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

E90/5/18

អង្គបុរេជំនុំជម្រះ
PRE-TRIAL CHAMBER
CHAMBRE PRELIMINAIRE

In the name of the Cambodian people and the United Nations and pursuant to the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea.

Criminal Case File N°002/19-09-2007-ECCC/OCIJ (PTC 16)

Before:	**Judge PRAK Kimsan, President** **Judge Rowan DOWNING** **Judge NEY Thol** **Judge Katinka LAHUIS** **Judge HUOT Vuthy**
Greffiers	**CHUON Sokreasey** **Anne-Marie BURNS**
Date:	**11 May 2009**

PUBLIC (REDACTED VERSION)
DECISION ON IENG THIRITH'S APPEAL AGAINST ORDER ON EXTENSION OF PROVISIONAL DETENTION

Co-Prosecutors

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1. **THE PRE-TRIAL CHAMBER** of the Extraordinary Chambers in the Courts of Cambodia ("ECCC") is seized of "Ieng Thirith Defence Appeal against 'Order on Extension of Provisional Detention' of 10 November 2008" filed on 9 December 2008 ("Appeal").

I. PROCEDURAL BACKGROUND

2. The Pre-Trial Chamber refers to, repeats and adopts the Report of Examination dated 19 February 2009, which forms part of this Decision.

3. On 10 November 2008, the Co-Investigating Judges issued their Order on Extension of Provisional Detention ("Extension Order") extending the provisional detention of Ieng Thirith, who had then been detained since 14 November 2007, for a period not exceeding one year.[1]

4. On 21 November 2008, the Co-Lawyers for the Charged Person filed a Notice of Appeal and, on 9 December 2008, they filed their Appeal Brief.[2]

5. The Co-Prosecutors filed, on 18 December 2008, an application for extension of time to file their Response to the Appeal. After having received a response from the Co-Lawyers for the Charged Person, the Pre-Trial Chamber, on 24 December 2008, granted the application and ordered that the Co-Prosecutor's Response be filed by 9 January 2009.

6. On 9 January 2009, the Co-Prosecutors submitted their Response to the Appeal (Co-Prosecutors' Response").[3]

7. No response was filed by the Civil Parties.

8. In their Response, the Co-Prosecutors requested the Pre-Trial Chamber to determine the Appeal on the basis of written submissions alone. This request was opposed by the Co-

[1] Order on Extension of Provisional Detention, 10 November 2008, C20/4 ("Extension Order").
[2] Ieng Thirith Defence Appeal against "Order on Extension of Provisional Detention" of 10 November 2008, 9 December 2008, C20/5/1 ("Appeal Brief").
[3] Co-Prosecutors' Response to Ieng Thirith Defence Appeal against the "Order on Extension of Provisional Detention of 10 November 2008", 9 January 2009, C20/5/7 ("Co-Prosecutors' Response").

Lawyers for the Charged Person[4] and then denied by the Pre-Trial Chamber by a decision issued on 29 January 2009, in which a hearing date was set for 24 February 2009.[5]

9. Before the hearing, the Pre-Trial Chamber was given access to the Case File, which was updated.

10. On 24 February 2009, the Pre-Trial Chamber held a hearing where the Charged Person was, in the absence of her International Lawyer, represented by her National Lawyer. This hearing was held partly in public and, at the request of the Defence, partly *in camera.* Pursuant to Rule 56 of the Internal Rules of the ECCC ("Internal Rules"), the information contained in the Case File shall remain confidential at this stage of the proceedings where the facts are still being investigated. During the *in camera* part of the hearing, confidential evidence contained in the Case File was considered.

II. ADMISSIBILITY OF THE APPEAL

11. The Extension Order was issued on 10 November 2008 and notified to the Parties on 11 November 2008. The Co-Lawyers for the Charged Person filed a Notice of Appeal on 19 November 2008, in accordance with Internal Rule 75. The Appeal Brief was filed on 9 December 2008, therefore in time.

III. APPLICABLE LAW

12. Internal Rule 63, on Provisional Detention, provides in relevant part:

> "2. An order for Provisional Detention shall:
>
> a) set out the legal grounds and factual basis for detention, based on sub-rule 3 below;
>
> [...]
>
> 3. The Co-Investigating Judges may order the Provisional Detention of the Charged Person only where the following conditions are met:
>
> a) there is well founded reason to believe that the person may have committed the crime or crimes specified in the Introductory or Supplementary Submission; and

[4] Defence Response to OCP Request to Determine Appeal against Order on Extension of Provisional Detention on the Basis of Written Submissions Alone, 19 January 2009, C20/5/9.
[5] Decision on Co-Prosecutors' Request to Determine the Appeal on the Basis of Written Submissions and Scheduling Order, 29 January 2009, C20/5/10.

b) the Co-Investigating Judges consider Provisional Detention to be a necessary measure to:

i) prevent the Charged Person from exerting pressure on any witnesses or Victims, or prevent any collusion between the Charged Person and accomplices of crimes falling within the jurisdiction of the ECCC;

ii) preserve evidence or prevent the destruction of any evidence;

iii) ensure the presence of the Charged Person during the proceedings;

iv) protect the security of the Charged Person; or

v) preserve public order.

