C20/5/7

BEFORE THE PRE-TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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REDACTED VERSION OF THE CO-PROSECUTORS' RESPONSE TO IENG THIRITH DEFENCE APPEAL AGAINST THE "ORDER ON EXTENSION OF PROVISIONAL DETENTION OF 10 NOVEMBER 2008"

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I. INTRODUCTION

1. The Co-Prosecutors respond to a Defence Appeal (the "Appeal"), filed on 9 December 2008 pursuant to the ECCC Internal Rules (the "Rules") 74 (f) and 75. The Appeal requests the Pre-Trial Chamber (the "PTC") to quash the Co-Investigating Judges' Order on Extension of Provisional Detention (the "Extension Order") of IENG Thirith (the "Charged Person" or the "Appellant") and to release her immediately under appropriate conditions.[1] The Defence argue that the Co-Investigating Judges (the "CIJs") made several mistakes of fact and law in their Extension Order. The Defence contends that (1) the Extension Order was insufficiently reasoned; (2) the CIJs applied wrong standards in terms of diligence and evidence found; (3) the CIJs sought to infringe/infringed the Appellant's right to silence; (4) the Extension Order did not show any 'real risk' that witnesses might refuse to participate in the proceedings in the future if the Charged Person were released -Rule 63 (3) (b) (i).

2. The Co-Prosecutors submit that the Defence application seeking a reversal of the CIJs Extension Order and immediate release should be dismissed in its entirety on the following grounds:

   (a) The Extension Order by CIJs is sufficiently and adequately reasoned: the CIJs set out the legal grounds and facts taken into account before coming to their Extension Order and are not obliged to indicate a view on all the factors. Contrary to what the Defence allege, the Extension Order does not contain any incorrect information and the Appellant has indeed access to all elements of the Case File, through her lawyers;

   (b) the length of time of the provisional detention is not unreasonable and there has been no lack of due diligence by the CIJs in the conduct of the proceedings; the standards of "special", "sufficient" or "absolute" diligence suggested by the Defence are not relevant in proceedings before the ECCC due to the very specific and complex nature of investigations within its jurisdiction as opposed to ECHR;

   (c) The 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

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[1] *Case of IENG Thirith*, IENG Thirith Defence Appeal against "Order on Extension of Provisional Detention" of 10 November 2008 dated 9 December, **C 20/5/1**, ERN 00250142-63 (ENG).

and undisputed by the CIJs. However, the absence of cooperation of the Appellant does not assist the CIJs in discovering exculpatory evidence.

(d) The Appellant has not demonstrated any material change in circumstances since she was originally detained by the CIJs on 14 November 2007 ("Detention Order").[2] Nor has she done so since that detention was confirmed by the PTC on 9 July 2008 ("Detention Appeal Decision").[3] In the Detention Appeal Decision, which evaluated all evidence on the Case File up to the date of the hearing of that Appeal, the PTC noted that the requirements of Rules 63(3)(a) and 63(3)(b)(i), (ii), (iii) and (v) were still met and "Provisional Detention [was] still a necessary measure on the basis of [those] grounds".

(e) The conditions for detention under Rule 63 (3) are still met today: the Case File contains evidence capable of satisfying an objective observer, at this stage of investigation, that the Appellant may have committed the crimes for which she is currently under investigation (Rule 63(3) (a)). Additionally, the disjunctive conditions under Rule 63(3) (b) are still fulfilled and even reinforced by a series of recent incidents, thereby rendering Provisional Detention a necessary measure. Specifically, the Appellant's Provisional Detention is necessary to (1) prevent the Charged Person from exerting pressure on witnesses or victims and preserve evidence or (2) prevent the destruction of evidence; (3) ensure the presence of the Charged Person during the proceedings; (4) protect the security of the Charged Person and (5) preserve public order.

II. RELEVANT PROCEDURAL BACKGROUND

3. On 18 July 2007, the Co-Prosecutors submitted an Introductory Submission detailing criminal facts and naming the Appellant and four other suspects as responsible for certain crimes within the jurisdiction of this Court enumerated therein. The Appellant was arrested

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2 *Case of IENG Thirith*, Detention Order dated 14 November 2007, **C 21**, ERN 00153250-52 (ENG). [*hereinafter* Detention Order].

3 *Case of IENG Thirith*, PTC Decision on Appeal against Provisional Detention Order of Ieng Thirith dated 9 July 2008, **C 20/I/26**, ERN 00201588-604 (ENG). [*hereinafter* IENG Thirith's Detention Appeal Decision].

on 12 November 2007[4], brought before the CIJs for an Initial Appearance[5] on the same day and was charged with Crimes against Humanity for the period from 17 April 1975 to 6 January 1979. An Adversarial Hearing on Detention took place on 14 November 2007[6], following which the CIJs ordered IENG Thirith's provisional detention for one year[7] and issued a Detention Order.[8] Since the Adversarial Hearing, the Appellant has exercised her right to remain silent.[9] On 2 January 2008, the Charged Person filed an appeal against the Detention Order,[10] which was responded to by the Co-Prosecutors on 21 January 2008.[11] The public hearing on the Provisional Detention, initially scheduled on 21 April 2008, was postponed at the request of the Defence[12] to 21 May 2008.[13] Before the hearing, on 16 May 2008, the Co-Prosecutors requested the CIJs to admit [REDACTED] as relevant to proving IENG Thirith's role in the crimes alleged in the Introductory Submission.[14] On 9 July 2008, the PTC judges rendered their "Decision on Appeal against Provisional Detention Order of Ieng Thirith".[15] On 13 October 2008, pursuant to Rule 63 (7), the CIJs notified the Charged Person and her lawyers that they were considering an extension of her provisional detention and requested them to submit their observations within 15 days[16], which they did on 27

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4 *Case of IENG Thirith*, Report on the Arrest of IENG Sary and IENG Thirith and the Search of their home address in Phnom Penh dated 13 November 2007, **D 31/ III**, ERN 00153309-10. See also Written Record of IENG Sary and IENG Thirith's House Search dated 12 November 2007, **D 31/I**, ERN 00152226-29 and 00157577-78; Written Record of Receipt of Evidentiary Materials dated 12 November 2007, **D 31/II**, ERN 00152224-25 and 00157576.

5 *Case of IENG Thirith,* Written Record of Initial Appearance, Investigation dated 12 November 2007, **D 39**, ERN 00153315-17 (ENG), 00152284-88 (KHM), 00153329-32 (FRE).

6 *Case of IENG Thirith*, Written Record of Adversarial Hearing, 14 November 2007, **C 18**, ERN 00153383-88.

7 *Case of IENG Thirith*, Provisional Detention Order dated 14 November 2007, **C 20**, ERN 00153245-49.

