

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

PRE-TRIAL CHAMBER

CASE NO. 002/19-09-2007-ECCC/OCIJ (PTC 17)

IENG SARY

THURSDAY, 2 APRIL 2009

0905H

APPEAL HEARING

Before the Judges:

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

For the Pre-Trial Chamber:

SAR Chanrath  
CHUON Sokreasey  
Entela JOSIFI

For the Office of the Co-Prosecutors:

YET Chakriya  
Vincent DE WILDE D'ESTMAEL

For the Charged Person IENG SARY

ANG Udom  
Michael KARNAVAS

For the Civil Parties

HONG Kimsuon  
LOR Chunthy  
NY Chandy  
Silke STUDZINSKY  
KIM Mengkhy  
KONG Pisey

**List of Speakers:**

Language used unless specified otherwise in the transcript

Speaker	Language
MR. ANEES AHMED	English
MR. ANG UDOM	Khmer
JUDGE DOWNING	English
MR. KARNAVAS	English
JUDGE LAHUIS	English
MR. LOR CHUNTHY	Khmer
JUDGE NEY THOL	Khmer
MR. NY CHANDY	Khmer
MS. SAR CHANRATH	Khmer
MS. STUDZINSKY	English
MR. TAN SENARONG	Khmer
THE CHARGED PERSON	Khmer
THE PRESIDENT (PRAK KIMSAN, Presiding)	Khmer

1

1 [9.05.30]

2 (Judges enter the courtroom)

3 MR. PRESIDENT:

4 Please be seated. I now invite the media representatives to  
5 leave the courtroom.

6 (Photographers leave the courtroom)

7 MR. PRESIDENT:

8 In the name of the Cambodian people and the United Nations, today  
9 the Pre-Trial Chamber of the Extraordinary Chambers in the Courts  
10 of Cambodia declares open the hearing of the criminal case N°  
11 002/19-09-2007-ECCC/OCIJ (PTC17), dated 10th of November 2008, in  
12 which the charged person Ieng Sary alias "Vann", Cambodian, male,  
13 born 24 October 1925, in Loeung Va Village, Loeung Va Commune,  
14 Tra Vinh District, Tra Vinh Province, Kampuchea Krom, pre-arrest  
15 address No 47B, Street 21, Group 36, Zone 4, Tonle Bassac  
16 Quarter, Chamkarmon District, Phnom Penh, Cambodia, father's  
17 name Kim Riem (deceased), mother's name Tram Thi Loi (deceased),  
18 wife's name Ieng Thirith with four children.

19 Is charged with crimes against humanity and grave breaches of the  
20 Geneva Convention of the 12th of August 1949, crimes set out and  
21 punishable under articles 5, 6, 29(new) and 39(new) of the Law on  
22 the Establishment of the Extraordinary Chambers in the Courts of  
23 Cambodia dated on the 27th of October 2004. Defence co-lawyers:  
24 Mr. Ang Udom, Mr. Michael Karnavas. Lawyers for the civil  
25 parties: Mr. Hong Kimsuon. Mr. Lor Chunthy, Mr. Ny Chandy, Mr.

2

1 Kong Pisey, Mr. Yong Panith, Mr. Kim Mengkhy, Miss. Moch  
2 Sovannary, Ms. Silke Studzinsky, Mrs. Martine Jacquin, Mr.  
3 Philippe Canonne, Mr. Pierre-Olivier Sur, Ms. Elizabeth  
4 Rabesandratana, Mr. Olivier Bahougne, and Mr. David Blackman.

5 The greffier, are all the participants present at the hearing?

6 MS. SAR CHANRATH:

7 Your Honour, the President. Parties are present except civil  
8 party lawyers, eight of them are absent including Mr. Yong  
9 Phanith, Ms. Moch Sovannary, Mrs. Martine Jacquin, Mr. Philippe  
10 Canonne, Mr. Pierre-Olivier Sur, Ms. Elizabeth Rabesandratana,  
11 Mr. Olivier Bahougne and Mr. David Blackman.

12 [9.11.40]

13 MR. PRESIDENT:

14 The person at today's hearing are: Mr. Prak Kimsan, President;  
15 two Mr. Rowan Downing, Judge; three, Mr. Ney Thol, Judge; four,  
16 Mrs. Katinka Lahuis, Judge; five, Mr. Huot Vuthy, Judge; and Mr.  
17 Pen Pichsaly, Reserve Judge. Greffiers include Miss. Sar Chanrath  
18 and Ms. Entela Josifi. Co-Prosecutors: Mr. Tan Senarong,  
19 Deputy Co-Prosecutor, Mr. Anees Ahmed, Deputy Co-Prosecutor.

20 The charged person. What is your name?

21 THE CHARGED PERSON:

22 (Not interpreted)

23 MR. PRESIDENT:

24 What is your alias name?

25 THE CHARGED PERSON:

3

1 (Not interpreted)

2 THE INTERPRETER:

3 Excuse me, the Interpreter cannot hear the charged person because  
4 the mic is not activated.

5 MR. PRESIDENT:

6 How old are you?

7 THE CHARGED PERSON:

8 (Not interpreted)

9 MR. PRESIDENT:

10 What is your nationality? Where were you born?

11 THE INTERPRETER:

12 The Interpreter regrets again that the charged person mic is not  
13 activated.

14 MR. PRESIDENT:

15 Could you please clarify, state your date of birth again.

16 THE CHARGED PERSON:

17 I was born in the above mentioned address.

18 MR. PRESIDENT:

19 What is your occupation?

20 THE CHARGED PERSON:

21 (Not interpreted)

22 MR. PRESIDENT:

23 Where did you live before you were arrested?

24 THE CHARGED PERSON:

25 I lived at house number 47B, Tonle Bassac, Chamcarmon.

4

- 1 MR. PRESIDENT:
- 2 What is your father's name?
- 3 THE CHARGED PERSON:
- 4 Mr. Kim Riem. Mother's name is Tram Thi Loi.
- 5 MR. PRESIDENT:
- 6 What is your wife's name?
- 7 THE CHARGED PERSON:
- 8 (Not interpreted)
- 9 MR. PRESIDENT:
- 10 How many children have you got?
- 11 THE CHARGED PERSON:
- 12 May I request that I sit next to my defence counsel and ask them
- 13 to talk on my behalf because I cannot speak now.
- 14 MR. PRESIDENT:
- 15 Could you state again, I cannot hear you.
- 16 THE CHARGED PERSON:
- 17 I cannot speak -- I find it difficult to speak, so that's why I
- 18 request that my defence counsel speak for me.
- 19 MR. PRESIDENT:
- 20 Pursuant to Rule 21(1)(d) of the Internal Rules, you are presumed
- 21 innocent as long as your guilt has not been established, and you
- 22 have the right to be informed of any charges brought against you,
- 23 and you have the right to be defended by a lawyer of your choice,
- 24 and the right to remain silent. I now invite Judge Ney Thol to
- 25 read out the report of examination.

5

1 [9.16.20]  
2 JUDGE NEY THOL:  
3 Thank you, the President. I would like now to read out the  
4 report of examination. The Extraordinary Chambers in the Courts  
5 of Cambodia, in the Pre-Trial Chamber, N°  
6 002/19-09-2007-ECCC/OCIJ (PTC17). Report of Examination. This  
7 report is divided into two main sections. Number one,  
8 Proceedings; number two, Examination of the case by the  
9 co-rapporteurs.  
10 Number one, Proceedings. I would like to inform the Court that  
11 this main item number one point A will not be read out. I will  
12 then skip to the following paragraph, so that we can save time.  
13 B. The Co-Investigating Judges order on extension of  
14 provisional detention. On the 11th of November 2008, the  
15 Co-Investigating Judges of the ECCC issued an order extending the  
16 provisional detention of the charged person, who has been  
17 detained since the 14th of November 2007, for another term not  
18 exceeding one year. The Co-Investigating Judges found that the  
19 first criterion to order provisional detention mentioned in Rule  
20 63(3)(a) is met, as there are well-founded reasons to believe  
21 that the charged person committed the crimes with which he is  
22 charged.  
23 To reach this conclusion, they rely essentially on the analysis  
24 of the case file that was undertaken by the Pre-Trial Chamber  
25 when seized of the charged person's appeal against the initial

6

1 order for provisional detention, whose conclusions have not been  
2 undermined by exculpatory evidence. The Co-Investigating Judges  
3 found that there has been no change in circumstances since the  
4 Pre-Trial Chamber decided that provisional detention is a  
5 necessary measure to ensure the presence of the charged person  
6 during the proceedings to protect his security and to preserve  
7 public order. They thus considered that these three grounds set  
8 out in Internal Rule 63(3)(b) are still met.

9 [9.20.00]

10 The Co-Investigating Judges further found that no reasonable  
11 conditions of house arrest could be imposed which would guarantee  
12 the objectives of Rule 63(3)(b)(i) to (v) to the same extent as  
13 provisional detention. They considered that detention for nearly  
14 12 months is not excessive in view of the scope of the  
15 investigations, the complexity and gravity of the crimes of which  
16 the Co-Investigating Judges are seized. And added that the  
17 exercise of the right to remain silent by the charged person,  
18 although recognised and undisputed, is not conducive to speedy  
19 proceedings.

20 C. Ieng Sary's appeal brief. On the 20th of December 2008, the  
21 co-lawyers for the charged person filed their appeal brief  
22 against the order of the Co-Investigating Judges in which they  
23 request the Pre-Trial Chamber to vacate the order and order  
24 provisional release for the charged person, or subsidiarily,  
25 order the Co-Investigating Judges to modify the conditions of



7

1 detention and impose house arrest. They do so on the grounds  
2 that the Co-Investigating Judges have not conducted their  
3 investigation with due diligence and have not respected the  
4 charged person's fundamental rights.

5 D. Civil parties co-lawyers' joint response. On the 26th of  
6 December 2008 the co-lawyers for the civil parties filed a joint  
7 response to the appeal in which they request the Pre-Trial  
8 Chamber to dismiss the appeal as the extension order of the  
9 Co-Investigating Judges is reasonable, justifiable, and the  
10 discretion is properly exercised.

11 E. On the 9th of January 2009, the Co-Prosecutors filed their  
12 response, requesting the Pre-Trial Chamber to dismiss the appeal  
13 on the main ground that the charged person has failed to  
14 demonstrate any material change in circumstances since he was  
15 originally detained by the Co-Investigating Judges on the 14th of  
16 November 2007.

17 [9.23.45]

18 2. Examination by the co-rapporteurs. A. Diligence in the  
19 conduct of the investigation. The co-lawyers for the charged  
20 person submit that the co-investigation has not been conducted  
21 with due diligence as very little evidence has been placed on the  
22 case file relating to Mr. Ieng Sary or the other charged persons.  
23 This results in a breach of the obligation to hold a trial within  
24 a reasonable time, and the charged person cannot be deprived of  
25 this right for the more reason that he has chosen to exercise his

8

1 right to remain silent. The age and ill-health of the charged  
2 person should be taken into account.

3 The Co-Prosecutors and the civil parties submit that the  
4 accumulation of evidence on the case file since the filing of the  
5 introductory submission negates a claim of missing due diligence.  
6 In any event, the Co-Prosecutors state that a lack of due  
7 diligence on the part of the Co-Investigating Judges is not  
8 relevant to the determination of provisional detention under Rule  
9 63(a) and (b) of the Internal Rules. They further observe that  
10 the exercise of the right to remain silent has not been held  
11 against the charged person, adding that a charged person can  
12 better than anybody else assist the Co-Investigating Judges in  
13 discovering exculpatory evidence.

14 B. The co-lawyers for the charged person contend that the burden  
15 of proof is on the Co-Investigating Judges to demonstrate that  
16 the conditions of Rule 63(a) and (b) have been fulfilled, and  
17 that human rights jurisprudence has consistently found the risks  
18 which justify initial detention diminish over time.

19 THE INTERPRETER:

20 The Interpreter repeats, the President asked the guard to take  
21 the charged person to the room.

22 (Charged person exits the courtroom)

23 (The charged person re-enters the courtroom)

24 [9.29.25]

25 MR. ANG UDOM:

9

1 Mr. President, may I ask that my client sit next to us?

2 MR. PRESIDENT:

3 We agree. Now I would like the rapporteur Judge to continue  
4 reading out the report.

5 JUDGE NEY THOL:

6 Thanks, Your Honour, the President.

7 B. Burden of proof. The co-lawyers for the charged person  
8 contend that the burden of proof is on the Co-Investigating  
9 Judges to demonstrate that conditions of Rule 63(a) and (b) have  
10 been filled, and that human rights jurisprudence has consistently  
11 found the risks which justify initial detention diminish over  
12 time. The Co-Prosecutors, in contrast, state that it is the  
13 appellant who has to identify a material change of circumstance  
14 to necessitate a reconsideration of his detention or a change in  
15 detention conditions, but that the charged person failed to do  
16 so.

17 C. Well-founded reasons to believe that the charged person may  
18 have committed the crime or crimes specified in the introductory  
19 submission, Internal Rules 63(3)(a). The co-lawyers for the  
20 charged person submit that a higher level of evidence is required  
21 to satisfy 63(3)(a) after Mr. Ieng Sary has spent a year in  
22 detention while still under investigation. By failing to  
23 identify new evidence relating to whether Mr. Ieng Sary may have  
24 committed the crimes with which he is charged, to supplement the  
25 evidence already identified by the Pre-Trial Chamber, the

10

1 Co-Investigating Judges have not satisfied its burden of  
2 persuasion outlined above in relation to Rule 63(3)(a).  
3 The Co-Prosecutors and civil parties respond that, since the  
4 first detention order, the Co-Investigating Judges' judicial  
5 investigation has progressed. The evidence on the case file  
6 incriminating the charged person has increased both in volume and  
7 gravity in the recent month. Witnesses have implicated the  
8 charged person in crimes committed throughout the period of  
9 Democratic Kampuchea, and no significant exculpatory evidence has  
10 been found to undermine the determination of the existence of  
11 well-founded reasons.

12 D. Consideration of the grounds making provisional detention a  
13 necessary measure, Internal Rule 63(3)(e). The co-lawyers for  
14 the charged person submit that house arrest is a form of  
15 detention permitted by the Internal Rules, and must be  
16 considered. Reasonable conditions could be attached to house  
17 arrest in order to protect the objectives of 63(3)(b). The  
18 co-lawyers contend that the risk of flight identified by the  
19 Co-Investigating Judges is hypothetical, since this is no  
20 evidence that he undertook activity to flee or interfere with the  
21 administration of justice.

22 Conditions such as: 1, confinement to his residence; 2,  
23 confiscation of his passport; and 3, placing his residence under  
24 armed guard, would ensure the charged person's presence at trial.  
25 The co-lawyers for the charged person point out that there is no

11

1 actual risk to Mr. Ieng Sary's personal security. The  
2 Co-Investigating Judges' assumption that imprisonment is the  
3 necessary form of detention once it becomes public, that there is  
4 an alleged nexus between Duch and the charged person, is entirely  
5 based upon a presumption of his guilt, as it takes as certain  
6 that such a nexus exists. And B, the alleged guilt of Duch is  
7 borne equally by Mr. Ieng Sary.

8 Concerning the objective to preserve public order, 63(3)(b)(v),  
9 the co-lawyers for the charged person refer to reports that, in  
10 their view, demonstrate that the situation in Cambodia is  
11 actually far more stable and peaceful. The Co-Investigating  
12 Judges did not consider what the Court as a whole could do to  
13 ensure that a risk to public order would not materialise, and the  
14 co-lawyers suggest that if the extensive outreach and public  
15 relations facilities of the ECCC properly explain that house  
16 arrest is a form of detention, no threat to public order would  
17 materialise.

18 [9.36.40]

19 The Co-Prosecutors respond that no new evidence was provided  
20 since the Pre-Trial Chamber decided on the 17th of October 2008  
21 that provisional detention is necessary. The Rules do not  
22 provide for alternative forms of detention other than detention  
23 at the ECCC detention facility. Only Rule 65(1) provides a  
24 release on bail, but a charged person cannot be released on bail  
25 if any of the conditions under 63(3)(b) aren't met.

12

1 The Co-Prosecutors submit that even if a charged person were to  
2 be put under house arrest or hospital detention, this would not  
3 satisfactorily mitigate the risk to his personal safety. He  
4 would be required to come to the ECCC premises on different  
5 occasions, and it would be difficult to ensure his safety during  
6 transportation from the hospital or his house to the ECCC to  
7 attend publicly scheduled hearings. The ECCC detention facility,  
8 on the other hand, is properly equipped to provide medical  
9 assistance as required.

10 The co-lawyers for the civil parties respond that the incident  
11 that occurred between the civil parties and the co-lawyers for  
12 Khieu Samphan during a press conference after the hearing shows  
13 the high tension within the Cambodian society, and the risk for  
14 the charged person's safety should he be released. Phnom Penh,  
15 23rd of February 2009, co-rapporteurs Judge Ney Thol, Judge  
16 Katinka Lahuis.

17 [9.28.55]

18 MR. PRESIDENT:

19 The charged person, please come before the Court. Mr. Ieng Sary,  
20 would you like to make to make a statement related to this  
21 appeal, or would you like your co-lawyers to speak on your  
22 behalf?

