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BEFORE THE PRE-TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

FILING DETAILS

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(REDACTED VERSION) CO-PROSECUTORS' RESPONSE TO IENG THIRITH'S APPEAL AGAINST
OCIJ ORDER TO FURTHER EXTEND HER PROVISIONAL DETENTION

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I. INTRODUCTION

1. The Co-Prosecutors respond to a Defence Appeal (“Appeal”), filed on 9 December 2009¹ pursuant to the ECCC Internal Rules (“Rules”) 74 (3)(f) and 75, and notified to the parties on 16 December 2009.² The Appeal requests the Pre-Trial Chamber (“PTC”) to quash the Co-Investigating Judges’ Order on Extension of Provisional Detention³ (“Second Extension Order”) of IENG Thirith (“Charged Person” or “Appellant”) and to release her immediately under appropriate conditions. The Defence contend that (i) the Co-Investigating Judges (“CIJs”) improperly determined the requirements of Rule 63 because they are following a “policy of automatic continuation of pre-trial detention” without a critical assessment of the requirements using a special diligence standard as the investigations are coming to an end; (ii) there is no well founded reason to believe that the Charged Person may have committed the crime as the CIJs are not impartial and give more weight to inculpatory evidence and disregard exculpatory evidence; (iii) the Second Extension Order does not show any ‘real risk’ that the Charged Person will interfere with witnesses or destroy evidence if released, especially at the closure of the investigations; (iv) the Second Extension Order does not show any risk that the Charged Person will abscond if released, the risk being negligible due to her health situation; (v) the Second Extension Order does not show any ‘real risk’ of disturbance of public order in the future if the Charged Person were released.
2. The Co-Prosecutors (“CPs”) request that the PTC dismiss the Appeal, *inter alia*, on the following grounds:
 - (a) The Second Extension Order by the CIJs is sufficiently and adequately reasoned: the CIJs set out the legal grounds and facts taken into account before coming to their Second Extension Order and are not obliged to indicate a view on all the factors; while there is no policy of automatic continuation of pre-trial detention there is an automatic periodic review of a Charged Person’s provisional detention, which is respectful of the defence rights and considers the interests of the Charged Person.

¹ *Case of IENG Thirith*, IENG Thirith’s Defence Appeal against OCIJ Order to Further Extend Madame Ieng’s Provisional Detention, 9 December 2009, C 20/9/1, ERN 00411092-102 (ENG), hereinafter the “Defence Appeal”.

² In an Interoffice Memorandum dated 20 November 2009 (ERN 00403591 -ENG-), the Pre-Trial Chamber informed the parties that they will have a recess during the period of time 24 December 2009- 4 January 2010. Consequently, this Appeal’s Response is filed on 5 January 2010, being the subsequent working day.

³ *Case of IENG Thirith*, CIJs Order on Extension of Provisional Detention, 10 November 2009, C 20/8, ERN 00399346-57 (ENG) hereinafter the “Second Extension Order”.

- (b) The length of time of the provisional detention is not unreasonable and there has been no lack of due diligence by the CIJs in the conduct of the proceedings.
- (c) The Defence contention that the CIJs “failed to act impartially and failed to properly and fairly evaluate the evidence” is a challenge to the operations of the CIJs, none of which have been found to be valid by the PTC. The tenuous argument that the CIJs judge inculpatory evidence and exculpatory evidence using different standards does not counter the plethora of evidence establishing the existence of well founded reasons that justify the Charged Person’s detention under Rule 63 (3)(a).
- (d) The Appellant has failed to demonstrate any material change in circumstances since she was originally detained by the CIJs on 14 November 2007 (“Original Detention Order”)⁴. Furthermore, she has continually failed to do so since that detention was confirmed by the PTC on 9 July 2008⁵, since the first extension of provisional detention on 10 November 2008⁶ and since that order was confirmed by the PTC on 11 May 2009⁷. In the latter decision, the PTC detailed inculpatory evidence and noted that the evidence of potential exculpatory nature on the Case File did not undermine the PTC’s previous conclusion that the CIJs were justified to find that there were well-founded reasons to believe that the Charged Person may be responsible for the crimes she was charged with.⁸
- (e) The conditions for provisional detention are still met today: the Case File contains evidence capable of satisfying an objective observer that the Appellant may have committed the crimes for which she is currently under investigation (Rule 63(3)(a)). Substantial evidence has been added to the Case File since February 2009 and additional and specific evidence has been placed on the Case File after the Second Extension Order was issued, which led the CIJs to notify further charges to the Appellant on 21 December 2009. Additionally, at least four of the five conditions outlined under Rule 63(3)(b) exist and are reinforced by a series of recent incidents, at the detention centre and during the hearings, thereby rendering provisional detention a necessary measure. Specifically, detention is still necessary to (i)

⁴ *Case of IENG Thirith*, Original Detention Order, 14 November 2007, C 21, ERN 00153250-52 (ENG).

