

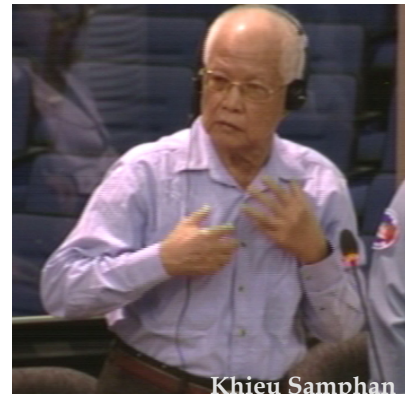
## Report on Pre-Trial Hearings on Appeals Against Extensions of Provisional Detention Orders

February 11-15, 2010

Sarah Thomas

### 1. INTRODUCTION TO THE PRE-TRIAL HEARINGS

On February 11, 12 and 15, the ECCC Pre-Trial Chamber heard oral argument on the appeals against the extension of the provisional detention orders of three of the four Charged Persons in Case 002, Ieng Sary, Khieu Samphan, and Ieng Thirith. Since their arrest in November 2007, the Co-Investigating Judges have ordered their provisional detention pending trial and have extended this detention each year as required by the Court’s Internal Rules. The Judges last ordered extensions of provisional detention in mid-November 2009 – just before the second anniversary of their detention – which the three Charged Persons all appealed in early December. At the hearings, the Co-Lawyers for the Charged Person requested that the Chamber order their clients’ release or house arrest. All alleged that the Co-Investigating Judges had erred in ordering extensions, as the evidence did not support the conclusion that their clients had committed the charged crimes and the Judges had failed to provide reasoned decisions explaining why the conditions for provisional detention were met. The hearings were well attended



Khieu Samphan



Ieng Sary



Ieng Thirith

with large groups invited by both the Victims Support Section and local NGOs. Several civil parties were in attendance each day.

### 2. LEGAL BACKGROUND TO PROVISIONAL DETENTION AT THE ECCC

The ECCC Internal Rules permit the Co-Investigating Judges (“CIJs”) or the Pre-Trial Chamber to order the “provisional detention” of a Charged Person pending final

judgment. As Charged Persons enjoy a presumption of innocence, provisional detention is not a form of punishment and has been described by the CIJs as “as an exception to the general rule of liberty at the pretrial phase.” Given its exceptional status, the CIJs may only order provisional detention at the pre-trial stage if they find two conditions required by Rule 63(3) to exist. First, there is “well-founded reason to believe that the person may have committed the crime or crimes specified in the Introductory or Supplementary Submission” (Rule 63(3)(a)). Second, provisional detention is necessary: (a) to prevent the exertion of pressure on witnesses or victims or collusion with accomplices; (b) to preserve or prevent the destruction of evidence; (c) to ensure presence during the proceedings; (d) to protect the Charged Person’s security; or (e) to preserve public order (Rule 63(3)(b)).

The Charged Person has the right to appeal an order of provisional detention to the Pre-Trial Chamber (Rule 63(4)). The CIJs may only order provisional detention for up to one year if the charges include genocide, war crimes or crimes against humanity (limited to six months for all other crimes) (Rule 63(6)). The CIJs may order an extension of provisional detention after one year and the Charged Person has the right to appeal such an order to the Pre-Trial Chamber (Rule 63(7)). As the Co-Investigating Judges may not order more than two extensions (Rule 63(7)), the Charged Person cannot be provisionally detained for more than 3 years at the pre-trial stage. The Co-Investigating Judges have the power to order by reasoned decision the continued provisional detention of the Charged Person in the Closing Order until he or she is brought before the Trial Chamber (Rule 68(1)). The Charged Person must be brought before the Trial Chamber within 4 months of this decision (Rule 68(3)).

