

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

PRE-TRIAL CHAMBER

CASE NO. 002/19-09-2007-ECCC/OCIJ (PTC 33)

IENG THIRITH

MONDAY, 15 FEBRUARY 2010

0901H

APPEAL HEARING

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:

SENG Bunkheang
Vincent DE WILDE D'ESTMAEL

For the Charged Person, IENG THIRITH:

PHAT Pouvseang
Karlijn VAN DER VOORT

For the Civil Parties:

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

Case No. 002/19-09-2007-ECCT/OCIJ (PTC 33)

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15/02/2010

List of Speakers:

Language used unless specified otherwise in the transcript

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Speaker	Language
MR. CHHORN PROLEOEUNG	Khmer
MR. DE WILDE D'ESTMAEL	French
JUDGE DOWNING	English
JUDGE HUOT VUTHY	Khmer
JUDGE LAHUIS	English
MR. PHAT POUVSEANG	Khmer
MR. SENG BUNKHEANG	Khmer
THE CHARGED PERSON	Khmer
THE PRESIDENT (PRAK KIMSAN, Presiding)	Khmer
MS. VAN DER VOORT	English

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1 P R O C E E D I N G S

2 [09.01.11]

3 (Judges enter the courtroom)

4 MR. PRESIDENT:

5 Please be seated.

6 In the name of our Cambodian people and the United Nations, today
7 the Pre-Trial Chamber of the Extraordinary Chambers in the Courts
8 of Cambodia declares open the hearing of the Criminal Case Number
9 002/19-09-2007-ECCC/OCIJ (PTC33), dated 10th November 2009 in
10 which the charged person Ieng Thirith, alias Phea, Cambodian
11 nationality, female, born on the 10th of March 1932 in Fifth
12 Quartier, Phnom Penh, Cambodia; residing before her arrest at
13 Number 47B Street 21, Tonle Bassac, Group 36, Zone 4,
14 Chamkarmorn, Phnom Penh, Cambodia; father's name Khieu On,
15 deceased; mother's name Ouk Ponn, deceased; husband's name Ieng
16 Sary, with four children,
17 is charged with Crimes Against Humanity and Grave Breaches of the
18 Geneva Conventions of August 1949, being crimes set out and
19 punishable under Articles 5, 6, 29 (new) and 39 (new) of the Law
20 on the Establishment of the Extraordinary Chambers in the Courts
21 of Cambodia dated 27th of October 2004.

22 Defence co-lawyers, Mr. Phat Pouv Seang and Ms. Karlijn Van Der
23 Voort.

24 Lawyers for the civil parties: Mr. Hong Kimsuon, Mr. Lor
25 Chunthy, Mr. Ny Chandy, Mr. Kong Pisey, Mr. Yong Phanith, Ms. Sin

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1 Soworn, Ms. Chet Vannly, Mr. Pich Ang, Ms. Silke Studzinsky, Mr.
2 Mahdev Mohan, Mr. David Blackman, Mr. Kim Mengkhy, Ms. Moch
3 Sovannary, Ms. Isabelle Durand, Ms. Elizabeth Rabesandratana, Mr.
4 Philippe Cannone, Ms. Martine Jacquin, Ms. Annie Delahaie, Ms.
5 Fabienne Trusses-Naprous.

6 Are all the participants present at the hearing?

7 THE GREFFIER:

8 Mr. President, the parties to the proceedings are present except
9 that the civil party lawyers -- only eight of them present among
10 the 18 co-lawyers.

11 [09.07.13]

12 MR. PRESIDENT:

13 Thank you.

14 Present at today's hearing are Mr. Prak Kimsan, President; Mr.
15 Rowan Downing, Judge; Mr. Ney Thol, Judge; Mrs. Katinka Lahuis,
16 Judge; Mr. Huot Vuthy, Judge, Mr. Pen Pichsaly, Reserve Judge.
17 Greffiers; Miss Sar Chanrath, Ms. Entela Josifi.

18 The prosecutors; Mr. Seng Bunkheang and Mr. Vincent de Wilde
19 d'Estmael.

20 Mrs. Ieng Thirith, please rise.

21 Can the microphone be adjusted so that she can be heard?

22 What is your name?

23 THE CHARGED PERSON:

24 Ieng Thirith.

25 MR. PRESIDENT:

3

1 Do you have any alias?

2 THE CHARGED PERSON:

3 They called me Rith.

4 [09.08.38]

5 MR. PRESIDENT:

6 How old are you?

7 THE CHARGED PERSON:

8 I was born in 1932.

9 MR. PRESIDENT:

10 What is your nationality?

11 THE INTERPRETER:

12 Not audible to the interpreter.

13 MR. PRESIDENT:

14 Where were you born?

15 THE CHARGED PERSON:

16 I was born in Sangkat number 5.

17 MR. PRESIDENT:

18 What is your occupation?

19 THE CHARGED PERSON:

20 I am a professor -- English professor -- a professor of English.

21 MR. PRESIDENT:

22 Where were you before you were arrested?

23 [09.09.19]

24 THE CHARGED PERSON:

25 I was living in the same address.

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1 MR. PRESIDENT:

2 What is your father's name?

3 THE CHARGED PERSON:

4 Khieu On. He worked at the court.

5 MR. PRESIDENT:

6 What is your mother's name?

7 THE CHARGED PERSON:

8 Ouk Ponn.

9 MR. PRESIDENT:

10 What is your husband's name?

11 THE CHARGED PERSON:

12 Could you please help me? What is his name? He's here with us.

13 He was before the Pre-Trial Chamber the other day. I seem to

14 forget his name. Actually, we both are in the Court. What is

15 his name? Can you please help me? Ieng Sary.

16 [09.10.18]

17 MR. PRESIDENT:

18 How many children do you have?

19 THE CHARGED PERSON:

20 I forget again regarding the number of children I have; I have

21 quite a few children, but because I have been fully engaged in my

22 work I seem to forget the number of my children I have. I say

23 four.

24 MR. PRESIDENT:

25 Do you have any lawyers to represent you?

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1 THE CHARGED PERSON:

2 Yes, I do. I have Mr. Phat Pouv Seang here, as you see.

3 MR. PRESIDENT:

4 I now inform you that pursuant to Rule 31.1(d) of the Internal
5 Rules you are presumed innocent as long as your guilt has not
6 been established. You have the right to be informed of any
7 charges brought against you. You have the right to be defended
8 by a lawyer of your choice and you have the right to remain
9 silent. Please be seated.

10 [09.11.39]

11 THE CHARGED PERSON:

12 Thank you, Mr. President.

13 MR. PRESIDENT:

14 The Co-Rapporteur Judge is now invited read the Report of
15 Examination.

16 JUDGE HUOT VUTHY:

17 Criminal Case File Number 002/19-09-2007-ECCC/OCIJ (PTC 33)
18 Report of Examination;

19 (1) Proceeding; (2) Examination of the case by the

20 Co-Rapporteurs.

21 1. Proceedings. A. Introduction. Pursuant to Rule 77.10 of
22 the Internal Rules of the Extraordinary Chambers in the Courts of
23 Cambodia in the Courts of Cambodia, the President of the
24 Pre-Trial Chamber has assigned Judge Huot Vuthy and Rowan Downing
25 to report in details on facts and legal matters contained in the

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1 Co-Investigating Judges' Order on Extension of Provisional
2 Detention which has been appealed.

3 The President has also asked the two judges to examine Case File
4 Number 002/19-09-2007-ECCC/OCIJ (PTC 33).

5 Identification of the Charged Person. Ieng Thirith, alias Phea,
6 female, Cambodian, born on March the 10th 1932 at Fifth Quartier,
7 Phnom Penh, Cambodia, residing before her arrest at Number 47B
8 Street 21, Tonle Bassac, Chamkamorn, Phnom Penh. Father's name
9 Khieu On, deceased; mother's name Ouk Ponn, deceased. Ieng
10 Thirith is represented by defence co-lawyers, Mr. Phat Pouv Seang
11 and Ms. Diana Ellis.

12 [09.14.21]

13 Charges. Ieng Thirith is charged with crimes against humanity
14 including murder, extermination, imprisonment, persecution and
15 other inhumane acts which are provided for and punishable under
16 Article 5.29 (new) and 39 (new) of the Law on the Establishment
17 of the Extraordinary Chambers in the Courts of Cambodia.

18 Purpose of this report. This report of the Co-Rapporteurs
19 provides the details of the facts and legal matters contained in
20 the decision which has been appealed and other related facts
21 before this Court. This report is to assist those who are not
22 parties to the proceedings to understand the case before the
23 Court.

24 B. Co-Investigating Judges' Order on Extension of Provisional
25 Detention. On the 10th of November 2009, the Co-Investigating

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1 Judges issued an order extending provisional detention of Ieng
2 Thirith, who had been detained since the 14th of November 2007
3 for a period not exceeding one year, pursuant to Internal Rule
4 63.6(a) of the Internal Rules.

5 The Co-Investigating Judges found that the first condition for
6 provisional detention order mentioned in Rule 63.3(a) was still
7 met and there were well-founded reasons to believe that the
8 charged person committed the crimes with which she has been
9 charged.

10 To reach this conclusion, they had relied fully on Pre-Trial
11 Chamber's analysis of the evidence placed on the case file as of
12 the 24th of February 2009, the last day for parties to file their
13 submissions after the Pre-Trial Chamber received the charged
14 person's appeal against the extension of detention order dated on
15 the 10th of November 2008.

16 [09.17.51]

17 The Co-Investigating Judges found that there has been no change
18 in circumstances since the Pre-Trial Chamber decided that
19 provisional detention was a necessary measure to prevent the
20 charged person from exerting pressure on witnesses to victims; to
21 ensure the presence of the charged persons during the
22 proceedings; to protect her security; and to preserve public
23 order. They, thus, conceded that the conditions provided for
24 Internal Rule 63.3(b) continued to be met.

25 The Co-Investigating Judges have been conscious that detention

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1 for nearly 24 months is certainly a long period of time but the
2 scope of investigations, complexity of the facts and legal
3 matters, and gravity of the crimes brought against the charged
4 person require preparation of large-scale investigative action.

5 C. Ieng Thirith's Appeal Brief. On 9 December 2009, the defence
6 co-lawyers for the charged person filed their appeal brief
7 against the order of the Co-Investigating Judges requesting the
8 Pre-Trial Chamber to (1) hold that the requirements set out in
9 Rule 63 for the extension of the charged person's detention were
10 no longer met; (2) quash the order extending the charged person's
11 provisional detention for another year; and (3) immediately
12 release the charged person under conditions deemed appropriate by
13 the Pre-Trial Chamber.