8 *Case of IENG Thirith*, Detention Order dated 14 November 2007, **C 21**, ERN 00153250-52.

9 [REDACTED].

10 *Case of IENG Thirith,* Appeal against the Provisional Detention Order dated 2 January 2008, **C 20/I/3**, ERN 00157111-280 (ENG).

11 *Case of IENG Thirith,* Response of the Co-Prosecutors to Ieng Thirith's appeal against Provisional Detention Order dated 21 January 2008, **C 20/I/7**, ERN 00186408-34 (ENG).

12 *Case of IENG Thirith,* Application to postpone the hearing of the appeal against the provisional detention order dated 21 March 2008, **C 20/I/9**, ERN 00172273-76 (ENG); Revised Scheduling Order- Change of Commencement Time, 25 April 2008, **C 20/I/18**, ERN 00181516-17 (ENG).

13 *Case of IENG Thirith,* transcript of the PTC Hearing on Provisional Detention dated 21 May 2008, ERN 00220079-164 (ENG), 00220246-326 (KHM) and 00220165-245 (FRE).

14 *Case of IENG Thirith,* Co-Prosecutors Request to admit a Statement relevant to Proving Ieng Thirith's Role in the Crimes alleged in the Introductory Submission dated 16 May 2008, **D 85**, ERN 00191111-18 (ENG). The CIJ granted the request and issued an order regarding the redaction of the witness' address as requested by the OCP (**D85/1**). Due to the protective measures requested, this request was not notified in time to the parties to be debated at the hearing of 21 May 2008.

15 IENG Thirith's Detention Appeal Decision, **C 20/I/26**, ERN 00201588-604 (ENG).

16 *Case of IENG Thirith*, CIJ Notification Pursuant to Internal Rule 63 (7) dated 13 October 2008, **C 20/2**, ERN 00231614-15 (ENG).

October 2008.[17] On 10 November 2008, the CIJs issued their Order on Extension of Provisional Detention of IENG Thirith, which was notified on 11 November 2008.[18] On 19 November 2008, the Defence filed a Notice of Appeals against the Order on Extension of Provisional Detention of IENG Thirith dated 10 November 2008[19] before filing their substantive Appeal on 9 December 2008.[20]

III. PRELIMINARY SUBMISSION

An Oral Hearing is not required

4. Internal Rule 77(3) ("Rules") permits the PTC, after considering the views of the parties, to determine an appeal on the basis of written submissions alone. The Appellant has not asked for an oral hearing of this Appeal. While hearings determinative of detention should be heard orally, the current Appeal concerns only an extension of a confirmed detention and, as such, raises no new material factual or legal arguments that need to be addressed in an oral hearing. Therefore, in the interest of judicial economy, the Co-Prosecutors request that the PTC determine this Appeal on written submissions alone.

IV. THE LAW

Nature and scope of the PTC review

5. The Defence arguments in paragraphs 13 to 56 of the Appeal are of no material relevance to the issue of the extension of the provisional detention. The Defence argue that the Extension Order is defective and hence must be quashed. 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 Defence seems to have misunderstood the nature and scope of the PTC review when it is seized of an appeal against a CIJs' order. At the ECCC, the PTC is not a court of "Cassation". The PTC does not have to examine the Case File and the conditions of Rule 63 (3) at the time the CIJs rendered their Extension

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17 *Case of IENG Thirith*, Defence Objections to the CIJ Intention to Extend Madame IENG Thirith's Provisional Detention dated 27 October 2008, **C 20/3**, ERN 00235246-257 (ENG).

18 *Case of IENG Thirith*, CIJ Order on Extension of Provisional Detention dated 10 November 2008, **C 20/4**, ERN 00238528-46 (ENG) [*hereinafter the "Extension Order"*].

19 *Case of IENG Thirith*, Record of Appeals dated 19 November 2008, **C 20/5**, ERN 2329730-31 (ENG); Notice of Appeal against CIJ Order on Extension of Provisional Detention of Ieng Thirith of 10 November 2008 dated 19 November 2008, **C 20/5**, ERN 00239732-33 (ENG).

20 *Case of IENG Thirith*, IENG Thirith Defence Appeal against "Order on Extension of Provisional Detention" of 10 November 2008 dated 9 December, **C 20/5/1**, ERN 00250142-63 (ENG). [*hereinafter the "Appeal"]*

Order.[21] As recalled by the PTC in its successive decisions on appeals against provisional detention orders, the PTC takes into consideration the whole Case File of the CIJs up to the date of the hearing,[22] including any new element or any piece of evidence filed since the Appeal. The PTC can therefore replace the CIJs orders by their own decisions and substitute its own reasons and motives for the ones of the CIJs.[23] In case of defect, the PTC could still "undertake its own analysis, applying the standard set out in Internal Rule 63(3)"[24] and cure the defect by substituting its own reasons.[25]

Duty to Give Reasons in Detention Orders

6. The Defence contends that the Extension Order was insufficiently or inadequately reasoned as (a) no sources are provided for the accusations made, (b) the Extension Order contains incorrect information and (c) the Appellant has no full access to the Case File.

7. Rule 63(7) requires the Co-Investigating Judges to "set out the reasons" for an extension of detention. These reasons have to be given after considering the Case File and the objections of the detainee.[26] Citing settled international jurisprudence, the PTC has found that all

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

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

23 The PTC usually states that "*the Order of the Co-Investigating Judges is affirmed with the reasons expressed in this decision being substituted for the reasons of the Co-Investigation Judges*". For example, IENG Thirith's Detention Appeal Decision, **C 20/I/26**, ERN 00201588-604 (ENG), at ERN 00201605 (ruling, last paragraph).

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

25 The PTC stated in paragraph 42 of its IENG Thirith's Detention Appeal Decision (**C 20/I/26**, at ERN 00201598), that "*the PTC further observes that any concern expressed by the Co-Lawyers as to whether the Co-Investigating Judges disregarded the presumption of innocence is resolved by the analysis that this Chamber has undertaken*".

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

decisions of judicial bodies, including the CIJs, have to be reasoned to meet international standards.[27]

8. The PTC has determined that the obligation to state reasons only requires that the CIJs set out the legal grounds and facts taken into account before coming to a decision. The CIJs can discharge this obligation "by referring to the Case File in general and other circumstances", as the CIJs are not obliged to indicate a view on all the factors.[28] Therefore, the Defence submission that "the Extension Order lacks reasoning by making general accusations without providing sources for it"[29] is unfounded and should be dismissed.

