EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

PRE-TRIAL CHAMBER

CASE NO. 002/19-09-2007-ECCC/OCIJ (PTC 32) IENG SARY

THURSDAY, 11 FEBRUARY 2010
0858H
APPEAL HEARING

PUBLIC: REDACTED

Before the Judges:

PRAK Kimsan, Presiding
Rowan DOWNING
HUOT Vuthy
NEY Thol
Katinka LAHUIS
PEN Pichsaly (Reserve)

For the Pre-Trial Chamber:

CHHORN Proleoeung
Entela JOSIFI
SAR Chanrath

For the Office of the Co-Prosecutors:

CHAN Dararasmye
Anees AHMED

For the Charged Person, IENG SARY:

ANG Udom
Michael G. KARNAVAS

For the Civil Parties:

NY Chandy
David BLACKMAN
PICH Ang
KIM Mengkhy
HONG Kimsoun
LOR Chunthy
SIN Soworn
CHET Vannly

List of Speakers:

Language used unless specified otherwise in the transcript

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Speaker	Language
MR. AHMED	English
MR. ANG UDOM	Khmer
MR. BLACKMAN	English
MR. CHHORN PROLEOEUNG	Khmer
MR. CHAN DARARASMYE	Khmer
JUDGE DOWNING	English
MR. BLACKMAN	Khmer
MR. NY CHANDY	Khmer
JUDGE LAHUIS	English
MR. KARNAVAS	English
JUDGE NEY THOL	Khmer
THE CHARGED PERSON	Khmer
THE PRESIDENT (PRAK KIMSAN, Presiding)	Khmer

P R O C E E D I N G S

(Judges enter courtroom)

[08.58.14]

MR. PRESIDENT:

Please be seated. The media are requested to leave the courtroom.

In the name of the Cambodian people and the United Nations, today the Pre-Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia declares open the hearing of the Criminal Case Number 002/19-09-2007-ECCC/OCIJ PTC32 dated 10 November 2009 in which the charged person, Ieng Sary, alias Van, Cambodian, male, born 24 October 1925 in Loeung Va Village, Loeung Va Commune, Travinh District, Travinh Province, Kampuchea Krom, pre-arrest address Number 47B Street 21, Group 36, Zone 4, Tonle Bassac Quarter, Champkcarmon District, Phnom Penh, Cambodia; father's name, Kim Riem, deceased, mother's name, Tram Thi Loi, deceased, is charged with Crimes Against Humanity and Grave Breaches of the Geneva Conventions of 12 August 1949, being crimes set out and punishable under Articles 5, 6, 29 (new) and 39 (new) of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia dated 27 October 2004.

Defence lawyers, Mr. Ang Udom, Mr. Michael Karnavas. Lawyers for the civil parties, Mr. Hong Kimsuon, Mr. Lor Chunthy, Mr. Kong Pisey, Mr. Yong Panith, Ms. Sin Soworn, Ms. Chet Vannly, Mr. Pich Ang, Ms. Silke Studzinsky, Mr. Mahdev Mohan, Mr. David Blackman,

Mr. Kim Mengkhy, Ms. Moch Sovannary, Ms. Isabelle Durand, Ms. Elizabeth Rabesandratana, Mr. Philippe Cannone, Ms. Martine Jacquin, Ms. Annie Delahaie, Ms. Fabienne Trusses-Naprous. Are all the participants present at the hearing?

[09.04.41]

THE GREFFIER:

(Microphone not activated)

Ms. Moch Sovannary, Ms. Elizabeth(sic) Durand, Ms. Elizabeth Rabesandratana, Mr. Philippe Cannone, Ms. Martine Jacquin, Ms. Annie Delahaie, Ms. Fabienne Trusses-Naprous not present.

MR. PRESIDENT:

I would like to declare the members of the bench.

Present at today's hearing are Prak Kimsan, President, Judge Rowan Downing, Judge Ney Thol, Judge Katinka Lahuis, and Judge Huot Vuthy, and Pen Pichsaly is a Reserve Judge.

The Greffiers are Mr. Chhorn Proloeung, Ms. Entala Josifi, Ms. Sar Sanrath, Ms. Faiza Zouakri.

The Co-Prosecutors are Mr. Chan Dararasmye, deputy Co-Prosecutor, and Mr. Anees Ahmed, deputy Co-Prosecutor.

The accused is requested to be brought to the dock.

[09.08.08]

MR. PRESIDENT:

The accused, what is your name?

THE CHARGED PERSON:

My name is Ieng Sary.

MR. PRESIDENT:

Do you have any alias? How old are you?

THE CHARGED PERSON:

I cannot hear you properly, Mr. President.

MR. PRESIDENT:

How old are you? What is your nationality? Where is your place of birth?

Due to the technical problem, translation was not possible. Let me repeat the questions.

What is your name?

THE CHARGED PERSON:

Ieng Sary.

MR. PRESIDENT:

Do you have any alias? How old are you?

[09.10.44]

THE CHARGED PERSON:

My nationality is Cambodian.

MR. PRESIDENT:

What is your place of birth? Which commune? Which quarter? Which district? Which province?

MR. PRESIDENT:

What is your occupation?

THE CHARGED PERSON:

(No interpretation)

MR. PRESIDENT:

What is your address pre-arrest?

THE CHARGED PERSON:

I lived near the Popey Pagoda.

MR. PRESIDENT:

What is your father's name and your mother's name?

[09.12.10]

THE CHARGED PERSON:

My mother's name is Tram Thi Loi.

MR. PRESIDENT:

What is your wife's name? How many children do you have?

THE CHARGED PERSON:

(No interpretation)

MR. PRESIDENT:

Do you have a legal representative or a lawyer?

THE CHARGED PERSON:

I would like my lawyer to speak on my behalf.

MR. PRESIDENT:

Do you know the names of your lawyers?

THE CHARGED PERSON:

My lawyers are Mr. Ang Udom and Mr. Karnavas.

MR. PRESIDENT:

Charged Person, I would like to read out your rights according to Rule 21.1(d). You have the following rights.

[09.13.12]

You are presumed innocent as long as your guilt has not been

established. You have the right to be informed of any charges brought against you. You have the right to be defended by a lawyer of your choice and you have the right to remain silent. I would like now to invite the Co-Rapporteur to read the Report of Examination.

JUDGE NEY THOL:

Thank you, Mr. President. I would like to read the Report of Examination as follows.

Extraordinary Chambers in the Courts of Cambodia Pre-Trial Chamber, Criminal Case File Number 002/19-09-2007-ECCC/OCIJ PTC32 Report of Examination. This report is divided into two main sections. First, the proceedings; second, the examination of the case file by the Co-Rapporteurs.

Proceedings.

A. Introduction.

Pursuant to Rule 77.10 of the Internal Rules of the Extraordinary Chambers in the Courts of Cambodia, the President of the Pre-Trial Chamber assigned Judges Ney Thol and Katinka Lahuis to prepare a written report setting out the facts at issue and details of the Co-Investigating Judges' Order on Extension of Provisional Detention dated 10 November 2009 against which an appeal has been lodged.

The President also asked the two judges to present relevant facts of case file number 002/19-09-2007-ECCC/OCIJ PTC32.

[09.15.53]

Identification of the charged person. Ieng Sary, alias Vann, male, born on 24 October 1925 in Loeung Va Village, Loeung Va Commune, Travinh District, Travinh Province, Kampuchea Krom, Cambodia, Khmer nationality. Pre-arrest residence, Number 47B Street 21, Group 36, Zone 4, Tonle Bassac Quarter, Champkcarmon District, Phnom Penh. Father's name, Kim Riem, deceased; mother's name, Tran Thi Loi, deceased. Ieng Sary is represented by co-lawyers Mr. Ang Udom and Mr. Michael Karnavas.

Charges. Ieng Sary is under investigation for Crimes against Humanity and Grave Breaches of the Geneva Conventions of 12 August 1949, being crimes defined and punishable under Articles 5, 6, 29 (new) and 39 (new) of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia dated 27 October 2004.

Purpose of the Report. This report sets out the facts at issue and the details of the decision under appeal and other related facts at issue before this Court. Its purpose is to assist those who are not parties to the proceedings to understand the matters before the Court.

B. Co-Investigating Judges Order on Extension of Provisional Detention. On the 10th November 2009, the Co-Investigating Judges issued an order extending, for a period not exceeding one year, the provisional detention of the charged person, who has been in provisional detention since 14 November 2007.

The Co-Investigating Judges found that the first criterion for

the issuance of a provisional detention order specified in Rule 63.3(a) of the Internal Rules was made, notwithstanding the passage of time.

[09.18.53]

They were of the view, after a fresh review of the evidence on the case file, that there were additional facts and information which could satisfy an objective observer that there was well-founded reason to believe that the charged person, Ieng Sary, in one or more of his functions and roles either planned, instigated, ordered, failed to prevent and otherwise aided and abetted the commission of crimes as specified in the Introductory Submission.

The Co-Investigating Judges found that there had been no change in circumstance since the Pre-Trial Chamber decided that provisional detention was a necessary measure to ensure the presence of the charged person during the proceedings, to protect his security and preserve public order. They thus considered that these three grounds set out in Rule 63.3(b) of the Internal Rules were still met.

The Co-Investigating Judges added that passage of time was relevant to determining the legitimacy of continued provisional detention of the charged person. In assessing the manner in which the judicial investigation had been conducted and by analogy with the case law of the European Court of Human Rights concerning reasonable time, the Co-Investigating Judges took

account of the facts of the case as a whole, including its complexity in terms of fact and law, the conduct of the judicial authorities and that of the parties.

[09.21.12]

The Co-Investigating Judges stated that they had been conscious of the fact that the nearly 24 months of detention was a significant period, but noted that the scope of the judicial investigation and gravity of the crimes brought against the charged person required large-scale investigative action, including direct interviews of witnesses and civil parties in order to find evidence to determine the roles of the charged person during the Democratic Kampuchea period and preparing written records of the interviews.

They concluded that the criteria for continued provisional detention of the charged persons as specified in Rule 63.3 of the Internal Rules were still met.

C. Ieng Sary's Appeal. On 7 December 2009 the co-lawyers for the defence of the charged person filed an appeal against the Co-Investigating Judges Order on Extension of Provisional Detention, requesting the Pre-Trial Chamber to reverse the order and terminate the charged person's provisional detention.

They argued that the Co-Investigating Judges had erroneously decided to extend Ieng Sary's provisional detention, that they had abused their discretion by failing to consider alternatives to provisional detention before issuing the extension order and

had violated Ieng Sary's right to liberty and his presumption of innocence as the requirements under Rule 63 of the Internal Rules for his continued detention were not met.

[09.23.53]

D. Civil Party Co-Lawyers' Response to the Appeal. On 16 December 2009, the co-lawyers for the civil parties filed a response to Ieng Sary's appeal in which they requested the Pre-Trial Chamber to reject the appeal as the extension order of the Co-Investigating Judges was reasonable, justifiable and the discretion had been properly exercised.

E. Co-Prosecutors' Response to the Appeal. On 17 December 2009, the Co-Prosecutors filed their response, requesting the Pre-Trial Chamber to dismiss the appeal on the main grounds that the appellant had failed to demonstrate any material change in circumstances since he was originally detained by the Co-Investigating Judges on 14 November 2007.

The Co-Investigating Judges note that he had not in particular demonstrated any change of circumstance since the Pre-Trial Chamber's confirmation of his provisional detention on 17 October 2008, an extension of provisional detention on 11 December 2008 or the Pre-Trial Chamber's confirmation of that order on 26 June 2009.

2. Examination by the Co-Rapporteurs.

A. Rule 63.3(a) of the Internal Rules. Extension of the Provisional Detention Order is appropriate if there are

well-founded reasons to believe that the charged person has committed crimes specified in the Introductory Submission. [09.26.44]

The co-lawyers for the defence argued that the Co-Investigating Judges conducted their investigation erroneously and without due diligence. They alleged that the OCIJ investigation was flawed in that there was a lack of sufficient exculpatory evidence on the case file which may have resulted from several problems with the judicial investigation, including (1) the bias of a Co-Investigating Judge; (2) the potential bias of other OCIJ staff; (3) interference with the administration of justice; (4) possible lack of an investigational plan and procedure for locating exculpatory evidence; and (5) the OCIJ's reliance on the use of torture-tainted evidence.

The co-lawyers therefore submit that these problems relating to the investigation could not be allowed to prejudice Mr. Ieng Sary's fundamental right to liberty and his right to be presumed innocent.

