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

In the Matter of the appeal by Kang Guek Eav (Duch)
against the order of provisional detention
by the Office of the Co-Investigating Judges dated 31 July 2007

Case No. 002/14-08-2006

A submission from Anne Heindel, Documentation Center of Cambodia (DC-Cam) Legal Advisor, in her personal capacity

October 4, 2007

Summary

This brief is submitted pursuant to the public notice of the Pre-Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia (ECCC) dated 4 September 2007, allowing submission by *amicus curiae* pursuant to Rule 33 of the ECCC Internal Rules. It addresses the finding by the ECCC Co-Investigating Judges (CIJs) that "they do not have jurisdiction to determine the legality of DUCH's prior detention" by the Cambodian Military Court. Consequently, it does not discuss the law applicable to deciding whether or not Duch's due process rights were violated by the Military Court nor take an opinion on whether or not he is entitled to provisional release or any other remedy.

Duch has appealed against the order of the CIJs authorizing his pre-trial detention under the ECCC Internal Rules and is seeking "immediate release" either unconditionally or under a bail order. The order of provisional detention considers two theories by which Duch's prior detention might be attributable to the ECCC, both of which could result in the Chambers' loss of personal jurisdiction. Finding that neither of these theories is applicable in this case, the CIJs hold that they do not have the jurisdiction to determine the legality of Duch's prior detention at this stage of the proceedings, but do not preclude the possibility that he will be entitled to a remedy at final judgment. They do not address other possible theories of attribution, such as whether Duch was held under the "constructive" custody of the ECCC. Moreover, because they do not examine the legal character of the ECCC, a *sui generis* institution, they do not consider whether or not it has the same or similar obligations as a national Cambodian court to address due process violations. Finally, jurisprudence of both human rights bodies and international criminal tribunals suggests that, even if a violation of Duch's rights can not be attributed to the ECCC, in considering whether provisional detention is appropriate, the Chambers have both the authority and the obligation to consider the legality and length of his prior detention.

Interest of *Amicus Curiae*

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I. ECCC Responsibility for Violations of Pre-Trial Detention by Cambodian Courts May Depend on Its Legal Characterization

A. The ECCC Is a National Court with International Characteristics

1. The Extraordinary Chambers in the Courts of Cambodia (ECCC) was created pursuant to an international agreement between the United Nations and the Government of Cambodia setting out the "legal basis and the principles and modalities for …[their] cooperation."[1] This Framework Agreement was approved by the Cambodian legislature and implemented by it through the adoption of a law establishing the Court.[2] Pursuant to the Agreement and the Establishment Law, the ECCC has been created "with international assistance" as part of "the existing court structure of Cambodia."[3]
2. The ECCC is thus a Cambodian court created pursuant to Cambodian law. However, it also shares some features of an international court. For this reason, Cambodian Deputy Prime Minister Sok An has characterized the ECCC as "a national court with international characteristics."[4] He has noted that it is "a mixed or hybrid tribunal —

[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, art. 1, *available at* http://www.cambodia.gov.kh/krt/pdfs/Agreement%20between%20UN%20and%20RGC.pdf [hereinafter Framework Agreement].
[2] *See* Law on the Establishment of the Extraordinary Chambers as amended 27 October 2004, No. NS/RKM/1004/006 [hereinafter Establishment Law]. *See* Framework Agreement, *supra* note 1, art. 2 (providing that "[t]he present Agreement shall be implemented in Cambodia through the Law on the Establishment of the Extraordinary Chambers as adopted and amended").
[3] Framework Agreement, *supra* note 1, pmbl. ¶ 4. *See also* Establishment Law, *supra* note 2, art 2 new.
[4] Presentation by Deputy Prime Minister Sok An to the National Assembly on Ratification of the Agreement Between Cambodia and the United Nations and Amendments to the 2001 Law concerning the establishment of

firmly located in the national courts but involving both national and international law; national and international judges, prosecutors, staff; and national and international financing."[5]

3. The legal characterization of the ECCC as either a national or an international court — or something in between — is significant because it can impact a number of issues that may arise before the Court, including the ECCC's responsibility to remedy any violations of Kang Guek Eav (Duch)'s rights while he was detained without trial for eight years by the Cambodian Military Court. Indeed, in ordering Duch's provisional detention by the ECCC, the CIJs emphasized that although the ECCC was "established within the Cambodian Judicial organization . . . [it] constitutes an independent institution having a separate structure from the national jurisdictions."[6] Apparently as a consequence, in determining their competence to adjudicate the legality of Duch's prior detention they did not consider the ECCC's possible obligations as a domestic Cambodian court.

4. In evaluating the legal personality of the Special Court for Sierra Leone (SCSL) — likewise considered a "hybrid" court[7] — the SCSL Appeals Chamber took into account several aspects of the court's relationship to Sierra Leone and the international

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Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, at 8 (4-5 Oct. 2004), *available at* http://www.cambodia.gov.kh/krt/pdfs/Sok%20An%20Speech%20to%20NA%20on%20Ratification%20and%20Amendments-En.pdf.

[5] Sok An, Deputy Prime Minister and Minister in Charge of the Office of the Council of Ministers Chairman of the Royal Government Task Force for the Khmer Rouge Trials Closing Remarks for the International Conference, Dealing with a Past Holocaust and National Reconciliation: Learning from Experiences, 28- 29 August, 2006, Phnom Penh, Cambodia.

[6] ECCC Office of the Co-Investigating Judges, Order of Provisional Detention, Case No. 002/14-08-2006, ¶ 3 (31 July 2007).

[7] *See, e.g.,* Michael P. Scharf, The Special Court for Sierra Leone, ASIL Insights (Oct. 2000), *available at* http://www.asil.org/insights/insigh53.htm. *See also* Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, ¶ 6, U.N. Doc. S/2000/915 (4 Oct 2000) (citation omitted) [hereinafter SCSL Report of the S-G].

> [T]he Special Court, as foreseen, is … a treaty-based sui generis court of mixed jurisdiction and composition. Its implementation at the national level would require that the agreement is incorporated in the national law of Sierra Leone in accordance with constitutional requirements. Its applicable law includes international as well as Sierra Leonean law, and it is composed of both international and Sierra Leonean judges, prosecutors and administrative support staff.

community before ruling that it is an international court.[8] The Chamber noted that the Special Court is a "new jurisdiction operating in the sphere of international law" that was "vested with juridical capacity" by a treaty between the UN and Sierra Leone.[9] Consequently, it found that the court is "an autonomous and independent institution,"[10] and not part of the domestic judiciary of Sierra Leone.[11] Comparably, as discussed above, the ECCC is both new jurisdiction established in conformity with a Framework Agreement between the UN and Cambodia[12] and a Cambodian court created pursuant to Cambodian law. Despite the ECCC's specialized jurisdiction, independent structure, and inclusion of United Nations staff, its autonomy from the Cambodian judiciary is not clear-cut. For example, while the SCSL Statute expressly gives the Special Court jurisdictional primacy over the national courts of Sierra Leone,[13] the Establishment Law does not address the hierarchical relationship between the ECCC and other Cambodian courts. While the Special Court was mandated to apply the rules in force at the International Criminal Tribunal for Rwanda (ICTR) and to amend those rules or adopt new ones as necessary,[14] the ECCC's procedure must be "in accordance with Cambodian

[8] *See* Prosecutor v. Charles Ghankay Taylor, Case No. SCSL-2003-01-I, Decision on Immunity from Jurisdiction, ¶ 41(c) (Appeals Chamber, 31 May 2004).
[9] Prosecutor v. Agustine Gbao, Case No. SCSL-2004-15-AR72(E), Decision on Preliminary Motion on the Invalidity of the Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court, ¶ 6 (Appeals Chamber, 25 May 2004) (citing Prosecutor v. Morris Kallon & Broma Bazzy Kamara, Case Nos. SCSL-2004-15-AR72(E), SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction, ¶ 14 (Appeals Chamber, 13 Mar. 2004)).
[10] *Id.*
[11] *Taylor* Decision on Immunity, *supra* note 8, ¶ 41(a).
[12] *See, e.g.,* G.A. Res. 56/169, U.N. GAOR, 56th Sess., U.N. Doc. A/RES/56/169 (2002) (urging "the Government [of Cambodia] and the United Nations to conclude an agreement without delay").
[13] *See* Statute of the Special Court of Sierra Leone, Annexed to the Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 16 Jan. 2002, art. 8(2), *available at* http://www.sc-sl.org/scsl-statute.html [hereinafter SCSL Statute].
[14] *See id.* art. 14.