14 D. Co-Prosecutor's Response. The Co-Prosecutors had submitted
15 their response, arguing that the appeal should be dismissed in
16 its entirety as (a) the Co-Investigating Judges has provided
17 sufficiently and completely reasons; (b) the length of time of
18 the provisional detention was reasonable and there had been no
19 lack of due diligence by the Co-Investigating Judges in the
20 conduct of the proceedings; (c) the analysis of evidence
21 undertaken by the Co-Investigating Judges was in accordance with
22 Internal Rules 63.3(a); (d) the charged person failed to
23 demonstrate any material change in circumstances since she was
24 initially detained by the Co-Investigating Judges; (e) the
25 conditions for provisional detention are still met today.

1 [09.21.44]

2 2. Examination by the Co-Rapporteurs. A. Diligence in the
3 conduct of the investigation. The defence co-lawyers have
4 submitted that the Co-Investigating Judges have erroneously set
5 out conditions prescribed in Internal Rule 63 as they have
6 applied principles of automatic extension of pre-trial detention
7 without clear assessment of the conditions, using a special
8 diligence standard when the investigation reaches its completion.
9 The Co-Prosecutors responded that the second extension order by
10 the Co-Investigating Judges had been issued with sufficient and
11 complete reasons and consideration of facts and legal matters and
12 the Co-Investigating Judges were not obliged to present their
13 views on the above reasons.

14 In fact, there is no policy of automatic extension of pre-trial
15 detention. However, there is automatic periodic review of a
16 charged person's provisional detention to respect the defence
17 rights and in the interests of the charged person.

18 B. Reasons found and strong belief that the charged person has
19 committed one or many crimes specified in the Introductory
20 Submission, Internal Rule 63.3(a). The defence co-lawyers for
21 the charged person have submitted that the Co-Investigating
22 Judges have failed to act impartially, accurately and fairly
23 evaluate evidence as required by Internal Rule 63.3(a) or
24 evidence obtained during the period between the 24th of February
25 2009 and 19th of November 2009 has not been considered.

1 The co-lawyers for the charged person concluded that the OCIJ had
2 failed to properly assess the criteria contained in Rule 63.3(a)
3 and there had not been sufficient facts or information to
4 persuade objective observers to believe that the charged person
5 may have committed the crimes with which she is charged.

6 [09.25.40]

7 The Co-Prosecutors responded that today the case file contains
8 evidence sufficient for unbiased observers to believe that at
9 this stage the appellant may have committed the crimes for which
10 she is currently under investigation. The defence mistakenly
11 challenged the existence of well-founded and convincing reasons.
12 The tenuous arguments that the Co-Investigating Judges had,
13 basing on inculpatory and exculpatory evidence using different
14 standards, are no longer valid and justified for the charged
15 person's detention under Internal Rule 63.3(a). The evidence
16 collected by the Co-Investigating Judges clearly demonstrated
17 this. For analytical purpose, relevant written reports of
18 witness interviews have been placed in the case file.

19 C. Consideration of the grounds for provisional detention as a
20 necessary measure, Internal Rule 63.3(b). The defence argued
21 that at this phase of the proceedings the OCIJ just simply used
22 earlier PTC and OCIJ decisions, which were incomplete, to
23 conclude their support to continued detention of the charged
24 person. They stressed that the onus to prove this was not on the
25 defence but rather on the investigative authorities.

1 The defence submitted that, based on the psychiatric expert
2 report, the charged person's health condition has deteriorated,
3 making the claimed risk of her absconding impractical and
4 unconvincing. They further stated that the presence of
5 post-traumatic stress disorder may not lead to a conclusion that
6 it would affect public order if the charged person would be
7 temporarily released.

8 [09.29.01]

9 The Co-Prosecutors respond in reference to the PTC's
10 determination on 11th of May 2009 that continuation of
11 provisional detention at the ECCC detention facility is necessary
12 under Internal Rule 63.3(a) to (1) prevent the charged person
13 from exerting pressure on witnesses or victims; (2) to preserve
14 evidence; (3) to ensure the charged person's presence during the
15 proceedings; and (4) to protect public order.

16 The appellant has provided no evidence since 11th of May 2009
17 that may lead the PTC to reverse this finding. The argument
18 outlined in the detention appeal decision is still valid today
19 and should be upheld.

20 With regard to the health issue raised by the defence, the
21 Co-Prosecutors react to that the expert report focused solely on
22 the issue of mental disorder and fitness to stand trial in the
23 context of the ECCC and not on other physical health questions,
24 although the experts reviewed the medical information provided to
25 them. Nothing in the report indicated that the health of the

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1 charged person would prevent her from absconding with or without
2 assistance.

3 Furthermore, and in relation to her psychiatric health, the
4 experts found that Mrs. Ieng Thirith has not suffered mental
5 disorder and her cognitive functioning, and in particular her
6 short-term memory impairment, was largely consistent with her age
7 and that she is able to stand trial.

8 The Co-Prosecutors further added that the past behaviour and
9 public statements of the appellant as mentioned by the PTC in its
10 11th of May 2009 decision clearly demonstrated the concrete risk
11 that the charged person may exert pressure against -- intimidate
12 or interfere with witnesses or victims if provisionally released.
13 Phnom Penh, 8th of February 2010. Co-Rapporteurs, Judge Huot
14 Vuthy, Judge Rowan Downing.

15 [09.32.35]

16 JUDGE DOWNING:

17 I would also add that since the Order of Detention was made by
18 the Co-Investigating Judges on the 10th of November 2009, the
19 appellant has been additionally charged with the crime of
20 genocide.

21 MR. PRESIDENT:

22 Ms. Ieng Thirith, please rise.

23 Would you like to make a statement related to your appeal or
24 would you like your co-lawyers to speak on your behalf?

25 THE CHARGED PERSON:

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1 At this time I would like my co-lawyers to speak on my behalf.

2 MR. PRESIDENT:

3 You may sit.

4 The floor is now opened for the co-defence lawyers to make your

5 oral submissions. You have one hour.

6 [09.34.07]

7 MR. PHAT POUVSEANG:

8 Good morning, Mr. President.

9 MR. PRESIDENT:

10 I would like to notify the co-defence lawyers that Ms. Ieng

11 Thirith can sit at the bench at the row next to your seat.

12 The co-defence lawyer, you may now resume your oral submission.

13 MR. PHAT POUVSEANG:

14 Good morning Mr. President, Your Honours, everyone in and around

15 the courtroom.

16 Before I present my oral argument and based on Internal Rule 22.2

17 of the ECCC Internal Rules, I would submit to the Pre-Trial

18 Chamber for the recognition of my co-lawyer.

19 MR. PRESIDENT:

20 The PTC has already acknowledged and recognized your co-lawyer.

21 MR. PHAT POUVSEANG:

22 The defence respectfully request that the Pre-Trial Chamber quash

23 the OCIJ's Extension of Provisional Detention Order.

24 The fact is that there are a number of procedural and substantive

25 defects, namely, the automatic continuation of pre-trial

1 detention without proper consideration of the matters that have
2 changed over time; (b) The OCIJ did not apply the correct
3 standard in its review; (c) the lack of a well-founded reason to
4 believe the charged person may have committed the crime; and (d)
5 and the lack of evidence to support the finding that there is a
6 real risk that the charged person will interfere with witnesses,
7 destroy evidence, abscond or disturb public order if released.

8 [09.38.06]

9 The defence submits that there has been a failure to properly
10 consider the grounds advanced by the defence for contesting the
11 charged person's continued detention. The defence does not
12 intend to re-state in detail the arguments set out in its
13 previous motions. Instead, the defence will incorporate those by
14 reference so as to make most efficient use of the Court's time.
15 The defence believes that the charged person's continued
16 detention is unjustifiable and causes an infringement of her
17 human rights. Further, continued pre-trial detention of the
18 charged person cannot be considered necessary as required by
19 Internal Rule 63.3(b).

20 Necessity is the underlying requirement for continued detention
21 at the ECCC. It is the defence submission that the Office of the
22 Co-Investigating Judges has not given sufficient, if any,
23 consideration to this fundamental principle. It is respectfully
24 submitted that this Court shall be seen to act in accordance with
25 well recognized principles designed to ensure that the charged

1 person is not denied her liberty without good and proper cause
2 justified in law.

3 Legal Framework. In order to allow continued provisional
4 detention of the charged person, the elements of Internal Rule
5 33.3(a) and (b) must be fulfilled. The first element under (a)
6 provides that there must be well-founded reasons to believe that
7 the person may have committed the crime or crimes specified in
8 the Introductory Submission or supplementary submission.

9 The second element under (b) requires that provisional detention
10 is necessary and provides five potential grounds, four of which
11 have been found applicable to the underlying case, namely, to:

12 one, prevent the charged person from exerting pressure on
13 witnesses or victims; two, preserve evidence or prevent the
14 destruction thereof; three, ensure her presence during the
15 proceedings; and four, preserve public order.

16 Pre-trial detention is a much debated topic in human rights
17 discourse and, indeed, the International Covenant on Civil and
18 Political Rights, the ICCPR, and its adjudicating body, the Human
19 Rights Committee, provide strict guidelines for pre-trial
20 detention and its continuance whilst awaiting trial. Article 9.3
21 of the ICCPR guarantees that it shall not be a general rule that
22 persons awaiting trial shall be detained in custody.

23 [09.42.26]

24 In a speech in celebration of the 50th anniversary of the
25 European Court of Human Rights, Justice Robinson, the President

1 of the ICTY, highlighted the importance of the interactions
2 between international criminal and international human rights
3 institutions.

4 Referring to the ICTY's system of pre-trial detention, he
5 explained that, initially, provisional release could only be
6 ordered in exceptional circumstances. The ICTY amended this
7 provision in 1999 so as to remove the clear contradiction that
8 existed with customary international law which, as reflected
9 international human rights instruments and the jurisprudence of
10 this supervisory body requires that pre-trial detention shall
11 remain.

12 To quote the European Court of Human Rights, an exceptional
13 departure from the right to liberty, likewise Article 9.3 of the
14 ICCPR states that:

15 "It shall not be the general rule that persons awaiting trial
16 shall be detained in custody."

17 This clear contradiction between international human rights law
18 and the practice and the ECCC is similarly contradictory. The
19 Office of the Co-Prosecutors claims that the automatic periodic
20 review of the charged person's provisional detention respects the
21 charged person's rights would only be acceptable if this review
22 involved a thorough and substantive analysis of the charged
23 person's circumstances, which it does not.