23 THE CHARGED PERSON:

24 I am very old, and I cannot speak much, so I would like my  
25 co-lawyers to speak on my behalf.

13

1 MR. PRESIDENT:

2 I would like the defence counsel to make your oral submission  
3 concerning the appeal against the provisional detention. You  
4 have one hour and a half for this submission. You can now take  
5 the floor.

6 MR. ANG UDOM:

7 Good morning, Mr. President, Your Honours. Good morning  
8 participants. My name is Udom, and with me is Mr. Michael  
9 Karnavas. We are honoured and privileged to represent Mr. Ieng  
10 Sary. Over the next hour and a half, we will be addressing the  
11 various issues raised in our appeal against the OCIJ's extension  
12 of the provisional detention order of 10 December 2008. Our  
13 submissions will be brief on these issues because we have clearly  
14 set out our position in our appeal brief. We believe it does not  
15 benefit the Pre-Trial Chamber or the precarious state of health  
16 of our client, Mr. Ieng Sary, who have to listen to submissions  
17 about issues on which we have already filed extensive written  
18 pleadings.

19 [9.43.45]

20 We also submit that this should be the approach of Your Honours  
21 towards both the Office of Co-Prosecutors and the lawyers for the  
22 civil parties in actively limiting them to making submissions on  
23 the issues we have raised in our appeal or on issues which they  
24 have raised in their responses to our appeal, and to which we  
25 must reply.

14

1 Summary of argument. There are two areas I would like to focus  
2 on today which will be set out as the following, as per our  
3 appeal. One, continued imprisonment of Mr. Ieng Sary is not  
4 necessary because he does not fulfil any of the criteria set out  
5 in Rule 63(3)(d). Two, alternatively, if some form of detention  
6 is required due to the risk posed to the Rule 63(3) objectives by  
7 Mr. Ieng Sary, house arrest should be ordered, as: A,  
8 imprisonment is not the only form of detention permitted by the  
9 Rules; B, there are reasonable conditions of house arrest  
10 available to the Co-Investigating Judges; and C, if these  
11 reasonable conditions of house arrest would protect the  
12 objectives set out in Rule 63(3)(d), imprisonment may not be  
13 ordered, as it is no longer necessary. The criteria set out in  
14 Rule 63(3)(d) are not fulfilled.

15 Turning to the application of provisional detention, Mr. Ieng  
16 Sary is detained by the OCIJ under three of the five prongs of  
17 Rule 63(3)(b), namely that provisional detention is necessary to:  
18 one, ensure the presence of the charged person during the  
19 proceedings; two, protect the security of the charged person; or  
20 three, preserve public order. The Pre-Trial Chamber has  
21 previously held that in assessing whether there is specific  
22 evidence to support an actual risk to public order; a measure of  
23 prediction is required. There is the Pre-Trial Chamber's  
24 decision on appeal against the provisional detention order of  
25 Ieng Sary dated 17 October 2008 paragraph 112.



15

1 In fact, this measure of prediction applies to assessing all of  
2 the objectives under Rule 63. This is because when a charged  
3 person is provisionally detained under this Rule, he is detained  
4 not because of what he or she has done, but what the OCIJ or the  
5 Pre-Trial Chamber predicts that he might do or might not do, or  
6 more importantly, what may be done to him in the future. In  
7 other words, the Pre-Trial Chamber or the OCIJ must predict  
8 whether Mr. Ieng Sary, if released, will try and run away and  
9 avoid trial, or whether his release would cause a threat to  
10 public order or indeed a threat to his own safety.

11 In making this prediction regarding Mr. Ieng Sary's future  
12 conduct under Rule 63(3)(b), the Pre-Trial Chamber must be  
13 careful not to select as a matter of course the least favourable  
14 outcome for the charged person. This appears to have been the  
15 course taken in the past. For example, while there may be  
16 evidence that would support a prediction that Mr. Ieng Sary might  
17 attempt to flee, if there is evidence or factors which counter  
18 this hypothesis, in application of the principle of *in dubio pro*  
19 *reo*, the benefit must be given to the charged person, and he  
20 should not be detained under this ground.

21 [9.52.10]

22 To demonstrate how drawing inferences of the charged person  
23 operates in practice, the defence refers to the recent  
24 International Criminal Court decision on the prosecutor's  
25 application for an arrest warrant to be issued against Hassan

16

1 Ahmad Al Bashir dated 4 March 2009, paragraphs 159 to 161. In  
2 this decision, the Pre-Trial Chamber rejected the prosecutor's  
3 application for an arrest warrant for the crime of genocide.  
4 This was because although it was reasonable to conclude that  
5 Bashir had committed genocide based on the materials provided by  
6 the prosecution to the Pre-Trial Chamber, there were also other  
7 reasonable conclusions that could be drawn from the same  
8 materials. Namely, that he had not committed genocide.  
9 In these circumstances, in application of the general principle  
10 of in dubio pro reo, doubt is resolved in favour of the accused,  
11 and no arrest warrant for this crime was issued.  
12 It is also noticeable that this principle applies not simply when  
13 the prosecutor is required to prove guilt beyond reasonable doubt  
14 at trial, but also when the standard is much less. In the Bashir  
15 case, it applied when the prosecution had to simply prove that  
16 there were reasonable grounds to believe he had committed this  
17 crime under article 58 of the ICC statute. It is unclear what  
18 standard of proof applies when the pre-trial assesses whether the  
19 Rule 63(3)(b) criteria have been fulfilled, but even if the  
20 Pre-Trial Chamber need only be convinced of a reasonable  
21 likelihood, the condition will be fulfilled. Any doubt as to  
22 whether there is correct or not it must be resolved in favour of  
23 Mr. Ieng Sary.  
24 [9.56.20]  
25 In truth, there is simply insufficient evidence that

17

1 provisionally releasing Ieng Sary as an individual would pose an  
2 actual risk to any of these objectives. In fact, the OCIJ's  
3 conclusions on these matters are based on nothing more than the  
4 malevolent behaviour of other people, tenuous interpretations of  
5 the relevant evidence, and reliance upon the least favourable  
6 interpretation of hypothetical considerations as explained above.  
7 In relation to the threat to public order and the threat to Mr.  
8 Ieng Sary's safety, there are two elements in rule Rule 63(3)(b)  
9 that do not require any blameworthy conduct by Ieng Sary to  
10 justify his continued provisional detention. In truth, relying  
11 on these criteria borders on violating the presumption of  
12 innocence. They are relied upon to justify Mr. Ieng Sary's  
13 continued detention when he has not caused these factors, and he  
14 is powerless to do anything to prevent their occurrence.  
15 Therefore, these grounds for detention must be used with  
16 considerable caution.  
17 Furthermore, in their response to the defence's appeal on the  
18 predicted threat to public order caused by Mr. Ieng Sary's  
19 release, the civil parties have gone one step further than simply  
20 relying on some abstract risks to public order caused by  
21 anti-Thai riots six years ago.  
22 [9.59.50]  
23 They have relied upon the disturbance that one civil party  
24 created after the Khieu Samphan provisional detention hearing on  
25 the 3rd December 2009 (sic) in order to claim that Mr. Ieng

18

1 Sary's release would pose a threat to public order. This  
2 argument is akin to the civil parties threatening to kidnap Ieng  
3 Sary and then claiming that, as his presence at trial could not  
4 be ensured, then he should be detained. Therefore, the civil  
5 parties must not be allowed to profit from their implied threats  
6 against Mr. Ieng Sary to keep Mr. Ieng Sary in provisional  
7 detention.

8 With regards to the alleged threat to the safety of Mr. Ieng  
9 Sary, based on his alleged access to Duch, such a conclusion,  
10 again, ignores any action on behalf of Mr. Ieng Sary and instead  
11 relies upon a very simplistic view of the relationship between  
12 the charged persons. The OCIJ does not cite to any particular  
13 evidence of Duch implicating Mr. Ieng Sary from any one of the  
14 many statements given by Duch to the OCIJ. Instead, it simply  
15 considered that once it becomes public that there is an alleged  
16 nexus between the purported crimes of Duch and the allegations  
17 against Ieng Sary, those who feel they have reason to threaten  
18 Duch security may feel those same reasons now apply to Ieng Sary.  
19 And might, therefore, feel inclined to threaten him too. That's  
20 OCIJ order, paragraph 27.

21 Although the OCIJ repeated the defence's argument that no account  
22 is taken of the differences between Mr. Ieng Sary and Duch, it  
23 failed to answer this argument. Furthermore, these statements by  
24 Duch have been confidential up until now due to the principle of  
25 the confidentiality of the substance of the investigation, and so

19

1 the public would not be aware of exactly what Duch relationship,  
2 if any, was to our client, Mr. Ieng Sary. Regrettably, the OCIJ  
3 seeks to rely upon this misunderstanding by the general public of  
4 Duch relationship with Mr. Ieng Sary rather than seeking to  
5 correct it.

6 [10.05.35]

7 Essentially, Mr. Ieng Sary is being punished by being  
8 provisionally detained on this ground, because of the supposed  
9 belief by the general public, for his guilt for the crimes for  
10 which he is being investigated. He is therefore being detained  
11 due to the court of public opinion rather than the rule of law.  
12 Your Honours, the final ground of Rule 63(3)(b), under which Mr.  
13 Ieng Sary is detained is that his detention is required to ensure  
14 his presence at trial. As repeatedly stated by the defence, this  
15 finding by the OCIJ completely overlooks the fact that Mrs. Ieng  
16 Thirith, Mr. Ieng Sary's wife of fifty years, is also detained at  
17 the same ECCC detention unit. If Mr. Ieng Sary fled, then he  
18 would not be able to see his wife. This factor clearly has never  
19 been raised before other international criminal tribunals, as  
20 never before have a husband and wife been detained together. Nor  
21 has it been sufficiently considered by the OCIJ.  
22 Furthermore, as will be extensively set out by my colleague,  
23 Michael Karnavas, Mr. Ieng Sary is an old and very sick man who  
24 needs constant access to medical attention. He is not, as seems  
25 to be the impressions created by other parties to this appeal,

20

1 able to run over the border into Thailand. Detention at the ECCC  
2 is not necessary as house arrest equally ensures Mr. Ieng Sary's  
3 attendance at trial, ensures his safety, and protects public  
4 order.

5 Even if Your Honours consider that some form of detention is  
6 necessary to protect the objectives set out in Rule 63(3), as  
7 repeatedly highlighted by the defence, house arrest would  
8 adequately do so. This is permitted under the Rules, and the  
9 Cambodian Criminal Procedure Code. It also would be cheaper for  
10 the Court. It would constitute a lesser infringement of Mr.  
11 Ieng Sary's right to liberty and security of the person, of an  
12 individual who has not yet even been convicted of a crime. And  
13 would actually increase the chances of Mr. Ieng Sary being able  
14 to be tried before this Court.

15 In assessing whether detention is required, the OCIJ is under an  
16 obligation to order the least restrictive means necessary to  
17 achieve the objectives set out in Rule 63(3). Therefore, house  
18 arrest is that least restrictive means.

19 Your Honours, the OCIJ has completely and unequivocally failed to  
20 explain why house arrest or hospitalisation would not achieve the  
21 objectives of Rule 63(3)(b), nor have they disputed that house  
22 arrest or hospitalisation interferes less with the charged  
23 person's right to liberty, or health, as protected by the  
24 Cambodian constitution and international covenants to which  
25 Cambodia is a party.

21

1 [10.13.10]

2 Instead, they have simply stated that there are no reasonable  
3 conditions of house arrest which could be imposed which would  
4 guarantee the objectives of Rule 63(3)(b) from point (iii) to  
5 (v), to the same extent as provisional detention. There is the  
6 extension order, paragraph 36.

7 Your Honours, in order to explain exactly how the OCIJ has failed  
8 to properly apply Rule 63(3)(b) and to further articulate the  
9 failures of due diligence in the OCIJ's investigation, I will now  
10 hand over to my co-lawyer for the rest of the defence's oral  
11 submissions. Thank you, Your Honours.

12 MR. PRESIDENT:

13 The Chamber will take a 15 minutes break now.

14 THE GREFFIER:

15 All rise.

16 (Court recesses from 1015H to 1036H)

17 MR. PRESIDENT:

18 May the defence counsel continue their statement? Thank you.

19 MR. KARNAVAS:

20 Good morning, Mr. President. Good morning, Your Honours. Good  
21 morning to everyone in and around the courtroom. Let me briefly  
22 pick up where my colleague left off, and just note, considering  
23 the Co-Investigating Judges' assessment concerning house arrest,  
24 where they simply make a statement, that they actually make no  
25 reasonable attempt to lay out any of the reasoning behind it, how

22

1 they arrive at their conclusion.

2 They simply state their conclusion. They simply state that house

3 arrest under no circumstances can equal detention as in the

4 prison facilities here, and I think that's axiomatic. A prison

5 is a prison, a house is a house. The only difference that we're

6 suggesting here is that you have a guard outside the house.

7 But no house can ever resemble a prison facility, because in a

8 prison facility you have somebody telling you what you will eat,

9 what you will drink, who will visit you, when you will get up,

10 when you will go to bed, and so on and so forth. So that's not

11 the real question. The real question is whether conditions of

12 house arrest will protect the objectives to an acceptable extent

13 that are laid out under the Rules, under Rule 63(3)(b).

14 And we submit, and we have submitted both in our written

15 submission and today my colleague Mr. Ang Udom has indicated that

16 we quite clearly show that Mr. Ieng Sary is old, he's sick, he

17 can barely make it to the dock over there without assistance, and

18 somehow the suggestion is that he is going to be fleeing away.

19 [10.38.35]

20 And as I've indicated, the OCIJ made absolutely zero attempts to

21 analyse how it is that house arrest doesn't meet the criteria

22 that would enable and ensure that Mr. Ieng Sary is present if and

23 when trial proceedings begin. So I don't want to dwell on the

24 point, but suffice it to say it puts the defence at a reasonable

25 disadvantage to try to opine as to what was in the OCIJ's mind



23

1 when they deliberately attempt to prevent the defence from poking  
2 holes into their reasoning. They simply make a statement. We  
3 said it, therefore it must be so.

4 But let me move on to the next segment, which deals with the  
5 issue of due diligence, and as it was pointed out during the  
6 initial presentation, on the procedural history of how we got  
7 here thus far, it is quite clear that we maintain that the  
8 investigation is rather slow, it's rather incomplete, and we will  
9 be filing submissions suggesting that it is not even properly  
10 being conducted, but that's neither here nor there for today's  
11 presentation.

12 But if I could just, a moment, go back to the health issue, and  
13 to suggest the issue of due diligence, and the fact that the OCIJ  
14 is seized with Mr. Ieng Sary. They are master of life and death,  
15 if you will, concerning Mr. Ieng Sary while they are in this  
16 investigative stage. However, it is very clear that once Mr.  
17 Ieng Sary goes to the hospital, they lose complete control of Mr.  
18 Ieng Sary because the hospital determines what the rules are,  
19 they disregard orders by the Co-Investigating Judges, they  
20 disregard any orders from the Pre-Trial Chamber, and we are in a  
21 position, as his lawyers, not to have access to his full medical  
22 history.

23 We don't know who all his lawyers (sic) are. We do know, from  
24 the good doctor who is over here, that there is this committee,  
25 that we daresay, if the OCIJ is going to seize Mr. Ieng Sary and

24

1 control who he sees, what sort of medication he receives, who are  
2 his treating physicians, whether he will be tested, then the OCIJ  
3 needs to share that material to the defence so we can be due  
4 diligent.

5 And our -- in the function that we fulfil, to ensure that  
6 actually tests are being done, the right ones, and of course it's  
7 regrettable that we didn't have the opportunity to hear Dr.  
8 Falke, because he would be able to tell us the sort of testing  
9 that is expected to take place once an accused is before the  
10 United Nations detention facility unit in The Hague.

11 [10.42.20]

12 So we do maintain that for some reason or other, this issue of  
13 health will continue to be on the forefront, and as part of the  
14 due diligence, why are we unable to have these medical reports?  
15 Why are we unable to see whether he is getting the proper medical  
16 treatment? Obviously we cannot order an independent evaluations  
17 because the OCIJ is seized with Mr. Ieng Sary. We cannot order  
18 that a psychiatric evaluation be done because that, again, is up  
19 to the OCIJ, if and when they feel it is necessary.

20 So we believe this is part and parcel of the fair trial rights  
21 that Mr. Ieng Sary enjoys and which I was presently surprised to  
22 find in the prosecution's recent submission where they quite  
23 eloquently state, and rightly so because that is the law after  
24 all -- and when they are right on the law we will commend them  
25 publicly, and repeatedly -- that the fair trial rights apply

25

1 throughout the proceedings, not simply at trial, but even at the  
2 pre-trial stage.

3 So we commend them and we believe that part and parcel of the  
4 fair trial rights is the right to take care of an individual who  
5 is in custody and when the custodian decides -- or is the  
6 decision maker, I should say as to the health and well-being of  
7 that individual.

8 Now, let me move on to the other issue, which is perhaps the more  
9 problematic issue with due diligence, because we maintain that  
10 the investigative process has not been carried on sufficiently,  
11 or speedily enough. The quality, as I said, we will deal in  
12 another time. But most recently, and this is part and parcel of  
13 this issue that was raised, most recently we see that there is an  
14 ever-growing issue concerning corruption in the Courts, in the  
15 administrative section, and it's not something that can be taken  
16 lightly, and I will exactly tie it in to show the nexus between  
17 due diligence and this issue.

