

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

PRE-TRIAL CHAMBER

CASE NO. 001/18-07-2007-ECCC/PTC(01)

KAING GUEK EAV

THURSDAY, 20 NOVEMBER 2007

1030H

APPEAL HEARING

Before the Judges:

PRAK Kimsan, Presiding  
HUOT Vuthy  
PEN Pichsaly  
Rowan DOWNING  
Katinka LAHUIS

For the Pre-Trial Chamber:

CHUON Sokreasey  
Anne-Marie BURNS

For the Office of the Co-Prosecutors:

CHEA Leang  
Robert PETIT

For the Charged Person KAING GUEK EAV:

KAR Savuth  
François ROUX

## PROCEEDINGS

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*(Photographers enter courtroom)*

MR. CHUON SOKREASEY:

Please rise up.

*(Judges enter courtroom)*

MR. CHUON SOKREASEY:

Please sit down. Thank you.

MR. PRESIDENT:

In the name of the Khmer people and the United Nations, today, the Pre-Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia declares the hearing of the criminal case to try the criminal case No. 001/18-07-2007 (*no interpretation*) dated 28th August 2007, in which charge persons called Kaing Guek Eav alias Duch, male --

Please, the media – the press and media stop taking pictures of the charge now.

The Charged Person Kaing Guek Eav, alias Duch, male, born on the 17th of November --

Please, the media – the press stop taking pictures of the charged person, otherwise I will stop the whole hearing.

*(Photographers exit courtroom)*

MR. PRESIDENT:

The Charged Person Kaing Guek Eav, alias Duch, born on 17th of November 1942, a Khmer national, was charged of crimes against humanity, crimes punishable under Article 5.29 new and 39 new of the laws on the establishment of the ECCC, dated on the 27 of October 2004; and also extra charge on the grave breaches of the Geneva Convention 1949 that violates Article 6 on the ECCC -- the establishment of the law on ECCC, during the time -- committed from the 17th of April 1975 to 1979,

1 and the lawyers include Kar Savuth and François Roux.

2

3 Today's hearing includes the composition of the Judges here, myself, Prak Kimsan, the President;  
4 Judge Rowan Downing; Judge Pen Pichsaly; Judge Katinka Lahuis; Judge Huot Vuthy. Our *greffiers*  
5 include Mr. Chuon Sokreasey, Mrs. Anne-Marie Burns; Co-Prosecutors, Mrs. Chea Leang,  
6 Mr. Robert Petit.

7 The *greffiers*, so are participants all present?

8 MR. CHUON SOKREASEY:

9 Your Honour, all the co-lawyers are present. The charged person is present. Thank you.

10 MR. PRESIDENT:

11 Mrs. Co-Prosecutor, what do you think about these proceedings?

12 MS. CHEA LEANG:

13 I agree that the proceeding can take place.

14 MR. PRESIDENT:

15 Pursuant to Rule 21(d) of the Internal Rules of the ECCC, the Charged Person Kaing Guek Eav, is  
16 hereby informed that he has the right to be informed of any charge brought against him, has the right  
17 to be defended by a lawyer of his choice and has the right to remain silent in all the proceedings of the  
18 Court.

19

20 The charged person, please come to the front.

21

22 What is your name?

23 THE CHARGED PERSON:

24 My name Kaing Guek Eav.

25

1 MR. PRESIDENT:

2 Do you have any alias?

3 THE CHARGED PERSON:

4 My name -- alias, Duch.

5 MR. PRESIDENT:

6 How old are you?

7 THE CHARGED PERSON:

8 I'm 66 years old.

9 MR. PRESIDENT:

10 What your nationality?

11 THE CHARGED PERSON:

12 Cambodian.

13 MR. PRESIDENT:

14 Where were you born?

15 THE CHARGED PERSON:

16 Peuvreuy, Peam Bav, Stong, Kampong Thom.

17 MR. PRESIDENT:

18 What was your occupation before arrest?

19 THE CHARGED PERSON:

20 I was a teacher.

21 MR. PRESIDENT:

22 Where did you live before you were arrested?

23 THE CHARGED PERSON:

24 I lived in O Tuntim village, Ta Sagn commune, Somlot district, Battambang province.

25

1 MR. PRESIDENT:

2 What is your father's name?

3 THE CHARGED PERSON:

4 Duch Ky.

5 MR. PRESIDENT:

6 Your mother's name?

7 THE CHARGED PERSON:

8 Meas Kim Sieu.

9 MR. PRESIDENT:

10 Your wife's name?

11 THE CHARGED PERSON:

12 Chhim Sophal.

13 MR. PRESIDENT:

14 How many children have you got?

15 THE CHARGED PERSON:

16 I have four children.

17 MR. PRESIDENT:

18 Have you asked any lawyer to defend you?

19 THE CHARGED PERSON:

20 Yes, of course, I do.

21 MR. PRESIDENT:

22 What are their names?

23 THE CHARGED PERSON:

24 Mr. Kar Savuth and Mr. François Roux.

25

1 MR. PRESIDENT:

2 Please sit down.

3

4 Please, the reporting Judge to read the report.

5 JUDGE HUOT VUTHY:

6 The Extraordinary Chambers in the Court of Cambodia, the Pre-Trial Chambers Criminal Case File

7 No. 001-18-07-07-ECCC, dated 19 November 2007.

8 The report of examination: (A) Proceedings; (B) Legal Provision; (C) Facts at issue.

9 (A) Introduction:

10 1. The proceedings: Pursuant to Rule 77.10 of the Internal Rules of the Extraordinary Chambers in  
11 the Courts of Cambodia, the President of the Pre-Trial Chamber has assigned, by the  
12 appointment No. 07-08-006 ECCC/PTC, dated 24 August 2007, Judges Huot Vuthy and Rowan  
13 Downing to set out the details of the decision of the Co-Investigating Judges to make a detention  
14 order, which is appealed against and the relevant facts of the case file  
15 No. 02/14-08-2006-ECCC/PTC, in which the charged persons, Kaing Guek Eav, alias Duch, male,  
16 born 17 November 1941, in Peuvveuy village, Pearn Bay commune, Stong district, Kampong  
17 Thom province, Cambodian; pre-arrest address, village O Tuntim, Ta Sagn commune, Somlot  
18 district, Battambang province; occupation, teacher; father's name, Duch Ky (deceased); mother's  
19 name, Meas Kim Sieu (alive).

20

21 Duch is represented by defence lawyer Mr. Kar Savuth and Mr. François Roux. Duch is charged,  
22 actually, with crimes against humanity, being crimes set out and punishable under Articles 5(29)  
23 new and 39 new of the Law on the Establishment of the Extraordinary Chambers in the Courts of  
24 Cambodia, dated 27 October 2004.