9. The Defence further argue that the Extension Order contains incorrect information.[30] This assertion is incorrect as both documents referred in footnote 14 of the Extension Order (D88 and D85/1) squarely concern IENG Thirith's knowledge and her role in the purges or the Ministry of Social Affairs' role [REDACTED].[31]

10. The Defence finally submit that contrary to the CIJs' holding in the Extension Order, the Appellant would have no access to all the elements of the Case File. Therefore, the Extension Order violates the requirement that a judicial decision needs to be reasoned.[32]

11. Firstly, the Internal Rules applicable before the ECCC do not provide that a Charged Person or a Civil Party can directly and personally access the Case File.[33] However, the Rules state

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

28 *Case of IENG Sary,* Decision on Appeal against Provisional Detention Order of Ieng Sary, Case No. 002/19-09-2007-ECCC-OCIJ (PTC 03) dated 17 October 2008, ERN 00232976-004, **C 22/I/74**, paragraphs 64-66; See also ICTY case law: *Prosecutor v. Popovic*, Decision on Defence's Interlocutory Appeal of Trial Chamber's Decision Denying Ljubomir Borovcanin Provisional Release, Case No. IT-05-88-AR65.2, Appeals Chamber, 1 March 2007, paragraph 13; *Prosecutor v. Haradinaj*, Decision on Lahi Brahimaj's Motion for Provisional Release, Case No. IT-04-84-PT, ICTY Trial Chamber, 3 May 2006, paragraph 16.

29 Appeal, **C 20/5/1**, paragraph 16.

30 Appeal, **C 20/5/1**, paragraphs 18-20.

31 [REDACTED]

32 Appeal, **C 20/5/1**, paragraphs 21-24.

33 Contrary to what the Defence suggests in their Request for Clarification dated 21 October 2008 (**A 228**), Article 149 of the Cambodian Criminal Procedure Code is inapplicable to ECCC procedure as it contradicts Rule 22 (3) of the Internal Rules. As recently ruled by the PTC, the Internal Rules prevail over the CPC provisions: on 26 August 2008, the PTC stated in its Decision on NUON Chea's Appeal against the Order Refusing Request for

that the parties have access to all the elements of the Case File, in person (the Co-Prosecutors) or through their lawyers (the Charged Persons and Civil Parties).[34] Secondly, in their Defence Request for Clarification dated 21 October 2008,[35] the Defence omitted to consider Rule 22 (3) which specifically provides that recognized defence lawyers may obtain a copy of the Case File, or records of proceedings, and bring this, together with any other relevant document, to discuss with their client.[36] It is clear that, except if her co-lawyers do not visit their client nor discuss the evidence of the Case File with her, the Appellant has effective access through her lawyers 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", as the CIJs recalled in their Extension Order.[37] Besides, the Defence acknowledge in their Appeal that certain documents of the Case File have been provided to the Appellant.[38] It is thus incorrect for the Defence to uphold the existence of an alleged lack of access to the Case File and even less to conclude that the Extension Order would have therefore violated the need for a judicial decision to be reasoned.[39]

Annulment, paragraph 14, that the Internal Rules constitute the primary instrument to which reference should be made in determining procedures before the ECCC where there is a difference between the procedures in the Internal Rules and the CPC. (*Case of NUON Chea*, PTC Decision on NUON Chea's Appeal against Order Refusing Request for Annulment, 26 August 2008, **D 55/1/8**, ERN 00219334-49 (KHM) and 00219322-33 (ENG), paragraph 14.) This principle has been confirmed by the PTC in its Decision on Application by the Co-Lawyer for the Civil Parties concerning Oral Submissions at the hearing of 4 December 2008 (*Case of KHIEU Samphan*, PTC Written version of Oral Decision on Application by the Co-Lawyer for the Civil Parties concerning Oral Submissions, 4 December 2008, **A 190/I/16**, ERN 00244305-07 (ENG), paragraph 2).

34 Rules 9 (5), 22 (3), 55 (6), 55 (11), 58 (1), 58 (2), 76 (6) and 77 (4) permit that the parties examine and make copies of the Case File during the investigation phase and that the Defence Co-Lawyers bring them to the detainees. As for the trial phase, similar provisions exist, for example Rule 86 and Rule 108 (6).

35 Case of IENG Thirith, Defence Request for Clarification of the Applicable Rules Concerning Charged Person receiving Case File Documents dated 21 October 2008, **A 228**.

36 Moreover, Rule 9 (21) of the Rules Governing the Detention of Persons Awaiting Trial or Appeal before the ECCC ("Detention Facility Rules"), adopted on 7 December 2008 (**Annex A, Attachment 1**) allow members of a defence team to pass papers to and from a detainee during a visit subject to judicial order.

37 Extension Order, **C 20/4**, paragraph 26.

38 Appeal, **C 20/5/1**, paragraph 23.

39 One should also mention that the issue of the constant access to the Case File by a Charged Person in the Detention Facility is currently addressed by the CIJs. The Co-Prosecutors are not opposed to such access. In order to respond to requests from IENG Thirith and NUON Chea's Defence teams respectively dated 22 October 2008 and 28 November 2008, the CIJs asked the Chief of the Detention Facility on 11 December 2008 whether a copy of the Case File could be kept in a separate room of the Detention Facility for consultation under supervision or, alternatively, to keep copies of documents in small lockable bookcases for each Charged Person inside or outside their cells (CIJs Internal Memorandum addressed to Chief of detention Facility concerning the access to the Case File by detainees, **A 228/2**, ERN 00250695 (ENG). The Chief of the Detention Facility responded that although there is no room available for keeping a copy of the Case File and for consultation purposes, a lockable cabinet with four shelves could be placed in each room of the Charged Person for keeping some Case File documents (*Réponse du Directeur du Centre de Détention aux Co-Juges*

12. In the light of the above arguments, the Co-Prosecutors submit that the Defence submission regarding the alleged lack of reasoning should be dismissed.

Extension of Detention

13. Rule 63(6) and (7) provides for an automatic periodic review of a Charged Person's detention. Such a provision is absent in the basic documents of the International Criminal Tribunals for the Former Yugoslavia ("ICTY") and Rwanda ("ICTR") and the Special Court for Sierra Leone ("SCSL"). Those ad hoc tribunals, however, maintain that for a renewed application for release to be successful, the defendant must demonstrate "a material change of circumstances".[40]

14. Similar to the Rules of this Court, Rule 118 of the Rules of Procedure and Evidence of the International Criminal Court ("ICC") requires that the pre-trial detention of a defendant must be reviewed by its Pre-Trial Chamber at least every 120 days. The Pre-Trial Chamber of the ICC has a "distinct and independent obligation [...] to ensure that a person is not detained for an unreasonable period prior to trial".[41] The Pre-Trial Chamber can modify its ruling on detention "if it is satisfied that the change in circumstances so require".[42] At the ICC, "the Prosecution has the burden of proof in relation to the continuing existence of the conditions [...] of pre-trial detention".[43]

15. Before this Court, the Rules do not require the CIJs to hear the Co-Prosecutors, or any other party excepting the Charged Person, while determining the extension of detention. They only provide for objections to be submitted by the Charged Person. The existence of an automatic

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d'Instruction relative à l'accès au dossier d'instruction par les personnes mises en examen, 19 December 2008, **A 228/2/I**, ERN 00251732 (FRE) –English version not available to date).