18 [10.44.55]

19 That we had none other than the highest UN official, Knut  
20 Rosenhaug, state that the chief administrator of this  
21 institution, Sean Visoth, had been implicated in a report issued  
22 by the German government based on representations made by Knut  
23 Rosenhaug. These are the reports that the German delegation made  
24 --

25 MR. PRESIDENT:

26

1 The lawyer please.

2 MR. AHMED:

3 May I have your indulgence, please, Your Honour. I don't mean to  
4 interrupt my friend's arguments, but the two issues, the issue of  
5 health and the issue of corruption do not lie within the four  
6 corners of this appeal that my learned friend has filed. The  
7 issue of health has been disposed of by Your Honours in four  
8 applications that were dismissed, and Your Honours were pleased  
9 to hold on the 30th of March, just two days ago, that health  
10 issues do not squarely arise substantively in this appeal.

11 Secondly, the question of corruption was nowhere raised, nowhere  
12 argued by my learned friend before the investigating judges,  
13 therefore they were not in a position to dispose thereof. And as  
14 we speak, it's public knowledge that an application to go into  
15 the question of corruption is before them.

16 [10.46.15]

17 So Your Honours, it would not be appropriate for my learned  
18 friend to dwell on this that are sub judice before the Court  
19 below. This is my submission. And the health issue, as I  
20 submitted, doesn't arise in the facts of this case. I apologise  
21 for this intervention.

22 MR. KARNAVAS:

23 And as I expected, the interruption from my colleague, who makes  
24 the habit of interrupting rather than making his submissions when  
25 his turn comes, let me just tie in why it's relevant. Because

27

1 two days ago, you had the Prime Minister, Mr. Hun Sen, indicate  
2 quite clearly that he was disappointed with the Japanese  
3 government providing \$200,000 I believe it was, for the payment  
4 for the salaries, which met half the salaries of the Cambodian  
5 staff. You have this corruption issue that is front and centre.  
6 Donors are shy to come up and step up to the plate to make  
7 contributions.

8 And why is this important? And it ties into our due diligence  
9 aspect, because we don't know if, six months or a year from now,  
10 this institution will be present, will be functional --

11 JUDGE LAHUIS:

12 Mr. Karnavas, I believe you're not responding on the interruption  
13 made by the Co-Prosecutors, and you're allowed to do so, and then  
14 we'll deliberate whether we allow you to continue.

15 MR. KARNAVAS:

16 Well, I was, Your Honour, responding, with all due respect,  
17 because I believe it's part and parcel of the issue. The budget,  
18 the corruption, whether we will be here. If the Investigative  
19 Judges are not conducting the investigation in a due diligent  
20 matter, and if the institution is likely not to be in existence  
21 six months or a year from now, then I daresay, with all due  
22 respect, it is -- this is a consideration for the Pre-Trial  
23 Chamber to take in determining whether an individual should  
24 continue to be detained when the likelihood of this institution  
25 being able to deliver the impartial and independent justice that

28

1 it has set out, and whether it has the funding to continue. And  
2 that's why we believe --

3 JUDGE LAHUIS:

4 Thus the Pre-Trial Chamber has to understand that the reasoning  
5 you're providing now is part of the due diligence reasoning which  
6 you put in the appeal?

7 MR. KARNAVAS:

8 That's correct. That's correct.

9 JUDGE LAHUIS:

10 Okay.

11 MR. KARNAVAS:

12 We believe it's part and parcel -- the due diligence has to do  
13 with the investigation. If the investigation is slow, and now  
14 with this corruption, because we have an application for the  
15 investigative Judges to investigate the corruption within this  
16 administration, not for the purposes --

17 JUDGE LAHUIS:

18 Perhaps I may -- before you go, continue, I would like to have  
19 the Co-Prosecutors respond on the response you've raised that  
20 this is part of the due diligence reasoning which you filed in  
21 the appeal, because, as I understand, the Co-Prosecutors say that  
22 the reasoning you're providing now is not part of the appeal.

23 MR. KARNAVAS:

24 And if I may be allowed just thirty seconds of indulgence to  
25 finish my thought. What we're suggesting is, because now the

29

1 Co-Investigating Judges will need to do investigations to see  
2 what, if any, part of their investigative process has been  
3 tainted, that means that the conclusion of the investigation will  
4 take even much more longer, so if they're not being able to be  
5 due diligent at this point, how can they be due diligent when  
6 they have to have this extra burden of looking into the matters  
7 not for the purposes of prosecuting a wrongdoer, but for the  
8 purposes of seeing, and we will be able to show, to what extent,  
9 if any, the evidence that has come before them, or the efforts  
10 that have been made that they're going to be relying on in making  
11 their decisions at the end has been tainted.

12 [10.50.15]

13 And we will be insisting that an investigation be done, by them,  
14 for those purposes. And I don't think that they can certainly  
15 shy away and say this is somebody else's burden. They have the  
16 burden because it's the OCIJ that has the obligation to ensure  
17 that the investigative process is fair, and what we're saying --  
18 that this will complicate matters. That's why it's part and  
19 parcel of the due diligence argument. And I hope I was clear,  
20 Your Honour.

21 JUDGE LAHUIS:

22 Will the Co-Prosecutors respond?

23 MR. AHMED:

24 Your Honour, it's an appeal of 19 pages, and the word  
25 'corruption' doesn't arise even once in this appeal. As a matter

30

1 of fact, it's a different charged person before you, Nuon Chea,  
2 who has raised this matter before the Co-Investigating Judges on  
3 the 26th of March, which my learned friends for the first time  
4 have joined in the form of an intervention application joining  
5 Nuon Chea in respect of that argument before the Investigating  
6 Judges.

7 No application, to my recollection, till today, filed by my  
8 learned friend has raised the issue of corruption before this  
9 Court. So in this appeal of 19 pages, not a word of corruption,  
10 and I draw Your Lordships' attention to 75(4) of the Internal  
11 Rules, where in February 2008, all of Your Honours sitting in the  
12 plenary decided that the appellate may not raise any matter of  
13 fact, or of law, during the hearing, which are not already set  
14 out in the submission on appeal.

15 So my respectful submission is: this was never raised, and in  
16 any case on this last date of hearing, when Your Honours are  
17 finally disposing of an appeal, my learned friend could have  
18 given us an indication even yesterday by an email that this issue  
19 is being raised. We could have responded.

20 And Your Honours would recall in the Khieu Samphan case on the  
21 20th of October 2008 you very correctly said, and I quote, if  
22 Your Honours permit me to read that, in just one sentence: "The  
23 Pre-Trial Chamber finds that the defence is barred by Internal  
24 Rule 75(4) from raising additional matters of fact or of law at  
25 this stage of the hearing, the final day of the proceedings,



31

1 which are not already set out in submissions on appeal." That's  
2 my most respectful submission.

3 MR. KARNAVAS:

4 If I may just very briefly respond. As I've indicated, it's part  
5 and parcel of the issue. Now, whether new developments have  
6 arisen, that's another story. Only two days ago, who could have  
7 predicted that Mr. Hun Sen would have made the remarks that he  
8 did in fact make, which again calls into question whether this  
9 institution will be in place. We believe that all of these facts  
10 are tied into the due diligence issue because the question that  
11 we're raised in due diligence is that it is taking so long, and  
12 when the process takes so long --

13 JUDGE LAHUIS:

14 I believe that you're repetitious now, Mr. Karnavas.

15 MR. KARNAVAS:

16 All right.

17 JUDGE LAHUIS:

18 And I only allow you to respond on the remark made by the  
19 Co-Prosecutors that it was not announced before this appeal.

20 MR. KARNAVAS:

21 Well, because we don't see it as new facts. We see it as part  
22 and parcel, and if we look at the decision on appeal against the  
23 provisional detention of Mr. Ieng Sary on the 17 October 2008, on  
24 paragraphs 68 and 69, but 69 in particular, you do indicate that  
25 in deciding if the grounds for provisional detention, as set out

32

1 in Rule 63(3) are met, the Pre-Trial Chamber has taken into  
2 account the written pleadings of the parties and their oral  
3 submissions, the evidence they have submitted, and the whole case  
4 file of the Co-Investigating Judges up to the date of the  
5 hearing.

6 [10.54.10]

7 Now, having said that, I wish to put on the record that this  
8 matter was indeed filed on the 26th, as my learned friend  
9 indicated, by the Nuon Chea, and we commend them for taking the  
10 lead on this issue. We then joined in on their submission, and  
11 adopted, in whole, unreservedly, all of their submissions, and  
12 sadly enough, to this date, days later, it is not in the  
13 Co-Investigating Judges -- it is not in the case file.  
14 However, that calls into another question that we have raised in  
15 the past: why does it take so long? But we maintain it is out  
16 there, they're aware of it, it's part and parcel of the issue,  
17 and therefore we're relying on what you've indicated here, on  
18 paragraph 69, to suggest that since this is part and parcel of  
19 the issue of due diligence we're not raising new facts. The  
20 issue of the budget. If the Co-Investigating Judges have less  
21 money to conduct their investigation, it's going to (indistinct).

22 JUDGE LAHUIS:

23 Mr. Karnavas, you're going into the matter again.

24 MR. KARNAVAS:

25 (Microphones overlapping)

33

1 JUDGE LAHUIS:

2 This was about the intervention and you were allowed to respond  
3 to the issues raised by the Co-Prosecutor and I believe you did.

4 MR. KARNAVAS:

5 Thank you very much, Your Honour. And I apologise if I'm being a  
6 little bit disputatious.

7 JUDGE DOWNING:

8 Mr. Karnavas, we will permit you to proceed on the basis of  
9 discussions concerning medical issues, but no other issues in  
10 respect of which you have not given direct notice, so there will  
11 be no discussion about issues of budget, and issues of  
12 corruption. They form, now, the basis of other applications  
13 which are before this Court.

14 MR. KARNAVAS:

15 Thank you, Your Honour. With that ruling, I believe that the  
16 issue of health and care and the ability for the lawyers to have  
17 access to Mr. Ieng Sary, and for the hospital to comply with the  
18 issues of the OCIJ or the Pre-Trial Chamber, I believe we have  
19 sufficiently covered them. And in light of your ruling, because  
20 we do believe that the issues that I did -- that the matters that  
21 I raised, which are part and parcel of the issue, cannot and  
22 should not simply be ignored because we may be giving the wrong  
23 impression, perceptually, and even though these matters have been  
24 seized for a different purpose, it would our respectful  
25 submission at this time, Your Honour, that the proceedings

34

1 continue to what has already been allowed thus far, and argued on  
2 behalf of Mr. Ieng Sary thus far, but that as I understand it you  
3 will return in June.

4 We could have a continuation of this hearing, in other words not  
5 make a decision, and allow the prosecution to have sufficient  
6 notice, although I'm quite comfortably sure that they are well  
7 aware of what is going on, but that would give them sufficient  
8 notice, because we do believe that the issue of whether the  
9 investigation will take on a life of its own and take an extended  
10 period of time, or whether there will be an insufficient budget  
11 for this institution to be around at some point. We do believe  
12 these are issues that you must consider in determining whether  
13 Mr. Ieng Sary should continue to be at the detention unit over  
14 here, or whether a less restrictive measure, such as house  
15 arrest, be issued which would ensure that he's available if and  
16 when the trial -- the investigation is completed, and depending  
17 on that -- those results, whether a trial is going to commence.

18 [11.01.25]

19 So that's why we believe that these are relevant issues, or  
20 relevant developments in this issue of due diligence. We do  
21 believe that it's taking a long time for this individual, and we  
22 do believe, and as I made my argument last time I appeared, the  
23 detention should not be a form of punishment, it should not be  
24 viewed as a way of getting a sentence out of someone prior to  
25 trial, especially when, perhaps, his health is precarious and

35

1 perhaps he may not be around for the trial so at least there may  
2 be some satisfaction, by some, that at least a very few years of  
3 his life were spent in detention waiting to be trialled, having  
4 been branded as a criminal, and having been essentially tried and  
5 convicted in the court of public opinion as a criminal for the  
6 crimes for which he's being investigated at this point.  
7 Because we do believe, in spite of what we read in the press, or  
8 in spite of what we know from reading the history books, he has  
9 certain rights, and those are the rights to be presumed rights,  
10 the fair trial rights which the prosecution so eloquently put in  
11 their last motion, which are based on, and ingrained in the  
12 Cambodian constitution and part of this institution's rules.  
13 So with those submissions, Your Honour, I have nothing further at  
14 this point in time and I appreciate your indulgence in allowing  
15 me to at least articulate the reasoning behind -- I understand  
16 your position, I accept it, however I felt compelled that, at  
17 least in my interpretation, that this was an issue that's part  
18 and parcel to the issue that we have raised, and that's why we  
19 raised it at this point in time and we appreciate, again the  
20 indulgence that you've shown and the time that you have given us  
21 to have this hearing. Thank you.

22 MR. PRESIDENT:

23 May invite the Co-Prosecutors to make their oral submissions.  
24 You have one and a half hours. The floor is yours.

25 [11.03.40]

36

1 MR. TAN SENARONG:  
2 Mr. President and Your Honours, in the names of the  
3 Co-Prosecutors of the Extraordinary Chambers in the Courts of  
4 Cambodia in support of the provisional detention of the charged  
5 person Ieng Sary, on behalf of the prosecution I would like to  
6 make the following submission.  
7 Due to the brutal and inhumane nature and gravity of the crimes  
8 committed by senior leaders and those most responsible during the  
9 period of Democratic Kampuchea on the innocent Cambodian people,  
10 and in order to find justice for those victims with a commitment  
11 to eradicate the practice of impunity in the Cambodian society,  
12 the royal government of Cambodia and the United Nations agreed to  
13 establish the Extraordinary Chambers in the Courts of Cambodia to  
14 prosecute crimes committed during the period of Democratic  
15 Kampuchea from 17 April 1975 to 6 January 1979.  
16 On the 10th July 2006, the office of the Co-Prosecutor of the  
17 Extraordinary Chambers in the Courts of Cambodia commenced its  
18 mandate, and conducted preliminary investigations into the crimes  
19 committed during the period the Democratic Kampuchea was in  
20 power. On 18th July 2007, the Co-Prosecutors submitted an  
21 introductory submission, in which Ieng Sary was one of the five  
22 suspects, to the Co-Investigating Judges and requested them to  
23 arrest and detain Ieng Sary provisionally, and the other four  
24 suspects, for the purpose of judicial investigations.  
25 After some months of investigations, the charged person Ieng Sary

37

1 was arrested and brought before the tribunal by the arrest  
2 warrant of the Co-Investigating Judges dated 8 November 2007. On  
3 12th November 2007 the charged person Ieng Sary appeared before  
4 the Co-Investigating Judges. Subsequently, the Co-Investigating  
5 Judges issued a provisional detention order for the charged  
6 person Ieng Sary dated 14 November 2007.

7 The charged person Ieng Sary was charged with crimes against  
8 humanity and grave breaches of the Geneva Convention dated 12th  
9 August 1949, the crimes defined and punishable under articles 5,  
10 6, 29new, 49new of the Law on the Establishment of the  
11 Extraordinary Chambers in the Courts of Cambodia dated 27 October  
12 2004. We all know that civil crimes are punished internationally,  
13 including crimes against humanity, genocide and war crimes. The  
14 international community has been anxiously expecting the charged  
15 person, who has seriously violated the international criminal  
16 law, be brought before the Court for prosecution.

17 Although it is imperative to balance the fundamental rights of  
18 the charged person there are other necessary factors which the  
19 Courts have to resolve and decide for crimes which are the  
20 concerns of the international community.

21 [11.08.05]

22 Mr. President, and Your Honours of the Pre-Trial Chamber, the  
23 decision to extend provisional detention for the charged person  
24 Ieng Sary has been objected by the charged person and his  
25 co-lawyers, and subsequently they made an appeal against the

38

1 extension order for provisional detention in the appeal dated 10  
2 December 2008. Today before the Chamber, the charged person Ieng  
3 Sary and his co-lawyers still --

4 MR. ANG UDOM:

5 Your Honours, may the Chamber all Mr. Ieng Sary to rest because  
6 he can longer sit, and we can continue the proceeding without his  
7 presence.

8 MR. PRESIDENT:

9 He is allowed. He is allowed to rest.

10 MR. KARNAVAS:

11 And just for the record, Your Honours, this is with his consent.  
12 In other words, he's consenting to be absent. So I just want to  
13 make sure that it was very clear on the record. Thank you.

14 (Charged person exits the courtroom)

15 [11.09.35]

16 MR. PRESIDENT:

17 So the prosecution may continue with the statement.

18 MR. TAN SENARONG:

19 Today, before the Chamber, the charged person Ieng Sary and his  
20 co-lawyers still maintain their position on the appeal, and  
21 request the Pre-Trial Chamber to reverse the extension order for  
22 provisional detention dated 10th November 2008 by the  
23 Co-Investigating Judges, and request the Pre-Trial Chamber to  
24 issue an order to modify the conditions of provisional detention  
25 from the detention facility to house arrest under strict and



39

1 necessary conditions imposed by the Pre-Trial Chamber. The  
2 co-lawyers submit that requirements of detention in Rule 63(3)(b)  
3 are not met; the Co-Investigating Judges failed to exercise due  
4 diligence; the fundamental rights of the charged person Ieng Sary  
5 were not sufficiently observed, and no other alternative modes of  
6 detention, such as house arrest were considered.

