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Phnom Penh,
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CAMBODIAN DEFENDERS PROJECT

Promoting Human Rights by Strengthening Rule of Law, Legal System and
Liberal Democracy

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3 October 2007

Hand Delivered

Greffier
Pre-Trial Chambers
Extraordinary Chambers in the
Courts of Cambodia
National Road 4
Choam Chao, Dangkoa
Phnom Penh, Cambodia

Re: *Amicus Curiae* Brief of Jeffrey M. KAHAN
Criminal Case File: 002/14-08-2006
Case Name: KAING Guek Eav

Dear Sir or Madam:

As you should be aware, yesterday I submitted an *amicus curiae* brief in the above referenced matter. After submission, I noticed that on page 2, para. 1, and page 8, para. 38, of the brief there were errors. I would very much like that to be corrected so that the brief that is in the official record of the Chambers is the correct one. Accordingly, I enclose herewith a new page 2 and page 8, with the corrections to paras. 1 and 38, and ask that you replace these pages with the ones in the brief that was provided yesterday.

Kindly contact the undersigned at the above office, address and phone numbers, or by mobile phone at 012 945 719, to advise of the date of the public hearing on the mater. Also, please contact the undersigned if there are any other questions or concerns that must be addressed with the regard to the submission and handling of this brief.

I thank you in advance for your kind cooperation and courtesies extended.

Sincerely,

Jeffrey M. KAHAN

Encs.



គ្រូបម្ភកច្បាប់ការពារសិទ្ធិកម្ពុជា

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2 October 2007

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Re: *Amicus Curiae* Brief of Jeffrey M. KAHAN
Criminal Case File: 002/14-08-2006
Case Name: KAING Guek Eav


Dear Sir or Madam:

Pursuant to the President of the Pre-Trial Chamber's Public Notice of September 4th, I herewith enclose one original form of an *Amicus Curiae* brief for submission to the Pre-Trial Chamber in the above-referenced matter. Please provide copies of the brief as may be necessary to the relevant parties.

Kindly contact the undersigned at the above office, address and phone numbers, or by mobile phone at 012 945 719, to advise of the date of the public hearing on the mater. Also, please contact the undersigned if there are any other questions or concerns that must be addressed with the regard to the submission and handling of this brief.

I thank you in advance for your kind cooperation and courtesies extended.

Sincerely,


Jeffrey M. KAHAN

Encs.

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

Criminal Case File: 002/14-08-2006
Case Name: KAING Guek Eav
Alias, Duch
Filed to: Pre-trial Chamber
Date of filing: 2 October 2007
Party filing: Mr. Jeffrey M. KAHAN as *Amicus Curiae*
Original language: English
Type of document: CONFIDENTIAL

**AMICUS CURIAE BRIEF
REGARDING APPEAL OF THE
31 JULY 2007 ORDER OF PROVISIONAL DETENTION**

Filed by:
Mr. Jeffrey M. KAHAN

អង្គបុរេជំនុំជម្រះនៃអង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា	
THE PRE - TRIAL CHAMBER OF THE ECCC	
លេខ No. :.....	001.....
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I. INTRODUCTION

1. It is with great respect for the historical and special role of this now operational Extraordinary Chambers in the Courts of Cambodia ("ECCC") that I, Jeffrey M. KAHAN, ("your *amicus curiae*") submit this *amicus curiae* brief based on the President of the Pre-Trial Chamber's invitation pursuant to Internal Rule 33 by public notice dated September 4th. The invitation allowed briefs to be submitted within 30 days of the public notice.¹

2. By way of brief background, your *amicus curiae* is an attorney-at-law and member in good standing of the Bar Associations for the States of New Jersey and New York in the United States of America. Since August of 2003, your *amicus curiae* has been a Legal and Development Advisor for the Cambodian Defenders Project ("CDP"). CDP is a local Cambodian NGO that is one of the oldest and largest providers of legal aid services to the poor and vulnerable on many legal matters in all courts throughout the Kingdom of Cambodia. CDP also provides important services as a provider of legal awareness, trainings and advocacy related to many matters that have some bearing on human rights and rule of law development and strengthening within Cambodia. In particular, since its founding to the present time, CDP lawyers and advocates consistently have performed an important role in the development of a system of justice that seriously understands and takes action to protect and enforce fundamental human rights, particularly those associated with due process of law and fair trial rights.

3. This now established and operational ECCC indeed has an historical and pre-eminent role and responsibility to render justice on behalf of the millions of souls who perished under the regime of Democratic Kampuchea and the untold millions who still live with its inhuman legacy.

4. At the heart of its undertaking, this ECCC must render justice in a manner that is competent, independent and impartial under the rule of law within the Kingdom of Cambodia.

5. Therefore, it is your *amicus curiae*'s sole desire to provide some role, no matter how large or small, to assist the ECCC to provide justice in a manner that is according to the strict requirements and limits of the law upon which it has been so conceived and authorized, and that has full respect for fundamental human rights as are protected in the Cambodian procedural laws, the Constitution of the Kingdom of Cambodia, and international human rights treaties, most notably the International Covenant on Civil and Political Rights

¹ http://www.eccc.gov.kh/english/cabinet/press/38/Pre-trial_statement_4_Sept_07__ENG.pd

("ICCPR"), all of which the courts of Cambodia, now including this ECCC, are bound to uphold and enforce.

6. This *amicus curiae* brief thus will focus directly on how this ECCC will perform its judicial responsibilities and in this instance specifically with regard to how it will address the extremely compelling questions presented by the case of Kaing Guek Eav, alias Duch ("Duch"), former Director of the Security Prison S-21 under the regime of Democratic Kampuchea from 1975 to 1979.

II. PROCEDURAL HISTORY

7. Duch was prosecuted, charged and detained by the Kingdom of Cambodia's military court in May of 1999 based on violations of Decree Law No. 2, the Law to Outlaw the Democratic Kampuchea Group.²

8. On September 6, 1999, Duch was further charged and detained in the military court with the crime of Genocide pursuant to Decree Law No. 1.³

9. By August of 2001, the first Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea ("ECCC Law I") entered into force.

10. On February 22, 2002, while in pre-trial detention since 1999 on the charges under Decree Laws Nos. 1 and 2, Duch was specifically charged and issued a detention order by the military court under ECCC Law I, Article 5, Crimes Against Humanity.⁴

11. On February 22, 2003, the military court extended Duch's pre-trial detention on the Crimes Against Humanity charge.⁵

12. In June of 2003 negotiations between the Royal Government of Cambodia and the United Nations were finalized and an Agreement ("the Agreement") regarding the establishment and functioning of the Extraordinary Chambers in the Courts of Cambodia was reached and became law in October 2004.

13. In October of 2004, the ECCC Law I was amended in order to conform it entirely to the Agreement. Hereinafter, the amended, final version of the ECCC Law in force will be referred to as the ECCC Law where the amendments do not affect the substantive provisions of the ECCC Law I.

² See the "Order to Forward Case for Investigation" from the Military Prosecutor of 10 May 1999.