⁵ *Case of IENG Thirith*, PTC Decision on Appeal against Provisional Detention Order of Ieng Thirith, 9 July 2008, C 20/V/26, ERN 00201588-604 (ENG), hereinafter “Original Detention Appeal Decision”.

⁶ *Case of IENG Thirith*, CIJs Order on Extension of Provisional Detention, 11 November 2008, C20/4, ERN 00238528-36 (ENG), hereinafter “First Extension Order”.

⁷ *Case of IENG Thirith*, PTC Decision on Appeal against Provisional Detention Order of Ieng Thirith, 11 May 2009, C 20/V/17, ERN 00303491-510 (ENG), hereinafter “First Extension Appeal Decision”.

⁸ First Extension Appeal Decision, para.29.

prevent the Charged Person from exerting pressure on any witness or victim; (ii) preserve evidence and prevent its destruction; (iii) ensure the presence of the Charged Person during the proceedings; and (iv) preserve public order.

II. PROCEDURAL BACKGROUND

3. On 11 May 2009, the PTC rendered a decision on the Defence Appeal against the Order on Extension of Provisional Detention.⁹
4. On 5 October 2009, pursuant to Rule 63(7), the CIJs notified the Charged Person and her lawyers that they were considering an extension of the provisional detention¹⁰ and requested them to submit their observations within 15 days, which they did on 19 October 2009¹¹. On 10 November 2009, the CIJs issued their Second Order on Extension of Provisional Detention¹². On 9 December 2009, the Defence filed their Second Appeal against the Order on Extension of Provisional Detention which was notified to the parties on 16 December 2009 and is responded to by the CPs herein.
5. On 21 December 2009, the CIJs notified further charges to the Charged Person in addition to crimes against humanity: crime of genocide, grave breaches of 1949 Geneva Conventions and national crimes.¹³

III. THE LAW

Conditions Necessitating Provisional Detention

6. Under Rule 63(3), the CIJs may order provisional detention where:
 - (a) There is well founded reason to believe that the defendant may have committed the crimes specified in the Introductory Submission; and
 - (b) They consider the provisional detention to be a necessary measure to:
 - (i) prevent the defendant from exerting pressure on any witness or victim, or prevent any collusion between him and his accomplices;
 - (ii) preserve evidence or prevent its destruction;
 - (iii) ensure the presence of the defendant during the proceedings;

⁹ First Extension Appeal Decision.

¹⁰ *Case of IENG Thirith*, CIJs Notice to Ieng Thirith and her lawyers for their views on the Extension of Provisional Detention, 5 October 2009, C 20/6, ERN 00385005-06 (ENG).

¹¹ *Case of IENG Thirith*, Defence Observations to the CIJs Intention to Further Extend Ieng Thirith's Provisional Detention, 19 October 2009, C 20/7, ERN 00390229-42 (ENG).

¹² First Extension Order.

¹³ *Case of Ieng Thirith*, OCIJ Written Record of Interview of Charged Person, 21 December 2009, D286, ERN 00418007-12 (ENG).

- (iv) protect the security of the defendant; or
- (v) preserve public order.

7. The five grounds of detention under Rule 63(3)(b) are disjunctive and therefore there is no requirement that the CIJs find that every ground is satisfied before they consider that provisional detention is a necessary measure or that its extension is warranted. On the contrary, should they consider that any one of the five grounds exist, the test for detention is met. This approach is also followed by other criminal tribunals dealing with similarly serious international crimes.¹⁴

Nature and scope of the PTC review

8. The principal issue in the determination of the appeal against an Extension Order is whether the conditions set out in Rule 63(3) are still met. The Defence seem to have misunderstood the nature and scope of the PTC review when it is seized of an appeal against a CIJs' order. Within the ECCC, the PTC does not act as a "*cour de cassation*" which would quash an Order and refer it back to the CIJs. The PTC can replace the CIJs' orders by its own decisions and substitute its own reasons and motives for the ones of the CIJs.¹⁵ In case of defect, the PTC has the discretion to "undertake its own analysis, applying the standard set out in Internal Rule 63(3)"¹⁶ and cure the defect by substituting its own reasons.¹⁷ Further the PTC does not have to examine the Case File and the conditions of Rule 63(3) at the time the CIJs render the Extension Order.¹⁸ As stated in its successive decisions on appeals against orders on provisional detention, the PTC noted that it considers the whole Case File of the CIJs up to the date of the hearing,¹⁹ including any new

¹⁴ *Prosecutor v Sainovic and Odjanic*, Decision Refusing Ojdanic Leave to Appeal, Case No. IT-99-37-AR65.2, ICTY Appeals Chamber, 27 June 2003, page 3 adopted by the ECCC PTC in Case of KAING Guek Eav alias "DUCH", Decision on Appeal Against Provisional Detention Order of Kiang Guek Eav alias "Duch", Case No. 001/18-07-2007-ECCC-OCIJ (PTC 01), 3 December 2007, ERN 00154284-302, C5/45, para. 59.