7 The Co-Investigating Judges have not exercised due diligence in  
8 conducting their investigation since this charged person's arrest  
9 in November 2007. On this matter, the prosecution would like to  
10 submit that the Co-Investigating Judges have an obligation to  
11 issue an order for the extension of provisional detention if  
12 deemed appropriate. However, the Co-Investigating Judges are not  
13 obligated to present additional evidence in the case file to  
14 support their decision in extending the provisional detention.

15 It is apparent that in the case file of the charged person Ieng  
16 Sary the evidence has increased both in volume and gravity,  
17 however in the appeal there are numerous mentioning that the  
18 Co-Investigating Judges failed to exercise due diligence and the  
19 fundamental rights of the charged person were not sufficiently  
20 respected, and that the Co-Investigating Judges failed to add  
21 additional evidence to the case file in order to support their  
22 extension order for provisional detention.

23 [11.12.30]

24 Moreover, the co-lawyers submit that the Co-Investigating Judges  
25 completely ignored the request to examine the aforementioned

40

1 issues that were raised. The submission by the co-lawyers is  
2 therefore inappropriate. Mr. President and Your Honours of the  
3 Pre-Trial Chamber, an order to extend a provisional detention  
4 order the charged person Ieng Sary was made by the  
5 Co-Investigating Judges. The Co-Investigating Judges had  
6 fulfilled the conditions for detention in compliance with Rule  
7 63(3)(a) in its fullness and strictness, and there is no  
8 infringement or failure in performing their duties.  
9 The Co-Investigating Judges based their decision on the existing  
10 facts and other evidence in the case file for the extension of  
11 the provisional detention. The Co-Investigating Judges relied on  
12 the existing facts and evidence in the case file which led them  
13 to believe that there is well-founded reasons to believe that the  
14 charged person Ieng Sary may have committed the crimes during the  
15 period of Democratic Kampuchea from 17th April 1975 to 6th  
16 January 1979.  
17 The extension of the provisional detention for the charged person  
18 Ieng Sary is a necessary measure in order to: (i) prevent the  
19 charged person from exerting pressure on any witness or victim,  
20 or prevent any collusion between the charged person and  
21 accomplices for the crimes committed under the jurisdiction of  
22 the Extraordinary Chambers. (ii) preserve evidence or prevent  
23 its destruction. (iii) ensure the presence of the charged person  
24 during the proceedings. (iv) protect the security of the charged  
25 person; and (v) preserve public order.

41

1 The five grounds for detention under Rule 63(3)(b) are  
2 disjunctive. There is no requirement that the Co-Investigating  
3 Judges finds that every ground is satisfied before they consider  
4 that provisional detention is a necessary measure, or that its  
5 extension is warranted. On the contrary, should they consider  
6 that any one of the five grounds exist, the test for detention is  
7 met.

8 [11.15.20]

9 We submit that the case file today contains evidence capable of  
10 satisfying an objective observer, at this stage of investigation,  
11 that the appellant may have committed the crimes for which he is  
12 currently under investigation. Additionally, three of the five  
13 disjunctive conditions under Rule 63(3)(b) are still fulfilled,  
14 thereby rendering provisional detention a necessary measure.

15 Specifically, the charged person's provisional detention is  
16 necessary: (i) to ensure his presence during the proceedings;  
17 (ii) to protect his security; and/or (iii) to preserve public  
18 order. In supporting the above view, I would like to submit to  
19 the Pre-Trial Chamber the reasons for extending the provisional  
20 detention of the charged person Ieng Sary as follows: the gravity  
21 of the crimes charged, the complexity of the case and the extent  
22 of the ongoing investigations being carried out by the  
23 Co-Investigating Judges.

24 The charged person is faced with several charges in relation to  
25 the amount of liability of the joint criminal enterprise, of its

42

1 extended and systematic character, and such provisional detention  
2 is warranted under the Internal Rules. Regarding the review on  
3 the assessment of the reasonable nature of a provisional  
4 detention, the ICTY has taken into consideration the length of  
5 provisional detention which is much longer than the reasonable  
6 length of time in light of the gravity of the crimes committed.

7 [11.17.40]

8 In order to prevent the charged person from exerting pressures on  
9 any witness or victim, the Co-Investigating Judges acknowledged  
10 the risk that if the charged person Ieng Sary were to be  
11 released on bail, he would definitely intend to exert pressure on  
12 witnesses or victims. The Co-Investigating Judges  
13 acknowledgement is appropriate in light of the evidence in the  
14 case file which supports this view. Moreover, Ieng Sary's senior  
15 position during the Democratic Kampuchea period, during the  
16 exiles, and during subsequent Khmer Rouge moments, as well as  
17 during the recent political movements have shown that Ieng Sary  
18 is a man of power for the most part of his adulthood. Even today  
19 he still enjoys his popular supports from the residents of the  
20 Pailin area, and those areas.

21 Everyone is aware that the charged person Ieng Sary and his  
22 family have great influence spreading over the areas of Pailin  
23 and Malai, and also in Anlong Veng, and a number of his relatives  
24 are still residing in those locations. Some potential witnesses  
25 and victims are also residing in those locations. There appears

43

1 an environment of fears spreading around to prevent the  
2 witnesses' participation before the Extraordinary Chambers for  
3 fear of revenge and/or intimidation.  
4 Moreover, it should be noted that there has been no plan to  
5 protect those witnesses in the context of the general situation  
6 in Cambodia, and there have been numerous violent incidents and  
7 ammunitions, explosives still scattered around throughout  
8 Cambodia. Therefore, to ensure the investigations by the  
9 Co-Investigating Judges, it is imperative to prevent any  
10 pressures being exerted on any witness or victim.  
11 Moreover, Ieng Sary has access to the entire case file, including  
12 written records of witnesses' statements and complaints. Hence,  
13 if the Pre-Trial Chamber decides to release Ieng Sary on bail, it  
14 will cause witnesses and victims being fearful. To prevent such  
15 risk, it is necessary to expand the provisional detention of the  
16 charged person Ieng Sary.  
17 During the investigation phase it is crucial to preserve evidence  
18 or to prevent its destruction. This includes the testimonies of  
19 witnesses who know about the events they saw or heard. Were the  
20 charged person be released on bail, these witnesses would be  
21 fearful of his presence and then not participate in the court  
22 proceedings. Omission of such participation is a great loss of  
23 important evidence. Thus any possible interference on any  
24 witness as mentioned about means taking away evidence from the  
25 Tribunal being in progress. Based on this reason, the extension

44

1 of the provisional detention of the charged person Ieng Sary is a  
2 necessary measure.

3 On 17 October 2008, the Pre-Trial Chamber issued a reasoned  
4 decision upholding the necessity of his pre-trial detention.  
5 This announcement has been made after evidence in the case file  
6 has been reviewed at that time. The Co-Prosecutors submit that  
7 the rationale outlined in the detention appeal decision is still  
8 valid up to this date, and should be upheld, and house arrest, as  
9 sought in the appeal, is neither a viable alternative to  
10 detention at the ECCC detention facility, nor will it protect the  
11 objectives of Rule 63(3)(b).

12 The Co-Prosecutors therefore request the Pre-Trial Chamber to  
13 hold that conditions of detention under Rule 63(3)(b)(i) to (v)  
14 are and continue to be satisfied. Thereby justifying an extension  
15 of the appellant's detention. At this stage, the charged person  
16 Ieng Sary is well aware that his alleged offences are civil  
17 crimes, internationally condemned, and if convicted he could face  
18 a life imprisonment.

19 [11.23.15]

20 This is the risk he may be willing to take if he were to be  
21 released on bail. Moreover, even if the charged person were to  
22 be placed under house arrest, this would not satisfactorily  
23 mitigate risk to his personal safety. It would be difficult to  
24 ensure his safety during transportation from his house to the  
25 ECCC to attend publicly scheduled hearings. Based on this

45

1 reason, it is necessary to continue the charged person Ieng  
2 Sary's detention to ensure his presence during the court  
3 proceedings.

4 At this juncture, everyone is well aware that the charged person  
5 Ieng Sary's provisional detention at the ECCC detention facility  
6 has been extended by the Co-Investigating Judges. Information on  
7 the extension of provisional detention has been known publicly  
8 and has been well received and supported by the public, the  
9 victims, as well as their families. Specifically since the  
10 commencement of preliminary investigation, the Co-Prosecutors  
11 have received huge numbers of complaints, in excess of 3000, or  
12 almost 4000.

13 This is clearly a testimony indicating that both victims and  
14 their families still remember and can never forget the suffering  
15 they received during the period the Democratic Kampuchea regime  
16 in power, at which time, Ieng Sary was the deputy Prime Minister  
17 and member of the Central Standing Committee of the Communist  
18 Party of Kampuchea. If, at this juncture, the Pre-Trial Chamber  
19 decides to release this charged person on bail, the security risk  
20 on the charged person can occur, due to the feelings of anger and  
21 revenge by the public, the victims, and their families, and these  
22 feelings arise from their dissatisfaction with the event, and  
23 this will place the charged person in an insecure situation.

24 [11.25.55]

25 Therefore, in order to assure the safety of the charged person,

46

1 it is necessary to continue his provisional detention. Although  
2 the crimes have been committed 30 years ago, the victims and  
3 their families still remember and cannot forget what happened to  
4 them, and they still hold anger inside their hearts in respect of  
5 the serious nature of the facts which occurred during that  
6 period.

7 Having a glimpse at the current social situation in Cambodia, one  
8 can say it still has its fragile characteristic, and this  
9 requires consideration. If, at this juncture, the Pre-Trial  
10 Chamber decides to release the charged person on bail, it can  
11 cause dissatisfaction from the public, the victims, and their  
12 families, and this can lead to public and social disorder.

13 Therefore, it is necessary to continue provisional detention of  
14 the charged person Ieng Sary.

15 Your Honours of the Pre-Trial Chamber, before this Chamber, the  
16 co-lawyers of the charged person only make submissions regarding  
17 the issue of their client's health condition and seniority, and  
18 request the Pre-Trial Chamber to release their client on bail,  
19 based on these conditions.

20 I would like to say that they repeat the same thing about the  
21 health condition and the old age of their client as mentioned by  
22 my colleague. This means even his lawyers clearly believed their  
23 client did commit the crimes.

24 MR KARNAVAS:

25 (Not interpreted)



47

1 -- outside the Co-Investigating Judges' finding when it indicated  
2 that my client was as risk to witnesses or was going to be  
3 tampering with evidence. I didn't object to that. I was going  
4 to raise it at some point, because he went way outside. And that  
5 is unacceptable. But at this point, I think this is way beyond  
6 the pale, and I will not sit here and allow the prosecutor to  
7 make these sorts of arguments at this setting. This is not the  
8 purpose for it.

9 [11.28.35]

10 MR. TAN SENARONG:

11 I would like to continue. And the belief that the extension of  
12 provisional detention is a necessary measure if they seek the  
13 modification of detention from the ECCC detention facility to  
14 house arrest. The procedures of the ECCC do not clearly specify  
15 the standard by which release on bail can be granted on health  
16 grounds. The Law on the Establishment of the Extraordinary  
17 Chambers states that conditions for the arrest and the custody of  
18 the accused shall conform to existing law in force. Article  
19 33(new) of the ECCC Law.

20 The existing laws encompass the ECCC Internal Rules, and the Code  
21 of Criminal Procedure of the Kingdom of Cambodia. The Internal  
22 Rules of the Extraordinary Chambers indicate that an accused may  
23 be released when conditions for detention are no longer met and  
24 none of the conditions relates to health issues. Rule 64(1) of  
25 the ECCC Internal Rules. The Internal Rules also stipulate that

48

1 the Court may order for medical or psychological evaluation to  
2 determine whether the accused is physically and mentally fit to  
3 stand trial or for any other reasons.

4 [11.30.20]

5 There are the Internal Rules which state stipulate best, the  
6 Article 32 of the Internal Rules. The Code of Criminal Procedure  
7 of the Kingdom of Cambodia mentions the issue as well. I just  
8 want to show the differences between the Code of Criminal  
9 Procedure of the Kingdom of Cambodia, about the stages of the  
10 pre-trial, and a presiding Judge may order a health examination  
11 on the accused to determine whether the accused is fit for the  
12 arrest.

13 It is in Article 309 of the Code of Criminal Procedure of the  
14 Kingdom of Cambodia. Due to the gap in the rules of procedure of  
15 the Extraordinary Chambers it is necessary to seek guidance in  
16 the procedural standards established at international level.  
17 Article 12 of the agreement between the royal government of  
18 Cambodia and the United Nations. Therefore the Co-Prosecutors  
19 submit that house arrest is unnecessary as the conditions in the  
20 detention facility remain appropriately suitable for his  
21 detention. In contrast, house arrest cannot provide any better  
22 facilitating means than the ECCC detention facility. The ECCC  
23 detention facility has been established to conform to the  
24 standard, and equipped with tools and equipments to provide  
25 service to the charged person.

49

1 Moreover, this detention facility attracts media attention, and  
2 during the process of its construction, consultation was made  
3 with the Red Cross committee on the appropriate overview and  
4 sketch of the building.  
5 As we all know, this detention facility has five doctors and four  
6 nurses for 24 hour medical care, with an ambulance on standby.  
7 Therefore, the release on bail could only be granted on  
8 humanitarian grounds, that is in a case where a medical expert has  
9 a terminal serious health condition which cannot be treated, and  
10 that person will only live for only two or three more months, and  
11 that, Your Honour, as in the condition of the Germans case, when  
12 the two Germanys joined together. The General Honecker was  
13 arrested and placed in detention. There was an objection to this  
14 former General Secretary of the Community Party of East Germany,  
15 and there a medical expert confirmed he will die in three months.  
16 After the confirmation from an expert like that in such a case,  
17 the Federal Court allowed him to release on bail and to live with  
18 his family in Chile. Three months later, Mr Erich Honecker  
19 passed away. So the conditions in the case files of the charged  
20 person we cannot accept their request for release on bail, and to  
21 the house arrest.  
22 [11.34.45]  
23 Also the co-defence lawyers cannot prove that Ieng Sary's life is  
24 at its final stage and that it may cause his death suddenly due  
25 to his health and I've addressed earlier regarding the

50

1 Secretary-General of the East German Community Party, Erich  
2 Honecker. The prosecution also submits that if the charged  
3 person is under house arrest, or even at the hospital, there are  
4 no material -- because it is not appropriate that he has to  
5 appear, and can be transported to appear before the Chambers of  
6 the ECCC.

7 In conclusion, in the name of the prosecution of the  
8 Extraordinary Chambers in the Courts of Cambodia I request and  
9 submit respectfully to the Pre-Trial Chamber to uphold the  
10 extension order for provisional detention dated 10 November 2008  
11 by the Co-Investigating Judges.

12 MR. PRESIDENT:

13 The international Co-Prosecutor. How long do you need to make  
14 your oral submission?

15 MR AHMED:

16 Your Honour, upwards of 15 minutes, and less than 30 minutes.  
17 Your Honours may be minded to take a break at this stage and then  
18 I could resume immediately after lunch, but I'm subject to Your  
19 Honours' discretion.

20 MR. PRESIDENT:

21 The international Co-Prosecutor can make your oral submission.

22 MR AHMED:

23 May it please Your Honours. Your Honours are sitting today in  
24 this oral hearing to determine a detention extension and appeal,  
25 and I stress detention extension appeal. This is not an appeal

51

1 of detention from the first time, when my learned friend's client  
2 was arrested in November 2007. That matter, that original  
3 detention, was decided by this Chamber on the 17th of October  
4 2008.

5 On the 10th of November 2008, what the Investigating Judges did,  
6 they rule that there was no material change in circumstance  
7 between the 17th of October 2008 (sic) and the 10th of November  
8 2008 for them to reconsider conditions of detention, and  
9 essentially relying on Your Honours' assessment of the conditions  
10 of detention in Your Honours' order of 17th of October 2008, they  
11 continued the detention of this charged person for another period  
12 of one year.

13 [11.38.40]

14 Therefore, what was before the Investigating Judges was Your  
15 Honours' very recent assessment, and objections of my learned  
16 friend of the 28th of October 2008. And on the basis of those  
17 two documents, the Investigating Judges extended the detention.  
18 Therefore, the questions that arise in this appeal are very  
19 narrow and focused. Whether the Investigating Judges rightly  
20 extended the detention on 10th of November on the basis of the  
21 fact that there were no material change in circumstances since  
22 the 17th of October 2008, when you had already determined that  
23 well-founded reasons existed for any reasonable observed to  
24 believe that this charged person may have committed the crimes  
25 for which he has been charged, which is 63(3)(a) condition, and

52

1 also that the last three limbs of Rule 63(3)(b) remain satisfied  
2 for him to be continued in detention.

3 My learned friend had raised the issue of health as a corollary  
4 matter in this appeal. I shall not refer to that matter because  
5 Your Honours very recently determined that the issue of health  
6 did not arise directly and specifically in this appeal, therefore  
7 I shall skip that matter.

8 I shall essentially address Your Honours, then, on whether  
9 material change of circumstances existed on the 10th of November  
10 when the Investigating Judges decided on their detention  
11 extension order. And whose onus was it to bring those material  
12 changes of circumstance to the attention of the Investigating  
13 Judges, and if material change of circumstances did not exist,  
14 then clearly, as the Co-Prosecutors argue; the Investigating  
15 Judges were right in extending the detention of this charged  
16 person.

