

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

Case No.: 002/19-09-2007-ECCC-OCIJ-PTC(16)
Filed to: Pre-Trial Chamber
Date of Document: 9 December 2008
Party Filing: Defence for Madame Ieng Thirith
Original Language: English and Khmer (translation)
Type of Document: Public

ឯកសារដើម	
ORIGINAL DOCUMENT/DOCUMENT ORIGINAL	
ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/Date de reception): 09 / 12 / 2008	
ម៉ោង (Time/heure): 14:30	
មន្ត្រីទទួលខុសត្រូវឯកសារ/Case File Officer/L'agent chargé du dossier: SAN N. RADA	

**IENG THIRITH DEFENCE APPEAL AGAINST
“ORDER ON EXTENSION OF PROVISIONAL DETENTION” OF 10 NOVEMBER 2008**

Filed by:

Defence for Ieng Thirith:
PHAT Pouv Seang
Diana ELLIS, QC

Distribution to:

Pre-Trial Chamber Judges:
PRAK Kimsan, President
HOUT Vuthy
Rowan DOWNING
NEY Thol
Katinka LAHUIS
PEN Pichsaly

Co-Prosecutors:
CHEA Leang
Robert PETIT

Civil Party Lawyers:
HONG Kim Suon
LOR Chunthy
NY Chandy
KONG Pisey
Silke STUDZINSKY
YONG Phanith
KIM Mengkhy
Martine JACQUIN

ឯកសារបានច្បាប់តាមច្បាប់ដើម	
CERTIFIED COPY/COPIE CERTIFIÉE CONFORME	
ថ្ងៃ ខែ ឆ្នាំ ត្រឹមត្រូវ (Certified Date/Date de certification): 11 / 12 / 2008	
មន្ត្រីទទួលខុសត្រូវឯកសារ/Case File Officer/L'agent chargé du dossier: SAN N. RADA	

TABLE OF CONTENTS:

I	INTRODUCTION	3
II	THE APPLICABLE LAW	4
2.1	Law Applicable to Appeal from Extension Order	4
2.2	Law Applicable to the Right to Remain Silent	5
III	REASONS OF FACT AND LAW	6
3.1	Insufficiently Reasoned Decision	6
3.1.1	<i>Extension Order Lacks Reasoning: No Sources Provided</i>	7
3.1.2	<i>Extension Order Contains Incorrect Information</i>	8
3.1.3	<i>No Full Access to the Case File</i>	8
3.1.4	<i>Conclusion</i>	9
3.2	Application of the Wrong Standards	10
3.2.1	<i>'Due Diligence' instead of 'Special Diligence' Standard</i>	10
3.2.2	<i>'Scope of the Investigations' instead of Evidence Found</i>	12
3.2.3	<i>Incorrect Time Frame Applied</i>	14
3.2.4	<i>Conclusion</i>	15
3.3	Infringement of the Right to Silence	15
3.4	No 'Real Risk' Shown	18
IV	CONCLUSION	20
IV	PRAYER	21

I INTRODUCTION

1. On 12 November 2007 Madame Ieng Thirith (“**Charged Person**”) was arrested at her home address in Phnom Penh pursuant to an arrest warrant¹ issued by the Office of the Co-Investigative Judges (“**OCIJ**”). On 14 November 2007, the OCIJ ordered the provisional detention of the Charged Person for a period not exceeding one year, pursuant to Rule 63 of the Internal Rules (“**IRs**”).²
2. On 13 October 2008 the OCIJ issued a Notice,³ indicating that the term of provisional detention for the Charged Person, set down in the Provisional Detention Order of 14 November 2007, would expire on 12 November 2008 and that it considered extending that order. The defence for the Charged Person was invited to submit its observations within 15 days. On 27 October 2008, the defence submitted its “Defence Objections to the Co-Investigating Judges’ Intention to Extend Madame Ieng’s Provisional Detention” (“**Objections**”),⁴ requesting the non-extension of the provisional detention under specific conditions.
3. On 10 November 2008, the OCIJ issued its “Order on Extension of Provisional Detention” (“**Extension Order**”),⁵ extending the Charged Person’s provisional detention for another period not exceeding one year, pursuant to Rule 63(6)(a) of the IRs.

¹ Arrest Warrant, 8 November 2007, Doc. No. C13.

² Provisional Detention Order, 14 November 2007, Doc. No. C20.