[...]

6. Provisional Detention may be ordered as follows:

a) for genocide, war crimes and crimes against humanity, for a period not exceeding 1 (one) year. However, the Co-Investigating Judges may extend the Provisional Detention for further 1 (one) year periods;

[...]

7. Any decision by the Co-Investigating Judges concerning extension of Provisional Detention shall be in writing and shall set out the reasons for such extension. An extension shall be made only after the Co-Investigating Judges notify the Charged Person and his or her lawyer and give them 15 (fifteen) days to submit objections to the Co-Investigating Judges. No more than 2 (two) such extensions may be ordered. All such orders are open to appeal."

IV. NATURE OF THE APPEAL

13. By their Appeal, the Co-Lawyers request the Pre-Trial Chamber to quash the Extension Order and release the Charged Person "under conditions such as suggested by the defence in its Objections, or as are otherwise deemed appropriate by the Pre-Trial Chamber"[6] on the grounds that the Order contains several mistakes of facts and law. They contend that (i) the Extension Order is insufficiently reasoned, (ii) the Co-Investigating Judges have applied the wrong standards when deciding whether the length of detention is justified, (iii) the Co-Investigating Judges have infringed upon the Charged Person's right to remain silent, and (iv) the Extension Order does not show a "real risk" that the witnesses might refuse to participate in the proceedings if the Charged Person is released.

14. The Co-Prosecutors submit that these arguments raised by the Co-Lawyers are "of no material relevance to the issue of the extension of provisional detention". They state:

[6] Appeal Brief, p. 22.

"The Defence disregarded the fact that the principal issue in the determination of the appeal against an Extension Order is whether the conditions set out in Rule 63(3) are still met. [...] The [Pre-Trial Chamber] can [...] replace the [Co-Investigating Judges'] orders by their own decisions and substitute its own reasons and motives for the ones of the [Co-Investigating Judges]. In case of defect, the [Pre-Trial Chamber] could still 'undertake its own analysis, applying the standard set out in Internal Rule 63(3)' and cure the defect by substituting its own reasons".[7]

15. The Pre-Trial Chamber will review the Extension Order by an examination of:
   (i) the sufficiency of evidence to conclude that there are well-founded reasons to believe that the Charged Person may have committed the crimes with which she has been charged pursuant to Internal Rule 63(3)(a) at the time the Extension Order was issued and at present;
   (ii) whether, in light of the arguments raised by the Co-Lawyers, provisional detention is still a necessary measure pursuant to the criteria set out in Rule 63(3)(b);
   (iii) the exercise of discretion by the Co-Investigating Judges in applying Internal Rule 63(3), including the reasonableness of the length of provisional detention; and
   (iv) the request for release on bail.

V. CONSIDERATIONS

A. Well-founded reasons to believe that the Charged Person may have committed the crime or crimes specified in the Introductory Submission (Internal Rule 63(3)(a))

16. The Pre-Trial Chamber observes that, in order to ensure that the investigation is not compromised, some excerpts of the Decision have been redacted in the public version.

17. In the Extension Order, the Co-Investigating Judges noted:

"On appeal, the Pre-Trial Chamber undertook a detailed analysis of the case file up to the date of the hearing on 21 May 2008. The Chamber considered, in its 9 July 2008 decision[8], that 'the Case File contains evidence capable of satisfying an objective observer, at this stage of the investigation, that the Charged Person may have committed the crimes for which she has been placed under judicial investigation.'"[9]

[7] Co-Prosecutors' Response, para. 5.
[8] Decision on Appeal against Provisional Detention Order of Ieng Thirith, 9 July 2008, C20/I/27 ("9 July 2008 Decision"), para. 41.
[9] Extension Order, para. 15.