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

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

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

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

review of an extension of detention provides the detainee with a set opportunity to put forward her position and, if warranted, exercise her right to Appeal against a reasoned decision.[44]

Diligence in the Conduct of the Proceedings and Other Criteria for Determining Reasonable Delay

16. The Defence submit that because the CIJs allegedly failed to demonstrate sufficient diligence in the investigations against the Appellant over the last year and consequently failed to adduce evidence in her case, the reasonable time requirement has been infringed and her provisional detention can no longer be extended.[45] The PTC should dismiss this contention for the reasons stated below.

Diligence and the Investigation

17. To support this argument, the Defence invites this Chamber to import into proceedings applicable before the ECCC a standard of diligence they variously refer to as "special" or "sufficient" or indeed absolute, the basis of which is to be found solely in certain jurisprudence of the European Court of Human Rights ("ECHR"). Whereas the CIJs referred to their "due diligence" in conducting the investigation[46] the Defence seeks application of a "special diligence"[47] or a "sufficient diligence"[48] or finally an absolute diligence[49] standard. The Co-Prosecutors submit that these standards are of little relevance or assistance in proceedings before the ECCC and that the investigation, taking into account its specificity

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44 Internal Rules, Rule 63(7).

45 Appeal, **C 20/5/1**, paragraph 39, as a conclusion of paragraphs 26 to 44.

46 Extension Order, **C 20/4**, paragraph 35.

47 Appeal, **C 20/5/1**, paragraphs 29-32. In any case, the argument of the applicability of a higher standard ("special diligence") than "due diligence" seems ambiguous in the Appeal, which is compounded by the fact that the Defence Lawyers dropped such theoretical and unsubstantiated distinction in the paragraph 31 of their Appeal and footnote 21. They eventually merely argue that the CIJs did not demonstrate "sufficient diligence" ("either due or special diligence") in their investigations against the Charged Person. The Defence argument that the CIJs applied a wrong standard in terms of diligence lacks of relevance and consistency.

48 Appeal, **C 20/5/1**, footnote 21 and paragraphs 33-35, 36. In footnote 21, the Defence refers to both standards of "due" or "special" diligence as "sufficient diligence" in order to include both definitions.

49 Appeal, **C 20/5/1**, paragraph 37. The Defence stated that "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". Emphasis added. There is no provision in the Internal Rules nor any international jurisprudence requiring the application of such an absolute diligence.

and exigencies, has indeed proceeded and led to significant evidence being adduced. Furthermore, the application of the doctrine of reasonable delay, properly construed, cannot support the request for release.

18. Whilst the CIJs did refer to their obligation to conduct the investigation with due diligence, adequate regard must be paid to the very specific nature of investigations within the jurisdiction of the ECCC. The Appellant is charged with crimes against humanity (murder, extermination, imprisonment, persecution and other inhumane acts). The Appellant is being investigated for having planned, instigated, ordered, aided or abetted, committed or for having superior responsibility for various crimes against humanity. Furthermore, as articulated in the Introductory Submission and in subsequent filings,[50] inclusive in the charge of "committing" is the Appellant's participation in a joint criminal enterprise ("JCE") as a co-perpetrator that led to the commission of numerous egregious crimes throughout Cambodia and for the entire temporal mandate of this Court. These crimes are among the gravest and most complex and the Charged Person faces a potential life sentence if convicted.

19. Regional human rights mechanisms, like the ECHR, which consider the issue of reasonable time and due diligence as relevant and whose decisions form the sole basis of the Appellant's submission on this concept, operate in fundamentally different circumstances to this Court. The ECHR primarily deals with cases emanating from national jurisdictions based on prosecutions of domestic crimes in non-conflict circumstances. Conversely, courts like the ECCC are specialised internationalised tribunals that try highly complex international crimes. The Co-Prosecutors submit that the PTC must consider the jurisprudence of the ECHR with requisite caution and should more appropriately look towards the jurisprudence of the permanent or ad hoc criminal tribunals trying crimes of equal complexity and magnitude for guidance on related issues. The Defence has not referred to that relevant jurisprudence in

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[50] *Case of IENG Sary*, Co-Prosecutors' Response to Ieng Sary's Motion on Joint Criminal Enterprise, Case No. 002/19-09-2007-ECCC/OCIJ dated 11 August 2008, **D 97/II,** ERN 00211956–70, **D 97/II**; Co-Prosecutors' Supplementary Observations on Joint Criminal Enterprise dated 31 December 2008, **D 97/8**, ERN 00268566-92 (ENG); Order on the Application at the ECCC of the Form of Responsibility Known as Joint Criminal Enterprise, Case No. 002/19-09-2007-ECCC/OCIJ dated 16 September 2008, **D 97/III**, ERN 00224208–09 (ENG).

their Appeal.[51] The Co-Prosecutors note that, contrary to the courts from which cases come to the ECHR, this Court has to work with a newly and specifically constituted investigative mechanism. This presents unique and specific challenges and complexities lessening the usefulness of the guidance offered by the jurisprudence cited by the Appellant.

20. Furthermore, as argued below (see paragraphs 35 to 43), an examination of the Case File demonstrate the progress made in the investigation and the evidence confirming the responsibility of the Appellant in the crimes for which she is charged clearly undermines the submission of the Defence.

Reasonable delay

21. The Charged Person was arrested on 12 November 2007. Before the expiry of the Provisional Detention Order dated 14 November 2007,[52] the CIJs issued on 10 November 2008 their "Order on Extension of Provisional Detention" extending the Charged Person's provisional detention for another period not exceeding one year, pursuant to Rule 63(6)(a).[53]

22. In the Extension Order, the Co-Investigating Judges acknowledge that the passage of time is relevant to determining if the basis of a continued provisional detention remains.[54] While the length of time has been considered by international tribunals as a relevant factor in determining the legitimacy of detention, the Defence has not demonstrated how the one year detention has prejudiced the Appellant's case in such a manner as to prevent a fair trial and / or to demonstrate how it can, in and of itself, justify a reconsideration of detention.