Law,"[15] with guidance from international procedural rules only where there is a lacunae, uncertainty in interpretation, or a question of consistency with international standards.[16]

5. Other distinctions between the SCSL and the ECCC highlight limits on the ECCC's independence from Cambodia. While the SCSL has the "capacity to enter into agreements with other international persons governed by international law,"[17] the ECCC does not appear to have comparable authority. Also notable is the fact that the SCSL Statute clearly prohibits the application of domestic amnesties for international crimes to any person falling within the jurisdiction of the SCSL,[18] while the Establishment Law provides only that "[t]he scope of any amnesty … that may have been granted prior to the enactment of this Law is a matter to be decided by the Extraordinary Chambers."[19] This may indicate the UN's own ambivalence regarding the legal character of the Chambers, as in recent years it has adopted a firm position against amnesties for international crimes.[20] Finally, unlike the SCSL, if UN staff "fail[s] or refuse[s] to participate" in ECCC proceedings or the UN withdraws its support from the Court and no foreign

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[15] Framework Agreement, *supra* note 1, art. 12(1). *See also* Establishment Law, *supra* note 2, arts. 20 new, 23 new, and 33 new.

[16] *See* Framework Agreement, *supra* note 1, art. 12(1). *See also* Establishment Law, *supra* note 2, arts. 20 new, 23 new, and 33 new. This connection to Cambodian courts may have been weakened somewhat by the decision of the ECCC judges to adopt a separate set of procedures rules for the Court, "the purpose of which is to consolidate applicable Cambodian procedure for proceedings before the ECCC[.]" ECCC Internal Rules, *supra* note 16, pmbl. ¶ 5 (12 June 2007).

[17] Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, art. 11(d) (2002), *available at* http://www.sc-sl.org/scsl-agreement.html (providing that the court has the capacity to "[e]nter into agreements with States as may be necessary for the exercise of its functions and for the operation of the Court"); *Taylor* Decision on Immunity, *supra* note 8, ¶ 41(b).

[18] *See* SCSL Statute, *supra* note 13, art. 10. *See also* Prosecutor v. Morris Kallon and Brima Bazzy Kamara, Case Nos. SCSL-2004-15-AR72(E), SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, ¶ 86 (13 Mar. 2004) (finding that "whether or not [the Lomé Agreement amnesty] is binding on the Government of Sierra Leone or not does not affect the liability of the accused to be prosecuted in an international tribunal for international crimes").

[19] Establishment Law, *supra* note 2, art. 40 new. *See also* Framework Agreement, *supra* note 1, (providing that "[t]he United Nations and the Royal Government of Cambodia agree that the scope of [the Ieng Sary] pardon is a matter to be decided by the Extraordinary Chambers").

[20] *See, e.g.,* SCSL Report of the S-G, *supra* note 7, ¶ 22.

> While recognizing that amnesty is an accepted legal concept and a gesture of peace and reconciliation at the end of a civil war or an internal armed conflict, the United Nations has consistently maintained the position that amnesty cannot be granted in respect of international

candidates are identified to fill vacant positions, the Cambodian government may choose Cambodian replacements.[21] The Establishment Law thus foresees the possibility that, under certain conditions, the ECCC could continue to function without international support or staffing.

6. On the other hand, the ECCC, like the SCSL, is conceived of as a mechanism of international justice. For example, the SCSL Appeals Chamber highlighted the fact that the treaty establishing the Special Court was an agreement on behalf of "*all* members of the United Nations and Sierra Leone," and was consequently "an expression of the will of the international community."[22] It found that "[t]he judicial power exercised by the Special Court is not that of Sierra Leone, but that of the Special Court itself reflecting the interests of the international community."[23] Comparably, the Framework Agreement is the result of many years of international negotiations and only came about through the encouragement of the UN General Assembly.[24]

7. Moreover, like the SCSL, the ECCC arguably was established to "fulfill an international mandate."[25] The ECCC's Framework Agreement emphasizes the fact that "the serious violations of Cambodian and international humanitarian law during the period of the Democratic Kampuchea from 1975 to 1979 continue to be matters of vitally important concern *to the international community as a whole*."[26] Prime Minister Hun Sen has echoed this point, remarking that "[t]he crimes [by the Khmer Rouge] were committed

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crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law.

[21] *See* Establishment Law, *supra* note 2, art. 46 new. Notably, a government spokesperson has recently asserted that the government has the power to "terminate" the ECCC all together. *See Minister: Government Can "Terminate" ECCC*, CAMBODIA DAILY, 3 Sept. 2007.

[22] *Taylor* Decision on Immunity, *supra* note 8, ¶ 38 (emphasis in original).

[23] *Gbao* Appeals Decision on the Invalidity of the Agreement Between the United Nations and the Government of Sierra Leone, *supra* note 9, ¶ 6.

[24] *See, e.g.,* G.A. Res. 56/169, U.N. GAOR, 56th Sess., U.N. Doc. A/RES/56/169 (2002) (urging "the Government [of Cambodia] and the United Nations to conclude an agreement without delay").

[25] *Taylor* Decision on Immunity, *supra* note 8, ¶ 39.

[26] Framework Agreement, *supra* note 1, pmbl. ¶ 1 (referencing G.A. Res 57/228 (18 Dec. 2002)) (emphasis added).

not just against the people of Cambodia but against humanity as a whole."[27] For this reason he found it "fitting that both Cambodian and international judges, prosecutors and lawyers will work together in the task of trying those most responsible and, in doing so, helping to build a culture that will prevent the recurrence of such crimes anywhere in the world."[28]

8. Because the ECCC is neither wholly national nor wholly international, the ECCC will likely need to consider the nature of its legal personality and what bodies of law apply to it on a case-by-case basis.

