E39/5

ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

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

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អង្គជំនុំជម្រះសាលាដំបូង
Trial Chamber
Chambre de première instance

សំណុំរឿងលេខ: ០០១/១៨ កក្កដា ២០០៧/អវតក/អជសដ

Case File/Dossier No. 001/18-07-2007/ECCC/TC

ឯកសារបានចម្លងត្រឹមត្រូវតាមច្បាប់ដើម
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អ្នកទទួលបន្ទុកសំណុំរឿង/Case File Officer/L'agent chargé du dossier: SANN RADA

Before:	**Judge NIL Nonn, President** **Judge Silvia CARTWRIGHT** **Judge YA Sokhan** **Judge Jean-Marc LAVERGNE** **Judge THOU Mony**
Date:	**15 June 2009**
Classification:	**PUBLIC**

DECISION ON REQUEST FOR RELEASE

Co-Prosecutors

CHEA Leang
Robert PETIT

Accused

KAING Guek Eav alias "DUCH"

Lawyers for the Civil Parties

KONG Pisey
HONG Kimsuon
YUNG Panith
KIM Mengkhy
MOCH Sovannary
Silke STUDZINSKY
Martine JACQUIN
Philippe CANONNE
TY Srinna
Pierre Olivier SUR
Alain WERNER
Brianne McGONIGLE
Annie DELAHAIE
Elizabeth RABESANDRATANA
Karim KHAN

Lawyers for the Defence

KAR Savuth
François ROUX
Marie-Paule CANIZARES

The **TRIAL CHAMBER** of the Extraordinary Chambers in the Courts of Cambodia ("ECCC");

BEING SEISED of Case File No. 001/18-07-2007-ECCC/TC pursuant to the "Decision on Appeal Against the Closing Order Indicting Kaing Guek Eav Alias Duch", rendered orally by the Pre-Trial Chamber on 5 December 2008 and filed in Khmer on 9 December 2008 ("Decision")[1];

HAVING HEARD the oral request for release by the Defence ("Request") and oral submissions of the Co-Prosecutors made on 1 April 2009[2];

NOTING its rejection of the Civil Parties' request to make submissions with regard to the Request, and its decision to reject written observations filed by Civil Party Group 3 on this issue[3];

FURTHER NOTING its invitation to the Civil Parties to comment on the Defence request that the Accused's detention before the Military Court be taken into account for sentencing purposes, and that, if convicted, a reduction of sentence be granted as a remedy for violation of his rights[4];

HAVING RECEIVED written observations from Civil Party Groups 1 and 3 within the prescribed deadline[5];

NOTING the written observations filed by the Defence on 10 April 2009[6];

HAVING RECEIVED a copy of the file of the case against the Accused before the Military Court ("military file")[7];

NOTING the comments filed by the Co-Prosecutors and the Defence, at the request of the Chamber, on 1 June 2009, in relation to the military file[8];

PURSUANT to Rule 82 of the Internal Rules;

HEREBY DECIDES as follows:

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[1] "Decision on Appeal Against the Closing Order Indicting Kaing Guek Eav Alias Duch", 5 December 2008 (Document D99/3/42).
[2] Written Record of Proceedings, 1 April 2009 (Document E1/7) and Transcript of Proceedings ("T."), 1 April 2009 (Document E1/7.1), pp. 20-38 (English).
[3] « Réponse des co-avocats des parties civiles (groupe 3) à la demande de mise en liberté de Kaing Guek Eav, alias DUCH » , 1 April 2009 (Document E39); Written Record of Proceedings, 6 April 2009 (Document E1/8).
[4] Written Record of Proceedings, 6 April 2009 (Document E1/8).
[5] « Observations supplémentaires des co-avocats des parties civiles (groupe 3) sur la demande de mise en liberté de Kaing Guek Eav, alias DUCH », 8 April 2009 (Document E39/1) and "Group 1 – Civil Parties' Co-Lawyers' Request to Deny Additional Compensation to the Accused Due to Illegal Provisional Detention", 10 April 2009 (Document E39/2).
[6] « Arguments supplémentaires de la Défense venant au soutien de ses demandes relatives à la question préalable », 10 April 2009 (Document E39/3).
[7] Document E52/4 and annexes.
[8] "Co-Prosecutors' Comment on the Military Court File", 1 June 2009 (Document E39/4/1) and «Observations de la défense relatives au dossier militaire», 1 June 2009 (Document E39/4/2).

A. INTRODUCTION

1. This decision follows a challenge by the Defence to the lawfulness of the Accused's provisional detention. Provisional detention was ordered by the Co-Investigating Judges (CIJ) on 31 July 2007 following adversarial argument in which the Defence argued, among other matters, the unlawfulness of this detention. Following an appeal, the Pre-Trial Chamber (PTC) of the ECCC confirmed the legality of the detention order. This challenge is renewed before the Trial Chamber, where it is contended that the Accused's detention before the Military Court and the ECCC is continuous and exceeds the maximum permitted duration of provisional detention under Cambodian national law, the ECCC Law and Rules, as well as international fair trial standards. The Defence seeks the immediate release of the Accused, subject to any conditions which the Trial Chamber may impose. It also seeks a declaration that the Accused, if convicted, is entitled to credit for the entirety of time served, in addition to a reduction of sentence as compensation for violation of his rights[9]. The request is opposed in part by the Co-Prosecutors and the Civil Parties.