³ Notice, 13 October 2008, Doc. No. C20/2; the defence was notified of this document the following day, 14 October 2008.

⁴ Defence Objections to the Co-Investigating Judges’ Intention to Extend Madame Ieng’s Provisional Detention, 27 October 2008, Doc. No. C20/3.

⁵ Order on Extension of Provisional Detention, 10 November 2008, Doc. No. C20/4, which document was received by the Defence on 11 November 2008.

II THE APPLICABLE LAW

2.1 Law Applicable to Appeal from Extension Order

4. Pursuant to Rules 74(f) and 75 of the IRs, the defence of the Charged Person herewith appeals from the Extension Order. An extension of the provisional detention by the OCIJ should be based on the provisions of Rule 63 IRs. Rule 63(7) provides:

“Any decision by the [OCIJ] 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 [OCIJ] notify the Charged Person and his or her lawyer and give them 15 (fifteen) days to submit objections to the [OCIJ]. No more than 2 (two) such extensions may be ordered. All such orders are open to appeal.”

And Rule 63(3) provides:

“The [OCIJ] may order the Provisional Detention of the Charged Person only where the following conditions are met:

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

The [OCIJ] consider Provisional Detention to be a necessary measure to:

- 1) 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;
- 2) preserve evidence or prevent the destruction of any evidence;
- 3) ensure the presence of the Charged Person during the proceedings;
- 4) protect the security of the Charged Person; or
- 5) preserve public order.”

5. Besides the Internal Rules, several human rights treaties can be relied upon, most importantly the International Covenant on Civil and Political Rights (“ICCPR”), Article 9(3) ICCPR reads:

“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. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.”

6. Article 5(3) of the European Convention on Human Rights (“**ECHR**”) is similar to the wording of the former ICCPR provision, and reads as follows:

“Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article 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 pending trial. Release may be conditioned by guarantees to appear for trial.”

7. The interpretation of Article 5(3) ECHR by the European Court of Human Rights (“**European Court**”) might be of valuable guidance in this Court’s interpretation of the Charged Person’s rights under the ICCPR, which has been acknowledged by the OCIJ in its Extension Order.

8. Besides the specific human rights provisions on (pre-trial) detention, the defence submits that the general fair trial provisions of Article 14 ICCPR and Article 6 ECHR are applicable to the determination of the issue at hand. Article 14 ICCPR provides, insofar relevant:

“1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. (...).

2. (...)

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) (...);

(b) (...);

(c) To be tried without undue delay;

(...).”

9. Article 6(1) ECHR is similar in its wording and application to Article 14(1) ICCPR, however, the ICCPR in Article 14(3)(b) even more strongly emphasises the right to be tried without undue delay.

2.2 Law Applicable to the Right to Remain Silent

10. Rule 21(1)(d) of the IRs provides:

“Every person suspected or prosecuted shall be presumed innocent as long as his/her guilt has not been established. Any such person has the right to be informed of any charges brought against him/her, to be defended by a lawyer of his/her choice and at every stage of the proceedings shall be informed of his/her right to remain silent.”

11. Article 13 of the Agreement between the United Nations and the Royal Government of Cambodia states that the rights of the accused enshrined in Articles 14 and 15 of the ICCPR shall be respected throughout the trial process. This includes the right against self-incrimination under Article 14(3)(g) and the presumption of innocence in Article 14(2) of the ICCPR.

12. Article 14(2) of the ICCPR provides for the presumption of innocence for the accused until proven guilty according to law. Article 14(3)(g) ICCPR provides for the right against self-incrimination:

“In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
 (...)
 (g) Not to be compelled to testify against himself or to confess guilt.
 (...)”

III REASONS OF FACT AND LAW

13. Rule 75 of the IRs provides insofar relevant that the “submissions on appeal shall contain the reasons of fact and law upon which the appeal is based”. The defence submits that the OCIJ made several mistakes of fact and law in its Extension Order, which mistakes warrant the current appeal.

3.1 Insufficiently Reasoned Decision

14. Each judicial decision should provide reasons for the conclusions it reaches. This can be considered a general principle of law, which has been acknowledged by the European Court, which held in *Hadjianastassiou v. Greece*:

“The national courts must (...) indicate with sufficient clarity the grounds on which they based their decision. It is this, inter alia, which makes it possible for the accused to exercise usefully the rights of appeal available to him.”⁶

⁶ *Hadjianastassiou v. Greece*, Judgment, European Court, Appl. No. 12945/87, 16 December 1992, para. 33.