³ See the "Order to Forward Case for Investigation" from the Military Prosecutor of 6 September 1999.

⁴ See the Detention Order of Investigating Judge of Military Court of 22 February 2002.

⁵ See the Detention Order of Investigating Judge of Military Court of 22 February 2003.

[02/10/2007]

[002/14-08-2006]

14. On February 22, 2004, the military court extended Duch's pre-trial detention on the Crimes Against Humanity charge under the ECCC Law.⁶
15. On February 28, 2005, the military court charged and issued a detention order against Duch specifically with violations of the ECCC Law, Article 6, War Crimes, and Article 8, Crimes Against Internationally Protected Persons.⁷
16. On February 28, 2006, the military court extended Duch's pre-trial detention on the ECCC Law, Articles 6 and 8 charges.
17. In or about July of 2006, the Co-Prosecutors, Co-Investigating Judges, and the Judges of the Pre-Trial Chambers, Trial Chamber and Supreme Court Chamber of the ECCC were all officially sworn in.
18. By in or about June of 2007, the Internal Rules for the ECCC were adopted.
19. On July 18, 2007, the Co-Prosecutors of the ECCC made an Introductory Submission against Duch to the Co-Investigating Judges on the charge of ECCC Law amended, Article 5, Crimes Against Humanity.
20. There were two fundamental questions before the Co-Investigating Judges in this matter, which could be fairly put forward as follows:
 1. With clear recognition and understanding of the charges and detention orders against Duch whereby Duch has been held in detention by the military court of Cambodia since 1999, and specifically since February 2002 pursuant to the ECCC Law, Article 5, Crimes Against Humanity charge, without ever being brought to trial, whether the ECCC Co-Investigating Judges should accept jurisdiction over Duch on the Co-Prosecutors' Introductory Submission under the ECCC Law, Article 5, Crimes Against Humanity charge; and
 2. Depending on the outcome of the jurisdiction question, addressing issues of provisional detention.
21. On July 31, 2007, the Co-Investigating Judges issued an Order of Provisional Detention wherein the Judges ordered that the ECCC exercise jurisdiction over Duch on the ECCC Law, Article 5, Crimes Against Humanity charge and place Duch in provisional detention for a period not exceeding one year.⁸

⁶ See the Detention Order of Investigating Judge of Military Court of 22 February 2004.

⁷ See the Detention Order of Investigating Judge of Military Court of 28 February 2005.

⁸ See Order of Provisional Detention by Co-Investigating Judges of the ECCC of 31 July 2007.

III. *AMICUS CURIAE* SUBMISSIONS

22. The correct standard that the Co-Investigating Judges and Chambers of the ECCC must follow in their decision and judgment making processes (“the ECCC standard”) must be understood and established as a fundamental prerequisite and foundation in order for the Co-Investigating Judges and now this Pre-Trial Chamber to undertake the critical analysis and judgment on whether the ECCC should exercise jurisdiction over Duch, and if so, deal with the provisional detention issues.

23. In its “grounds for the decision” (“grounds”) in support of the Order of Provisional Detention (“Order”), the Co-Investigating Judges failed to apply the correct ECCC standard. In the points of law to follow your *amicus curiae* will:

- Advocate for the application of the correct ECCC standard that the Pre-Trial Chamber must follow on this appeal.
- In so applying this standard, your *amicus curiae* will demonstrate that there is a certain and sufficient basis in Cambodian procedure and law to clearly determine that Duch’s rights have been violated in a manner that objectively and fairly can be deemed to be serious and egregious.
- Furthermore, your *amicus curiae* will demonstrate under the ECCC standard that the question of the appropriate remedy for such abuse of Duch’s rights is not sufficiently answered by Cambodian procedure and law and therefore, given the gravity of the charge and historical undertaking of the ECCC, it is reasonable, right and proper to seek guidance in rules established at the international level.
- In seeking such guidance, your *amicus curiae* will submit that there is persuasive authority, substantially as found in the abuse of process doctrine established in international law, to support and justify a decision and judgment by the Pre-Trial Chamber that jurisdiction should not be exercised over Duch by the ECCC.
- Your *amicus curiae* will leave all other relevant and applicable arguments - whether they pertain to provisional detention or some other remedy for abuse of rights - on behalf of Duch to his Defense counsel or other *amici curiae*.

IV. POINTS OF LAW

A - The plain language of the Internal Rules, the Agreement and the ECCC Law establish a mandatory standard to be followed by the Co-Investigating Judges and Pre-Trial Chamber in their decision and judgment making processes.

24. The Co-Investigating Judges (alternatively, “Judges”) and all the Chambers, including this Pre-Trial Chamber (alternatively, “Chamber”), of the ECCC must apply the correct standard in their decision and judgment making processes, the ECCC standard, as required by the plain language of the Internal Rules (“IRs”), the Agreement and the ECCC Law.

25. The creation and implementation of the IRs was a necessary step in the ECCC development process. The IR’s provide essential procedural rules and standards for the various activities of the ECCC. The drafters of the IRs were aware of their obligation to follow the letter and spirit of the Agreement and ECCC Law regarding the requirement that Cambodian procedure and law apply to the activities of the ECCC with guidance being sought in rules established at the international level, as an option, when relevant and necessary.

26. IR 2 is crucial to understanding and applying the correct ECCC standard. IR 2 states:

Rule 2. Procedure Applicable in case of *lacunae* in these IRs

Where in the course of these ECCC proceedings, a question arises which is not addressed by these IRs, the Co-Prosecutors, the Co-Investigating Judges or the Chambers shall decide in accordance with Article 12(1) of the Agreement and Articles 20 new, 23 new, 33 new or 37 new of the ECCC Law as applicable, having particular attention to the fundamental principles set out in Rule 21 and the applicable criminal procedural laws.⁹

27. As can be concluded from the plain language of IR 2, IR 2 recognizes that there will be some limitations in the extent to which the IRs cover all questions or matters before the ECCC. Therefore, IR 2 makes clear that when questions are not covered by the IRs then decisions on the relevant question or matter must follow the dictates of the Agreement and ECCC Law with focus being given to the “principles set out in Rule 21 and the applicable criminal procedural laws.” When questions are not covered by the IRs, the plain language of the Agreement and ECCC Law makes clear that the ECCC must first examine and apply the relevant Cambodian procedure and law to any question or matter that was to come before the ECCC.

28. Article 12 of the Agreement could not be clearer on this point:

1. The procedure [of the ECCC] shall be in accordance with Cambodian law. Where Cambodian law does not deal with a particular matter, or

⁹ Internal Rule 2.

where 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.¹⁰

29. Article 23 of the ECCC Law determines how the Co-Investigating Judges are to manage and decide matters before them. In line with the language of Article 12 of the Agreement, Article 23 states:

All investigations shall be the joint responsibility of two investigating judges, one Cambodian and another foreign, hereinafter referred to as Co-Investigating Judges, and shall follow existing procedures in force. If these existing procedures do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application or if there is a question regarding their consistency with international standards, the Co-Investigating Judges may seek guidance in the procedure in procedural rules established at the international level.¹¹

30. The Agreement and ECCC Law equally make it clear that only if in the first instance Cambodian procedure and law is not sufficient to address a question, than guidance sought in rules and standards established at the international level is an option, not a requirement.