B. PROCEDURAL HISTORY

2. The Accused was arrested and detained by the Cambodian Military Court on various charges pursuant to Cambodian law on 10 May 1999[10]. The Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia entered into force on 10 August 2001[11]. On 20 February 2002, and annually thereafter until 20 February 2004, the Investigating Judge of the Military Court issued detention orders on the basis of Articles 5 and 39 of the ECCC Law, pursuant

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[9] T., 1 April 2009 (Document E1/7.1), pp. 20-32 (English).

[10] "Indictment", Military Prosecutor, 10 May 1999 (Military Court No. 012/99, Document E52/4.3) and "Detention Order", Investigating Judge of the Military Court, 10 May 1999 (Military Court No. 142/99, Document E52/4.8). These charges included "crimes against domestic security with the intention of serving the policies of the Democratic Kampuchea group", committed together with Ung Choeun, known as Ta Mok, during the period of 1975 to 1999, pursuant to the Law to Outlaw the Democratic Kampuchea Group of 1994 and the Decree Law on Penalty of Revolution's Betrayal and Some Penalties of the Other Betrayals of 1980 ("Decree Law 2"). Further charges, including for the crime of genocide, were added in September 1999 pursuant to Article 2 of Decree Law No.1 on the Establishment of People's Revolutionary Tribunal at Phnom Penh to Try the Pol Pot-Ieng Sary Clique for the Crime of Genocide of 1979. "Order to Forward Case for Investigation", Military Prosecutor, 6 September 1999 (Military Court No. 044/99, Document E52/4.26) and "Detention Order", Investigating Judge of the Military Court, 10 September 1999 (Military Court No. 176/99, Document E52/4.22). *See also* "Order to Forward the Case File for Examination", Investigating Judge of the Military Court, 10 May 1999 (Military Court No.140); "Second Order to Forward Case for Investigation", Military Prosecutor, 10 May 1999 (Military Court No. 029/99, Document E52/4.9). The provisional detention of the Accused was further extended annually in May 2000 and 2001 on the basis of the charge of genocide: "Decision on Extension of Judicial Investigation", Military Prosecutor, 18 May 2000 (Military Court No. 013/2000, Document E52/4.34) and "Decision on Extension of Judicial Investigation, Military Prosecutor, 15 May 2001 (Military Court No. 015/2001, Document E52/4.46).

[11] This law, as amended on 27 October 2004, is collectively referred to as "the ECCC Law".

to which the Accused was charged with crimes against humanity[12]. An order to release the Accused with respect to the charge of genocide in May 2002 was rendered ineffective by the prior order to detain him on the charge of crimes against humanity[13].

3. On 24 February 2005, the Military Prosecutor issued a new "Order forwarding the case for investigation"[14]. The Investigating Judge of the Military Court extended the provisional detention of the Accused on 28 February 2005, 28 February 2006 and 28 February 2007 respectively, on the basis of charges of war crimes and crimes against internationally protected persons under Articles 6 and 8 of the ECCC Law [15]. On 21 July 2008, the Military Court, considering that it was no longer competent to try crimes falling under the jurisdiction of the ECCC, issued a Decision terminating the competence of the Military Court with respect to the Accused[16].

4. The Accused has been in the custody of the ECCC since 31 July 2007. On that date, further to an arrest warrant issued by the CIJ on 30 July 2007, the Accused was transferred from the Military Court to the ECCC Detention Facility[17]. At an adversarial hearing on 31 July 2007 before the CIJ, the Defence alleged that the Accused's detention was unlawful under national and international law[18]. On the same day, the CIJ issued a Provisional Detention Order, for a period not exceeding a year, finding that they lacked jurisdiction to determine the legality of the prior detention of the Accused. In accordance with Rule 63, the CIJ held that a well-founded belief existed that the Accused committed the crimes with which he was charged, and that provisional detention was necessary to ensure his presence during the proceedings, to ensure his security and to

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[12] Detention Orders of the Investigating Judge of the Military Court, 22 February 2002 (Military Court No.16/2002 DK, Document E52/4.47), 22 February 2003 (Military Court No.10/03/DK, Document E52/4.48) and 22 February 2004 (Military Court No.19/04/DK, Document E52/4.54), and "Decision on Extension of Judicial Investigation", Military Prosecutor, 20 February 2004 (Military Court No. 003/04, Document E52/4.52).

[13] "Order on Provisional Release of the Offence", Investigating Judge of the Military Court, 10 May 2002 (Military Court No. 05/2002, Document E52/4.55) and "Detention Order" of the Investigating Judge of the Military Court, 22 February 2002 (Military Court No.16/2002 DK, Document E52/4.47).