23. Article 14(3) (c) of the ICCPR provides that "in the determination of any criminal charge against him, everyone shall be entitled [...] to be tried without undue delay". Article 9(3) of the ICCPR, Article 7(5) of the American Convention on Human Rights and Article 5(3) of the European Convention on Human Rights provide that everyone detained shall be entitled

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51 *Prosecutor v. Tihomir Blaskic*, Order Denying a Motion for Provisional Release, Case No. IT-94-14- Trial Chamber, 20 December 1996; *Prosecutor v. Kanyabashi*, Decision on the Defence Motion for the Provisional Release of the Accused, Case No. ICTR 96-15-T, Trial Chamber, 21 February 2001, para. 12.; Prosecutor *v. Casimir Bizimungu, Justin Mugenzi, Jérome-Clément Bicamumpaka and Prosper Mugiraneze*, Decision on Prosper Mugiraneze's application for a hearing or other relief on his motion for dismissal for violation of his right to a trial without undue delay, Case No. ICTR-99-50, Trial Chamber, 3 November 2004.

52 Provisional Detention Order, 14 November 2007, **C 20**.

53 Extension Order, **C 20/4**.

54 Extension Order, **C 20/4**, paragraph 35.

to trial within a 'reasonable time'. The Human Rights Committee has held that "what constitutes 'reasonable time' is a matter of assessment for each particular case".[55] This is a settled principle of international criminal law having been approved by both the *ad hoc* Tribunals for the Former Yugoslavia and Rwanda respectively.[56]

24. The ICTY has established that in order to establish the reasonable nature of the length of provisional detention it is necessary to evaluate the circumstances of each case in light of the following criteria:

(a) The effective length of the detention;
(b) The length of the detention in relation to the nature of the crimes;
(c) The physical and psychological consequences of the detention on the detainee;
(d) The complexity of the case and the investigations;
(e) The conduct of the entire proceedings.[57]

25. The ICTR has adopted a similar test in evaluating the reasonableness of pre-trial detention and, in light of the circumstances of the cases before it, is yet to find any period of pre-trial detention unreasonable.[58]

26. Notwithstanding the gravity of the charges tried by the ECCC, Rule 63 provides for several safeguards to ensure that pre-trial detention is as short as possible. Rules 63 (6) and (7) provide that no accused before the ECCC can be held in provisional detention for more than three years in total.[59] This safeguard does not exist before the ICTR and ICTY. Moreover, as stated above in paragraph 13 of the present Response, Rules 63 (6) and (7) provide for an

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55 U. N. Human Rights Committee, Communication No. 336/1988, N. Fillastre v. Bolivia (Views adopted on 5 November 1991), in UN doc. GAOR A/47/40.

56 *Prosecutor v. Kanyabashi*, Decision on the Defence Motion for the Provisional Release of the Accused, 21 February 2001, para. 11; The Prosecutor v. Tihomir Blaskic, Order Denying a Motion for Provisional Release, Trial Chamber, 20 December 1996.

57 *Prosecutor v. Tihomir Blaskic*, Order Denying a Motion for Provisional Release, Case No. IT-94-14- Trial Chamber, 20 December 1996.

58 See for example, Prosecutor *v. Casimir Bizimungu, Justin Mugenzi, Jérome-Clément Bicamumpaka and Prosper Mugiraneze*, Decision on Prosper Mugiraneze's application for a hearing or other relief on his motion for dismissal for violation of his right to a trial without undue delay, Case No. ICTR-99-50, Trial Chamber, 3 November 2004, para. 26.

59 IR 63(6) provides for an initial period of provisional detention for crimes against humanity that does not exceed one year. 63(6) provides for one-year extensions of provisional detention by the OCIJ, 63(7) limits the OCIJ to two such extensions. It is unlikely that such safeguard be extended in the future by the Plenary Session of ECCC Judges.

automatic periodic review of detention of a Charged Person (at least every year). Accordingly, the Internal Rules clearly envisage that no Charged Person will be subject to an unreasonable period of pre-trial detention.

27. The ICTY, in evaluating the reasonableness of pre-trial detention, has consistently considered much longer periods of detention to be reasonable in light of the gravity of the crimes concerned.[60] In the current case, the ECHR cases the Defence have put forward involve crimes of an inherently less serious nature and periods of detention which greatly exceed that of the Charged Person and are therefore incomparable to the case at hand.[61] As the ICTY has noted however the ECHR has found no violation of article 5(3) of the European Convention in other cases involving periods of pre-trial detention much greater than that in the case at hand.[62] In light of the gravity of crimes charged and the safeguards contained in the Internal Rules against indefinite detention, the Charged Person's one year in provisional detention is not unreasonable.

28. The ICTR has held that the complexity of factual or legal issues raised by a case are relevant to the question of whether the length of proceedings comply with the 'reasonable time' requirement[63] and has considered the complexity of cases to be pertinent in holding periods

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60 For example, *Prosecutor v. Blaskic*, Order Denying a Motion for Provisional Release, ICTY Trial Chamber, 20 December 1996. *Prosecutor v Mrda,* Decision on Darko Mrda's Request for Provisional Release, Case No. IT-02-59-PT, ICTY Trial Chamber II, 15 April 2002.

61 *Tomasi v. France,* Judgment, European Court, Appl. No. 12850/87, 27 August 1992, para. 89. (Pre-trial detention for 5 years and 7 months on suspicion of the crimes of premeditated murder; the applicant was eventually acquitted); *Wemhoff v. Germany,* Judgement, European Court, appl. No. 2122/64, 27 June 1968. (Pre-trial detention for 3 years on suspicion of a series of fraud, a period held by the Court as reasonable); *Stögmüller v. Austria,* Judgment, European Court, Appl. No. 1602/62, 10 November 1969. (Pre-trial detention for 2 years on suspicion of aggravated fraud). *Matznetter v. Austria,* Judgement, European Court, Appl. No. 2178/64, 10 November 1969. (Pre-trial detention for 25 months on suspicion of fraud); *Calleja v. Malta,* Judgment, European Court, Appl. No. 75274/01, 7 April 2005. (Provisional detention for 4 years and 10 months on suspicion of complicity in murder); *Letellier v. France,* Judgment, European Court, Appl. No. 12369/86, 26 June 1991. Letellier was held in pre-trial detention for 2 years and 9 months on suspicion of being an accessory to murder; sentenced to 3 year imprisonment; *Assenov v. Bulgaria,* Judgment, European Court, appl. No. 24760/94, 28 October 1998 (2 years in pre-trial detention on suspicion of burglaries; sentenced to 30 months imprisonment).

62 *Prosecutor v. Blaskic*, Order Denying a Motion for Provisional Release, ICTY Trial Chamber, 20 December 1996.