In response to the appellant's contention that flaws in the OCIJ's investigation were such that it was impossible to determine from the case file whether well-founded reasons existed, the Co-Prosecutors and the civil parties note that the appellant bases this argument on various motions that he had brought against the OCIJ before the Pre-Trial Chamber. They argue that the appellant had not proved how pleadings regarding

OCIJ operations and their as-yet unsuccessful result could be sufficient to demonstrate any flaws. They add that the appellant had not shown how any flaws in the investigation would hinder the appraisal of the necessity of detention.

The Co-Prosecutors make the further argument that, in any event, a lack of due diligence on the part of the Co-Investigating Judges is not relevant to the determination of provisional detention under Rule 63.3(b) of the Internal Rules. They submit that the rationale outlined in the first extension appeal decision is still valid and should be upheld to protect the objectives of Rule 63.3(b).

[09.30.19]

B. Burden of Proof. The co-lawyers for the charged person contend that the burden of proof is on the Co-Investigating Judges to demonstrate that the conditions of Rule 63.3(a) and (b) have been fulfilled and that, unlike the International Criminal Code, the International Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, the ECCC has jurisdiction to issue arrest and detention warrants at any time, based on the condition of the charged person.

In response, the Co-Prosecutors state that the appellant has not identified any material change of circumstance to justify the consideration of his detention or even a change in his detention conditions.

C. The Conditions for Detention.

1. Provisional detention remains a necessary measure to ensure the appellant's presence during the proceedings; Rule 33.3(b) of the Internal Rules.

The co-lawyers for the charged person argue that the charged person's condition has changed as he was now 84 years old and is not in good health. They add that his poor health greatly limits his mobility and that he can hardly walk, let alone flee. Moreover, they note he is a well-known figure and would be unlikely to escape from the jurisdiction unnoticed. In addition, unlike the ICC, the ICTY or the ICTR, the ECCC has judicial police and has the power to issue arrest and detention warrants.

The Co-Prosecutors and civil parties respond that the Pre-Trial Chamber had already considered the appellant's advanced age and presumably the health concerns that accompany it and determined that it might count as an aggravating circumstance rather than a mitigating one when examining risk of flight.

[9.33.40]

They add that the argument that the appellant was a well-known figure could also be considered aggravating rather than mitigating as he was unlikely to be without contacts to help him flee. Similarly, they submit contrasting the ECCC's to the ICC, ICTY and ICTR in relation to the availability of judicial police and the arrest warrants was unhelpful in that the ECCC, being the only court of its kind in Cambodia which was prosecuting serious international crimes of unprecedented magnitude, must deal with

aggravated flight risk linked to the proximity to contacts and ease of flight unmatched by the other municipal courts. Moreover, to note the issue of judicial police and the arrest warrants raised by the appellant was only relevant once he had fled, which did nothing to reassure this Court that such flight was impossible.

Two, provision of detention is a necessary measure to ensure the charged person's safety. The co-lawyers for the charged person submit that the Co-Investigating Judges have erred in determining that the provision or detention of Ieng Sary was necessary to protect his security.

The lawyers add that the order appeared to be based on tension within the Cambodian society and on the fact that there was a risk of aggression against Duch. The co-lawyers for the charged person explained that there was no reason to fear for Ieng Sary's safety based on a risk to Duch. If there was aggression to Duch, this may be because he had confessed to his crimes during the well-publicized trial. Ieng Sary, they note, has not confessed to any crimes and as his trial has not yet started, the publicity surrounding his alleged crimes was much less than that surrounding Duch. That, they conclude, threats made against Duch could not be equated with a threat to Ieng Sary.

[09.37.32]

The co-lawyers for the charged person contend further that Duch's trial was drawing to a close and, once sentenced, it was hoped

that this would help appease any feelings of aggression or retribution which may exist amongst the general public. According to them, the outcome of Duch's trial would surely enhance the public's faith and trust in the judicial system and in justice generally, which should lessen any risk of aggression to Ieng Sary.

The Co-Prosecutors responded that the Pre-trial Chamber determined on the 26 of July 2009 that provisional detention at the ECCC detention facility was necessary under Rule 33.3(b)(iv) of the Internal Rules, on the basis that the alleged nexus between co-charged person Kaing Guek Eav, alias Duch, and the appellants meant that the risk of aggressive behaviour by the public towards the former could also be vented towards the latter. The Co-Prosecutors stressed that the argument of the co-lawyers for the charged person that this is no reason to fear for Mr. Ieng Sary's safety based on a risk to Duch. It was unacceptable because it was not up to the appellant to make that determination.

Referring to the appellant's argument that there may be a change in circumstance with the sentencings of Duch, the Co-Prosecutors observed that the theorized shift in feeling within Cambodian society was purely speculative and the anticipated sentencing cannot be considered as a change in circumstance as it had not yet happened.

[09.39.52]

The co-lawyers for the civil parties note that the cases of Kaing Guek Eav and Ieng Sary were different, but could nevertheless be compared as they were both similarly charged for serious crimes within the ECCC's jurisdiction.

Ieng Sary has been charged with more crimes than Kaing Guek Eav as he is also accused of being a top leader of Democratic Kampuchea. Moreover, the co-lawyers for the civil parties note Kaing Guek Eav, unlike Ieng Sary, has acknowledged his responsibility and co-operated with the court. They also note that although these factors are advantageous to Kaing Guek Eav, he has still not been released by the Trial Chamber.

Three, provisional detention remains a necessary measure to preserve public order.

The co-lawyers for the charged persons submit that the fact that the public suffered from the period of Democratic Kampuchea and that they are therefore interested in the ECCC proceeding could not be a basis for the extension of Ieng Sary's provisional detention. They observed that it must be remembered that pre-trial detention is not to be considered as pre-trial punishment and shall not be used for punitive purposes. That, they contend, Ieng Sary could only be properly detained where his release would pose a threat to public order.

Co-lawyers for charged persons submit that despite claims that investigations into these five suspects could lead to a civil war, no one takes the threat of instability seriously although

new trials could begin.

The Co-Prosecutors respond that the appellant's argument that the suffering of the public in the Democratic Kampuchea period could not be a basis to order the extension of detention proceeded from the mistaken and the standing that the detention was being applied as a punitive measure.

[09.43.33]

According to the Co-Prosecutors, the first extension of detention order was, however, not framed as a punitive measure but as one that thought to prevent disruptions to the public order. The Co-Prosecutors add that the appellant had argued that no one takes the threat of instability seriously, but in doing so attempted to substitute without substantiation his judgment for that of the Pre-Trial Chamber.

Moreover, the Co-Prosecutors note it was unclear how the argument that the lack of public disorder upon the announcement of the further investigation of five additional suspects had any bearing on the potential effect on public order that the release of a charged person as widely known as the appellant and associated with Duch might have.

D. Consideration of Less Restrictive Alternatives to Detention.

The co-lawyers for the charged person considered that the Co-Investigating Judges have abused their discretion and/or failed in their responsibilities and the Rule 21.1 and .2 of the Internal Rules and failing to consider less restrictive

alternatives to detention. They argue that in the present case, the Co-Investigating Judges and the Pre-Trial Chamber's previous concerns regarding the charged person's potential flight risk, the threat to his safety and the preservation of public order could all be adequately addressed through less restrictive measures than detention.

[09.46.00]

The co-lawyers for the charged person point to Rule 5.1 of the Internal Rules, which states that the Co-Investigating Judges may order that a charged person remain at liberty or be released from detention. They may order release from detention on bail. The order by the Co-Investigating Judges shall specify whether a bail bond is payable and impose such conditions as are necessary to ensure the presence of the person during the proceedings and the protection of others.

The co-lawyers for the charged person argue that Rule 65.1 makes it clear that simply because the Office of Co-Investigating Judges determines that one of the conditions listed in Rule 63.3(b) exists does not mean that the OCIJ must order detention.

The Co-Prosecutors respond that there had been no new evidence since the Pre-Trial Chamber determined on the 26 of July 2009 that detention at the ECCC's detention facility was necessary and the Rule 63.3 of the Internal Rules, and that alternatives to provisional detention was outweighed by the need for provisional detention as they had previously argued, Co-Prosecutors submit

that the necessity of provisional detention was not diminished and that alternatives to provisional detention continued to be outweighed.

The Co-Prosecutors further submit that the rationale outlined in the first extension appeal decision was still valid and should be upheld to protect the objectives of Rule 63.3(b). Moreover, they note since no change of circumstances existed which would affect the plausibility of the alternatives to detention, the Co-Investigating Judges had not abused their discretion or failed in their responsibilities and the Rules 21.1 and 21.2 of the Internal Rules.

Phnom Penh, 8 of February 2010, Co-Rapporteurs, Judges Ney Thol and Katinka Lahuis.

I would like now to give the floor to the Co-Rapporteur to make further comments.

[09.49.25]

JUDGE LAHUIS:

In addition to the written Report of Examination which just has been read by my Co-Rapporteur, it is mentioned that a second group of civil parties have filed their responses to the appeal requesting the confirmation of the Order, and a reference is made to the Order of the Co-Investigation Judges that in the investigation is included the crime of genocide. This is an order dated 20 November 2009 and therefore of a later date than the Order of the Provisional Detention of 10 November 2009.

MR. PRESIDENT:
The charged person, Mr. Ieng Sary, do you wish to make any statement concerning the ground for your appeal? Do you hear me? The person, Mr. Ieng Sary, can you hear me? Do you wish to make any statement concerning the ground for your appeal on your own or would you wish to give the floor to your co-counsels to address the matter?
THE CHARGED PERSON:
Mr. President, I would wish to give the floor to my co-counsel to act on my behalf regarding this matter.
MR. PRESIDENT:
We now give the floor to the co-counsel of the charged person to address the Court. You have one hour to do so.
Mr. Ieng Sary, would you wish to make any comments now? Are you asking that you want to sit here or would you need a rest; could you clarify that? The counsel, could you please clarify his request?
MR. ANG UDOM:
First of all, Your Honours, good morning, Mr. President and Your Honours.
As always, to begin with, may it please Your Honours, I ask that Mr. Ieng Sary be allowed to sit near us so that he can be consulted.
[09.52.58]
He just requested that he take a rest briefly because he cannot

really sit long enough during -- or more than half an hour. And it happened during the course of our work with him, every 30 minutes he would request that he go to the restroom or maybe I can talk to him more to see what his request is.

THE PRESIDENT:

You may proceed.

MR. ANG UDOM:

May we request that the charged person be allowed to go to the restroom because he needs to relieve himself?

THE PRESIDENT:

The request is granted.

The Court will adjourn for 15 minutes.

(Judges exit courtroom)

(Court recesses from 0954H to 1013H)

(Judges enter courtroom)

[10.13.30]

MR. PRESIDENT:

We can now resume our proceeding.

I would like to touch on the issue of the submission by the Co-Prosecutors request to place into the case files of a report dated 2009 regarding the world peace condition. After consideration by the members of the Pre-Trial Chamber upon receiving it yesterday morning and the Pre-Trial Chamber would like to seek comments and opinions from the concerned parties regarding the submission made by the Co-Prosecutors.

[10.18.02]

(Deliberation between Judges)

MR. PRESIDENT:

The charged person, you are requested to sit next to your co-lawyers. However, we would like to tell you that when you are requested to make your final submission, you need to be brought and sit at the dock.

MR. ANG UDOM:

Yes.

MR. PRESIDENT:

I would like to make a correction. The Pre-Trial Chamber now requests the charged person to sit at the other table, not next to the co-lawyers.

[redacted]

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[redacted]

MR. PRESIDENT:

We now resume our proceedings. The co-lawyers for the charged person, you can now take the floor. You have one hour.

[10.25.34]

MR. ANG UDOM:

One again, good morning, Mr. President, Your Honours. Good morning, ladies and gentlemen in the public gallery.

Before I jump into my oral submission and, as the President has said, there is a request by the Co-Prosecutors and it is now -- I have the document with me and it was submitted on the 10th at 1 p.m. -- and this document is only in the French and English languages. Although I have a limited understanding of the English language, I do not have time necessary to review it in detail. Therefore, I request the Pre-Trial Chamber to reject

this request on two grounds.
First, on the principle of equality of arms, we the defence do not have sufficient time to review this document so that we can provide appropriate response. Two, because of the fact that we have not reviewed the document, I am of the opinion that this document is not relevant to the current case.
I strongly urge the Pre-Trial Chamber to reject this request to be included into the case file and I would like the Pre-Trial Chamber to make a decision on this request first before I continue my submission.
(Deliberation between Judges)
MR. PRESIDENT:
Mr. Co-Lawyer, would you like to obtain the document in the Khmer language?
[10.29.00]
MR. ANG UDOM:
In general, I require documents in the Khmer language and sufficient time to review and analyze the document. And also an annex is attached to the document and the document that I have does not have the annex that attached to it or what it is about. I still maintain my position that the Pre-Trial Chamber should reject this application.
MR. PRESIDENT:
(No interpretation)
MR. ANG UDOM:

Good morning, Your Honour.