25

1 On the 2nd of October 2007, there has been a supplementary charge in respect of grave  
2 breaches of the Geneva Convention of 1949 in breach of Article 6 of ECCC law.  
3 Purpose of this report: This report of the *co-rapporteurs* sets out the details of the decision  
4 appealed against and the facts in issue before this Court. It is to assist those who are not parties  
5 to the proceedings to understand the matters before the Court.  
6  
7 2. Facts: The Co-Prosecutors alleged, amongst other matters, that Duch was directing the security  
8 prison, S-21, between 1975 and 1979, where under his authority, countless abuses were allegedly  
9 committed against the civilian population, including, in broad terms, mass murder, arbitrary  
10 detention and torture which occurred within a political context of a widespread and systematic  
11 abuses, and constitute crimes against humanity. In more specific terms, the allegations include  
12 keeping of some prisoners in pits which would fill with rain, causing them to drown, and torture  
13 inflicted upon the prisoners by them being beaten, suspended from ropes and stabbed, having  
14 their fingernails punctured or removed and being bled to death.  
15  
16 It is alleged that many thousands of civilians died in S-21 between 1975 and 1979. The following  
17 is a chronology of events relating to Duch's detention since 1999. It is understood that these  
18 events are not in dispute.  
19  
20 10 of May 1999, Duch was arrested by the authorities of the Kingdom of Cambodia and brought  
21 before the military court of Phnom Penh. The office of the military Prosecutor issued second order  
22 to forward case for investigation number 029/99, in which the Prosecutor indicted Duch, together  
23 with another, for crimes against domestic security.  
24  
25 On the 6 of September 1999, military prosecutor Major General Sao Sok issue order to forward

1 case for investigation number 044/99, in which he indicted Duch, together with another, for the  
2 crime of genocide, in violation of Article 2 of Decree Law No. 1.

3  
4 On the 22nd of February 2002, 22nd of February 2003 and 22nd of February 2004: "To ensure  
5 good investigation" the investigating Judge of the military court issued detention orders against  
6 Duch for crimes against humanity, according to Article 5 and 39 of the 2001 ECCC law, dated  
7 10 August 2001.

8  
9 On the 28th of February 2005, 28 February 2006 and February 28, 2007, in order to carry out a  
10 good investigation, investigating judges of the military court issued three detention orders, citing  
11 charges of war crimes and crimes against internationally protected persons, according to Articles 6  
12 and 8 of the 2004 ECCC law.

13  
14 3. Statutory submission of Co-Prosecutors: On the 18 July 2007, the Co-Prosecutors of the ECCC  
15 filed an introductory submission in which they asked the Co-Investigating Judges to open a judicial  
16 investigation against a number of suspects, including Duch, and asked that all suspects be  
17 arrested and detained. The Co-Prosecutor requested that Duch be placed in provisional detention  
18 on the grounds that there are well-founded reasons to believe that he had participated in the  
19 crimes stated in the introductory submission, and that such detention is necessary to prevent  
20 pressure on witnesses, ensure his presence at the trial, protect his personal safety and preserve  
21 public order.

22  
23 4.

24 (A) Detention order issued by Co-Investigating Judges: On the 30th of July 2007, the Co-Investigating  
25 Judges of the ECCC issued warrant to bring Duch before them. Duch was then transferred from



1 the military court detention centre to that of the ECCC. On the 31st July 2007, after having  
2 conducted an adversarial hearing, the Co-Investigating Judges issued an order for provisional  
3 detention not exceeding one year.

4  
5 (B) Reasons for the decision of the Co-Investigating Judges: Factual situation and legal issues raised  
6 in the detention include: Within the context of military proceedings, Duch was placed in provisional  
7 detention beginning from 10 May 1999 and has remained in detention since that date. "His  
8 continued provisional detention is problematic in light of international standards of justice and  
9 Article 9(3) and 14(3)(c) of the ICCPR." The question is: "Is such detention so excessive and  
10 prejudicial to the rights of the defence as to affect the very ability to bring this case within the  
11 jurisdiction of the Extraordinary Chambers to no longer allow the detention of the charged person  
12 within the jurisdiction of the Extraordinary Chambers or even to require the Co-Investigating  
13 Judges to stay the proceedings?"

14  
15 The choice is: Must the maximum *male captus bene detentus* apply, or should the theory of  
16 abuses of process take precedence? In plain words, should the circumstances which bring an  
17 accused before a tribunal have no effect on the judgement of the accused by the court, or is what  
18 has previously occurred to the accused to be considered such as abuse or violation of the  
19 accused's rights that continuing with the proceedings would "contravene the court's sense of  
20 justice?"

21  
22 Conclusion of the Co-Investigating Judges:

23 (1)The Co-Investigating Judges found that they do not have jurisdiction to determine the legality of  
24 Duch's prior detention. The fact that the ECCC is part of the judicial system of Cambodia does not  
25 lead to the conclusion that this Tribunal acted in concert with the military court. The Tribunal only

1 became operational on the 22nd of June 2007 when the Internal Rules entered into force.

2  
3 (2) The abuse of process doctrine does not apply to the case. Courts applying this doctrine have  
4 always considered the proportional relationship between the alleged violations and the  
5 proposed remedy. In a case of crimes against humanity, proceedings should only be stayed  
6 where the rights of the accused have been seriously affected. The Co-Investigating Judges,  
7 after considering the jurisprudence on this matter found: "Where it has not been established or  
8 even alleged that Duch suffered incidents of torture or serious mistreatment before -- or prior to  
9 his transfer before the ECCC, the prolonged detention under the jurisdiction of the military court  
10 in comparison with the crimes against humanity alleged against the accused cannot be  
11 considered a sufficiently grave violation of the rights of the accused".

12  
13 An eventual remedy for the prejudice caused by the prior detention is not an issue during the  
14 investigating phase of the case.

15  
16 The reasons for ordering provisional detention are: number one, the gravity of the alleged acts  
17 in such that public order is disrupted and release could lead to violence; two, because Duch  
18 may be sentenced to life imprisonment, there is a risk of flight; and, three, the detention is  
19 required to protect Duch's safety.

20 5.

21 A) Appeal lodged by Duch against the order of provisional detention: On the 23rd of August 2007,  
22 Duch's lawyers filed an appeal against the order of provisional detention and on  
23 5 September 2007 they filed an appeal brief.

24 (B) Duch's submissions: The grounds of appeal, as set out in the appeal brief, are:

25 (1) Duch should be released on the grounds that his provisional detention is a violation of

1 Cambodian law and of the international standards for the protection of human rights and  
2 that the necessary legal inferences from this violation have not been drawn.

3

4 (2) The period already spent in detention should have been taken into account in determining whether  
5 to keep Duch in detention for a future year – sorry – a further year and the conditions for detaining  
6 Duch as at 31st July 2007 were not met.

7

8 (3) Duch should be awarded compensation for the harm he has suffered as a result of the time he  
9 has spent in provisional detention which has exceeded legal time limits.

10

11 Particular assertions by Duch's lawyers in support of these grounds:

12 (1) Illegality of detention: Article 14(3) of the International Covenant on Civil and Political  
13 Rights and 5(3) of the European Convention on Human Rights -- similar to Article 9(3)  
14 International Covenant on Civil and Political Rights -- have been violated. These provisions assert  
15 that the fundamental principle that an accused is entitled to trial within a reasonable time or  
16 released – or released and are applicable.

17

18 The right is protected under Cambodian law: Constitution of 1993, United Nations Transitional  
19 Authority in Cambodia Penal Code of 1992, Law on Temporary Detention Period of  
20 26 August 1999.

21

22 Provisional detention of more than eight years is illegal under Cambodian law. New charges were  
23 brought several times against Duch in order to keep him in provisional detention. The Constitution  
24 provides that Cambodia shall respect human rights, as stipulated in the various human rights  
25 instruments.

1 Article 9(3) of the International Covenant on Civil and Political Rights provides that a charged  
2 person "shall be entitled to trial within a reasonable time or to release. It should not be the  
3 general rule that persons awaiting trial should be detained in custody."

4  
5 According to European Convention on human rights case law, it is necessary to establish that the  
6 judicial authorities have exercised particular diligence in conducting the proceedings in order not  
7 to fall foul of Article 5(3) of the convention.

8  
9 Duch has not been tried in as expeditious manner as possible, or failing that, released, as  
10 required under human rights law.