63 *Prosecutor v. Kanyabashi*, Decision on the Defence Motion for the Provisional Release of the Accused, Case No. ICTR 96-15-T, Trial Chamber, 21 February 2001, para. 12. In this case the Trial Chamber held that the accused's five years pre-trial detention were reasonable in light of, *inter alia,* the complexity of the factual and legal issues raised by the case.

of pre-trial detention of four and a half years and five years to be reasonable.[64] In dealing with the issue of whether the Charged Person's period of pre-trial detention exceeds a 'reasonable time', the Defence relies on the ECHR case of *Wemhoff v. Germany*.[65] Notwithstanding the comparably less serious offences and longer period of pre-trial detention in that case the ECHR held the period of pre-trial detention to be reasonable given the complexity of the case and held there to have been no violation of article 5(3) of the European Convention on Human Rights.[66] The Charged Person faces numerous charges involving different modes of liability concerning her participation in a criminal enterprise charged with responsibility for a network of widespread and systematic crimes for a period of more than three and a half years. In light of the exceptionally complex nature of these crimes the Charged Person's one year in provisional detention is not unreasonable.

29. The Appellant has failed to substantiate the applicability of a "special diligence" or "sufficient diligence" standards to the proceedings before the ECCC or the criteria to identify and differentiate each of those notions. Furthermore the evidence collected by the CIJs covers all the modes and types of the Appellant's contribution to the crimes against humanity she is charged with, including crime base evidence, evidence linking crime base to leadership structures within which the Appellant exercised command authority, evidence supporting her participation in the JCE, evidence supporting jurisdictional elements such as the widespread and systematic attack against a civilian population, and so forth. The CIJs, in issuing several rogatory letters and collecting more than one hundred witness statements and documents supporting these categories of evidence[67] have, therefore, exercised due diligence in conducting their investigation.

30. The Co-Prosecutors submit that the Defence have not shown how the length of detention has prejudiced the Appellant's case in such a manner as to prevent a fair trial and / or to demonstrate how it can, in and of itself, justify a reconsideration of detention. In light of the

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64 *Prosecutor v. Casimir Bizimungu, Justin Mugenzi, Jérome-Clément Bicamumpaka and Prosper Mugiraneze*, Decision on Prosper Mugiraneze's application for a hearing or other relief on his motion for dismissal for violation of his right to a trial without undue delay, Case No. ICTR-99-50, Trial Chamber, 3 November 2004 and *Prosecutor v. Kanyabashi*, Decision on the Defence Motion for the Provisional Release of the Accused, Case No. ICTR 96-15-T, Trial Chamber, 21 February 2001, respectively.

65 Appeal, **C 20/5/1**, footnote 17.

66 *Wemhoff v. Germany,* Judgment, European Court, Appl. No. 2122/64, 27 June 1968, para. 17.

67 See below, paragraphs 35-43 of the present Response.

circumstances of the case and international jurisprudence, the length of provisional detention of the Appellant is reasonable under Article 9(3) of the ICCPR. The Charged Person has been held in Provisional Detention for a reasonable period of time given the gravity of the crimes charged, the complexity of the case and the extent of the ongoing investigations being carried by the CIJs. The safeguards contained in the Internal Rules limiting the duration of Provisional Detention permissible and providing for review of Provisional Detention allay any concerns that the duration of Provisional Detention will be permitted to become unreasonable. For these reasons the Co-Prosecutors invite the PTC to dismiss the Defence Appeal.

No Infringement of the Right to Remain Silent

31. The Appellant argues that the CIJs sought to infringe or actually infringed the right of the Appellant to remain silent and "blamed her (...) for adopting an attitude which is not conducive to speedy proceedings".[68] Thus, the Defence argue, the Extension Order should be quashed as it would no longer be legitimate.

32. No factual support is offered for this statement which appears to be based on an erroneous reading of the Extension Order. The CIJs have simply asserted that the Appellant's exercise of this recognized and undisputed right "is not conducive to speedy proceedings".[69] It is a mere fact. This assertion does not indicate that the CIJs have held the exercise of this right by the Appellant against her. The Co-Prosecutors emphasize that a Charged Person's right to remain silent is protected by law applicable before this Court and is an international standard, which is binding upon it. As neutral judges conducting a search for the truth, the CIJs have to gather both incriminatory and exculpatory evidence. Presumably, a Charged Person can - better than anybody else- assist the CIJs in discovering exculpatory evidence. In the absence of this cooperation, the investigation necessarily takes longer than it would have taken had the Appellant presented such evidence.

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[68] Appeal, **C 20/5/1**, paragraphs 45-56, especially 47. These paragraphs are unclear as regards to the alleged *infringement* or *attempt to infringe* the right to remain silent.

[69] Extension Order, **C 20/4**, paragraph 37.

33. The Co-Prosecutors, therefore, request the Pre-Trial Chamber to reject the Appellant's argument that the CIJs sought to infringe / infringed the right of the Appellant to remain silent.

V. PROVISIONAL DETENTION

Facts and Argument

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

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

35. The Case File today contains evidence capable of satisfying an objective observer, at this stage of the investigation, that the Appellant may have committed the crimes for which she is currently under investigation.

36. In the Appeal, the Defence do not submit any relevant arguments based on Rule 63 (3) (a). Indeed the Defence do not challenge the existence of a well-founded reason to believe that the Charged Person may have committed the crimes specified in the Introductory Submission, although indirect and unsubstantiated references are made to it[70].

37. Therefore, the Co-Prosecutors deem necessary only to mention the new elements under Rule 63 (3) (a) that intervened since the arrest of the Appellant. As for the evidence supporting the Introductory Submission, which in itself is still sufficient for justifying the criteria of "well-founded reason to believe", the Co-Prosecutors incorporate by reference the submissions contained at paragraphs 18 to 24 of their "Response to IENG Thirith's Appeal against Provisional Detention Order of 14 November 2007".[71]

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[70] In their Appeal, **C 20/5/1**, instead of arguing about the existing evidence in the Case File, they merely criticize the fact that the Extension Order would allegedly contain general accusations without providing sources for it (paragraphs 16-17), that the Extension Order would contain incorrect information (as two documents mentioned by the CIJ would be irrelevant -paragraphs 18-20), that the CIJ would have failed to gather any incriminating evidence against the Appellant which would directly support the charges against her (paragraphs 33, 36, 38 and 39 of the Appeal). See the comments made in the present Response about some of those arguments, above in paragraphs 8-10 and 29.

[71] *Case of IENG Thirith*, Co-Prosecutors' Response to IENG Thirith's Appeal against Provisional Detention Order of 14 November 2007 dated 21 January 2008, **C 20/I/7**, ERN 00186408-34 (ENG).