B. To the Extent That the ECCC Is Part of the Cambodian Judiciary, It Has an Obligation under Human Rights Law to Remedy Violations by Other Cambodian Courts

9. The Establishment Law provides that:

> [t]he Extraordinary Chambers of the trial court shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights [ICCPR].[29]

Moreover, as a State Party to the ICCPR,[30] the Cambodian government, including all of its branches, is obligated to "respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the … Covenant[,]"[31] including the right to be tried "without undue delay."[32] It thus may not invoke internal law — including arguably a division of authority between the Military Court and the ECCC —

[27] Presentation by Deputy Prime Minister Sok An to the National Assembly, *supra* note 4, at 8 (quoting this language).
[28] *Id.*
[29] Establishment Law, *supra* note 2, art. 33 new.
[30] Cambodia acceded to the ICCPR in 1992. *See* Office of the High Commissioner for Human Rights Information on the Status of Ratifications and Reservations of the ICCPR, *available at* http://www.ohchr.org/english/countries/ratification/4.htm.
[31] International Covenant on Civil and Political Rights, *adopted* 16 Dec. 1966, *entered into force* 23 Mar. 1976, 999 U.N.T.S. 171, art. 2(1) [hereinafter ICCPR]. *See also* General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 4 (29 Mar. 2004) (noting that "[a]ll branches of government (executive, legislative and judicial) … at whatever level — national, regional or local — are in a position to engage the responsibility of the State Party").
[32] ICCPR, *supra* note 31, art. 14(2), (3)(a),(c).

to justify a failure to perform.[33] Therefore, to the extent that the ECCC is considered a Cambodian national court, it must "give effect to the rights recognized in the … Covenant,"[34] including "[t]o ensure that any person claiming an [effective] remedy shall have his right thereto determined by competent judicial … authorities[.]"[35] Indeed, the Human Rights Committee (HRC) has said that this requirement "is unqualified and of immediate effect."[36] For this reason,

> the right to an effective remedy may in certain circumstances require States Parties to provide for and implement provisional or interim measures to avoid continuing violations and to endeavour to repair at the earliest possible opportunity any harm that may have been caused by such violations.[37]

10. Possible remedies for human rights violations include compensation,[38] reduction in sentence,[39] and release, "taking into account the subject matter as well as the nature of the right allegedly violated."[40] For example, when an accused was held in provisional detention for five years in contravention of domestic procedures, the HRC found that in

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[33] *See* General Comment No. 31, *supra* note 31, ¶ 4. Notably, ICCPR Article 50 provides that "[t]he provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions." By analogy, no division of national authority should be invoked as a justification for a failure to respect rights protected by the Covenant.

[34] ICCPR, *supra* note 31, art. 2(2).

[35] *Id.* art. 2(3)(a),(b).

[36] General Comment No. 31, *supra* note 31, ¶ 14. The Human Rights Committee is "the body of independent experts that monitors implementation of the International Covenant on Civil and Political Rights by its State parties." Office of the High Commissioner for Human Rights information on the HRC, *available at* http://www.ohchr.org/english/bodies/hrc/index.htm.

[37] General Comment No. 31, *supra* note 31, ¶ 19.

[38] The Establishment Law and the Internal Rules do not provide a right to compensation for violations of due process rights. ICCPR Article 9(5) provides that "[a]nyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation." *See also* European Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11, June 4, 1950, art. 5(5) [hereinafter European Convention] (providing that "[e]veryone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation"); American Convention on Human Rights, *opened for signature* Nov. 22, 1969, art. 63(1), 1144 U.N.T.S. 123, *entered into force* July 18, 1978 [hereinafter American Convention] ("[i]f the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule . . . if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party").

[39] Although human rights bodies most often call for states to provide compensation for due process violations, in some cases they may call for a reduction in sentence. *See, e.g.,* Dave Sewell v. Jamaica, Case No. 12.347, IACHR Report No. 76/02, § VII.1 (2002) (finding that due to violations of the petitioner's rights, including trial without undue delay as well as the conditions of his detention, the imposition of a mandatory death sentence, and denial of procedural remedies, his sentence of death should be commuted).

[40] Prosecutor v. André Rwamakuba, Case No. ICTR-98-44C-T, Decision on Appropriate Remedy, ¶ 68 (Trial Chamber, 31 Jan. 2007) (citing human rights jurisprudence).

addition to receiving compensation he should be released pending final judgment.[41] And where accused were detained for nine years without trial, the HRC found that

> the State party is under an obligation to provide the authors with an effective remedy, which shall entail adequate compensation for the time they have spent unlawfully in detention. The State party is also under an obligation to ensure that the authors be tried promptly with all the guarantees set forth in article 14 or, *if this is not possible, released*.[42]

C. To the Extent the ECCC Is an International Court, It Is Responsible for Violations of Duch's Rights While He Was Held in Its "Constructive Custody"

11. The ICTR has held that, where it shares "constructive custody" over an accused detained by a national jurisdiction, it is required to consider whether the length of his prior detention violated norms of international human rights and, if it has, provide an appropriate remedy.[43] In the *Barayagwiza* case, the accused complained of, *inter alia*, the length of his provisional detention in Cameroon prior to his transfer to the ICTR detention unit.[44] The accused was originally detained pursuant to State extradition requests[45]; however, after these were rejected, Cameroon held the accused for almost nine months at the behest of the ICTR Prosecutor before he was indicted by and transferred to the Tribunal.[46] The Appeals Chamber found that it must consider "the relationship between Cameroon and the Tribunal with respect to the detention of the Appellant" in order to determine whether the Tribunal had constructive custody over the accused during this period.[47]

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[41] *See* Floresmilo Bolaños v. Ecuador, HRC Comm. No. 238/1987, ¶ 2.1 (1989). *See also* Bronstein et al. v. Argentina, Report No. 2/97, ¶ 61(ii), IACHR, OEA/Ser.L/V/II/95 Doc. 7 rev. at 241 (1997), *available at* http://www1.umn.edu/humanrts/cases/1997/argentina2-97.html (recommending provisional release "in all cases of prolonged preventative detention which do not meet the requirements set forth in the American Convention").
[42] Geniuval Cagas et al. v. Philippines, HRC Comm. No. 788/1997, ¶ 9 (2001) (emphasis added). Several members of the Committee argued in dissent that the violation had been so egregious that the accused should be released immediately. *See id.*, Individual opinion dissenting in part, ¶ c.
[43] *See* Jean-Bosco Barayagwiza v. Prosecutor, Case No**.** ICTR-97-19, Decision, ¶¶ 61-62 (Appeals Chamber, 3 Nov. 1999).
[44] *See id.* ¶ 2.
[45] *See id.* ¶ 43.
[46] *See id.* ¶¶ 44, 54.
[47] *Id.* ¶ 54.

12. According to the ICTR Appeals Chamber, "notwithstanding a lack of physical control, the Appellant *was* in the Tribunal's custody *if* he was detained pursuant to 'lawful process or authority' of the Tribunal."[48] In this case, it found that "*but for*" the Prosecutor's request for provisional detention, Barayagwiza would have been released at the time the State extradition request was denied.[49] The Appeals Chamber found the situation analogous to

> the 'detainer' process, whereby a special type of warrant … is filed against a person *already in custody* to ensure that he will be available to the demanding authority upon completion of the present term of confinement. A 'detainer' is a device whereby the requesting State can obtain the custody of the detainee upon his release from the detaining State.[50]

In such cases, national courts have found that "the accused is in the constructive custody of the requesting State and … the detaining State acts as agent for the requesting state for purposes of … challenges [to the lawfulness of detention]."[51] It emphasized that in the case under review, "the relationship between the Tribunal and Cameroon is even stronger, on the basis of the international obligations imposed on States by the Security Council under … [the ICTR] Statute."[52]

13. Likewise, in the *Kajelijeli* case, the Appeals Chamber considered the link between the detaining State and the Tribunal in determining the responsibility of the ICTR for violations of the accused's rights while in State custody.[53] It determined that "although the violation [of the rights of the accused] is not solely attributable to the Tribunal, it has to be recalled that it was the Prosecution, thus an organ of the Tribunal, which was the requesting institution responsible for triggering the Appellant's apprehension, arrest and