¹⁵ The PTC usually states that "*the Order of the Co-Investigating Judges is affirmed with the reasons expressed in this decision being substituted for the reasons of the Co-Investigation Judges*". For example, IENG Thirith's Detention Appeal Decision, C20/I/26, ERN 00201588-604 (ENG), at ERN 00201604 (ruling, last paragraph).

¹⁶ IENG Thirith's Detention Appeal Decision, C 20/I/26, ERN 00201588-604 (ENG), at ERN 00201592, para. 18.

¹⁷ The PTC stated in paragraph 42 of its IENG Thirith's Detention Appeal Decision (C20/I/26, at ERN 00201598), that "*the PTC further observes that any concern expressed by the Co-Lawyers as to whether the Co-Investigating Judges disregarded the presumption of innocence is resolved by the analysis that this Chamber has undertaken*".

¹⁸ The PTC review Provisional Detention Orders by "an examination of: a. the procedure of the CIJ prior to the order being issued; b. the sufficiency of the facts for ordering provisional detention under Internal Rule 63 (3); c. whether the circumstances on which the Order was based still exist today; and d. the exercise of discretion by the CIJ in applying Internal Rule 63(3)", in IENG Thirith's Detention Appeal Decision, C 20/I/26, ERN 00201588-604 (ENG), at ERN 00201591, para. 15; Decision on Appeal against Provisional Detention Order of NUON Chea, 20 March 2008, C 11/54, ERN 00172907-34 (ENG) at ERN 00172909, para. 9.

¹⁹ For example, IENG Thirith's Detention Appeal Decision, C 20/I/26, ERN 00201588-604 (ENG) at ERN 00201592, para. 20.

element or any piece of evidence filed since the Appeal. The CPs submit that the PTC should therefore take into account not only the new evidence filed since the Order and the Appeal up to the date of the hearing but also the fact that the Charged Person was notified additional charges on 21 December 2009.

Exercise of Discretion in Considering Detention

9. A judicial authority may exercise discretion in determining whether provisional detention is a necessary measure or its extension is warranted. Such discretion is usually exercised by taking into account all documents on the Case File and all relevant facts of the case, including the gravity of the charges, the cogency of the evidence, the past and present character and behaviour of the Charged Person, the interests of witnesses and the interests of justice as a whole.²⁰ This conforms to the accepted practice in international criminal tribunals which has also been adopted by this Court.²¹

Duty to Give Reasons in Detention Orders

10. Rule 63(7) requires the Co-Investigating Judges to “set out the reasons” for an extension of detention. These reasons have to be given after considering the Case File and the objections of the detainee.²² Citing settled international jurisprudence, the PTC has found that all decisions of judicial bodies, including the CIJs, have to be reasoned to meet international standards.²³
11. The PTC has determined that the obligation to state reasons only requires that the CIJs set out the legal grounds and facts taken into account before coming to a decision. The CIJs can discharge this obligation “by referring to the Case File in general and other circumstances”, as the CIJs are not obliged to indicate a view on all the factors.²⁴ The Extension Order is sufficiently and adequately reasoned.

²⁰ *Prosecutor v Ljube Baskoski and Johan Tarculovski*, Decision on Johan Tarculovski’s Interlocutory Appeal on Provisional Release, Case No. IT-04-82-AR65.4, ICTY Appeals Chamber, 27 July 2007, para.4.

²¹ Duch Detention Appeal Decision para.27.

²² Pursuant to Rule 63 (7), the extension proceedings take place solely between the CIJ and the Charged Person as, before extending a provisional detention, the CIJ hear only the Charged Person’s objections. No other party is heard or is involved in this process. The process of extension under Rule 63 (7) is therefore markedly different from the process of initial detention under Rule 63 (3), which includes an adversarial hearing before the CIJ.

²³ *Case of NUON Chea*, Decision on Nuon Chea’s Appeal against Order Refusing Request for Annulment dated 28 August 2008, Case No. 002/19-09-2007-ECCC-OCIJ (PTC 06), D 55/I/8, ERN 001219322-33 (ENG), para. 21.