B - The Applicable and Correct ECCC Standard

31. A careful and complete reading of the Order demonstrates that the Co-Investigating Judges did not correctly establish and apply the ECCC standard with specific regard to the jurisdiction question.

32. The particular jurisdiction question placed squarely before the Judges, and now this Chamber, is whether or not to accept jurisdiction over Duch based on his procedural history of being detained by the military court since 1999 on charges unrelated to the ECCC subject matter jurisdiction, and 5 ½ years - since February 22, 2002 - specifically on the ECCC Law, Article 5, Crimes Against Humanity charge, all without ever being brought to trial.

33. Pursuant to IR 2, the Co-Investigating Judges were first required to address the jurisdiction question by applying appropriate IRs, if available, to the question.

¹⁰ The Agreement, Article 12(1).

¹¹ ECCC Law, Article 23.

34. With the utmost respect to the Co-Investigating Judges, it is clear that they did not follow this necessary first step. The Judges simply make no effort in their grounds to examine whether the question is addressed by the IRs.

35. A careful and complete reading of the IRs demonstrates that in fact the particular jurisdiction question at issue is not addressed, or if it is, it is done so in a manner that lacks certainty and clear authority upon which the Judges or this Chamber fairly and competently can make a decision and render judgment.

36. In other words, the IRs do not provide the clear procedural authority and standards for the Judges or Chamber to determine whether or not to accept jurisdiction over Duch based on his procedural history of being detained by the military court since 1999 on charges unrelated to the ECCC subject matter jurisdiction, and 5 ½ years - since February 22, 2002 - specifically on the ECCC Law, Article 5, Crimes Against Humanity charge, all without ever being brought to trial.

37. Therefore, pursuant to the ECCC standard the Judges were required "to decide in accordance with Article 12(1) of the Agreement and Articles 20 new, 23 new, 33 new or 37 new of the ECCC Law as applicable, having particular attention to the fundamental principles set out in Rule 21 and the applicable criminal procedural laws."¹²

38. Article 12(1) of the Agreement and Article 23 of the ECCC Law are quoted in full *supra* at paragraphs 28 and 29.

39. Pursuant to the ECCC standard, it was a mandatory requirement that the Judges first examine applicable Cambodian procedure and law on the jurisdiction matter.

40. The Judges, again respectfully, did not do this. The Judges simply made no effort to examine applicable Cambodian law and procedure on the jurisdiction matter. Rather than follow this required step in the ECCC standard, in their attempt to decide the matter the Judges directly proceed to the examination and application of jurisprudence from primarily national courts dealing with the jurisdiction related doctrines of *male captus, bene detentus* and abuse of process.

41. In understanding and applying the ECCC standard, the Chamber must not lose sight of the fact that the existing Cambodian court structure is one that is based on the civil law system of justice. A Jurist of no less authority than United States Supreme Court Justice, Antonin Scalia, has made the important point that in the civil law system it is the text of the

¹² Internal Rule 2.

law that is authoritative, and judicial opinions are, or should be, consulted for their persuasive effect only.¹³

42. Thus, the Judges immediate move to settle the matter through the application of judicial opinions defied this basic principle underlying the civil law system.

43. The ECCC standard plainly mandates that seeking guidance in rules established at the international level – which quite legitimately could include some of the jurisprudence relied on by the Judges - is only a secondary and optional, as opposed to initial and mandatory, procedure. Guidance at the international level assuredly does provide relevant assistance to the decision and judgment making process, and may in fact be determinative, but it cannot be solely relied upon at the expense of deviating entirely from a well defined framework for judicial review and decision making.

44. The Judges disregard for establishing and applying the correct ECCC standard must be corrected on this Appeal as it is manifest error of law. Failure by this Chamber to reverse the Order, confirm and apply the correct ECCC standard and render a decision and judgment pursuant to such standard will establish a very wrong precedent and only create serious and unnecessary questions as to whether this special body competently, independently and impartially can and will render justice.

C - Application of the ECCC Standard

45. As is stated *supra*, the Judges in their grounds and Order failed to perform the required first step under IR 2 of examining the IRs to determine if the IRs addressed the question of accepting jurisdiction over Duch's case. Additionally, as is stated *supra*, if the Judges properly had undertaken this required step, it would be revealed that the IRs do not provide the clear procedural authority and standards for the Judges or Chamber to determine whether or not to accept jurisdiction over Duch based on his procedural history of being detained by the military court since 1999 on charges unrelated to the ECCC subject matter jurisdiction, and 5 ½ years - since February 22, 2002 - specifically on the ECCC Law, Article 5, Crimes Against Humanity charge, all without ever being brought to trial.

46. Thus, in order to determine the jurisdiction matter IR 2 requires that Article 12(1) of the Agreement and Articles 20, 23, 33 or 37 of the ECCC Law as amended be applied "with particular attention to the fundamental principles set out in Rule 21 and the applicable criminal procedural laws."

¹³ Antonin Scalia, "Common Law Courts in a Civil Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws, Princeton University March 8-9, 1995.

C(i) - The ECCC is a court within the existing court structure of Cambodia

47. To begin the examination of this issue, as a fundamental threshold matter it must be established and confirmed that the ECCC is a court within the existing court system of the Kingdom of Cambodia. On this point, Article 2 of the ECCC Law as amended could not be clearer:

Extraordinary Chambers shall be established in the existing court structure, namely the trial court and supreme court to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian laws related to crimes, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979. (Emphasis added).¹⁴

48. To be sure, the ECCC is a special court; a so-called “hybrid court”. It is a war crimes tribunal to address grave matters of international humanitarian law that in the majority is staffed by Cambodian nationals in cooperation and coordination with representatives from the international community under the authority and with the assistance of the United Nations. Though it is entirely proper to acknowledge and appreciate that the ECCC carries a special historical status, purpose, jurisdiction and administrative structure, nevertheless, based on the plain language of the ECCC Law as amended, it is in fact only another trial court chamber, or court of first instance, existing side by side the other municipal and provincial trial courts, and the military court, in the Kingdom of Cambodia. Similarly, the ECCC is a special chamber within the existing Supreme Court of the Kingdom of Cambodia.

49. As is abundantly clear from the relevant language of the Agreement and ECCC Law, it is Cambodian procedure and law that is to take precedence over any other legal authority when the ECCC addresses matters before it.

50. In truth, the Co-Investigating Judges of the ECCC in dealing with Duch’s case were actually only one court of first instance within the existing Cambodian court structure just as the military court and its investigating judge has been a court of first instance within the existing Cambodian court structure also dealing with Duch’s case.

51. Therefore, in answering the jurisdiction questions before this Chamber an understanding must be reached as to the mechanism under applicable Cambodian procedural

¹⁴ ECCC Law amended Article 2.

laws that controls the issue of how the ECCC as a court of first instance within Cambodia addresses Duch's case given the procedural history that has transpired in the military court, which is in fact a sister court of first instance alongside the ECCC within the existing Cambodian court structure.