24 [09.44.49]

25 The Office of the Co-Prosecutors continues to assert that the

1 defence is required to demonstrate a material change in
2 circumstances; yet this would blatantly contravene the human
3 rights standard set out previously by the defence.
4 The Office of the Co-Prosecutors nevertheless cites the ICC's
5 requirement of a distinct and independent obligation to ensure
6 that a person is not detained for an unreasonable period prior to
7 trial. They even confirmed that at the ICC, the prosecution has
8 the burden of proof in relation to the continuing existence of
9 the conditions of pre-trial detention.
10 The European Court of Human Rights has consistently held that the
11 justification for pre-trial detention diminishes with time. The
12 defence submits that two-and-a-half years in pre-trial detention
13 is extremely long. Whilst one of the possible justifications for
14 pre-trial detention is the complexity of the case, the defence
15 submits that this is not applicable to the charged person.
16 Whilst the Co-Prosecutors have chosen to file one single
17 Introductory Submission in relation to the charged person, the
18 available evidence now shows that hardly any connection can be
19 made between the charged person and effects and crimes alleged in
20 the Introductory Submission. This factor, coupled with the
21 European Court's determination that the justification for
22 pre-trial detention diminishes over time, should lead to the
23 balance shifting in the charged person's favour at this
24 particular stage of the proceedings.
25 Rule 33.3 (a), Well-founded Reason to Believe that the Charged

1 Person May Have Committed the Crime. The Office of the
2 Co-Prosecutors in its response to the appeal refers to the best
3 inculpatory evidence that has been guarded by the OCIJ since
4 November 2007.

5 [09.47.40]

6 The defence submits that the recent interrogatory letter, D2/31,
7 by the Office of the Co-Investigating Judges dedicated to the
8 background to the hospitals and the charged person's role has
9 provided a substantial amount of new exculpatory evidence. Given
10 the public nature of this hearing and if the Chamber would find
11 it of assistance, the defence can deal with it more fully in a
12 closed session.

13 The defence submits that the overall evidence available on the
14 case file now at the end of the investigations of Case File 002
15 fails to substantiate the claims laid down in the Introductory
16 Submissions and the role allegedly played by the charged person.
17 Whilst it is not for the Chamber at this stage of the proceedings
18 to assess in detail all the evidence to determine guilt or
19 innocence, it is relevant at this stage to analyze the available
20 evidence to assess whether the requirement of Rule 63.3(a) is
21 still fulfilled.

22 The defence submits that the overall evidence does not support
23 the finding that there are well-founded reasons to believe that
24 the charged person may have committed a crime -- these crimes in
25 the Introductory Submission.

1 As will be discussed later on, the OCIJ have failed to take into
2 account several witness statements that had been available to the
3 OCIJ for months but not yet added to the case files by it.
4 Therefore, the appeal against the extension order should be
5 allowed and the order quashed.

6 [09.50.02]

7 Instead, the Pre-Trial Chamber is respectfully requested to
8 assess the totality of the evidence including Rogatory Letter
9 D2/31 and to find that the requirements of Rule 63.3(a) no longer
10 met.

11 Rule 63.3(b) elements have not been proven. It is the defence's
12 submission that also the elements of 63.3(b) have not been
13 fulfilled. Whilst the OCP implicitly acknowledges that the
14 fourth element, that is the security of the charged person is no
15 longer an issue, it contends that the other four elements are
16 still present. The defence will first discuss these four
17 elements in relation to the argument addressed by the
18 prosecution's response to the appeal.

19 No Risk of Interference with Witnesses and the Rule 63.3(b)(i)
20 and (ii). Throughout the past two years since her arrest, the
21 charged person has known the names of many sensitive witnesses
22 for and against her, yet there has never been any suggestion that
23 the charged person has directly or indirectly through any other
24 person sought to interfere or obstruct the administration of
25 justice in the process of interviewing witnesses being conducted

1 by the OCIJ.
2 [09.52.12]
3 Further, the charged person has entered her third year of
4 pre-trial detention and the investigation's coming to an end.
5 The imminent closure of the investigations means that there will
6 no longer be an argument that it is necessary to detain the
7 charged person to ensure the integrity of the investigations.
8 The European Court for Human Rights held that the risk of
9 pressure on witnesses is no longer decisive after the numerous
10 examinations of witnesses, and that a genuine risk of pressure
11 diminished and it did disappear with the passing of time.
12 The European Court further held that the risk of a suspect or
13 accused tampering with the evidence gradually lost its relevance
14 when few witnesses in the case were already interviewed and the
15 evidence had already been guarded.
16 In the long term, the requirements of the investigation do not
17 suffice to justify the detention of a suspect and, as a result,
18 potential destruction of evidence cannot be in itself a
19 reasonable ground to maintain the charged person in provisional
20 detention. The burden on OCIJ to prove reasons for detention
21 increases as the length of the charged person's detention
22 increases. This is supported by European Court case law, which
23 generally holds that the risk of pressure being put on witnesses
24 diminishes as the case progresses.
25 For instance, in *Kluth v. Belgium*, the European Court

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1 acknowledged that the very complicated case necessitating
2 difficult inquiries. By his conduct, Mr. Kluth considerably
3 impeded and indeed delayed them. The authorities believe that he
4 should consequently be kept in detention in order to prevent him
5 from disrupting the inquiry even more is easy to understand, at
6 least at the outset.

7 [09.55.12]

8 In the long term, however, the requirements of the investigation
9 do not suffice to justify the detention of a suspect in the
10 normal course of events. The risks alleged diminish with the
11 passing of time as the inquiries effected, statements taken, and
12 verifications carried out.

13 The Charged Person Does Not Present a Risk of Absconding or
14 Threat to Public Order and the Rule 63.3(b)(iii) and (v).
15 Deterioration in the charged person's health situation over the
16 last year makes any risk of not appearing at trial unrealistic,
17 especially when viewed in combination with its specific
18 guarantees suggested by the defence.

19 This is further substantiated by the most recent medical
20 examination in which the two OCIJ- appointed psychiatrists
21 concluded that the charged person's physical condition is frail;
22 that is on page 9 of the medical report.

23 In regard to the charged person posing a threat to public order,
24 the Pre-Trial Chamber may be assisted by the decision of the
25 European Court of Human Rights in the case of Letelier v. France.

1 The Court required the existence of facts capable of showing that
2 the accused's release would actually disturb public order in
3 order to continue detaining the accused. No such facts are
4 available in this case. The defence continues to contest the
5 assertion that the release of the charged person could cause a
6 threat risk to the society.

7 [09.57.40]

8 The OCIJ, in the Extension Order, continues to refer to the
9 article by Rob Savage on the alleged presence of post traumatic
10 stress disorder or PTSD. The defence is surprised that the OCIJ
11 are still referring to this source. As far as the defence knows,
12 Rob Savage is not a doctor or a psychologist or even a
13 sociologist. He does not only refer in his article to the
14 Democratic Kampuchea, but specifically also to the estimated
15 600,000 killed by American bombing and the brutalization of those
16 survivors who became the unwanted residents of Thailand's refugee
17 camps.

18 This text is available regarding the PTSD, and the brutalization
19 is available as an annexed A-25, and the document number is
20 C11/11 regarding Nuon Chea's decision.

21 This document further specifies that Khmer civilians were being
22 exposed to combat even before the overthrow of the Lon Nol regime
23 and the establishment of the Democratic Kampuchea. The American
24 bombing campaigns of the later 1960s and the early 1970s saw a
25 bombardment three times more intensive than the wartime bombing

1 of Japan, and it did not stop with the ousting of the Khmer
2 Rouge.

3 Thirdly, and most importantly, no relationship has been shown
4 between a certain unclear percentage of the population suffering
5 from PTSD and the possibility of these persons causing a
6 disturbance of public order if the charged persons would be
7 released. Neither is such relationship argued by the author of
8 the said article.

9 It is not made clear how depressions of PTSD in a part of the
10 Cambodian population would lead to public disorder if the charged
11 person would be released, as many in Cambodian society continue
12 to deny these crimes. PTSD symptoms cannot lead us to believe
13 that persons who suffer from such illness are more likely than
14 others to threaten the security of the charged person if
15 released.

16 The Co-Prosecutors argued that the general trauma experienced by
17 the Cambodian population would be aggravated by the charged
18 person's denial of her guilt but it does not distinguish how the
19 population would be affected by the charged person's release.

20 [10.01.29]

21 Speaking generally, the ECCC's proceedings are in part meant to
22 publicize the events in the 1975 to 1979 period and, in
23 particular, the different versions of these events presented by
24 the OCP and the defence among other parties. The OCP fails to
25 establish a link between the release of the defence and the

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1 aggravation of existing mental conditions. Releasing the charged
2 person temporarily will not exacerbate the Cambodian population's
3 PTSD as the OCP suggests.

4 This is further evidenced by the fact that whilst further
5 investigation commenced against further suspects, nothing has
6 happened in the country in spite of the fact that none of them
7 has been arrested yet. While their names are not officially
8 known to the public, some of their names are quite obvious and at
9 least one of them has even given interviews to the media on
10 several occasions about the possible case against him.

11 How can it be that this does not pose a threat to public order
12 and releasing the charged person pending the pre-trial phase
13 would? This is unexplainable. The European Court of Human
14 Rights has held that the threat to public order dissipates with
15 time. Please refer to *Tomasi v. France* appeal, Number 1 to 8,
16 50-87, 27 August 1992, paragraph 91.

17 The charged person has been in provisional detention for over two
18 years now and the Office of Co-Investigating Judges has failed to
19 establish how the threat to public disorder, if any, would not
20 have diminished over time. If anything, the charged person's
21 notoriety, which the OCP highlights with regard to the charged
22 person's alleged risk to public order, also mitigates against her
23 flight risk as she is recognizable throughout Cambodia.

24 [10.04.32]

25 The charged person lived openly in Cambodia for many years

1 without incident prior to her arrest in November 2007.

2 The OCIJ's orders have not been adequately reasoned and do not
3 take into account all of the evidence. Rule 67.7 requires that
4 any decision concerning the extension of provisional detention
5 shall set out the reasons for such extension and Rule 63.2(a)
6 specifies further that an order for provisional detention shall
7 set out the legal grounds and factual basis for detention.

8 These rules reinforce the general principle that every judicial
9 decision should include reasons for its conclusion as
10 acknowledged by the European Court of Human Rights in *Hadjidjanis*
11 *v Greece*.