As Mr. Ieng Sary's co-lawyers, Michael Karnavas and I are honoured and privileged to represent Mr. Ieng Sary. Assisting us today are our case manager, Mr. So Mosseny, and our consultants, Ms. Tanya Pettay and Neville Sorab.

Mr. President, our submissions today will be brief. The issue of pre-trial detention is relatively well known by now to all of us, and our position has been clearly set out in our appeal brief.

Your Honours, Mr. Ieng Sary is detained by the Office of the Co-Investigating Judges under three of the five prongs of Rule 63.3(b), namely, that a provision of detention is necessary to, one, ensure his presence during the proceedings; two, protect his security; and, three, preserve public order.

The Pre-Trial Chamber has previously held that in accessing whether there is specific evidence to support an actual risk to public order, a measure of prediction is required. Please refer this to the Pre-Trial Chamber's decision on appeal against the provision of Detention Order of Ieng Sary, the 17th of October 2008, paragraph 112. In fact, this measure of prediction applies to assessing all of the objectives and this rule under Rule 63. [10.34.07]

This is because when a charged person is provisionally detained under this rule, he is detained not because of what he or she has done but what the Office of Co-Investigating Judges or Pre-Trial Chamber predicts that he might do or not do or, more importantly,

what may be done to him in the future.

In other words, the Pre-Trial Chamber or the Office of Co-Investigating Judges must predict whether Mr. Ieng Sary, if released, will try and run away and avoid trial or whether his release would cause a threat to public order or indeed a threat to his safety.

Regarding this matter, I would like to draw Your Honours' attention to the matter, and to the public who have not been well informed, that the position of the counsel for the charged person from the very beginning when there was the first, the second, and the third trial, we have never asked that Mr. Ieng Sary be released provisionally. Our humble request was that the Court change the conditions of his provisional detention from the provisional detention at the facility of the ECCC to the detention under house arrest, or he is placed under detention at the hospital.

In making this prediction regarding Mr. Ieng Sary's future conduct under Rule 63.3(b), the Pre-Trial Chamber must be careful not to select, as a matter of course, the least favourable outcome for the charged person. This appears to have been the course taken in the past.

[10.37.29]

For example, while there may be evidence that would support a prediction that Mr. Ieng Sary may attempt to flee, if there is evidence or factors which counter this hypothesis, an application

of the principle of in dubio pro reo, the benefit must be given to the charged person and he should not be detained under this ground. There is simply no evidence upon which to conclude that provisionally releasing Mr. Ieng Sary would pose an actual risk to any of these objectives.

The Office of Co-Investigating Judges' conclusions are based on the malevolent behaviour of other people, tenuous interpretations of irrelevant evidence, and reliance upon the least favourable interpretation of the hypothetical considerations as explained above.

According to Rule 63.3(b)(iii), Mr. Ieng Sary may be detained if detention is required to ensure his presence at trial. The Office of Co-Investigating Judges and Pre-Trial Chamber have previously found that there is a risk of flight if Mr. Ieng Sary is not provisionally detained and that detention is therefore necessary under Rule 63.3(b)(iii).

Mr. Ieng Sary is 84 years of age. He turns 85 this year. He has serious health problems which greatly limit his mobility. He can hardly walk let alone flee. As repeatedly stated by the defence, Mrs. Ieng Thirith, Mr. Ieng Sary's wife of 50 years, is detained at the same ECCC detention unit. If Mr. Ieng Sary fled then he would not be able to see her. These factors must be considered in assessing the potential risk of flight.

Likewise, Mr. Ieng Sary is a well-known figure. Is it realistic to suggest that he would be able to flee Cambodia unnoticed,

particularly in light of his health?

The civil parties believe that Prime Minister Samdech Akkak Moha Sena Padey Dekjo Hun Sen's reported statement that he hoped the ECCC would run out of money so that the Cambodian judicial system can take over and speed up the existing cases is somehow a statement of direct support for Mr. Ieng Sary. This is clearly a distorted reading of the Prime Minister's statement. That statement, whether it was made directly or indirectly in support of Ieng Sary -- although he referred to the work of the Court. Considering the context in which the Prime Minister made these statements, it is clear that he was not demonstrating support for Mr. Ieng Sary, but was instead stating that he opposed additional prosecutions. His very next lines in the article quoted by the civil parties were, "I will allow this Court" -- I'm sorry, maybe I cannot really imitate the full speech but it reads:

[10.44.43]

"I will allow this Court to fail, but I will not allow Cambodia to have another war. This is an absolute stand. Please prosecute only those people."

This is the actual statement made by the Prime Minister, so there is no point whatsoever that the Prime Minister supports Mr. Ieng Sary in such statement.

Finally, the ECCC, unlike the ICC, ICTY or ICTR, has judicial police and has the authority to issue arrest warrants; see Rules 15, 42, 44 and 45. There, the need for detention to ensure

presence during the proceedings is not as great here as it may be at international tribunals. The Office of Co-Investigating Judges and Pre-Trial Chamber have previously found that detention is necessary to protect Mr. Ieng Sary's safety and that therefore detention is warranted pursuant to Rule 63.3(b)(iv). This conclusion appears to be based on tension within the Cambodian society and on the fact that there is a risk of aggression against Duch.

The Office of Co-Investigating Judges extension order noted that there had been no change in circumstances since the Pre-Trial Chamber's latest findings, therefore, threats made against Duch cannot be equated with a threat to Mr. Ieng Sary. If there is aggression toward Duch, this may be because he has confessed to his crimes during a well-publicized trial. Mr. Ieng Sary has not confessed to any crimes and, as his trial has not yet started, the publicity surrounding his alleged crimes is much less than that surrounding Duch.

[10.48.56]

The Co-Investigating Judges erred in failing to consider whether house arrest with armed guards would protect Mr. Ieng Sary as well as detention. The Co-Investigating Judges have failed to consider so.

Measures could be taken to alleviate any concern that he would be in danger when travelling to and from the Court. No efforts have thus far been made to see whether house arrest as a measure of

protective custody is feasible.
The obvious reason may simply be that under no circumstances will the Co-Investigating Judges or the Pre-Trial Chamber ever consider any measures which, even if appropriate and sufficient, would permit Mr. Ieng Sary to enjoy any semblance of freedom. The fact that the public suffered from the Democratic Kampuchea period and that they are therefore interested in the proceedings at the ECCC cannot be a basis to order the extension of Mr. Ieng Sary's provisional detention. It must be remembered, as noted by the Pre-Trial Chamber at the ICC, that pre-trial detention -- and that we have to remember that the ICC stated that pre-trial detention is not to be considered as pre-trial punishment and shall not be used for punitive purposes. Please refer to the case of Prosecutor vs. Bemba Gombo, ICC 01/05-01/08 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 Republic of Germany, the Italian Republic and the Republic of South Africa on the 14th of August 2009, paragraph 38.
Mr. Ieng Sary may only be properly detained where his release would pose a threat to public order. That is clearly not the case here. Consider that due to the Co-Prosecutors reasoned (indistinct), investigations will begin involving five additional suspects. These suspects are still at large and their identities have not been released, although the identity of at least two of

these suspects is widely known or thought to be known. Cambodian society has not been threatened by the announcement that new trials may begin.

[10.54.31]

Mr. President, Your Honours, in relation to the threat to public order and the threat to Mr. Ieng Sary's safety, these are the two elements in Rule 33.3(b) that do not require any blameworthy conduct by Ieng Sary to justify his continued provisional detention. In truth, relying on this criteria borders on violating the presumption of innocence. They are relied upon to justify Mr. Ieng Sary's continued detention when a) he has not caused these factors and b) he is powerless to do anything to prevent their occurrence. Therefore, these grounds for detention must be used with considerable caution.

Even if Your Honours consider that some form of detention is necessary to protect the objectives set out in Rule 63.3, as repeatedly highlighted by the defence, house arrest would adequately do so. It is permitted under the rules and Cambodian Criminal Procedure Code. It would be a cheaper for the Court. It would constitute a lesser infringement of Mr. Ieng Sary's right to liberty and security of the person of an individual who has not yet even been convicted of a crime and would actually increase the chances of Mr. Ieng Sary being able to be tried by this Court.

In assessing whether detention is required, the Co-Investigating

Judges is under an obligation to order the least restrictive means necessary to achieve the objectives set out in Rule 63.3. House arrest is the least restrictive means.

Mr. President, Your Honours, this concludes my oral submissions.

[10.58.22]

But before giving the floor to my colleague, I would like to draw your attention and the public's attention that the purpose -- the original purpose -- and general purpose of the drafters of the law and of the people of Cambodia and that of the international communities is to see the role of this Court as a role model for other courts including those of Cambodian ones.

However, regarding the liberty, the freedom of Mr. Ieng Sary, has the Court determined or made any decision to leave the model for other courts as yet?

In other tribunals -- international tribunals -- including the ICTY, there are charged persons -- and this information can be supported by the document we submitted to the Court on the 3rd of January 2008 which indicates that in that court there are significant numbers of charged persons who are allowed by the court to be provisionally released and I would not need to quote those numbers. In some cases, the charged persons were provisionally released and later on arrested and put under detention.

This is an example of the international tribunals and I believe that my colleague, Mr. Michael Karnavas will confirm this.

Having compared what the national courts have been doing now, there is a high profile and outstanding case in Cambodia regarding the murder case of the union leader, -- the labour union leader -- Mr. Chea Vichea. The Trial Chamber and the Appeal Court made the decision to detain the charged persons but the ultimate decision by the Supreme Court was that the accused was released. Why can't this Court make a decision to release my client, just follow the least example of the National Court or other international tribunals, and I can say that our Court has not done so yet so far.

And I may have to reiterate time and again that we never requested the release of Mr. Ieng Sary. We only asked the Court to change the detention condition because we have our concern, and the concern is well shared by the civil party lawyers and civil parties group -- that Mr. Ieng Sary's health condition deteriorating but having him placed at home would have restored his health because he could have been healthier if he were to be kept at home instead of being detained at the ECCC detention facility. Your Honours may refer to the record of the medical report of Mr. Ieng Sary in the last few years.

[11.03.17]

So we therefore request that the condition of detention is changed and it is not really a big request to be entertained. When our client were released then the Court can still be -- can have the possibility to bring the charged person to trial, for

example, if he were to be released and put under house arrest. The Co-Prosecutors and the civil parties would probably challenge such a request. It was not really a pilot project of the trial to release the person and to see what happen after the charged person would be released.

But I believe that the Court can do so by way of granting his release and having him put under house arrest and see what would happen to him if he would be armed-guards by security guards. Then his security would be well maintained. And if the Court sees that there is possibility during such arrest that Ieng Sary would flee or would be about to flee, then the Court can issue an order to bring that person to be detained provisionally under the Court. I don't believe that when the person is released that the Court has no jurisdiction to return the person back to the Court. So the Court can also confirm to the counsel that, "Look, we the Court has already entertained your request that the person is placed under house arrest but we can see that there is a flight risk and that the charged person could no longer be detained under house arrest," and that he would eventually be returned to the detention facility of this Tribunal, and that is possible. So the defence counsel will abide by any decision made or the findings found by the Tribunal.

So we now are seeing that this Court is a hybrid court, extraordinary one, and that people are observing this closely to see what kind of role model the Court can set for the national

courts, but I can see in the contrary that the national courts seem to move some steps ahead of this Tribunal.

[11.06.22]

I would like now to hand over the floor to my colleague but before that I would like to just finally emphasize that we see these tribunals have very restrictive manner in releasing our client, compared to other tribunals. I'm very grateful, Your Honour, for the time given.

MR. PRESIDENT:

The international co-lawyer for the defence, you may now proceed.

MR. KARNAVAS:

Good morning, Mr. President. Good morning, Your Honours. Good morning to everyone in and around the courtroom. Let me just pick up a little bit from where my colleague left off. I'll be very brief.

I think this Tribunal was established in order to enhance civil society and the mechanisms within that are required or necessary for a civil society here in Cambodia, and so I think that not only the Cambodians but the international community is looking at this institution as a role model for the judiciary in Cambodia and in other cases. I start there because I do think that this Tribunal should emphasize and should be very mindful of procedural justice, not just substantive justice, throughout the proceedings, starting with the arrest of Mr. Ieng Sary and onwards.