11  
12 He has been detained without reasons given. The length of detention is not attributable to Duch  
13 or his defence.

14  
15 (2) Jurisdiction: Co-Investigating Judges did have jurisdiction to determine the legality of  
16 Duch's prior detention. The Pre-Trial Chamber is asked to declare that had has jurisdiction and  
17 must draw all necessary legal inferences from the violation of Duch's rights. In ordering Duch's  
18 detention for a ninth year, the Co-Investigating Judges have contributed to the excessive duration  
19 of the detention and validated the prior proceedings relating to his detention.

20  
21 Duch has been detained while awaiting the establishment of the ECCC, and the proceedings  
22 before the military court and the ECCC are intrinsically linked.

23  
24 Article 12 of the agreement and Article 33 of the ECCC law state that ECCC shall exercise its  
25 jurisdiction in accordance with international standards of justice.

1 Decisions of the international tribunals are relevant concerning the entitlement of trial within a  
2 reasonable time, or release. These confirm that the relevant period starts from the arrest or initial  
3 detention and that the period prior to the date on which the court was granted jurisdiction to  
4 examine the violation has to be taken into consideration.

5  
6 The International Criminal Tribunals have allowed similar applications for release for persons  
7 accused of crimes as serious as the ones with which Duch is accused.

8  
9 (3) Conditions of provisional detention: Even if the decision of the Co-Investigating Judges  
10 relating to jurisdiction was valid, the Co-Investigating Judges were bound to take into account the  
11 previous period of detention when ruling on a further period of detention.

12  
13 The conditions of Internal Rule 63.3, providing for the pre-conditions for the making of a detention  
14 order, were not met. The Co-Investigating Judges were of the opinion that Duch had to remain in  
15 detention, first, to preserve public order; two, to ensure that Duch would be present in court; and,  
16 three, to protect Duch's own safety. And these reasons were neither pertinent nor sufficient.

17  
18 Public order: According to the case law, the conditions to be met before an order for detention  
19 can be made on this ground are: facts which demonstrate that the release of the detained person  
20 would disturb public order; detention maintains legitimate only if there is a threat to public order,  
21 and it may not be used in anticipation of custodial sentence. The relevance of this fact – these  
22 factors decreases over time.

23  
24 Personal safety: The Co-Investigating Judges have not demonstrated that a genuine threat exists  
25 and, moreover, Duch could be protected in other ways; for example, house arrest.

1 Risk of flight: The only justification invoked is that Duch may be sentenced to life imprisonment  
2 and, according to international jurisprudence, the risk that the person will abscond must be  
3 established, and the risk of absconding may not simply be assessed on the basis of the gravity of  
4 the sentence.

5  
6 Duch should be granted bail, and that he can meet bail conditions and alternative measures to  
7 detention may be adopted; for example, house arrest.

8  
9 (4) Reparation: The Pre-Trial Chamber is requested to state that in the event of an acquittal,  
10 financial compensation should be paid to Duch, and in the event of a conviction, the eight years  
11 he has already served should be deducted from the sentence.

12  
13 6.

14 (A) Response by the Co-Prosecutors: In matters of this nature the Co-Prosecutors defend the  
15 decision of the Co-Investigating Judges before this Court. Submission in response to the appeal  
16 brief were filed by the Co-Prosecutors on the 3rd of October 2007.

17  
18 (B) Co-Prosecutors' submissions: The Prosecutor argues that the appeal should be dismissed  
19 because: one, the Co-Investigating Judge was correct in finding that the grounds for provisional  
20 detention were certified and, two, any violations of the right to be tried within a reasonable time  
21 are not attributable to the ECCC and such violations are not of sufficient – or seriousness to  
22 require the ECCC to provide Duch with a remedy at the investigative stage.

23  
24 The Prosecution also seeks a ruling on the interpretation of the time limit in Internal Rule 75,  
25 asserting that the defence had failed to comply with the time limited provided.

1           1.    Grounds for provisional detention: The Prosecution submits that there are both well-found  
2           reasons to believe that Duch committed the offences charged in the introductory submission and  
3           a solid evidentiary basis for finding that provisional detention is necessary.

4  
5           The Pre-Trial Chamber is asked to apply international standards concerning procedure and to  
6           seek guidance primarily from the jurisprudence of other international tribunals rather than the  
7           decisions of human rights bodies.

8  
9           It is pointed out that the grounds under Internal Rule 63.3 are disjunctive. The standard in relation  
10          to the grounds is described as being one of "considering" that they are made out, as distinct from  
11          proving the existence of any of the grounds.

12  
13          Standard of review of the burden of proof: The Prosecution submits that the standard of review is  
14          whether it can be shown that the Co-Investigating Judges made a "discernible error" in the  
15          exercise of their discretion and the defence must bear the burden of proof of demonstrating that  
16          the Co-Investigating Judges erred.

17  
18          Alternatively, the Pre-Trial Chamber should find that the grounds for detention have been made  
19          out and that the burden of showing that provisional detention is no longer necessary and falls on  
20          the defence.

21  
22          First ground. The Prosecution refers to the evidence demonstrating that Duch is a flight risk. The  
23          Prosecution argues that there is no discernible error in the Co-Investigating Judges' exercise of  
24          direction or, alternatively, that the defence have failed to prove that the presence of Duch would  
25          be ensured should be – or, should he be released.

1 Ground 2: The Prosecution refers to evidence demonstrating that the safety of Duch would be  
2 imperilled if he were released and that the passage of time has not diminished these threats. The  
3 Prosecution argues that there is no discernable error in the Co-Investigating Judges' exercise of  
4 discretion, or, alternatively, that defence has failed to prove that there would be no danger to the  
5 security of Duch if he were released.

6  
7 Ground 4 (*sic*): The Prosecution argues that as the Co-Investigating Judges did not address the  
8 issue of exerting pressure on witnesses, the Pre-Trial Chamber is entitled to substitute its own  
9 discretion and therefore presents submissions on this point.

10  
11 The Prosecution asserts that no bail order would be rigorous enough to ensure the presence of  
12 Duch and there is no precedent for such an order in Cambodian criminal procedure as the  
13 concept has only recently been introduced.

14  
15 Ground 4: The Prosecution argues that as the Co-Investigating Judge did not address the issue  
16 of exerting pressure on witnesses, the Pre-Trial Chamber is entitled to substitute its own discretion  
17 and therefore presents submissions on this point.

18  
19 The Prosecution asserts that no bail order would be rigorous enough to ensure the presence of  
20 Duch and there is no precedent for such an order in Cambodian criminal procedure as the  
21 concept has only recently been introduced.

22  
23 2. No error in failing to release Duch: The Prosecution submits that the Co-Investigating Judges'  
24 order was not a validation of the prior detention ordered by the military court, but, rather, an  
25 independent judicial decision taken in the exercise of their unique jurisdiction in that, one, the



1 ECCC is an independent judicial entity, separate from military court and, two, the ECCC has never  
2 acted in concert with, or adopted, the actions of the ministerial court.

3  
4 Independence of the ECCC: The ECCC is a "special internationalised Tribunal": one, created by  
5 international treaty; forming part of the "machinery of international justice"; three, having different  
6 jurisdiction to the national courts of Cambodia, being limited materially, temporally and personally;  
7 four, having no possibility of appeal to other courts in Cambodia; five, having a limited lifespan;  
8 and, six, having unique structural characteristics not found in domestic courts.