18. The Co-Investigating Judges found that the Pre-Trial Chamber's conclusion remains valid as it has not been undermined by exculpatory evidence. The Co-Investigating Judges added that additional evidence has been placed on the Case File since the hearing before the Pre-Trial Chamber, "some of which provide specific information regarding the Charged Person's potential role within the regime".[10] They specifically referred to two documents: (i) a Written Record of Interview of Kaing Guek Eav ("Duch")[11] and (ii) an Interview of [REDACTED] filed by the Co-Prosecutors.[12]

19. The Co-Investigating Judges concluded as follows:

> "[T]he Co-Investigating Judges consider that, having looked at the totality of the evidence on the case file afresh, there continues to be, at this stage of the investigation, facts or information which would satisfy an objective observer that Ieng Thirith, in her capacity as Minister of Social Action, may have:
> (a) exercised authority and effective control over the Ministry and all its constituent and subordinate organs; and
> (b) instigated, ordered, failed to prevent or punish, or otherwise aided and abetted in the commission of the crimes for which she is charged."[13]

Reasoning of the Co-Investigating Judges

20. The Co-Lawyers argue that the Extension Order lacks sufficient reasoning, in contravention to Internal Rule 63(7), as the Co-Investigating Judges made "general accusations without providing sources for it" when they concluded that new evidence providing information on the Charged Person's role in the regime has been put on the Case File.[14] They further contend that the only two documents to which the Co-Investigating Judges refer do not mention the name of the Charged Person and are thus not supporting the Co-Investigating Judges' conclusion.[15]

21. The Co-Prosecutors respond that the Extension Order is sufficiently and adequately reasoned and that is does not contain any incorrect information.[16]

22. [REDACTED][17]

[10] Extension Order, paras 15-18.
[11] Written Record of Interview of Charged Person Kaing Guek Eav ("Duch"), 3 June 2008, D88.
[12] [REDACTED].
[13] Extension Order, para. 18.
[14] Appeal Brief, paras 16 and 17.
[15] Appeal Brief, paras 18-20.
[16] Co-Prosecutors' Response, para. 2(a).

23. [REDACTED][18]

24. Noting that the Charged Person was also known as "Phea", the Pre-Trial Chamber considers that these two documents referred to in the Extension Order provide relevant information on the implication of the Charged Person and the Ministry she was heading in the purge process alleged in the Introductory Submission. Contrarily to what is asserted by the Defence, the Pre-Trial Chamber finds that these documents support the Co-Investigating Judges' conclusion that some material providing "specific information regarding the Charged Person's potential role within the regime" has been added to the Case File.

Sufficiency of the facts for ordering provisional detention under Internal Rule 63(3)(a)

25. The Pre-Trial Chamber notes that it would have been preferable for the Co-Investigating Judges to give more details about the evidence they have gathered which supports their conclusion that there continue to be well-founded reasons to believe that the Charged Person may have committed the crimes with which she has been charged. It is implicit from the Extension Order that the Co-Investigating Judges have taken into consideration the relevant material contained in the Case File as they mentioned having looked "at the totality of the evidence on the case file afresh".[19] The Pre-Trial Chamber finds that this was sufficient for the Co-Investigating Judges to conclude that there were well-founded reasons to believe that the Charged Person may have committed the crimes for which she has been charged at the time the extension of provisional detention was ordered.

26. The Pre-Trial Chamber notes that in addition to the two documents referred to by the Co-Investigating Judges, the following information, which supports the conclusion of the Co-Investigating Judges, had also been included in the Case File at the time the Extension Order was issued.

27. [REDACTED][20]

28. It is also noted that a witness declared that Ieng Thirith attended, together with [REDACTED], meetings with the District Committees, Sector Committees and Zone Committees whenever these involved Social Action.[21]

[17] [REDACTED]
[18] [REDACTED]
[19] Extension Order, para. 18.
[20] [REDACTED]

29. The Pre-Trial Chamber notes that evidence of potential exculpatory nature had been placed on the Case File before the Extension Order was issued.[22] This evidence does not undermine the Pre-Trial Chamber's previous conclusion that the Co-Investigating Judges were justified to find that there are well-founded reasons to believe that the Charged Person may be responsible for the crimes against humanity for which she has been placed under judicial investigation.

30. After the Extension Order was issued, two written records of witness interviews where the Charged Person's participation in political meetings is reported have been added to the Case File. [REDACTED][23] REDACTED][24]

31. An article published in the magazine "Search for the Truth" has also been filed by the Co-Prosecutors with their Response to the Appeal in relation to the alleged role of the Charged Person in the purge process. In this article, it is reported that a former staff member from the 17 April Hospital declared that her brother, who was a dentist cadre at the 17 April Hospital, "was arrested by the Angkar and disappeared up to now." It is reported that after this disappearance and that of other hospital cadres, the Charged Person called "cadres and female and male combatants of the hospital" to meet and talked about "those who had betrayed the Angkar and had been removed by the Angkar". According to this article, the Charged Person "took and read a list of the hospital cadres that betrayed the Angkar" and, after finishing reading, asked the medic cadres "who has been involved with these betrayers". She further asked: "If you have, raise the hand and make the commitment before the collective."[25]