[14] "Order to Forward Case for Investigation", Military Prosecutor, 24 February 2005 (Military Court No.004/05) (referred to in the Orders of the Investigating Judge of the Military Court, 28 February 2005 (Military Court No.08/05, Document E52/4.57), 28 February 2006 (Military Court No.05/06/DK, Document E52/4.60) and 28 February 2007 (Military Court No.74/07, Document E52/4.63)).

[15] Detention Orders of the Investigating Judge of the Military Court, 28 February 2005 (Military Court No.08/05, Document E52/4.57), 28 February 2006 (Military Court No. 05/06/DK, Document E52/4.60) and 28 February 2007 (Military Court No.74/07, Document E52/4.63), respectively (citing the need "to carry out an investigation" and relying on Articles 6 and 8 of the ECCC Law, under which the Accused was charged with war crimes and crimes against internationally protected persons). *See also* "Decision on Extension of Judicial Investigation", Military Prosecutor, 21 February 2006 (Military Court No. 001/06, Document E52/4.61).

[16] "Order", Investigating Judge of the Military Court, 21 July 2008 (Military Court No.139/08/DK, Document E52/4.66).

[17] Arrest Warrant, 30 July 2007 (Document C1). *See also* Introductory Submission, 18 July 2007 (Document D3) (alleging violation of the 1956 Penal Code, crimes against humanity and grave breaches of the 1949 Geneva Conventions) and "Written Record of Handover of the Offender", 31 July 2007 (Document E52/4.65).

[18] Written Record of Adversarial Hearing, 31 July 2007 (Document C2).

preserve public order[19]. On 28 July 2008, the CIJ ordered the continuation of the Accused's provisional detention for an additional year, on the basis of charges of crimes against humanity and grave breaches of the Geneva Conventions[20].

5. On 23 August 2007, the Defence appealed the CIJ's Provisional Detention Order[21]. On 3 December 2007, the PTC dismissed the appeal with substituted reasoning and affirmed the Detention Order of the CIJ, on grounds that all five alternative conditions for detaining the Accused under Rule 63(3) were met[22]. On 5 December 2008, in its Decision on the Appeal of the Co-Prosecutors against the Closing Order, the PTC further ordered that the provisional detention of the Accused continue until his appearance before the Trial Chamber[23].

C. SUBMISSIONS

6. The Defence seeks the release of the Accused for the duration of the trial, subject to any conditions imposed by the Chamber. The principal basis for this request is the continuous detention of the Accused from 10 May 1999 by the Cambodian authorities. In its submission, there was no legal basis, under either Cambodian or international law, for the Accused's detention after May 2002. According to the Cambodian Constitution of 1993, the UNTAC Criminal Code of 1992, the Law on Duration of Pre-Trial Detention of 1999 and Article 210 of the Cambodian Code of Criminal Procedure, the duration of provisional detention of suspects accused of genocide, war crimes or crimes against humanity may not exceed three years. Pursuant to Article 503 of the Code of Criminal Procedure, and international jurisprudence which demonstrates that prior detention for the same crimes under a national jurisdiction must be taken into account in sentence, the Defence further seeks a declaration that if convicted, the Accused is entitled to credit for the total period of time already served in detention. The Defence additionally seeks, in the event of conviction, a reduction in sentence as a remedy for the violation of the Accused's right to be tried within a

[19] Order of Provisional Detention, 31 July 2007 (Document C3); Detention Order, 31 July 2007 (Document C4).
[20] "Order on Extension of Provisional Detention", 28 July 2008 (Document C3/II).
[21] "Appeal Brief Challenging the Order of Provisional Detention of 31 July 2007", 5 September 2007 (Document C5/5); "Co-Prosecutors' Response to Defence Appeal Against Co-Investigating Judges Order of the Provisional Detention of Kaing Guek Eav alias DUCH on 31 July 2007", 3 October 2007 (Document C5/8).
[22] "Decision on Appeal Against Provisional Detention Order of Kaing Guek Eav", 3 December 2007 (Document C5/45).
[23] "Decision on the Appeal of the Co-Prosecutors against the Closing Order", 5 December 2008 (Document D99/3/42), para. 147 and Detention Order, 5 December 2008 (Document D99/3/43). On 8 August 2008, the Accused was indicted for crimes against humanity and grave breaches of the Geneva Conventions of 1949 (Closing Order indicting Kaing Guek Eav alias Duch, 8 August 2008 (Document D99)). The PTC Decision of 5 December 2008 further indicted the Accused for violations of the 1956 Code, under Articles 3 new, 29 new and 39 new of the ECCC Law.

reasonable time[24]. In its observations relating to the military file, the Defence reiterates its arguments of continuity of the detention of the Accused and of unduly prolonged detention[25].