9  
10 No concerted action between ECCC and military court: The Prosecution submits that the fact that  
11 the military court has invoked ECCC law in ordering the detention of Duch is of no consequence  
12 as there is no judicial continuity either in fact or law between the proceedings of the military court  
13 and of the ECCC. In particular, the ECCC did not ask the military court to detain Duch. The  
14 Office of the Co-Prosecutors conducted its own preliminary investigation, and Duch was arrested  
15 through an arrest warrant and issued by the Co-Investigating Judges and not transferred from the  
16 military court and the complete files of the military court have not been placed before the  
17 Co-Investigating Judges.

18  
19 The Prosecution submits that the Pre-Trial Chamber should examine the extent to which Duch  
20 exhausted his remedies before the military court as part of any consideration as to whether the  
21 ECCC should provide a remedy.

22  
23 3. Residual basis for a remedy: The Prosecution submits that the Co-Investigating Judges were  
24 correct in determining that prolonged detention was not sufficiently grave to require an immediate  
25 remedy and that any eventual remedy was not an issue at the investigative stage. It is argued

1 that relying on International Tribunal case law as a more appropriate guide than human rights  
2 case law, only where there is evidence of torture or serious mistreatment must a Tribunal trying  
3 serious international crimes provide an immediate remedy.

4  
5 *Amicus curiae* briefs being participants not involved in the case, but that have made submissions  
6 to the Court to assist it.

7  
8 On September the 4th, 2007 this Court invited organisations and the public to submit written *amicus*  
9 *curiae* briefs in this matter by October the 3rd, 2007. The Court acknowledges with thanks the  
10 submissions received from – and these submissions deal with, first, substantially legal issues and are  
11 not otherwise referred to in this report. These submissions will be considered by the Court, as will the  
12 responses to such made by the defence and the Co-Prosecutors.

13  
14 Further recommendations – all the public – or the *amicus curiae* -- from all the parties, including briefs  
15 from those who are not parties are posted on the web site of the Pre-Trial Chamber of the ECCC.

16  
17 (B) Relevant legal provisions: Duch, if found guilty of the offences for which he is currently detained  
18 and under investigation, is liable under Article 39 of the ECCC law to "be sentenced to a prison term  
19 from five years to life imprisonment".

20  
21 The provisional detention in the present case is governed by Article 63 of the Internal Rules of this  
22 Court. Paragraph (3) of the said rule states the grounds on which the Co-Investigating Judges can  
23 order a provisional detention, and paragraph (4) provides the right for the charged person to lodge an  
24 appeal before the Pre-Trial Chamber.

25

1 Article 63 of the Internal Rules

2 3. The Co-Investigating Judges may order the provisional detention of the charged person only  
3 where the following conditions are met.

4 (a) There is well-founded reason to believe that the person may have committed the crime or  
5 crimes specified in the introductory or supplementary submission; and,

6 b) the Co-Investigating Judges consider provisional detention to be necessary measure to:  
7 one, prevent the charged person from exerting pressure on any witnesses or victims, or  
8 prevent any collusion between the charged person and accomplices of crimes falling within  
9 the jurisdiction of the ECCC; two, preserve evidence or prevent the destruction of any  
10 evidence; three, ensure the presence of the charged person during the proceedings; four,  
11 protect the security of the charged person; or, five, preserve public order.

12  
13 4. The charged person may appeal against an order for provisional detention to the  
14 Pre-Trial Chamber:

15  
16 (C)Facts at issue: Well-founded reasons to believe that the person may have committed the crime  
17 or crimes specified in the introductory submission.

18  
19 The Co-Prosecutors alleged that Duch has admitted that he has – or, sorry, he was the deputy and  
20 then chairman of S-21 from 1975 onward, a fact not contested by the defence lawyers in their  
21 appeal brief. This is also the position he had adopted when speaking with journalists, according to  
22 documents filed by the Co-Prosecutors.

23  
24 Duch has asserted that his authority in S-21 was theoretical and that it was merely a conduit of his  
25 superiors, as reported in two media articles following interviews in 1999, titled "Khmer Rouge

1 Torturer Converts, Feels His Life is Like That of St Paul" and "Duch's Mother: Family Fears for the  
2 Tuol Sleng (S-21) Prison Chief".  
3  
4 Since the order for provisional detention, Duch has been interviewed several times by the  
5 Co-Investigating Judges and has made a number of comments upon the evidence which this Court  
6 will take into account, but cannot, at this stage, make public, as the case file is still confidential.  
7  
8 Necessary measure to ensure the presence of the charged person during the proceedings: Duch  
9 was at liberty from 1979 to 1999 before he was arrested and detained by the military court. Duch  
10 has used a number of names, including Yim Keav, Guek-Eav, Duch and Hang Pin, as well as Kaing  
11 Cheav.  
12  
13 It is argued that it was a common practice during the revolution to change one's name. In the article  
14 titled "Khmer Rouge Torturer Converts, Feels His Life is Like that of St Paul", journalist Seth Mydans  
15 reports that Duch had told him that he left the movement in 1992 and became a teacher. Then,  
16 under "assumed names", he worked for the United Nations and private relief organisations.  
17  
18 In the book, *The Lost Executioner: A Story of the Khmer Rouge*, journalist Nic Dunlop reports that  
19 after Duch was first recognised by an official, who requested anonymity, he has indicated to that  
20 official that he knew people in Samlaut that can offer him protection.  
21  
22 The moment is not indicated in the extract filed by the Co-Prosecutor. He was then offered a job  
23 there as the director of education.  
24  
25 Journalist Dunlop also reports that he had seen the biography and curriculum vitae that Duch gave

1 to his employer at the education offices in Sisophon.

2

3 Duch was in Samlaut when Dunlop discovered him in April 1999.

4

5 According to Dunlop, when the story of his discovery and confession was made public Duch  
6 disappeared.

7

8 In the article, "Duch's mother: Family fears for the Tuol Sleng (S-21) Prison Chief", journalist  
9 John Ciorciari and Kok-Thay Eng report a conversation with Duch's mother where she said that  
10 Duch disappeared in 1979 and that his family did not hear from him for nearly two decades, so she  
11 thought he was dead.

12

13 The journalists also report that Duch's mother mentioned that he came back at some point to visit  
14 her and resumed frequent visits to her between 1996 and 1999. According to the journalists, Duch  
15 lived a quiet life in the Khmer Rouge-controlled area of north-western Cambodia until 1995. When  
16 he became Christian in 1995 he adopted the alias "Ta Pin" and worked as medical aid worker in  
17 refugees' camp.

18

19 In an article entitled "Death in Detail", journalist Nate Thayer, who had conducted a 40-hour  
20 interview with Duch just before he was taken into custody, quotes him: "I guess that I will have to go  
21 to jail now, but it is okay. The killings must be understood. The truth should be known." Nic Dunlop  
22 writes in his article that Duch had given himself to the authorities. Apparently, he was flown by  
23 helicopter to Phnom Penh -- in a high-security prison to be formally charged.

24

25 The defence proposes guarantees to ensure that Duch will appear for his trial, but did not submit

1 any evidence in respect of such, paragraph 123.

2

3 Necessary measure to protect the security of the charged person: After having talked with Nic Dunlop  
4 after the Khmer Rouge regime and given him names of leaders, Duch asked Dunlop if "anyone know  
5 he were here and he knew about his identity". He added that "They will be angry if they know" – "if  
6 they know", apparently referring to the Khmer Rouge, either the remaining ones or the ones who had  
7 defected to the government. Dunlop reports that he did not know if it was a caution or a threat. He  
8 adds that Duch's protector was still in control of the area, and as far as he knew Duch could still order  
9 people to silence him if he felt threatened.