32. The statement made by the Charged Person during the hearing of the Appeal on 24 February 2009 indicates that she knew that people working for the Ministry of Social Affairs or in hospitals were being arrested and/or executed:

> "So I had nothing to do with Nuon Chea, although I knew what he has done, and I knew he killed people, I knew this. I know this. I know how many people died and who killed those people. I am knowledgeable. So the students who came with me, they are university graduates from Russia, from Moscow, from Prague, from France. So when I

[21] [REDACTED].
[22] [REDACTED].
[23] [REDACTED].
[24] [REDACTED].
[25] Search for the Truth, Issue 89, May 2007, p. 2, filed as Annex B of the Co-Prosecutors' Response.

came they came with me and stayed, lived in Phnom Penh with me. And at the beginning of everything when my students were arrested and executed it done by Nuon Chea, and they took them in a truck and executed.

[…]

And when my students, who learned how to produce medicines, then Nuon Chea ordered them to be arrested under Nuon Chea -- Kaing Guek Eav's supervision, and I would like to make it clear that Nuon Chea killed all my students, and instead I was accused wrongly.

[...]

But now all my students have been executed, you know, they brought a truck and then uploaded them and then brought them to be executed. So everything done by Nuon Chea.

[…]

Only recently when Nuon Chea brought my students to be killed by Kaing Guek Eav that I started to know this person. So only one student left, the person who I asked to be on duty at the office, because everyone who helped build or repair the factories or the hospitals have all been executed."[26]

33. Taking into account this evidence and the fact that no exculpatory evidence has been placed on the Case File between the issuance of the Extension Order and the hearing held on 24 February 2009, the Pre-Trial Chamber finds that the first condition for ordering provisional detention, mentioned in Internal Rule 63(3)(a), is still met.

B. Consideration of the grounds making provisional detention a necessary measure (Internal Rule 63(3)(b))

34. In the Extension Order, the Co-Investigating Judges noted that the Co-Lawyers "did not introduce any arguments concerning Internal Rule 63(3)(b) in their [Observations concerning possible extension of provisional detention]".[27] They found that the grounds on the basis of which the Pre-Trial Chamber considered that provisional detention was a necessary measure – namely to prevent the Charged Person from exerting pressure on witnesses and victims (Rule 63(3)(b)(i)), to preserve evidence (Rule 63(3)(b)(ii)), to ensure

[26] Transcripts, 24 February 2009, pp. 47, 48 and 50.
[27] Extension Order, para. 21.

the presence of the Charged Person during the proceedings (Rule 63(3)(b)(iii)) and to preserve public order (Rule 63(3)(b)(v)) – were still met in light of the circumstances prevailing at the time of the expiry of the initial Provisional Detention Order.

35. It is noted that the arguments raised by the Co-Lawyers before the Pre-Trial Chamber in relation to Internal Rule 63(3)(b) are limited to the grounds set out in Internal Rule 63(3)(b)(i) and (ii).

36. In relation to these specific grounds, the Co-Investigating Judges mentioned in the Extension Order:

> "[T]he Co-Investigating Judges stress the fact that the Charged Person has access to all the elements in the case file, including the written records of interviews with specific witnesses, as well as complaints and civil party applications. [...] Clearly, the Charged Person already has access to a large body of evidence containing details on her possible role within the regime. There is a real risk that witnesses might refuse to participate in the proceedings in the future if Ieng Thirith were released. Moreover, many of these witnesses might be re-interviewed during the investigation, and, in their statements, have given other leads and named other potential witnesses who have not yet been interviewed at this stage of the judicial investigation. There are reasons to believe that these witnesses could be subjected to pressure, either because they were the Charged Person's subordinates or, in a broader sense, because of the senior positions the Charged Person held. The risk is real and is corroborated by the Charged Person's behaviour and public statements."[28]

37. The Co-Lawyers first contend that the Co-Investigating Judges have violated the principle that a decision needs to be reasoned by stating that the Charged Person "has access to all the elements of the Case File", which, in the Co-Lawyers' views, does not reflect the current situation.[29]

38. The Pre-Trial Chamber notes that the Charged Person has access to the Case File through her lawyers.[30] Thus, the Co-Investigating Judges did not provide incorrect information in this regard in their Extension Order although the Charged Person is not fully granted personal access.

[28] Extension Order, para. 26.
[29] Appeal Brief, para. 24.
[30] Appeal Brief, para. 23.