15. This requirement similarly applies to the OCIJ Extension Order, which needs to provide adequate reasoning for its decisions. The defence respectfully submits that the Extension Order on several occasions fails to reach this threshold.

3.1.1 *Extension Order Lacks Reasoning: No Sources Provided*

16. The defence submits that the Extension Order lacks reasoning by making general accusations without providing sources for it. Further, in particular, the Extension Order alleges, *inter alia*, that:

- The OCIJ has collected “additional evidentiary materials (...) some of which provide specific information” on the Charged Person,⁷
- The Charged Person has access to “a large body of evidence containing details on her possible role within the regime”,⁸
- The OCIJ has collected “a large body of evidence (...) some of which provide specific information on the potential role played by the Charged Person in the regime”,⁹ and
- “As of 4 November 2008, over 100 Written Records of Interview of Witnesses have been placed on the Case File, some of whom have given evidence on the role played by Ieng Thirith.”¹⁰

17. The OCIJ explicitly refrains from stating that, in the one year the Charged Person has been in pre-trial detention, it has collected evidence that directly supports the charges against her. Instead, it only refers to evidence pointing to the vague notion of her “potential role within the regime”. It does not provide any reference to what this “large body of evidence containing details on her possible role within the regime” would be or what specifically it would consist of. The OCIJ thus seems to merely refer to the Charged Person’s position as Minister of Social

⁷ Extension Order, para. 17. See section 19 below, which deals with the incorrect sources mentioned in this paragraph.

⁸ Extension Order, para. 26.

⁹ Extension Order, para. 38.

¹⁰ Extension Order, para. 38.

Affairs, which obviously in itself is not a crime under international law and is insufficient basis for prolongation of her provisional detention.

3.1.2 *Extension Order Contains Incorrect Information*

18. In addition to the foregoing, the Extension Order contains incorrect information, which again forms an infringement of both Rule 63(7) of the IRs and the general principle of law that a judicial decision needs to be reasoned.

19. In supporting its allegation that “there is specific information regarding the Charged Person’s potential role within the regime”¹¹ the OCIJ refers in footnote 14 to two documents in the Case File, namely D88 and D85/1, neither of which mentions Ieng Thirith’s name.

20. The defence submits that the Extension Order contains incorrect information in this crucial part of its decision, and thus lacks support for its allegation that evidence has been collected supporting the charges against the Charged Person.

3.1.3 *No Full Access to the Case File*

21. In its Extension Order, the OCIJ alleges 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”.¹²

22. On 21 October 2008, well before the OCIJ issued its Extension Order, the defence filed a “Defence Request for Clarification of the Applicable Rules Concerning Charged Person Receiving Case File Documents” with the OCIJ,¹³ in which it

¹¹ Extension Order, para. 17.

¹² Extension Order, para. 26.

¹³ Defence Request for Clarification of the Applicable Rules Concerning Charged Person Receiving Case File Documents, 21 October 2008, Doc. No. A228.

requests clarification of the contradictory rules and practices currently governing the detainees' limited access to the Case File.

23. The OCIJ has not yet responded to this request, which is especially important given that it is unclear how such access to the full Case File would be practically feasible since there seems to be no space in the Detention Centre to allow such full access. In the absence of a decision on this matter by the OCIJ, the defence is providing the client with certain documents of the Case File, but full access as assumed by the OCIJ is currently not possible.

24. The Extension Order, in stating that the Charged Person has access to all the elements of the Case File, is not reflecting the current situation and is incorrect. It violates the requirement that a judicial decision needs to be reasoned as required by the general principle of law and Rule 63(7) of the IRs.

3.1.4 *Conclusion*

25. Given that the OCIJ (i) failed to provide adequate reasoning for its allegations, (ii) provided incorrect information relating to alleged evidence against the Charged Person, and (iii) provided incorrect or inadequate information concerning the Charged Person's access to the Case File, the Extension Order lacks sufficient reasoning in contravention of Rule 63(7) of the IRs and the aforementioned general principle of law. This failure should lead to the quashing of the Extension Order.