10

11 Duch has given interviews to a representative of the UNHCR and journalists, where he confirmed his  
12 previous position as chairman of S-21 and exposed other members of the regime. In three media  
13 articles, it's reported that before his arrest in May 1999 Duch had expressed his fear for his life to  
14 journalists.

15

16 The United Nations and Amnesty International also expressed their concerns about Duch's safety at  
17 that time, since the interviews he was giving exposed crimes committed by Khmer Rouge leaders.

18

19 The Co-Prosecutors also raised the fact that Duch's identity is now famous as his "recent photograph  
20 has appeared in virtually every newspaper and on television stations Cambodia".

21

22 The defence raised the fact that during the time Duch was in liberty, no attempt was made to his  
23 safety.

24

25 Necessary measure to preserve public order: To support their assertion that the commencement of

1 ECCC's judicial activities may pose risks of Cambodian society, the Co-Prosecutors filed a report  
2 assessing the potential witnesses' fear to testify before the ECCC, which cannot be disclosed publicly.  
3 The defence raised the facts that when Duch was at liberty between 1979 and 1999 the public order  
4 was not disrupted.

5  
6 Necessary measure to prevent the charged person were exerting pressure on any witnesses or  
7 victims, or prevent collusion between the charged person and accomplices of crimes falling within the  
8 jurisdiction of the ECCC.

9  
10 Duch asserts that he does not know the name of the witnesses and that even he did, he has no  
11 reason to interfere with them.

12  
13 It is not contested that the full case has now been made available to Duch, including the names of  
14 potential witnesses.

15  
16 The Co-Prosecutors referred to an article titled "Victims and Perpetrators: Testimony of Young Khmer  
17 Rouge Comrades" to support their allegation that the prisons guard who used to serve under Duch at  
18 prison S-21 expressed the "ubiquitous feeling of fear" they had at the time they were working at S-21".

19  
20 A public report titled "Weapons collection report 2005-2007" has been provided, stating that 16,940  
21 weapons were collected in two Cambodian districts from September 2005 to 31st August 2007,  
22 obviously prepared after the order for provisional detention, and another titled "How Many Weapons  
23 are there in Cambodia?", estimating that some 22,000 to 85,000 weapons were illegally circulating in  
24 Cambodia in 2005.

25 Judge Rowan Downing, Judge Huot Vuthy

1 MR. PRESIDENT:

2 So, please, the charged person, stand up.

3

4 Why have you lodged an appeal against the provisional order dated 31st August by the

5 Co-Investigating Judges? Do you have anything to add on the submission of your defence lawyers?

6 THE CHARGED PERSON:

7 I lodged the appeal --

8 MR. PRESIDENT:

9 Please speak loudly.

10 THE CHARGED PERSON:

11 Your Honour, the reason I lodged an appeal -- because I were -- I had been detained without trial for

12 eight years, six months and 10 days already, and in regard to legal issues, I would like the Court to

13 allow my defence lawyers to report in detail.

14 MR. PRESIDENT:

15 So you transfer or convey your right to the lawyers to talk on your behalf.

16

17 The next question: in the military court, have you ever lodged any appeals against the provisional

18 detention order?

19 THE CHARGED PERSON:

20 No, I didn't.

21 MR. PRESIDENT:

22 Judges, would you like to have any questions in regard to the charged person?

23

24 Please, the defence lawyers, please present your case.

25



1 MR. KAR SAVUTH:

2 Before I start, I would like to ask Your Honour, please let the charged person to sit down. I would like  
3 to respect the Chamber according to the (*unintelligible*) ... I, Kar Savuth, the – please acknowledge  
4 François Roux, who is the international lawyer, who is the co-lawyer, defend the charged person  
5 named Kaing Guek Eav from now on.

6  
7 Again, I would like to express my respect to the whole Chamber. I, Kar Savuth, the lawyer to defend  
8 the charged person named Kaing Guek Eav, alias Duch, who was also the chief of S-21, who was  
9 also the chief of the Tuol Sleng prison in the regime of Democratic Kampuchea. The lawyer, defence,  
10 would like to tell the Chamber as follow: Kaing Guek Eav, alias Duch, have been arrested on the  
11 10 of May 1999 and had been detained at the military court until the 30th of July 2007. Then the  
12 Co-investigating Judge of the ECCC issued the arrest warrant and brought Duch here. Counting from  
13 the date of his arrest on the 10th of May 1999 until now, which is on November 28th, 2007, it is eight  
14 years, six months and 10 days already.

15  
16 It was at the military court for eight years, two months and 20 days, and the ECCC three months and  
17 20 days. During this detention at the military court for eight year, two months and 20 days, charge --  
18 Kaing Guek Eav continuously with his (*unintelligible*) who was the chief of the S-21 in the regime of  
19 Democratic Kampuchea. First, at the time arrested, Kaing Guek Eav on the 10th of May 1999, he  
20 was charged about the -- with the crime against humanity.

- 21
- 22 2. On the 31st August 1999, charge him of the crime of genocide.
  - 23
  - 24 3. On the 2nd of February 2002 charge him -- charge him with the crime against humanity.

25

1           4.           On the 28th February 2005, charge him with the crime -- the war crime, and the crime  
2                            against the international protected person.

3  
4           From February 2002 the military court charge and detain Duch continuously, based on the law on the  
5           establishment of the Extraordinary Chamber in the Courts of Cambodia, which -- dated on 10 of  
6           August 2001. Obviously, on the third time it was on 22nd February 2002 -- charge him of the crime  
7           against humanity, based on Article 5 and Article 39 of the law of -- on establishment of the  
8           Extraordinary Chambers in the Court of Cambodia, dated on the 10 of August 2001. On the fourth  
9           time it was on 28 February 2005, charge him of war crime and the crime on the international protected  
10          personality, based on the Article 6 and Article 8 of the law on the establishment of the Extraordinary  
11          Chambers in the Courts of Cambodia.

12  
13          On the 31st of July 2007, the Co-Investigating Judges of the ECCC open an investigation and charge  
14          him with the crime against humillity, based on the provision -- Article 5.29 new and 39 new of the Law  
15          on the Establishment of the Extraordinary Chambers in the Courts of Cambodia which -- dated on the  
16          27 October of 2004. The Co-Investigating Judge issue warrant on the 31st of July 2007 and decided  
17          to detain him, to detain him temporarily for the maximum of one year.

18  
19          We, Kar Savuth and François Roux, the co-lawyer of Kaing Guek Eav, alias Duch, filed an appeal for  
20          this decision for the provisional detention so that the Pre-Trial Chamber consider whether this  
21          detention of eight years, six months and 10 days is legal or illegal. If it is legal, what kind of law, what  
22          article? If there is a strategy jurisdiction at the national law or the international law, please, the  
23          Pre-Trial Chamber, please, verify it so that -- on this decision.

24  
25          The co-lawyer would like to request the Pre-Trial Chamber deny that decision, that dated on the

1 31st of July 2007 of the Co-Investigating Judge, and please release Kaing Guek Eav, alias Duch. Let  
2 him have his freedom immediately because the provisional detention for eight years, six months and  
3 10 days is the violation of the law of the Kingdom of Cambodia and also the standard of the  
4 international human right because the Co-Investigating Judges -- then think about the consequence  
5 that caused by this violation.

6  
7 On the first point, I would like to respond to the submission of the Co-Prosecutors that said that the  
8 ECCC doesn't have the jurisdiction in order to decide on the legality of the previous detention of the  
9 charged person.