39. The Co-Lawyers also contend that the Co-Investigating Judges "[have] not shown that a 'real risk' exists that (i) the Charged Person would influence witnesses directly or indirectly, and (ii) that such influence would lead to witnesses refusing to participate in the future proceedings."[31] They further argue that "the [Co-Investigating Judges] [have] had the chance to find a proper basis for such 'real risk' that witnesses would be concerned with the Charged Person's provisional detention coming to an end, and none of the witnesses has expressed such a fear."[32]

40. The Co-Prosecutors submit that the previous "offensive attitude" shown by the Charged Person during the hearings before the Pre-Trial Chamber on 21 May 2008 and 9 July 2008, "consisting in threats and attempts to intimidate the parties and / or the judges" should be taken into account when assessing the risk that the Charged Person might exert pressure on witnesses and victims.[33]

41. The Pre-Trial Chamber notes that the Charged Person has access, through her lawyers, to evidence containing details on her possible role within the Democratic Kampuchea regime. The Co-Investigating Judges mentioned in their Extension Order that "many of these witnesses might be re-interviewed during the investigation, and, in their statements, have given other leads and named other potential witnesses who have not yet been interviewed at this stage of the investigation."[34] The Pre-Trial Chamber finds that the Co-Investigating Judges were justified to conclude that there is still a need to prevent that pressure be exercised on witnesses and victims.

42. The Pre-Trial Chamber further notes the Charged Person's behaviour during the hearing held before the Pre-Trial Chamber on 24 February 2009 where she declared: "So don't accuse me of murder otherwise you will be cursed to the seventh level of hell."[35]

43. The Pre-Trial Chamber finds that provisional detention is still necessary to prevent the Charged Person from exerting pressure on witnesses or victims and from destroying evidence. The grounds mentioned in Internal Rule 63(3)(b)(i) and (ii) are thus still met.

44. The Pre-Trial Chamber observes that the Co-Investigating Judges have found that the two other conditions necessitating the Charged Person's detention under Rule 63(3)(b)(iii) and

[31] Appeal Brief, para. 58.
[32] Appeal Brief, para. 60.
[33] Co-Prosecutors' Response, para. 47.
[34] Extension Order, para. 26.
[35] Transcripts, 24 February 2009, p. 48.

(v) were still met in light of the circumstances prevailing at the time of the renewal of the detention and the fact that the Co-Lawyers did not put before the Chamber any argument or change in circumstances indicating the contrary. An examination of the Case File by the Pre-Trial Chamber has not undermined this conclusion of the Co-Investigating Judges.

45. Therefore, the Pre-Trial Chamber finds that provisional detention is still a necessary measure to (i) prevent the Charged Person from exerting pressure on witnesses or victims, (ii) to preserve evidence, (iii) to ensure the Charged Person's presence during the proceedings, and (iv) to protect public order.

Co-Prosecutors' request to include an additional ground for ordering provisional detention

46. The Pre-Trial Chamber observes that in their Response, the Co-Prosecutors asserted that the ground mentioned in Internal Rule 63(3)(b)(iv) – to protect the security of the Charged Person – which was considered as not being met by the Pre-Trial Chamber in its 9 July 2008 Decision and was not mentioned by the Co-Investigating Judges in their Extension Order, is now satisfied.

47. As far as this can be seen as a request to insert a new ground to the Extension Order, the Co-Prosecutors' request is not granted. The Pre-Trial Chamber observes that each of the four grounds upon which the Co-Investigating Judges have ordered the extension of provisional detention individually justify the conclusion that provisional detention is a necessary measure. In these circumstances, and as this issue was raised in a response to an appeal lodged by the Charged Person and therefore not fully discussed within the Appeal, the Pre-Trial Chamber does not consider it necessary to analyse the additional ground as requested by the Co-Prosecutors.

C. Exercise of discretion in ordering extension of provisional detention

48. In the Extension Order, the Co-Investigating Judges acknowledged that "the passage of time is relevant to determining the legitimacy of continued provisional detention of a Charged Person". They considered that "[t]he time spent in provisional detention cannot be deemed unjustified if it is demonstrated that due diligence is shown in conducting the proceedings."[36]

[36] Extension Order, para. 35.