12 The OCP response acknowledges that the importance of the
13 requirement that reasons be provided for an extension of
14 provisional detention and indeed that all decisions have to be
15 reasoned according to international jurisprudence. The OCP
16 response addresses this issue and states that the extension order
17 is sufficiently and adequately reasoned. Refer to this at OCP
18 *Response to Appeal*, paragraph 11.

19 This requirement indeed similarly applies to the OCIJ extension
20 order, which needs to provide adequate reasoning for its
21 decisions. In its response to this appeal the OCP agreed with
22 this requirement, stating that:

23 "The Pre-Trial Chamber has found that all decisions of judicial
24 bodies including the OCIJ have to be reasoned to meet
25 international standards."

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1 OCP response to appeal paragraph 10.

2 [10.07.07]

3 And this paragraph 10 citing decision on Nuon Chea's appeal
4 against order refusing request for annulment dated 28th August
5 2008, case file 002/19-09-2007 ECCC/OCIJ (PTC06) D55/1/8
6 paragraph 21.

7 The Office of Co-Investigating Judges appears to be continuing a
8 policy of almost automatic continuation of the pre-trial
9 detention despite the defence previous demonstration that
10 pre-trial detention at the ECCC should be applied cautiously and
11 restrictively. Again, the OCIJ's decision lacks a critical
12 reassessment of the criteria mentioned in Rule 63 as explained
13 below.

14 A default policy of detention does not comply with international
15 human rights standards, especially given the fact that the OCIJ
16 ignored several important exculpatory witness statements in its
17 determination of the continuance of the charged person's
18 provisional detention, as will be highlighted by my colleague.
19 The OCIJ have failed to adequately reason its decision and to
20 take into account all relevant evidence. This provides a ground
21 for quashing the extension order.

22 Now I would like to share the floor with my colleague to make his
23 part of the oral submission, may it please the Court.

24 MR. PRESIDENT:

25 Before the defence counsel can make the oral submission, the

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1 Court would adjourn for 15 minutes.

2 [10.09.15]

3 THE GREFFIER:

4 All rise.

5 (Judges exit courtroom)

6 (Court recesses from 1009H to 1026H)

7 (Judges enter courtroom)

8 MR. PRESIDENT:

9 Be seated.

10 The defence counsel, in your submission you raised your request
11 for the Pre-Trial Chamber to consider an in-camera session, so
12 may we seek your clarification now regarding this request to make
13 sure we understand you clearly?

14 [10.27.51]

15 MS. VAN DER VOORT:

16 Your Honour, with permission I would like to address that
17 question.

18 We have prepared -- we have gone through all the evidence
19 underlying the OCIJ's extension order as well as the prosecution
20 appeal brief and our own appeal, and if it would assist your
21 Court we are able to go through that evidence in closed session
22 but only if it's necessary for your Court.

23 JUDGE DOWNING:

24 With respect, it's not for us to determine whether it will assist
25 us or not. It's for you to determine whether you think it will

1 assist us and whether you wish us to do it.

2 MS. VAN DER VOORT:

3 In that case, Your Honour, can we perhaps address that after the
4 prosecution submissions to see whether it's necessary for us to
5 address? Thank you.

6 MR. PRESIDENT:

7 The defence co-counsel will have 25 minutes to make the remaining
8 oral submission. You may now proceed.

9 MS. VAN DER VOORT:

10 Thank you, Your Honours.

11 In the second part of the defence oral arguments, I will
12 highlight three further aspects relating to Madam Ieng's
13 provisional detention.

14 First, we argue that the Co-Investigating Judges have failed to
15 specify to which specific crimes alleged in the Introductory
16 Submission may have been committed by the charged person.

17 Secondly, the Co-Investigating Judges have failed to make timely
18 disclosure of one Rogatory Letter specifically dealing with our
19 client, which has prejudiced the defence in the assessment of the
20 grounds for continuation of the provisional detention and has
21 precluded us to meaningfully participate in the investigations on
22 that part.

23 And, thirdly, the defence submits that the Co-Investigating
24 Judges have failed to adequately address the necessity
25 requirement embedded in Rule 63.3(b) of the Internal Rules.

1 The first aspect I would like to highlight is the failure by the
2 Co-Investigating Judges and the Co-Prosecutors to specify the
3 specific crimes it is alleged the charged person may have
4 committed.

5 It is the defence submission that the Co-Investigating Judges
6 have misapplied Internal Rule 63.3(a). The standard formula used
7 by your Chamber at this stage is whether an objective observer
8 can be satisfied that the charged person may have been
9 responsible for the commission of the crimes specified in the
10 Introductory Submission. This standard has not been met.

11 As my colleague has pointed out, an analysis of the case file at
12 this very end of the investigative stage reveals that there is
13 insufficient evidence upon which to conclude that the charged
14 person has committed any of the crimes specified in the
15 Introductory Submission. Moreover, the order fails to identify
16 the specific crimes to which the standard would apply. The order
17 only states that the OCIJ have collected evidence about the role
18 of Madam Ieng as minister of social affairs but no link is made
19 to the actual crimes in the Introductory Submission.

20 [10.31.37]

21 The evidence cited by the OCIJ in support of its conclusion that
22 there is sufficient evidence to meet the standards set out by
23 your Chamber cannot sustain this conclusion any longer.

24 In accordance with the standard previously formulated by the
25 Pre-Trial Chamber at this stage, the Co-Investigating Judges and

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1 the Co-Prosecutors must be able to specify to which particular
2 crimes the available evidence relates. The OCIJ have not
3 followed this approach and, more importantly, are unable to do so
4 because the totality of the evidence at this stage of the
5 proceedings, the very end of the investigative stage, does not
6 point in the direction of guilt of the charged person but rather
7 highlights her absence of real power and responsibility on her
8 side.

9 At this stage, now that the investigations are coming to an end,
10 this should be acknowledged and the issue resolved in favour of
11 the charged person. In reality, it is highly unlikely that at
12 this stage further inculpatory evidence will be added to the case
13 file and now the balance has shifted in favour of the charged
14 person.

15 The OCIJ have failed to identify the evidence which is relied
16 upon to prove the specific crimes which are alleged to have been
17 committed by the charged person. Without being able to link that
18 specific evidence to the crimes listed in the Introductory
19 Submission, the defence submits that the standard previously
20 formulated by the Pre-Trial Chamber has not been met. The appeal
21 should be allowed and the charged person released under
22 conditions deemed necessary by your Chamber.

23 [10.33.33]

24 The second issue I would like to address is the failure of the
25 Co-Investigating Judges to disclose evidence in relation to the

1 charged person until one day after the issuance of the extension
2 order.

3 The defence has only recently discovered that Rogatory Letter
4 D2/31 and its completion report were finalized by 25 June 2009
5 but these were only added to the case file 11 November 2009,
6 almost five months later. Today the defence has filed a
7 complaint in this regard, regarding the Co-Investigating Judges'
8 failure to make timely disclosure of this evidence containing
9 exculpatory information on the charged person's alleged
10 responsibility and role as minister of social affairs during the
11 Democratic Kampuchea.

12 Whilst this document is obviously currently pending before the
13 OCIJ, we thought it was very important to mention it before your
14 Chamber today because it negatively affects the validity of the
15 extension order. The OCIJ waited for almost five months after
16 completion of that Rogatory Letter to disclose that information
17 to the defence. There is no information available on the case
18 file that justifies this delay.

19 The defence was thus precluded from raising this evidence as a
20 ground for discontinuance of the Provisional Detention Order.
21 This in itself forms a ground for quashing the extension order
22 and the Pre-Trial Chamber is respectfully requested to look at
23 the totality of the evidence, including Rogatory Letter D2/31, to
24 reassess whether the standard of Rule 63.3(a) still applies.
25 It is the defence submission that, looking at the totality of the

1 evidence available today, it can no longer be maintained that an
2 objective observer can be satisfied that the charged person may
3 have been responsible for the crimes committed in the
4 Introductory Submission. Consequently, the extension order must
5 be quashed and the charged person released from provisional
6 detention.

7 [10.35.48]

8 The third issue I would like to address, Your Honours, is the
9 necessity requirement embedded in Rule 63.3(b). The extension
10 order states, and I quote:

11 "The Co-Investigating Judges note that provisional detention is
12 an exception to the general rule of liberty at the pre-trial
13 phase."

14 In spite of this consideration, the order seems to automatically
15 repeat the conclusions drawn at earlier stages of the
16 proceedings. These conclusions can no longer suffice. The
17 extension order also contains the fully consideration, and I
18 quote:

19 "The Co-Investigating Judges recall that, as clarified by the
20 Pre-Trial Chamber, in order to justify a provisional detention
21 order only one of the objectives set out in Rule 63.3(b) needs to
22 be satisfied and that, as such, there is no obligation to examine
23 each of the criteria if the Judges deem that they have
24 sufficiently demonstrated the need for provisional detention in
25 reference to one or more of the conditions stipulated in Rule

1 63.3(b) at the relevant time."

2 The OCIJ have failed to address perhaps the most important
3 element of Rule 63.3(b), namely, the necessity requirement. This
4 has led the Co-Investigating Judges to apply the wrong standard
5 of proof. The chapeau of Rule 63.3(b) requires not only that one
6 or more of the elements set out in sections 1 to 5 have been met;
7 that is, not only that there are reasons to keep the charged
8 person in detention but also that continued detention is
9 necessary. In other words, necessity is a separate element.

10 [10.37.45]

11 But instead of treating necessity as a separate element, the OCIJ
12 analyzes four of the five elements, concludes that these elements
13 are still present, and automatically concludes that thus
14 provisional detention is necessary. Especially given the
15 presumption of release at this Tribunal, the necessity
16 requirements should be given due weight.

17 Your Honours, "necessity" relates to the underlying general
18 principle of law that measures taken at this stage of the
19 proceedings when the charged person is still innocent, the
20 measures to be taken must be the ones least intrusive to the
21 charged person. This, in turn, is related to the tension between
22 pre-trial detention on the one hand and the fundamental
23 presumption of innocence on the other.

24 These cardinal principles reinforce the requirements that the
25 Tribunal should favour release over detention at the earliest

1 reasonable opportunity and with the least onerous conditions
2 necessary to ensure the five elements of Rule 63.3(b). The
3 requirement that pre-trial measures be least intrusive has been
4 addressed quite extensively by the European Court of Human
5 Rights. Article 5 of the European Convention on Human Rights
6 does not include the element of necessity but, nonetheless, the
7 European Court has found that necessity does form a separate
8 element.