7. In response, the Co-Prosecutors contend that the lawfulness of the Accused's provisional detention has already been considered by the CIJ and the PTC. The ECCC is a hybrid tribunal independent from the national court system. As the Accused's prior detention by the Military Court was not initiated at the request of the Co-Prosecutors, any alleged violation of the rights of the Accused by a national court is irrelevant before the ECCC. Further, there had been no change in circumstances to warrant his release since the PTC decision maintaining the Accused's provisional detention[26]. After examination of the military file, the Co-Prosecutors reiterate their claim that the actions of the Military Court cannot be imputed to the ECCC. They decline to comment on the military file, arguing that its contents are irrelevant to the Accused's request for immediate release.

8. Although not objecting to any sentence taking account of the time spent previously in detention, Civil Party Group 1 disputes that the Accused is entitled to a further reduction in sentence as a consequence of any alleged violation of his rights. The ECCC is not obliged to take account of previous violations of the Accused's rights arising from detention in a different jurisdiction[27]. The rights of the Accused must also be weighed against the interest of the international community in the prosecution of persons charged with serious violations of international humanitarian law[28].

D. FINDINGS

a. The Trial Chamber's jurisdiction in relation to alleged violations of the Accused's rights occurring prior to the ECCC's establishment

9. The core of the Defence submission is that the Accused's case before the ECCC is effectively a continuation of his case before the Military Court. They allege that his current

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[24] Written Record of Proceedings, 1 April 2009 (Document E1/7) and T., 1 April 2009 (Document E1/7.1), pp. 20-33 and in particular pp. 30, lines 14-15 and 31, lines 19-23 (English); «Arguments supplémentaires de la Défense venant au soutien de ses demandes relatives à la question de la peine», 10 April 2009 (Document E39/3)

[25] «Observations de la défense relatives au dossier militaire», 1 juin 2009 (Document E39/4/2).

[26] T., 1 April 2009 (Document E1/7.1), pp.33-38 (English).

[27] "Group 1 – Civil Parties' Co-Lawyers' Request to Deny Additional Compensation to the Accused due to Illegal Provisional Detention", 10 April 2009 (Document E39/2).

[28] *Id. See also* « Observations supplémentaires des co-avocats des parties civiles (groupe 3) sur la demande de mise en liberté de Kaing Guek Eav, alias Duch », 8 April 2009 (Document E39/1) (additional observations on the request for release of the Accused in breach of the Chamber's direction that it confine its responses to the subsidiary Defence request regarding the impact of the Accused's detention before the Military Court for sentencing purposes).

provisional detention commenced on 10 May 1999 and has lacked any legal foundation since February 2002[29].

10. The Chamber notes that the ECCC, which were established by agreement between the Royal Government of Cambodia and the United Nations, is a separately constituted, independent and internationalised court. Although its constitutional documents show that the ECCC was established within the existing Cambodian court structure, the ECCC is, and operates as, an independent entity within this structure[30]. As a court of special ("extraordinary") and independent character within the Cambodian legal system, the ECCC was designed to stand apart from existing Cambodian courts and rule exclusively on a narrowly-defined group of defendants for specific crimes committed within a limited period.

11. The structure of the ECCC is distinct from the structure of other Cambodian courts. While its procedure is in accordance with Cambodian law, the ECCC is entitled to adopt its own Internal Rules in compliance with international standards, which take into account the specific mechanisms necessary to adjudicate mass crimes. It is composed of Cambodian and international staff and judicial officers, who have no competence to appear before or to sit in judgment over a decision by a domestic Cambodian court. Further, Cambodian judges before the ECCC have privileges and immunities additional to those possessed by other Cambodian judges. Whereas Article 11 of the Agreement precludes amnesty or pardon for the crimes within the ECCC's jurisdiction, this may be requested by the Government for sentences imposed by Cambodian courts.

12. There is also no procedural basis for commencing investigations before a domestic Cambodian court and concluding them before the ECCC. Prosecutions before the ECCC are the prerogative of the Office of the Co-Prosecutors. There is no line of authority between the ECCC and other courts in the Cambodian judicial system[31].

13. The Defence relies on the Decision of the Investigating Judge of the Military Court terminating the proceedings against the Accused in the Military Court in favour of the ECCC to argue that the proceedings against the Accused before the ECCC are a continuation of the

[29] T., 1 April 2009 (Document E1/7.1), p. 22, lines 9-13 (English).
[30] ECCC Law, Article 2 new; Article 12(1), Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea ("Agreement"), 6 June 2003. *See also* "Decision on Appeal against Provisional Detention Order of Kaing Guek Eav alias DUCH", 3 December 2007 (Document C5/45), para. 19.
[31] Article 36 new, ECCC Law.

proceedings against him at the Military Court[32]. However, this Order was issued on 21 July 2008, nearly a year after the Accused had been taken into custody at the ECCC. It was therefore clearly not a transfer of this case. This Order was neither the basis for the release of the Accused to the ECCC detention facility nor accompanied by the Accused's case file before the Military Court. Further, the judicial investigation before the ECCC commenced a different and new procedural phase.

14. The fact that the Military Court made reference to the ECCC law in its earlier orders, which were issued before the ECCC finally became operational in June 2007 (following the adoption of its Internal Rules), does not demonstrate continuity between the detention ordered by the Military Court and ECCC. There is no evidence of any involvement by ECCC judicial authorities in the Accused's Military Court file and in particular in its decisions concerning the detention of the Accused[33].