Now, before I go into the few remarks that I do wish to make concerning the provisional release, I did want to touch upon a little bit the prosecution's filing yesterday, because it does deal with procedural justice in a sense. Now, I don't know whether they were terribly busy with the plenary last week, busy greeting their new boss who was here from The Hague. I have no idea what it was that kept them from filing this earlier, but this is a report dated 2009. It was filed the day before the hearing and, being suspicious as I am, I can only conclude that it was done for tactical reasons.

[11.08.46]

I note that there is no explanation as to why this was not brought to the Pre-Trial Chamber's or to the parties' attention earlier. There is no explanation, there's no excuse. I will take them at their word that it was just simply a slip-up. However, I do hope that in the future we avoid these sorts of mishaps because in the future we will be much more forthright in our response, as opposed to generously assuming that it was just an oversight and not for tactical reasons.

Now, moving on to procedural justice. Early on during the summary that was presented by Your Honours it was mentioned that we have raised the issue of exculpatory evidence, the lack thereof, the lack of due diligence on the part of the OCIJ. Here's why we believe and we submit that this is a relevant issue. Mr. Ieng Sary was in Cambodia after he was granted the

pardon and the amnesty. He remained here. He was in public. It was widely known that the Tribunal was being established and there is absolutely no evidence, not one shred or piece of evidence, that at any point in time Mr. Ieng Sary tried to flee, tried to disguise himself, tried to hide. He was arrested and he was brought here.

Now, it is presumed that those who have made that decision, which also have the powers and jurisdiction to investigate, would go about the business of investigating in a proper, thorough, and objective manner. Now, I raise this because from the very beginning, two or three years ago, we mentioned the fact that within the OCIJ there are elements that clearly demonstrate that they're not objective in their manner in investigating.

[11.11.06]

We mentioned one legal officer -- who also goes by different monikers such as analyst, investigator -- David Boyle, who had suggested before even the creation of the Tribunal, judges and prosecutors should get together to get around the amnesty issue. That's indicative of the sort of investigation that is being done.

We brought to the Trial Chamber's attention Mr. Lemonde's comments to his senior investigators to get more incriminating and less exculpatory evidence. That has not been denied by Judge Lemonde.

He claims to either not have made it or can't recall making it or

if he did make it -- make the remark -- it was in jest.
The point I'm making, however, is this: we were denied an opportunity to have him in the dock to explain and to bring in evidence to have the individuals that were there present to demonstrate to this Trial Chamber that one of the reasons that, perhaps, there's the lack of exculpatory evidence and one of the reasons that we believe that the prosecution's case is not as strong as they would like us to believe, is because the Office of the Co-Investigative Judges are not acting in a due diligent manner.
[11.12.16]
And I do think when it comes to provisional release one of the aspects that you have to look at is the strength of the prosecution's case. But how can we possibly demonstrate that the case is not as strong if we have an investigative judge, who is tasked with the investigation, threatened the defence lawyers from doing any kind of investigation, but at the same time, acting as second prosecutors in the case. Where they have, for instance, Mr. Heder who worked first in drafting the Introductory Submission for the prosecution who then begins to work for the Office of the Co-Investigative Judges. In other words, first he drafts the submission and now he's going to investigate to see whether what he drafted is proper, and now he's being sought as an expert witness by the prosecution in the trial.
So we do see these irregularities that do go into the aspect of

exculpatory evidence, lack of due diligence. And we do think that if you're going to incarcerate someone for two or three years while you do this investigation, there is an obligation to either investigate the case properly or at least during the stage of the investigation, allow for provisional detention measures that are the least restrictive available.

And so I just raise this because we do hope that in the future we do get some sort of relief in a manner of public hearings so that the public is fully aware of what is happening, not just mere accusations of how this investigation is going on and why, perhaps, the defence is so irate at this point in time as far as the lack of investigation while the client remains in a prison facility.

Flight risk: let me address that very quickly. Anyone who observed Mr. Ieng Sary today would have noticed that on and off throughout the proceedings this morning, he was dozing off; he was half asleep. Anybody who watched him get up and go to use the facilities saw that this gentleman can hardly walk without the assistance. So he hardly poses the sort of flight risk that a 20 or 30-year old; someone who is robust in health. And as I noted earlier, he could have left when he knew that the tribunal was being established, yet he did not. And that's indicative -- that is indicial of his willingness to sit here and abide by the conditions and let the trial take its course.

[11.15.13]

Now, in the past couple of years, Mr. Ieng Sary had to go to the hospital. While at the hospital, I tried to visit him. I was unable to do so. And why is that? Because there was an armed guard. There's an armed guard who works for the facility or the detention unit who's preventing his lawyers -- even with the Co-Investigative Judges instructing those guards that we should have access -- because the hospital had given its orders, we do not have access to our client.

And what is the point that I'm trying to make? The point I'm trying to make, Your Honours, is you do have the capacity -- you do have the capacity to issue guards outside his house to make sure that nobody comes in or goes out and it's proven; we saw that at the hospital. To suggest somehow that Cambodian society's going to fall apart if Mr. Ieng Sary is allowed to be under house arrest -- and I'm emphasizing arrest -- with guards outside the house is rather, to be very blunt, ridiculous. There's not going to be a civil war. There's not going to be civil unrest and I do say that those conditions do exist at the moment.

I can't help but see in the papers in the last couple of days you have the Prime Minister going to the Thai border where it appears that Cambodia is getting ready for a confrontation with a much bigger neighbour. They're capable of that to defend a plot of land and a temple, yet, at the same time, the very same community -- this very same country -- is incapable of keeping somebody

under house arrest who can barely walk to the toilet.
[11.17.18]
The conditions exist, Your Honours, and I think because the investigation is taking longer
-- and we do want the investigation to be as thorough as possible so we're not asking that anything be short changed on that end -- but also because the investigation is not being done, and we submit in a fair and objective manner because the Office of the Co-Investigative Judges -- and when I say that I am speaking both for the international and the national side -- neither side have stepped up to the plate to do what they were supposed to be doing. There's not one shred of evidence that they're actually looking for exculpatory evidence. And when we made the request for them to produce the modalities on how they go about in doing their investigation all we received was, "Don't worry, be happy." Basically that was the decision.
And so we submit that because of these irregularities, because of the time that it's taking to get this case to trial, because you have the capacity to impose conditions that ensure that nothing happens to Mr. Ieng Sary, or that he does nothing to anyone else, or that he doesn't flee and that he's available for trial, we suggest that you opt for that and provide him with house arrest.
And let me touch on one last point that my colleague raised, Mr. Ang Udom, concerning what happens before the international criminal tribunals, and I'm speaking primarily for the ICTY. An

accused who is in the middle of a trial -- in the middle of a trial -- it doesn't matter what phase -- could be during the prosecution's phase, could be during the defence case, it could be while the Trial Chamber is deliberating on the evidence -- in those instances, there have been numerous occasions -- and I've represented a client on several of those occasions -- where provisional release was provided for the individual to leave the Netherlands, go back to his or her country of origin for a short 5,10-day, two-week or more visit and then come back.

[11.19.47]

Here we're not talking about Mr. Ieng Sary going to some foreign country. We're saying he's going to be going in the middle of the town where he can be watched by the same police that watch over him when he goes to the hospital. So the conditions are available.

I don't believe there's anything else I need to say at this point in time because I believe our briefs have been rather comprehensive on this point and there's no need to belabour the obvious.

We look forward to any questions that you may have from the Bench later on and if necessary, to respond to anything that we hear from the civil parties. But I want to thank you, at this point in time, for your indulgence and consideration of our remarks.

Thank you very much.

MR. ANG UDOM:

Before we continue the proceeding, I would like the Chamber to allow my client, Mr. Ieng Sary, to use the bathroom facility.

[11.20.53]

MR. PRESIDENT:

We now adjourn for 10 minutes.

(Judges exit courtroom)

(Court recesses from 1121H to 1301H)

(Judges enter courtroom)

THE PRESIDENT:

Please be seated. The Court is now in session.

I would like to give the floor to the Co-Prosecutors to make their oral submission. You have one hour.

MR. CHAN DARARASMYE:

Good afternoon, Mr. President, Your Honours, ladies and gentlemen in the public gallery.

Today, on behalf of the prosecution, we would like to submit our finding and understanding regarding the appeal of the charged person, Ieng Sary, regarding the extension of provisional detention against this charged person. I will provide my submission from point 1 to 8 and my colleague, Mr. Anees Ahmed, will do the rest.

Mr. President, Your Honours, first of all, I would like to present the introduction and a brief history of the appeals submitted by the charged person. On 18 August 2007 the Co-Prosecutors sent the Introductory Submission in which the

charged person's name appeared amongst other four suspects allegedly committed crimes under the jurisdiction of the ECCC. [13.03.43]

On 14 November 2007, after the confrontation, the Co-Investigating Judges made a decision for provisional detention of Ieng Sary for a minimum period of one year. On the 12 December 2007 the charged person, Ieng Sary, made an appeal against the provisional detention order. Subsequently a hearing was held on the 30th of June and the 1st, 2nd and 3rd of July 2008. The Pre-Trial Chamber agreed unanimously on the order extending the provisional detention by the Co-Investigating Judges.

On 13 October 2008 the Co-Investigating Judges notified the charged person and his co-lawyers they planned to extend the provisional detention of the charged person, Ieng Sary, and stated that the defence had 15 days to appeal against that order. Subsequently on 28 October 2008, due to their dissatisfaction with the extension of the provisional detention of the charged person, Ieng Sary, his co-lawyers submitted their notification and requested the Co-Investigating Judges to release their client or to use another alternative form of detention, namely house arrest, for the conditions stipulated in Rule 63 of the Internal Rules.

On 10 November 2008 the Co-Investigating Judges issued an order extending the provisional detention of the charged person, Ieng

Sary, for another one year in compliance with Internal Rule 63.6(a). On 26 October 2008 the Pre-Trial Chamber unanimously agreed on the order extending the provisional detention by the Co-Investigating Judges. On 5 October 2009 the Co-Investigating Judges notified the charged person and his co-lawyers that they are considering the extension of the provisional detention and that they have 15 days to provide their response.
[13.07.10]
On 20 October 2009 the co-lawyers of the charged person, Ieng Sary, submitted their opinion and on 10 November 2009 the Co-Investigating Judges issued the order extending the provisional detention of the charged person, Ieng Sary, for another one year in accordance with the Internal Rule 63.6(a) of the Internal Rules.
As they were not satisfied with the extension for another year of the charged person in the provisional detention as decided by the Co-Investigating Judges, on 10 November 2009 the co-lawyers of the charged person submitted an appeal against the order extending the provisional detention to the Pre-Trial Chamber.
On 16 December 2009 a group of civil party lawyers submitted their responses to the appeal of the charged person against the order extending the provisional detention of the Co-Investigating Judges and requested the Pre-Trial Chamber to dismiss the appeal of the co-lawyers for the charged person, Ieng Sary, and they also submitted their conclusion that the extension of provisional

detention by the Co-Investigating Judges are justified and reasoned and that they properly used their discretion for the main purposes, namely to prevent the charged person from applying pressure to the witnesses or victims, to ensure the presence of the charged person during the proceedings, to protect the security and safety of the charged person and to protect the public order.

The Co-Prosecutors also provided their response against the appeal of the charged person to the Pre-Trial Chamber and in that submission the Co-Prosecutors requested the Pre-Trial Chamber to dismiss the appeal by the charged person.

[13.09.58]

Mr. President, Your Honours, the charged person, Ieng Sary, lodged his appeal requesting the reversal of the Co-Investigating Judges' order extending his provisional detention for another year with the reasons that his right to freedom and his presumption of innocence were violated by the extending of provisional detention and the prerequisite conditions for his detention as stated in Rule 63.3 of the Internal Rules were not fulfilled; the Co-Investigating Judges violated or abused his discretion by failing to consider other alternatives or other forms of alternative rather than detention at the ECCC facility to ensure the presence of the charged person during any proceeding or for his own safety or for the public order.

For the reasons stated by the charged person, Ieng Sary, the

Co-Prosecutors requested the Pre-Trial Chamber to dismiss those reasons, based on the following arguments. The appellant has failed to demonstrate any material change in circumstances since he was originally detained by the Co-Investigating Judges on 14 November 2007.

In particular, he has not demonstrated any change of circumstance since the Pre-Trial Chamber's confirmation of his provisional detention on the 17 October 2008 and since the first extension of provisional detention on the 11 December 2008 or the Pre-Trial Chamber's confirmation of that order on the 26th, June 2009.