### **3. PROCEDURAL BACKGROUND TO THE PRE-TRIAL HEARINGS**

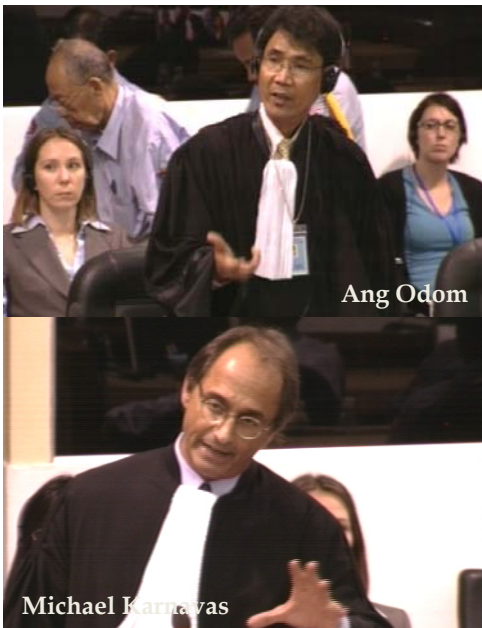
In mid November 2009, the CIJs ordered a second extension of the provisional detention of Ieng Sary, Khieu Samphan and Ieng Thirith for a period not exceeding one year. In their Orders, the CIJs found that, as required by Rule 63(3)(a), there was well-founded reason to believe based on the evidence that the three Charged Persons had committed the charged crimes. The CIJs further concluded that, in accordance with Rule 63(3)(b), their continued provisional detention was necessary in order to ensure their presence at trial (Ieng Sary, Ieng Thirith), to ensure their safety (Ieng Sary, Khieu Samphan), to avoid threats to witnesses (Ieng Thirith), and to preserve public order (Ieng Sary, Khieu Samphan, Ieng Thirith). Rather than showing the existence of these conditions, the CIJs merely cited the Pre-Trial Chamber’s prior decisions and concluded that circumstances have not changed. While recognizing twenty-four months as “significant,” the CIJs found the detention period to be reasonable given the complexity of the investigation.

In early December 2009, the Co-Lawyers for the three Charged Persons filed separate appeals against the CIJs’ Orders. In all three appeal briefs, the Co-Lawyers claimed that the CIJs had erred in ordering the continued detention of their clients at the detention facility. The brief of Ieng Sary’s Co-Lawyers differed from the others in

that, instead of requesting release, it asserted that he should be placed under house arrest. Broadly speaking, all three appeal briefs argued that detention was unjustified based on the evidence and unnecessary. The Co-Lawyers argued that the burden of proof lies with the CIJs and, as such, the CIJs erred in failing to provide a written, reasoned decision justifying the necessity of provisional detention. Thereafter, the Co-Prosecutors and the civil parties filed responses requesting denial of the appeals, arguing that extension was reasonable, justifiable, and a proper exercise of discretion.

#### 4. SUMMARY OF PRE-TRIAL HEARINGS

##### a. Hearing on Appeal of Ieng Sary, February 11



Both the National (Ang Odom) and International (Michael Karnavas) Co-Lawyers for Ieng Sary participated in the hearing on the appeal. The Co-Lawyers argued that the CIJs had erred by: (a) failing to act with required due diligence, as the evidence would not lead an objective observer to conclude that their client committed the crimes alleged; (b) failing to provide a written, reasoned opinion showing that the conditions for detention have been met, as the burden of proof is on the CIJs; and (c) failing to consider less restrictive alternatives to detention. The Co-Lawyers argued that provisional detention is unnecessary as: (a) there is no credible risk of flight, as Ieng is too unwell and too well-known; (b) there is no credible risk to his

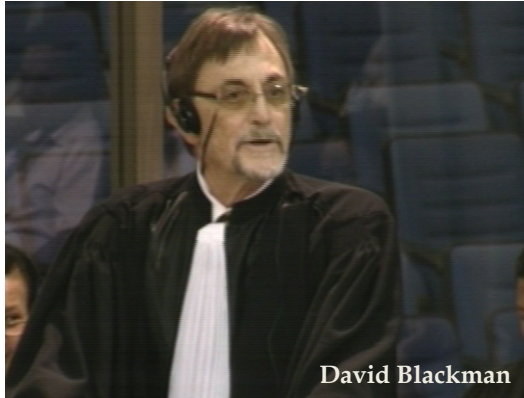
safety, as the documented aggression towards Duch would not be transferred; and (c) there is no credible risk of public order. The Co-Lawyers requested that their client be placed under house arrest or in hospital detention for health reasons.