[48] *Id.* ¶ 58 (emphasis in original).
[49] *Id.* ¶ 55 (emphasis in original).
[50] *Id.* ¶ 56 (emphasis in original).
[51] *Id*. *See also id.* ¶ 57.
[52] *Id.* ¶ 56.
[53] *See* Juvénal Kajelijeli v. Prosecutor, Case No. ICTR-98-44A-A, Judgment, ¶ 232 (Appeals Chamber, 23 May 2005).

detention in Benin."[54] Because the Prosecutor had "failed to effect its prosecutorial duties with due diligence," the violations of the accused's detention rights in the custodial State were attributable to the Tribunal.[55]

14. Comparably, in the *Semanza* case, the ICTR Appeals Chamber found that the accused's detention in Cameroon for over seven months at the request of the Prosecutor was not attributable to the Tribunal.[56] The Chamber determined that the time lapse before the accused's transfer to the Tribunal was due to "political and judicial factors" including pressure on Cameroon to extradite him to another State and pending national elections.[57] And in the *Lubanga* case, the International Criminal Court (ICC) Appeals Chamber found that "[m]ere knowledge on the part of the Prosecutor of the investigations carried out by the [national] authorities is no proof of involvement on his part in the way they were conducted or the means including detention used for the purpose."[58] It also emphasized that the accused's detention in the custodial State was for crimes that were "separate and distinct" from those of which he was accused by the ICC.[59]

15. As pointed out in Duch's Appeals Brief, "[i]n February 2002, the charges against Mr KANG and the orders placing and holding him in detention were based explicitly on the [Establishment Law]" and the crimes over which it has jurisdiction."[60] Whether or not these facts, combined with factors such as the nature of the ECCC as a Cambodian court, are found sufficient to amount to "constructive custody" by Chambers over Duch during this period, this question should be examined.

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[54] *Id.* ¶ 232.
[55] *See id.* ¶¶ 231-32, 252-53.
[56] *See* Laurent Semanza v. Prosecutor, Case No. ICTR-97-20-A, Decision, ¶ 104 (Appeals Chamber, 31 May 2000).
[57] *See id.* ¶ 103.
[58] Situation in the Democratic Republic of the Congo in the Case of Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06 (OA4), 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, ¶ 42 (Appeals Chamber, 14 Dec. 2006) [hereinafter *Lubanga* Appeals Decision].
[59] *Id.* ¶ 42.

16. If an international court has constructive custody over an accused, it shares responsibility with the national government for any violations of the accused's rights. For example, in the *Kajelijeli* case, the accused was arrested by national authorities at the request of the ICTR Prosecutor and held in custody for almost three months before being served with an ICTR arrest warrant or being brought before a judge.[61] The ICTR Appeals Chamber found that neither the ICTR Statute nor its Rules of Procedure specified "the manner and method" of the accused's arrest.[62] Instead, "[i]t is for the requested State to decide how to implement its obligations under international law."[63] At the same time, "a shared burden exists with regard to safeguarding the suspect's fundamental rights in international cooperation on criminal matters."[64] Because the prosecution has "overlapping responsibilities" with cooperating States, once it initiates a case, it must ensure "the case proceeds to trial in a way that respects the rights of the accused."[65] As a consequence,

> [i]f an accused [or suspect] is arrested or detained by a state at the request *or under the authority of* the Tribunal even though the accused is not yet within the actual custody of the Tribunal, the Tribunal has a responsibility to provide whatever relief is available to it to attempt to reduce any violations as much as possible.[66]

17. Neither the statutes of the ICTR nor the International Criminal Tribunal for Yugoslavia (ICTY) provide for a right to an effective remedy for due process violations; nevertheless, the ICTR Trial Chamber recently found that it has an "inherent" power to

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[60] Defense Appeal Brief Challenging the Order of Provisional Detention of 31 July 2007, Case. No. 002/14-08-2006, ¶ 3 (5 Sept. 2007). *See also id.* ¶¶ 68-73.
[61] *See Kajelijeli* Appeals Judgment, *supra* note 53, ¶ 210.
[62] *See id.* ¶ 219.
[63] *Id.*
[64] *Id.* ¶ 221. In an earlier decision, an ICTR Trial Chamber found that it "lacks jurisdiction to review the legal circumstances attending the arrest of a suspect [at Prosecutor's request] in so far as the arrest has been made pursuant to the laws of the arresting state." Prosecutor v. Joseph Nzirorera, Case No. ICTR-98-44-T, Decision on the Defence Motion Challenging the Legality of the Arrest and Detention of the Accused and Requesting the Return of Personal Items Seized, ¶ 27 (Trial Chamber, 7 Sept. 2000).
[65] *Kajelijeli* Appeals Judgment, *supra* note 53, ¶ 220.
[66] *Id.* ¶ 223 (citing *Semanza* 2000 Appeals Decision, *supra* note 56, Declaration of Judge Lal Chand Vohrah, ¶ 6 (emphasis added)).

provide remedies[67] including compensation.[68] Where an accused's rights "have been violated, but not egregiously so," the ICTR will reduce the accused's sentence if he or she is found guilty.[69] Like the ECCC, all of the international criminal tribunals place time limits on provisional detention and either allow or require release once these limits have passed.[70]

D. Regardless of the Legal Character of the ECCC, if the Violation of Duch's Rights by the Military Court Is Sufficiently Egregious, the ECCC Has the Discretion to Stay the Proceedings

18. As recognized by the CIJs, where there are serious allegations of violations of a detainee's rights, courts have considered whether the abuse was so egregious that to proceed with criminal proceedings would "undermine the integrity of the judicial process" and be unfair to the accused. Under the "abuse of process" doctrine, even where courts share no responsibility for the due process violation, they have the discretion to terminate criminal proceedings.[71] This doctrine is related to the idea that "courts have

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[67] *See Rwamakuba* Decision on Appropriate Remedy, *supra* note 40, ¶ 45. *See also* Jean Bosco Barayagwiza v. Prosecutor, Case No. ICTR-97-19-AR72, Decision on the Prosecutor's Request for Review or Reconsideration, ¶ 75 (Appeals Chamber, Mar. 31, 2000); *Semanza* Appeals Decision, *supra* note 56, § VII(6)(a).

[68] *See Rwamakuba* Decision on Appropriate Remedy, *supra* note 40, ¶ 58. Comparatively, the ICC's Rome Statute, like the ICCPR, explicitly provides that "[a]nyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation." Rome Statute of the International Criminal Court, art. 85(1), *adopted* on July 17, 1998 by the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *entered into force* July 1, 2002 [hereinafter Rome Statute].

[69] *Kajelijeli* Appeals Judgment, *supra* note 53, ¶ 255. *See also* Prosecutor v. Laurent Semanza, Case No. ICTR-97-20-T, Judgment and Sentence, ¶ 580 (Trial Chamber, 15 May 2003) (affirmed by the Appeals Chamber in Laurent Semanza v. Prosecutor, Case No. ICTR-97-20-A, Judgment, ¶¶ 325-26 (Appeals Chamber, 20 May 2005).

[70] *See, e.g.,* Rome Statute, *supra* note 68, art. 92(3) (providing that suspects who are provisionally detained in custodial states at the request of the Prosecutor "may" be released after 60 days); International Criminal Court, Rules of Procedure and Evidence, R.188, ICC-ASP/1/3 (2002); Special Court for Sierra Leone, Rules of Procedure and Evidence, R.40(C)(ii) (*as adopted* 29 May 2004) (providing that a suspect held by a custodial state "shall" be released if the Prosecutor does not apply for his or her transfer within ten days).