49. The Co-Investigating Judges found that the twelve-month period during which the Charged Person has been in detention is not excessive "in view of the scope of the investigations, the complexity and gravity of the crimes of which the Co-Investigating Judges are seised."[37] They further considered that "since the opening of the judicial investigation, they have undertaken large-scale investigations into crimes of which they are seised and collected a large body of evidence [...]."[38]

50. The Co-Investigating Judges also stated:

> "The Co-Investigating Judges recall that the right to remain silent is recognised and undisputed. The right of the Charged Person's lawyers not to cooperate actively with the judicial authorities during the judicial investigation is also undisputed. Nevertheless, this attitude is not conducive to speedy proceedings."[39]

51. The Co-Lawyers contend that the Co-Investigating Judges have applied the wrong standards in determining whether the length of pre-trial detention is justified in light of the Charged Person's right to be tried within a reasonable time. They argue that the Co-Investigating Judges (i) should have applied a standard of "special diligence" rather then "due diligence", (ii) should have considered the evidence found, not only the scope of the investigation, and (iii) should have evaluated the progress in the investigation starting from the Charged Person's arrest on 12 November 2007, not the date of the hearing of her appeal on provisional detention before the Pre-Trial Chamber.

52. The Co-Lawyers also argue that the Extension Order infringes upon the Charged Person's right to remain silent by putting the blame for the delay in proceedings on the Defence.[40]

53. The Co-Prosecutors respond that the length of pre-trial detention is reasonable given the gravity of the crimes charged, the complexity of the case and the extent of ongoing investigations being carried out by the Co-Investigating Judges.[41] They submit that the standard of "special diligence" suggested by the Defence is not relevant in the proceedings

[37] Extension Order, para. 36.
[38] Extension Order, para. 38.
[39] Extension Order, para. 37.
[40] Appeal Brief, para. 56.
[41] Co-Prosecutors' Response, para. 30.

before the ECCC due to the very specific and complex nature of investigations within its jurisdiction as opposed to the European Court on Human Rights (ECHR).[42]

54. The Co-Prosecutors further submit that "[t]he alleged infringement of the Appellant's right to remain silent appears to be based on an erroneous reading of the Extension Order; the right to remain silent is recognized and undisputed by the [Co-Investigating Judges]. However, the absence of cooperation of the Appellant does not assist the [Co-Investigating Judges] in discovering exculpatory evidence."[43]

55. The Pre-Trial Chamber notes that Internal Rule 63(7) provides, in relation to the length of time allowed for provisional detention, that "no more than 2 (two) such extensions may be ordered" and that Internal Rule 21(4) provides, in relation to due diligence, that "[p]roceedings before the ECCC shall be brought to a conclusion within a reasonable time". "Proceedings before the ECCC" include judicial investigations. While the limit set for the progress of investigations is that the time spent is "reasonable", the limit set for the time that a Charged Person can spend in provisional detention is very specific.

56. The Pre-Trial Chamber further notes Article 9(3) of the International Covenant on Civil and Political Rights (ICCPR), which provides in relevant part:

> "Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release."[44]

57. International tribunals have considered that the right to be tried within a reasonable time requires judicial authorities to ensure that the length of provisional detention is reasonable in light of the circumstances of each case.[45] In this respect, the Pre-Trial Chamber of the International Criminal Court (ICC) considered in the case of *Lubanga*, which was confirmed by the Appeals Chamber, that:

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[42] Co-Prosecutors' Response, para. 2(b).
[43] Co-Prosecutors' Response, para. 2(c).
[44] International Covenant on Civil and Political Rights (ICCPR), 23 March 1976, Article 9(3).
[45] *Prosecutor v. Blaskic*, Case No. IT-95-14-T, "Order Denying a Motion for Provisional Release", Trial Chamber, 20 December 1996 ("*Blaskic* Order of 20 December 1996"), p. 5; *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-AR65.2, "Decision on Lahi Brahimaj's Interlocutory Appeal against the Trial Chamber's Decision Denying his Provisional Release", Appeals Chamber, 9 March 2006, para. 23, referring to *Prosecutor v. Mrksic et al.*, Case No. IT-95-13/1-PT, "Decision on Defence Motion for Provisional Release", Trial Chamber II, 9 March 2005 ("*Mrksic* Decision of 9 March 2005"), paras 24-25; *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, "Judgment on the appeal of Mr. Thomas Lubana Dyilo against the decision of Pre-Trial Chamber I entitled "Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo", Appeals Chamber, 13 February 2007 ("*Lubanga* Judgment of 13 February 2007"), paras 98, 110, and 118-124; *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06 OA 9 OA 10, "Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008" Appeals Chamber, 23 July 2008, pp. 10-11.