52. The Chamber can easily find in Cambodian law an understanding of the place of the military court within Cambodia's existing court structure. Decree Law No. 6, the Law on the Organization and Activities of the Adjudicate Courts of the State of Cambodia ("Adjudicate Courts Law") and the Provisions Relating to the Judiciary and Criminal Law and Procedure During the Transitional Period ("Transitional Criminal Law"), set forth the purpose and jurisdiction of the military court much as the Agreement and ECCC Law did for the ECCC.

53. The Adjudicates Courts Law clearly establishes the military court as a lower court of first instance, located in Phnom Penh, with jurisdiction over the entire territory of Cambodia. Article 9 of the Adjudicates Courts Law states:

The military court shall have competence to adjudicate and shall be subjected to appeals for those cases of military offenses.

Military offenses are those committed by military members in the army and which concerned with military discipline or effected properties of military armed forces.

In case when a military member committed normal criminal offence, he/she shall be prosecuted by the provincial/municipal court.

The procedure of the military court shall be the same as that of the provincial and municipal court.¹⁵

54. An impartial review of the matter clearly indicates that the military court did not have either personal or subject matter jurisdiction over the ECCC Law, Article 5, Crimes Against Humanity charge against Duch. First, it was error by the military court to accept that at the time of the charge, Duch could have been considered a military member of the army as could be reasonably contemplated and covered by the Adjudicates Courts Law. Second, it would stretch any legal interpretation to an irrational extreme to hold that the Crimes Against Humanity charge is a "military offense" as could be reasonably contemplated and covered by the Adjudicates Courts Law. It is fundamentally a crime of the highest level under international humanitarian law and as such was specifically incorporated into the ECCC Law.

¹⁵ Adjudicates Courts Law, Article 9. The relevant provisions of Transitional Criminal Law are substantially the same as the Adjudicates Courts Law and therefore do not impact on this analysis.

A Crimes Against Humanity offense does not meet the definition of an offense concerning “military discipline or effected properties of the military armed forces.”

55. Additionally, and perhaps most importantly, at the time Duch was charged in February of 2002 in the military court under Article 5 of the ECCC Law I, it should have been abundantly clear to the military court that the ECCC specifically and specially was to be the court in the existing Cambodian court structure that only was to have personal and subject matter jurisdiction over any charge against Duch under the ECCC Law. The Adjudicates Courts Law makes clear that “normal offenses” should be prosecuted in the municipal or provincial courts. Therefore, it is entirely reasonable to construct and assert that all ECCC Law charges were to have been prosecuted in the ECCC, not the military court.

56. Notwithstanding this seemingly obvious and important intent and purpose of the ECCC Law mechanism for the ECCC to be the court in the existing Cambodian judicial system to address all matters related to the ECCC Law, the Cambodian military court prosecutor and investigating judge decided to act under and invoke the authority of the ECCC Law and establish the military court as the court of first instance within the existing Cambodian court structure to begin the prosecution and investigating judge processes against Duch under the Article 5, Crimes Against Humanity charge.

C(ii) - Violation of Duch’s rights under Cambodian criminal procedural law, the Constitution of the Kingdom of Cambodia, and fundamental rights human rights under international human rights law

57. Duch’s rights have been violated, perhaps irreparably, under Cambodian criminal procedural laws, under the Constitution of the Kingdom of Cambodia, and under international human rights law.

Fundamental principles set out in applicable criminal procedural laws

58. Duch being charged and held in detention pursuant to orders by the military court under the ECCC Law strongly indicates serious breaches of Cambodian procedural law.

As stated, pursuant to the Adjudicates Courts Law, the military court was bound to follow the applicable procedure for the provincial and municipal trial courts that existed at that time.

Of significance to the analysis here are the criminal procedural laws, the Law on Temporary Detention and the Transitional Criminal Law, which were in effect at the time Duch was charged and detained in the military court under the ECCC Law, Article 5, charge.

59. The Law on Temporary Detention states:

In any circumstances the temporary detention period shall not exceed four months. However based on sound judgment, this period can be extended up to sixth 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.¹⁶

60. The Law on Temporary Detention amended in part the provisions of Article 14(4) of the Transitional Criminal Law. Article 14(4) addressed the pre-trial detention time limits for all crimes within Cambodia but specifically did not include genocide, war crimes and crimes against humanity. Even assuming *arguendo* that in February 2002 the military court properly exercised jurisdiction over and detained Duch under the ECCC Law, Crimes Against Humanity charge, under the applicable procedures clearly by the end of February 2005 the military court was no longer entitled to detain him on that charge.

61. Not only was the military court no longer entitled to detain him on that charge, there is a compelling argument to be made that under Cambodian procedure, by February 2005 Duch was entitled to have his Crimes Against Humanity charge “judged.” Article 21 of the Transitional Criminal Law, which was applicable at the time, set maximum time limits by which a court must judge a person for a charged crime. Article 21(1) states: “Any person, whether or not in detention, *must be judged* no later than six months after arrest.”¹⁷ (Emphasis added).

62. Article 21(1) addresses ordinary crimes in line with Article 14(4) pre-trial detention provisions of the Transitional Criminal Law. While the Law on Temporary Detention does address the maximum time period for temporary pre-trial detention on a crimes against humanity charge, it does not provide similar “must be judged” language as does Article 21(1) of the Transitional Criminal Law.

63. Nevertheless, there is a statutory procedural scheme in place that must be read in a complimentary, reasonable and logical manner. It is reasonable and proper to analogize that if an accused charged with a “normal offense” such as the serious crime of premeditated murder, for example, must be judged by the end of the maximum pre-trial detention period of 6 months, than at the end of the 3 year maximum pre-trial detention period for the Crimes Against Humanity charge, that accused must also be judged.

¹⁶ Law on Temporary Detention.

¹⁷ Transitional Criminal Law, Article 21(1)

64. Into this analysis of applicable Cambodian law and procedure on the jurisdiction issue the court also can now consider the recently adopted Criminal Procedure Code. The Criminal Procedure Code ("CPC") does not address the jurisdiction, functioning or procedures related to the military court in relation to other courts thus there is a gap in the law and it is correct to continue to apply the provisions of the Adjudicates Courts Law. The CPC does have a similar provision specifically regarding temporary detention for crimes against humanity in Article L. 413-26, which states:

In case of charges for crimes against humanity, genocide crime or war crime, temporary detention shall not exceed one year for each of these offenses. However, when this period of time ends, the investigating judge can extent [sic] temporary detention for another one year by warrant with a clear and fair statement of reasons.

The extension can only be made twice.¹⁸

In applying this provision of the CPC to Duch's Crimes Against Humanity charge in the military court, again, he could only be held in pre-trial temporary detention for a maximum of 3 years.

65. Unlike the Transitional Criminal Law, however, a thorough review of the CPC does not clearly reveal authority stating the same or similar language on the specific time limit by which an accused "must be judged."

66. Therefore, in reviewing the jurisdiction matter with particular attention to applicable criminal procedural laws we clearly observe a series of serious violations of Duch's rights.