National (Chan Dararasmey) and International (Anees Ahmed) Senior Assistant Prosecutors made submissions for the Office of the Co-Prosecutors. The Senior Assistant Prosecutors argued for denial of the appeal, as there is well-founded reason to believe based on the evidence that Ieng committed the charged crimes. Ahmed noted that more than 96 statements speak of his role in the crimes. The Senior Assistant Prosecutors further argued that provisional detention is necessary, as three of the five Rule 63(3)(b) conditions have been satisfied. With respect to these conditions, the Senior Assistant





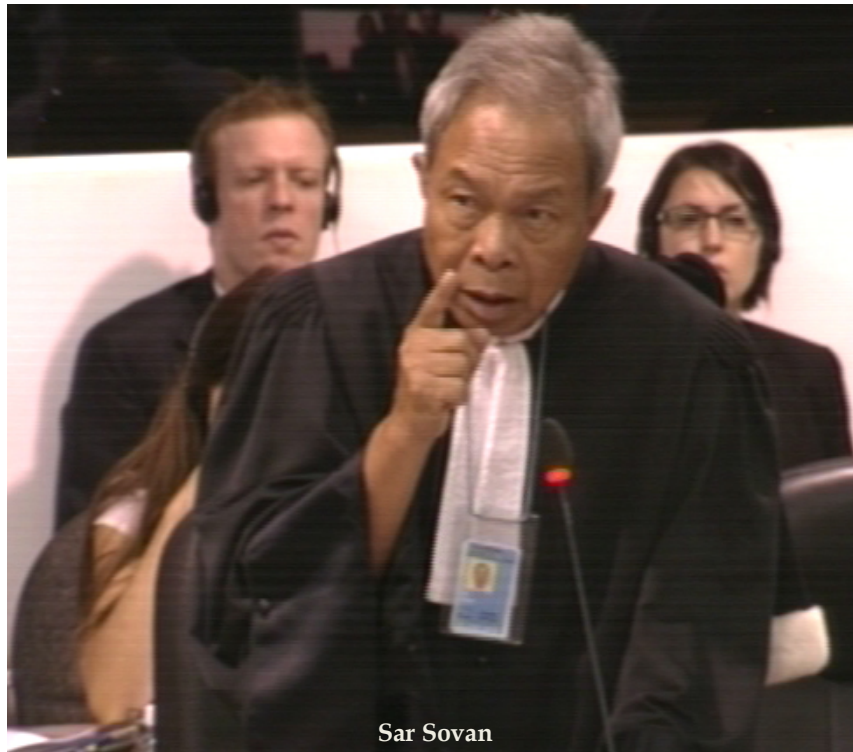
Prosecutors asserted that the burden is on the Charged Person to show changed circumstances and that he had failed to do so. Responding to the proposal of house arrest, Ahmed argued that provisional detention was more appropriate given the gravity of the charged crimes and that the ECCC Detention Facility is best equipped to care for Ieng's ailments.



All International Civil Party Co-Lawyers were absent from the hearing, with the exception of David Blackman, who made his first appearance. Ny Chandy and Blackman both made brief oral submissions. While largely repeating the Senior Assistant Prosecutors' submissions, Ny urged the Chamber not to order release in reliance on the judicial police's ability to re-arrest Ieng if necessary, as, Ny alleged, he has "connections to the authorities." He

further warned that the Cambodian people may misinterpret house arrest as release due to their poor understanding of legal procedures and that this may cause civil unrest. Blackman echoed this concern, arguing out that Ieng's transportation from his house to the Court every day would cause significant disruption and upset the residents of Phnom Penh. Very surprisingly, Karnavas conceded in response that detention would be more "secure" and "convenient" at the trial stage.

b. Hearing on Appeal of Khieu Samphan, February 12



The International Co-Lawyer for Khieu Samphan, Jacques Vergès, was absent from Friday's hearing; reasons for his absence were not given. His National Co-Lawyer, Sar Sovan, appeared alone. In their brief, the Co-Lawyers had argued *inter alia* that their client should be released due to the CIJs's alleged bias and alleged a lack of due diligence for failing to provide a written, reasoned opinion justifying detention. Vergès' absence did not appear to serve his client well, as the unaccompanied Sar made little in the way of legal argumentation. Instead, he used his time to highlight that his own father's death during the regime and that he too was at the Court to "search for the truth." Having known his client for many years, he proclaimed his personal belief in his innocence, saying that he had never known him to "steal a chicken." In a surprising departure from the appeal brief, Sar asked the Chamber to consider alternative measures to detention in the ECCC Detention Facility (i.e., house arrest).



National (Veng Huot) and International (Tarik Abdulhak) Senior Assistant Prosecutors argued for denial of the appeal on behalf of the Office of the Co-Prosecutors. Speaking to the requirement of Rule 63(3)(a), Abdulhak noted that there is evidence that Khieu was aware of, promoted, disseminated, and implemented CPK policies, including purges of suspected enemies. He further noted that there is evidence of his involvement in the evacuation of Phnom Penh. Abdulhak argued that provisional detention is necessary, as there is a "present and real risk" to Khieu's safety and as Cambodia's fragile society is susceptible to civil unrest. Informed that he had two minutes left to speak, Abdulhak was unable to speak to the CIJs' exercise of discretion and the alleged breaches of due process rights as intended. Instead, he concluded merely by submitting that any alternative to detention at the ECCC Detention Facility would be inappropriate.