In the original detention appeal decision, which evaluated all evidence on the case file up to date of the hearing, the Pre-Trial Chamber noted that the requirements of Rules 63.3(a) and 63.3(b)III to IV were met and provisional detention was still a necessary measure on the basis of those grounds.

[13.13.22]

In the first extension appeal decision, the Pre-Trial Chamber noted that once the existence of well-founded reasons has been established, unless exculpatory evidence has been found to undermine it, it is sufficient to fulfil the requirement of Rule 63.3(a) throughout the pre-trial stage of proceedings.

The case file today contains evidence capable of satisfying an objective observer at this stage of investigation that the appellant may have committed the crimes for which he is currently under investigation. No material exculpatory evidence has been

found to undermine this evidence.
The flaws in the investigation contended by the defence as an impediment to the appraisal of the existence of reasons for detention are evidenced only by defence challenges through operations of the Office of the Co-Investigating Judges, none of which has been found to be valid by the Pre-Trial Chamber.
In addition, three of the five disjunctive conditions under Rule 63.3(b) are still fulfilled, thereby rendering provisional detention a necessary measure. Specifically, the appellant's provisional detention is necessary for the following reasons: one, to ensure his presence during the proceedings; two, to protect his security; and three, to preserve public order.
The Pre-Trial Chamber has noted that house arrest or even hospital detention for this appellant is not warranted. There has been no change in circumstances to merit a reversal of this holding. The ECCC detention facility remains appropriately equipped to detain him.
[13.16.54]
The law regarding the conditions necessitating detention under Rule 63.3: The Co-Investigating Judges may order provisional detention where there is a well-founded reason to believe that the defendant may have committed the crimes specified in the Introductory Submission and the Co-Investigating Judges consider provisional detention to be a necessary measure in order to, one, prevent the defendant from exerting pressure on any witness or

victim, or prevent any collusion between him and his accomplices; two, preserve evidence or prevent its destruction; three, ensure the presence of the defendant during the proceedings; four, protect the security of the defendant; and five, preserve public order.

The five arguments, as stipulated under Rule 63.3(b) of the Internal Rules are disjunctive. There is no requirement that the Co-Investigating Judges find that every ground is satisfied before they can consider that provisional detention is a necessary measure or that its extension is warranted. On the contrary, should the Co-Investigating Judges consider that any one of the five grounds exist, the test for detention is made. This approach is also followed by other criminal tribunals dealing with similarly serious international crimes.

Judicial authority may exercise discretion in determining whether or not detention is a necessary measure or its extension is granted. Such discretion is usually exercised by taking into account all documents on the case file and all relevant facts of the case, including the gravity of the charges, the cogency of the evidence, the past and present character and behaviour of the defendant, the interest of the witnesses and victims, and the interest of justice as a whole. This conforms to the accepted practice in international criminal tribunals which has also been adopted by this Court.

[13.20.46]

Regarding the extension of detention, Rule 63.6 provides for an automatic periodic review of a charged person's detention. Such a provision is absent in the basic documents of the international criminal tribunals for the former Yugoslavia and for Rwanda and the Special Court for Sierra Leone. Those tribunals, however, require that for a renewed application for release to be successful the defendant must demonstrate a material change of circumstances.

However, similar to the rules of this Court, Rule 118 of the Rules of Procedure and Evidence of the International Criminal Court requires that the pre-trial detention of a defendant must be reviewed by its Pre-Trial Chamber at least every 120 days. The Pre-Trial Chamber of the ICC has a distinct and independent obligation to ensure that a person is not detained for an unreasonable period prior to trial. The Pre-Trial Chamber can modify its ruling on detention if it is satisfied that the change in circumstances so require.

At the ICCC, the prosecution has the burden of proof in relation to the continuing existence of the conditions of pre-trial detention. In this Court, the rules do not require the Co-Investigating Judges to hear the Co-Prosecutors or any other party except the charged person while determining the extension of detention. The existence of an automatic periodic review of detention provides the detainee with an opportunity to put forth his position and, if warranted, to exercise his right to appeal.

[13.24.08]

Mr. President, Your Honours, the Co-Prosecutors still maintain our view that the provisional detention of the charged person, Ieng Sary, is the best option, as we have already submitted to the Co-Investigating Judges and that we also provided our response to the Pre-Trial Chamber on 17 December 2009, as we have the reasons and grounds to believe that the extension of provisional detention of the charged person is to ensure the following reasons.

That the charged person will not flee and that the charged person does not provide any new evidence to support his reasons, except his recalling of the previous arguments; that the provisional detention of the charged person is a necessary measure because the facts and the law of this case is complex and it is difficult for the judicial authority and for all the concerned parties.

In addition, the provisional detention is to avoid any possible revenge by the victims and to prevent exerting pressure on any witness or victim. The provisional detention is useful due to the gravity of the crimes, although the crimes were committed a long time ago.

Mr. President, Your Honours, next I would like my colleague, Mr. Anees Ahmed, to continue the view of the Co-Prosecutors.

MR. PRESIDENT:

International Co-Prosecutor, you may now take the floor.

[13.27.00]

MR. AHMED:

Thank you very much, Mr. President, for that opportunity. And given that my learned friend has given a very succinct exposition of the law and facts of this case, I shall be brief, and I shall also be brief because my learned friends on the other side have been brief and I shall essentially restrict myself to responding to certain points raised by the defence.

But before getting on to responding to those two points, I would just make a small submission to this Court. My most respectful submission, Your Honours, is that today you are sitting in this Chamber to decide a detention extension appeal. You're not sitting today to decide an appeal from his first arrest in November 2007; so there's a very important distinction here. The original detention of November 2007 was upheld by Your Honours in October 2008. Indeed, the first extension was also upheld by Your Honours on 26 June 2009. The only question today is whether the Investigating Judges rightly extended the detention of this charged person on 10 November 2009.

In our most respectful submission, there is nothing on the record and, indeed, there are no material circumstances to suggest that Your Honours should reconsider your decision on 26 June 2009, and that is what the Investigating Judges did because they found no material circumstance on the record to change their own opinion or, indeed, to differ from the opinion taken by the Pre-Trial Chamber just about three months before that, which was 26 June

2009.
Therefore, what guided the investigating magistrates was that there was no material change of circumstance and my learned friend Mr. Karnavas' appeal, and indeed his objections before the Investigating Judges, also failed to point out that there were any material change in circumstances from the 26 June when Your Honours were pleased to decide that detention should be extended. [13.29.38]
Indeed, as you found on 26 June, the well-founded reasons to establish that this person may have committed the crimes continue to exist. Indeed, they have become stronger. This charged person has on 26 December 2009 been further charged with the crime of genocide and also various national crimes under the Cambodian Penal Code of 1956.
The much-contested crime of mode of liability of joint criminal enterprise, which will come before you in a separate appeal -- but as of now it's been found to be applicable on facts in respect of this charged person.
The investigation has been closed on 14 January. The Investigating Judges in their press released announced -- and it's part of the case file record, so I can state that -- that there were more than 800 witness statements taken during the course of this entire investigation, 500 letters rogatory issued, and I can state on the basis of an analysis that I conducted two days ago that there are more than 96 witness statements that

directly talk about the role of this accused, this charged person, in the various criminal acts that have been submitted in the Introductory Submission by the Co-Prosecutors.

Therefore, we most respectfully submit that the well-founded reasons existed on 26 June and they continue to exist as of today, and I'll just repeat one sentence that my learned friend quoted from your order of 26 June, that once the existence of well-founded reasons has been established, unless exculpatory evidence has been found to undermine it -- and Mr. Karnavas has not been able to bring on record any exculpatory evidence; at least he didn't refer to it in the Court today -- it is sufficient to fulfil the requirements of Rule 63.3(a) throughout the pre-trial stages of the proceedings. We are at an advanced pre-trial stage of the proceedings. The trial is about to start in a matter of a few months. This charged person may or may not be indicted -- of course, that's open to the Investigating Judges -- but we submit that the evidence is sufficient on record to satisfy 63.3(a) conditions.

The next submission -- and I shall not belabour on those points because they have been extensively argued in our appeal response -- is this: that Your Honours, again on the 26th of June 2009, concluded that three conditions of 63.3(b) remain satisfied, which is, one, to ensure the presence of the charged person before the Trial Chamber; second, to protect the security of the charged person; and, lastly, and most importantly in the facts of

today, the preservation of public order should he be released. [13.32.59]

Once again, because very little time had elapsed between the 26th of June 2009 and the time when the Investigating Judges passed their order, they found, and indeed there was none, material change in circumstances to change their position. And, therefore, I'll not trouble Your Honours with further arguments in respect of those three points because they have been extensively argued in our appeal response, but I'll bring to your attention a very interesting argument made by my learned friend this afternoon, indeed, this morning.

We were told by both the defence counsel before you that they are not seeking release today. What they're seeking is only a house arrest. Now, Your Honours, this Court is now aware of change of pleas by its accused before it, as Duch did on his last day. My learned friend in his appeal on the last page says and asks Your Honours to terminate his provisional detention. This is page 12 of his appeal. Today he would argue before you that he's no longer seeking termination of provisional detention, he only seeks a house arrest.

Now, if my learned friend is seeking house arrest then, in our most respectful submission, he's essentially conceding that the 63.3(b)(iii) conditions, on the basis of which his detention was ordered, are continuing to exist and that is why he is not seeking a provisional release and he's only seeking a house

arrest.

Now, in the face ---

THE PRESIDENT:

The co-counsel interrupts.

[13.34.55]

MR. ANG UDOM:

May I seek your leave so that Mr. Ieng Sary is allowed to take a rest in another room while the proceeding continues?

THE PRESIDENT:

Your request is granted.

JUDGE LAHUIS:

Is Mr. Ieng Sary now leaving the Court or does he want to return at the last stage of the proceeding? He's now leaving not to come back?

MR. ANG UDOM:

He would only request that he take a rest at another room and that he can join the proceeding through remote participation, and if his back pain does not improve he may request that he stay there until the end of the proceeding.

JUDGE LAHUIS:

Thank you.

MR. AHMED:

Your Honours, may I just clarify -- only for the purposes of the record -- that the charged person waives his physical presence in the Court and the proceedings may go ahead?

If that's the case -- and I see a nod from Your Honour, Judge Lahuis -- I'll begin with my arguments.

[13.36.33]

Your Honours, with this change of plea, therefore, I'll have to address two arguments that are newly raised and, of course, they were raised in some form or the other in their appeal, but these are now the principle arguments before you.

The first argument is we're not seeking provisional release, grant him house arrest. And the second argument is his health is bad because he is 84 years old, he's frail, and he'll be held here at home, therefore, put him at home.

I wish to submit that health was never a major issue in this appeal. This appeal was essentially directed against the Investigating Judges' determination that three 63.3(b) conditions were satisfied. So health was raised only in one sentence in his objections of the 20th of October 2009 and only in one-and-a-half sentences in his appeal of the 7th of December 2009. Having said that, I will still meet the health argument. Therefore, Your Honours are not being called upon to release him solely on his health grounds, you're being called upon now that please consider his old age and frail health and therefore send him for house arrest.

With that in the background, Your Honours, I shall now address you on the question of house arrest. Now, this question has also come before you and Your Honours have handled this question, so

it's not new. Your Honours considered this matter both in your order of the 17th of October 2008 and your latest order of the 26th of June 2009.

[13.38.31]

You found out that Internal Rules and, indeed, the Court of Criminal Procedure of Cambodia -- quite contrary to what my learned friend, Mr. Ang Udom, today submitted -- do not provide for any house arrest provisions. Rule 65.1 of the Internal Rules, however, speaks about grant of bail under certain conditions, however, if any -- and Your Honours held this. If any condition of provisional detention out of the five conditions in 63.3(b) are met, bail is out of the question.

We submitted, and Your Honours found out, that the detention facility remains properly equipped to provide assistance to this charged person should he require one.

Now, with this background that the Court of Criminal Procedure and the Internal Rules do not provide for house arrest provisions, let's look towards international law in respect of house arrest. No major international tribunal, ICC, ICTR, Special Court for Sierra Leone, provided or granted house arrest to any of the accused before them, except for two or three cases before ICTY which, as I shall presently submit before you, were exceptional, and this happened in the earlier days of the ICTY and that practice stopped almost in the third or the fourth year of the existence of that tribunal.

The most written case about house arrest is the case of Blascic who was granted house arrest in 1996 and, while considering his house arrest on the 23rd of April 1996, the ICTY found these conditions, these factors, which had to be satisfied if house arrest was to be granted. And Your Honours would remember, this is 1996, almost 14 years ago, and ICTY has come a long distance since then.