67. To start, personal and subject matter jurisdiction was wrongfully exercised by the military court over Duch on the ECCC Law, Article 5, Crimes Against Humanity charge. The detention order was first issued against Duch on that charge in February 2002, thus, as of this time, Duch has been detained specifically under that ECCC Law crime for over 5 ½ years without a fair trial taking place. There can be no doubt this is a serious abuse of Duch's rights.

68. The basis for statutorily providing a maximum 3 year time period in the Law on Temporary Detention, the new CPC and the IRs is because of the obvious gravity and complexity of the crime, and the need for a competent and complete investigation of such a crime. Cambodian procedural law thus provides persuasive authority that strongly indicates that after this appropriately lengthier 3 year detention period it was required that Duch be

¹⁸ Cambodian Criminal Procedure Code, Article L. 413-26. This is substantially the same as that set forth in Internal Rule 63(6) & (7).

judged. The “must be judged” language in the Transitional Criminal Law can only be reasonably interpreted to mean that Duch should have been brought to trial with judgment pronounced by the court of first instance so charging and holding him, rightfully or wrongfully, under ECCC Law, Article 5, Crimes Against Humanity.

69. This court of first instance was the Cambodian military court, as all of this has transpired until very recent time in the military court. Now the ECCC is finally operational with sitting judges and is rightfully seized of Duch’s case. However, the fact that the ECCC now is seized of Duch’s case cannot by some fiat, not found or clearly enunciated in Cambodian procedural law, extinguish or nullify the abuses that he has suffered under Cambodian procedural law that both the military court under the Adjudicates Courts Law and now this ECCC under the Agreement, ECCC Law and IRs are bound to uphold.

Fundamental principles set out in IR 21

70. In following the ECCC standard, fundamental principles set forth in IR 21 also should be considered and applied. IR 21 opens with the overarching requirement that “[t]he applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as *to always safeguard the interests of Suspects, Charged Persons, Accused and Victims* and so as to ensure legal certainty and transparency of proceedings, in light of the inherent specificity of the ECCC, as set out in the ECCC Law and the Agreement.”¹⁹ (Emphasis added).

71. Therefore, given the requirement to interpret the law so as “to always safeguard the interests” of Duch, as a Charged Person, it is completely appropriate to evaluate the jurisdiction matter under applicable Cambodian criminal procedural laws with due and necessary understanding of and deference to the rights guaranteed by the Constitution of the Kingdom of Cambodia. Article 150 of the Constitution leaves no question as to its place within the Cambodian hierarchy of laws: the Constitution is the Supreme Law of the land.²⁰ Thus, all laws, certainly including criminal procedural laws, of Cambodia must be made and applied so as not to violate the rights guaranteed and protected by the Constitution. All laws and rules derive their very authority and propriety from those inviolable Constitutional rights.

72. Accordingly, a review of the relevant and applicable Constitutional rights demonstrates the following:

¹⁹ Internal Rule 21.

²⁰ Constitution of the Kingdom of Cambodia, Article 150.

- Article 32 guarantees that “[e]very Khmer citizen shall have the right to life, personal freedom, and security.”²¹
- Article 38 guarantees that “[t]he law shall protect life, honor, and dignity of the citizens. The prosecution, arrest, or detention of any person shall not be done except in accordance with the law. (. . .) The accused shall be considered innocent until the court has judged finally on the case. Every citizen shall enjoy the right to defense through judicial recourse.”²²

73. Thus, under Cambodian procedural laws, which derive their authority from and must not violate rights guaranteed under the Constitution of the Kingdom of Cambodia, Duch has experienced serious abuse of his Constitutional rights by the military court specifically regarding the ECCC Law, Article 5, Crimes Against Humanity charge.

74. The military court wrongfully exercised personal and subject matter jurisdiction on the ECCC Law, Crimes Against Humanity charge over Duch and has detained him on such charge beyond the maximum 3 year pre-trial temporary detention period. It is now over 5 ½ years since the first detention order was issued and Duch has not had a fair trial on such charge.

75. A plain reading, interpretation and application of the relevant criminal procedural laws and rights specifically set forth in and guaranteed by the Constitution strongly demonstrate that:

- Duch’s rights to personal freedom and security have been abused.
- Duch’s rights to prosecution, arrest, and detention in accordance with the law have been abused.
- Duch’s right to the presumption of innocence has been abused.
- Duch right to defense through judicial recourse has been abused.

Fundamental principles set out in International Human Rights Law

76. Application of Article 31 of the Cambodian Constitution allows us to extend our analysis further in order to review and apply fundamental rights of due process of law and fair trial that are also enshrined in international human rights law. The Cambodian Constitution, Article 31, explicitly states:

The Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of

²¹ Constitution of the Kingdom of Cambodia, Article 32.

Human rights, the covenants and conventions related to human rights, women's and children's rights.²³

The requirements of Article 31 are inextricably linked to Cambodia's binding international treaty obligations based on its ratification of the International Covenant on Civil and Political Rights ("ICCPR").

77. The ICCPR *ipso facto* is a covenant related to human rights. In relevant part, the ICCPR sets forth the following:

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.

2. Anyone who is arrested shall be informed, at the time of his arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be a general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.²⁴

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and

²² Constitution of the Kingdom of Cambodia, Article 38

²³ Constitution of the Kingdom of Cambodia, Article 31.

²⁴ International Covenant on Civil and Political Rights, Article 9.

obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. (...)

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

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

- (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
- (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
- (c) To be tried without undue delay; (...)²⁵

78. In line with our analysis and application *supra* of Cambodian criminal procedural laws and rights guaranteed by the Cambodian Constitution to Duch's case, we discern that many of the same violations have occurred under the ICCPR. Fundamental rights that have been violated under the ICCPR are as follows:

- Article 9(1) right to liberty and security of person.
- Article 9(1) right to not be deprived of liberty except on such grounds and in accordance with such procedures as are established by law.
- Article 9(3) right to trial within a reasonable time or to release.
- Article 14(1) right to a fair and public hearing by a competent, independent and impartial tribunal established by law.
- Article 14(2) the rights to be presumed innocent until proved guilty according to the law.
- Article 14(3)(c) the right to be tried without undue delay.

79. A correct and thorough application of the ECCC standard has taken us to this point where we cannot escape the cold conclusion that under criminal procedural laws, and fundamental rights enshrined in the Constitution and international human rights law, Duch's rights have been seriously violated.

C(iii) – The Appropriate Remedy

²⁵ International Covenant on Civil and Political Rights, Article 14.

80. Thus, we are confronted with the major and difficult question that now must be answered: What is or should be the appropriate judgment of this Pre-Trial Chamber as to the remedy for such violations of Duch's rights?

81. Once the military court placed Duch's rights in jeopardy by accepting jurisdiction over him specifically under the ECCC Law, Article 5, Crimes Against Humanity charge, the "must be judged" requirement of Article 21 of the Transitional Criminal Law would appear to provide strong authority that it was Duch's right to have a fair trial on that charge, at a minimum, of at or very near to the 3 year temporary detention mark set by all criminal procedural laws dealing with the issue. Given the definitiveness of the "must be judged" language, is dismissal, or staying of the ECCC's jurisdiction, of the ECCC Law, Article 5, Crimes Against Humanity charge the appropriate remedy?