9 Author Stefan Trechsel defines "necessary" in the context of the
10 European Court of Human Rights as a pressing social need.

11 Further, it needs to be proportionate to the aim pursued. In
12 *N.C. v. Italy*, the European Court of Human Rights held the
13 following:

14 [10.39.43]

15 "It does not suffice that the deprivation of liberty is executed
16 in conformity with national law. It must also be necessary in
17 the circumstances."

18 In the case of *Enhorn v. Sweden*, the European Court noted further
19 that:

20 "The detention of an individual is such a serious measure that it
21 is only justified where other less severe measures have been
22 considered and found to be insufficient to safeguard the
23 individual or public interest which might require that the person
24 concerned be detained."

25 With regard to exceptions to human rights treaties such as the

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1 lifting of the rights to liberty, the Human Rights Committee has
2 said the following:

3 "A restriction must be legitimate and necessary. Restrictive
4 measures must be appropriate to achieve their protective
5 function. They must be again the least intrusive instrument
6 amongst those which might achieve the desired results."

7 Your Honours, the requirement of necessity has not been addressed
8 separately by the Co-Investigating Judges' order, nor can it
9 deemed fulfilled at this stage and with the available evidence.
10 Why is it necessary to detain the charged person instead of
11 releasing her under conditions suggested previously to your
12 Chamber? The necessity requirement is a separate element that
13 has been largely ignored by the Co-Investigating Judges.

14 [10.41.17]

15 The OCIJ has failed to show that the potential presence of the
16 four sub-elements results in a necessity of continuing the
17 charged person's continued detention. Once again the defence
18 submits that detention is not necessary and special measures can
19 be taken at this point to protect the proceedings and which
20 better reflect the requirement that at this stage in the
21 proceedings liberty should be granted over detention.

22 Finally, Your Honours, I would like to remind the parties present
23 that the charged person has informed her legal team and the Court
24 on several occasions that, save for answering questions as to her
25 identity, she wishes to remain silent.

1 I have now come to the concluding part of our arguments. The
2 threshold for continued detention should be higher now that we've
3 entered the third year of provisional detention. Investigations
4 are coming to an end and in any event the Court cannot be
5 satisfied that the continued provisional detention of the charged
6 person is in accordance with the standards that have to be met.
7 The defence respectfully requests that the Pre-Trial Chamber
8 replace the OCIJ's extension order and release the charged person
9 as a result of the procedural and substantive defects in that
10 extension order.

11 Already on 8 January 2008 the defence submitted a declaration by
12 the charged person in which she states to abide by certain
13 conditions which can be attached to her release.

14 [10.42.53]

15 These are for the charged person to (a) reside and sleep each
16 night at her daughter's home address in Phnom Penh; (b) to remain
17 in the city of Phnom Penh at all times, subject to receiving
18 prior permission from the ECCC authorities if she desires to
19 travel elsewhere; (c) to surrender all travel documents to the
20 ECCC authorities and to undertake not to apply for any new ones;
21 (d) to abide by a curfew between the hours of 8 p.m. and 7 a.m.;
22 (e) to report on a daily basis to local police station; (f) not
23 to contact directly or indirectly any witnesses, victims or
24 potential witnesses, or any other such persons as directed; and
25 finally (g) to attend all proceedings held before the ECCC.

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1 Your Honours, we have arrived at the end of the investigative
2 stage of the proceedings and circumstances have changed
3 materially. Several of the justifications of Rule 63.3(b) relate
4 to the interests of the investigations which can no longer be
5 deemed a justification for continued detention. The defence
6 respectfully requests Your Honours to release the charged person
7 with the mentioned bail conditions or any other conditions deemed
8 necessary by your Chamber.

9 I thank you for your attention.

10 MR. PRESIDENT:

11 The floor is now open for the Co-Prosecutors to make your oral
12 submissions. You have one hour.

13 MR. SENG BUNKHEANG:

14 Thank you, Mr. President.

15 On behalf of the prosecution of the ECCC I would like to affirm
16 the response of the Co-Prosecutors dated 5th January 2010 in
17 response to the appeal of the co-lawyers of Ieng Thirith and I
18 would like to submit the following.

19 [10.45.15]

20 During the controlling the regime for three years eight months
21 and 20 days, including Ieng Thirith, caused millions of Cambodian
22 people to suffer inhumanely and unjustly. They forced the
23 people, young and old alike, to overwork. Their freedom was
24 deprived. Their respect and practice for their religion was
25 prohibited and pagodas were destroyed. Food was deprived and

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1 they were detained and tortured and killed. And young children
2 were used as murderers to kill people, sometimes even their own
3 parents and relatives.

4 When this tribunal was established and the Office of the
5 Co-Prosecutor initiated its preliminary investigations and then
6 sent its Introductory Submission to the OCIJ for further judicial
7 investigations, OCP identified five suspects and Ieng Thirith was
8 one of them.

9 Ieng Thirith was decided to be detained by the OCIJ provisionally
10 first on the 14th of November 2007 for a maximum period of one
11 year and the charged person appealed that decision. Subsequently
12 the Pre-Trial Chamber held a public hearing and decided to detain
13 provisionally.

14 The second detention was on the 10th of November 2008 for a
15 maximum period of one year and it was too appealed by the charged
16 person. As a result the Pre-Trial Chamber held a public hearing
17 once again and made a decision for provisional detention of the
18 charged person.

19 The third detention was on the 10th of November 2009 for a
20 maximum period of one year and, in response to this third
21 decision, on the 9th December 2009 the co-defence lawyers of the
22 charged person launched an appeal against that decision to the
23 Pre-Trial Chamber and they requested the Pre-Trial Chamber to
24 reverse the decision of the OCIJ regarding the extension of the
25 provisional detention of the charged person and requested their

1 client be provisionally released.

2 [10.48.36]

3 In their appeal the co-defence lawyers provided the following
4 arguments: that the OCIJ implemented the automatic detention of
5 provisional detention without due diligence in their judicial
6 investigation. There has been no founded reasons that the
7 charged person has committed those crimes because the OCIJ are
8 biased and only weigh the inculpatory evidence and not the
9 exculpatory evidence.

10 Regarding the pressuring the witness or the destruction of
11 evidence, the OCIJ did not properly assess the risk according to
12 the current circumstance. And due to the frailty of the health
13 condition of the charged person, the risk of absconding shall not
14 be a problem and finally, regarding disturbance, the disturbance
15 to public order is not applicable.

16 In all these arguments raised by the co-defence lawyers we, the
17 Co-Prosecutors, would like to submit that the order extending the
18 provisional detention by the OCIJ is not the policy of the OCIJ
19 for automatic detention of the charged person but it is in fact a
20 review of the detention of the charged person and it is a
21 mechanism to ensure the rights and interests of the charged
22 person and to provide opportunity to the charged person to
23 express her position and, if necessary, the charged person can
24 exercise her rights by appealing against such decision.

25 It is the burden of the charged person to show the material

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1 change in circumstance because the extension of a provisional
2 detention -- that is the first extension was withheld or was
3 affirmed by the Pre-Trial Chamber. The OCIJ has a clear
4 obligation to reassess the criteria for extending the provisional
5 detention before the expiry of such an extension by considering
6 all the observations submitted by the co-defence lawyers.
7 In accordance with Internal Rule 63.7 of the Internal Rules,
8 before an extension of the provisional detention of the charged
9 person, the OCIJ has to notify and provide a reasonable period to
10 the charged person and her co-lawyers to respond; therefore, we
11 can see that this procedure is only between the OCIJ and the
12 charged person without the involvement or participation of other
13 parties.

14 [10.52.09]

15 Indeed, on the 5th October 2009 the OCIJ notified the charged
16 person and her lawyers that the Office of the Co-Investigating
17 Judges are considering the issue of the extension of the
18 provisional detention.

19 MR. PRESIDENT:

20 We shall take a brief adjournment for five minutes for the change
21 of the recording tape. Due to the technical glitch we shall
22 adjourn for five minutes.

23 (Break for technical reasons)

24 MR. PRESIDENT:

25 Co-Prosecutor, you may now resume your oral submission.

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1 MR.SENG BUNKHEANG:

2 Thank you, Mr. President.

3 Indeed, on the 5th of October 2009, OCIJ notified the charged
4 person and her lawyers that they are considering the issue of
5 extending the provisional detention and requested the charged
6 person and her lawyers to submit their observations within 15
7 days and subsequently the charged person and her lawyers
8 responded to the request on 19th October 2009.

9 [10.54.55]

10 Rule 63.6 and 63.7 of the Internal Rules permit the
11 Co-Investigating Judges to review periodically on the condition
12 of the provisional detention. These provisions have not been
13 stipulated or coded in the norms or the laws of the ICTY, ICTR or
14 the Special Court for Sierra Leone. However, those international
15 tribunals maintained a position that in order for the application
16 for release declared admissible, the charged person has to show a
17 material change of circumstance and if we look at the
18 jurisprudence of the ICTY in the case of the Prosecutor v
19 Boskovski and Tarculovski, the Pre-Trial Chamber stated that the
20 jurisdiction of the Court allows the Court itself to exercise its
21 discretion on the issue as to whether to continue the provisional
22 detention and that discretion was applied by considering all the
23 relevant documents in the case file, including the gravity of the
24 charges, the evidence, the character in the past and the present
25 of the charged person, the interest of the witnesses and for the

1 interest of justice, the conditions and the scope or review by
2 the Pre-Trial Chamber.

3 The important thing in determining the decision on the appeal
4 against the order extending the provisional detention is that
5 whether all the conditions stipulated under Rule 63.3 are still
6 fulfilled. The Pre-Trial Chamber is not a Supreme Court which
7 can reverse the order and send that order back to the OCIJ. The
8 Pre-Trial Chamber can supersede the order of the Co-Investigating
9 Judges by its own decision and by providing its own reasons and
10 arguments in response to the reasons and arguments raised by the
11 OCIJ.

12 In cases where there is a failure to apply the provisions then
13 the Pre-Trial Chamber has its own discretion to make its own
14 analysis by adhering to the standard specified in Internal Rule
15 63.3 and that one can be replaced by its own decision.

16 [10.58.32]

17 In addition, the Pre-Trial Chamber did not observe the case file
18 and the conditions of Rule 63.3 of the Internal Rule when the
19 OCIJ issued its decision extending the provisional detention, as
20 the Pre-Trial Chamber has raised in its decision for the appeal
21 against the extending of provisional detention, which is the
22 Pre-Trial Chamber has noticed that the Pre-Trial Chamber itself
23 considers the entire case file of the OCIJ up to the date of the
24 hearing and including any new evidence since the lodgment of the
25 appeal and the issuance of the order extending the provisional

1 detention.