Again, the International Co-Lawyers for the Civil Parties were all absent, with the exception of David Blackman. Although the civil parties had not filed responses, President Prak Kim San permitted the Co-Lawyers to make oral submissions in light of the new request for house arrest. Blackman and one National Co-Lawyer made brief oral submissions urging continued detention in the ECCC Detention Facility. Thereafter, Sar responded rather erratically to the oral submissions of the Senior Assistant Prosecutors and civil parties, accusing Co-Investigating Judge Lemonde of searching for inculpatory evidence only and urging the Judges not to base their Rule 63(3)(a) analysis upon evidence collected by Youk Chhang and DC-Cam. He concluded by reminding the Judges that, in any event, his client would be released after 36 months barring an amendment to the Internal Rules, which he described as "unlikely," and by asking that his client be released under judicial supervision.

The hearing closed with a statement by Khieu Samphan to the Chamber, in which he claimed that he lacked any real power in Democratic Kampuchea. He joined the

State Presidium, he told the Chamber, only in order “to represent the entire Cambodian nation” when the country was in a state of chaos. He emphasized that he had no soldiers under his command and said that people referred to him as a leader without power. He pointed out that he was merely a member of the Central Committee and not the Standing Committee.

c. Hearing on Appeal of Ieng Thirith, February 15



The International Co-Lawyer for Ieng Thirith, Diana Ellis Q.C., was absent from Monday’s hearing due to a prior commitment. The team’s International Legal Consultant, Karlijn van der Voort, made oral submissions in her absence alongside the National Co-Lawyer, Phat Pouv Seang. Phat opened and gave an impressive performance, clearly setting out the grounds on which the order should be quashed. He argued that: (a) the CIJs failed to

act with due diligence in automatically ordering continued provisional detention without considering changed circumstances; (b) the CIJs failed to apply the correct standard when they required the defense to show changed circumstances; (c) there is no well-founded reason to believe that she committed the charged crimes; and (d) the grounds in Rule 63(3)(b) have not been met. He highlighted that Article 9(3) of the ICCPR imposes strict guidelines for detention and argued that the ECCC’s practice clearly contradicts international human rights law.

National (Seng Bunkeang) and International (Vincent de Wilde) Senior Assistant Prosecutors argued for denial of the appeal on behalf of the Office of the Co-Prosecutors. The Senior Assistant Prosecutors argued that there is well-founded reason to believe based on the evidence that Madame Ieng committed the charged crimes. In support of this, de Wilde referred to two recent rogatory letters, which aid understanding of Madame Ieng’s control over hospitals, pharmaceutical companies and the Ministry of Social Affairs. He further argued that provisional detention is necessary, as three of the five Rule 63(3)(b) conditions exist. In support of the likelihood of threats to witnesses, de Wilde cited her threats against judicial officers in the last pre-trial



hearing and at least 70 threats made against guards and her fellow detainees. He asserted that witnesses and victims are particularly susceptible to effect of threats due to the prevalence of PTSD.

The Co-Lawyers for the Civil Parties had not filed responses and did not make oral submissions. The Co-Lawyers for Madame Ieng responded to the Senior Assistant Prosecutors' oral submissions. Phat accused de Wilde of trying to "exploit his client" and of trying to "provoke her" by referring to her earlier threats. In response to an allegation made that Madame Ieng has the resources necessary to abscond, Phat reminded the Chamber that she had been found unable to pay her legal fees following a U.N. investigation. Van der Voort reasserted their argument that a material change has taken place with respect to the Rule 63(3)(b) conditions and that, even if such a change had not occurred, the burden is not on the defense to show changed circumstances. She further alleged that the Senior Assistant Prosecutors had failed to show any link between the allegedly inculpatory evidence and the Introductory Submission.

The hearing closed with a somewhat incoherent statement by Madame Ieng to the Chamber, in which she informed the Judges that she hails from an elite family with a background in the law. She stated that she had been a law student, that both her father and grandfather had been lawyers, and that her father had worked in the court in Battambang.