²⁴ *Case of IENG Sary*, Decision on Appeal against Provisional Detention Order of Ieng Sary, Case No. 002/19-09-2007-ECCC-OCIJ (PTC 03), 17 October 2008, C 22/I/74, ERN 00232976-004 (ENG), para. 64-66 (*hereinafter* IENG Sary Detention Appeal Decision); See also ICTY case law: *Prosecutor v. Popovic*, Decision on Defence’s Interlocutory Appeal of Trial Chamber’s Decision Denying Ljubomir Borovcanin Provisional Release, Case No. IT-

IV. ARGUMENT

Extension of Provisional Detention and Reasonable Delay

12. Rule 63(6) and (7) provides for an automatic periodic review of a charged person's detention. Such a provision is absent in the basic documents of the International Criminal Tribunals for the Former Yugoslavia ("ICTY") and Rwanda ("ICTR") and the Special Court for Sierra Leone ("SCSL"). Those tribunals, however, maintain that for a renewed application for provisional release to be successful, the defendant must demonstrate "a material change of circumstances".²⁵
13. Similar to the Rules of this Court, Rule 118 of the Rules of Procedure and Evidence of the International Criminal Court ("ICC") requires that the pre-trial detention of a defendant must be reviewed by its Pre-Trial Chamber at least every 120 days. The Pre-Trial Chamber of the ICC has a "distinct and independent obligation [...] to ensure that a person is not detained for an unreasonable period prior to trial".²⁶ The Pre-Trial Chamber can modify its ruling on detention "if it is satisfied that the change in circumstances so require".²⁷ At the ICC, "the Prosecution has the burden of proof in relation to the continuing existence of the conditions [...] of pre-trial detention".²⁸
14. In this Court, Rule 63(7) does not require the CIJs to hear the CPs, or any other party excepting the Charged Person, while determining the extension of detention. Rule 63(7) only provides for objections to be submitted by the Charged Person. The existence of an automatic review of an extension of detention provides the detainee with a set opportunity to put forward her position and, if warranted, exercise her right to Appeal against a reasoned decision.²⁹ It is the Appellant who has to demonstrate any material change in circumstances since the first extension was confirmed by the PTC. Contrary to what the Defence contend,³⁰ there is no CIJs' policy of "an

05-88-AR65.2, Appeals Chamber, 1 March 2007, para. 13; *Prosecutor v. Haradinaj*, Decision on Lahi Brahimaj's Motion for Provisional Release, Case No. IT-04-84-PT, ICTY Trial Chamber, 3 May 2006, para. 16.

²⁵ *Prosecutor v. Boskoski and Tarculovski*, Case No. IT-04-82-PT, Decision Concerning Renewed Motion for Provisional Release of Johan Tarculovski, 17 January 2007, para. 9.

²⁶ *Situation in the Democratic Republic of the Congo, In the Case of the Prosecutor v. Germaine Katanga and Mathieu Ngudjolo Chui*, Decision Concerning Observations on the Review of the Pre-Trial Detention of Germaine Katanga, Case No. ICC-01/04-01/07, Pre-Trial Chamber, 9 July 2008, page 4.

²⁷ *Situation in the Democratic Republic of the Congo, In the Case of the Prosecutor v. Germaine Katanga and Mathieu Ngudjolo Chui*, Review of the Decision on the Conditions of the Pre-Trial Detention of Germaine Katanga, Case No. ICC-01/04-01/07, Pre-Trial Chamber, 18 August 2008, page 6.

²⁸ *Situation in the Democratic Republic of the Congo, In the Case of the Prosecutor v. Germaine Katanga and Mathieu Ngudjolo Chui*, Decision Concerning Observations on the Review of the Pre-Trial Detention of Germaine Katanga, Case No. ICC-01/04-01/07, Pre-Trial Chamber, 9 July 2008, page 4.

²⁹ Internal Rules, Rule 63(7).

³⁰ Defence Appeal, para. 12.

almost automatic continuation of pre-trial detention”. The automatic periodic review of the Charged Person’s provisional detention constitutes a safeguard for the defence rights as the CIJs have the positive obligation to re-assess the criteria for continued detention before the expiry of the extension, taking the observations from the Defence into account. Moreover, Rule 64 provides that the CIJs must order, on their own motion, the release of a Charged Person where the requirements of provisional detention as set out in Rule 63 are no longer satisfied, which implies the re-assessment of those requirements on a regular basis.