3.2 Application of the Wrong Standards

3.2.1 'Due Diligence' instead of 'Special Diligence' Standard

26. In its Extension Order, the OCIJ applied the standard of 'due diligence' to its investigations in determining whether it complied with a process within a reasonable time. In OCIJ holds:

"The [OCIJ] acknowledge that the passage of time is relevant to determining the legitimacy of continued provisional detention of a Charged Person. The time spent in provisional detention cannot be deemed unjustified if it is demonstrated that due diligence is shown in conducting the proceedings."¹⁴

27. In the case of *Tomasi v. France* the European Court explicitly held that:

"The existence and persistence of serious indications of the guilt of the person concerned undoubtedly constitute relevant factors, but the Court considers, like the Commission, that they cannot alone justify such a long period of pre-trial detention."¹⁵

28. In defining a standard for reasonable time with regard to pre-trial detention, the European Court, referring to the then existing European Commission on Human Rights, defined the obligations on the judicial authorities as follows: it referred to the relevance of the manner in which the investigations were conducted. This consists of (i) the system of investigation applicable, and (ii) the judicial authorities' conduct of the investigation, i.e. "the diligence shown by them in dealing with the case and the manner in which they organised the investigation."¹⁶

29. In the case of *Stögmüller v. Austria*, the European Court formulated the requirement of 'special diligence' the judicial authorities need to exercise when the accused person is in pre-trial detention (to which Article 5(3) ECHR is applicable). It held:

"Article 5(3) (art. 5-3), for its part, refers only to persons charged and detained. It implies that there must be special diligence in the conduct of the prosecution of the cases concerning such persons."¹⁷

¹⁴ Extension Order, para. 35.

¹⁵ *Tomasi v. France*, Judgment, European Court, Appl. No. 12850/87, 27 August 1992, para. 89.

¹⁶ *Wemhoff v. Germany*, Judgment, European Court, Appl. No. 2122/64, 27 June 1968, p. 11-12, para. 2.

¹⁷ *Stögmüller v. Austria*, Judgment, European Court, Appl. No. 1602/62, 10 November 1969, p. 35, para. 5. This requirement has been repeated in later ECHR case law on numerous occasions, see e.g. *Matznetter v.*

30. The OCIJ thus indicates that it has to demonstrate 'due diligence' in its investigations in order to justify continued provisional detention of the Charged Person. Whilst referring to 'due diligence' the OCIJ states this is analogous with the case law of the European Court.¹⁸ The defence wishes to indicate, however, as it did in its Objections,¹⁹ that the European Court does not refer to mere 'due diligence' as, misleadingly, submitted by the OCIJ, but explicitly refers to 'special diligence', a term which suggests a higher threshold than the one suggested by the OCIJ.²⁰

31. Given that the Extension Order neither contends that it uses a different terminology from the European Court, nor provides any explanation of a difference between 'due' and 'special' diligence, the defence submits that this must have been an oversight. In any case, the defence submits that the OCIJ has not demonstrated either 'due' or 'special' diligence²¹ in its investigations against the Charged Person since her arrest and specifically since the Pre-Trial Chamber decision on the Pre-Trial Chamber's decision of 9 July 2008 on the Charged Person's appeal against the Provisional Detention Order.²²

32. In any case the OCIJ has not addressed the defence argument that 'special diligence' should be exercised by the OCIJ. This infringes the OCIJ's obligation to provide reasoning for its judicial decisions, as specifically required by Rule 63(7).

Austria, Judgment, European Court, Appl. No. 2178/64, 10 November 1969, p. 30-31, para. 12; *Calleja v. Malta*, Judgment, European Court, Appl. No. 75274/01, 7 April 2005, para. 100.

¹⁸ Extension Order, para. 35.

¹⁹ Objections, paras. 24-26.

²⁰ See e.g. *Letellier v. France*, Judgment, European Court, Appl. No. 12369/86, 26 June 1991, para. 35 and *Assenov v. Bulgaria*, Judgment, European Court, Appl. No. 24760/94, 28 October 1998, paras. 157-158 (both authorities are attached to the Objections).

²¹ It is the defence argument that neither standard—'due' or 'special' diligence—has been met, and will refer to both standards as 'sufficient diligence' hereafter in order to include both definitions.

²² Decision on Appeal against Provisional Detention Order of Ieng Thirith, 9 July 2008, Doc. No. C20/1/26.

33. Given that the Charged Person has been incarcerated for over one year, and the OCIJ in that year has failed to gather any evidence against her which would directly support the charges against her mentioned in the Introductory Submission, the OCIJ have failed to demonstrate sufficient diligence in their investigations against the Charged Person.