38. On 10 November 2008, in their impugned Extension Order, the CIJs noted that well founded reasons continued to exist to believe that the Appellant may have committed the crimes specified in the Introductory Submission. They recalled that the PTC, in its decision dated 9 July 2008, undertook a detailed analysis of the Case File and found that there was sufficient evidence to satisfy an objective observer that the Appellant may have committed the crimes alleged.[72] The CIJs also noted that the judicial investigation has progressed since the Detention Appeal hearing dated 21 May 2008 as additional evidentiary materials have been collected.[73]

39. The Co-Prosecutors submit that the PTC should confirm its previous findings of the existence of a well-founded reason to believe that the Charged Person may have committed the crimes alleged.[74] It is clear from a review of the Case File that the basis of this belief is now even stronger than one year ago, as the evidence incriminating the Appellant has increased both in volume and gravity in the recent months. The CIJs have issued at least thirteen Rogatory Letters in Case File No. 002 (Document Nos. D25, D40, D43, D78, D82, D91, D92, D93, D94, D104, D107, D115 and D123)[75] and they, or their investigators, have interviewed more than a hundred witnesses in relation to the crimes that the five persons charged in that Case File, including the Appellant, may have committed.[76] In addition, the substantive content of the Case File No. 001, largely relevant to the Appellant's case, has

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72 IENG Thirith's Detention Appeal Decision, **C 20/I/26**, paragraph 41.

73 Extension Order, **C 20/4**, paragraphs 13-20.

74 In its decision on appeal against provisional detention order of IENG Sary, the PTC noted that the term "have committed" had to be understood as "incur individual responsibility for" which includes planning, instigating, ordering, aiding and abetting, or committing and superior criminal responsibility. *Case of IENG Sary*, PTC Decision on Appeal against Provisional Detention Order of IENG Sary dated 17 October 2008, **C 22/I/73**, ERN 00232830-61 (ENG), paragraph 71.

75 Among those Rogatory Letters, seven relate to witness interviews: **D 25** (36 witness interviews), **D 40** (25 witness interviews), **D 91** (24 witness interviews), **D 92** (8 witness interviews), **D 94** (16 witness interviews), **D 107** (at least one witness interview), **D 115** [REDACTED].and **D 123** (3 witness interviews) for a total of at least 118 witness interviews placed on the Case File. According to the CIJs however, numerous rogatory letters are in the course of being executed. It is not a surprise as the parties are usually -but unfortunately- informed of the existence of such Rogatory Letters at the time they are completed. It means that in reality, it is highly likely that many more witness statements have been collected by the OCIJ since the 118 witness interviews were placed on the Case File. The Co-Prosecutors encourage the practice of placing the witness statements as soon as possible on the Case File before the Rogatory Letters' reports are completed.

76 Now that the Closing Order has been issued in Case File No. 1, it is expected that the pace of investigations will drastically accelerate in the near future.

been transferred to the Case File No. 002 by a note of the CIJs dated 28 October 2008;[77] the 28 written records of interview of KAING Guek Eav alias DUCH conducted in the context of Case File No. 001 had already been integrated by the CIJs in Case File No. 002 on 30 May 2008.[78] Moreover, [REDACTED][79].

40. The Co-Prosecutors also contributed to the investigation by filing a large number of evidentiary materials since the Introductory Submission and the arrest of the Appellant.[80] It is recalled that the evidence placed in the Case File by the CIJs at the request of the Co-Prosecutors (Introductory Submission and subsequent filings) as well as the evidence collected by the CIJs in the last year cover all the modes and types of the Appellant's contribution to the crimes against humanity she is charged with, including crime base evidence, evidence linking crime base to leadership structures within which the Appellant exercised command authority, evidence supporting her participation in the JCE and evidence supporting jurisdictional elements such as the widespread and systematic attack against a civilian population.

41. [REDACTED].[81] [82] [83]

42. [REDACTED].[84] [85] [86] [87] [88]

43. [REDACTED].[89] [90]

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77 *Case of NUON Chea et al.*, Note by the Co-Investigating Judges dated 28 October 2008, **D 108**, ERN 00236076-77 (ENG) and its annex **D 108/1**.

78 *Case of NUON Chea et al.*, Note by the Co-Investigating Judges dated 30 May 2008, **D 86**, ERN 00194661-67 (ENG).

79 [REDACTED].

80 [REDACTED].

81 [REDACTED].

82 [REDACTED].

83 [REDACTED].

84 [REDACTED].

85 [REDACTED].

86 [REDACTED].

87 [REDACTED].

88 [REDACTED].

89 [REDACTED].

90 [REDACTED].

44. Finally, one must mention that while other Charged Persons have filed investigative requests, the Appellant has filed none. Therefore, the Appellant's contention of a lack of progress is unfounded and should be rejected. No significant exculpatory evidence has been found to undermine this determination of the "existence of a well founded reason". To date, the Appellant has not placed any material, much less exculpatory material, on the Case File that should trigger a reconsideration of this determination.

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

45. The Appellant does not identify any material change of circumstances to show that conditions necessitating her detention under Rule 63(3)(b) are no longer met. The PTC's determination on 9 July 2008 that provisional detention at the ECCC Detention Facility is necessary was issued after a review of all the evidence then on the Case File. The Appellant has provided no new evidence since 9 July 2008 that may lead the PTC to reverse this finding. The Co-Prosecutors submit that the rationale outlined in the Detention Appeal Decision is still valid today and should be upheld.

46. Furthermore, the Defence do not contest the existence of the alternative and disjunctive conditions of Rule 63 (3) (b) for determining whether the provisional detention is a necessary measure to (ii) preserve evidence or prevent its destruction; (iii) ensure the presence of the defendant during the proceedings; or (v) preserve public order. Therefore the Co-Prosecutors incorporate by reference the submissions contained at paragraphs 31 to 49 of their "Response to IENG Thirith's Appeal against Provisional Detention Order of 14 November 2007".[91] The Defence solely argue that the CIJs failed to provide any reasoning in the Extension Order justifying a "real risk" that witnesses might refuse to take part in the proceedings[92] (Rule 63 (3) (b) (i)).

47. Firstly, some relevant incidents took place at the PTC hearings dated 21 May 2008 and 9 July 2008. As argued below, the offensive attitude of the Charged Person at those hearings, consisting in threats and attempts to intimidate the parties and / or the judges, are elements to

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91 *Case of IENG Thirith*, Co-Prosecutors' Response to IENG Thirith's Appeal against Provisional Detention Order of 14 November 2007 dated 21 January 2008, **C 20/I/7**, ERN 00186408-34 (ENG)..

92 Appeal, **C 20/5/1**, paragraphs 57-64, especially 64.

take into consideration while evaluating the risks posed in regards to the pressure the Appellant might exert against witnesses and victims (63 (3) (b) (i)), the preservation of evidence (63 (3) (b) (ii)) and the preservation of public order (63 (3) (b) (v)). It may also affect her personal security if this behaviour is repeated in public once released (63 (3) (b) (iv)). The incidents can be described as following, in paragraphs 48 – 49.