## **5. KEY LEGAL ARGUMENTS**

### **a. Alleged Lack of Evidence Suggesting Commission or Responsibility**

All defense teams argued that the CIJs erred in ordering an extension of provisional detention, as an objective observer would not conclude based on the evidence that there is well-founded reason to believe that their clients may have committed the crimes specified in the Introductory Submission as required by Rule 63(3)(a). The Co-Lawyers for Ieng Thirith were particularly vociferous proponents of this argument, alleging the "absence of real power and responsibility" on her part. Her National Co-Lawyer, Phat Pouv Seang, alleged that the evidence on the case file is such that "hardly any connection" can be made between his client and the charged crimes. Her International Legal Consultant, Karlijn van der Voort, similarly alleged that the Senior Assistant Prosecutors had failed to show any link between the allegedly inculpatory evidence and the Introductory Submission.

### **b. Obligation on CIJs to Give Reasons and Burden of Proof for Showing Changed Circumstances**

With respect to the conditions required by Rule 63(3)(b), all defense teams objected to the CIJs' mere adoption of the Pre-Trial Chamber's earlier decisions and unreasoned conclusion that circumstances have not changed. The Co-Lawyers argued that the Rule 63(7) imposes a burden on the CIJs to justify the existence of

one of these conditions in a reasoned, written decision. As such, the Co-Lawyers argued, the CIJs' summary conclusion that the Charged Person has failed to show changed circumstances does not suffice to discharge this burden. In response, the Senior Assistant Prosecutors argued that the Rule 63(7) does not require the CIJs to justify provisional detention; instead, they argued, it only requires the CIJs to give reasons for extension. They argued that the burden is on the Charged Person to show changed circumstances and pointed to practice in other international and internationalized tribunals requiring Charged Persons to show changed circumstances in making applications for release.

c. Alleged Requirement of Necessity Independent of Existence of Rule 63(3)(b) Conditions

The International Legal Consultant for Ieng Thirith, Karlijn van der Voort, argued that necessity is a separate element of Rule 63(3)(b) and that its existence must be considered independently of the existence of the five listed conditions. Citing case law from the European Court of Human Rights, she argued that necessity requires that the measure be the least intrusive possible. She argued that the CIJs have, by failing to consider necessity independently, failed to show that Rule 63(3)(b) has been satisfied.

d. Request for House Arrest and Alleged Failure to Consider Less Restrictive Form of Detention

Consistent with their earlier strategy, the Co-Lawyers for Ieng Sary requested that their client be placed under house arrest at his home or in hospital, instead of requesting his release. The Co-Lawyers argued that house arrest: (a) would be a lesser infringement of their client's right to liberty and the presumption of innocence; (b) would be beneficial for his health; and (c) would be less costly, as the government would only need to station an armed guard at his house. In his oral submission, Karnavas asserted that house arrest would be feasible and would not endanger his client's safety. In a surprising concession in response to an argument made by the civil parties, Karnavas stated that he recognized that it would be more "secure" and "convenient" to have the Charged Person detained at court at the trial stage. The International Senior Assistant Prosecutor, Anees Ahmed, argued that neither the Internal Rules nor the Cambodian Code of Criminal Procedure provides for house arrest; Rule 65(1) speaks only of bail.

In support of house arrest, Ang claimed the existence of both national and international precedent and controversially cited the Supreme Court's release of those accused of murdering a union leader, Chea Vichea. In response, Ahmed distinguished the Chea Vichea case by pointing out that the Supreme Court released the accused only after declaring a mistrial. He further stated that no major international criminal tribunal has granted house arrest, with a few limited exceptions in early ICTY case law. In *Prosecutor v. Blaškić*, the ICTY found house arrest to be permissible only if there is: (a) no evidence that the person will escape;



(b) no likelihood of witness/evidence tampering; (c) no likelihood of continued criminality; and (d) no threat to peace and security. Ieng, Ahmed argued, does not meet these conditions. Karnavas sought to distinguish *Blaškić*, as it involved an exceptional house arrest in the Netherlands. He argued that the later case of *Prosecutor v. Plavšić* applied, in which Plavšić was placed under house arrest in Belgrade pending trial and sentencing.

The Co-Lawyers alleged that, by failing to consider house arrest as a less restrictive alternative to detention, the CIJs had violated their client's right to liberty and the presumption of innocence in Rule 21(1)-(2). Ang alleged that the CIJs failed to make any efforts to determine whether it would be feasible to place Ieng under house arrest with armed guard. Karnavas asserted that house arrest would be feasible and would not endanger his client's safety. He stated mockingly that he could not believe that the Cambodian authorities are "incapable of keeping someone under house arrest who can barely walk to the toilet." In support of their legal argument, the Co-Lawyers cited recognition by the ICC Pre-Trial Chamber in *Prosecutor v. Bemba* that provisional detention is not a form of punishment and must take the least restrictive means possible.