82. Again, based on the plain language of the ECCC Law, the ECCC is undeniably a sister court of the military court within the existing court structure, regardless of the obvious fact that each has their own jurisdiction and systems of administration set by law, and the enormous task of the ECCC in terms of the Kingdom of Cambodia finally administering justice regarding this horrible period – indeed, this reign of terror - in its modern history. Clearly, it was not the military court that should have been first seized of jurisdiction under the ECCC Law Crimes Against Humanity charge.

83. Under the first and amended, final version of the ECCC Law, the Crimes Against Humanity charge was specifically meant to come under the subject matter jurisdiction of the ECCC. Yet the military court did accept jurisdiction and thus Duch's personal freedom, liberty and security were deprived. Duch's deprivation of liberty and pre-trial detention in the military court was not in accordance with the law. Duch most certainly has not been brought to trial on the charge for 5 ½ years and counting.

84. Again, your *amicus curiae* urges this Chamber to consider: Is this 5 ½ years, and counting, not a serious and egregious violation of Duch's right "to be judged," "to judicial recourse," to "trial within a reasonable time" and to trial "without undue delay"?!

85. The consideration of dismissal of this charge, or the staying of jurisdiction, by this Pre-Trial Chamber of the ECCC as a remedy is a weighty one indeed, and under the ECCC procedural standard, certainly one that should not be disposed of without the most rigorous examination and deliberation. Yet despite the extensive analysis undertaken herein *supra*, there still is not that required level of certain and sufficient authority to convincingly answer such a weighty question. Therefore, under the ECCC standard, it is entirely justified and

appropriate that the Pre-Trial Chamber seeks guidance in rules established at the international level to assist in reaching a decision with regard to the question of remedy.

D – Guidance in procedural rules established at the international level

86. It is now, at this appropriate juncture that rules established at the international level that directly address the question of remedy can be examined for guidance on the issue of what the appropriate remedy should be for the abuses of Duch's rights as analyzed and categorized at length *supra*.

87. To start this inquiry, your *amicus curiae* submits that the language of the Agreement and ECCC Law regarding "procedural rules established at the international level" should reasonably and logically be interpreted to be found, in the first instance, in rules and standards established by the Human Rights Committee's jurisprudence in addressing violations of the ICCPR, and/or the rulings of cases from other International Tribunals, such as the International Criminal Tribunal for Rwanda ("ICTR") and the International Criminal Tribunal for the former Yugoslavia ("ICTY"). These are judicial rule making bodies of truly international form and substance as they have been specifically established through the legal authority and administration of the United Nations.

88. With this stated, we address the Co-Investigating Judges grounds wherein they first sought guidance in the theory of *male captus, bene detentus*, in part, to determine the jurisdiction question. All of the cases cited by the Judges in the grounds and Order are from national courts with the exception of one reference to an ICTR case.²⁶ These national court cases at heart deal with the potential violations of rights of State sovereignty, procedural law and human rights when a suspect or accused in a different territorial and legal jurisdiction of one, or the first, country (or State for the United States) is captured and detained – with indices of physical and mental abuse - in another country in order to be transferred and brought before the bar of justice in the competent court in the first country.

89. These cases and the issues that they are addressing are different and distinguishable from what is before this Pre-Trial Chamber. The jurisdiction questions and all of the abuses that are alleged to have been suffered by Duch are the result of decisions and actions taken by the Cambodian authorities in courts established under Cambodian law within the territory of the Kingdom of Cambodia. The matter fundamentally focuses on Duch being charged and

²⁶ In this regard it is worth noting, and as will be more fully developed *infra* in the more relevant analysis and application of the abuse of process doctrine, it is ICTR jurisprudence that lends the greatest authority for this

detained under the ECCC Law, in Cambodia, by the military court prosecutor and investigating judge pending the official opening and functioning of the ECCC, and with its opening and functioning, the transfer of Duch's Crimes Against Humanity case to the ECCC. The matter does not involve Duch being captured, detained and transferred – with indications of physical or mental abuse - from one foreign jurisdiction to Cambodia so that he could rightfully be brought to justice on the charges pending before the ECCC.

90. In short, *male captus, bene detentus* provided some cover, arguably based in international law, for the Judges to make the decision they did; but it is not the most appropriate or applicable persuasive authority for them to have sought guidance in under the ECCC standard.

91. A review of decisions by the Human Rights Committee (alternatively, “the Committee”) and the International Tribunals provides sufficient and compelling authority that goes directly to the issues that must be dealt with by the Chamber on this Appeal under the ECCC standard as to how to address the chain of human rights abuses that Duch has suffered directly at the hands of the Cambodian authorities within the existing Cambodian court system, under Cambodian law. The specific rights violations under Cambodian criminal procedural law, Constitutional law, and international human rights law, again, focus directly on Duch's right “to be judged,” “to judicial recourse,” “trial within a reasonable time” and to trial “without undue delay” most centrally, among the other violations clearly enumerated *supra*.

92. Before directly addressing the remedy issue, however, jurisprudence of the Human Rights Committee in its interpretation and application of the provisions of the ICCPR on what is a trial “within a reasonable time” and “without undue delay” gives us some measure to judge if Duch's time in detention without trial has been within reasonable boundaries.

93. With regard to the article 9(3) mandate that an accused be afforded a trial “within a reasonable time” the Human Rights Committee has held that “what constitutes ‘reasonable time’ is a matter of assessment for each particular case”. The Human Rights Committee has rejected a lack of “adequate budgetary appropriations for the administration of criminal justice” to justify unreasonably long delays by a State Party in bringing a criminal case to trial. The Human Rights Committee has rejected the fact that investigations are in large measure performed pursuant to written proceedings to justify unreasonable delays. Matters pertaining to the need to gather evidence have been determined to not justify detention lasting

Chamber to decide whether dismissal of the charge, or staying of the ECCC's jurisdiction, is an appropriate remedy.

almost 4 years, and have been deemed by the Human Rights Committee to violate article 9(3).²⁷ Detentions without trial of 31 months on charges of belonging to an allegedly outlawed political party²⁸, and detentions of 4 years and 4 months without trial have been deemed to violate article 9(3).²⁹

94. Under the Committee's jurisprudence addressing ICCPR article 14(3)(c) right to trial "without undue delay," it has been plainly stated that the difficult economic status of a State party does not relieve it of its requirement to comply with this term of the Covenant, as "the rights set forth in the Covenant constitute minimum standards which all States parties have agreed to observe."³⁰ The Committee has been fair and practical enough to recognize under both articles 9(3) and 14(3) that the complexities of a case must always be considered and in some instances will justify delays.³¹ This stated, the Human Rights Committee has determined that delays of 29 months³² and of 2 years from arrest to trial were human rights violations.³³

95. These decisions provide excellent guidance for the Pre-Trial Chamber to evaluate the legality of the circumstances surrounding Duch's detention and the length of his detention without having a fair trial. Along with the other deprivations of Duch's rights under Cambodian procedural law, the Constitution and the ICCPR, specifically under ICCPR articles 9(3) and 14(3), these decisions of the Human Rights Committee demonstrate that Duch's length of time in pre-trial detention on the Crimes Against Humanity charge without being brought to trial either in the military court or the ECCC can be deemed to be in violation of the international standards governing the issue.