> "[S]ince pre-trial detention cannot be extended to an unreasonable degree; that reasonableness cannot be assessed *in abstracto* but depends on the particular features of each case; and that to assess the reasonableness of the detention, it is particularly important to assess the complexity of the case [...]."[46]

58. The Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) found, in the case of *Blaskic*, that the following criteria should be examined when considering whether the length of provisional detention is reasonable:

> "1) the effective length of the detention;
> 2) the length of the detention in relation to the nature of the crime;
> 3) the physical and psychological consequences of the detention on the detainee;
> 4) the complexity of the case and the investigations;
> 5) the conduct of the entire procedure"[47]

Similar criteria have been applied by the International Criminal Tribunal for Rwanda (ICTR)[48], although jurisprudence of this tribunal refers more specifically to "the conduct of the parties" and "the conduct of the relevant authorities".[49] The Pre-Trial Chamber notes that these factors are generally taken into consideration by international tribunals when assessing the reasonableness of the length of provisional detention.

59. In relation to the conduct of the authorities, the Pre-Trial Chamber of the ICC took into consideration the fact that "the organs of the Court have acted swiftly and that at no moment were proceedings dormant".[50] Similarly, the ICTY found that the length of detention was proportional to the circumstances of the case where "the investigation into the crimes has been ongoing and conducted in a reasonable manner".[51]

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[46] *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06-586, "Decision on the Application for the interim release of Thomas Luganga Dyilo", Pre-Trial Chamber 1, 18 October 2006 ("*Lubanga* Decision of 18 October 2006"), p. 7, confirmed by the Appeals Chamber in *Lubanga* Judgment of 13 February 2007, paras 110, and 118-124.
[47] *Balskic* Order of 20 December 1996, p. 5.
[48] *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, "Decision on Prosper Mugiraneza's Application for a Hearing or Other Relief on his Motion for Dismissal for Violation of his Right to a Trial Without Undue Delay, Trial Chamber II, 3 November 2004, para. 26.
[49] See, for example, *Prosecutor v. Mugiraneza*, Case No. ICTR-99-50-AR73, "Decision on Prosper Mugiraneza's Interlocutory Appeal from Trial Chamber II Decision of 2 October 2003 Denying the Motion to Dismiss the Indictment, Demand Speedy Trial and for Appropriate Relief", 27 February 2004.
[50] *Lubanga* Decision of 18 October 2006, p. 6.
[51] *Mrksic* Decision of 9 March 2005, para. 25.

60. Guidance can also be sought in the practice of the ECHR which has determined a standard of "special diligence" on the part of national authorities when undertaking investigations[52]. Where grounds given by the national judicial authorities are found by the court to justify continued detention, the Court will then ascertain whether the national authorities displayed diligence in the conduct of their proceedings.

61. The Pre-Trial Chamber notes that the Charged Person has been in detention for one year and five months. The reasonableness of the length of detention and the diligence of the Co-Investigating Judges in conducting their investigation are factors that shall be taken into consideration when exercising the discretionary power to extend provisional detention.

62. The Charged Person is being investigated for her alleged participation, through various modes of liability, in the perpetration of crimes against humanity (murder, extermination, imprisonment, persecution and other inhumane acts) that were allegedly committed on a massive scale throughout Cambodia between 17 April 1975 and 6 January 1979.

63. It is observed that, pursuant to Internal Rule 55(5), the Co-Investigating Judges may, in the conduct of their investigation, "take any investigative action conducive to ascertaining the truth". They are independent in the way they conduct their investigation.[53]

64. The Pre-Trial Chamber notes that since the Charged Person was arrested on 12 November 2007, the Co-Investigating Judges have, themselves or upon delegation of power to their investigators, conducted 21 interviews of the five Charged Persons (13 of these being interviews of Duch), interrogated 280 witnesses and collected over 900 documents. Sixteen additional rogatory letters to interview witnesses or collect evidence have been issued and are currently being processed.

65. The Pre-Trial Chamber further notes that a large amount of material has been transferred from Case File 001, in which the facts committed inside the framework of S-21 were investigated separately, to Case File 002.[54] This evidentiary material includes 21 interviews of Duch, 68 witness interviews, 2 Written Records of Crime Scene re-enactment at Choeung Ek and Tuol Sleng, 3 Written Records of Confrontation of Duch with 11 witnesses and 2

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[52] ECHR, *Ilijkov v. Bulgaria*, Application no. 33977/96, "Judgment", 26 July 2001, para. 77. See also *Labita v. Italy*, Application no. 26772/95, "Judgment", 6 April 2000, paras 152 and 153; *Assenov and others v. Bulgaria*, Application no. 90/1997/874/1086, "Judgment", 28 October 1998; *Stögmüller v. Austria*, Application no. 1602/62, "Judgment", 10 November 1969; and *Wemhoff v. Germany*, Application no. 2122/64, "Judgment", 27 June 1968.

[53] The French system has been used to interpret Internal Rule 55(5): See Christian Guéry, *Instruction Préparatoire*, *Rép. pén. Dalloz*, January 2008, para. 56.