2 Therefore, the review and the consideration of the Pre-Trial

3 Chamber is not only to consider the new evidence from the

4 issuance of the order extending the provisional detention and the

5 appeal against such order and until the date of the hearing, but

6 also it has to examine and consider the facts that the charged

7 person was notified by the OCIJ regarding the additional charges

8 on the 21st December 2009. Therefore, after having noted that

9 the Office of Co-Investigating Judges with due diligence examined

10 the matters and because the Co-Investigating Judges have already

11 reviewed the crimes committed by the charged person during the

12 Democratic Kampuchea era, this makes the Office of

13 Co-Investigating Judges to press more charges on the charged

14 person for additional counts, including the Crimes against

15 Humanity, Genocide, Grave Breaches of the Geneva Convention of

16 1949 and the domestic crimes according to document D28/6.

17 This reflects that the investigation by the Co-Investigating

18 Judges has been in progress and that more evidence has been

19 collected which makes the Office of Co-Investigating Judges to

20 press more charges on the charged person. In any event, when the

21 Office of Co-Investigating Judges have reviewed the conditions of

22 provisional detention and that the conditions are no longer met,

23 the Co-Investigating Judges on its motion can initiate the

24 dismissal order according to Internal Rule 64 of the Internal

25 Rules.

1 [11.01.59]

2 However, after having reviewed and analyzed all the available
3 evidence collected from the investigative phase, that provisional
4 detention of the charged person is imposed further in which the
5 Office of Co-Investigating Judges issue an order to extend the
6 provisional detention to another one-year period. So the
7 Co-Investigating Judges have reviewed the legal facts before
8 issuing such an order. This provisional detention is not an
9 automatic policy, as submitted by the defence.

10 Meanwhile, the provisional detention is appropriate and there is
11 no lack of diligence on the part of the Co-Investigating Judges
12 in the procedures. The Co-Investigating Judges have considered
13 the legal grounds and facts before making a decision to extend
14 the provisional detention and that they are not bound by the
15 obligation to prove the other related matters.

16 As the Pre-Trial Chamber in its decision already ruled on this,
17 that the Office of Co-Investigating Judges can review on the
18 available legal grounds and evidence before issuing such order
19 and that they are free from such obligation. So the Office of
20 Co-Investigating Judges can review -- can base their argument on
21 the general circumstances and the other circumstances.

22 The Office of Co-Investigating Judges have paid great attention
23 in its procedures before the ECCC and that the evidence collected
24 by the Office of Co-Investigating Judges during its investigative
25 phase covers all forms of participation of the charged person in

1 the crimes as charged.

2 [11.04.53]

3 Also, in the decision on the appeal concerning the first
4 provisional detention, the Pre-Trial Chamber has indicated that
5 the reasonableness of the detention and the diligence of the
6 Co-Investigating Judges in its fulfilment of the work has been
7 used in its discretion to issue provisional detention order. The
8 Pre-Trial Chamber, in its decision, rendered that the
9 Co-Investigating Judges have fully exercised its discretion in
10 extending the provisional detention because the provisional
11 detention is appropriate, having taken into account the scope of
12 the crimes and the scope of the ongoing investigation.

13 Thus, this point is even more important when considering more
14 charges being brought against the charged person lodged on the
15 21st of December 2009. Until now, the charged person has been
16 charged for three additional counts by the Co-Investigating
17 Judges.

18 Furthermore, this provisional detention is reasonable and
19 acceptable due to the fact of the complexity and the gravity of
20 the crimes as charged, including the Crimes against Humanity,
21 Genocide, Grave Breaches of Geneva Convention of 1949 and
22 domestic crimes. Internal Rules 63.6 and 7 also give the right
23 to the Office of Co-Investigating Judges to extend provisional
24 detention, not exceeding two times. And having based on the
25 circumstances of the case and other international jurisprudence,

1 the provisional detention of this charged person is applicable.
2 I would like now to share the floor with my colleague to finish
3 the remaining of the oral submission.

4 MR. DE WILDE D'ESTMAEL:

5 Mr. President, Your Honours, good morning.

6 [11.08.03]

7 You will certainly remember that in the last hearing on the
8 extension of provisional detention of the charged person -- this
9 was on the 24th of February 2009 -- Madam Ieng Thirith chose to
10 come out of her silence and welcomed the parties and the public
11 with a statement whose violence, cynicism, paradoxical as well as
12 provocative nature surprised us all. She basically --

13 MS. VAN DER VOORT:

14 I am sorry, I don't think -- I would generally not interrupt a
15 prosecution submission in this regard, but I would like to remind
16 the parties that our client is very vulnerable, as we have seen
17 last time, and we would like to ask the prosecution to not make
18 any unnecessarily inflammatory statements regarding our charged
19 person. She has indicated that she wishes to remain silent and
20 the prosecution statements may provoke her to go against her own
21 wish not to speak.

22 I would ask Your Honours to ask the prosecution not to make any
23 unnecessarily inflammatory statements. Thank you.

24 (Deliberation between Judges)

25 JUDGE DOWNING:

1 Thank you. The position of the Court is that we note what you've
2 said and I'm sure the prosecutor will note what you've said, but
3 it's not for this Court to direct the prosecutor as to what he
4 will or will not say.

5 MR. DE WILDE D'ESTMAEL:

6 Thank you.

7 The charged person in essence said -- and I'm not saying this to
8 destroy her reputation, but said, "Do not persist in accusing me
9 of murder, otherwise you will be cursed to the seventh level of
10 Hell." I am not an expert in the matter but, if I'm not
11 mistaken, there is nothing worse in Hell than this seventh level.
12 I would simply like to remind you that the true Hell is the more
13 than two million victims of the Khmer Rouge who lived through it
14 before their death, as well as the other victims who survived as
15 best as possible.

16 [11.11.14]

17 Back then it was not only about exercising her right to persist
18 in her denial -- this denial that she has been sustaining since
19 the period of Democratic Kampuchea until now. This is certainly
20 a psychological defence mechanism that is quite well suited in
21 order not to have to face her past nor the horrible crimes of a
22 regime of which she was one of the figureheads, of which she was
23 the "first lady", a mechanism that was also used in order not to
24 be confronted with the harsh reality of the crimes against the
25 people who were under her responsibility.

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1 During this hearing of the 24th of February 2009, the charged
2 person also shifted the responsibility of the crimes committed
3 during the regime on Mr. Nuon Chea and Mr. Kaing Guek Eav, alias
4 Duch, and considered them as traitors to the Communist regime of
5 Democratic Kampuchea. This shifting of responsibility on others
6 is also a means used in order not to face any introspection but,
7 above all, this promise that was given to us to perish in Hell
8 was an attempt to pressure us, was an attempt to shift the fear
9 of being tried and to instil fear among the Co-Prosecutors and
10 certainly to instil fear among the Judges and certainly to
11 influence victims and potential witnesses.

12 Quite fortunately, the period of arbitrary justice, or rather the
13 period of total absence of justice, has passed. Impunity has
14 passed and the justice here at the ECCC is insensitive to the
15 threats that were pronounced by the charged person, no matter how
16 harsh they may be.

17 Here we are a year later and, as you see, the Co-Prosecutors were
18 not influenced by these threats and we can persist in our quest
19 to see the charged person tried and to see her remain in
20 provisional detention until her trial and during this trial as
21 well.

22 [11.13.50]

23 So then what happened over the past year? What are the events?
24 What are the elements that must be considered relevant by this
25 Chamber and that concern the conditions that are necessary to

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1 continue the provisional detention of the charged person? This
2 is what is at stake during this hearing today.

3 We are not going to revisit the elements that have already been
4 the object of written correspondence or of debates in the past
5 before this Chamber. Nonetheless, the Pre-Trial Chamber will
6 have to take these elements into consideration as well.

7 We are rather going to insist on new elements that came to our
8 attention since the 24th of February 2009 and that justify
9 continuation of provisional detention. First of all, regarding
10 Rule 63.3(a), I would like to remind you of two important and
11 relevant elements which your Chamber will certainly take into
12 consideration. As my esteemed colleague said on December 21st
13 2009, the charged person was charged for other charges beyond
14 crimes against humanity -- that is to say war crimes, genocide
15 and national crimes.

16 The Chamber will refer to the grounds that were developed by the
17 Co-Investigating Judges to support this decision in paragraphs 4
18 to 10 of the Written Record of Examination, D2/86 and I would
19 also like to mention that a little earlier on, on the 8th of
20 December 2009, an order on the application of the form of
21 liability known as joint criminal enterprise was rendered by the
22 Co-Investigating Judges and it transpires from this that two of
23 these forms of joint criminal enterprise may be applied before
24 the ECCC regarding international crimes, whereas the third form
25 can also be applied to a certain extent.

1 I'm not going to enter a debate about this because we are here
2 facing an appeal, but I wanted to simply mention this inclusion
3 of this form of liability, of course, upon the discretion of your
4 decision.

5 [11.16.31]

6 Now, regarding specifically the well-founded reasons to believe
7 that the charged person has committed the crimes for which she is
8 being prosecuted, the investigation contains at this advanced
9 stage facts and information that may convince an objective
10 observer that the charged person might have been responsible for
11 these crimes or might have committed them.

12 I would like, first of all, to remind that this is what your
13 Chamber deemed to be true on the 11th of May 2009 following an
14 adversarial hearing and after a detailed analysis of the
15 investigation. Nothing in the appeal allows us to question the
16 decision of your Chamber then. Today, beyond the hundreds of
17 documents that are placed on the case file and that directly or
18 indirectly relate to the charged person, we can release at least
19 80 written records of witness interviews involving her, of which
20 60 have been gathered by the Co-Investigating Judges after the
21 24th of February 2009.

22 Therefore we cannot speak about lack of due diligence during the
23 past year on the part of the Co-Investigating Judges. There are
24 specifically two Rogatory Letters -- not one, but two -- whose
25 written records have been placed on the case file recently and

1 which exclusively involve the charged person and the bodies upon
2 which she exercised her authority.

3 The first was mentioned by the defence and is indexed D2/31 and
4 it involves 25 statements and it was notified for the parties on
5 the 12th of November 2009; that is to say maybe this was a
6 question of chance, but in any case two days after the
7 Co-Investigating Judges' order came down but one month before the
8 defence appeal brief was given to you. And today the defence
9 there say to you that it has not seen these statements on time in
10 order to refer to these in their appeal brief. The defence had
11 one month to analyse them and to incorporate them in their appeal
12 brief.