10  
11 The Extraordinary Chambers in the Court of Cambodia just started the proceeding on the 26th of  
12 June 2006. The defence lawyers would like to confirm the Pre-Trial Chamber; the ECCC is the new  
13 jurisdiction that just establishes -- based on the agreement between the United Nations and the Royal  
14 Government of Cambodia and also the Court of Cambodia which is established by the Cambodian  
15 law. Also, the ECCC has the special jurisdiction -- had the independent structure and has the  
16 personnel from the United Nations that cannot restrict of the jurisdiction in the Cambodian court that,  
17 based on the Cambodian law, doesn't have the definition about the burden for all the issues that  
18 related to the previous detention in this national jurisdiction.

19  
20 And then the military court and the Extraordinary Chamber in the Courts of Cambodia are the court  
21 that is under the national law the same? The two courts are the court of Court of the Cambodia, the  
22 two courts implement the rule and the proceeding the same. Obviously, the accusation at the  
23 military court in February 2002 also based on the law of the agreement on the establishment of the  
24 ECCC.

25

1 The military court is also the same ECCC and also the same court in Cambodia has been given the  
2 authority, the same authority, had the same responsibility under the law of Cambodia, not the  
3 independent and not follow the law.

4  
5 What the military court has implemented in the past just follows the law of Cambodia, just the same  
6 like the ECCC; therefore, the detention at the military court in the past, it is the burden and solution of  
7 the ECCC. Also, there is no correct argument which say that the ECCC doesn't have the jurisdiction  
8 to -- on the detention of Duch at the military court. Even if it is based on the law or, case  
9 jurisprudence -- whatever jurisprudence.

10  
11 Point 3, the ECCC has brought Duch from the military court. It is shown that the ECCC has  
12 acknowledged Duch was detained at the military court already; therefore, the ECCC must  
13 acknowledge the detention in the past if -- based on the Article 503 of the Criminal Code of the Royal  
14 Government of Cambodia. It also counts the duration of this provisional detention in the detention.  
15 The refusal of the consideration about the duration of the detention in the past, it is the legal error. It  
16 caused an injustice.

17  
18 The illegal detention, it's a detention against the law. Therefore, in order not to be illegal, the  
19 Pre-Trial Chamber must have the jurisdiction to check and examine about the legality of the  
20 provisional detention of Duch, whether or not the right of Duch has been violated or not in the  
21 detention for eight years, six month and 10 days.

22  
23 Another point, the Co-Prosecutor brought up into the hearing that the ECCC didn't have the  
24 proceeding because they had the agreement with or they were -- implement the activity of the military  
25 court at all. The defence lawyers would like to tell the Chamber, please examine if the ECCC doesn't

1 follow at all the activity of the military court. Let me ask: Why the document copy and keep in the  
2 case file -- in the ECCC case file? This I would like to bring up the document that I took from the  
3 ECCC record and I keep this in the ECCC, and if the Co-Prosecutor said -- never had the cooperation  
4 with the military court, please don't take those documents from the military court and put it in the case  
5 file of ECCC.

6  
7 The Co-Prosecutor said at the military court, why didn't you file the appeal? The defence lawyer  
8 would like to confirm that at the military court the accusation charge based on the Article 5 and  
9 Article 33 of the law on the establishment of the Extraordinary Chambers in the Courts of Cambodia.  
10 At that time, the ECCC was not established yet. So, the defence had to wait until the ECCC is  
11 established to speak frankly. The military court charge, they used the law on the Khmer Rouge to  
12 charge, and the Court of the Khmer Rouge not established yet; and how can the defence lawyer file  
13 the appeal where -- because the -- because the (*unintelligible*) court doesn't have the competence on  
14 the issue of trial the Khmer Rouge?

15  
16 So the lawyer have to wait until the Khmer Rouge Tribunal is established. Now it is established. I  
17 come to file the complaint. So, the Chamber in the Court of Cambodia, please solve this problem.

18 Another point, in the brief of the Co-Prosecutor cited the delay of the --

19 JUDGE DOWNING:

20 Excuse me, Mr. co-defence lawyer, if I would just ask you a question in relation to your last  
21 submission. You have said that no appeal has been made to the military court and there's no  
22 jurisdiction in the military court to deal with charges relating or made under the ECCC law. Could you  
23 not have lodged an appeal in respect of the lack of competency of the military court that have brought  
24 these charges in the first place?

25

1 MR. PRESIDENT:

2 Please turn on the microphone. Thank you.

3 MR. KAR SAVUTH:

4 In the brief of the Co-Prosecutor, the delay of the detention does not have enough characteristics that  
5 can be considered at the serious violation. The defence lawyers would like to confirm that the  
6 detention has been delayed for a long time. There is enough characteristic that can be considered as  
7 the grave violation because the grave violation there are two points: One, the grave violation, of  
8 physical violation. At the time in the prison they tortured, they beat him up and they tortured him.  
9 That's the serious violation on his body, on his physical point.

10 JUDGE DOWNING:

11 I'm sorry, I think -- maybe there's been a translation problem. You said that no appeal was lodged.  
12 So, I think maybe there has been a problem with the translation. My question arises because you  
13 said that there had been no appeal lodged in the military court because you said that it lacked  
14 competence and that it lacked competence because the charges that were brought against him  
15 related to the EEC law -- ECCC law and that as that Court did not exist, you could make no appeal.  
16 But could you not have made an appeal challenging the fact of these charges not being correct, that  
17 is, they could not have been brought by the military court in the first place? Was that not open to you?

18 THE ENGLISH INTERPRETER:

19 Excuse me; please turn on the microphone. Thank you.

20 MR. KAR SAVUTH:

21 At the military court, they charged, and after they charged I asked for him to stay outside the  
22 detention, I don't remember the date, and then the Court issued the warrant and at the same time  
23 they issued another warrant to detain him back. And then I would like to further appeal, but I don't  
24 know where to file it because they charge him under the law of the establishment of the ECCC. If I file  
25 the appeal, I know that the Appeal Court would not have the competent to try to case and now the

1 ECCC has been established, so if it is already established, I would like to file this appeal.

2 JUDGE DOWNING:

3 Right. Did you consider lodging an appeal or lodging a complaint under Article 39 of the Constitution,  
4 which would have been another way of proceeding?

5  
6 That was not translated: Did you consider lodging a complaint or a denunciation under Article 39 of  
7 the Constitution?

8 MR. KAR SAVUTH:

9 I don't deny the Article 39 of the Constitution. But if the lawyer want to put -- want to file the appeal,  
10 they have to do it accordingly and correctly, and at that time I don't think the Appeal Court would be  
11 able to trial the case.

12  
13 I would like to continue the conclusion. One is the physical violation that the first point. The serious  
14 violation it is the violation of law. The delay of the detention beyond the limit of the law it considered a  
15 serious violation, also. It's not necessary that unless he was beaten up or tortured. It doesn't mean  
16 that unless he was tortured that the serious violation. So, the delay of the detention of the eight years,  
17 six months and 10 days is the very serious violation because the law limit the time for the detention  
18 for -- just for the maximum for three years.

19  
20 Another point, the Co-Investigating Judges, and also like the Co-Prosecutor, cited on Article 63.3, the  
21 provisional detention is the necessary strategy in order to prevent the charged person from being put  
22 pressure on the victim.

23  
24 The defence lawyer would like to confirm to the Pre-Trial Chamber the important witness, and most of  
25 them have been interviewed. So, how can he put pressure on those witnesses, because those

1 witnesses already interviewed?

2

3 Number two, the witness are far away from each other and Duch doesn't know the address of those  
4 witnesses. And Duch's family and Duch himself, they are the poor family -- the family was not able to  
5 get money in order to take the transportation to this hearing -- so he doesn't have the ability to put the  
6 pressure on those witnesses.