15. Apart from the passage of time, the Appellant has not identified any material change of circumstance to necessitate a reconsideration of her detention. While the length of time in detention has been considered by international tribunals as a relevant factor in determining the legitimacy of detention,³¹ the Defence have not demonstrated how the two-year detention has prejudiced the Appellant’s case in such a manner as to prevent a fair trial and / or to demonstrate how it can, in and of itself, justify a reconsideration of provisional detention.
16. On 11 May 2009, the PTC recalled that the Rules themselves provide for a limited length of provisional detention. The PTC stated that Rules 63(6) and (7) provide that “no more than 2 (two) extensions of provisional detention may be ordered” and that Rule 21(4) provides, in relation to due diligence, that “proceedings before the ECCC shall be brought to a conclusion within a reasonable time”³². After reviewing the jurisprudence in this regard, the PTC stated that “the reasonableness of the length of detention and the diligence of the CIJs in conducting their investigation are factors that shall be taken into consideration when exercising the discretionary power to extend provisional detention”³³. The PTC concluded that the “CIJs properly exercised their discretion in ordering the extension of provisional detention as the duration of this detention is reasonable in light of the crimes that are being investigated”.³⁴ This is now even more significant as on 21 December 2009 the Appellant was additionally charged with the crime of

³¹ *Prosecutor v. Tihomir Blaskic*, Order Denying a Motion for Provisional Release, Case No. IT-94-14- Trial Chamber, 20 December 1996: The ICTY has established in that decision that in order to establish the reasonable nature of the length of provisional detention, it is necessary to evaluate the circumstances of each case in light of the following criteria: (a) The effective length of the detention; (b) The length of the detention in relation to the nature of the crimes; (c) The physical and psychological consequences of the detention on the detainee; (d) The complexity of the case and the investigations; (e) The conduct of the entire proceedings.; Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui, Review of the Decision on the Application for the Interim Release of Mathieu Ngudjolo Chui, Case No. 01/04-01/07, Pre-Trial Chamber of the ICC, 23 July 2008, page 12.

³² First Extension Appeal Decision, para. 55.

³³ First Extension Appeal Decision, para. 61.

³⁴ First Extension Appeal Decision, para. 67.

genocide, grave breaches of the 1949 Geneva Conventions and national crimes. The Defence have failed to substantiate the applicability of the “special diligence” standard of ECHR and have provided no new evidence since 11 May 2009 that could persuade the PTC that the duration of this detention is unreasonable.

17. As discussed at paragraph 22 below, the CIJs have significantly progressed in their investigation. In light of the circumstances of the case and international jurisprudence, the length of provisional detention of the Appellant is reasonable under Article 9(3) of the ICCPR. The Charged Person has been held in Provisional Detention for a reasonable period of time given the gravity of the crimes charged, the complexity of the case, the conduct of the proceedings and the extent of the ongoing investigations being carried by the CIJs. The safeguards contained in the Rules limiting the duration of provisional detention permissible and providing for review of provisional detention allay any concerns that the duration of provisional detention will be permitted to become unreasonable. For these reasons the CPs invite the PTC to dismiss the Defence Appeal.

Rule 63 (3) Conditions Necessitating Provisional Detention

18. The two conditions set out in Rule 63(3) are still fulfilled and justify the extension of the provisional detention for an additional maximum period of one year.

A. Well-founded Reason - Rule 63(3)(a)

19. The Case File today contains evidence capable of satisfying an objective observer, at this stage of the investigation, that the Appellant may have committed the crimes for which she is currently under investigation.
20. In the Appeal, the Defence do not submit any relevant arguments based on Rule 63(3)(a). Indeed the Defence mistakenly challenge the existence of a well-founded reason by stating that the CIJs fail to consider exculpatory evidence and do not afford it sufficient weight. They further contend that the CIJs “failed to act impartially and failed to properly and fairly evaluate the evidence”. They support this contention by referring to one witness statement, that of [REDACTED], and an extract of an interview with Kaing Guek Eav alias “Duch”.
21. The role of the CIJs under Rule 63(3)(a) is to weigh the totality of the evidence gathered to date in order to determine whether there is well founded reason to believe the Charged Person committed the crime. The evidence collected by the CIJs clearly demonstrates this. The Appellant’s argument relating to the impartiality of the CIJs has no place in the present appeal.