34. The Human Rights Committee's consideration in General Comment No. 8, states that "[p]re-trial detention should be an exception and as short as possible. The Committee would welcome information concerning mechanisms existing and measures taken with a view to reducing the duration of such detention".²³ Especially given the above principle, embedded in international law, it can be concluded that the OCIJ has failed in its obligation to exercise sufficient diligence and to keep the Charged Person's pre-trial detention as short as possible.

35. For this reason, the OCIJ has failed to demonstrate sufficient diligence in its investigations against the Charged Person. Such diligence is required for the OCIJ to be able to extend the Charged Person's provisional detention. Given that failure, the Extension Order should be quashed.

3.2.2 *'Scope of the Investigations' instead of Evidence Found*

36. The Extension Order states that the one year period that the Charged Person has been in detention cannot be considered excessive "in view of the scope of the investigations".²⁴ The defence, however, submits that again, the OCIJ applies the wrong standard here. The standard should not merely be the scope of the investigations, but rather whether the OCIJ can show what it has factually done in the year that she has been in detention which directly supports the charges against her. Arguably, the investigations cover a complex area of facts, but if the OCIJ

²³ Human Rights Committee, General Comment 8, Article 9 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 (1994), para. 3 (this authority is attached to the Objections).

²⁴ Extension Order, para. 36.

has been unable to bring any incriminating evidence—more than merely confirming that she was a Minister of Social Action—against her in this one year of detention, the complexity or scope of the investigations is not relevant, or at least an insufficient standard. The reason why the OCIJ has not been able to provide evidence against her in the one year that she has been incarcerated is either that such evidence does simply not exist, or that the OCIJ has not demonstrated sufficient diligence in its investigations and was thus unable to provide evidence against her, which should not result in a situation detrimental to the Charged Person.

37. The scope of the investigations in combination with the complexity and gravity of the crimes charged does not in itself warrant a prolongation of provisional detention. The OCIJ needs to show it has continually done everything within its power to conduct and complete the investigations against the Charged Person, so that the case can proceed to trial as soon as possible or that the charges against her be dismissed.
38. The fact is that whilst the Charged Person was arrested on 12 November 2007, the whole last year the OCIJ has focussed almost entirely on the investigations in Case File No. 001. This is in contradiction to the requirement that “an accused person in detention is entitled to have his case given priority and conducted with particular expedition”, as formulated by the European Court.²⁵ Such priority is not shown to the Charged Person.
39. The fact that the OCIJ is now referring to “numerous rogatory letters” which are “in the course of being executed” is insufficient in this regard. The OCIJ has failed to demonstrate sufficient diligence in the investigations against the Charged Person over the last year, as a result of which the reasonable time requirement has been infringed, and her provisional detention can no longer be extended.

²⁵ *Dzelili v. Germany*, Judgment, European Court, Appl. No. 65745/01, 10 November 2005, para. 77.

3.2.3 *Incorrect Time Frame Applied*

40. The Extension Order states that the OCIJ have “collected additional evidentiary materials since 21 May 2008 (...) some of which provide specific information regarding the Charged Person’s potential role within the regime”.²⁶ The defence submits that, contrary to what the Extension Order suggests, the OCIJ has failed to produce such evidence.

41. The OCIJ has applied an incorrect standard in determining whether it produced (sufficient) evidence against the Charged Person to warrant an extension of provisional detention.

42. In its Extension Order states the OCIJ states that it has “collected additional evidentiary materials since 21 May 2008”.²⁷ The OCIJ suggests that the date of 21 May 2008 is used because on that day, the Pre-Trial Chamber held a hearing on the defence appeal against the Provisional Detention Order.²⁸ The use of that date, the defence submits, is arbitrary, and the relevant period should be evidence collected from 12 November 2007, i.e. the date of the arrest of the Charged Person. The European Court also takes the date when the accused person was remanded in custody as the beginning point of the reasonable time requirement.²⁹

43. By using a much more limited period of time, the OCIJ seems to suggest it has worked very hard and produced a lot of evidence. However, if the whole year during which the Charged Person has been in pre-trial detention is taken into account, the failure to produce any evidence directly incriminating against her, should lead to the conclusion that extension of the provisional detention is not warranted. The OCIJ has applied the wrong yardstick, as a result of which the Extension Order should be quashed.

²⁶ Extension Order, para. 17.

²⁷ Extension Order, para. 17; para. 38 uses similar wording.

²⁸ Extension Order, para. 15.