17 Now to refer to the question of material change of circumstances,  
18 the appellant in his objections of the 28th of October 2008  
19 failed to identify any material change of circumstances that  
20 would have necessitated the Investigating Judges to change their  
21 opinion from the opinion of Your Honours of the 17th of October.  
22 The appellant failed to do that in his objections before the  
23 Investigating Judges on the 28th of October, and indeed he failed  
24 to do so in this appeal, which was filed on the 10th of December.  
25 Your Honours, as I submitted, found, in that order of the 17th of

53

1 October, that both 63(3)(a) conditions were satisfied, and  
2 63(3)(b) last three limbs were satisfied. And we submit that  
3 those conditions existed on the 17th of October, they existed on  
4 the 10th of November when detention was existed, and indeed they  
5 exist today for Your Honours to conclude that detention should be  
6 continued, and the Investigating Judges rightly did so on the  
7 10th of November.

8 [11.42.00]

9 We also shall submit -- and this is a summary of my arguments, my  
10 learned friend's very elaborately argued these matters -- that as  
11 he submitted, the detention facility of this institution remains  
12 appropriately equipped to handle any medical emergencies, as it  
13 has done so in the past 15 or so months of this charged person's  
14 detention. We also submit, as argue by my learned friend Mr.  
15 Karnavas, that due diligence, although it is important in  
16 investigation, doesn't arise in the determination of provisional  
17 detention under 63(3)(a) or 63(3)(b). There is no legal  
18 provision, or legal hurdle, that a party has to cross, in respect  
19 of due diligence under 63(3)(a), 63(3)(b). Due diligence may be  
20 relevant, but it may be a different forum before which my learned  
21 friend has to agitate the due diligence or lack thereof in the  
22 investigation of the Co-Investigating Judges.  
23 We shall also submit that there is no unreasonable delay in the  
24 proceedings against my learned friend's client. This period of  
25 15 months which has taken for the investigation of the case

54

1 against him, in our most respectful submission, is not  
2 unreasonable, it is much lesser than the periods in which accused  
3 in other tribunals of similar nature -- ICTY, ICTR -- have been  
4 kept in detention, and indeed ICTR has not found any period,  
5 including a period of eight years in respect of a particular  
6 accused, unreasonable for detention. And we shall also submit  
7 that the ECHR, the European Court of Human Rights jurisprudence  
8 that my learned friend has cited in his appeal should be treated  
9 with caution by this honourable court. This jurisprudence is  
10 important; it comes from a very advanced regional jurisdiction  
11 towards which this Court has looked for international standards,  
12 but the ECHR deals with a very focused set of cases. It deals  
13 essentially with municipal crimes and crimes coming within the  
14 municipal jurisdiction of an ordinary court, I would call them  
15 ordinary crimes, while this Court deals with extraordinary crimes  
16 that shake the conscience of national and international  
17 communities.  
18 These are clearly, as the Investigating Judges have held, very  
19 complex cases which are different from ordinary cases before  
20 national jurisdictions, and most importantly, they deal with  
21 investigative bodies which are properly established with all the  
22 facilities, forensic or otherwise, at their disposal, while this  
23 Court deals with an institution that's been very recently  
24 established, with all the limitations that there are in respect  
25 of time and funding.



55

1 So we would submit that while deciding the period of detention of  
2 this charged person, you must consider the question of  
3 unreasonable delay with amount of caution when you consider that  
4 in the light of the decisions of the ECHR and other decisions of  
5 other parallel international tribunals.

6 [11.45.30]

7 Your Honour, my learned friend has adverted to issues of 63(3)(a)  
8 and 63(3)(b) conditions, and I shall not dwell on them because  
9 they've already been argued. Suffice it to mention that Your  
10 Honours found, on the 17th of October, that well-founded reasons  
11 existed, and I may draw your attention to paragraph 94 of your  
12 order of 17th of October that well-founded reasons existed to  
13 continue to hold that this person may have committed crimes  
14 within the jurisdiction of this Court for which he's been charged  
15 in the introductory submission. Indeed, he's been charged for  
16 crimes of S-21, the detention centre in the centre of Phnom Penh  
17 for which one of his co-accused, co-charged person Duch has  
18 recently been indicted, and facing trial.

19 So at least one set of crime scene on which this person is being  
20 charged has resulted in an indictment before this honourable  
21 Court, and therefore conditions of well-founded reason remain to  
22 be satisfied. We also submit that while the Investigating Judges  
23 have added material till the 17th of October 2008 to satisfy Your  
24 Honours that well-founded reasons existed on that day, they have  
25 continued to add material on the case file to continue to hold

56

1 that well-founded reasons exist for this person to be detained.  
2 And I can just draw your attention to the fact that as of today,  
3 there are about 250 statements, and the figures could be larger  
4 than that. Duch's entire case file, and my learned friend  
5 mentioned about the allegations against Duch in the case file  
6 against him have been transferred onto this case file on the 30th  
7 of May 2008. There have been upwards of 38 rogatory letters  
8 issued by Co-Investigating Judges since July 2008, and indeed  
9 after the matter was decided by you in October 2008.  
10 [11.47.40]  
11 Fifty six rogatory reports have been kept on the case file after  
12 Your Honours decided that matter. We, the Co-Prosecutors filed  
13 the case file with about 123 binders in July of 2007 and the case  
14 file has increased both in volume and gravity to the extent that  
15 there are about 450 binders on this case file, and I don't want  
16 to dwell on the numbers, they are on record before Your Honours,  
17 but just to give you some statistics about the investigation  
18 conducted by the Investigating Judges.  
19 Of course, it's a matter for trial, and it's a matter for an  
20 indicting court to determine whether those statements are of any  
21 relevance to my learned friend's client's case, but that stage we  
22 shall cross when we come to the stage of indictment, but at this  
23 stage, in our respectful submission, due diligence has been  
24 exercised by the Office of the Investigating Judges to the extent  
25 that evidence has been added. And I may bring it to Your

57

1 Honours' attention the fact that they may not be all evidence  
2 that may directly name this charged person. They may not be all  
3 evidence in which his personal conduct may have been identified,  
4 because ultimately in cases of this magnitude and this size and  
5 this complexity, there has to be, in our most respectful  
6 submission, a (indistinct) evidence that crimes occurred. Those  
7 crimes may not necessarily be physically perpetrated by my  
8 learned friend's client, but at least crimes were committed by  
9 certain people who, in our respectful submissions, my learned  
10 friend's client was either directing as a superior or he was part  
11 and parcel of a joint criminal enterprise with those physical  
12 perpetrators and which we shall submit before the investigating  
13 judges make him equally culpable as a co-perpetrator for the  
14 crimes committed by the physical perpetrators.

15 The second set of evidence that's been brought by the  
16 investigating Judges --

17 MR. KARNAVAS:

18 If I may, Your Honour, now we're going into the facts of the  
19 case, and if we're going to be relieved of our confidentiality  
20 duties to go into the facts, as is being pleaded at this moment,  
21 then fine. But I certainly didn't come here to plead what is in  
22 the investigative file. We've argued due diligence, but now I  
23 think my friend is going well beyond that point, and I did give  
24 him some latitude, but I believe he needs to move on. Otherwise,  
25 we risk going into confidential matters, because now he's

58

1 directly discussing evidence which he believes, and he's giving  
2 testimony, in effect, as an advocate he's giving testimony as to  
3 what he believes the evidence shows, or doesn't show.

4 [11.50.20]

5 MR. AHMED:

6 I am in Your Honours' hands, but I shall not refer to any  
7 confidential matter, with all sense of responsibility, on the  
8 case file. I was just identifying the heads of evidence that the  
9 investigating Judges have identified, and I shall be very brief,  
10 consistent with what my learned friend has just submitted to you.  
11 So evidence of linkage between the crimes committed by his  
12 subordinates to his role as the Standing Committee --

13 MR. KARNAVAS:

14 Please, Your Honour, we're back to where I just stated. And I  
15 would like a ruling from the Trial (sic) Chamber. The Trial  
16 Chamber was very quick to interrupt me to ask me the relevance.  
17 In this case, I've objected, and he indicated he would move on,  
18 and then he went right back to where he's at. And we can play  
19 this cat and mouse game all day long, but I would like a ruling  
20 from the Trial Chamber as to whether he's allowed to go into the  
21 specifics, or if they're headings, but if he's drawing  
22 conclusions or what's in the facts, and he's talking about a mode  
23 of liability which this Pre-Trial Chamber declined to rule on and  
24 which is before the Trial Chamber in another case, and I'm  
25 referring to the joint criminal enterprise.

59

1 JUDGE LAHUIS:

2 May I ask the Co-Prosecutor, without a ruling, as you have just  
3 explained to the Court that you would continue in accordance with  
4 the remarks made by the --

5 MR. AHMED:

6 I shall do so, Your Honour. Once again, just two other points.  
7 Jurisdictional requirements. Crimes against humanity have  
8 jurisdictional requirements that we have to prove that it was  
9 part of a systematic and widespread nature. The investigating  
10 Judges are collecting evidence to that nature. Conspiracy, we  
11 have said, it's part of public knowledge that there was a  
12 conspiracy. Investigating Judges are collecting evidence in  
13 respect of conspiracy that this accused, this charged person was  
14 part of a wider conspiracy.  
15 Forensic evidence, evidence to establish the existence of the  
16 crime and the occurred, and people who committed those crimes is  
17 also being collected by the Investigating Judges. Therefore my  
18 respectful submission is that evidence of a wide variety of  
19 nature is being collected, and it's not appropriate to say that  
20 if a witness statement doesn't name a particular charged person  
21 it's not relevant to this case, because relevance should be seen  
22 in the light of these five heads that I submitted before Your  
23 Honour.  
24 [11.52.40]  
25 Investigative requests have been filed by various charged

60

1 persons. My learned friend has filed his first investigative  
2 request only about 10 to 12 days ago. My learned friend has not  
3 brought to the prosecution's awareness any exculpatory evidence  
4 on the case file for the Investigating Judges to rule otherwise  
5 that well-founded reasons do not exist to believe that this  
6 charged person may not have committed those crimes for which he's  
7 been charged. Therefore, I --

8 MR. KARNAVAS:

9 If I may - if I may interrupt again, Your Honour. Now we're  
10 going into confidential matters, and I don't want to bring in the  
11 issue of when I was flying back last time the Investigating  
12 Judges had a very public announcement about holding the defence  
13 lawyers in contempt essentially for disclosing confidential  
14 matters. Now the gentleman is going into investigative requests  
15 that we made that were filed as confidential. As confidential.  
16 And the gentleman knows. And now he's discussing them publicly.

17 [11.53.35]

18 And I do believe what's good for the defence is good for the  
19 prosecution. And for him to say what the Co-Investigating Judges  
20 is doing is not enough concerning our argument of due diligence,  
21 or whether the evidence is relevant or not. We never raised the  
22 issue of relevance. But I do believe that he should not be  
23 allowed to go into pleading that were filed confidentially, and  
24 the contents of which is confidential, based on jurisprudence or  
25 (indistinct) or the rules of this institution. And he shouldn't

61

1 be allowed to do that, because then I have to respond, and if I  
2 have to respond I have to go into confidential matters.

3 MR. AHMED:

4 Your Honours, I shall just submit what was part of our appeal,  
5 that my learned friend has not brought any exculpatory evidence  
6 onto the case file to the awareness of the prosecution, and this  
7 was part of our appeal response, which is a public document as  
8 released by Your Honours. I will then go over to the question of  
9 house arrest, without taking too much of your time -- my learned  
10 friend has already referred to that matter -- and just draw your  
11 attention in particular response to my learned friend's arguments  
12 in his appeal response, where the house arrest in the facts and  
13 circumstances of this case is an appropriate measure.

14 [11.54.55]

15 And once again I shall be very brief, and I can even conclude  
16 before Your Honours adjourn for lunch, and my submission is, the  
17 suggestion of house arrest and the so-called hospital detention  
18 as mentioned by my learned friend was discussed by Your Honours,  
19 it was raised by my learned friend in his first appeal against  
20 original detention, and it was dismissed by this honourable  
21 Court. It was dismissed in your order of the 17th of October on  
22 two issues.

23 The first issue was hospital detention, Your Honours held, was a  
24 matter to be determined by doctors, as and when doctors have  
25 decided this charged person has gone to the Calmette Hospital

62

1 with which this Court has a special agreement. So doctors shall  
2 determine whether this person should be sent to the hospital or  
3 not. It's not a matter for judicial adjudication, so Your  
4 Honours have clearly dealt with that matter. And facts and  
5 circumstances remain the same, material circumstances have not  
6 changed, and therefore the Investigating Judges had no reason to  
7 go into that question and decide otherwise.

8 On the question of house arrest, Your Honours had a very  
9 elaborate discussion of the question of house arrest, and were  
10 convinced, on the 17th of October, that house arrest was not an  
11 appropriate measure. The investigating Judges relying, quite  
12 appropriately, on a ruling of an appellate court just about 15  
13 days before they decided, they felt convinced that house arrest  
14 was not an appropriate measure. Therefore my learned friend's  
15 argument that the investigating Judges did not elaborate  
16 reasoning to agree with Your Honours would therefore not hold too  
17 much water, most respectfully.

18 I would submit, and Your Honours, just to recap what Your Honours  
19 held on the 17th of October, Your Honours said in paragraph 119  
20 of Your Honours' order, the Internal Rules and the CPC, the  
21 Cambodian Criminal Procedure Code do not provide for an  
22 alternative means of detention. The Internal Rules, Your Honours  
23 held, only provide for detention in this detention facility.  
24 Your Honours also felt, however, that there was an argument of  
25 bail. It could be raised under 65(1), but Your Honours said that



63

1 if conditions necessitating detention under 63(3)(b) are  
2 satisfied, there was no condition for bail, and Your Honours  
3 consequently held that those three conditions, as my learned  
4 friend mentioned, (iii),(iv) and (v) of 63(3)(b) remain  
5 satisfied, and therefore Your Honours extended the detention and  
6 denied the request for house arrest. And we most respectfully  
7 submit that the conditions in which house arrest is not an  
8 appropriate measure remain satisfied.

9 [11.57.50]

10 My learned friend in his appeal mentioned certain decisions of  
11 one international tribunal, the ICTY, which in its early years  
12 granted so-called house arrest to one or two of its accused.  
13 That happened, with most respect, in the early years of that  
14 tribunal, in the mid-nineties when that tribunal was established,  
15 and thereafter the practice of that Court has not been in respect  
16 of granting more house arrest.

17 For example, my learned friend has cited the case of Blaskic, who  
18 in 1996 was the subject of an application of house arrest, and in  
19 which -- I may draw your attention to the Blaskic decision, in  
20 which the ICTY held that four conditions need to be satisfied, or  
21 at least need to be considered by a court when house arrest is to  
22 be determined, and these four conditions are very appropriately  
23 and properly paraphrased there.

24 There must be no evidence that the defendant will escape, number  
25 one. Number two, there must be no likelihood that the defendant

64

1 will tamper with evidence or witnesses. Number three, there must  
2 be no likelihood of continued criminality, and -- and I stress on  
3 that word "and" -- there must be no threat to peace and security.  
4 And all of these conditions have to be satisfied for a court to  
5 be convinced that house arrest, if at all appropriate, should be  
6 ordered in this case.

7 In our most respectful submission, most particularly the last  
8 argument, that there may be threat to peace and security is not  
9 satisfied, as Your Honours have held on the 17th of October as  
10 confirmed by the investigating Judges, and therefore the  
11 investigating Judges were right in not declaring house arrest.  
12 My learned friend's client has very clearly told the  
13 investigating Judges, when he was brought before them for  
14 statutory interview in respect of detention conditions that he  
15 found no particular problems, and I say that with some sense of  
16 responsibility in respect of detention, and I'm just quoting  
17 directly from two interviews of this charged person. One  
18 interview was considered by Your Honours when you decided the  
19 17th of October appeal, and I'll not dwell on that because that's  
20 a matter that's been determined, but just to tell Your Honours  
21 that on the 2nd of May the only complaint that my learned  
22 friend's client was, was that he was getting food which was  
23 slightly fatty, which was pork, and therefore the food should be  
24 changed.

25 He said to the investigating Judges that the administration has

65

1 accepted that his daughter can bring frozen fruit to him, that he  
2 also recognised that a male nurse visited him every day, that if  
3 he has a problem he can call a doctor immediately, and he gets  
4 both Khmer and French doctors, and that no, he did not need any  
5 medical care abroad.

6 The same kind of interview happened on the 12th of December,  
7 that's after the filing of the appeal -- just two days after the  
8 filing of the appeal, when my learned friend Mr. Karnavas  
9 appeared with the charged person before the investigating Judges  
10 and said this, and the prosecution was not present there. He  
11 said "Concerning detention condition," -- and Mr. Karnavas  
12 speaking here -- "My client already made remarks on food given to  
13 him. He did not like pork because apparently it was fatty. He  
14 does not eat pork because it is fatty. Other than the food, we  
15 have no comments on detention conditions." And Your Honours  
16 recognised this in your order of the 23rd of February, dismissing  
17 an application for calling doctors to depose in this oral  
18 hearing.

19 [12.01.35]

20 That's why I would respectfully submit that Your Honours have  
21 held that the ECCC detention facility is appropriately equipped,  
22 and as my learned friend submitted it's been internationally  
23 vetted by the ICRC, and therefore no cause arises for any other  
24 form of detention than detention in this facility.