The Rules provide an avenue for a Charged Person to challenge a lack of impartiality by a judicial organ of the ECCC through an application for disqualification under Rule 34. [REDACTED]

Further, it must be underlined that in their Second Extension Order, the CIJs provided two explicit references to [REDACTED] witness statement (footnotes 35-36) as containing exculpatory elements and even cited the relevant passages in footnote 35. It can not be reasonably argued that the CIJs did not afford sufficient weight to that particular statement. In relation to Duch's statement [REDACTED], it should be considered in a broader context together with several other statements in which he [REDACTED]

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22. The CPs deem necessary only to mention the vast inculpatory evidence that has been gathered by the CIJs since November 2007 and therefore the CPs incorporate this by reference to the submissions contained at paragraphs 39 to 44 of their "Response to Ieng Thirith's Defence Appeal against Provisional Detention Order of 10 November 2008" dated 9 January 2009³⁶. Regarding the evidence collected since the PTC hearing of 24 February 2009, the CPs firstly note that the CIJs, in paragraphs 14 and 30 of their Extension Order, provided sufficient details of additional evidentiary documents placed in the Case File, *proprio motu*, or at the request of the parties, including at least 21 directly relevant new witness statements. The CPs also submit that on 12 November 2009, nearly a month prior to the Appeal being filed, the parties were notified of a further 24 written records of witness interviews, under references D231/3 – D231/26. Among those statements, which provide primary information in relation to the role of the Charged Person during the DK period and her participation in the crimes she is charged with, the most relevant interviews are those of [REDACTED]

,³⁷ Subject to further analysis, more relevant written records of witness interviews have recently been placed into the Case File.³⁸

³⁵ Reference is made in this regards to the arguments developed in the paragraphs 42 and 43 of the Co-Prosecutors' Response to IENG Thirith's Appeal against Provisional Detention Order of 10 November 2008, 9 January 2009, C 20/5/7, ERN 00270423-49 (ENG) at 00270443-44.

³⁶ *Case of IENG Thirith*, Co-Prosecutors' Response to IENG Thirith's Appeal against Provisional Detention Order of 10 November 2008, 9 January 2009, C 20/5/7, ERN 00270423-49 (ENG).

³⁷ [REDACTED]

³⁸ [REDACTED]

23. The CPs, therefore, request that for the above reasons the PTC dismiss these grounds of Appeal and hold that the conditions of detention under Rule 63(3)(a) are, and continue to be, satisfied thereby justifying an extension of the Appellant's detention.

B. Provisional Detention Remains a Necessary Measure - Rule 63(3)(b)

24. The PTC's determination on 11 May 2009 that provisional detention at the ECCC Detention Facility is necessary was issued after a review of all the evidence then on the Case File. The PTC determined that provisional detention was a necessary measure under Rule 63(3)(b) to (i) prevent the Charged Person from exerting pressure on witnesses or victims, (ii) to preserve evidence, (iii) to ensure the Charged Person's presence during the proceedings, and (iv) to protect public order³⁹.

25. The Appellant has provided no evidence since 11 May 2009 that may lead the PTC to reverse this finding. The CPs submit that the rationale outlined in the Detention Appeal Decision is still valid today and should be upheld. Furthermore, the Defence do not raise any valid arguments to contest the existence of the alternative and disjunctive conditions of Rule 63(3)(b) therefore the CPs incorporate by reference the submissions contained at paragraphs 45 to 53 of their "Response to IENG Thirith's Appeal against Provisional Detention Order of 10 November 2008" and will only focus on a limited number of issues or new elements.⁴⁰

Risk of absconding

26. The Defence's sole counter argument is that the situation at this time is different because the Appellant's health situation has deteriorated over the last year whereby any risk of absconding would be a negligible one. They support their contention
41 [REDACTED].⁴² After requesting it from the
42 CIJs,⁴³ the CPs have received notification of this document on 29 December 2009. No conclusion
43 can be drawn from this report regarding the Charged Person's alleged deterioration of health

³⁹ First Extension Appeal Decision, para. 45.

⁴⁰ *Case of IENG Thirith*, Co-Prosecutors' Response to IENG Thirith's Appeal against Provisional Detention Order of 10 November 2008, 9 January 2009, C 20/5/7, ERN 00270423-49 (ENG).

⁴¹ [REDACTED]

⁴² [REDACTED]

⁴³ [REDACTED]

condition.[REDACTED]

⁴⁴ Nothing in the report indicates that the health of the Charged Person would prevent her from absconding, with or without assistance.[REDACTED]

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Risk of exerting pressure against witnesses and victims

27. In their decision the PTC determined that the Charged Person has access, through her lawyers, to evidence containing details on her possible role within the Democratic Kampuchea regime and that there was still a need for provisional detention to prevent any pressure being exerted on witnesses or victims and to prevent the destruction of evidence. The past behaviour and public statements of the Appellant as mentioned by the PTC in its 11 May 2009 Decision on Appeal,⁴⁷ clearly demonstrate the concrete risk that the Charged Person may exert pressure against, intimidate or interfere with witnesses or victims if provisionally released. The Appellant has access to the names of the key witnesses and civil parties and some of whom have yet to be heard by the CIJs at this stage of the proceedings, until the closure of the investigation and until all potential appeals before the PTC are decided upon pursuant to Rule 66.⁴⁸ Furthermore, some of