7

8 Second point: The provisional detention is the necessary measure in order to maintain the evidences  
9 and not to destroy the evidences. It means that if Duch is released, there is a worry that there is a risk  
10 that Duch would try to destroy the evidences. I would like to tell you that at the S-21 prison camp they  
11 guard carefully -- to destroy them is not because whoever enter the compound would get the guide.

12

13 And the second point for the other document, the CD-Cam had collected all of them and keep them.  
14 There are nothing else at Tuol Sleng so that he can destroy, and those documents at the ECCC also  
15 maintain those documents. So, what is the benefit for Duch to destroy those evidence if there are  
16 evidence here also?

17

18 Point number three: The provisional detention is the necessary measure in order to guarantee his  
19 appearance in front of the proceeding. It mean that to release of the detention there is -- there is a  
20 risk that he would flee or when he is summoned and he doesn't appear. I would like to tell the  
21 Pre-Trial that Duch will not flee to anywhere. I would like to be permitted -- not just Duch; even the  
22 senior leader of the Khmer Rouge, they all know that they would be arrest, they know, but they never  
23 intend to flee, so don't worry, they will not flee.

24

25 One, Duch doesn't have passport. He cannot go to any country, if he doesn't have passport, so how



1 can he flee to the other country?

2

3 Point number two: He is poor; his relative also poor. They cannot help him to escape or to flee to  
4 anywhere. And very important is the point number three here.

5

6 Duch has promised with the Court and the Co-Investigating Judge that he will return to the Court and  
7 he will cooperate with the Court in the process to find the justice that related to S-21.

8

9 Number Four: I believe that if the Court call him in, the Court already knows his address, so the Court  
10 can just ask the authority to arrest him back to the Court. So, please don't use this pretext – so, this  
11 pretext cannot be used in order to continue to detain Duch.

12

13 Number four: The provisional detention is the necessary measure for the safety and security of the  
14 charged person. I would like to tell you that he doesn't need that protection. Because from 1979  
15 to 1999, it's for 20 years. From '79 to '99, it is 20 years. Nobody protect him; he just live by himself,  
16 he live alone, nobody defend him, protect him. And for these 20 years he never get any accident.  
17 And he never received or never been harmed on his personal safety. And please don't use the  
18 pretext that he will flee or move from one place to another place and then change his name. That's  
19 not the correct argument, because --

20 JUDGE DOWNING:

21 Sorry, you've said that -- you have asserted that Duch lived without threat from 1979 to 1980 -- or  
22 1999. Was he not living under an assumed or different name so that people would not discover who  
23 he was and what he had allegedly done? Could this be an explanation as to why he may not been  
24 under any threat?

25

1 MR. KAR SAVUTH:

2 When he was born -- at his birth place in Stong when he was born, his name at birth, Khieu. Chinese  
3 thought that his name should be Khieu because he was sick many times at that time. And at that time  
4 he enrolled at school, his father put Kaing Guek Eav. And then during the revolution his name is  
5 Duch. So, anywhere he go they know that his name Duch. And then everybody would know him.  
6 But in 1986 when Duch changed his name in Hang Pin, at the time when Son Sen send him to study  
7 in China and at that time he just follow Son Sen and change his name to Fong Pin and then in  
8 Samlaut, in Battambang in *(unintelligible)* and *(unintelligible)* so anyone know Duch's name. He  
9 doesn't hide his name and he doesn't conceal his name.

10 JUDGE DOWNING:

11 Thank you.

12 MR. KAR SAVUTH:

13 And I would like to show the point number two. The other suspects, their name has been published  
14 on the media and the news, and who has the more serious crime? And even at present time those  
15 people -- those people have never received any threat for their personal safety. So Kaing Guek Eav  
16 should not be detained further because of these reason. I would like to append a parenthesis for his  
17 family and for himself, who used to say about -- he worry about his safety, his personal safety. He  
18 does not worry that the people or the government go to harm him. He worry about Ta Mok forces  
19 because Ta Mok, he kill even friends. That why as I know that Duch worry the most about Ta Mok  
20 force and, now, Ta Mok is already dead so it's no problem for Duch.

21

22 Point number five: That -- say that the provisional detention is in order to protect the public order.

23 This means that if Duch is released, there might be the disqualification and cause the violence that  
24 can impact the public's order. The defence lawyer would like to specify that there are no any  
25 evidence, there is no news that can be used, and based on this argument that if he is released will

1 cause the violence. Because 20 years already Duch was outside of the detention, he used his name  
2 as Duch, and there was no any action that impact the public's order. So using this pretext in order to  
3 continue to detain him is not correct. And, also, for 30 years after the fact, after these things  
4 happened, it's not the reasonable fact now.

5  
6 The number two important point, I would like to tell the Court about the Cambodian law -- about the  
7 provisional detention of the -- based on the Cambodian law that will be used by the ECCC. Based on  
8 the Constitution of Cambodia of 1993, that have been founded, Article 32, anyone has the right to live,  
9 have freedom and safety. Article No. 38, the accusation -- the arrest, the detain or -- the detention of  
10 anyone can be implemented unless follow the legal procedure. So, the detention -- the detention of  
11 Duch has follow the legal procedure, or not?

12  
13 Point number two: If we look at Internal Rule of the ECCC, the Article 63.6, for the crime of genocide,  
14 of the war crime and the crime against humanity, the duration of the provisional detention must not be  
15 beyond one year. But the Co-Investigating Judge can add another time -- another year for the  
16 detention. And Article 63.7, in any case, the delay -- the delay -- the repeat of the detention should  
17 not be more than two times, according to the Criminal Code of the Royal Government of Cambodia,  
18 that go in to force on the 8/28/2007. I would like to tell that -- the Co-Prosecutor that the detention  
19 could not apply because at that time this law was not in force, so for the Pre-Trial, they can decide  
20 now -- they can make this decision.

21  
22 It's on to Article 210 (*sic*). And it stipulate the same like Article 63.3 -- cannot detain one year, each  
23 time, and not -- can repeat it, another year and another year, but not more than two times. That mean  
24 that only in the detention for only three years. So, these provision has shown that the provisional  
25 detention that had the duration of eight years, six months and 10 days is clearly a violation of the law

1 of Cambodia. It is wrong and illegal, according to the law of Cambodia because the law only allow the  
2 detention for only three years. If it is wrong from the legal procedure like that. According to Article 22  
3 of the Penal Code, the Criminal Code of the transitional period, the charged person has to be  
4 released and has to be released immediately, regardless of any serious crime that have been  
5 committed.

6  
7 In conclusion, Kaing Guek Eav, alias Duch, has been detained illegally for eight years, six months and  
8 10 days. It is very bad for him now. The fact -- the only fact -- the same offence, and detained Duch  
9 repeatedly. So, we have a hard time to state the violation of his right is very -- how big this violation  
10 is. But I just want to make the summary; this provisional detention is the violation of the law of the  
11 Royal Kingdom of Cambodia and also the international human right, the centre. Therefore, the  
12 defence lawyer would like to -- to submit three requests.

13  
14 One: Please, release him unconditionally release. If this first request denied by the Pre-Trial, I would  
15 like the Pre-Trial to examine point number two. The request number two: Please release Duch for  
16 temporary and then pick the address for him to stay -- I'm sorry, the address where he will live, I  
17 already have and I will submit to the Pre-Trial later. And then every week require Duch to go to sign  
18 at the local police station, which is near his house, in order to guarantee that he will not flee to  
19 anywhere.

20  
21 If the request number one and number two has been rejected, I would like the Pre-Trial to consider  
22 point number three.