25 I have one more issue, and that was -- and this is subject to my

66

1 learned friend's objection, because this was a matter that we  
2 brought before the investigating Judges to put on the case file  
3 -- they determined that this did not arise in respect of the  
4 facts they were investigating, however they did rule that this  
5 was a public report that was issued by a very respected  
6 university, the University of Berkeley, in respect of the  
7 perception of the Court, and the threats that the ordinary people  
8 of Cambodia felt from the charged persons, either charged here or  
9 other people associated with the former Khmer Rouge.  
10 And with Your Honours' leave, I've given a copy to my learned  
11 friend, I would refer to that report, and I have a Khmer copy  
12 although this is only in English.  
13 Just one paragraph of that report, and I request the Court  
14 Officer to bring it to Your Honours' attention. It's already  
15 been provided. It's a report issued by the University of  
16 Berkeley, and this happened after we filed our appeal response.  
17 We filed our appeal response in early January, and this report  
18 came out on the 21st of February. Just one paragraph from this  
19 report, Your Honours, and that will end my arguments.  
20 MR. KARNAVAS:  
21 But if it has to do with threats to witnesses or tampering with  
22 evidence, I would object to reading even that one paragraph  
23 because I don't know exactly which paragraph the gentleman  
24 (indistinct) referred to.  
25 MR. AHMED:

67

1 I shall just read it and then make my submission, and if my  
2 learned friend wishes to object on my submission --  
3 MR. KARNAVAS:  
4 I'm objecting on the grounds that that's not part of this appeal  
5 process, that wasn't the part of the findings of the OCIJ, and if  
6 you can point to where in the decision they also indicated that  
7 Mr. Ieng Sary posed a threat to witnesses, and that he was going  
8 to be destroying evidence, very well, but if the gentleman could  
9 just please tell us whether the section that he's referring to in  
10 this report goes to that aspect. Because if it does, I object.  
11 [12.03.50]  
12 If it goes to public peace and order, he's already made his  
13 argument, and I have no objection to him reading something from a  
14 report.  
15 MR. AHMED:  
16 Your Honour, it, in our respectful submission, pertains to the  
17 question of public order. That it shall be disturbed if these  
18 accused, these charged persons before you, are released. And I  
19 must submit that the investigating Judges left a window open for  
20 us to say that if it's a public document, it can be raised in  
21 proceedings either before them or before the Trial Chamber, of  
22 course, with the leave of that particular Chamber.  
23 And I've had the relevant paragraph translated into Khmer, and  
24 I'm reading from page 29 of this document, Your Honours. The top  
25 paragraph on page 29. And this was a survey done throughout the

68

1 country, and with a sample that was representative of the  
2 population of this country, and my submission, Your Honour, is  
3 just to take this on record. Four out of five respondents in our  
4 survey said that they harboured feelings of animosity towards  
5 those Khmer Rouge members who were responsible for violent acts.  
6 71 per cent said they wanted to see them suffer in some way. A  
7 third said they wished they could take revenge against the former  
8 Khmer Rouge, and that they could do so if they had the  
9 opportunity. However, one third of the respondents said that  
10 they had forgiven the Khmer Rouge. Feelings of hatred were more  
11 frequent amongst those who lived under the Khmer Rouge regime  
12 compared to those who did not. Likewise, forgiveness was less  
13 frequent among those who lived under the Khmer Rouge regime  
14 compared to those who did not."

15 My respectful submission is that when a majority of people feel  
16 threatened by, or have strong feelings against people associated  
17 with the Khmer Rouge and the crimes of the Khmer Rouge, it may  
18 disturb public order if these persons who are directly related to  
19 those crimes, in the prosecution's submission, and those who are  
20 at least publicly identified as related to those crimes, are  
21 released by this Court.

22 So most respectfully I would submit that there is no material  
23 change in circumstance since Your Honours passed that order of  
24 the 17th of October, and the investigating Judges confirmed the  
25 order on the 10th of November for Your Honours to revisit the

69

1 conditions of detention, and in any case, my learned friend has  
2 not identified those material change in circumstance, and I would  
3 close my arguments there subject to any questions that the Court  
4 may have.

5 JUDGE LAHUIS:

6 Just before the President will close for lunch, I would like to  
7 make a remark related to the objection that -- the multiple  
8 objections raised by the co-lawyers. I would like to make clear  
9 that the schedule of the Pre-Trial Chamber contains a possibility  
10 of a partly in camera hearing. So if there is any need to  
11 address confidential matters, I would like to invite the  
12 co-lawyers to make this known to the greffier, and the last part  
13 of the hearing will be in camera.

14 MR. KARNAVAS:

15 Thank you, thank Your Honours. We do not intend to be seeking,  
16 at this point, an in camera hearing.

17 JUDGE LAHUIS:

18 Okay.

19 MR. PRESIDENT:

20 The Chamber will now adjourn for lunch, and will resume at 1.30  
21 p.m.

22 (Court recesses from 1208H to 1330H)

23 MR. PRESIDENT:

24 We now resume our session. I would like to invite the co-civil  
25 parties lawyers to make your oral submissions. You have one and

70

1 a half hours. Thank you.

2 MR. LOR CHUNTHY:

3 Mr. President, Your Honours, good afternoon participants both in  
4 the courtrooms and at home. My name is Lor Chanthy, I'm a civil  
5 party lawyer. I would like to make my oral submissions in  
6 response to the submissions made by the charged person's team.  
7 By the submissions of the charged person's group, I would like to  
8 make the following points, as following, which are related to the  
9 historical facts and to the law and to the arguments and to the  
10 additional evidence.

11 Due to the serious crisis in 1975 to 1979 which caused the civil  
12 crimes during the Democratic Kampuchea period, in addition in  
13 1979 we also had a trial relating to the prosecution of the  
14 Democratic Kampuchea leaders and in 1993, regarding the  
15 restructuring of the country to be a democratic country a new  
16 government was formed and the ECCC was established subsequently.

17 Based on the complaints and the objections of the extension of  
18 provisional detention, I would like to raise some issues as  
19 following. Regarding the Rule 63(3)(a) of the Internal Rules,  
20 where the Co-Investigating Judges issue a detention order, a  
21 provisional detention order of the charged person for the  
22 following conditions: (a) there is reasonable grounds that the  
23 person might have committed a crime or crimes as stated in the  
24 introductory submission or the additional submission; (b) the  
25 Co-Investigating Judges consider that the provisional detention



71

1 is a measure necessary to prevent the charged person from  
2 exerting pressures on any victim or witness, or to prevent any  
3 collusions between the charged person and the accomplices of the  
4 crimes committed under the jurisdiction of the ECCC; and also to  
5 preserve evidence, or to prevent its destruction; to ensure the  
6 presence of the charged person during the proceedings, and to  
7 protect the safety of the charged person as well as to preserve  
8 public order.

9 [1.35.40]

10 In addition, the provisional detention order is a necessary  
11 measure to prevent and ensure the charged person of any  
12 interference from the victims or witnesses in order to preserve  
13 evidence, preserve public order, to protect the safety of the  
14 person and to ensure his presence during the upcoming hearings.  
15 These orders have been issued and fulfilled according to Rule  
16 63(3)(b)(i) to (v). The house arrest under certain conditions,  
17 which is another form of detention, however, it does not prevent  
18 all those issues raised in point 63(3)(a), especially the  
19 condition of preserving public order and to protect the safety of  
20 the charged person and to prevent -- to preserve the evidence.  
21 The Office of the Co-Investigating Judges provided reasons in  
22 their decision in extending to the provisional detention  
23 regarding Internal Rules Rule 63(3)(a), which the  
24 Co-Investigating Judges also based on the decision of the  
25 Pre-Trial Chamber, which was announced recently. The Office of

72

1 the Co-Investigating Judges has added more evidence after that  
2 decision. For the conditions stipulated in 63(3)(b), the Office  
3 of the Co-Investigating Judges indicates that the conditions in  
4 their decision regarding the appeal -- the conditions are not  
5 changed. And they also agree with the Pre-Trial Chamber's  
6 decision.

7 And these conditions are also in compliance with European human  
8 rights, which was taken into consideration by the OCIJ for the  
9 previous detention and also the ongoing investigations and the  
10 hundreds of interviews of witnesses and the complexity of the  
11 case file. So all these conditions are appropriate and compliant  
12 with the European human rights court.

13 Another point which was raised was in relation to house arrest.  
14 The OCIJ indicated their position that house arrest is not a form  
15 substituting and which is reasonable. That is, comparing the  
16 ECCC detention and the house arrest, the house arrest is not  
17 appropriate. Another point raised by the defence counsel  
18 regarding due diligence in investigation, and also another point  
19 raised by the defence counsel regarding the inculpatory evidence  
20 is the burden of the OCIJ, and it shows the conditions in Rule  
21 63(3)(a) and (b) that has to be fulfilled or satisfied.

22 [1.40.45]

23 The OCIJ failed to include any material evidence that have been  
24 found and that is to believe that the charged person have  
25 committed crimes as stated in the introductory submission. The

73

1 detention at the detention facility is only a form of detention,  
2 and house arrest under certain appropriate conditions are also  
3 another alternative form of detention that the OCIJ should have  
4 chosen. House arrest is also to protect the objectives of the  
5 Rule 63(3)(b), that is the reasons raised by the defence counsel.  
6 However, what has been raised, there has been a response by the  
7 prosecution that if the conditions in Rule 63(3)(a) and (b) are  
8 fulfilled with this based in decisions by the OCIJ with their own  
9 reasons, so the OCIJ already confirms the reasons and the  
10 conditions stipulated in Rule 63(3)(a) and (b). And also the  
11 defence counsel does not raise which particular point that has to  
12 be satisfied in that rule.

13 Another reason that the OCIJ mention in their decisions to extend  
14 the detention is related to 63.7, which states that the decision  
15 of the OCIJ regarding provisional detention is based on reasons  
16 for such extension of detention. All these issues have been  
17 raised and there has been discussion whether all these issues  
18 have any impact, or violate the right of the charged person.

19 Another point, the civil party lawyers used to indicate in their  
20 brief in response to the appeal of Mrs. Ieng Thirith, in which  
21 their appeal was limited so the submission which was used as a  
22 reference, the Pre-Trial Chamber could reject the decisions of  
23 the OCIJ if they violate their discretion.

24 [1.44.30]

25 And if their decision is not appropriate, or not based on

74

1 existing legal points; that is, if the Pre-Trial Chamber  
2 considers the issues, the reasoning's raised by the OCIJ, it can  
3 decide accordingly. What has been believed in the order of the  
4 provisional detention is that, one, there is a reasonable belief  
5 that the charged person may have committed the crimes, and for  
6 the order on the extension of provisional detention required, the  
7 investigation needs to be done with due diligence in order to  
8 ensure a fair trial without unnecessary delay.

9 The first provisional detention order based on the introductory  
10 submission, and the OCIJ issue various orders by providing  
11 reasons that, in relation to witnesses or in finding new evidence  
12 in expediting their investigations. Testimonies from the  
13 investigations reveals the people were forced to do labour, the  
14 monks were forced to disrobe, and people were mass-executed, and  
15 did not receive any proper medical treatment. In addition,  
16 people received torture until they died.

17 The charged person was a member of the Central Standing Committee  
18 who attended the zones and sector meetings regularly and the  
19 investigations required an observer who can confirm the charged  
20 person might have committed the crimes as charged.

21 [1.47.42]

22 For the long detention is not a cause for the release, longer  
23 detention is not a sufficient grounds for an order to release,  
24 and is not also a reason for release at all if the investigation  
25 was done with due diligence and also considering the complexity

75

1 of the case. That is, the OCIJ's investigation has been done  
2 constantly and continually, and there is not a delay in the  
3 investigation, or in the conduct of the investigations. It is  
4 balanced and appropriate that the extension of provisional  
5 detention for more than one year and for the extension for  
6 another one year is still appropriate considering the severity of  
7 the crimes alleged for the charged persons and also the  
8 complexity of the case has to be taken into account.  
9 The co-civil party lawyers submit that the Criminal Code of the  
10 Kingdom of Cambodia, the criminal procedure states that the  
11 person's right is the law, but detention is based on the  
12 proceeding, and this is stipulated in the code of the criminal  
13 procedure which is similar to 63(3)(a) and (b) of the Internal  
14 Rules. The civil party lawyers submit that the only priority of  
15 all these conditions is for the provisional detentions to be  
16 appropriate.  
17 I also would like to add that in response to the submission by  
18 the defence counsel of the charged person regarding his health  
19 issue, if we consider the health issue of the charged person here  
20 at the ECCC detention facility and the house arrest, I think here  
21 at this facility the health, medical treatment and service is  
22 more than adequate, and better than medical service at home. And  
23 that is my submission.  
24 Another point I would like to raise is concerning his safety if  
25 he were to detain under house arrest with the conditions, we can

76

1 ask whether that house arrest -- what is a systematic approach in  
2 order to protect his safety and to ensure his presence before the  
3 ECCC Chambers. So this is a question that needs to be answered.  
4 And we cannot find any appropriate answers to this question yet  
5 regarding his safety, there is no one who can provide insurance  
6 if he were to be released on bail that his safety is 100 per cent  
7 guaranteed for his appearance before the Chamber. Thank you.

8 MR. PRESIDENT:

9 I would like to invite other civil party lawyer to make your  
10 submission. Civil party lawyer?

11 MR. NY CHANDY:

12 First of all, thank you very much, The President and Your  
13 Honours. Before I let my colleague Silke to continue, I would  
14 like to add just a few words concerning the legal arguments  
15 concerning the order of provisional detention against charged  
16 person Ieng Sary.

17 This order has a justification and is issued according to the  
18 existing laws. If you look at Internal Rules 63(6) of our  
19 Internal Rules and also article 210 of the criminal procedural  
20 code, that guide the duration of provisional detention of the  
21 charged person which is the sole discretion of the  
22 Co-Investigating Judges when they regard this matter as a  
23 necessary means. So it is true that the charged person is  
24 detained for the second year, and every one of us is quite  
25 familiar concerning the factual events in the Democratic

77

1 Kampuchea which are complicated.

2 Among them, this matter is made even worse because the charged

3 person exercised his right to remain silent. Rule 63(7) of the

4 Internal Rules and article 211 of criminal procedure code of

5 Cambodia state that if the Co-Investigating Judges would like to

6 continue or extend the provisional detention with a reasoned

7 decision then they are entitled to do so. So in the criminal

8 code of procedure article 211 and 205 are also the guidance for

9 Co-Investigating Judges to use to support their arguments,

10 because these articles are consistent with the Internal Rules

11 Rule 63.

12 [1.55.15]

13 I can submit that what the Co-Investigating Judges have done or

14 performed so far are accordance with the legal guidance and they

15 have done in relation to the prescription of the regulation, our

16 Internal Rule 63.

17 And of course there have been a lot of discussions concerning the

18 provisional detention, and the Co-Investigating Judges still have

19 clear justification to support the argument. And in the appeal

20 of the charged person they challenge the decision of the

21 Co-Investigating Judges claiming that Co-Investigating Judges

22 fail to find reasonable evidence to support such a decision.

23 Actually, the Pre-Trial Chamber has already ruled on the matter

24 according to the Rule 63(3)(a), which is about: 63(3)(a) there

25 is a well-founded reason to believe that the person may have

78

1 committed the crime or crimes, so the decision by the Pre-Trial  
2 Chamber is clear in that the decision has been based on the  
3 decision made by the Co-Investigating Judges who also got  
4 reasoned arguments. And the condition in Rule 63(3)(b) which  
5 reads that the Co-Investigating Judges consider provisional  
6 detention to be a necessary measure.

7 So I see that the burden of proof that these conditions can no  
8 longer be applied to the charged person, for example, the  
9 security of the person or the exertion of pressure to witnesses  
10 or the destruction of evidence, so on and so forth, if they  
11 cannot be applied or if the circumstances change then it is the  
12 sole responsibility of the defence counsel of the charged person  
13 to prove, not the Co-Investigating Judges, because so far the  
14 Pre-Trial Chamber has already ruled on those kinds of conditions.  
15 So in order to solve this issue, and to support the provisional  
16 detention order and to prove it is the responsibility of the  
17 defence counsel.

18 [1.58.50]

19 Regarding the health condition of the charged person, Ieng Sary  
20 himself is no longer young. He is old. He is more than 80 years  
21 old now, so naturally anyone of his age is weak, although he  
22 stays in hospital or being detained in hospital it is not  
23 different from his condition outside the hospital premises, so I  
24 can submit that the Co-Investigating Judges has exercised their  
25 discretion legally.



79

1 MR. PRESIDENT:

2 I would like next the civil party lawyer to continue.

3 MS. STUDZINSKY:

4 Good afternoon, Mr. President, Your Honours. Good afternoon to  
5 everybody. I will now start with the second part of the civil  
6 party, or third part, let's say, co-lawyers' submission related  
7 to the question if the detention is still a necessary measure in  
8 accordance with Rule 63(3)(b) of the Internal Rules.

9 Your Honours, please let me submit three remarks in advance.

10 First, we've observed that the defence of the charged person  
11 refers to civil parties in general, and assigns behaviour of  
12 parties to all civil parties. I would like to review that civil  
13 parties may share several common interests, but each of them acts  
14 in a particular manner and has specific views and concerns.

15 Therefore, generalising and speaking of civil parties as a  
16 homogenous group does not reflect that variety. Generalising  
17 does not take into account that they are individual and different  
18 persons with different approaches. Generalisation is misleading.