15. The ECCC Law not only authorizes the ECCC to apply domestic criminal procedure, but also obligates it to interpret these rules and determine their conformity with international standards prescribed by human rights conventions and followed by international criminal courts[34]. Moreover the ECCC must consider Article 31 of the Constitution of the Kingdom of Cambodia which states that "the Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights, the covenants and conventions related to human rights".

16. Even if a violation of the Accused's right cannot be attributed to the ECCC, international jurisprudence indicates that an international criminal tribunal has both the authority and the obligation to consider the legality of his prior detention. The ICTR Appeals Chamber decision in *Barayagwiza* held that a violation of an accused person's rights under the law must be acknowledged by an international criminal tribunal before which he seeks relief, even if that

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[32] "Decision", Investigating Judge of the Military Court, 21 July 2008 (Military Court No.139/08/DK, Document E52/4.66).

[33] *See e.g.* Detention Orders of the Investigating Judge of the Military Court of 10 May 1999 (Military Court No. 142/99, Document E52/4.8), 10 September 1999 (Military Court No. 176/99, Document E52/4.22), 22 February 2002 (Military Court No.16/2002 DK, Document E52/4.47), 22 February 2003 (Military Court No.10/03/DK, Document E52/4.48), 22 February 2004 (Military Court No.19/04/DK, Document E52/4.54), 28 February 2005 (Military Court No.08/05, Document E52/4.57), 28 February 2006 (Military Court No.05/06/DK, Document E52/4.60) and 28 February 2007 (Military Court No.74/07, Document E52/4.63).

[34] Article 33 new, ECCC Law. *See e.g.* Article 9 of the International Covenant on Civil and Political Rights, to which Cambodia is a party, which provides that "no one shall be subjected to arbitrary arrest or detention, nor be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law".

violation cannot be attributed to that tribunal[35]. The international case law further indicates that the Accused's previous history in detention may be relevant to decisions upon sentencing. This case law has also examined circumstances in which previous violations of an Accused's rights are so egregious that they may preclude or restrain the exercise of an international criminal tribunal's jurisdiction on grounds of abuse of process and violation of the fundamental rights of the accused[36].

17. It is accordingly necessary to evaluate whether the prior detention by the Military Court was a violation of the Applicant's rights, and if so, the applicable remedies before the Trial Chamber.

b. Legality of Orders of the Military Court

18. The ECCC law provides that ECCC prosecutions, investigations and trials must be conducted in accordance "with existing [Cambodian] procedures in force", and that "[c]onditions for the arrest and the custody of the accused shall conform to existing law in force"[37]. Article 38 of the Cambodian Constitution further provides that "[t]he prosecution, arrest, or detention of any person shall not be done except in accordance with the law".

19. The Chamber notes that a new Cambodian Code of Criminal Procedure entered into force on 7 June 2007[38]. Before its adoption, and applicable at the time of detention of the Accused by the Military Court, were instead two Cambodian criminal procedural codes: the 1992 Transitional Law adopted by the United Nations Transitional Authority in Cambodia of 1992 and the 1993 Law on Criminal Procedure[39]. In 1999, the Cambodian government also promulgated the Law on Duration of Pre-Trial Detention of 1999, which imposed a maximum ceiling of three years' provisional

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[35] *Prosecutor v. Barayagwiza,* Case No. ICTR-97-19, Decision of 3 November 1999 (ICTR Appeals Chamber), para. 85: "[I]t is irrelevant that only a small portion of the total period of provisional detention is attributable to the Tribunal, since it is the Tribunal – and not any other entity – that is currently adjudicating the Appellant's claims. Regardless of which other parties may be responsible, the inescapable conclusion is that the Appellant's right to be promptly informed of the charges against him was violated".

[36] *See e.g. Prosecutor v. Lubanga,* Case No. ICC-01/04-01/06, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006 (ICC Appeals Chamber), 14 December 2006, paras. 26-35; *Prosecutor v. Barayagwiza,* Case No. ICTR-97-19, Decision of 3 November 1999 (ICTR Appeals Chamber), para. 73: "[U]nder the abuse of process doctrine, it is irrelevant which entity or entities were responsible for the alleged violations of the Applicant's rights".

[37] Articles 20 new, 23 new and 33 new, ECCC Law.

[38] Article 210 stipulates that "[i]n case of crimes against humanity, genocide or war crimes, provisional detention shall not exceed one year for each of these offences. However, when this time period ends, the investigating judge may extend a provisional detention for another year by an order with a proper and express statement of reasons. The extension can only be made twice."

[39] "Provisions relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia during the Transitional Period" ("UNTAC Law"), 10 September 1992 (in particular Article 21); and the State of Cambodia (SOC) Law on Criminal Procedure, 8 March 1993 (in particular Article 64).

detention in relation to genocide, war crimes and crimes against humanity charges[40]. The Accused appears to have been held under this latter law for nearly eight years and therefore illegally until his transfer to the ECCC in July 2007. The Chamber notes that it is difficult to determine precisely whether the illegal detention began from 10 May 1999 or 10 September 1999.