[71] *See, e.g., Barayagwiza* 1999 Appeals Decision, *supra* note 43, ¶ 73 (finding that "under [this] doctrine, it is irrelevant which entity or entities were responsible" for violations of an accused's rights); Prosecutor v. Dragan Nikolić, Case No. IT-94-2-PT, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, ¶ 114 (Trial Chamber, 9 Oct. 2002) (adopting the view of the *Barayagwiza* Appeals Chamber); Situation in the Democratic Republic of the Congo in the Case of Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to Article 19(2)(a) of the Statute, at 10 (Pre-Trial Chamber, 3 Oct. 2006) [hereinafter *Lubanga* Pre-Trial Decision] ("the abuse of process doctrine constitutes an additional guarantee of the rights of the accused") (citation omitted). *But see* Prosecutor v. Dragan Nikolić, Case No. IT-94-2-AR73, Decision on Interlocutory Appeal Concerning Legality of Arrest, ¶ 18 (Appeals Chamber, 5 June 2003) (finding that "[o]nce the standard warranting the declining of the exercise of jurisdiction has been identified, the Appeals Chamber will have to determine

supervisory powers that may be utilised in the interests of justice, regardless of a specific violation."[72]

19. Dismissal is an appropriate remedy only where there has been particularly egregious conduct[73]; however, the abuse of process doctrine has not only been applied in cases of "torture or serious mistreatment."[74] The ICC Appeals Chamber has said that dismissal of charges and unconditional release may be appropriate where an accused's rights have been egregiously violated by delay or "illegal or deceitful conduct on the part of the prosecution."[75] The ICTR Appeals Chamber has found that "[i]t is the combination of … factors — and not any single finding" — that leads to the application of this remedy.[76] In the *Barayagwiza* case, the ICTR Appeals Chamber found the doctrine appropriate where there had been a "combination of delays that seemed to occur at virtually every stage" of the case,[77] "repeated" violations of the fundamental rights of the accused, and a failure by the Prosecutor to prosecute "tantamount to negligence."[78] The Appeals Chamber emphasized,

> it is irrelevant that only a small portion of that 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.[79]

20. Cases warranting dismissal "are exceptional and, in most circumstances, the 'remedy of setting aside jurisdiction, will . . . be disproportionate.'"[80] For this reason, in a later

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whether the facts …, if proven, would warrant such a remedy" and then "determine whether the underlying violations are attributable … to the [Tribunal]").
[72] *Barayagwiza* 1999 Appeals Decision, *supra* note 43, ¶ 76.
[73] *See Lubanga* Appeals Decision, *supra* note 58, ¶ 30 (providing that "[n]ot every infraction of the law or breach of the rights of the accused in the process of bringing him/her to justice will justify stay of proceedings"; "[t]he illegal conduct must be such as to make it otiose, repugnant to the rule of law to put the accused on trial").
[74] Duch Order of Provisional Detention, *supra* note 6, ¶ 21. *See also id.*, ¶ 19, citing *Lubanga* Pre-Trial Decision, *supra* note 71, at 10 (stating that "to date, the application of [the abuse of process] doctrine, which would require that the Court decline to exercise its jurisdiction in a particular case, has been confined to instances of torture or serious mistreatment by national authorities of the custodial State in some way related to the process of arrest and transfer of the person to the relevant international criminal tribunal") (citations omitted).
[75] *Lubanga* Appeals Decision, *supra* note 58, ¶ 36.
[76] *Barayagwiza* 1999 Appeals Decision, *supra* note 43, ¶ 73.
[77] *Id.* ¶ 109.
[78] *Id*. ¶ 106.

decision in the *Barayagwiza* case, the Appeals Chamber found that new facts "diminish[ed] the role played by the failings of the Prosecutor as well as the intensity of the violations of the rights of the Appellant."[81] It consequently found that dismissal of charges was "disproportionate in relation to the events" and instead ordered that compensation be provided.[82] Notably, however, the Chamber also "confirm[ed] its … [earlier decision] on the basis of the facts it was founded on."[83]

II. Whether or Not Detention by the Military Court Is Attributable to the ECCC, the ECCC Has Both the Authority and Obligation to Review Its Legality

A. The Establishment Law Gives the ECCC Authority to Review and Interpret Domestic Cambodian Criminal Procedure

21. The ECCC has statutory authority to review and interpret Cambodian procedures and, when required, to determine whether or not they have been implemented in accordance with international law. The Establishment law provides that ECCC prosecutions, investigations, and trials must be conducted in accordance "with existing [Cambodian] procedures in force."[84] Moreover, "[c]onditions for the arrest and the custody of the accused shall conform to existing law in force."[85]

> Where Cambodian law does not deal with a particular matter, or if there is uncertainty regarding the interpretation or application of a relevant rule of Cambodian law, or where there is a question regarding the consistency of such a rule with international standards, guidance may also be sought in procedural rules established at the international level.[86]

22. In addition to the ECCC Internal Rules adopted in July 2007, a new Cambodian Code of

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[79] *Id.* ¶ 85.
[80] *Kajelijeli* Appeals Judgment, *supra* note 53, ¶ 206. *See also Nikolić* Appeals Decision, *supra* note 71, ¶ 30. *See also* Prosecutor v. Joseph Kanyabashi, Case No. ICTR-96-15I, Decision on the Defence Extremely Urgent Motion on Habeas Corpus and for Stoppage of Proceedings, ¶ 81 (Trial Chamber, 23 May 2000) (providing that where "the violation is not so extensive … it will not necessitate a remedy of a stay of the proceeding").
[81] *Barayagwiza* 2000 Appeals Decision, *supra* note 68, ¶ 71.
[82] *See Barayagwiza* 2000 Appeals Decision, *supra* note 68, ¶ 71. *See also id.* ¶ 75.
[83] *Id.* ¶ 51.
[84] *See* Establishment Law, *supra* note 2, arts. 20 new, 23 new, and 33 new.
[85] *Id.* art. 33 new.
[86] Framework Agreement, *supra* note 1, art. 12(1). *See also* Establishment Law, *supra* note 2, arts. 20 new, 23 new, and 33 new.

Criminal Procedure entered into force in August 2007.[87] Before the adoption of these procedures, there were two Cambodian criminal procedural codes: the 1992 Transitional Law adopted by the United Nations Transitional Authority in Cambodia (UNTAC Law),[88] and the 1993 Law on Criminal Procedure.[89] In 1999 the Cambodian government also promulgated the Law on Temporary Detention Period, allowing individuals charged with crimes against humanity, war crimes, or genocide to be held in temporary detention "for a period of one year" not to exceed "three years in total."[90] Duch was held under the Temporary Detention Law for eight years until his transfer to the ECCC.

23. The Internal Rules indicate that they are intended to be a "consolidation" of Cambodian procedure, not a replacement.[91] The "existing procedures in force" to be applied by the ECCC thus arguably include not only the Internal Rules, but all Cambodian procedural rules relevant to legal questions arising in ECCC proceedings, in particular questions relating criminal processes taking place before the Internal Rules were adopted.