19 Second, the request of the defence for an oral hearing was based,  
20 among others, upon the, I quote, "Inflammatory arguments of the  
21 civil parties that need to be rebutted in public." This term  
22 gives reason for serious concerns. The notation itself is  
23 inflammatory, and contributes to excite the climate. Therefore  
24 we suggest and invite the defence to return to matter-of-fact  
25 terms instead of inciting and to calm down.

80

1 Third, the defence confuses cause and effect by arguing, and I  
2 quote, "civil parties who rely on their own aggressive conduct in  
3 threatening counsel representing Khieu Samphan to justify that  
4 the charged person's detention continues." We submit that our  
5 joint brief in this appeal is factual and takes only into account  
6 recent events to assess the elements of the security of the  
7 charged person and the public order.

8 I start now analysing if the security of the charged person and  
9 the public order are at risk in the case of his release or being  
10 under house arrest. The defence argues in the appeal that the  
11 grounds in the extension order by the Co-Investigating Judges do  
12 not refer to current events, but to incidents from 2003 which  
13 were directed against the Thai embassy. The defence claims that  
14 such events could not demonstrate any tension in the Cambodian  
15 society of today in light of an eventually release or house  
16 arrest or the charged person.

17 Likewise, the defence criticises that no facts were submitted to  
18 show that the release of the charged person or being under house  
19 arrest, the public order could be disturbed, or and the safety of  
20 the charged person were at risk. We will demonstrate that the  
21 defence must fail with these arguments and shed light on the  
22 fragile post-conflict situation in Cambodia.

23 On the 4th of December 2008, after the appeal hearing against  
24 Khieu Samphan, several victims, civil parties and applicants,  
25 held a press conference on the premises of the court and waited

81

1 after defence counsel of Khieu Samphan had addressed the press.  
2 The aggressive arguments by both defence lawyers requesting the  
3 immediate release of their client due to the lack of translation  
4 of the entire case file in to French incited the victims' side  
5 and both sides exchanged vociferous statements. The tension  
6 between the national co-lawyer who was attacked for defending  
7 Khieu Samphan, and the victims' side who claimed for an  
8 expeditious trial, increased to the extent of physical approaches  
9 against each other, so that the security staff had to intervene  
10 and to accompany the defence outside.  
11 This incident highlights several issues. The tension among some  
12 victims and some civil parties is very high, and can turn  
13 immediately into physical attacks. One of the concerned subjects  
14 was a request for immediate release of the charged person besides  
15 the delay that could be caused by the defence's demand to get  
16 every document, regardless of its nature, translated into French.  
17 The anger was directed against the defence counsel, was only  
18 acting on behalf of the client and is not charged with allegedly  
19 having committed gross atrocities. The national co-lawyer was  
20 also beside himself with anger and had not the necessary distance  
21 to calm the situation, instead he shouted back.  
22 This incident demonstrates, well, that the sufferings of some  
23 victims, which were buried for a long time, become more and more  
24 strongly since the ECCC are operational and proceed with their  
25 work. The slightest provocation can amount to verbal and

82

1 physical aggressions and attacks even against defence lawyers.  
2 However, it is not farfetched to state that the feelings were  
3 more intensive against the charged persons. Even if this  
4 incident occurred in the case of Khieu Samphan it can be brought  
5 forward to the cases of the other defendants.  
6 To conclude and to make it clear, the civil party co-lawyers and  
7 many of the civil parties uphold that lawyers never should be  
8 identified with their clients, and the clients those are charged  
9 with, and should work freely and without any threat on their  
10 cases.  
11 Between 9th of September and 3rd of October 2008, I want to refer  
12 now to the already disseminated survey which is not a repetition,  
13 even if there are some points overlapping. Between 9th of  
14 September and 3rd of October 2008, the Human Rights Centre,  
15 University of California Berkeley, conducted interviews of  
16 randomly selected thousand Cambodians over 18 years old, and  
17 examined their attitudes about social reconstruction and the  
18 ECCC. The survey was published recently and does not provide new  
19 facts, but complies with and confirms already submitted general  
20 arguments of the still unstable Cambodian post-conflict society.  
21 We would like to highlight some results of this study: 84.6 per  
22 cent of the respondents who lived under the DK period said that  
23 they have feelings of hatred towards those Khmer Rouge  
24 responsible for violence. There are in average 82.9 per cent,  
25 including those who did not live under the Khmer Rouge period.

83

1 And the question if the respondents wished they could take  
2 revenge, 35 per cent agreed. And nearly 40 percent of both  
3 groups wished to take revenge if they could. 71.5 per cent  
4 wished to see those responsible hurt or miserable, and only one  
5 third have forgiven the Khmer Rouge.

6 Asked about their attitude towards the Khmer Rouge, 12 per cent,  
7 in average, want to kill them and 5.7 per cent want to torture  
8 them. The results show clearly that a high potential of violence  
9 is still in place. From a Buddhist perspective this does not  
10 contradict feelings of anger or hatred resulting from past  
11 experiences and fuelled by attitudes and negative stereotypes  
12 towards the Khmer Rouge who are seen as the enemy. The study  
13 shows that people could rather forgive individual Khmer Rouge but  
14 still have feelings of anger towards the leaders, or the Khmer  
15 Rouge violence in general.

16 Last but not least, the behaviour of Ieng Thirith, wife of the  
17 charged person, with whom he meets regularly, during the appeal  
18 hearing -- her appeal hearing -- give reasons for serious  
19 concerns. The co-lawyers for the civil parties do not deny the  
20 right as a charged person to disclaim the charges, but she went  
21 far beyond when she threatened the prosecution and the civil  
22 parties by intimidating both, and I quote "Don't accuse me of  
23 murder, otherwise you will be cursed to the seventh level of  
24 hell."

25 MR. KARNAVAS:

84

1 Your Honour, at this point I would be objecting --

2 MS. STUDZINSKY:

3 According -- please, I want to --

4 MR. KARNAVAS:

5 I want to object --

6 MS STUDZINSKY:

7 I want to finish and I will finish soon --

8 MR. KARNAVAS:

9 I am entering an objection on the grounds -- no, I am sorry --

10 MS. STUDZINSKY:

11 -- and it is nothing to object and you have then 15 minutes to

12 respond, and --

13 MR. KARNAVAS:

14 This is not --

15 MS. STUDZINSKY:

16 -- it was a public event, a public appeal hearing to which I can

17 refer and I give only examples to give reasons why the public

18 order or the safety of the charged person is at risk, at these

19 points, and of course I can illustrate this by illuminating

20 events --

21 MR. KARNAVAS:

22 We just heard, Your Honours, we just heard --

23 MS. STUDZINSKY:

24 Please, I want to --

25 MR KARNAVAS:

85

- 1 Excuse me. I am entering an objection, Madam.
- 2 MS. STUDZINSKY:
- 3 (indistinct) intervene please, because I do not want to --
- 4 JUDGE LAHUIS:
- 5 Just a moment.
- 6 MR KARNAVAS:
- 7 At this point -- Your Honours, I entered an objection, when the
- 8 prosecution stood up I yielded the floor, there was a record, the
- 9 bench turned to me and asked me to respond.
- 10 JUDGE LAHUIS:
- 11 Yes.
- 12 MR. KARNAVAS:
- 13 I stood up, I objected, the madam continues to speak. I just got
- 14 a lecture about not generalising the civil parties, now she's
- 15 generalising about my client's wife, about her behaviour and what
- 16 she said, and I'm objecting because this procedure is not about
- 17 that procedure. And the one has nothing to do with the other,
- 18 and I don't think it's relevant. So on the grounds of relevancy
- 19 I'm objecting, and I'm asking for a ruling.
- 20 JUDGE LAHUIS:
- 21 I think you make your point in response already to what Mr.
- 22 Karnavas (sic) raised, and if you wait a minute, we will provide
- 23 a ruling.
- 24 MS. STUDZINSKY:
- 25 Could I -- sorry, could I add something because he vandalised

86

1 just now. This is not to the content, this is not generalising,  
2 I focus on special events that occurred here in this Court, and I  
3 describe these, and I think there is no doubt that the -- how I  
4 quoted her is disputed or objected. I think the quotation was  
5 right. And so it is not to generalise then I must object this  
6 objections of the defence. Thank you.

7 JUDGE LAHUIS:

8 Thank you, I think that was clear already in the first round way  
9 you replied on the objection.

10 (Deliberation between Judges)

11 [2.13.50]

12 JUDGE LAHUIS:

13 The Pre-Trial Chamber allows the lawyer of the civil parties to  
14 continue with her pleadings, and the Pre-Trial Chamber finds that  
15 what the lawyer is doing is stating facts to demonstrate that  
16 public order is still disturbed, and insofar facts are raised  
17 which will be considered irrelevant by the Pre-Trial Chamber,  
18 they will be reasons if the Pre-Trial Chamber finds so.

19 MS. STUDZINSKY:

20 Yes, thank you, Your Honours. I continue. Yes. I was in the  
21 middle of the appeal hearing of Ieng Thirith, and repeat the last  
22 paragraph, what I want are the last two sentences that I want to  
23 submit. The co-lawyers for the civil parties do not deny her  
24 right -- Ieng Thirith's right -- as a charged person, to disclaim  
25 the charges, but she went far beyond when she threatened the



87

1 prosecution and the civil parties by intimidating both, and I  
2 quote "Don't accuse me of murder, otherwise you will be cursed to  
3 the seventh level of hell."  
4 According to Cambodians' belief, the seventh level of hell is a  
5 term for the (indistinct) for ghosts at the seventh level.  
6 People believe that this location is a very bad place where  
7 ghosts live after some people died because those people committed  
8 very sinful actions against others. That means to be cursed at  
9 the seventh level is a very strong threat and makes people very  
10 scared. Even if the charged person did not threaten himself,  
11 civil parties and victims, these threats must be taken into  
12 account for the assessment of security of the charged person and  
13 related to the public order.  
14 Likewise, other menaces from Prime Minister Hun Sen who warned  
15 that prosecuting Ieng Sary will cause war, or his son, who warned  
16 to charge his father must be seen as puzzle pieces for the whole.  
17 In this climate of tension which causes again fear but as well  
18 anger among some of the civil parties which could result in  
19 verbal and physical attacks against the charged person.  
20 To conclude, the recent clash between some victims, respectively  
21 civil parties and the defence counsel reflects the readiness to  
22 express anger to the extent of violent attitudes, at least to  
23 senior leaders and instead of reaching those, this attitude is  
24 directed against defence counsel. The incident is in full  
25 accordance with the results of the survey, and mirrors the

88

1 fragile society where coping mechanisms for the immense  
2 sufferings have never been developed nor practised.  
3 The ECCC works somehow as a trigger which leads to the breaking  
4 off of long hidden pain. Therefore, the co-lawyers for the civil  
5 parties note that the outbreak of violence of parts of the civil  
6 parties is probable and could result in public disorder or/and  
7 putting the security and safety of the charged person at risk.  
8 Only one of the conditions of Rule 63(3)(b) needs to be  
9 accomplished to justify the necessity of provisional detention.  
10 A recent event sets grounds for two elements that are required to  
11 justify the extension of the detention order. The defence  
12 submits that the objectives of Rule 63(3)(b) are protected by  
13 conditions of house arrest in the same manner as provisional  
14 detention can do. The co-lawyers for civil parties recognise  
15 that house arrest can be held as a form of detention. However,  
16 it is considered as less rigorous than incarceration, and it is  
17 most likely that those victims and civil parties who have  
18 expressed their anger do not perceive house arrest as a form of  
19 detention, and will consider such a measure as an enhancement for  
20 the charged person to the effect that their anger put the safety  
21 of the charged person at risk and disturbs public order. In light  
22 of the results of the Berkeley study, the Berkeley survey, and  
23 the incident in 2008, house arrest does not reduce the risks for  
24 public order and the risk for the security of the charged person.  
25 Therefore the necessity of provisional detention is given further

89

1 on.

2 [2.19.50]

3 MS. STUDZINSKY:

4 I would like, at the end, to focus on one confidential matter,

5 and would request the Pre-Trial Chamber to be allowed to submit

6 the last point that I want to submit at the end, in Closed

7 Session, but before finishing in public session, I would like to

8 give a comment on the request of the defence to not decide after

9 this hearing of today, and to continue in June in order to

10 include arguments on corruption.

11 We submit that the corruption matter, which was not raised in

12 this appeal within the deadline that may be discussed within the

13 pending application therefore we request to reject this defence

14 motion.

15 And so I end at this point because we have here the family of the

16 charged person sitting, and others of course who can follow the

17 hearing so that I would like to continue my submission in Closed

18 Session later on.

19 MR. KARNAVAS:

20 Just one point. I do take exception, and I hope it never occurs

21 again, where a lawyer points to the audience and makes a comment

22 about somebody in the audience being related to an accused. I

23 think it's totally inappropriate. And if somebody wishes to

24 bring harm to another individual, that's a perfect example. And

25 I think if we're going to be respectful of the civil parties,

90

1 let's be respectful to the loved ones of those who are accused.

2 [2.22.00]

3 MR. PRESIDENT:

4 The defence counsel of the charged person, would you like to make  
5 further comments on top of what you already addressed?

6 MR. KARNAVAS:

7 One second. Yes, Mr. President, my apologies for being clumsy  
8 here. I'll be very brief, and I will touch on the points, but I  
9 will probably start with the very last point, the issue of public  
10 safety. I do think this is a rather important issue that needs  
11 to be discussed, and I will be discussing it in the context of  
12 this particular report, because here it would appear that it  
13 started with the prosecution, it then moved on to the civil  
14 parties, and it would appear that now we're going to be asking a  
15 court of law, Judges, to be making decisions based on polls.  
16 What I've called, on several occasions, the court of public  
17 opinion.

18 Now let's take this argument somewhat further. If public  
19 sentiment is such, and if Cambodia is so fragile, and is about to  
20 erupt into a tsunami of violence, if someone is provisionally  
21 released under strict conditions and supervision, imagine what  
22 would happen if, at the conclusion of the trial, the evidence  
23 pointed to a not guilty verdict. By that argument, if you were  
24 to buy that reasoning, you would have to find the person guilty  
25 even if the evidence didn't warrant it, otherwise you may have

91

1 public violence on your hands. And that is what is being  
2 suggested here today.  
3 That we look at polls, and we use polls to determine whether  
4 somebody should be provisionally released, tomorrow we will use a  
5 poll whether somebody is guilty, and based on these polls we  
6 would decide, even if the facts don't warrant guilt, you  
7 nonetheless should find the person guilty so we can protect the  
8 public and protect society from itself, because of an  
9 inconvenient judgment.  
10 Which is why I don't think that in this particular proceeding, or  
11 any proceedings, we should be relying on polls to determine how  
12 you, as independent and impartial Judges, should be viewing the  
13 evidence? I don't think that in my jurisdiction, in the United  
14 States, a lawyer would even be allowed to make such a claim, that  
15 a poll was taken and therefore a Judge should use his or her own  
16 discretion, based on the poll, to make a decision. I don't think  
17 that we should be doing it here in Cambodia.  
18 But if that is indeed the case, as they suggest, then it begs the  
19 question, how is it that the prosecution, or at least one of the  
20 Prosecutors, the international side, is pursuing, aggressively,  
21 the charging of more persons when you have Mr. Hun Sen himself  
22 saying that I will not allow Cambodia to have another war.  
23 That's the Prime Minister's take. So when it comes to charging  
24 more people, the Prosecutor is not worried about the fragile  
25 circumstances of this particular society or country. And the

92

1 Prime Minister is a very, very wise man. And he knows, and he's  
2 come out and said it. This is what possibility lies ahead if  
3 more people are going to be charged. There the Prosecutor is  
4 perfectly happy to say that's nonsense, nothing will happen, that  
5 we don't have the data, that's just a few windows and innuendo.  
6 But when it suits them, they will pull out another study to say  
7 that, based on this study, no one of the accused thus far can be  
8 safe on the streets. I do apologise, and I say this with all due  
9 sincerity, if we have offended any of the civil parties by  
10 grouping them, by generalising, the facts as was related by one  
11 of the counsel for the civil parties was accurate as far as what  
12 had happened. Obviously that incident was with respect to one  
13 civil party, so we do apologise if in any way we impugned the  
14 integrity of all civil parties, that was not our intention. But  
15 we were trying to -- the point that we were trying to make is you  
16 can't have a civil party verbally or physically attacking a  
17 lawyer or threatening a particular accused, and then turn around  
18 and use that bad behaviour as the reasoning of saying, you know,  
19 there's going to be civil unrest, they're not safe.