Although not requested in the appeal brief, the National Co-Lawyer for Khieu Samphan, Sar Sovan, similarly requested house arrest for his client during oral argument.

## **6. NOTABLE ISSUES ARISING DURING THE HEARINGS**

### **a. Alleged Bias of CIJs Against Charged Persons**

All defense teams alleged that there is a systemic bias against the Charged Persons in the Office of the Co-Investigating Judges and that this has caused the CIJs to discharge their duties in a biased manner and without the required due diligence. The Co-Lawyers for Ieng Sary advanced this argument particularly vociferously, describing the CIJs as "second prosecutors." Karnavas provocatively questioned the impartiality of David Boyle and Steve Heder, and raised the instructions allegedly given by Co-Investigating Judge Marcel Lemonde to his investigators to find more inculpatory evidence. He criticized the Chamber for refusing to hear evidence of this bias. Judge Lahuis appeared very frustrated by Karnavas' line of argument; she told him curtly that he was "overdoing it" and "made [her] uncomfortable." Cutting Karnavas off, she granted the International Senior Assistant Prosecutor (Anees Ahmed) leave to speak.

In response, Ahmed pointed out that these allegations of bias against Lemonde have been found not to have any validity and, thus, are barred by *res judicata*.

Furthermore, he argued, a pre-trial hearing is not an appropriate venue in which to raise this issue. During the hearing on Ieng Thirith's appeal, International Senior Assistant Prosecutor (Vincent de Wilde) argued that there is a strong presumption of

a judge's impartiality. He argued that, if a party wishes to question a Co-Investigating Judge's impartiality, it must submit an application to the Pre-Trial Chamber for disqualification pursuant to Internal Rule 34.

b. Ill Health of Ieng Sary

Throughout oral argument, the Co-Lawyers for Ieng Sary emphasized their client's advanced age (pointing out that he will soon turn 85 years old) and his ill health (stating that he can hardly walk, cannot sit for longer than 30 minutes, and must visit the restroom regularly). Ieng suffers from heart problems, lumbar arthritis (back pain), and urinary problems. He appeared to experience difficulty in moving around the courtroom and had to be aided by guards. Before the end of the Senior Assistant Prosecutors' oral argument, the Co-Lawyers requested that he be permitted to rest in another room and to participate in the hearing remotely. The Judges granted this request and Ieng left the courtroom. He ultimately did not return, waiving his right to make concluding remarks. The Co-Lawyers used his ill health to justify their argument that he should be placed under house arrest in his home or in hospital and further to argue that he does not pose a credible flight risk.

The Senior Assistant Prosecutors and Co-Lawyers for the Civil Parties all argued that Ieng should not be placed under house arrest on health grounds, as he receives the best medical care at the ECCC Detention Facility. The Senior Assistant Prosecutor (Anees Ahmed) cited international jurisprudence establishing that bail is only necessitated on health grounds if medical treatment is unavailable in the detention unit or the host country. This is not, he asserted, the case here. He explained that, in fact, Ieng has benefitted from an array of services, which has included: "dozens" of physiotherapy sessions, installation of a special handrail, a buzzer system for 24-hour nurse care, and a total of 17 doctors available on call around the clock. Ahmed pointed out that Ieng's ailments are not immediately life threatening and cited jurisprudence establishing that serious illness on its own does not justify release on bail unless terminal in nature, immediately life threatening, and untreatable in detention.

The Senior Assistant Prosecutors and Co-Lawyers for the Civil Parties both highlighted that the CIJs and the Pre-Trial Chamber have already taken his age and health into consideration in reaching this and prior decisions. Furthermore, they argued, his age and ill health should be considered aggravating - not mitigating - factors and provide greater motivation for flight, as these factors make it a distinct possibility that Ieng would die in prison if convicted. Ahmed argued that assessments do not suggest that Ieng's health problems are life threatening or render him unfit to stand trial. In response, Karnavas pointed out that OCIJ-selected doctors conducted the fitness examinations with no provision for input on their selection from the defense. Furthermore, he alleged, these fitness examinations were not proper medical or psychological examinations, as the examiners asked only simple questions, such as his client's name. He described the report on fitness to stand trial as "laughable."