24. Significantly, the Establishment Law not only authorizes the ECCC to apply domestic Cambodian criminal procedure, it makes clear that the ECCC, including the CIJs, are expected to interpret these rules and determine their conformity with international standards — arguably including those standards prescribed by human rights conventions and followed by international criminal courts. This gives the CIJs authority to interpret

[87] Cambodian Code of Criminal Procedure (*as adopted* 10 Aug. 2007).
[88] Provisions Relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia During the Transitional Period (10 Sept. 1992), *available at* http://www.cdpcambodia.org/untac.asp [hereinafter UNTAC Law].
[89] State of Cambodia Law on Criminal Procedure (8 Mar. 1993), *available at* http://www.cdpcambodia.org/soclaw.asp.
[90] Law on Temporary Detention Period, *promulgated by* CS/RKM/0899/09, art. 1 (26 Aug. 1999).
[91] *See* Internal Rules, *supra* note 16, pmbl. ¶ 5. The drafters of the Internal Rules recognize the continuing relevance of Cambodian procedures when they acknowledge that "additional rules" will need to be adopted where Cambodian law does not address a particular matter, is unclear, or is inconsistent with international standards. *Id.*

the Temporary Detention Law as well as the UNTAC Law's requirement of "immediate" release when pre-trial detention procedures are not followed.[92]

25. The mandate of the European Court of Human Rights (ECHR) can be analogized to the authority of the ECCC in this respect — both have the power determine if a law is consistent with international standards but not to review the interpretation of that law by national courts.[93] It is thus notable that the ECHR has found that Article 5(1) of the European Convention authorizes it "to review the observance of domestic law by the national authorities[.]"[94] This article provides in part, "[n]o one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law."[95] The ECHR found that this wording refers not only to the fact that domestic law must conform to the Convention, but also to Member States' obligation to comply with domestic law.[96] For this reason,

> [w]hilst it is not normally the Court's task to review the observance of domestic law by the national authorities …, it is otherwise in relation to matters where, as here, the Convention refers directly back to that law; for in such matters, disregard of the domestic law entails breach of the Convention, with the consequence that the Court can and should exercise a certain power of review[.][97]

26. The ICC Appeals Chamber has similarly interpreted Rome Statute language providing that arrested persons "shall be brought promptly before the competent judicial authority in the custodial State which shall determine, in accordance with the law of that State, that … [t]he person has been arrested in accordance with the proper process … and … [their] rights have been respected."[98] The Appeals Chamber rejected the accused's argument that this article empowers the court to determine the correctness of domestic authorities'

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[92] *See* UNTAC Law, *supra* note 88, art. 22(1).
[93] *See* Ringeisen v. Austria, Eur. Ct. HR, App. No. 2614/65, ¶ 97 (16 July 1971).
[94] Case of Winterwerp v. Netherlands, Eur. Ct. HR, App. No. 6301/73, ¶ 46 (24 Oct. 1979).
[95] European Convention, *supra* note 38, art. 5(1).
[96] *See* Winterwerp v. Neth., *supra* note 94, ¶ 46.
[97] *Id.* ¶ 46.

decisions, but found that "[i]ts task is to see that the process envisaged by [domestic] law was duly followed and that the rights of the arrestee were properly respected."[99]

27. Likewise, because the Establishment Law "refers back" to Cambodian procedural law with regard to questions of arrest and detention, the ECCC has the textual authority to determine whether domestic procedures have been observed by other Cambodian courts.

B. The ECCC Has the Inherent Authority to Review the Legality of Prior Detention and Provide an Effective Remedy

28. As a correlary of the right to have the legality of detention reviewed,[100] the ECCC must have the jurisdiction to consider the legality of detention. Indeed, the Cambodian Criminal Code provides that "[a]ny judge who has received a complaint regarding illegal confinement shall make an immediate examination."[101] In reviewing the legality of detention in two cases before the ICTR, the Appeals Chamber attributed the accuseds' detention by domestic authorities to the Tribunal's Prosecutor in one case, but not the other. Nevertheless in both cases the Chamber affirmed the accused's fundamental human right to "recourse to an independent judicial officer for review of the detaining authority's acts[.]"[102] It found that

> the Tribunal must hear [a challenge to the legality of detention] and rule upon it without delay, as principal instruments of human rights law prescribe. If such a writ is filed but not heard, the Chamber will find that a fundamental right of the accused has been violated.[103]

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[98] Rome Statute, *supra* note 68, art. 59(2). *See also id.* art. 99(1) (providing *inter alia* that enforcement of arrest warrants "shall be executed in accordance with the relevant procedure under the law of the requested State").
[99] *Lubanga* Appeals Decision, *supra* note 58, ¶ 41.
[100] The ICTR Appeals Chamber has found that "the notion that a detained individual shall have recourse to an independent judicial officer for review of the detaining authority's acts is well established by the Statute and Rules" and human rights law. *Id.* ¶ 88. *See also Semanza* 2000 Appeals Decision, *supra* note 56, ¶ 112.
[101] Code of Criminal Procedure, art. 507. The meaning in the official Khmer version is similar to "take a look at."
[102] *Barayagwiza* 1999 Appeals Decision, *supra* note 43, ¶ 88. *See also Semanza* 2000 Appeals Decision, *supra* note 56, ¶ 112.
[103] *Semanza* 2000 Appeals Decision, *supra* note 56, ¶ 113 (citation omitted).

29. The ICTY Trial Chamber has similarly said, "the Tribunal certainly does have both the power and procedure to resolve a challenge to the lawfulness of a detainee's detention."[104] This right belongs to "[a] detained person whose case has been assigned to the Trial Chamber[.]"[105] "Once … a [preliminary] motion has been filed before a Trial Chamber, the prosecution has a right to file a response, and the Trial Chamber then gives its decision."[106]

30. If the CIJs authority to review the legality of Duch's prior detention is not found in text of the Establishment Law, it should nevertheless be considered one of its inherent powers. In the *Rwamakuba* case, the ICTR Appeals Chamber found that "neither [its] Statute, nor the Rules of th[e] Tribunal provide for a right to an effective remedy for violations of human rights."[107] Nevertheless, it held that its power to provide an effective remedy "arises out of the combined effect of the Tribunal's inherent powers and its obligation to respect generally accepted international human rights norms."[108] This inherent power "accrues to the Chamber because [it] is essential for the carrying out of judicial functions, including the fair and proper administration of justice."[109] An additional source is the nature of the ICTR, a "special kind of subsidiary organ of the U.N. Security Council" that is "bound to respect and ensure respect for generally accepted human rights norms."[110] As discussed above, the ECCC also has strong ties to the United Nations and is a mechanism intended to promote international justice. Furthermore, due to its close connection to the Cambodian judiciary, it has perhaps an ever greater obligation to ensure respect for

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[104] Proscutor v. Radoslav Brdanin, Case No. IT-99-36-T**,** Decision on Petition for a Writ of Habeas Corpus on Behalf of Radoslav Brdanin, ¶ 5 (Trial Chamber, 8 Dec. 1999).
[105] *Id.* ¶ 6.
[106] *Id.*
[107] *Rwamakuba* Decision on Appropriate Remedy, *supra* note 40, ¶ 40.
[108] *Id.* ¶ 45.
[109] *Id.* ¶ 47. As noted by one commentator, "[t]he judge alone has power to exercise full jurisdiction over a case whenever there arises a question relating to the abrogation or restriction of individual liberties. Whatever the stage of the proceedings, the judge's role as defender of human rights is a dominant feature of criminal procedure[.]" EUROPEAN CRIMINAL PROCEDURES, 531 (M. Delmas-Marty & J.R. Spencer, eds. 2002).
[110] *Rwamakuba* Decision on Appropriate Remedy, *supra* note 40, ¶ 48.

detainees' human rights. The Pre-Trial Chamber should thus find that the CIJs have the inherent authority to determine the legality of Duch's initial detention and consider its effect on the appropriateness of pre-trial release.