20 [2.27.15]

21 That was the point, and perhaps I should apologise for not being  
22 clearer in stating our position, but that is, indeed, what we  
23 were trying to argue. Not that the civil parties are doing that,  
24 but at least there are some who feel very strongly and act  
25 poorly, and that poor behaviour should not be rewarded, and we

93

1 believe that that's what would be the case. And I don't think, I  
2 really don't think that there's sufficient evidence before you,  
3 Your Honours, to suggest that someone who is detained in his own  
4 house poses a threat either to himself or to others.  
5 Certainly given Mr. Ieng Sary's condition, his age, which was  
6 recognised by one of the civil party lawyers, is rather advanced.  
7 You can see that he's barely ambulatory, he is not the sort of  
8 person that might run away. And speaking of age, because the  
9 Prosecutor stood up and said even eight years is enough. If  
10 you're accused -- and the underlying, the subtext is of course  
11 they're guilty so it's okay to hold somebody for eight years --  
12 that is the subtext, because what if that person were to be found  
13 not guilty, how does that person get his eight years back? He  
14 doesn't.  
15 But the innuendo is, or the subtext, is that holding somebody up  
16 to eight years is perfectly okay. Well let's run with that,  
17 let's develop that a little bit. If that individual is 20, or  
18 30, or maybe even 40 years, eight years may not be that much.  
19 For 40 years, you get out; you're 48 that might be okay. When  
20 you're 80, 82, 83, eight years of detention or three years of  
21 detention or one year of detention is a lot more than one year  
22 for a 25 or 40 year old. There's a big difference.  
23 And the change of circumstances, they say where are the change of  
24 circumstances? Well -- and they cite what representations I made  
25 at a particular hearing on that particular day. What the

94

1 Prosecutor failed to bring to your attentions, Your Honours, was  
2 that it was slightly thereafter that circumstances did in fact  
3 change. Because of his advanced age, we don't know from one  
4 moment to the other whether he is going to be over here, in a  
5 relatively good and cheerful mood, able to carry on a  
6 conversation, or whether he needs to be rushed to the hospital by  
7 ambulance because he needs immediate medical attention. And  
8 those circumstances change from day to day, so it wasn't very far  
9 or very long after that particular hearing, which lasted about 15  
10 or 20 minutes, that his health did change, and then he went into  
11 the hospital on several occasions.

12 And so, well, those are the circumstances which have changed, in  
13 part, which brings me to one point and perhaps we may need some  
14 guidance from the Pre-Trial Chamber on this one, because if the  
15 issue is, you know, where are the change of circumstances, as we  
16 -- from the moment that we make a filing, a submission, there's a  
17 lag of time to the point when it comes before you, either for  
18 hearings such as this or when we file a reply and you have to  
19 make a decision. And this is a very fluid situation, especially  
20 because of the advanced age and the physical health of our  
21 client. Are we to file notices with the Pre-Trial Chamber that a  
22 circumstance has changed, on a periodic basis?

23 And if that is the procedure, and if that is indeed the procedure  
24 I apologise for not applying it, and we will so in the future,  
25 but perhaps this may be something that the Pre-Trial Chamber may



95

1 wish to consider and give us some guidance, but as I understand  
2 it -- as I understand it from reading the decision that I had  
3 read earlier from 17th October 2008 in para 68 to 69, at least  
4 factually speaking, and legally speaking, you were to consider  
5 whatever was in the case file. And of course these changed  
6 circumstances may not necessarily be in the case file, but we do  
7 think that when something comes up, right before a hearing, that  
8 is relevant to the hearing, we should make it part of the  
9 hearing, and that was what we were trying to do earlier with our  
10 submission which was dealing with the issue of due diligence  
11 which was tied into the length of the investigation and tied into  
12 allegations concerning findings by a UN office that one  
13 particular individual in a very high place was engaged in corrupt  
14 activities, and of course the budgetary issue that I alluded to  
15 earlier.

16 [2.33.00]

17 We believe these are changed circumstances. We would suggest  
18 that a hearing would be appropriate; however, we do understand  
19 that these sorts of proceedings should be dealt with in a finite  
20 period. So what I would propose, Your Honour, because it is out  
21 there, we're not asking for you to do any investigation, what we  
22 are asking to at least be allowed to brief the matter. We  
23 believe it is an important matter, because of the age of our  
24 client, and because of his health, because of the continuing  
25 length of the investigation and especially since, if you look at

96

1 article 28 of the agreement, it makes it very clear that if  
2 circumstances change at some point, the UN is perfectly within  
3 their right to cease to provide assistance, financial or  
4 otherwise.

5 And it's almost verbatim text which was quoted by Mr. Knut  
6 Rosenhaug -- at least that's what he's being quoted in this  
7 report by the German delegation, where he himself said the report  
8 that was provided by the United Nations and had named Mr. Sean  
9 Visoth was the one individual who was at the apex, that the UN  
10 had found that he was guilty of corruption. That's what is in  
11 the report. So we do believe that this is something that should  
12 be considered because if this institution may change in its  
13 appearance, it may go national as opposed to the hybrid. If --  
14 the Co-Investigating Judges will need extra time to consider  
15 whether any of the evidence that they have considered has been  
16 tainted, because I want to be very very clear. We are not making  
17 any suggestions that anything has been tainted.

18 JUDGE DOWNING:

19 Excuse me, Mr. Karnavas, are you not now addressing us on a  
20 matter that we said you should not be addressing us on at this  
21 point?

22 MR. KARNAVAS:

23 I'm simply replying to --

24 JUDGE DOWNING:

25 Well, I think you were going further than that.

97

1 MR. KARNAVAS:

2 I will move on.

3 JUDGE DOWNING:

4 Thank you.

5 MR. KARNAVAS:

6 And I just touch on a few other points. Going -- if I may start  
7 now from the beginning, dealing with the health issues. It was  
8 raised -- maybe I didn't quite understand the argument that was  
9 being made, but it seems to me that the prosecution's  
10 understanding when it comes to being provisionally released due  
11 to health, it is only after there is some sort of a medical  
12 finding that you are about to die. That you don't have very long  
13 to live. There have been some instances in The Hague where that  
14 has happened. I believe it was General Talic, was one of them,  
15 who was released early and shortly thereafter he did die.

16 [2.36.10]

17 However, as I mentioned in the last time that we were here, and I  
18 believe it might've even been last year ago, the Stani?i? case,  
19 and I'm rather astounded that the gentleman wasn't aware of the  
20 case, because Mr. Stani?i? is yet to go to trial, and this  
21 individual held the position of being the head of the secret  
22 service of Yugoslavia who perhaps knows more about the events  
23 than Miloševi? himself. And of course he's a very high valued  
24 accused, charged with very serious crimes, and yet because he had  
25 a stomach ailment, and because of depression, the Trial Chamber

98

1 found that he was not physically fit or mentally fit to go to  
2 trial. The trial had begun and a day or two later it stopped.  
3 So here is a very good example, where health, in and of itself,  
4 can mandate provisional release, because that's what happened.  
5 There was a determination that he would be better served being in  
6 Serbia being treated by his local doctors as opposed to being  
7 treated in The Hague, in Seveningen where they have the UN  
8 detention centre and where they have the UN doctors. And so he  
9 was provisionally released based on a guarantee that was provided  
10 by Serbia, and that's where he remains, as far as I understand,  
11 that's where he was prior to my departure to come here to  
12 Cambodia.

13 So there is a very good example, and that ties into my other  
14 point. If we are unable to assess, at this point in time, our  
15 client's ability to assist in his own defence, either physically  
16 or mentally, and from Dr. Falke we have that, at least we have  
17 some inkling but we don't have the necessary tests, because they  
18 were never performed -- how can we possibly then argue to you  
19 that at this stage of the proceedings, he's not fit to stand  
20 trial?

21 The one gentleman, and I was rather surprised, I must say,  
22 because I understand some of the lawyers for the civil parties  
23 are also defence lawyers -- I was rather shocked to hear that he  
24 mentioned that my client has decided to exercise his fair trial  
25 right to remain silent, and therefore that was a complication.

99

1 And this is the first time I hear that exercising one's right  
2 becomes a complication.  
3 [2.38.55]  
4 I don't think exercising one's rights should be viewed in that  
5 fashion. But you must keep in mind that in order for someone,  
6 assuming that he wishes to assist, by not exercising his right to  
7 remain silent; in other words, providing a statement, he does  
8 have the right to assist in his own defence but being able and  
9 capable of reading what's in the file, the dossier, that is being  
10 collected. And it was precisely for those reasons on several  
11 occasions I brought it to Your Honours' attention in our motions  
12 that part and parcel of the right to assist in one's own defence  
13 is the ability to understand, comprehend and to contribute after  
14 reading the documents and speaking with the lawyers.  
15 And it is rather presumptuous that the gentleman sits here and  
16 says, well, he exercises his human right to remain silent, and  
17 therefore we can draw some conclusions, rather than saying, well,  
18 perhaps, one of the reasons may have been because he's unable to  
19 assist in his own defence because of his physical health and  
20 mental health. His age. So I just put that out there as a  
21 counter point.  
22 There was an argument made that house arrest was a thing of the  
23 past, it was passé, as it were. Something that the International  
24 Criminal Tribunal for the former Yugoslavia sort of experiment in  
25 the Blasic case and afterwards gave up on it. You have to

100

1 understand one thing: The ICTY, first of all, is an  
2 international court. It negotiated an agreement with the  
3 Netherlands. Thirdly, the Netherlands made it very clear that  
4 they didn't want anybody provisionally released while in The  
5 Hague, and there's a very fine case on that point, it's the  
6 Blagojevic Jokic case, where Judge Schoenberg did in fact find  
7 that someone could be provisionally released, and the Dutch  
8 government, the next day, came to court and their diplomat said  
9 that the decision was, and I quote, "abhorrent". And the reason  
10 I say that is because I was present when that happened.  
11 So you cannot look at the Netherlands and say, oh, the Blasic  
12 case, and say they just gave up on it. Because if you fast  
13 forward a few years, and I'm sure that my learned colleague here,  
14 who comes from the office of the prosecution from the ICTY, would  
15 have known that in the Biljana Plavscic case, who was the  
16 political twin of Karadzic and Krajisnik, the troika of the  
17 Republika Srpska -- Karadzic was the most wanted man other than  
18 Mladic. They were on the same level. And even before she  
19 decided that she would plead guilty to a reduced charge, one  
20 count of persecution, she was provisionally released, in  
21 Belgrade, under house arrest.  
22 Not only that, Your Honours, but when she pled guilty, she did so  
23 via video link from Belgrade, as I understand, and she continued  
24 to be under house arrest until sentencing. Now let's look at the  
25 circumstances there, because the former Yugoslavia, Serbia in

101

1 particular, has been noted in the press for being a rather  
2 volatile area where the sentiments run very high against the  
3 International Criminal Tribunal for the former Yugoslavia. And  
4 here, it became known to God and mankind that this woman was  
5 going to not just plead guilty, but was going to implicate some  
6 of her highest associates. And never once did anyone question  
7 whether now we need to bring her back to The Hague, back to the  
8 UN detention unit, because house arrest was dangerous to her  
9 health, that they could no longer protect her.

10 [2.43.40]

11 So when they say that that's an issue that's something passé,  
12 there's a more recent example, a very high level individual, a  
13 volatile region, pleads guilty, names names,, takes on  
14 responsibility and also claims that others are responsible for  
15 very serious crimes, and yet she's allowed to remain under house  
16 arrest while waiting to be sentenced. And keep in mind that  
17 after you plead guilty, your status changes dramatically. You no  
18 longer enjoy the presumption of innocence. You pled guilty, so  
19 therefore once the court accepts the guilty plea, you are guilty.  
20 So I raise that just for your understanding.

21 The Duch case came up, and they say, well, he's being tried, and  
22 therefore there may be some evidence -- after all, my client was  
23 in Phnom Penh on or about certain periods of time when Duch was  
24 doing whatever he was doing, and it is our submission that at  
25 this point in time, any suspicion or innuendo is just that.

102

1 There is no hard evidence, none that is before you, and I don't  
2 think that you need to give that any weight. Otherwise, we're  
3 just going to be speculating, and we're going to be finding  
4 people guilty by association, because that's what that argument  
5 leads to.

6 Which is exactly why I was rather quick to my feet, and rather, I  
7 would say, direct and sharp with my colleague for the civil  
8 parties when she brought in my client's wife, because what she  
9 said, what she did, under what circumstances, has nothing to do.  
10 But very cleverly, what she said, that my client sees his wife on  
11 a weekly basis, and therefore -- you see, there you go. They see  
12 each other, so therefore what the wife says you must attribute  
13 also to the husband. That's the underlying argument of that.  
14 Pernicious as it may be, I don't believe it has any weight for  
15 you to consider. What she did or what she said is irrelevant in  
16 your determination as to Mr. Ieng Sary -- is not a flight risk, a  
17 risk to himself or a risk to others.

18 [2.46.20]

19 The issue as far as the UN detention unit being sort of enjoying  
20 the stamp of approval by the United Nations or other  
21 organisations that have looked at it. What we're not saying, and  
22 nor do we want for you to be left with the impression that we're  
23 saying that it is some inhumane place, that's not what we're  
24 saying. What we are saying is due to his age, and due to his  
25 health, that may not be the best suitable place, and so that's



103

1 the argument I want to make sure -- that I'm not misunderstood.  
2 But when they had the temerity to say this is a UN approved --  
3 and then I bring in, or try to bring in, a UN doctor, from the  
4 other sister organisation, who looks after all of these accused,  
5 who says for my quick study of the medical reports that I have,  
6 it appears that at least two major examinations are not being  
7 provided to this individual, examinations which are standard, in  
8 order for us to determine whether the person is fit to assist in  
9 his own defence, to enjoy his fair trial rights, when it comes to  
10 that they are very dismissive. He is over there. He hasn't  
11 looked at it. He's only a generalist. They do everything they  
12 possibly can not to hear the particular individual.  
13 And so it begs the question: how can on the one hand they say  
14 this is UN approved, and then when I bring in a UN doctor who is  
15 the doctor in oversees all of the accused for the International  
16 Tribunal of the former Yugoslavia, the ICC, Mr. Taylor who is a  
17 guest over there, from the Sierra Leone Court, and probably the  
18 Lebanese. So I don't see how they can say this individual is not  
19 qualified to be heard, at least in the very limited nature of  
20 whether these exams are given and should be given in this  
21 instance based on the records that he has heard. Yes, sir.  
22 MR AHMED:  
23 May I make a brief submission that my learned friend is seeking  
24 to reargue an application that in two different forms have been  
25 rejected in the very recent past. And I was wondering whether

104

1 Your Honour would let that continue. Thank you very much.

2 MR. KARNAVAS:

3 I'm not arguing, Your Honour, that he be heard. But he invoked  
4 the UN standards. And that's my reply. And so if he didn't want  
5 to hear what I have to say about Dr. Falke and his qualifications  
6 as a UN doctor then he should not have raised the issue that this  
7 place over here enjoys the UN's seal of approval.

8 I believe that I have covered all of the points that I wanted to  
9 cover, Your Honour. Again, I want to thank you very much for  
10 giving us this opportunity to be heard. We would appreciate, and  
11 this would be an oral submission, to consider either continuing  
12 so we can make further submissions so that there are no claims of  
13 not being duly noted, or give us the opportunity, say 10 or 15  
14 says, to provide written submissions for you to consider.

15 Sir, those are our request. Again, we thank you very much. We  
16 apologise if we were overly aggressive at any point, but we  
17 certainly appreciate your indulgence. Thank you.

18 (Deliberations between Judges)

19 [2.51.45]

20 JUDGE LAHUIS:

21 The Pre-Trial Chamber rules on the request to delay the hearing  
22 in order to allow the defence to make additional submissions, as  
23 how the Pre-Trial Chamber understands the question raised, either  
24 orally or in writing, it is the same issue involved. The  
25 Pre-Trial Chamber denies this request because the Pre-Trial

105

1 Chamber finds that the way the co-lawyers have put this request  
2 before the Pre-Trial Chamber is of a speculative nature, as it is  
3 asserting that if this delays the hearing it should have  
4 consequences, and then raises the issues which are concerned.  
5 And the Pre-Trial Chamber finds that it's only taking in  
6 consideration the facts as they are relevant and are present at  
7 this moment and not speculative facts which may. And the  
8 Pre-Trial Chamber also notes that there is a possibility for the  
9 defence lawyers to issue, ask for the release of the charged  
10 person if the circumstances are found that influencing the, well,  
11 the way the proceedings are going on. So there is a possibility.  
12 So that's why the Pre-Trial Chamber denies the request.  
13 Just to be sure, the charged person has left, and the defence has  
14 made clear that he doesn't want to be present here anymore, but  
15 does he also waive his right to speak last in these proceedings?  
16 MR. KARNAVAS:  
17 I am glad -- thank you for the ruling. And just to -- I should  
18 have made it clear that prior to the commencement of the  
19 proceedings again, we did consult with him after the lunch break  
20 --  
21 JUDGE LAHUIS:  
22 Yes.  
23 MR. KARNAVAS:  
24 -- and he wasn't feeling well, so he gave us permission to  
25 continue the hearing in his absence, and he had indicated that he

106

1 does not wish to make a statement, he communicated that to us,  
2 and for the proceedings to close in his absence. And of course,  
3 it should be understood, but I guess I have to say this, that the  
4 waiver was only for today.

5 JUDGE LAHUIS:

6 Yes, yes, yes, yes.

7 MR. KARNAVAS:

8 So it's not a continuing waiver. Thank you.

9 JUDGE LAHUIS:

10 Thank you.

11 [2.55.20]

12 MR. PRESIDENT:

13 I would like to inform the public that after this public hearing  
14 we will have a break and when the Court resumes it's going to be  
15 in camera, and I would like to inform the public that the order  
16 of the decision of the Pre-Trial Chamber will be notified three  
17 days before it's going to be delivered. Therefore I declare the  
18 adjournment for 15 minutes breaks, and when the Court resumes  
19 it's going to be in camera.

20 (Court adjourns to Closed Session 1456H)

21

22

23

24

25