The five factors are this. There must be no evidence that the defendant will escape. This has not been found here. Your Honours have found that he may flee. There must be no likelihood that the defendant will tamper with evidence or witnesses. There must be no likelihood of continued criminality, and there must be no threat to peace and security, and I would submit that amounts to public order.

[13.41.27]

Ieng Sary, therefore, as Your Honours have held and as the Investigating Judges also held in line with Your Honours holding, Ieng Sary does not meet these conditions. He may be old but detention is not life threatening to him.

Indeed, there have been various requests made by Ieng Sary defence team to the detention facility, through the Investigating Judges, and those requests at many times have been granted for maintaining his health.

Very recently -- and I'm stating this with the knowledge that my learned friend will not object to Ieng Sary's health being

discussed in public because he gave an undertaking in the previous proceedings -- he had dozens of sessions of physiotherapy at the expense of this Tribunal to take care of his back problem. A special handrail was created in his detention cell so as to take care of his back problem -- he could stand up. Remote control emergency buzzers were recently provided so that 24-hour nursing facilities can be granted.

[13.42.30]

There are today 17 doctors available around the clock on rotation for any of the defendants and their health needs. Nurses and ambulances are available around the clock. Staff are being trained to provide appropriate nutrition to these charged persons who are clearly advanced in their ages. And very recently, about two months ago, a fitness to stand trial assessment was made. Your Honours had denied it once, the Investigating Judges granted it recently. An assessment was made and it was found that these health conditions that have continued since the time Mr. Ieng Sary was detained here continue in the form that they were and they have been contained and they have been addressed medically and that he is found to be fit to stand trial. At least that's what the psychological report tells.

Now, I'll just address Your Honours on three principal issues of health of this charged person, which have been consistently found from 2007, November, when he was first brought before the investigating magistrates. The first is a heart condition which

predated his arrest. He had multiple bypass surgeries before his arrest. The second is lumbar arthritis, which in ordinary language is back pain, which has been addressed by various means as I submitted to you. And the third is some urinary disorders of some complex nature.

But none of the doctors that have seen him over a period of more than two years of detention have found that detention is not conducive to taking care of his health requirements. In fact, in the Mangin report of May of 2008, the only conditions that Dr. Mangin, who is French, and another Cambodian doctor found was that toilets should be closer to the cell and that back pain requires a mattress. And I understand from reading submissions of the detention facility that these issues have been addressed. [13.44.51]

Therefore, sufficient facilities exist at the detention facility and with an agreement with the Calmette Hospital to take care of any health requirements of any of the charged persons, including this one, and therefore there's no special requirement that he should be compulsorily hospitalized or he should be put somewhere else where some better facilities exist. Indeed, Calmette Hospital, which is around-the-clock available, is considered to be the best medical facility in Cambodia.

Now, Your Honours, with that in the background I will in about five to seven minutes address you, and then I shall finish, on whether health conditions such as this grant the accused a right

to seek bail; whether, if health is bad, bail is the only solution. And this issue, like many other issues that Your Honours have encountered, has not happened for the first time before an international tribunal. Other tribunals have seen accused in various ages which were advanced.

Now, three criteria have been established by the jurisprudence of international tribunals where health can necessitate bail, and the first criteria is when medical treatment is unavailable at the detention unit or, indeed, in the host country. Now, this was done in the case of Norman in the Special Court of Sierra Leone when he had to be taken to Senegal because something is not available in the detention facility of the special court in Freetown or indeed in Sierra Leone.

The whole question, as the ICTY held in 2004 in the case of Stanisic is whether treatment is possible in detention, and this came in the case of Milosevic many times before the ICTY and the Court found that the medical facilities in the detention centre in The Hague and indeed in the Netherlands were available such that there was no requirement that he should be sent to Russia, as he had been asking.

[13.47.11]

The second criteria laid down by the jurisprudence of international tribunals is this: whether on humanitarian grounds the accused's health is incompatible with detention. Now, while holding that the Court said that serious illness on its own --

and I'm reading from a decision in the Kovacevic case -- serious illness on its own does not justify release unless that illness is terminal in nature, it is immediately life-threatening and it is untreatable in detention -- three conditions with an "and". All three have to be satisfied.

That it is terminal in nature -- no doctor has today, till late, found that anything that Mr. Ieng Sary is suffering is terminal in nature -- that it is immediately life-threatening, that it is not curable by anything or it can threaten his life despite the presence of nurses and the Calmette Hospital and the ambulances, and that it is untreatable in detention. In our most respectful submission, all these three conditions are not satisfied and therefore he cannot be released on the second set of factors also.

And the third ground in which various tribunals released the accused was when they were found unfit to stand trial. Now, this came for consideration in the very important case of Pavle Strugar, and my learned friend has argued that case in various of his filings. Once again, the ICTY found that the issue is not whether the accused suffers from particular disorders but whether he's unable to exercise his rights in the proceedings against him. This is when he's unfit to stand trial.

This charged person has been found fit to stand trial. No doctor -- and many have treated him -- has ever found that his cognitive facilities are such, either temporarily or permanently, that he's

unable to assist his counsel or take part in proceedings such that they are meaningful and his contribution is as is required under the law.

[13.49.44]

A link must be made between the mental diagnosis and the actual effect on the accused's capacity. So they went ahead. They said even if there are certain mental capacities, a link should be made in respect of his mental capacity that should directly affect his capacity to participate in the proceedings. Therefore, ultimately what was held was that under international law, whenever the accused are released for treatment they should be released for the particular medical reason and not for any other reason that can be derived from something that can be treatable. Therefore, they are released only to a medical facility, as Strugar was released to Montenegro, and returned to the detention facility after completion of their treatment. Now, this has happened in respect of this charged person whenever it's been required -- and my learned friend is aware of that -- for longer durations, for durations running into days and at times weeks. He has been to the medical facility at Calmette Hospital and brought back when recovered.

Now, it's a different matter which needs to be addressed and which is a fair trial right matter, whether my learned friend is allowed to meet his client at the Calmette Hospital. That's outside the scope of the current proceedings. The question is

whenever his charged person has suffered any medical condition, his condition has been addressed.

[13.51.20]

Now, none of the cases that I have mentioned allowed a release to his family home. They allowed release only to a medical facility, unless it was found to be inoperable or incurable, such that an accused was released and he died within one month because it was terminal and incurable. Now, those are my submissions in respect to house arrest and medical facilities.

And, Your Honours, we would submit, as we have done in our Appeal Response Brief that none of the conditions under 63.3(b) are satisfied that health is such that it can be treated in the detention facility and Your Honours have held that house arrest -- because the three conditions are met -- is not a question to be considered at this stage.

I'll finish by referring to my learned friend, Mr. Ang Udom's, reference to certain cases in the national jurisdiction and on his reliance that because an accused was released, an accused in a special tribunal like this facing charges of genocide, crimes against humanity and war crimes should also be released.

[13.52.40]

And I can just draw a distinction between the Chea Vichea case and the case before you. In the Chea Vichea case, the Supreme Court of Cambodia found that there was a mistrial and on that finding, the accused were released. Nobody has ruled or indeed

even heard an argument that there was a mistrial in this case. And to argue that certain applications are pending before this Court in respect of certain acts of the Office of the Investigating Judges and that's why the investigation has been vitiated; (a) is a wrong argument in an appeal on provisional detention and (b) all those arguments and at least most of them have been dismissed by your own Chamber and I'll finish that by just addressing the five arguments my learned friend raised to challenge the integrity of the judicial investigation.

He said that there was an argument of bias against the International Co-Investigating Judge. It's indeed true that one application is pending before you, but one principal application in which he was alleged to have been seeking only inculpatory evidence has been dismissed by you. The application in respect of bias of Mr. Heder and Mr. Boyle has been dismissed long ago by this Pre-Trial Chamber and, therefore, to re-argue that application, to my mind, in this detention hearing is inappropriate.

The applications for interference in the administration of justice are pending, but they are, once again, tied with the application for disqualification of the National Investigating Judge which -- of which one of them has been dismissed by you. [13.54.18]

The whole question of use of torture-tainted -- allegedly torture-tainted evidence has been dismissed by Your Honours and

the order of the Investigating Judges has been upheld.
The whole question of lack of plan in respect to finding exculpatory evidence, it's a subject of an order that my learned friend, Mr. Karnavas, can appeal before you. He's chosen not to appeal that order and, therefore, that order also has attained finality.
In my most respectful submission, therefore, the appeal should fail. Your Honours should reduce the scope of appeal now to only the question of house arrest from release which they sought in their appeal brief which they now changed. And in the facts and circumstances, even house arrest is not warranted either on health grounds or indeed on any other grounds.
And we shall rest on that. I thank Your Honours.
JUDGE LAHUIS:
I would like to request the Co-Prosecutors also to make some remarks on the filing which was mentioned earlier this morning and to which the co-lawyers have made their comments.
MR. AHMED:
Your Honour, I apologize. I should have addressed that argument on my own.
Now, in a decision of the 3rd of July 2009, in respect of provisional detention appeal of Khieu Samphan, Your Honours were pleased to observe and rely upon a report called the Global Peace Index Report 2008. That report of 2008 is already on the case file.

[13.56.11]
A new report has come up as a succession, as a sequel, to that report of 2008. We felt that it's appropriate that that comes on the record so that if required in the three appeals that you're hearing today, tomorrow, and Monday that document may be referred to. And the reason we filed that was essentially by abundance of caution. We wanted to rely upon that just to support our argument. It was not a principal argument or a principal document that we wish to rely upon. It would have been a secondary document to corroborate what we had already submitted in our appeal response.

We were supported in this by an order of the investigating magistrates on the 19th of March 2009 in which the learned judges said that in respect of a public file -- in respect of a public document that does not go to the facts under investigation in the Introductory Submission. The parties and indeed the Chambers can rely upon such a public document whenever they so wish without it being filed on the case file.

With this order, which is on the 19th of March signed by Marcel Lemonde and You Bunleng, Investigating Judges, we were granted this right to use such document that does not support facts in the Introductory Submission. It only supports facts in respect of our submissions on provisional detention which are not facts under investigation and this is a finding which once again attained finality because it was never appealed. So relying on

this, we would have referred to that document. Of course, I did not refer to that document today, but we would have referred to that document and by abundance of caution and by a courtesy to the defence counsel, and indeed the civil parties, we wanted to put that on record.

[13.58.24]

Now, we leave it to Your Honours. I shall not address their argument any further than that because our principal ground today is that in any case, none of the appeal grounds are made out; not material change in circumstance.

Should Your Honours encounter that document in the next two appeal hearings, we shall meet that argument in support of that submission, but our submission is it was by abundance of caution and to give an advance notice to the defence we gave that document relying on this decision of the Investigating Judges; we would have, in any case, referred to that document. That's my limited submission.

JUDGE LAHUIS:

And I would also invite you to address the issues raised by the defence like the late filing before this appeal.

MR. AHMED:

Your Honours, the argument of late filing is immaterial because as I submitted, it was a question of courtesy and a question of notice to the defence that we may raise an issue that is in the public domain and that's available to every party and as counsel,

we always extend this courtesy that at least 24 hours before we bring it to the attention of our learned colleagues that we refer to it. It does not refer to anything that's being investigated by the Investigating Magistrates and as this order says, it's in the public domain and we can refer to it. And it's for Your Honours to assign any weight to that document should you have to. Thank you.

[13.59.59]

MR. PRESIDENT:

I would like now to give the floor to the civil party co-lawyers. You have one hour.

MR. NY CHANDY:

Thank you, Mr. President. Good afternoon, Mr. President, Your Honours.

My name is Ny Chandy, the co-national lawyer for the civil parties and I would like to provide our response to the appeal against the extension of the detention by the charged person.

Before I provide my responses to the appeal, I would like to make some observations regarding the request by the Co-Prosecutors to put a document into the case file and that the parties shall make observations regarding that request.

This morning the defence counsel had the opportunity to respond, but the civil party lawyers did not have that opportunity. We do not want to give the view to the request made by the Co-Prosecutors, but we would put a request to the Pre-Trial

Chamber. Once seized with such a request that in the future the civil party co-lawyers sort of so be sought of the view of such request.

Let me now go to the point. I, as the co-lawyer of the civil party, would like to submit our oral submission regarding the appeals of the charged person, and then my colleague Mr. David Blackman will continue our submission.

We would like to totally reject the appeal by the charged person and would like also to request the Pre-Trial Chamber to dismiss the appeal as lodged by the charged person on the 7th of December 2009 through his co-lawyers, because, in fact, that appeal mistakenly provided a evaluation to the decision extending the provisional detention of the Co-Investigating Judges as of the 10th of November 2009 and that appeal is not based on any sufficient grounds.

