[226] The Government of Cambodia is obliged, under the ECCC Agreement, to facilitate the execution of arrest warrants and otherwise cooperate with the Court (ECCC Agreement, Art. 25).
[227] This Chamber is only aware of four extradition agreements between the Royal Government of Cambodia and other states namely, those with Thailand (1999), China (2000), and Laos (2005) (available in Khmer at http://cambodia.ohchr.org/klc_pages/klc_section14.htm). Another agreement was also signed with Australia (2007) (available at http://www.austlii.edu.au/au/other/dfat/treaties/2009/4.html).
[228] Transcripts, 13 November 2012, E138/1/10/1.2, pp. 56-58.
[229] Factors considered in assessing the likelihood that an accused will abide by court conditions include personal assurances to abide by conditions and court orders, indicating the accused's good faith. *See inter alia: Prosecutor v. Galić*, IT-98-29-A, Decision on Defence Request for Provisional Release of Stanislav Galić, Appeals Chamber, 23 March 2005 ("*Galić* Decision"), para. 16 ("The fact that the Appellant is ready to accept any order given by the Appeals Chamber on the conditions for his provisional release supports the Appellant's good faith."); *Prosecutor v. Norman et al.*, SCSL-04-14-AR65, Fofana – Appeal against Decision Refusing Bail, Appeals Chamber, 11 March 2005 ("*Norman* Decision"), para. 23 ("The evidence which best favors the fair determination of a bail application is evidence of guarantees offered by the defendant that he will attend trial and pose no danger to others") and *Prosecutor v. Sesay et al.*, SCSL-04-15-AR65, Sesay – Decision on Appeal against Refusal on Bail, Appeals Chamber, 14 December 2004, para. 36 ("While in principle a judge could be satisfied that a particular accused would appear for trial notwithstanding [other guarantees], at the same time conditions and guarantees need to be meaningful").
[230] Insufficient personal guarantees may be alleviated by a reliable guarantee of government cooperation or a court enforcement mechanism, such as a police force (*see inter alia Norman* Decision, para. 43 (considering release was not possible where the local police claimed to be incapable of monitoring an accused and personal guarantees were insufficient); *Galić* Decision, para. 12. At the ICTY, for example, government guarantors undertake, *inter alia*, to ensure compliance with conditions, including monitoring the presence of the Accused at the address given (*see inter alia*: *Prosecutor v. Čermak and Markač*, IT-03-73-AR65.1, Decision on Interlocutory Appeal against Trial Chamber's Decision Denying Provisional Release, Appeals Chamber, 2 December 2004, para. 44(b)).

serve the purpose of verifying if the Accused still resides at the address she has provided to the Court and that she has not left the country. Any concern about the security of the Accused, should the issue arises, must also be noted, in accordance with the obligation of the Cambodian authorities to ensure safety of the Accused.[231] At this point, however, it is noted that there appears to be no particular threat to the Accused's safety. A brief report shall be provided to the Trial Chamber every month, focused primarily on informing the court in the event of any relevant changes in the situation of the Accused. Alternatively, the Accused, through her guardian, may be offered the possibility of sending herself such brief report every month.

76. The Chamber considers that the conditions mentioned above constitute a minimal restriction of the Accused's freedom of movement[232] that is proportionate to the objective of making her available to the Court while proceedings against her are still pending.

*Contact with Co-Accused, Witnesses and Victims and Interference with the Administration of Justice*

77. The Co-Prosecutors request that the Accused be ordered to refrain from contacting, directly or indirectly, the other Co-Accused (excluding her husband, IENG Sary); contacting any witness, experts or victims proposed by the Trial Chamber; or interfering with the administration of justice.[233]

78. The Supreme Court Chamber emphasises that the prohibition against interfering with the administration of justice is a universal obligation, so the Accused, like any other citizen, is already bound by this obligation.[234] Insofar as additional measures are requested by the Co-

[231] ECCC Agreement, Art. 24.
[232] Universal Declaration of Human Rights, Art. 13 ("Everyone has the right to freedom of movement and residence within the borders of each state… Everyone has the right to leave any country, including his own, and to return to his country"). *See also* ICCPR, Art. 12 ("Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. Everyone shall be free to leave any country, including his own. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant"). *See inter alia Liakat Ali Alibux, Suriname*, Inter-American Commission on Human Rights, Doc. 32, 22 July 2011, para. 100 ("On the question of proportionality, the Court considered that the restriction of the right to leave the country imposed during criminal proceedings by means of a precautionary measure should be proportionate to the legitimate purpose sought, so that it is only applied when there is no other less restrictive measure and during the time that is strictly necessary to comply with its purpose"); M. Nowak, *U.N. Covenant on Civil and Political Rights – CCPR Commentary*, Engel Publisher, Strasbourg, 1993, p. 213 ("States have a limited right to prevent persons who have been accused of a crime from leaving the territory of the State (*e.g.* by way of pre-trial detention or taking the passport away").
[233] Co-Prosecutors' Supplementary Appeals Submissions, para. 27.
[234] Internal Rule 35.