13 And the second Rogatory Letter is index D2/80 and includes 19
14 statements and was given to the parties at the end of December
15 2009. These statements as a whole contain crucial evidence. I
16 am not going into detail and I believe also that it is not
17 necessary to hold an in-camera hearing to refer to each one of
18 these statements. It'll be too long and too painstaking. I
19 believe that the Chamber is sufficiently aware to carry out the
20 analysis of this evidence. But, however, I'd like to mention
21 that if we look at these statements globally we have a more
22 complete vision of the role of the charged person and of the
23 crimes that are held against her. This involves the staff of her
24 ministry, the Ministry of Social Affairs, K-2. This also
25 involves hospitals and pharmaceutical factories that were

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1 directly under her control and of which many were executed and
2 sent to S-21 and many others sent to be re-educated and sent to
3 forced labour.

4 The written records also involve the criminal participation of
5 the charged person in the great policy lines defined by the
6 senior leaders of the Party and not only in her fields of work --
7 health, welfare or shall we say "ill-fare", of the citizens of
8 Cambodia. These statements also detail in great part the
9 organization, the field of activity and the structure of the
10 Ministry of Social Affairs and its units.

11 [11.21.35]

12 A public hearing is obviously not the right place to analyze this
13 evidence in detail and it will be up to you, Mr. President, Your
14 Honours, to rule on this evidence while taking into account these
15 statements but also the other documents that are placed on the
16 case file, whether they be S-21 documents, whether they be
17 prisoner lists, whether they be execution lists, whether they be
18 confessions, and whether they be reports of meetings between
19 political leaders, whether they be documents relating to radio
20 broadcasts of Democratic Kampuchea, propaganda articles,
21 international press articles, and finally statements from the
22 charged person herself.

23 In short, if we compare the situation today with the situation a
24 year ago, it is clear that the statements that were gathered are
25 much more numerous and much more complete than previously. Of

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1 course we would have hoped that the investigation, which was
2 diligent, would have been more complete and would have covered
3 more aspects of the charges and in particular the continuation
4 and the depth of the charged person's engagement before 1975 and
5 after 1979. And we would have also wished the Co-Investigating
6 Judge to focus more on the personality, on the character of the
7 charged person. This is not yet the case but we hope that extra
8 information might be provided by the Judges in the weeks to come.
9 Returning to the defence's appeal brief regarding Rule 63.3(a),
10 the defence contented itself by underlining two points. That is
11 to say that the Judges would not have included a statement by
12 Duch or would not have given sufficient attention to a statement
13 that is exculpatory.

14 [11.24.05]

15 We have underlined in our written submissions that the
16 Co-Investigating Judges must take into consideration all of the
17 evidence, whether inculpatory or exculpatory, and this is what
18 they have done. However, if you analyze the evidence in the case
19 file you will notice that the vast majority of this evidence is
20 inculpatory.

21 Now, very rapidly regarding Duch's statement of the 20th of
22 October 2009, which apparently has been silenced, it is necessary
23 to position it in a broader context of inculpatory evidence from
24 this person and more specific statements by Duch, in particular a
25 certain number of interviews that we referred to last year in our

1 brief -- in particular, the interviews carrying references --
2 D163, D68, D72, D88, D95, D117, D119, D120 and D121.
3 Now, regarding the statement index D166/176 which according to
4 the defence the Co-Investigating Judges did not weigh
5 sufficiently, the Co-Investigating Judges on the contrary took it
6 fully into account because in the impugned order reference is
7 explicitly made to the footnotes on pages 35 and 36.
8 Furthermore, the Co-Investigating Judges even quoted passages
9 that they could consider as exculpatory evidence. They have,
10 however, concluded rightfully so in paragraph 16 of their order
11 that these elements were not sufficient in themselves to reverse
12 the grounds of the well-founded reasons to believe that the
13 conditions of Rule 63.3(a) are met.
14 Finally, you might have noticed that in the appeal brief that the
15 defence is questioning the impartiality of the Co-Investigating
16 Judges and implying that they have not given enough weight to
17 certain evidence. I would like to stress here that there is a
18 very strong presumption of impartiality for any Judge and that
19 any questioning of this impartiality should not be debated in
20 this kind of appeal but should be debated in another proceeding
21 such as set out in Rule 34.
22 [11.27.12]
23 Regarding Rule 63.3(b), provisional detention remains for us a
24 necessary reason for four reasons. One, to prevent the charged
25 person from exerting pressure on witnesses and victims, prevent a

1 destruction of evidence, ensure the presence of the charged
2 person during proceedings and to uphold public order.

3 It is furthermore considered that both the Co-Investigating
4 Judges of the Pre-Trial Chamber consistently made sure that the
5 provisional detention of the charged person was attained as of
6 November 2007. The defence did not adduce any further evidence
7 that would persuade the judges that provisional detention was no
8 longer necessary.

9 In this regard, by the way, today you heard elaborate arguments
10 regarding the -- these arguments were elaborated additionally by
11 the Co-Investigating Judges and I would like to point out that we
12 are dealing here with a new argument under Rule 63.4. The
13 Internal Rules have to be observed strictly because there is no
14 other rule for appeals in this regard.

15 Let me now look at the last condition. It has to do with the
16 risk of interfering with witnesses. The defence is of the view
17 that there are no real risks since no pressure has been exerted
18 so far, either directly or by the family of the charged person,
19 against potential witnesses. Furthermore, in view of the fact
20 that the closure of the investigation will take place soon, it is
21 important to ensure that the investigations are carried out
22 properly.

23 We are not in an ordinary case. Attempts to intimidate, to
24 influence or exert pressure by the charged person could be fully
25 exerted during this period up until the judgment phase.

1 Under Rule 66.1, witnesses can still be examined between the
2 Notice of Closure of Investigation up until the referral or
3 dismissal order.

4 The Co-Prosecutors, by the way, requested last Thursday in a
5 motion addressed to the Co-Investigating Judges that about 20
6 witnesses are still to be examined in relation to the charged
7 person. Let me remind the Chamber here of the decision of the
8 Co-Investigating Judges refusing such action and which is subject
9 to appeal.

10 Furthermore, it is important to note that some of the same
11 witnesses will be heard during the trial phase if the charged
12 person is referred to the Trial Chamber. It doesn't suffice to
13 take their testimony and to consider it in filings in proceedings
14 like this one. All the parties at trial can be examined. It is
15 primordial that the victims who already have their misgivings
16 about the judicial system, who may fear reprisals, most of whom
17 may be thrown off guard by the solemnity of the trials.

18 [11.32.05]

19 Some of these same witnesses who have been affected by
20 post-traumatic stress disorders and who were victims of the old
21 regime could be afraid when they face a former member of the old
22 regime. Such witnesses cannot cope with any threats or pressure
23 being brought to bear on them. We should bear in mind that under
24 Rule 93 the witnesses could still be called nationwide or could
25 be the subject of rogatory letters and investigations, and the

1 Chamber could also call witnesses to appear at trial.

2 It is obvious that attempts to intimidate the witness can no
3 longer be tolerated. The charged person has already tried to
4 exert pressure and to intimidate the officers of Court and on
5 each occasion, whether it's public or not, the charged person has
6 tried to bring pressure to bear on them by threatening and
7 insulting them and trying to force them to keep silent.

8 In this regard, there's a last episode that dates back to the
9 21st of December 2009 before the Co-Investigating Judges. She
10 regularly and violently, on at least 70 occasions, threatened
11 co-detainees at the detention facility and also threatened guards
12 at the detention facility. Regarding public hearings, the
13 attitude of the witness, it's already such as to instil fear in
14 victims and potential witnesses, so we can imagine the problems
15 this would pose through the media.

16 Under such conditions, failing to extend the provisional
17 detention would pose many problems and it could force witnesses
18 not to appear or not to speak. We cannot afford to deprive
19 ourselves of these witnesses by minimizing the risk of pressure
20 being brought to bear on these people by the charged person if
21 she were released.

22 [11.35.14]

23 The presence of the charged person when she's released and the
24 very nature of the society, given the influence she exerted in
25 the past and her personality, can constitute a real threat to the

1 participation of victims and witnesses during proceedings before
2 the ECCC.

3 The defence relied on a psychiatric report dated the 22nd of
4 November 2009, which had not been disclosed to the parties, to
5 assert that the health of the charged person had degraded and
6 that consequently the risk of flight would be marginal.

7 It was necessary that the Co-Prosecutors ask for a copy of this
8 report in order to respond to the argument in writing. This
9 report which was mentioned is not relevant, for it only concerns
10 the physical health of the charged person. It doesn't refer to
11 her mental health.

12 This report on the health of the charged person doesn't enable
13 the charged person -- that the charged is not able to walk for
14 any length of time and cannot run and that this argument is not
15 relevant, but we find that the charged person could easily be
16 assisted to cross the border. The family of the charged person
17 has significant economic resources. The border is porous and it
18 is very easy for the person to slip into Thailand. I would like
19 to point out that in the past the charged person went to Bangkok
20 three to four times a year for medical check-ups.

21 Now that we are drawing closer and closer to the issue of the
22 Closing Order of the investigation, the risk of flight of the
23 charged person is significantly increased, with the risk that the
24 charged person could escape, particularly given the gravity of
25 the crimes and the risk of a life sentence.

1 [11.38.21]

2 The defence submits in its appeal brief that the Co-Investigating
3 Judges and the Co-Prosecutors should no longer refer to an
4 article by Rob Savage on post-traumatic stress disorders. Very
5 well, but the reality of such post-traumatic stress disorders
6 does not depend on the credibility of a journalist.

7 The defence submits also that there wouldn't be any link between
8 the interest shown by the population and the media as regards the
9 proceedings before the ECCC and possible protests, violent
10 protests, in the case of provisional release of the witness, but
11 it doesn't show any evidence to establish this assertion by
12 repeating again reference to the Letelier decision.

13 We have to take into account the assessment of this aspect of the
14 preservation of public order, the importance of the crimes, the
15 significance of the crimes committed, the personality of Ieng
16 Thirith and, in particular, aggressiveness and the threats made
17 to the public and the harmful nature of her pronouncements and,
18 thirdly, the context of the Cambodian society and, in particular,
19 the number of victims -- close to two million dead and six
20 million victims who were victims of the Khmer Rouge oppression,
21 not including the stress they endured.