96. We now, finally, turn to the abuse of process doctrine as it specifically can be applied in the case at bar.

²⁷ Communication No. 336/1988, *N. Filastre v. Bolivia* (Views adopted on 5 November 1991), in UN doc. GAOR, A/47/40, p. 306, para. 6.5

²⁸ Communication No. 314/1988, *P. Chiiko Bwalya v. Zambia* (View adopted on 14 July 1993), in UN doc. GAOR, A/48/40 (vol. II), p. 54, para. 6.3.

²⁹ Communication No. 386/1989, *F Kone v. Senegal* (Views adopted on 21 October 1994), in UN doc. GAOR, A/50/40 (vol. II), p. 8, para 8.6.

³⁰ Communication No. 390/1990, *B. Lubuto v. Zambia* (Views adopted on 31 October 1995), in UN doc. GAOR, A/51/40 (vol. II), p. 14, para. 7.3.

³¹ Communication No. 336/1988, at p. 306, para. 6.6.

³² Communication No. 564/1993, *J. Leslie v. Jamaica* (Views adopted on 31 July 1998), in UN doc. GAOR, A/53/40 (vol. II), p. 28, para. 9.3.

³³ Communication No. 672/1995, *C. Smart v. Trinidad and Tobago* (Views adopted on 29 July 1998), in UN doc. GAOR, A/53/40 (vol. II), p. 149, para. 10.2.

97. An analysis of the cases of *Jean-Bosco Barayagwiza v. The Prosecutor*³⁴ from the Appeals Chamber of the ICTR, and the manner in which these cases so thoroughly addressed and applied the abuse of process doctrine, must be the place where we begin the application of this doctrine with regard to reaching a determination as to the appropriate remedy. The holdings of the Appeals Chamber in *Barayagwiza I* truly challenge this Pre-Trial Chamber of the ECCC to decide whether dismissal, or staying of the ECCC's jurisdiction, of the Crimes Against Humanity charge is the correct decision regarding remedy, or whether the remedy enunciated by the Judges in their Order, or as is requested by Defense Counsel for the accused or other *amici curiae*, is the one to be entered.

98. The abuse of process standard that has been established that may justify dismissal of a charge against an accused in an International Criminal Tribunal is what can be called the "serious and egregious abuse" standard.

99. As directly applicable to the issue before this Pre-Trial Chamber, the abuse of process doctrine stands for the principle that to exercise jurisdiction over Duch's case with specific understanding of its procedural history within the Cambodian court system thus far – which includes the military court and now this ECCC - would so offend the ECCC's sense of justice, propriety and integrity.

100. On this key point, the *Barayagwiza* Appeals Chamber stated:

It is important to stress that the abuse of process doctrine may be invoked as a matter of discretion. It is a process by which Judges may decline to exercise the court's jurisdiction in cases where to exercise that jurisdiction in light of the serious and egregious violations of the accused's rights would prove detrimental to the court's integrity.³⁵

101. The *Barayagwiza I* court thoroughly reviewed numerous cases where dismissal was deemed to be the appropriate remedy when abuse of process could clearly be demonstrated. Central to our concerns here, it is of paramount importance to recognize that the *Barayagwiza I* court had to address issues regarding the overlapping roles played by the judiciary (and, in

³⁴ There are two significant cases involving the matter of accused, *Jean-Bosco Barayagwiza*, before the ICTR Appeals Chamber, which will be referred to *infra* as *Barayagwiza I and II -Jean-Bosco Barayagwiza v. the Prosecutor*, ICTR, Appeals Chamber decisions of 3 November 1999 and 31 March 2000.

³⁵ *Barayagwiza I*, para. 74

part, government) of Cameroon with that of the relevant ICTR organs in properly bringing the accused within the jurisdiction of the ICTR to face the crimes he was charged with therein. In answering these compelling questions about overlapping or competing roles and how they should be considered in light of the abuse claims, the *Barayagwiza I* court under the abuse of process doctrine made this threshold ruling: “First and foremost, this analysis focuses on the alleged violations of the Appellant’s rights and is not primarily concerned with the entity responsible for the alleged violation(s) (. . .) Thus, under the abuse of process doctrine, *it is irrelevant which entity or entities were responsible for the alleged violations of the Appellant’s rights.*”³⁶ (Emphasis added)

102. Additionally, the *Barayagwiza* court ruled that by the time the case was finally brought within its jurisdiction, “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. Regardless of which other parties may be responsible, the inescapable conclusion is that the Appellant’s” fundamental human rights were violated.³⁷

103. The *Barayagwiza I* court ruled that the abuse of process evidenced by the cumulative violations of the accused’s rights in that case, most notably regarding his excessive length in detention without being promptly informed of the charges against him, his right to an initial appearance before the Tribunal, the failure to resolve matters regarding a *writ of habeas corpus* application, and finally regarding the Prosecution’s lack of diligence in handling the case, required the remedy of dismissal of the charges against the accused.³⁸

104. The ICTR Appeals Chamber then made the following decision:

The crimes for which the Appellant is charged are very serious. However, in this case the fundamental rights of the Appellant were repeatedly violated. What may be worse, it appears that the Prosecutor’s failure to prosecute this case was tantamount to negligence. We find this conduct to be egregious and, in light of the numerous violations, conclude that the only remedy available for such prosecutorial inaction and the resultant denial of his rights is to release the Appellant and dismiss the charges against him.³⁹

³⁶ *Barayagwiza I*, para. 73.

³⁷ *Ibid.* at para. 85

³⁸ *Ibid.* at paras. 102 – 106.

³⁹ *Ibid.* at para. 106.