c. Mental Health and Apparent Memory Loss of Ieng Thirith

At the outset of her hearing, Ieng Thirith claimed to forget basic information about herself when asked by the President, Prak Kim San. When asked her husband's name, she appeared confused and looked around the courtroom and to her defense team, stating that she could not remember his name, but knew that he was also in detention. She asked those in the courtroom for assistance and, apparently after prompting from her defense team, gave his name as "Ieng Sary." When later asked for the number of her children, she again looked confused and said that she could not remember because she was "so busy," eventually giving the number as four.

d. Alleged Provocation of Ieng Thirith by Senior Assistant Prosecutor

In support of his argument that provisional detention is necessary to prevent the exertion of pressure on witnesses and victims, the International Senior Assistant Prosecutor (Vincent de Wilde) began his oral submission by reminding the Chamber of Ieng Thirith's statement at her last pre-trial hearing on provisional detention on February 24, 2009. At that time, she had threatened that her accusers would be "cursed to the seventh level of hell." Van der Voort immediately interrupted de Wilde, requesting that the Judges order him not to make inflammatory statements likely to provoke her client. She urged the Judges to consider her client's "vulnerable state." Judge Rowan Downing, speaking for the Chamber, denied this request, explaining that it was not for the Judges to direct the prosecution's submissions.

e. Lengthy and Repetitive Presentation of Procedural History by Senior Assistant Prosecutors

As is customary, one of the national Judges read the Report of Examination at the start of each hearing. Despite being expressly intended to "assist those who are not parties to the proceedings to understand the matters before the Court," this Report is a lengthy description of the appeal's procedural history. Frustratingly, each of the National Co-Prosecutors also read very similar narratives describing the procedural history. On Friday, this prompted Sar Sovan to interrupt the National Senior Assistant Prosecutor (Veng Huot), opining that the audience was bored and pointing out that Huot was merely repeating the procedural history. Huot's presentation of the procedural history certainly was lengthy - likely half of the hour allocated to the Co-Prosecutors - and left his international counterpart, Tarik Abdulhak, little time to address the requirements of Rule 63(3)(b). Due to the lack of time, Abdulhak was unable to present his arguments related to the CIJs' exercise of discretion and the alleged breaches of due process as he had informed the Chamber he would.

## 7. PUBLIC ATTENDANCE AT THE HEARINGS

### a. Attendance Figures and Public Reaction



The hearings were well attended with the Public Gallery reaching close to its full capacity of around 500 seats on all three days thanks to the efforts of the Public Affairs Section and local NGOs. On Thursday, with the assistance of Public Affairs, a large group from Siem Reap watched the hearing on Ieng Sary's appeal. On Friday, also with the assistance of Public Affairs, a group of 350 students and teachers from the Hun Sen Teacher Training School in Acha Lakh Commune, Stung Sen District, Kampong Thom, and students from Phnom Penh High School watched the hearing on Khieu Samphan's appeal. On Thursday and Friday, 93 visitors from Banteay Meanchey, Svay Rieng and Kandal attended with the assistance of DC-Cam. The Victims Support Section also invited civil parties to the hearings. Groups in attendance at Monday's hearing on Ieng Thirith's appeal are unknown. On Thursday and Friday, staff members interviewed attendees about their experiences.

Many of the interviewees, such as Sam Chan, a DC-Cam invitee from Kandal, said that they found the hearings interesting and expressed optimism about the tribunal process. Sam told interviewers that he believed that "the Court would find justice for us and provide a fair trial to the accused." Sing Sita, from Svay Rieng, reported that he had been skeptical of the Court's fairness before the hearing, but that "after watching it with [his] own eyes, [he] realized that it is doing the right thing and following its ethics code." Many reported having watched hearings on TV or having listened to them on the radio previously. Many interviewees complained of their inability to understand the hearings. Mok Sophat, a DC-Cam invitee, and Khim Vuthy, a civil party from Kampong Speu, both expressed disappointment to interviewers that the Charged Person had not acknowledged his wrongdoing. Mok said that she felt distressed by the harsh language employed by Sar Sovan, National Co-Lawyer for Khieu Samphan.

**Villagers from Banteay Meanchey province**



b. Support to Visitors From the Court and NGOs

The interviews revealed that the support received by the visitors from their inviting organizations varied. Visitors invited by DC-Cam attended the hearing as part of a three-day trip to Phnom Penh, during which they also attended a presentation on the Court by William Smith (Deputy International Co-Prosecutor), watched several documentary films on the regime, visited the Cheung Ek memorial site, Tuol Sleng Genocide Museum and the Royal Palace, and watched a performance of the play, “Breaking the Silence.”<sup>1</sup> Khim Vuthy, an ADHOC-assisted civil party from Kampong Speu, told interviewers that she had been invited to attend by the Victims Support Section, but had not been provided any financial support.