⁴⁴ [REDACTED]

⁴⁵ [REDACTED]

⁴⁶ [REDACTED]

⁴⁷ PTC Decision on Appeal against Provisional Detention Order of Ieng Thirith, C20/I/26, ERN 00201588-604 (ENG), para. 49-50. IENG Thirith insulted and attempted to intimidate Youk Chhang: Letter sent on 7 February 1999 by IENG Thirith to Chris Decherd, published under the title "Ieng Thirith says she only wanted to serve her people", *The Cambodia Daily*, 12 February 1999, ERN 00000588-89 (ENG). The Charged Person is reported to have called people to shut May Makk up in a DNUM meeting in 2003: "Khmer Rouge Inc: Former Communists Embrace the Market Economy in Malai District," *The Cambodia Daily*, 17 February 2007, ERN 00106073-78 (ENG).

⁴⁸ Rule 66 (1) provides that after the notification by the CIJs of the conclusion of the investigation, the parties have 15 days to request further investigative action, which might include requests to conduct interviews of witnesses or civil parties never heard by the CIJs or re-interviews of witnesses / civil parties. Rule 66 (2) states that where the CIJs

those witnesses and civil parties will be heard by the Trial Chamber at the trial stage if the Charged Person is indicted. Accordingly, the risk that she might influence the witnesses or victims from testifying before the ECCC if released is even greater. Moreover, if released, there is a concrete risk that the Appellant would continue making such offensive statements to the public media which could have the effect of intimidating witnesses and victims but also of disturbing public order.

28. The PTC noted the Charged Person's threatening and intimidating behaviour towards the parties and/or judges during the hearing before the PTC on 24 February 2009 where she declared: "So don't accuse me of murder otherwise you will be cursed to the seventh level of hell"⁴⁹. This incident followed similar threats and insults uttered during the hearings of 21 May and 9 July 2009, as mentioned in the CPs' Response to the First Extension Appeal, and other violent public behaviour and statements.⁵⁰ Since then, there have been numerous further incidents [REDACTED]

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29. Another incident took place during the Charged Person's interview [REDACTED]
⁵² [REDACTED]
 . The offensive attitude of the Charged Person consisting of threats and attempts to intimidate the parties at hearings or in the

decide to reject such requests, they shall issue a reasoned order, which is appealable before the PTC within 30 days (Rule 66 (3)). It means that witnesses and civil parties can potentially still be interviewed by the CIJs after granting a request of further investigative action or as a result of a PTC decision on appeal. Therefore, the PTC is invited to conclude that the Defence misled the PTC by arguing that "Closure of the investigations means there will no longer be an argument that it is necessary to detain the Charged Person to ensure the integrity of the investigations" (Appeal, para.4).

⁴⁹ PTC Decision on Appeal against Provisional Detention Order of Ieng Thirith, C 20/I/26, ERN 00201588-604 (ENG), para. 41 and 42.

⁵⁰ *Case of IENG Thirith*, Co-Prosecutors' Response to IENG Thirith's Appeal against Provisional Detention Order of 10 November 2008, 9 January 2009, C 20/5/7, ERN 00270423-49 (ENG), para. 47-49 and 50.

⁵¹ [REDACTED]

⁵² [REDACTED]

detention facility are further evidence that support the risks posed in regards to the pressure the Appellant might exert against witnesses and victims if she were released.

A necessary measure to preserve public order

30. As regards the threats posed to public order, the Defence argue that the presence of post-traumatic stress disorder does not conclude that there will be public disorder if the Charged Person was released. The Defence fixate on one article on post traumatic stress disorder by Rob Savage and do not refer to the other arguments and articles provided by the CPs in previous submissions in relation to post traumatic stress disorder, other mental health problems and potential violence directed against former Khmer Rouge leaders if released.⁵³ Furthermore, the Defence have provided no new evidence since 11 May 2009 that may convince the court that there is no threat to public order if the Charged Person were to be released. The CPs therefore submit that the rationale outlined in the First Extension Appeal Decision is still valid and should be upheld. In addition, they refer to the expert testimony of Dr. Chhim Sotheara during the Kaing Guek Eav alias Duch's hearing on 25 August 2009 (Case File 001), who not only discussed post-traumatic stress disorder but the psychological impact on the victims and their trauma.⁵⁴ He stated that many traumatized victims are subject to depression, anger, alcoholism and domestic violence.⁵⁵ He further stressed that the psychological healing of Khmer Rouge victims is dependent on the honesty that the former leaders of the Democratic Kampuchea show, express or acknowledge, that the absence / denial of responsibility is an extra burden placed upon the victims and the Cambodian people as a whole and that the victims are not happy and feel furious at such denial.⁵⁶ It is unnecessary to recall here that the Charged Person always denied the crimes she is charged with. Expert Chhim Sotheara also reiterated that for some victims, due to trial hearings, the traumatization seems to recur.⁵⁷ Furthermore, "some 30% of Cambodia's nearly 14 million