C. The ECCC Has an Obligation to Determine Whether Duch's Prior Detention Was Lawful and Not Arbitrary

31. In evaluating the legality of detention, the first question addressed by both human rights bodies and international criminal courts is if it was lawful.[111] For detention to be lawful, it must occur "on such grounds and in accordance with such procedure as are established by law."[112] For example, the Inter-American Commission on Human Rights (IACHR) has said any detention extending beyond the legally specified period "should be deemed *prima facie* unlawful" because "any norm that authorizes the release of a prisoner from jail cannot be interpreted so as to allow the preventative detention to be prolonged for a greater length of time than the procedural code deems reasonable for the entire judicial procedure."[113] Consequently, any extension of a period of detention must be "strictly scrutinized."[114] Not only must detention be lawful, it also must not be "arbitrary."[115]

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[111] *See, e.g.,* Klaus Altmann (Barbie) v. France, Eur. Comm'n HR, App. No. 10689/83, at 234 (4 July 1984) (finding that "it is [the ECHR's] responsibility to satisfy [itself] that a legal basis existed and that domestic law has not been interpreted or applied in an arbitrary manner").

[112] ICCPR, *supra* note 31, art. 9(1); Clifford McLawrence v. Jamaica, HRC Comm. No. 702/1966, ¶ 5.5 (1997) ("the principle of legality is violated if an individual is arrested or detained on grounds which are not clearly established in domestic legislation"); Hugo van Alphen v. Netherlands, HRC Comm. No. 305/1988, ¶ 5.6 (1990) (providing that States must "observe[] the rules governing pre-trial detention laid down in the Code of Criminal Procedure"). *See also* European Convention, *supra* note 38, art. 5(1)(c) (providing in part that "[n]o one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: … c. the lawful arrest or detention of a person"); American Convention, *supra* note 38, art. 7(2) (providing that "[n]o one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto"); African [Banjul] Charter on Human and Peoples' Rights, *adopted on* June 27, 1981, art. 6, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* 21 Oct. 1986 (providing that "[n]o one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained"); Rome Statute, *supra* note 68, art. 55(1)(d) (providing that no person shall be "deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in this Statute").

[113] Jorge A. Giménez v. Argentina, Case 11.245, Report 12/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.91 Doc. 7 at 33, ¶ 71 (1996).

[114] *Id*. ¶ 72.

[115] *See* ICCPR, *supra* note 31, art. 9(1); Rafael Marques de Morais v. Angola, HRC Comm. No. 1128/2002, ¶ 6.1 (2005) ("the notion of 'arbitrariness' is not to be equated with 'against the law', but must be interpreted more broadly"); Albert Womah Mukkong v. Cameroon, HRC Comm. No. 458/1991, ¶ 9.8 (1994) (finding that

Detention has been considered arbitrary where it is not "reasonable" and "necessary" under the circumstances.[116] Thus, an assessment of the lawfulness of detention requires both a determination of whether the applicable procedures have been complied with and also "the reasonableness of … the legitimacy of the purpose pursued by the arrest and the ensuing detention."[117]

32. In *Altmann v. France*, the European Commission on Human Rights considered whether France was responsible for an allegedly illegal extradition procedure employed by Bolivia resulting in the applicant's detention in France.[118] In considering whether there had been "concerted action" between the two States[119] as argued by the appellant, the Commission examined whether the French law governing his detention in France had been complied with and was not arbitrary. Because these criteria had been satisfied it found no violation of the Convention.[120]

33. In the *Lubanga* case, the ICC considered the legality of the accused's arrest and detention by the Demoractic Republic of the Congo in response the accused's challenge to the court's jurisdiction.[121] The ICC Pre-Trial Chamber determined that, in the absence of an abuse of process, it was obligated to examine violations of the accused's rights while in custody in a national jurisdiction "only once it has been established that there has been

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abritrariness includes factors such as "inappropriateness, injustice, lack of predictability and due process of law"). *See also* American Convention, *supra* note 38, art. 7(3); Rome Statute, *supra* note 68, art. 55(1)(d); Steel & Others v. United Kingdom, App. No. 24838/94, Eur. Ct. HR, ¶ 54 (23 Sept. 1998).

[116] *See Womah Mukkong v. Cameroon*, *supra* note 115, ¶ 9.8; *van Alphen v. Neth*., *supra* note 112, ¶ 5.8. *See also Bronstein et al. v. Arg*., *supra* note 41, ¶ 18 (stating that the duration of detention "cannot be deemed reasonable solely because it is the term established by law"); Report of the Working Group on Arbitrary Detention, Comm. HR, 49th Sess., at 20, ¶ III.2, U.N. Doc. E/CN.4/1993/24 (1993) (finding a "[legal] measure of deprivation of freedom is inherently arbitrary in character … [w]here, although the measure has been made of a specific duration, it is continuously renewable and, *a fortiori*, renewed"); *Kajelijeli* Appeals Judgment, *supra* note 53, ¶ 233 (finding the length of a suspect's pre-trial detention to be arbitrary where, although not technically violative of the Tribunal's detention rules, it did not conform with the overall purpose of those rules or the Tribunal's overarching responsibility to protect the rights of the accused).

[117] Ilijkov v. Bulgaria, App. No. 33977/96, Eur. Ct. HR, ¶ 94 (2001).

[118] *See Altmann v. Fr.*, *supra* note 111, at 232.

[119] *See id.* at 234.

[120] *See id.* at 235.

[121] *See Lubanga* Pre-Trial Decision, *supra* note 71, at 3 (noting that the accused challenged the court's jurisdiction under the "abuse of process" doctrine).

concerted action between the Court and the . . . [domestic] authorities[.]"[122] On review, the Appeals Chamber found no involvement on the part of the Prosecutor in the accused's detention in the custodial State.[123] Nevertheless, it determined that the court was tasked by its statute "to see that the process envisioned by [national] law was duly followed and that the rights of the arrestee were properly respected."[124] The Appeals Chamber noted that the Pre-Trial Chamber had in fact "determined that the process followed accorded with Congolese law" and found "[t]here [was] nothing to contradict this statement … [or] to indicate that his arrest or appearance before the Congolese authority involved or entailed any violation of his rights."[125]

D. The ECCC Has an Obligation to Take into Account of the Length of Prior Detention in Determining the Legality of Continued Detention

34. The newly adopted Cambodian Code of Criminal Procedure provides that "[a]s a general principle, the freedom of an accused must be allowed[,]" but "in special cases, the accused can be temporarily detained[.]"[126] Human rights bodies likewise have determined that pre-trial detention is an exception[127] and should not exceed the limits of what is strictly necessary.[128] In evaluating the appropriateness of continued detention, these bodies apply a balancing test. For example, the ECHR has said, "[i]t falls in the first place to the national judicial authorities to … examine all the circumstances arguing for or

[122] *Id.* at 9. *See also id.* at 10 (considering that "the abuse of process doctrine constitutes an additional guarantee of the rights of the accused").
[123] *See Lubanga* Appeals Decision, *supra* note 58, ¶ 42.
[124] *Id.* ¶ 41. *See* Rome Statute, *supra* note 68, art. 59(2) (providing in part, "[a] person arrested shall be brought promptly before the competent judicial authority in the custodial State which shall determine, in accordance with the law of that State, that: … (b) The person has been arrested in accordance with the proper process; and (c) The person's rights have been respected").
[125] *Lubanga* Appeals Decision, *supra* note 58, ¶ 41.
[126] Code of Criminal Procedure, art. 203.
[127] *See* W.B.E. v. Netherlands, HRC Comm. No. 432/1990, ¶ 6.3 (1992); *Ilijkov v. Bulg.*, *supra* note 117, ¶ 84; *Giménez v. Arg.*, *supra* note 113, ¶ 84.
[128] *See* Suárez-Rosero v. Ecuador, Inter-Am. Ct. H.R, Judgment of Nov. 12, 1997, Ser. C. No. 35, ¶ 77.