48. [REDACTED].[93] [94] [95] [96] [97] [98] [99] [100] [101] [102] [103]

49. On 9 July 2008, at a PTC hearing, the President read out the PTC "Decision on Appeal against Provisional Detention Order of Ieng Thirith". At the end of the hearing, the Charged Person shouted to the Court Judges: *"I know who wrote that decision! I know who!"* This intervention can be interpreted as an attempt to threaten or intimidate the judges and / or ECCC staff.[104] It is unfortunately not reported in the transcript of that hearing.

50. Both these incidents, combined with the past behaviour and public statements of the Appellant as mentioned by the PTC in its 9 July 2008 Decision on Appeal,[105] clearly demonstrate the concrete risk that the Charged Person may exert pressure against, intimidate or interfere with witnesses or victims if provisionally released. The Appellant has access to the names of the key witnesses. Many of them have yet to be heard by the CIJs at this stage

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93 [REDACTED].
94 [REDACTED].
95 [REDACTED].
96 [REDACTED].
97 [REDACTED].
98 [REDACTED].
99 [REDACTED].
100 [REDACTED].
101 [REDACTED].
102 [REDACTED].
103 [REDACTED].
104 *Case of IENG Thirith*, PTC Decision on Appeal against Provisional Detention Order of Ieng Thirith, C20/I/26, ERN 00201588-604 (ENG). Again, the quote reflects what the Co-Prosecutors remember the Charged Person as saying.
105 PTC Decision on Appeal against Provisional Detention Order of Ieng Thirith, C20/I/26, ERN 00201588-604 (ENG) at paragraphs 49-50. IENG Thirith insulted and attempted to intimidate Youk Chhang: Letter sent on 7 February 1999 by IENG Thirith to Chris Decherd, published under the title "Ieng Thirith says she only wanted to serve her people", *The Cambodia Daily*, 12 February 1999, ERN 00000588-589 (ENG). The Charged Person is reported to have called people to shut May Makk up in a DNUM meeting in 2003: "Khmer Rouge Inc: Former Communists Embrace the Market Economy in Malai District," *The Cambodia Daily,* 17 February 2007, ERN 00106073-78.

of the proceedings. Accordingly, the risk that she might influence the witnesses' fear of testifying before the ECCC is even greater.

51. Furthermore, if released, there is a concrete risk that the Appellant would continue making such offensive statements in public media which could have the effect of intimidating witnesses and victims but also of disturbing the public order and, as a consequence, creating risks to her personal safety.

52. Secondly, as regards the threats posed to public order and personal security -63 (3) (b) (iv) and (v)-, the recent statements and behaviour of some victims or civil parties show that any release of the five charged persons might degenerate into violence directed against the former Khmer Rouge leaders, including the Appellant, the defence teams or the ECCC. In an article published in the New York Times on 17 June 2008,[106] two victims said that they wanted respectively to "slice (Nuon Chea) into ribbons and pour salt into his wounds (...), beat him up and torture him and give him electric shocks to make him talk" and to have them (the Charged Persons) "suffer the way I suffered" as "only killing them will make me feel calm". Three persons reiterated those statements / threats (against Khieu Samphan and his Defence team but also against the court) at a press conference held after the PTC hearing on 4 December 2008.[107] These emotional reactions are symptomatic of post-traumatic stress disorders still persisting among the victims as the ECCC proceedings led to the resurfacing of

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106 "In Khmer Rouge Trial, Victims Will Not Stand Idly by", The New York Times, Seth Mydans, 17 June 2008. accessible at http://www.nytimes.com/2008/06/17/world/asia/17cambodia.html?scp=1&sq=Seth%20Mydans%20in%20Khmer%20Rouge%20Trial%20Victims&st=cse on 4 January 2009. (**Annex B – Attachment No. 2**).

107 As the ECCC video of the press conference dated 4 December 2008 indicates (**Annex B – Attachment No. 3**), a first female KR victim shouted and pointed the finger at the national Defence Co-lawyer during the press conference. Ly Monysar, a victim now security guard threatened the court with a terrorist act against the KR leaders "if the court continues to be a comedy" during the Victims' Press Conference and a female civil party (applicant), Sok Chear, repeated that if she could catch Khieu Samphan she would "tear and eat him". See also "Tribunal Khmer Rouge: l'exaspération des victims intensifiées par un clash avec la défense" dated 5 December 2008, Ka-Set (site d'information sur le Cambodge), Stéphanie Gée, accessible at the following web address : http://ka-set.info/index2.php?option=com_content&task=view&id=783&pop=1&page=0&Itemid=46 (**Annex B – Attachment No. 4**); "Farce Meets Justice in Khmer Rouge Trial", *The Nation (New York, USA)*, Barbara Crossette, 17 December 2008, 4th paragraph (**Annex B – Attachment No. 5**); "Khmer Rouge Court Holds Hearing of Khieu samphan's Appeal against decision on Translation of Case File" dated 5 December 2008, English translation, *Rasmei Kampuchea*, vol.16 #4760 (**Annex B – Attachment No. 6**); "Disorder in the court as hearing ends in disarray" dated 5 December 2008, *The Phnom Penh Post*, by Georgia Wilkins (**Annex B – Attachment No. 7**); "Le Cirque Vergès" dated 11-17 December 2008, *Cambodge Soir*, by Adrien Le Gal (**Annex B – Attachment No. 8**). These four last press clippings are accessible on the ECCC G:Drive at their respective dates of publication (G:\Public Affairs\Daily Clippings International\12. Dec).

anxieties.[108] Therefore, the potential threat to public order and personal security is not illusory but is still vivid and concrete.

53. The Co-Prosecutors therefore, request the Pre-Trial Chamber to hold that conditions of detention under Rule 63(3)(b)(i)-(v) are, and continue to be, satisfied thereby justifying an extension of the Appellant's detention.

C. - No Bail Order

54. No bail order would be rigorous enough to satisfy the needs of protecting of the Charged Person's personal safety, the preservation of public order, and to prevent the Charged Person exerting pressure on witnesses and victims and therefore, destroying evidence.

VI. CONCLUSION

55. The Co-Prosecutors, therefore, request the Pre-Trial Chamber to DISMISS the Defence Appeal in totality.

YET Chakriya — Deputy Co-Prosecutor

Robert PETIT — Co-Prosecutor

Signed in Phnom Penh, Kingdom of Cambodia on this 22th day of January, 2009.

[108] Rob Savage states that the commencement of judicial activities before the ECCC "may pose a fresh risk to the Cambodian society" which could "lead to the resurfacing of anxieties and a rise in the negative social consequences that may accompany them". Rob Savage, "Post Traumatic Stress Disorder: A Legacy of Pain and Violence", *Monthly South Eastern Globe,* July 2007, pp. 24-27, ERN 00153657 – 61 (ENG).