²⁹ See e.g. *Letellier v. France*, Judgment, European Court, Appl. No. 12369/86, 26 June 1991, para. 34.

3.2.4 Conclusion

44. As shown above, the OCIJ on three different occasions applied the wrong standards, leading to inadequate and incorrect conclusions which form the basis of the Extension Order. Therefore, the conclusions of the Extension Order have no legal or factual basis and the Order should be quashed.

3.3 Infringement of the Right to Silence

45. In its Extension Order, the OCIJ states the following:

“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.”³⁰

46. The OCIJ thus implies that the investigations are not as speedy as they would want them to be. This affects the reasonable time requirement, which is very strict in case the Charged Person is in provisional detention.

47. Importantly, the Extension Order, though carefully worded, blames the Charged Person and her defence for adopting an attitude which is not conducive to speedy proceedings. The defence respectfully submits that the OCIJ, in making such an observation, seek to infringe the right of the Charged Person to remain silent, and to wrongly justify its own lack of progress.

48. Case law by the European Court makes clear that the Charged Person and her defence can under no circumstances be forced or even expected to cooperate with the proceedings. Underlying this rule is the principle that an accused person does not have to cooperate with the judicial authorities to have the charges against him or her proven.

³⁰ Extension Order, para. 37.

49. The right to remain silent lies at the heart of the notion of the Charged Person's right to a fair trial as guaranteed by international human rights standards.³¹ The European Court in the case of *Eckle v. Germany* held that even though Mr. and Mrs. Eckle had, unlike in the present case, actively resorted to actions which were likely to delay matters, they were not required to actively cooperate with the judicial authorities. The European Court stated:

“Far from helping to expedite the proceedings, Mr. and Mrs. Eckle increasingly resorted to actions - including the systematic recourse to challenge of judges - likely to delay matters; some of these actions could even be interpreted as illustrating a policy of deliberate obstruction (...).

However, as the Commission rightly pointed out, Article 6 (art. 6) did not require the applicants actively to co-operate with the judicial authorities. Neither can any reproach be levelled against them for having made full use of the remedies available under the domestic law.”³²

50. One of the aspects in determining whether the OCIJ conducts its investigations within a reasonable time, with particular regard to the Charged Person's period in detention, is the behaviour of the parties. The OCIJ seems to hold the Charged Person and her defence responsible for not cooperating actively, without defining what such cooperation should consist of, whilst phrasing it in such a way that they cannot avoid blaming the defence for employing such tactics.

51. The defence is in no way obliged to cooperate actively with the OCIJ, nor can it be blamed for exercising its right to remain silent. The OCIJ thus takes a punitive approach to the Charged Person for this ‘attitude’ in response to a defence allegation that the OCIJ has not shown sufficient diligence in its investigations over the last year.

52. When examining the conduct of the applicant in the legal proceedings, the defence emphasises that the Charged Person is not under an obligation to

³¹ See e.g. *Saunders v. the United Kingdom*, Judgment, European Court, Appl. No. 19187/91, 17 December 1996, para. 68; *Eckle v. Germany*, Judgment, European Court, Appl. No. 8130/78, 15 July 1982, para. 82 (attached as an authority to the Objections); *Dobbertin v. France*, Judgment, European Court, Appl. No. 13089/87, 25 February 1993, para. 43; *Zana v. Turkey*, Judgment, European Court, Appl. No. 18954/91, 25 November 1997, para. 79.

³² *Eckle v. Germany*, Judgment, European Court, Appl. No. 8130/78, 15 July 1982, para. 82 (attached as an authority to the Objections).

cooperate actively with the authorities,³³ nor is she under any duty to act in such a way as to shorten the proceedings.³⁴ The OCIJ cannot put the blame for the slow pace of its investigations on the Charged Person and any attempt to do so constitutes an infringement of the Charged Person's right to remain silent.

53. In particular, there is no obligation upon the Charged Person to assist in the investigation of criminal charges against her. The prosecution has a case to prove, it is not up to the defence to assist to that in any way. The European Court held in the case of *Nemeth v. Hungary* that:

“It must also have regard to the fact that the applicant cannot be blamed for exercising his right to silence and that the prosecution bore the burden of proving the case against him. In these circumstances, no particular period of inactivity can be imputed to the applicant.”³⁵

54. As a result, the Charged Person and her defence cannot be accused of slowing down the judicial proceedings by exercising her right to remain silent.