105. Issues related to Prosecutorial negligence and misconduct weighed heavily in the Appeals Chambers decision in *Barayagwiza I*. After that first decision, the Prosecution pursuant to motion for review or reconsideration was given an opportunity to present new facts and evidence to the Appeals Chamber that had not been presented during the first appeal to overcome concerns of negligence or misconduct. This second hearing in the Appeals Chamber can be referred to as *Barayagwiza II*. After reviewing the Prosecution's submissions in *Barayagwiza II*, the Appeals Chamber reversed only the remedy from *Barayagwiza I*, ruling that the new submissions indicated that the Prosecution had not made egregious errors in prosecuting the case. The Appeals Chamber determined, therefore, that dismissal of the indictment and releasing the Appellant would be a disproportionate remedy for the serious violations of his rights compared to the severity of the crimes for which he was charged. The Appeals Chamber in *Barayagwiza II*, nevertheless, explicitly confirmed the serious nature of the violations of the Appellant's rights, but ruled that a more balanced remedy was required and that this would be compensation and/or a reduction in sentencing should the Appellant be found guilty at trial.⁴⁰

106. The issue of an International Tribunal being requested to decline accepting jurisdiction of an accused also has been raised and tested in the ICTY, particularly in the case of *Prosecutor v. Dragan Nikolic*. In *Nikolic*, the ICTY asked in "what circumstances, if any, the International Tribunal should decline to exercise its jurisdiction because an accused has been brought before it through conduct violating State sovereignty or human rights."⁴¹ A major issue in the ICTY's analysis in *Nikolic* was the breach of State's sovereignty, which was a matter it had not dealt with before. The analysis there is closer to the matters raised under the theory of *male captus, bene detentus* that the Judges reviewed in their grounds as addressed *supra*. As your *amicus curiae* also stated *supra*, this is not an issue before this Chamber. In addressing how the ICTY should view the allegations of human rights abuses, the *Nikolic* court tended to focus more on whether the accused's rights were violated by being subject to inhuman, cruel or degrading treatment or torture, i.e. serious physical or mental abuse, at any time before the Tribunal was asked to accept jurisdiction over the accused's case. The court opined that it was these kinds of violations that indicate violations of a

⁴⁰ *Barayagwiza II*, paras. 74 – 75.

⁴¹ *Prosecutor v. Dragan Nikolic*, ICTY, Appeals Chamber decision of 5 June 2003, para. 18.

serious and egregious nature. The *Nikolic* Appeals Chamber did not decline jurisdiction because it found that the “treatment of the Appellant was not of such an egregious nature.”⁴²

107. The Co-Investigating Judges Order indicates that they were more moved by this rationale for application of the abuse of process doctrine – whether there was serious physical or mental abuse of the accused prior to being brought before the ECCC - in deciding whether to accept or decline jurisdiction of Duch’s case. Perhaps Duch’s arrest and then detention in the military court prison could be considered to have been done without serious mental or physical abuse, though your *amicus curiae* has not seen authoritative records or facts to render a definitive argument or opinion on this subject.

108. Under the ECCC standard, guidance now has been sought in rules established at the international level to assist this Pre-Trial Chamber to make a decision and judgment on remedy.

109. Your *amicus curiae* respectfully submits that the guidance from the many cases of the Human Rights Committee and key points from the ICTR *Barayagwiza* cases that have been stated and stressed *supra* regarding the abuse of process doctrine have direct application and are most persuasive to evaluate and decide the jurisdiction issue in the case at bar. The number and type of violations of rights under Cambodian procedural law, and fundamental rights under the Constitution and international human rights law cannot be understated. Like in *Barayagwiza I*, given the quantity and type of abuse, it is very difficult to escape a conclusion that they have been of a serious and egregious nature. Also, and most importantly, that the abuses first took place in the Cambodian military court, before the ECCC became seized of the matter, has been determined by the *Barayagwiza* Appeals Chamber to not be a relevant consideration as it is now this ECCC that must adjudicate the charges against the accused. This Pre-Trial Chamber of the ECCC thus has the weighty task indeed of determining whether the violations to Duch are of such magnitude that exercising jurisdiction over him would so undermine the integrity of this court in its essential ability to fairly render justice.

110. With regard to issues of Prosecutorial negligence or misconduct as it influenced the *Barayagwiza* case outcomes, it must be acknowledged that with the entering into force of the ECCC Law, the Cambodian military court prosecutor and investigating judge decided to

⁴² *Nikolic*, at para. 31.

exercise jurisdiction over Duch under the ECCC Law, Crimes Against Humanity charge, knowing that it was the ECCC that was to be the court within the Cambodian court system that was to have jurisdiction over any such ECCC Law crimes. It simply would defy logic and basic common sense to think otherwise.

111. Once the military court authorities acted against Duch under the ECCC Law, that court was bound to conform to and uphold Cambodian procedural law, and rights protected by the Constitution of Cambodia and the ICCPR. Additionally, with the ECCC Law enacted and Duch charged there under in the military court, it was the duty of the Royal Government of Cambodia ("RGC"), in coordination as may have been necessary with the United Nations ("UN"), as the responsible parties for establishing the ECCC, to in fact establish the ECCC, efficiently and expeditiously - and make sure that Duch would have his right "to be judged," "right to judicial recourse," to be tried "within a reasonable time" and "without undue delay".

112. If there was neglect or misconduct, it must, respectfully, be shared between the RGC and the UN in allowing the formation and opening of the ECCC to take such an impermissibly long time. This time consuming and sometimes contentious formation process only served to allow Duch's fundamental human rights - rights all courts within the Kingdom of Cambodia judicial system, that now includes this ECCC, are strictly bound to respect and uphold - to be abused and perhaps to a point where this now operational ECCC being seized of his case must so decline to accept jurisdiction over it.

113. The violations of Duch's rights under Cambodian criminal procedural law, the Cambodian Constitution and international human rights law have been enumerated in great detail *supra*. Yet, as both the *Barayagwiza* and *Nikolic* Appeals Chambers clearly understood, a "correct balance must . . . be maintained between the 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."⁴³

114. Your *amicus curiae* fully respects the rationale that underlies the need for this Pre-Trial Chamber of the ECCC to find that correct balance in the decision it must make.

V. REQUEST FOR JUDGMENT

115. The Pre-Trial Chamber must render an order that as a threshold matter and fundamental prerequisite for all processes of decision making and judgment, the ECCC

[02/10/2007]

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standard must be established and followed by the Co-Investigating Judge, this Pre-Trial Chamber and all Chambers of the ECCC. There is a clear and explicit framework for decision making established in the IRs, the Agreement and the ECCC Law that must be fully respected and enforced.

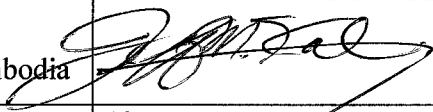
116. Your *amicus curiae* submits that in correctly establishing and applying the ECCC standard, that there is sufficient and compelling authority for this Pre-Trial Chamber to render a decision and judgment to stay the ECCC's jurisdiction on the Co-Prosecutor's Introductory submission of the ECCC Law, Article 5, Crimes Against Humanity charge against Duch.

117. Your *amicus curiae* respectfully leaves it to Defense counsel or other *amici curiae* to submit other requests for relief that may otherwise bear on the Pre-Trial Chamber's appellate review of the Order of Provisional Detention

VI. CONCLUSION

118. Whatever may be the ultimate decision and judgment of the Pre-Trial Chamber in this matter, your *amicus curiae* will place trust that such will be done in a manner that comports with international fair trial standards of competence, independence, and impartiality that are required of all courts within the Cambodian judicial system, including this ECCC.

119. Your *amicus curiae* is honored to have had this opportunity to respectfully submit this brief and to hopefully have assisted the Pre-Trial Chamber of the ECCC to reach a decision and judgment on this historic and important occasion.

2 October 2007	Jeffrey M. KAHAN	Phnom Penh, Kingdom of Cambodia	
Date	Name	Place	Signature

⁴³ *Nikolic*, at para. 30.