20. There appears to have been no substantial and systematic investigation throughout the period of detention and there was a general lack of reasoning setting out the legal basis for the various detentions[41]. It also appears from the military file that in some instances, the extension of the detention was ordered by the Prosecutor alone, and not the Investigating Judge[42]. Further, several laws on which the Military Court relied appear to have been applied retroactively, in violation of the rights of the Accused under Cambodian and international law[43].

21. The Chamber therefore finds that the Accused's prior detention before the Military Court constitutes a violation of the Cambodian domestic law applicable at the time. It also contravenes his internationally-recognized right to a trial within a reasonable time and detention in accordance with the law.

c. Requirements for provisional detention before the Trial Chamber

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[40] Article 21(1) of the UNTAC Law provided that "[a]ny accused person, whether or not in detention, must be judged no later than six months after arrest". Article 1 of the Law on Duration of Pre-Trial Detention provided that: "In any circumstances the temporary detention period shall not exceed four months. However, upon the decision of a judge setting out the reasons, this period can be extended up to six months if necessary for the investigation. For crimes of genocide, war crimes and crimes against humanity, stipulated in the Conventions of the United Nations to which Cambodia is a signatory, the above temporary detention can be extended for a period of one year; but such extension shall not exceed three years in total" (unofficial translation).

[41] It appears from a review of the military file that the investigation was mainly composed of interviews of the Accused. The file further comprises a few press clippings and a list of foreign prisoners sent to the Military Court by the Australian Embassy (Documents E52/4.21 and E52/4.20, respectively). Only two witnesses appear to have been interviewed during the 8-year detention of the Accused ("Written Record of Witness Interview", 28 June 1999 (Document E52/4.19) and "Written Record of Witness Interview", 21 February 2003 (Document E52/4.49)). None of the detention orders are based on any legal reasoning. For example, the Detention Orders of 10 May 1999 and 10 September 1999 (Documents E52/4.8 and E52/4.22, respectively) order the detention of the Accused "in order to carry out an investigation". The Detention Order of 22 February 2002 (Document E52/4.48) does not provide any ground to justify detention. Letters requesting the extension of the investigation on the basis of which continued detention was ordered by the Military Prosecutor are in some instances only based on the "complexity of the case file" (*see e.g.* "Letter Concerning Extension of Investigation" of 10 May 2000, Document E52/4.33 and of 10 May 2001, Document E52/4.35).

[42] "Letter Concerning Extension of Investigation", Investigating Judge of the Military Court, 10 May 2000 (Military Court No. 50/2000, Document E52/4.33) and 10 May 2001 (Military Court No. 17/01, Document E52/4.35), and "Decision on Extension of Judicial Investigation", Military Prosecutor, of 18 May 2000 (Military Court No. 013/2000, Document E52/4.34) and 15 May 2001 (Military Court No.015/2001, Document E52/4.46).

[43] *See e.g.* the Detention Order of 10 May 1999 (Document E52/4.8) detaining the Accused for crimes dating back to 1975 on the basis of the Law to Outlaw the Democratic Kampuchea Group, which entered into force on 15 July 1994, and Decree Law 2, which entered into force on 15 May 1980.

22. Although the above findings of unlawfulness in relation to his detention by the Military Court may entitle the Accused to a remedy at a later stage, the issue of whether his provisional detention under the authority of the ECCC is justified must also be evaluated according to the criteria found in the Internal Rules.

23. The Chamber notes that Rule 82 sets out the provisions for detention by the Trial Chamber. Rule 82(1) provides that "[w]here the Accused is in detention at the initial appearance before the Chamber, he or she shall remain in detention until the Chamber's judgment is handed down, subject to sub-rule 2".

24. Rule 82(2) provides that the Chamber may, at any time during the proceedings, order the release of an Accused. When the Chamber is seized of a first application for release, it is obliged to examine whether all the legal and factual requirements are fulfilled at this new stage of the proceedings. Article 82(4) provides that once the Trial Chamber has denied an application, the Accused may file a further application for release only where his circumstances have changed since the rejection of his last application for provisional release.

25. The Chamber notes that the Accused is currently in provisional detention pursuant to the Decision of the PTC on the appeal against the Closing Order and the related Detention Order[44]. The PTC found provisional detention to be justified in December 2007 on grounds of the need to prevent witness intimidation, to ensure the presence of the Charged Person during proceedings, the protection of his security, and the preservation of public order[45]. The Chamber considers that in the current case, only three of the conditions in Rule 63(3) are applicable at the trial stage[46]. It finds that the ruling of the PTC with respect to flight risk, the necessity to preserve public order and the protection of the Accused's security remains valid at this stage of the proceedings[47]. These concerns have not abated since the last order, and remain unlikely to be adequately addressed by conditions imposed upon release.