against the existence of a genuine requirement of public interest justifying … a departure from the rule of respect for individual liberty."[129]

35. International courts have generally considered release to be the exception, but in recent years they too have applied a balancing test. The ICTY Trial Chamber has said, "the focus [of provisional detention evaluations] must be on the particular circumstances of each individual case … [and the Tribunal's] task must rather be to weigh up and balance the factors presented to it in that case before reaching a decision."[130] Nevertheless, it retains "considerable discretion when determining the weight to accord these factors in light of the specific circumstances of the case."[131]

36. Both the ICTR and ICTY Trial Chambers have found the length of detention to be an "important factor in the exercise of discretion in determining an application for provisional release."[132] Nevertheless, while a long period of pre-trial detention "entail[s] the need for a reparation[,]" it is not "*per se* good cause for [provisional] release."[133] In

[129] Letellier v. France, App. No. 12369/86, Eur. Ct. HR, ¶ 45 (26 June 1991).
[130] Prosecutor v. Miodrag Jokic, Case No. IT-01-42-PT, Order on Miodrag Jokic's Motion for Provisional Release, ¶ 17 (20 Feb. 2002) (citation omitted). *See also* Prosecutor v. Issay Hassan Sesay et al., Case No. SCSL 2004-15-PT, Decision on Application of Issa Sesay for Provisional Release, ¶ 39 (Trial Chamber, 31 Mar. 2004) (adopting the view of the *Jokic* Trial Chamber).
[131] Prosecutor v. Popović et al., Case No. IT-05-88-AR65.1, Decision on Interlocutory Appeal of Trial Chamber Decision Denying Drago Nikolić's Motion for Provisional Release, at 5 (Appeals Chamber, 24 Jan. 2006).
[132] Prosecutor v. Momčilo Krajišnik & Biljana Plavšić, Case No. IT-00-39 & 40-PT, Decision on Momčilo Krajišnik's Notice of Motion for Provisional Release, ¶ 22 (Trial Chamber, 8 Oct. 2001). *See also* Prosecutor v. Simo Drljaca & Milan Kovacevic, Case No. IT-97-24-T, Decision on Defence Motion for Provisional Release, ¶ 22 (Trial Chamber, 20 Jan. 1998) (finding that the length of an accused's detention is a factor to be considered in determining whether the accused has shown exceptional circumstances sufficient to justify his provisional release). The ICC has a statutory obligation ensure that no one is detained for an unreasonable period prior to trial due to "inexcusable delay" by the Prosecutor. *See* Rome Statute, *supra* note 68, art. 60(4). In applying this provision, the Appeals Chamber has found that "issues regarding prior detention are relevant where they are part of the 'process of bringing the Appellant to justice for the crimes that form the subject-matter of the proceedings before the Court'." Situation in the Democratic Republic of the Congo in the Case of Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06 (OA7), Judgment on the Appeal of Mr. Thomas Lubanga Dyilo Against the Decision of Pre-Trial Chamber I, ¶ 121 (Appeals Chamber, 13 Feb. 2007). *Cf. Semanza* Trial Judgment & Sentence, *supra* note 69, ¶ 584 (crediting the accused for time held in the custodial state solely on the basis of a Rwandan warrant of arrest based on the same allegations forming the subject matter of his ICTR trial because "fairness requires that account be taken of the total period the Accused spent in custody").
[133] Joseph Kanyabashi v. Prosecutor, Case No. ICTR-96-15-A, Decision on Application for Leave to Appeal Filed Under Rule 65(D) of the Rules of Procedure and Evidence, at 3 (Appeals Bench, 13 June 2001). *See also* Prosecutor v. Théoneste Bagosora et al., Case No. ICTR-98-41-T, Decision on the Defence Motion for Release, ¶ 22 (Trial Chamber, 12 July 2002) (stating that "[a]lthough the length of an accused's detention is not, by itself, a determining factor, it may nevertheless be one factor to be assessed in consideration of the … three cumulative factors that must be weighted … to justify[] provisional release").

the *Krajišnik* case, the Trial Chamber decided not to allow release where the length of detention did not exceed periods found unreasonable by the ECHR, trial was anticipated to start in a few months, and the accused had not satisfied the Chamber that if released he would appear for trial and not pose a danger to victims and witnesses.[134] In dissent, Judge Robinson argued that, although the accused's two-year pre-trial detention may not be so long as to violate human rights standards, taken together with guarantees offered by the accused to ensure his appearance, it justified his release.[135]

37. In the *Bagosora et al.* case, the ICTR Trial Chamber considered whether the length of the accused's detention, combined with other factors, warranted provisional release.[136] The Prosecutor argued that the length of detention should be calculated not as six years, but as five years and four months — excluding the period of detention not found imputable to the Tribunal. Although the Trial Chamber did not explicitly address this argument, it appears to have taken into account the full period of the accused's detention and not only the time found attributable to the Tribunal.[137] The Chamber thus noted, "in certain circumstances, six years of pre-trial detention may be a factor in the consideration of exceptional circumstances warranting the release of an accused."[138]

III. Conclusion

38. The ECCC plays an important role in bringing justice to Cambodia. This includes not only its core function of trying senior Khmer Rouge leaders and those most responsible for serious crimes committed during the Democratic Kampuchea period, but also the

[134] *See Krajišnik & Plavšić* Trial Decision, *supra* note 132, ¶ 22.
[135] *See id.* ¶ 43 (Robinson, J., dissenting).
[136] *See Bagosora et al.* Trial Decision, *supra* note 133, ¶¶ 22-27.
[137] *See id.* ¶ 27.
[138] *Id.* Nevertheless, the Chamber found that release was not warranted due to countervailing considerations. *Id. But cf.* Prosecutor v. Théoneste Bagosora, Case No. ICTR-96-7 & Prosecutor v. Gratien Kabiligi & Aloys Ntabakuze, Case Nos. ICTR-97-34 & ICTR-97-30 & Prosecutor v. Anatole Nsengiyemuva, Case No. ICTR-96-12, Decision on the Prosecutor's Motion for Joinder, ¶ 153 (Trial Chamber, 29 June 2000) (finding it unnecessary to include time in custody under national authorities in its calculations of the amount of delay that would result from joinder because "[t]he Tribunal has no authority over national jurisdiction[,]" "cannot direct

example it sets for the Cambodian judiciary. For eight years Duch has been held in detention without any apparent attempt to bring him to trial. He is not the only detainee in Cambodia who has been held for an extended period without process. It is essential to the legitimacy and legacy of the ECCC that it does everything in its power to ensure the rights of persons falling under its jurisdiction. By doing so, it can make a significant contribution to long-term reconciliation efforts in Cambodia, the scope of which extends far beyond the ECCC's limited mandate and the short period of time during which it will be in operation.

39. To this end, the Pre-Trial Chamber should find that the CIJs have the jurisdiction to review the legality of Duch's provisional detention, and itself consider if his rights in fact have been violated. Whether or not the Pre-Trial Chamber finds that the delay in bringing Duch to trial entitles him to provisional release, or instead finds that some other remedy would be more appropriate, taking into account this question from the earliest stages of the proceedings will highlight the seriousness of the issue and establish an exemplary model of due process for other Cambodian courts.

Submitted by

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national authorities to do or not do a particular act[,]" and "cannot therefore be held responsible for the activities of national governments or their courts").