55. The OCIJ is the authority empowered with the means and task to investigate the crimes alleged in the Introductory Submission, and has a structural obligation to organise its legal investigations in such a manner that justice can be done within a reasonable time, especially during the time that the Charged Person remains in detention on remand. The onus is not on the defence to prove that it has cooperated so as to help speed up proceedings; the onus is on the OCIJ, with or without active assistance by the defence. Unless the defence is acting in such a way that it is actively slowing down proceedings, the defence cannot be blamed for delays in the investigative stage of the proceedings.

³³ See e.g. *Eckle v. Germany*, Judgment, European Court, Appl. No. 8130/78, 15 July 1982, para. 82 (attached as an authority to the Objections); *Corigliano v. Italy*, Judgment, European Court, Appl. No. 8304/78, 10 December 1982, para. 42; *Dobbertin v. France*, Judgment, European Court, Appl. No. 13089/87, 25 February 1993, para. 43; *Ledonne v. Italy*, Judgment, European Court, Appl. No. 35742/97, 12 May 1999, para. 25; *Saccomanno v. Italy*, Judgment, European Court, Appl. No. 36719/97, 12 May 1999, para. 24; *De Blasii v. Italy*, Judgment, European Court, Appl. No. 33969/96, 14 December 1999, para. 23; *Barfuss v. Czech Republic*, Judgment, European Court, Appl. No. 35848/97, 31 July 2000, para. 81; *Yagci and Sargin v. Turkey*, Judgment, European Court, Appl. Nos. 16419/90 and 16426/90, 8 June 1995, para. 66; *Richet v. France*, Judgment, European Court, Appl. No. 34947/97, 13 February 2001, para. 75.

³⁴ *Guincho v. Portugal*, Judgment, European Court, Appl. No. 8990/80, 10 July 1984, para. 34.

³⁵ *Nemeth v. Hungary*, Judgment, European Court, Appl. No. 60037/00, 13 January 2004, para. 29.

56. The Charged Person and her defence have not undertaken any action to slow down the proceedings in the case. The Extension Order, by putting the blame for such delay on the defence, thus infringes the right to remain silent. The Extension Order can no longer be considered a legitimate judicial decision, and should be quashed.

3.4 No 'Real Risk' Shown

57. The Extension Order states that “[t]here is a real risk that witnesses might refuse to participate in the proceedings in the future if Ieng Thirith were released”.³⁶ The OCIJ concludes the existence of such ‘real risk’ from the following:

- The Charged Person knows the names of the witnesses who have testified in the case, so she can identify them;
- Many of these witnesses might be re-interviewed and they have given names of other persons who might be interviewed in the future;
- “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”;
- Such risk is corroborated by the Charged Person’s behaviour and public statements, referring to ‘incidents’ in respectively 1999 and 2003.³⁷

58. The OCIJ has 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. Rather, some of the Rogatory Reports mention the level of willingness of the witnesses to cooperate with the proceedings³⁸ and *none* of the witnesses has expressed either being

³⁶ Extension Order, para. 26.

³⁷ Extension Order, para. 26.

³⁸ See the witness interviews recorded in Doc. No. D92/2 (ERN 00204702-00204708) and Doc. No. D92/6 (ERN 00204730-00204734). See Report of Execution of Rogatory Letter D92/10 (ERN 00204763-

concerned about the Charged Person's influence in general, or if she would be released from provisional detention.

59. The firm wording used in the Extension Order suggests the existence of underlying evidence, which in fact is non-existent. The OCIJ has not added any evidence to the Case File since the Charged Person's arrest, that would support the allegation that there is a risk of her exerting influence over witnesses if she would be released or of witnesses refusing (further) cooperation with the ECCC.

60. What would perhaps be a sufficient standard of proof at the beginning of the proceedings—referring to incidents in 1999 and 2003³⁹—is no longer sufficient after one year in pre-trial detention. The OCIJ has 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. The OCIJ has not provided any basis for such alleged 'real' risk.

61. Given the fact that none of these witnesses provided incriminating evidence against the Charged Person, there is no basis upon which the OCIJ can conclude that it would fear the end of her provisional detention.