[14.03.07]

The co-lawyers for the charged person raised that the Co-Investigating Judges erred or made errors in considering the necessity of the measures in Rule 63.3(b) (iii) and (b) (iv) and (b) (v) regarding the ensuring of the presence of the charged person to the security of the charged person and to the preservation of the public order. And they also mentioned that the Co-Investigating Judges erred in failing to consider other alternative forms of detention. And finally, the co-lawyers for the charged person requested to the Pre-Trial Chamber to reject

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or to reverse the order extending the provisional detention of the charged person and that the charged person shall be provisionally released.

These are all the facts and reasons provided in the appeal by -- of the charged person, but it never asked the Pre-Trial Chamber to consider other facts, and only in the notice of the decision of the extension of the provisional detention by the Co-Investigating Judges the co-lawyers only requested the reversal of the order by the Pre-Trial Chamber and no other points were requested to the Pre-Trial Chamber for its consideration.

Also we believe that the Co-Investigating Judges properly used their discretion in issuing the order extending the provisional detention through its proper investigation and the reasons provided by them also the necessity to continue the extension as mentioned in internal Rule 63.3(b).

Regarding the point mentioned under Rule 63.3(a), in his appeal the charged person did not object to the order extending provisional detention under Rule 63.3(a) regarding the reasons that the charged person was allegedly believed that he committed one or more crimes, as stated in the Introductory Submission or in the Supplementary Submission. However, the charged person not only mentioned the reasons or the condition under Rule 63.3(a) as sufficient or the lack of exculpatory evidence due to procedural defect, that a charged person himself did not make appeals

against such fact, or it is not even relevant to the appeal that is being heard today.

[14.06.29]

In addition, the point raised by the charged person regarding the bias in the investigation had already been resolved; that is the allegation was dismissed, therefore condition one of Rule 63.3(a) was not really objected by the charged person and the co-lawyers themselves did not provide a necessary response to this point, and my colleague, Mr. Blackman will point out more regarding Rule 63.3(a).

Now we look at Rule 63.3(b), both the Co-Investigating Judges and the charged person agreed to the points mentioned under 63.3(a) if any of the conditions mentioned under that sub-rule are fulfilled as stated in Rule 63.3(b), which means the Co-Investigating Judges can issue the order extending the provisional detention if necessary.

Therefore, in his appeal we can now discuss on the conditions mentioned under Rule 63.3(b). In the order extending the provisional detention of the charged person the Co-Investigating Judges found three disjunctive conditions under Rule 63.3(b) which are fulfilled, namely to ensure the presence of the charged person during the proceeding, two, to ensure the security or to protect the security of the charged person, and three, to preserve public order. These three conditions were provided properly with reasons by the Co-Investigating Judges; that is the

three conditions have been fulfilled from the commencement of the proceedings, notwithstanding the passage of time.

[14.08.40]

The co-lawyers for the charged person mentioned that his client is in the advance age and that restricts his mobility, not even mentioning the fleeing, but he could even hardly walk. We would like to provide our observation that although the charged person, who is old, this is not a legal ground to support his release or bail or to look for other alternatives of the detention forms in cases where it is necessary for the detention of the charged person regarding his health issue. As mentioned by the Co-Prosecutors, it is not a significant issue at this stage and it seems that it is better for the charged person to be detained in the detention facility because here the medical service is 24 hours per day and it almost becomes an obligation to provide such a service to the charged person.

The co-lawyers for the charged person also said that the charged person himself is a very well known figure and it is unlikely that he could flee from the jurisdiction unnoticed. In addition, the ECCC have judicial police and the authority to issue detention and arrest order, which are the distinct features cannot be found at the ICC or ICTY or ICTR.

We, they call the civil party co-lawyers, would like to categorically object to this ground. Although he is a well known figure this does not mean he cannot flee. And when you look at

the history of his record and his experience he has various strategies in order to make himself away from everybody else and sin.

Regarding the responsibility of a state in providing judicial police to assist the ECCC task, it does not necessarily mean to ensure his fleeing and that the charged person apparently seems to enjoy certain supports of the population, including a number of the local authorities. Therefore, releasing on bail or other alternative forms of detention is the most risky measure for the risk that may occur.

[14.11.39]

While the charged person himself at this stage is aware that if convicted he would be imprisoned from five years to life imprisonment. The defence lawyers stated that there is no well-founded reason for the safety of the charged person comparing to the risk that could be imposed on Duch because the aggression against Duch is in the way that Duch confessed to the crimes during the hearings, which was well publicized.

The defence lawyer also added that the charged person did not confess to any such crime and his trial has not yet commenced, therefore the publication surrounding the crimes alleged committed by him is not in the same category as the crimes alleged on Duch. Therefore, aggression against Duch cannot be compared to the aggression against the charged person.

[14.13.92]

The civil party co-lawyers have a different view as the defence counsel already acknowledged that the charged person is a well-known figure. That's why he is well known everywhere and currently he is probably under every eyesight of the general population. The press and the media published both his picture and his wife's. His high-ranking role during the Democratic Kampuchea made people more intrigued to understand his role, and his failure to respond or to confess to the crimes does not mean it is the reason to bring peace and reconciliation, but instead it's going to cause more pain to the victims throughout the country, as the charged person had a leadership role which was effective and during such time crimes were committed everywhere throughout Cambodia, and instead the charged person expressed his opinion that he did not know about them and that he has not cooperated with the ECCC.

Likewise, if we compared his role and responsibility against those of Duch, the charged person has more responsibility because he was involved in more details with the crimes committed throughout Cambodia, particularly those Khmer intellectuals who were tortured and killed during Democratic Kampuchea.

The civil party co-lawyers would like to completely object to the claims by the defence lawyers that if Duch were to be convicted by this Court that would help to minimize the anger of the general population. We, the civil party co-lawyers, observe that the 30-year waiting of the Cambodian people for this trial, and

not only the trial for Duch, but they also want to focus mainly on the leadership of the Khmer Rouge government, especially for the prosecution of Case 002 and they have been waiting for such trial, for the trial of the leaders in the Case 002, as I stated. [14.15.55]

The civil party co-lawyers also observe that the extension of provisional detention of the charged person is a necessary measure in order to preserve public order. The defence lawyer stated that the pre-trial detention is not to be considered as pre-trial punishment and shall not be used for punitive purposes. We, the civil party co-lawyers, acknowledge this point but the order extending the provisional detention issued by the Co-Investigating Judges and the reasons mentioned in such order is not an element of presumption for the punishment of the charged person in the future. It is the absolute discretion of the Co-Investigating Judges by referencing to the necessary circumstance in order to preserve public order.

In addition, since the decision of the Pre-Trial Chamber on the extension of provisional detention of the charged person dated 26 June 2009, we have not seen any material change through the circumstance which could lead to the changes of the detention of the charged person and we would like to state that the impression of the general public in the new case files cannot be compared to the case file of the charged person because of the differences of the confidentiality of the case, the duration of the

investigation, the role and the responsibility of the charged person.

The defence lawyers also stated that the Co-Investigating Judges abused their discretion by failing to consider the alternatives to the detention before they made their decision on the order.

We, the civil party co-lawyers, have the view that the assessment of the defence lawyers that the Co-Investigating Judges abused their discretion is groundless and house arrest is not an alternative solution to preserve the security of the charged person or to preserve public order, although armed guards were to be deployed.

[14.19.02]

Particularly the understanding of the general public for the laws and the procedures are limited and the general public might have a wrong impression that the house detention of the charged person is indeed a release of the charged person and that would lead to any risk that would disrupt public order, and that would cause disturbance and would lead to difficulty to be tackled by the government.

Therefore, we would like to state that placing the charged person under judicial supervision is not a form of detention because in their appeal of the co-lawyers they mention that the Co-Investigating Judges shall look at other alternatives, including house arrest or placing the person under judicial supervision with bail or other strict necessary conditions to

ensure the presence of the charged person during the proceedings and to protect the general public.

We have the view that placing the charged person under judicial supervision is not a form of detention but it is a provisional release and that would cause severe risk than placing the person under house arrest as it cannot ensure all the conditions stipulated under Rule 63.3(b).

We also have the view that in the appeal of the charged person he did not request for consideration of the alternatives to detention but the basic or the main request is to reverse the order extending the provisional detention and to have him provisionally released. He mentions about his fundamental right and the presumption of innocence, so that he should be provisionally released.

It seems that they put the blame on the Co-Investigating Judges for failing to consider these aforementioned points.

And, finally, the co-defence lawyer requested to the Pre-Trial Chamber to reverse the extension order and to provisionally release the charged person but failed to request to the Pre-Trial Chamber to consider the alternatives to detention, and that's what has been set out in his appeal.

And, in fact, we, the civil party co-lawyers, have a similar view that fundamental freedom and presumption of innocence will always be with the charged person, but that principle shall not be considered for serious crimes if the charged person is to be

released on bail or to use other alternatives to detention may create risk to the charged person himself or the disturbance to the public order or to disrupt the smooth proceedings of the ECCC.

[14.23.15]

In addition, besides the gravity of the crimes alleged on the charged person, the complexity of the case file and the investigation are also the factors that need to be considered so that appropriate provisional detention can be done. In that case, the civil party co-lawyers would reiterate that the discretion used by the Co-Investigating Judges in their order extending the provisional detention is appropriate and justified. And we would like to respond in two points in brief to what has been said by the co-defence lawyers which were not included in their appeal. First, the co-defence lawyer, Mr. Ang Udom, raised the strategies used for the murder; that the offender murdered the former head of the union, Chea Vichea. In fact, the murder case committed outside the ECCC jurisdiction or system and the case of the charged person before this Court is completely different.

First of all, the crime committed on the former union leader, Vichea, is an ordinary crime. Although it is serious, the scope of the crime is just an ordinary crime and there is only one victim, that is Mr. Vichea. But if we look at the crimes alleged to be committed by the charged person under the jurisdiction of

the ECCC, they are international crimes and the scope is extensive and it is not comparable to what happened in the other murder case.

So the scope of the crime is extensive, therefore, it is pointless to compare these two cases and, as raised by the Co-Prosecutor, if a decision is made for the charged person to be on bail because that person was not involved in that crime. [14.26.08]

The defence lawyer, Mr. Karnavas, also raised a point comparing the domestic law and the use of the force to defend the country, and the proceedings and the decisions by the ECCC to protect the charged person if he were to be released for house arrest. In fact, country defence is the matter of the government, it is not the subject matter of the jurisdiction of the ECCC. And only this Court can consider independently all the facts and the risk that could happen if the charged person is to be released on bail or under house arrest.

I conclude that as a co-civil party lawyer, I conclude my submission and I would like this time to be given to my colleague, Mr. David Blackman, to provide our submission to this appeal.

Thank you, Your Honour.

JUDGE LAHUIS:

To clarify the position of the Pre-Trial Chamber on the document which was filed by the prosecutor, it was the intention of the

Pre-Trial Chamber to allow all the parties to comment on that during this hearing. And we just note that in accordance with that intention, you make your observations on that and that will be taken into consideration.

The Court now is calling for a break of 15 minutes, as scheduled.

(Judges exit courtroom)

(Court recesses from 1428H to 1444H)

(Judges enter courtroom)

THE PRESIDENT:

Please be seated.

Mr. David Blackman, you may now proceed with your oral submission.

MR. BLACKMAN:

Mr. President, Your Honours and the civil parties who are present and those honoured guests that are before this Court, I am honoured to speak to you today on behalf of all Cambodians that I represent, including American Cambodians.

[14.45.11]

In my 38 years before the bench, I have been involved in representing murderers and robbers and villains of all types and victims of toxic torts who have breathed chemical poison released from the air from gigantic corporations, but I must say appearing before this international tribunal I feel as though I were a cat walking on a hot tin roof. It is not a forum that I have been to before, but it is one that I am honoured to appear.

Three years ago I came to Cambodia to become involved in one of the world's most heinous crimes against humanity, the crimes committed by the Communist Party of Kampuchea. In those three years, I've read the Introductory Submissions, I've tried to keep up with the case filings, I've heard for myself the cries of the victims of the Khmer Kraham.

It is like no one in Cambodia has escaped the Communist Party of Kampuchea. Millions of people, thirty years after the fact, still are mortally wounded by the alleged crimes committed by this defendant who asks you to not forget his fundamental rights to liberty and the presumption of innocence. What he's asking for, through his counsel, his learned counsel, his articulate counsel, is for pity.