Visitors invited by the Public Affairs Section were brought to the Court on buses from their villages early in the morning and returned in the afternoon. Invitees from Kampong Thom reported that, on Thursday evening, Public Affairs had shown a video at their school to introduce them to the proceedings. The interviews show that, while broadly satisfied with the support provided, many of these invitees found the schedule set for them to have been extremely arduous. The towns of Kampong Thom and Siem Reap are located 162km and 321km north of Phnom Penh respectively. On Thursday, the Siem Reap attendees reported that they had departed for Phnom Penh at 3 a.m., arrived at the hearing late, and departed for Siem Reap after lunch.

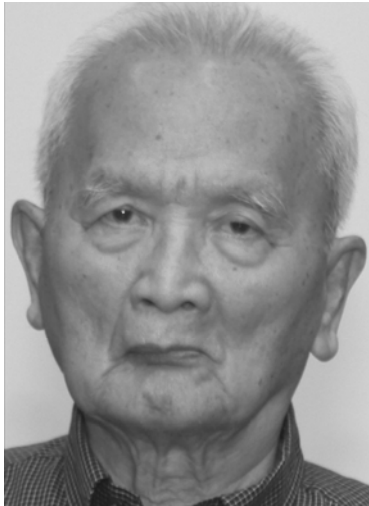
On Friday, the Kampong Thom attendees reported that they had departed for Phnom Penh at 5 a.m. and were not given food until lunchtime. Many complained of exhaustion due to a lack of sleep and/or hunger. Chan Srey Pum, 22, a teacher

<sup>1</sup> Randle DeFalco, *Community Outreach Trip to Phnom Penh and the ECCC... and Even the Love of Our Enemies*, SEARCHING FOR THE TRUTH (Feb. 2010).

trainee from Kampong Thom, told interviewers that she had woken at 2 a.m. and felt dizzy. The Public Affairs Section declined to comment.

## 8. EXPECTED FUTURE DEVELOPMENTS

At the conclusion of the hearings, President Prak Kim San informed the public that the Chamber would announce the date for the reading of the decision two days in advance. Past practice shows that the Pre-Trial Chamber typically takes 3-5 months to issue its decisions on appeals against provisional detention orders and extensions of such orders, though this time may be decreased given that the Court announced in late February 2010 that the Pre-Trial Chamber will now be sitting full-time.



Nuon Chea

Looking forward, the Internal Rules provide that the Co-Investigating Judges may not order more than two extensions of provisional detention for a total of 3 years' imprisonment at the pre-trial stage for individuals charged with war crimes, crimes against humanity and/or genocide (Rule 63(6)-(7)). This time elapses in September 2010 for Nuon Chea and November 2010 for Ieng Sary, Ieng Thirith and Khieu Samphan. Thus, even if the Pre-Trial Chamber upholds the CIJs' orders extending provisional detention, the CIJs cannot order further extensions this year and must release the Charged Persons. If, however, the CIJs succeed in issuing the Closing Order before the third anniversary of their detention, they have the power to order by reasoned decision continued provisional detention in the Closing Order (Rule 68(1)).

As such, the Internal Rules set a very tight deadline for conclusion of the pre-trial stage, if the Charged Persons are to remain in provisional detention. Given that Nuon Chea was detained on September 17, 2007, the CIJs must either issue the Closing Order by September 17, 2010, or order his release. This likely explains the CIJs' statement that they will issue the Closing Order by September 2010. Furthermore, if provisional detention is to be continued through trial, the Charged Persons must be brought before the Trial Chamber within 4 months of the CIJs' decision extending provisional detention in the Closing Order (Rule 68(3)).

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Sarah Thomas is an Associate at a law firm in New York City. She was the 2008-09 David W. Leebron International Human Rights Fellow at Documentation Center of Cambodia (DC-Cam), where she provided legal counsel to DC-Cam's Victim Participation (VPA) Project. She continues to advise the Project. She has previously interned at the UN Office of the Legal Counsel, the International Justice Program at Human Rights Watch and the International Criminal Tribunal for the former Yugoslavia. She holds a J.D. from the Columbia University School of Law and an LL.B. from the London School of Economics. The DC-Cam's *Observing the ECCC* project is sponsored by *John D. and Catherine T. MacArthur Foundation*.