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[44] "Decision on Appeal Against the Closing Order Indicting Kaing Guek Eav Alias Duch", 5 December 2008 (Document D99/3/42) and "Detention Order", 5 December 2008 (Document D99/3/43), respectively.

[45] "Decision on Appeal against Provisional Detention Order of Kaing Guek Eav alias DUCH", 3 December 2007 (Document C5/45), paras. 30-36.

[46] Rule 63(3), which lists criteria upon which the CIJ may order provisional detention (namely where necessary to prevent witness intimidation, collusion between Charged Persons or accomplices, the preservation of evidence, or where required to ensure the presence of the Charged Person during proceedings, to protect his security, or preserve public order (Rule 63(3)(b)(i-v)), may serve as guidance also to the Trial Chamber.

[47] "Decision on Appeal against Provisional Detention Order of Kaing Guek Eav alias DUCH", 3 December 2007 (Document C5/45), paras. 37-41 (noting that while at large, "many factors indicate that [the Accused] took different measures to conceal his past", including his changes of name, jobs, and residence).

26. Finally, the Chamber finds, in accordance with Rule 21(2), that the detention of the Accused is justified by the requirements of the trial proceedings, in particular the need to ensure his presence, and is proportionate to the gravity of the crimes for which he is accused. Regarding conditions of detention, the Chamber notes that the ECCC Detention Facility is regularly visited by the International Committee of the Red Cross, that the Accused is entitled to receive visits, that he is under medical supervision and that his conditions generally appear to respect human dignity.

d. Credit for time served and remedy

27. The Chamber notes that according to Article 503 of the Code of Criminal Procedure, the Accused is entitled to credit for time already served in detention[48]. The Chamber accordingly decides that in the event of conviction, time spent in detention under the authority of the ECCC since 31 July 2007 will be credited to the Accused in relation to any sentence imposed.

28. The Chamber acknowledges that under the same provision, the Accused would have been entitled to credit for time served from 10 May 1999 to 31 July 2007, had he been brought to trial before the Military Court. In view of the termination of the case by the Military Court, the Accused will not be brought to trial before that court[49]. The Chamber notes that the accused was detained before the Military Court for investigation of allegations broadly similar to those being considered in this trial.

29. The Chamber accordingly finds that if convicted, the Accused is entitled, as a remedy, to credit for the duration of the period spent in detention under the authority of the Military Court, namely since 10 May 1999.

30. Having concluded that the detention of the Accused by the Military Court appears to contravene Cambodian law then in force and amounts to a violation of the Accused's rights, the Chamber now considers the remedies applicable in consequence of these violations.

31. The ICTY Appeals Chamber has reiterated that when considering the appropriate remedy for an alleged violation of the rights of the accused, a "balance must … be maintained between the

[48] Article 503 stipulates that: "The duration of any provisional detention shall be deducted from the sentence decided by the court […]". In addition, Rule 99(1) of the Internal Rules provides that "In case of acquittal or where a sentence handed down is less than, or equal to, that of any Provisional Detention already served, the Accused shall be immediately released, unless he or she is in detention in relation to other charges."

[49] "Order", Investigating Judge of the Military Court, 21 July 2008 (Military Court No. 139/08 DK; Document E52/4.66).

fundamental rights of the accused and the essential interests of the international community in the prosecution of persons charged with serious violations of international humanitarian law"[50].

32. Violations of an accused person's rights by external authorities will only be attributed to an international tribunal where there has been concerted action between the international tribunal and those authorities in respect of these violations[51].

33. The abuse of process doctrine constitutes an additional guarantee of the rights of the accused and may apply even in circumstances where there is no concerted action between the international criminal tribunal and the external authorities[52]. This doctrine, which would require a tribunal to decline to exercise its jurisdiction in a particlar case, has been narrowly construed and limited to cases where the illegal conduct in question is such as to make it repugnant to the rule of law to put the accused on trial[53]. Where the violations in question are not attributable to an international tribunal, this doctrine appears to be confined to instances of torture or serious mistreatment by the external authorities and has most usually been applied in relation to the process of arrest and transfer[54].

34. The ICC Appeals Chamber in the *Lubanga* case considered the lawfulness of provisional detention ordered by the ICC Pre-Trial Chamber in the light of this doctrine following allegations that the accused had been unlawfully detained by national authorities. The ICC Appeals Chamber concurred that there was no evidence to indicate that Lubanga's arrest and detention prior to 14 March 2006 was the result of any concerted action between the ICC and the authorities of the Democratic Republic of Congo, or that he had been tortured or seriously mistreated at any time. It concluded that the ICC Pre-Trial Chamber had thus not erred in deciding to provisionally detain

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[50] *Prosecutor v. Nikolić,* Case No. IT-94-2-AR73, "Decision on Interlocutory Appeal Concerning Legality of Arrest" (ICTY Appeals Chamber), 5 June 2003, para. 30.