22 Regarding post-traumatic stress, we have to look at press
23 articles and the testimony of Dr. Chhim Sotheara during the trial
24 of Duch on the 25th of August 2009 to be convinced by the reality
25 of this syndrome and the necessary link between this syndrome and

1 certain forms of violence that could occur if the charged person
2 were released.

3 Dr. Chhim Sotheara particularly asserted that the psychological
4 healing of the victims of the Khmer Rouge depends on the honesty
5 of the former leaders of Democratic Kampuchea and that denial of
6 responsibility constitutes additional burden on their shoulders
7 and we should bear in mind that 30 percent of the people are
8 subject to sudden resurgence of rage.

9 [11.42.02}

10 The risk of disturbing public order is all the more significant
11 as victims and the people would interpret the provisional release
12 shortly after the issue of the Closing Order as a return to an
13 era of impunity. It is a very charged emotional context.

14 Lastly, application for provisional release under judicial
15 supervision. Reference is made to certain conditions in the
16 appeal. These conditions have been listed during these
17 proceedings. These are conditions that, according to defence,
18 the charged person would accept. But again, these same
19 conditions are not acceptable. They were already presented two
20 years before and they include the possibility of the charged
21 person moving about freely in Phnom Penh town.

22 Insofar as provisional detention is deemed necessary for at least
23 one of the four grounds that I have just presented, no measure of
24 liberty, even if it is accompanied by cohesive measures, would
25 provide the necessary guarantees -- sufficient guarantees to

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1 satisfy the need to preserve public order, prevent the flight of
2 the charged person, and also prevent the charged person from
3 exerting pressure on victims and witnesses and destroying
4 evidence.

5 In conclusion, we request the Chamber to deny the defence appeal
6 and consequently to make sure the charged person remains in
7 provisional detention up until the issue of the investigative
8 closing order and beyond.

9 MR. PRESIDENT:

10 The Pre-Trial Chamber observes the following. The civil parties
11 did not file their submissions against the appeal.

12 [11.44.55]

13 The civil parties are summonsed to attend the hearing and be
14 allowed to file submissions and make brief observations if any
15 new issues raised during the hearing would, to the consideration
16 of the Pre-Trial Chamber, necessitate their submissions.

17 JUDGE LAHUIS:

18 Everybody has been notified of the schedule of the Pre-Trial
19 Chamber, which we would like to follow. It just depends a little
20 on how much time the defence will need for responding on the
21 responses of the prosecutors whether we now have a break or can
22 continue.

23 MS. VAN DER VOORT:

24 Your Honours, I think we need the 15-minute schedules so,
25 depending on your preference, we could take a break now.

1 JUDGE LAHUIS:

2 We prefer to continue at this moment because it will then all be
3 finished around 12. That's a good time for lunch break, so
4 please continue.

5 MR. PHAT POUVSEANG:

6 Thank you, Mr. President, Your Honours, for allowing me the
7 opportunity to respond to the submissions by the Co-Prosecutors.
8 Their submission, from my understanding, is that they have the
9 intent to exploit the circumstance of my client by raising the
10 non-fact matter and to cause anxiety of my client and that she
11 can be caught for her behaviour.

12 [11.48.25]

13 Also, at the same time they raised the issue of improper
14 behaviour of my client repeatedly from the hearing in 2008-2009
15 and their purpose is to make my client angry, and the same
16 wording has been used repeatedly since last year when my client
17 was angry and talked about going to the seventh circle of Hell.
18 And the Co-Prosecutors, from my observation, failed to observe
19 the gathering of evidence by the United Nations. They concluded
20 that my client is wealthy and that she can abscond to Thailand.
21 I would like to submit that when my client was arrested on the
22 12th of November 2007 that was the time where my client was to
23 provide fees for her legal representatives for three months. My
24 client then submitted her letter to the DSS that she did not have
25 the ability to pay the lawyers' fees and, as a result, the

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1 Defence Support Section made a request to the United Nations and
2 after its investigation it found that my client did not have any
3 property or resources. Therefore, the lawyers' fee was paid by
4 the United Nations. This is a valid argument showing that my
5 client is not wealthy.

6 The second point is that the Co-Prosecutors violated the
7 presumptions of innocence principle and that my client might be
8 convicted for life imprisonment.

9 From the outset of the hearing, the Pre-Trial Chamber announced
10 that my client is innocent until proven guilty otherwise through
11 trial and the pronouncement of judgement. So the Co-Prosecutors
12 are reminded to look into that principle -- the principle of
13 presumption of innocence and I believe that it is not a
14 necessarily requirement to detain my client for the reason based
15 on the Internal Rule 63.3(b) which states clearly that the
16 provisional detention by the Co-Investigating Judges in the case
17 is in order to prevent the charged person exerting pressure on
18 the victims or witnesses or to collude with the accomplices to
19 the crimes under the jurisdiction of the ECCC.

20 I would like to submit that it's been almost more than two years
21 that the Co-Investigating Judges have sufficient and ample time
22 to conduct the investigation, to collect evidence and to
23 interview several witnesses, and in such circumstances my client
24 knows the names of the witnesses for both inculpatory and
25 exculpatory evidence against her and my client has never been

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1 proved that she has asserted any pressure on those witnesses.

2 [11.52.02]

3 Also, at the same time I would like to submit that the OCIJ has
4 got the evidence and thus the evidence is sufficient. That's why
5 on the 14th of January 2010 they notified the co-lawyers and the
6 parties that their office closed the judicial investigation
7 within 30 days and if any party wanted to appeal that would be
8 different and it would deal with it accordingly. So it means
9 that the investigation yielded sufficient evidence by the OCIJ.
10 And a second point of the Internal Rule is to preserve the
11 evidence and to prohibit its destruction. I would like to submit
12 to the Pre-Trial Chamber that it is not necessary as it has been
13 more than two years that the OCIJ has gathered evidence which are
14 ample and if they are not ample or sufficient, then Closing Order
15 cannot be issued by them.

16 And the third point, in order to ensure her presence during the
17 proceedings, I would like to submit that in order to maintain
18 someone for his or her appearance during the proceedings, it's
19 not necessary. If she is provisionally released on bail, she
20 would have sufficient time for her health treatment and you all
21 know that the charged person is frail, she's 78, and that means
22 she always has chronic diseases and she needs to consult with the
23 doctor for such treatment so that her health can become better or
24 sufficient for her to stand trial. And if she is to be detained
25 in such a condition, she does not have the opportunity to consult

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1 with her clients and therefore her health condition would become
2 worse and it's been so long already that she has been in
3 detention.

4 And another point of the subrule, that is to preserve the public
5 order. I would like to submit that my client has never caused
6 any disturbance to public order and her way of living before was
7 normal and she only used her name, Ieng Thirith; she did not
8 change her name or use any other alias, so my client did not
9 cause any disturbance to public order.

10 [11.54.42]

11 And this is my final submission and I would like my international
12 colleague to follow.

13 MS. VAN DER VOORT:

14 Your Honours, I have a few more points to add.

15 First of all, the material change that the prosecution alleges
16 that we should show in regard to the conditions of Rule 63.3(b)
17 -- first of all, I would like to state that such a material
18 change has taken place in the sense that time has passed and we
19 are now at the very, very end of the investigative stage of the
20 proceedings.

21 And in the second place, I would like to stress that it is not on
22 the defence to prove a material change in circumstances. The
23 presumption of liberty is the principle at this Tribunal.

24 Secondly, the fact that the OCIJ have the right under the
25 Internal Rules to further prolong the charged person's

1 provisional detention doesn't mean that it is necessary as
2 required by Rule 63.3(b).

3 Another element that the prosecution has not addressed, even
4 though we raised it in our arguments, is that the prosecution
5 says that the vast majority of the evidence that is now on the
6 case file is inculpatory. However, the OCIJ and also the
7 Co-Prosecutors were unable to link this to the specific crimes
8 enumerated in the Introductory Submission. It is our submission
9 that this link is necessary at this stage of the proceedings and
10 the inability to make any link between these two must result in
11 the release of the charged person.

12 [11.56.32]

13 Lastly, I would surely want to address the PTSD arguments. The
14 extension order states that a proportion of the population
15 suffers from PTSD, post-traumatic stress disorder, and relies
16 again on the Rob Savage article that was also quoted by my
17 learned colleague from the prosecution.

18 Only 5 per cent of the Cambodian population is over 50 years of
19 age and could suffer from PTSD directly resulting from the period
20 of the Democratic Kampuchea. Most people exposed to trauma will
21 never develop PTSD. Most people who do get PTSD will recover
22 from that in three months time. PTSD generally results in
23 recollection of dreams and not in violence; rather, violence is
24 not even one of the symptoms of PTSD.

25 If the prosecution or if the Co-Investigating Judges want to make

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1 a proper argument that PTSD is one of the reasons why public
2 unrest will result if the charged person be released, they should
3 file a proper report with proper information, Your Honours.

4 Thank you, these were the points we wanted to address.

5 MR. PRESIDENT:

6 Charged person, Ieng Thirith, please rise.

7 You are entitled to make a final statement. Do you wish to say
8 anything to the Court?

9 [11.58.19]

10 THE CHARGED PERSON:

11 My co-lawyers have already spoken on my behalf and they clearly
12 know my condition and even the prosecutors know me and my family
13 very well. I'm from the elite class of the society and we
14 studied law. That is all, Your Honour.

15 My father, Khieu On, was also a major lawyer and the father of my
16 mother was also in the legal profession and he worked closely
17 with the king. That is all I want to say. I am from a proper,
18 elite family. I never took a single cent of money from anybody.
19 We relied on the salary we earned through our work and this
20 should clearly be aware of by everybody.

21 And even my mother -- my mother is a very well-known figure too
22 although she passed away now. My father, Khieu On, I know you
23 all know him. He worked in Battambang -- and don't get confused;
24 although he worked in Battambang, I was born in Phnom Penh, but
25 my father worked in Battambang. He was in the Court in

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1 Battambang province. His name is Khieu On; I say it again.

2 MR. PRESIDENT:

3 Do you have anything else to add?

4 THE CHARGED PERSON:

5 That is all. My family had a legal background, so I knew more
6 about the legal affairs.

7 MR. PRESIDENT:

8 We would like to notify the public that the decision on the
9 appeal today will be notified two days before its issuance and
10 the hearing on this appeal is now adjourned.

11 THE GREFFIER:

12 All rise.

13 (Judges exit courtroom)

14 (Court adjourns at 1201H)

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