⁵³ *Case of IENG Thirith*, Co-Prosecutors' Response to IENG Thirith's Appeal against Provisional Detention Order of 10 November 2008, 9 January 2009, C 20/5/7, ERN 00270423-49 (ENG), para. 52.

⁵⁴ Transcript of Trial Proceeding Kaing Guek Eav "Duch", 25 August 2009, E1/68.1, ERN 00370950-1055 (ENG), hereinafter "Transcript".

⁵⁵ Transcript, sp. pp. 15-16 / 42, ERN 00370967-68/94 (ENG)

⁵⁶ Transcript, p. 38, ERN 00370990 (ENG).

⁵⁷ Transcript, pp. 18 and 59, ERN 00370970 and 00371011 (ENG); See also *Pour une meilleure justice, il faut aussi un soutien psychologique aux victimes*, Cambodge soir, Chheang Bopha, 29 septembre 2006, accessible at http://www.cambodgesoir.info/index.php?option=com_content&view=article&catid=43%3Aarchives&id=20365%3Apour-une-meilleure-justice-il-faut-aussi-un-soutien-psychologique-aux-victimes&Itemid=46; *Now Prozac Battles Dark Dreams That Khmer Rouge Left*, The New York Times, Phnom Penh Journal, 16 February 2006, accessible at http://www.nytimes.com/2006/02/16/international/asia/16cambodia.html?_r=1&pagewanted=print, where Chhim Sotheara "said his concerns were "retraumatization" of survivors who will come face to face with the past; new

people reportedly suffer from a debilitating mental condition – from anxiety and chronic unexplained physical pain to unpredictable mood swings or sudden eruptions of rage”⁵⁸ and a high number of victims transmit their trauma from generation to generation.⁵⁹ At this stage of the proceedings, where the investigative phase is coming to an end and the trial phase is expected by the population, if the Charged Person was released there is a real risk of aggravating existing mental conditions and sudden eruption of violence.

31. The CPs, therefore, request that the PTC hold that conditions of detention under Rule 63(3)(b)(i)-(v) are, and continue to be, satisfied thereby justifying an extension of the Appellant’s detention.

C. No Bail Order

32. The PTC determined on 11 May 2009 that in the absence of reasoning “to support the request for release” on bail, the continued detention of the Charged Person was necessary under Rule 63(3) and the alternatives to detention were outweighed by the need for provisional detention⁶⁰. Since, as argued above, the need for provisional detention has not diminished, the alternatives to detention are not viable. The Defence have provided no new evidence since 11 May 2009 that may convince the PTC to reverse its finding.
33. The CPs submit that the rationale outlined in the First Extension Appeal Decision is, and continues to be, valid and request that the PTC reject the request for bail and hold the conditions of detention to the exclusion of any alternative modes of restraint.

trauma on young people who did not experience the Khmer Rouge era; and renewed anger and hostility among victims”.


⁵⁸ *Cambodia’s long look backwards; doctors struggle to heal troubled country*, AFP, 3 September 2007, accessible at <http://afp.google.com/article/ALeqM5idAIOjK3ixMBq5JqFvuqDOZaRtcg?index=0>

⁵⁹ *Des psychiatres au secours des victimes enfermées dans leurs cauchemars*, *Cambodge Soir*, 11 mars 2005, accessible at http://www.cambodgesoir.info/index.php?view=article&catid=43:archives&id=16087:des-psychiatres-au-secours-des-victim-es-enfermees-dans-leurs-cauchemars&format=pdf&option=com_content

⁶⁰ First Extension Appeal Decision, para. 68-69.

V. CONCLUSION

34. The Co-Prosecutors, therefore, request the Pre-Trial Chamber to dismiss the Defence Appeal.

Date	Name	Place	Signature
8 January 2010	CHEA Leang Co-Prosecutor	Phnom Penh	
	William SMITH Deputy Co-Prosecutor	Adelaide Australia	