[54] Separation Order, 19 September 2007, D18.

civil parties and over a hundred documents. Given the alleged implication of the Charged Person in the purges that occurred in the framework of S-21, this material that has been collected in Case File 001 should also be considered when assessing the progress of the investigation in Case File 002.

66. The Pre-Trial Chamber observes that it is clear from the Extension Order that, contrary to what is asserted by the Co-Lawyers, the Co-Investigating Judges have taken into account the entire period during which the Charged Person has been detained when evaluating their diligence in the conduct of the investigation. The Co-Investigating Judges' reference to additional material collected after the Pre-Trial Chamber's hearing on the Appeal on the Order on Provisional Detention on 21 May 2008 goes to consideration under Internal Rule 63(3)(a) and is not related to the assessment of the length of detention.

67. The Pre-Trial Chamber finds that the Co-Investigating Judges properly exercised their discretion in ordering the extension of provisional detention as the duration of this detention is reasonable in light of the crimes that are being investigated and the actions they have undertaken.

68. The Pre-Trial Chamber further finds that it cannot be concluded that the Co-Investigating Judges draw any adverse inference against the Charged Person from the fact that she has chosen to exercise her right to remain silent. This does not appear to have been a consideration taken into account by the Co-Investigating Judges when evaluating the reasonableness of the length of the detention but a mere comment about the fact that the exercise of this right by the Charged Person is not conducive to assisting the Co-Investigating Judges in discovering exculpatory evidence.

D. Request for release on bail

69. In their Appeal Brief, the Co-Lawyers request the Pre-Trial Chamber to "[i]mmediately release the Charged Person, under conditions such as suggested by the defence in its Objections, or as are otherwise deemed appropriate by the Pre-Trial Chamber."[55] In their Objections to the Co-Investigating Judges' Intention to Extend Madame Ieng's Provisional Detention, the Co-Lawyers referred to the conditions they had proposed in Annex C of their initial appeal against the Order of Provisional Detention before the Pre-Trial Chamber.[56] No reasoning was submitted by the Co-Lawyers in the Appeal Brief to support the request for

[55] Appeal Brief, p. 22.
[56] Appeal against the Provisional Detention Order, 2 January 2008, C20/I/3, Annex C.

release. Their submissions rather focus on arguments leading to the conclusion that provisional detention should not have been extended.

70. The Pre-Trial Chamber has decided on this same request in its Decision on the Charged Person's Appeal against Provisional Detention Order, dated 9 July 2008, stating that "the Charged Person cannot be released on bail, as any of the conditions proposed by the Charged Person [in Annex C attached to her appeal] are outweighed by the necessity for her provisional detention".[57]

71. During the hearing, the Co-Lawyers for the Charged Person submitted orally to the Pre-Trial Chamber a request to release the Charged Person on bail on the conditions mentioned in their Appeal against the Provisional Detention Order ("Oral Request for Release"). No arguments were presented to explain why this request was made orally during the hearing while it was not requested separately in the Appeal Brief but merely as a consequence of the Co-Lawyers' submissions against the extension of detention. No prior notice of this request was given to the other Parties. Objections were made by the Co-Prosecutors and a Lawyer for a Civil Party when this oral request was submitted.

72. Pursuant to Internal Rule 75(4), "the appellant may not raise any matters of fact or law during the hearing which are not already set out in the submissions on appeal". This rule is part of due process principles to be applied in appellate procedures as it is necessary to ensure that other parties are able to respond on the issues raised in an appeal. Considering that no reasoning for the request was set out in the Appeal Brief and the request was made with only a reference to a previously-made request on which the Pre-Trial Chamber had already decided, the Pre-Trial Chamber finds that the Oral Request for Release is inadmissible. In reaching this conclusion, the Pre-Trial Chamber has taken into consideration the fact that this oral request was not advised to the Parties prior to the hearing and that no reason was given to explain why the issue was raised at the latest possible instance.

[57] 9 July 2008 Decision, para. 74.

THEREFORE, THE PRE-TRIAL CHAMBER HEREBY DECIDES UNANIMOUSLY:

1) The Appeal is admissible in its form;
2) The Appeal is dismissed.
3) The Oral Request for Release on Bail is inadmissible.

In accordance with Rule 77(13) of the Internal Rules, this Decision is not subject to appeal.

GIVEN IN PUBLIC BY the Pre-Trial Chamber, in the presence of the Charged Person's national Co-Lawyer,

Phnom Penh, 11 May 2009

Pre-Trial Chamber

President

Rowan DOWNING **NEY Thol** **Katinka LAHUIS** **HUOT Vuthy** **PRAK Kimsan**

Greffiers

CHUON Sokreasey **Anne-Marie BURNS**