Prosecutors to specifically prohibit the Accused from contacting a number of persons, the Chamber considers that these are not necessary in the current circumstances.

79. At a previous stage, a number of factors were considered to create a potential risk that the Accused may interfere with witnesses or victims and tamper with evidence, including the Accused's access to the case file which contains details facilitating the contact of, and interference with, witnesses and victims;[235] the Accused's former positions of influence and substantial network of supporters in influential positions, some with armed guards;[236] the gravity of the crimes;[237] the stage of the proceedings, namely the on-going investigations, Closing Order and confirmation of the indictment;[238] prior hostility towards those who advocated for the trial of senior Khmer Rouge officials or implicated the Accused;[239] and the subjective fears of witnesses and victims.[240]

80. The Chamber considers that the risk that the Accused may interfere with witnesses or victims, collude with the co-Accused or otherwise tamper with evidence is no longer present. Indeed, this ground was eliminated as a reason for pre-trial detention of the Accused during the review by the Trial Chamber in February 2011.[241] Moreover, the Supreme Court takes into account that the Accused, due to her cognitive impairment, would have very little possibility to first identify who the witnesses and victims are, and then deliberately enter into contact with them. Any possibility to contact the co-Accused, apart from her husband, and collude with them is even more remote as they are currently being detained at the ECCC Detention Facility. Given the Accused's current condition and her difficulty in keeping a coherent language, any threat could not be taken seriously. In any event, the Accused would have very little incentive to interfere with victims or witnesses, now that the proceedings against her are stayed indefinitely. Indeed, it is noted that since her release on 16 September 2012, there is no indication that the Accused has attempted to do so.

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[235] *IENG Thirith* Original Detention Order, para. 7; *IENG Thirith* 2008 PTC Decision, para. 44; *IENG Thirith* 2008 Extension Order, para. 26.
[236] *IENG Thirith* Original Detention Order, para. 7; *IENG Thirith* 2008 PTC Decision, paras 45-47.
[237] *IENG Thirith* Original Detention Order, para. 9.
[238] *IENG Thirith* Original Detention Order, para. 7; *IENG Thirith* 2008 Extension Order, para. 27 (noting that the progress of the investigation renders the risk more acute); Closing Order Detention Decision, para. 1623; *IENG Thirith* January 2011 Decision, para. 5.
[239] *IENG Thirith* 2008 PTC Decision, para. 48; *IENG Thirith* 2008 Extension Order, para. 26; *IENG Thirith* 2009 PTC Decision, para. 42.
[240] *IENG Thirith* 2008 Extension Order, para. 26.
[241] TC February 2011 Release Decision, para. 41

*Review of Conditions*

81. In order to ensure that the Accused is not subject to arbitrary restrictions on her right to privacy and freedom of movement, the measures of judicial supervision must be reviewed by the Trial Chamber every 12 months, or at any time upon request, as provided for under Article 229 of the CCP and Internal Rule 65. This Chamber clarifies that that the annual review need only decide whether each condition continues to be suitable, necessary and proportional. The review shall not include a reassessment of the Accused's fitness to stand trial, unless warranted by a change in circumstances.

## VI-DISPOSITION

**FOR THE FOREGOING REASONS, THE SUPREME COURT CHAMBER:**

**GRANTS** the Immediate Appeal, in part;

**SETS ASIDES** the Impugned Decision insofar as it refuses to order measures of judicial supervision ("Rejects all other measures sought by the Co-Prosecutors");

**ORDERS** a regime of judicial supervision pursuant to which the Accused Ieng Thirith is hereby obliged:

(1) To inform the Trial Chamber or an official designated by it prior to any change of her current residential address;
(2) Not to leave the territory of the Kingdom of Cambodia without the authorisation of the Trial Chamber;
(3) To undergo six-monthly medical examinations by medical practitioners to be appointed by the Trial Chamber;
(4) To make herself available for security checks to be performed by judicial police once a month, in order to verify compliance with the above-mentioned measures of judicial supervision. Alternatively, the Trial Chamber may accept that the Accused provide, through

her general guardian, a monthly report to the Trial Chamber or an official designated by it, attesting to the compliance with the above-mentioned measures of judicial supervision.

**ORDERS** that the Accused's passport and her identification card be returned to the Accused's general guardian, with the condition that these not be used for the purpose of international travel, without prior authorisation from the Trial Chamber.

**ORDERS** the judicial police to conduct a monthly check at the address provided by the Accused to the Court, in order to i) verify that the Accused still resides at this address and has not left the country and ii) report any threat to the Accused's safety, in accordance with the obligation of the government of Cambodia to ensure security of the Accused and report to the Trial Chamber.

**REJECTS** the remainder of the Co-Prosecutors' Immediate Appeal.

**DIRECTS** the Office of Administration to provide all necessary administrative support to implement this decision, including by notifying this decision to the relevant Cambodian authorities, for their action.

**ORDERS** that other provisional measures ordered by the President in the Decision on Co-Prosecutors' Request for Stay of Release Order of IENG Thirith be lifted.

**Phnom Penh, 14 December 2012**

**President of the Supreme Court Chamber**

**KONG Srim**