[51] *See e.g. Prosecutor v. Rwamakuba,* Case No. ICTR-98-44-T, "Decision on the Defence Motion Concerning the Illegal Arrest and Illegal Detention of the Accused" (ICTR Trial Chamber), 12 December 2000, para. 30: "[t]he Trial Chamber does ... not consider that, from 2 August 1995 until 22 December 1995, when the Prosecutor notified the Namibian authorities of their knowledge that the accsued was in their custody, the Tribunal was responsible for the accused's detention. The Tribunal having no jurisdiction over the conditions of that period of detention, any challenges in this respect are to be brought before the Namibian jurisdictions."

[52] *Prosecutor v. Barayagwiza,* Case No. ICTR-97-19, Decision of 3 November 1999 (ICTR Appeals Chamber), para. 73: "[U]nder the abuse of process doctrine, it is irrelevant which entity or entities were responsible for the alleged violations of the Applicant's rights".

[53] *Prosecutor v. Lubanga,* Case No. ICC-01/04-01/06, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006 (ICC Appeals Chamber), 14 December 2006, paras. 30, 37 (finding that where a fair trial becomes impossible because of breaches of the fundamental rights of the accused by his accusers, the object of the judicial process is frustrated and the process must be stopped).

[54] *Prosecutor v. Nikolić,* Case No. IT-94-2-AR73, Decision on Interlocutory Appeal Concerning Legality of Arrest (ICTY Appeals Chamber), 5 June 2003, para. 30.

Lubanga before the ICC[55]. The Chamber finds that although the Accused's prior detention amounted to a clear violation of his rights, absent allegations of torture or serious mistreatment by the national authorities, this would appear insufficient to debar the exercise of the ECCC's discretion to order provisional detention.

35. The case law of the ICTR Appeals Chamber nevertheless indicates that even where these violations cannot be attributed to an international tribunal or do not amount to an abuse of process, an accused may be entitled to seek a remedy for violations of his rights by national authorities[56]. These violations are most appropriately addressed at the sentencing stage. This case law indicates that in the event the Accused is convicted, he is entitled not only to credit for time already spent in detention, but also to a reduction in sentence as a result of previous violations to his rights

36. Should the Accused be convicted, the Chamber finds him to be entitled to a remedy, to be decided by the Chamber at the sentencing stage, for the time spent unlawfully in detention before the Cambodian Military Court between 10 May 1999 and 30 July 2007.

37. Where an Accused is acquitted, the international case law instead indicates that he may seek compensation before the national authorities responsible for the violation of his rights[57]. If acquitted, the Accused would thus be entitled to pursue remedies available within Cambodian national law in relation to time spent in detention and any violation of his rights whilst in the custody of the Cambodian Military Court.

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[55] *Prosecutor v. Lubanga,* Case No. ICC-01/04-01/06, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006 (ICC Appeals Chamber), 14 December 2006, paras. 9-10, 42-43 (upholding findings of ICC Pre-Trial Chamber that in absence of concerted action between the ICC Prosecutor and the national authorities, prior detention by the latter authorities had no bearing on the issue of abuse of process absent evidence to establish torture or serious mistreatment).

[56] *Prosecutor v. Barayagwiza,* Case No. ICTR-97-19, Decision of 3 November 1999 (ICTR Appeals Chamber), para. 85: "[I]t is irrelevant that only a small portion of the total period of provisional detention is attributable to the Tribunal, since it is the Tribunal – and not any other entity – that is currently adjudicating the Appellant's claims. Regardless of which other parties may be responsible, the inescapable conclusion is that the Appellant's right to be promptly informed of the charges against him was violated".

[57] *Prosecutor v. Rwamakuba,* Case No. ICTR-98-44-T, "Decision on the Defence Motion Concerning the Illegal Arrest and Illegal Detention of the Accused" (ICTR Trial Chamber), 12 December 2000, para. 30 (as the ICTR was not responsible for the accused's detention before the Namibian authorities, any challenges in this respect were to be brought before the Namibian jurisdictions).

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER:

DENIES the request for release;

ORDERS that the Accused shall remain in provisional detention for the duration of the trial;

FINDS that the detention of the Accused by the Military Court was an error of application of procedural law, a violation of his rights, and that therefore the detention was unlawful;

DECLARES that the Accused, under international law and the law of the Kingdom of Cambodia, is entitled to a remedy for the time spent in detention under the authority of the Military Court and the violation of his rights;

NOTES that the Accused, in the event of acquittal, may seek appropriate remedies for time spent in detention at the Military Court and for the violation of his rights before the national courts of Cambodia;

DECLARES that, in the event of conviction before the ECCC, and applying Article 503 of the Cambodian Code of Criminal Procedure, the Accused is entitled to credit for the time served in detention under the authority of the ECCC, namely since 31 July 2007;

DECLARES further that, in the event of conviction before the ECCC, the Accused is entitled to the remedy of credit for the time spent in detention under the authority of the Military Court, namely from 10 May 1999 to 30 July 2007;

RESERVES the question of the nature and extent of the additional remedy in consequence of the violation of his rights to the Chamber's determination of sentence, if applicable.

Phnom Penh, 15 June 2009
President of the Trial Chamber

Nil Nonn