Mr. Karnavas talks of procedural justice but spent 20 minutes talking about substance and the lack thereof. I say antit anut. My fellow American Cambodians find themselves ill with mental and physical illnesses that cannot be erased by time. To lose your family or to lose your children to starvation and cruelty, to be forced not to love or to care about other human beings, to be forced to do evil and call evil good, is not pardonable.

[14.47.35]

Ieng Sary is 84 years old. While confined in ECCC facility, he receives the best of care and the greatest chance to be managed so that he can attend the day-to-day, the week-to-week, the month-to-month and, if necessary, the year-to-year trials of his

case.
Can you imagine if he was released to home? A police escort blocking the roads so he can get to this courtroom? What would that do to the victims of the oppressive Khmer Rouge regime? They would see a defendant given special privileges, walking their road as he heads towards the courthouse. That would be the result of home detention. He could not start early enough in the day to prepare himself to come here. Such a request is not reasonable given the stakes in these cases.
As this Court has written on two prior occasions, the gravity of the crimes charged is an important consideration, as well as well-founded reasons to believe the defendant has committed these crimes. There has been an admission in this case that indeed Ieng Sary, defendant Ieng Sary, was indeed a senior leader of the Khmer Kraham. There's no dispute about that.
To me and all my civil parties and my clients, the most important factors assure ourselves that he will be present day after day until judgment day, so that this dark chapter in Khmer history will be over and done with and life can go on and the shadow of the Khmer Kraham will be no more. The sun will shine. That day is approaching. And his confinement in the ECCC facility guarantees that that day can come.
[14.49.54]
House arrest, or any other form of incarceration, will prevent the successful conclusion to these proceedings. It is therefore

humbly and respectively requested, on behalf of my civil parties and the civil parties that are 8,000 strong, that his request to be released to house arrest be summarily denied as out of the question.

Thank you.

Your Honours, I was asked by co-counsel, who is well familiar to you, to mention the Mumunda (phonetic) case that was mentioned by national counsel. In that case, the ICC overturned the ruling that he should be free. The reasons are not important, but indeed that ruling was overturned.

Thank you.

THE PRESIDENT:

The counsel for the charged person is now allowed to respond.

MR. KARNAVAS:

Thank you, Mr. President. And, again, good afternoon, Mr. President; good afternoon, Your Honours; good afternoon to everyone in and around the courtroom.

I'll be brief and I'll just touch on all the points, hopefully within the next five minutes. First, let me begin with the pleadings because there seems to be this assertion that we have changed tactics, we're pleading something other than we had pled before. I think if you look at our submissions, Your Honours, we are asking or seeking at least alternative measures available as a form of detention.

So I believe that our submissions today are consistent with what

we filed earlier on this appeal and asking for house arrest is a form of detention. It's a less restrictive form of detention than what is presently here but I believe that it is pled in the appeal brief and therefore it was appropriately addressed here today.

House arrest. I'm rather surprised that my colleague who mentioned the Blaskic case -- he was a member of the Office of the Prosecution at the ICTY, so he should be also familiar with the Plavsic case. Now, Blaskic, the one that he did mention, is rather unique. If my memory serves me correctly, Blaskic was allowed house arrest but in the Netherlands, and there lies the difference because when the Netherlands entered into an agreement with the United Nations, part of the agreement was that any accused would be detained. There would be no form of bail while those individuals were in the Netherlands, for safety reasons and for other reasons.

[14.53.35]

This came up also in the Blagojevic-Jokic case when Judge Schomburg on one occasion allowed Mr. Jokic to be provisionally released while in the Netherlands on the very same day the government of the Netherlands sent a representative to remind the Trial Chamber that it did not have the authority to release someone in the Netherlands because of the contractual arrangements. So that case does not fit here.

Now, the Plavsic case is rather interesting and again with my

memory, if it serves me correctly, that was around 2001, 2002, 2003 -- in that range. She, along with Krajisnik and Karadzic, were the troika in Bosnia Herzegovina, so she was very high level. She was allowed house arrest in Belgrade, and this is at a time when Serbia was less than cooperative with the ICTY. Nonetheless, they allowed her house arrest while the case was pending. She ultimately pled out, she pled guilty, was sentenced and, as I understand it, from the moment that she even pled out, pled guilty, to the time that she was sentenced she was allowed to go back and remain in Belgrade under house arrest.

We only point this out to suggest that house arrest is not bail. It is a form of detention and I dare say it is available in Cambodia and before the ECCC. It's interesting that when it suits the prosecution or others to cite the ad hoc international criminal tribunals for case law that they like, even though they may not necessarily be on point or specific to the criminal procedure of Cambodia, they cite it and they say by analogy you can use it.

[14.55.56]

When the other side does it, somehow they're saying it's prohibited. We say that if the Pre-Trial Chamber finds it appropriate it can provide for house arrest, but that's a discretionary matter for you to decide. And on that point I wish to address the gentleman from the civil parties because he mentioned both the murder case and also my analogy with respect

to what is happening on the border and the potential conflict between Thailand and Cambodia. The point that I'm trying to make is as follows.

This is a national court. The ECCC does not have its own police force. It relies on the national police department or the Ministry of Interior to provide all the folks that provide our safety here, day in and day out, and provide the safety for the charged persons. So it is the government itself and the point that we were trying to make, perhaps not as articulately as we could have, is the fact that the government does have the capacity through its various ministries to provide the necessary protection if the Pre-Trial Chamber finds that house arrest is appropriate. So that was the point that we were trying to make.

Fitness to stand trial. I wasn't prepared to come and address the mental issue. With all due candour, I was asked about the physical, I wasn't asked about the mental, and I was rather surprised that this report that was prepared concerning my client's ability to follow the proceedings was mentioned. Be that as it may, let me just address that very quickly.

First of all, the doctor was chosen by the OCIJ with no consultation from the defence. Secondly, the OCIJ deliberately prevented the defence from observing and monitoring these examinations. Thirdly, there was no examination to speak of. There were two or three visits where it was basically, "How are you? Do you know who your lawyers are?" That was the extent.

It wasn't an evaluation and in fact I'll go so far as to say that the report itself is laughable. It's a disgrace if it's supposed to be a report on psychiatric fitness.

[14.58.55]

With respect to that, we requested additional information. We're still waiting to hear back from the OCIJ concerning that because we do intend to look further into that. With respect to bias, the prosecution is correct; one matter was addressed by the Pre-Trial Chamber, although I must say with all due candour -- and I'm fairly well known, rightly or wrongly, for speaking rather directly to members of the bench -- we were extremely disappointed in the fact that we were not provided the opportunity to take evidence because it's sort of like the chicken and the egg.

We have a senior analyst from the OCIJ who one day he was a trusted analyst who was making some very serious allegations based on his inside knowledge. We have nothing more. We need to get those folks that were present to give evidence. Naturally no-one is going to talk to us and of course we want the evidence to come here when they're speaking under oath. We were denied that opportunity.

Another submission was filed thereafter when we found out more information but with respect to bias let me just say a couple of things and this is why we believe some circumstances have changed. In our opinion the OCIJ is not acting as an independent

investigative agency, if you will, trying to collect the evidence with equal zeal both for the prosecution and for the defence. Take just one issue. I'll just take the demographer.

[15.00.53]

We asked for a demographer to be assigned. We wanted to participate in the selection. So where do they go to? They went to the Office of the Prosecution at The Hague where their former colleague comes over here. We asked for another independent demographer. The answer was no. That leads us to believe, at least on its face, well, if you're so independent and if you're not biased, then why are you constantly reaching out to the prosecution to get information?

Or, for instance, we mentioned that there was a communication -- perhaps even more than just a communication -- with Etcheson, who works for the OCP, and here he's talking with members of the Co-Investigating Judges on how to look for more incriminating evidence. We have this information from the analyst that worked for the Office of the Co-Investigating Judges. How can we get more information unless we have them on the dock to take evidence?

JUDGE LAHUIS:

I think you're perhaps overdoing because the prosecutor wants to make an intervention.

MR. AHMED:

Your Honours, I promised to myself I'll not intervene when Mr.

Karnavas argues. He's a learned friend of mine for some years now but he's, most respectfully, re-arguing applications that have been either decided by you or are pending in separate proceedings.

[15.02.32]

Now, this is a provisional detention matter. Either Mr. Karnavas wants all those applications to be joined here and argued because they're different parties who have made different submissions. We made our submissions which we didn't make here. So Your Honours may decide whether you want to combine all those arguments into one or to re-hear applications that have been dismissed.

Now, the demographer application's been dismissed. Craig Etcheson application is pending in a separate proceeding. The first Lemonde application was dismissed in a separate one ---

JUDGE LAHUIS:

I think you have ---

MR. AHMED:

--- so my submission is Your Honours may choose to decide whether you want to allow Mr. Karnavas to argue all those applications here or if he was to refer to only those things that refer directly to his application and appeal here.

JUDGE LAHUIS:

I think you have made your point. Mr. Karnavas, wait a minute. You may have noticed that I felt slightly uncomfortable and

that's why I allowed Mr. Co-Prosecutor to ---

MR. KARNAVAS:

I do believe that it was raised by the gentleman and so I was only trying to reply and so it was -- as far as I was concerned it was an invited reply, but I think the point is made that we believe that there is inherent bias on the Office of the Co-Investigating Judges and, because of that, we do believe that that is in and of itself a change of circumstances.

[15.03.01]

All of these events have come out in the last few months and so when you look and see what they're doing as far as evaluating whether the conditions -- certain conditions -- have changed if at all, you don't see a whole lot from the Office of the Co-Investigating Judges.

With respect to exculpatory evidence, we're in the same bind. If ---

JUDGE LAHUIS:

Mr. Karnavas, I believe that what you're doing now is continuing with dealing with decisions which are already dealt with by the Pre-Trial Chamber and/or under --- and that's, you know, kind of a limit which binds you.

MR. KARNAVAS:

However, I must say when the prosecution was making his submissions, there was nothing from the bench. He addressed the issue, for instance, of our third investigative request regarding

the modalities. Now, perhaps he was responding to me; I'm just replying now, but I'll move on.

With respect to the issue raised by the civil parties, I am somewhat concerned because on the one hand they talk about that they have this understanding of fundamental rights but, at the same time, the argument was that there's presumption of guilt on --- our client is already guilty. We know it; we heard an opening argument or a closing statement, I don't know what it was, one of the two, from the second civil party lawyer, but the message that we're getting from the civil parties is basically that this individual is guilty and therefore he should not be afforded certain rights.

[15.05.57]

And, of course, they look and say, well, look at his position. His position is different, and for that I can mention quite safely the Milutinovic case at the ICTY which was recently -- there was a three-year trial, it was before Judge Bonomy presiding it and Milutinovic was basically the right-hand person of Milosevic. Nonetheless, after three years, he was acquitted and the Office of the Prosecution at the Hague -- that the ICTY did not appeal that acquittal.

Now, I mention that because I think there is something to be said about the presumption of innocence. It's not something that we just say it but we don't mean it. I think that is rather cynical if we were to say, well, yes, we have to say it but, let's face

it, if they're here they must be guilty and therefore let's not afford them their rights. And I only mention that because I thought that the civil party submissions were a little bit over the top with respect to that.

We've made our submissions, Your Honours. We believe circumstances have changed. We believe that you have the capacity to reconsider and to provide lesser alternative measures than the ones that currently exist that would ensure both Mr. Ieng Sary's presence here at the trial, his safety, the safety to others.

The investigation is taking on a lot longer than was anticipated. Trial is not expected to start until a year from now, and while I take the point that perhaps during the trial you would not want to have a charged person or an accused driving through the streets of Phnom Penh to get to court, we're talking about pre-trial detention at the pre-trial stage not at the trial stage. And at the trial stage, I daresay I would be more inclined -- more inclined to agree with the gentleman that, at that stage, probably it would be much safer and more convenient to have our client closer to the Tribunal so as not to cause the congestion of traffic or the discomfort to anyone out there.

[15.08.22]

And, again, I want to thank you, Your Honours, for your attention.

JUDGE LAHUIS:

Mr. Co-lawyers of the charged person -- we were just wondering whether your client wants to return now to have a final statement because he's allowed to? You can also say that he waives that right but then we know for sure.

MR. ANG UDOM:

Your Honours, I have received a statement from him and I can assure you that he shall not be here to make his concluding remarks and that he waives his right.

MR. PRESIDENT:

The Pre-Trial Chamber would like to inform the public that the decision concerning today's hearing will be pronounced and before such pronouncement the public will be notified two days in advance.

The hearing today is adjourned. All rise.

(Judges exit courtroom)

(Court adjourns at 1510H)