62. European Court case law generally holds that the risk of pressure being put on witnesses diminishes as the case progresses.⁴⁰ In *Clooth v. Belgium*, this Court held:

"The Court acknowledges that it was a very complicated case necessitating difficult inquiries. By his conduct (...), Mr Clooth considerably impeded and indeed delayed them. The authorities' belief that he should consequently be kept in detention in order to

00204764), p. 2, which mentions that these are reluctant witnesses, but no incriminating reference is made to the Charged Person, nor does the witness mention anything about being concerned about the Charged Person in general, or her release from provisional detention in particular.

³⁹ Footnote 19 of the Extension Order refers to incidents of 1999 and 2003, on which it based its initial Provisional Detention Order of 14 November 2007, and which the Pre-Trial Chamber found sufficient at that level.

⁴⁰ See e.g. *Kemmache v. France*, Judgment, European Court, Appl. Nos. 12325/86 and 14992/89, 27 November 1991, para. 53.

prevent him from disrupting the inquiry even more is easy to understand, at least at the outset.

In the long term, however, the requirements of the investigation do not suffice to justify the detention of a suspect: in the normal course of events the risks alleged diminish with the passing of time as the inquiries are effected, statements taken and verifications carried out.”⁴¹

63. With regard to this risk the European Court condemned the judicial authorities by stating that:

“They did not point to any factor capable of showing that the risks relied on actually existed and failed to establish that the applicant, who had no record and whose role in the mafia-type organisation concerned was said to be minor (...), posed a danger. No account was taken of the fact that the accusations against the applicant were based on evidence which, with time, had become weaker rather than stronger.”⁴²

64. For the above reasons, the defence submits that the OCIJ has failed to provide any reasoning for its conclusion that there is a ‘real’ risk that witnesses might refuse to take part in the proceedings⁴³ if the Charged Person’s provisional detention were not extended. As such, the Extension Order contains yet again an error which warrants the current appeal. Consequently, the Extension Order should be quashed.

IV CONCLUSION

65. From the above, it can be concluded that the Extension Order fails to meet the standard of Rule 63(3) and 63(7) of the IRs on several levels. Firstly, the decision is insufficiently reasoned; secondly, it contains incorrect information on several matters. Thirdly, it applies wrong standards to several legal standards. Fourthly, it infringes the Charged Person’s right to remain silent, and finally, its contention that there is a ‘real’ risk that the Charged Person will exert influence on witnesses is without any evidential basis.

⁴¹ *Clooth v. Belgium*, Judgment, European Court, Appl. No. 12718/87, 12 December 1991, para. 43.

⁴² *Labita v. Italy*, Judgment, European Court, Appl. No. 26772/95, 6 April 2000, para. 163.

⁴³ Extension Order, para. 26.

66. In conclusion, the defence submits that the investigations currently undertaken by the OCIJ are not carried out in a speedy manner, which has a negative impact on the sufficient diligence to be exercised by the OCIJ in conducting its investigations. This in turn infringes the Charged Person's right to be tried within a reasonable time, specifically with regard to the fact that she has been in provisional detention for over one year, whilst the OCIJ has not been able to show it has exercised sufficient diligence in its investigations against her. The OCIJ is the sole organ responsible for the delay.

67. The little "information" the OCIJ managed to put on the Case File over the last year on the Charged Person's potential role during the regime is insufficient to further prolong her provisional detention. The OCIJ did not collect any evidence on the Case File which would further support the well-founded reasons to believe that the Charged Person committed the crimes she is charged with. The threshold becomes higher the longer the provisional detention lasts. The OCIJ has not been able to find incriminatory evidence against her in the one year she has been in detention. Thus, the threshold is no longer met and the provisional detention cannot be extended.

68. These infringements are further aggravated by the fact that it is as yet completely unclear when this case will be set down for trial.

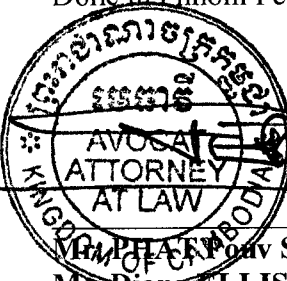
IV PRAYER

69. For the above reasons, the defence respectfully requests the Pre-Trial Chamber to:

- (1) Hold that the strict requirements for the extension of the Charged Person's detention are no longer met,
- (2) Quash the Extension Order extending the Charged Person's provisional detention for another year, and

- (3) Immediately 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.

Done in Phnom Penh, this 9th day of December 2008,


AVOCAT
ATTORNEY
AT LAW
Mr. ~~Diana~~ Poav Seang
Ms. ~~Diana~~ ELLIS, QC
Co-Lawyers for Madame Ieng