23  
24 The request number three: Please, release him for a temporary and put him under the monitoring of  
25 the Court. Place him under the monitoring of the Court is also good idea because, one, he is not able

1 to put pressure on the witness or destroy the evidence, and I think these are the main thing that the  
2 Court worry about, and I think this will not happen.

3  
4 Number two: Under the monitoring of the Court, please, the Pre-Trial Chamber, please use this as the  
5 model because the ECCC is the model court for the Court of Cambodia.

6  
7 So, the request number three -- the request number three can be used as the model for the Court of  
8 Cambodia, and I would like to ask your permission from the Pre-Trial to the *amicus curiae* brief. In  
9 six briefs of the *curiae* brief, three and a half on the defence lawyer side, only there to ask that request  
10 to release Duch, so only two and a half go to the Co-Prosecutor, so only two and a half point that go  
11 to the Co-Prosecutor and they have asked for the continuation of the detention. The brief of David  
12 Scheffer, the expert of international law, would like to support the Co-Investigating Judge's decision to  
13 continue to detain Duch because based on the American law, and the defence lawyer here would like  
14 to argue that this is the hybrid court in Cambodia and follow the law of Cambodia and also the  
15 international law.

16  
17 And we don't use American law in here.

18  
19 Number two, the brief of the committee of the human right of Cambodia also asked to continue to  
20 detain him, Duch, further. The defence lawyer regret because this committee, this organisation, are  
21 the association to protect human rights, so they should help to protect human right; however, they  
22 encouraged to have the detention of someone. Even they see that this detention are beyond the legal  
23 limit. And for the idea that thing about Duch is a savage person who killed a hundred people, that's  
24 the other facts. We should not bring this issue to talk for this right now.

25

1 We have to keep it until the facts in the next -- the other hearing. And also another brief from the  
2 CSD, half of them said that -- as to detain Duch, and another half come on my side. The centre for  
3 social development organisation said that the detention previously by the military court it a violation of  
4 his right and the ECCC must acknowledge this problem.

5  
6 Yes, I would like to finish there. I would like to thank you very much, Mr. President and the whole  
7 Chamber.

8 MR. PRESIDENT:

9 The hearing now is -- we come at 12 and 40 minutes o'clock. We would like to take a lunch break.

10

11 The guards please take the charged person to his room. Please wait at the waiting room.

12

13 The hearing will resume at one and 40 o'clock, so we have one hour for the lunch break. Please take  
14 your lunch break.

15 *(Court recesses from 1243H to 1340H)*

16 MR. PRESIDENT:

17 Please, sit down.

18

19 I would like to announce the continuing session of the Court. And, please, the floor is over the  
20 François Roux for his submission.

21 MR. ROUX:

22 Mr. President, dear madam, ladies and gentlemen, and the Judges, Mr. Judges of the Pre-Trial  
23 Chamber, it's a great honour for me to take the floor today before you. With this initial hearing of the  
24 ECCC Pre-Trial Chamber in the Courts of Cambodia, we are all aware that we are living an important  
25 moment for justice, for Cambodia, and for international law. We are all gathered here to take part in

1 the initiative of justice. Each of us is at our own place.

2

3 The Office of the Co-Prosecutor is in charge of prosecution against the man, Mr. Kaing Guek Eav,  
4 who is charged on serious grounds. Pursuant to the Article 21(d) of the Internal Rules, this man is  
5 presumed to be innocent. This man is defended by his attorneys who will exercise with seriousness  
6 and determination, the counsel, they have been entrusted with. We will exercise this counsel  
7 respecting law, respecting the victims, and in respect of the Extraordinary Chambers within the Courts  
8 in Cambodia. This is the honour of the defence counsel that we are supporting.

9

10 And it is with respect that I am tell you, dear madam and dear sirs, the Judges of the Pre-Trial  
11 Chamber, your states have chosen you among the best of you to render justice following serious  
12 breaches of Cambodian law and humanitarian international law committed during the Democratic  
13 Kampuchea period from 1975 to 1979. You are entrusted with a noble and delicate mission to render  
14 justice, to set the law.

15

16 Rendering justice, setting the law, that is what we are expecting from you on the occasion of this  
17 hearing. This is what our appeal is aiming at. You will have to decide on the legal issue which is part  
18 of human fundamental rights: the right to be tried within due time limits or to be released, as  
19 contained in Article 9.3 of the International Covenant on Civil and Political rights, a principle which is  
20 reiterated in the Cambodian Code of Criminal Procedure in its Article 203, which says, in principle, the  
21 charged person remains free; exceptionally he can be placed in provisional detention.

22

23 Following the remarkable explanation of Mr. Kar Savuth regarding the solution of the Cambodian  
24 national law, it is up to me to analyse the solutions which are given by international law. But, please,  
25 if you allow me, before this I would like to shed some light regarding the hearing of today which

1 sometimes has not been properly announced within the audience at the initial appearance of Duch  
2 before his Judges. I recall that the proceedings before the ECCC is proceedings in support of the  
3 Cambodian law, itself inspired from the Civil Law. We in this Court, we would not use the proceedings  
4 of Common Law which inspires several international jurisdiction. Within this Court, we will use the  
5 procedure used by the Cambodian Code of Criminal Procedure, which is in force since  
6 August the 20th, 2007, and which applies to this hearing today and also enshrined by the Internal  
7 Rules of the ECCC. This procedure not only enshrines, but the proceedings should be conducted by  
8 two Co-Investigating Judges and that it is secret. That is why, today, nothing could be said during this  
9 public hearing regarding the essence of the case file, which has been investigated by the  
10 Co-Investigating Judges since July the 31st. No statement made by Duch before the Investigating  
11 Judges, even extracts of statements, can be disseminated at this stage of the hearing. I recall  
12 Article 56.1 from the Internal ECCC Rules. In order to preserve the rights and the interests of the  
13 parties, the proceedings are secret. Any people taking part in it are bound by confidentiality.

14  
15 It should be clear for each of us that this secrecy has only one goal that is to allow the investigation of  
16 this case in serenity in respect of the rights of the charged person and also those of the victims. But,  
17 when time has come, this process will be subject to a public hearing on the basis of the inculpatory  
18 and exculpatory evidence collected by the Co-Investigating Judges.

19  
20 As I said many times, following the tragedy that Cambodia has lived, there was the time for  
21 journalists; there was the time for historians to try to understand and the time for NGOs to attempt to  
22 try to rebuild. Now, today, is the time for justice. It is a different time with different proceedings, the  
23 rule of which is the principle of the contradictory -- in the case of inculpatory and exculpatory  
24 proceedings. Many different things have been written and shot – filmed on the Khmer Rouge regime,  
25 mostly from the testimonies of victims. But if excellent testimony movies have been made and if



1 interviews which were a bit more dubious – or have been published, they would not establish their  
2 responsibilities. Today it is up to justice. It belongs to justice to work and listen to the words of  
3 everybody: victims and also the charged persons. While organising confrontation, if they are judged  
4 to be necessary, and seeking, firstly, through secret proceedings, and then through public hearings, to  
5 establish, first of all, facts and, secondly, responsibilities.

6  
7 Since July 31st, Duch has appeared several times before the Co-Investigating Judges, which keep  
8 doing their investigation, so that we can say that Duch has already appeared before his Judges before  
9 this hearing. And the proceeding is unfolding in accordance with the ECCC Rules. So the case file  
10 which is gathering us today only deals with the appeal of the order issued by the Co-Investigating  
11 Judges, dated from July the 31st, 2007, which placed Duch in provisional detention.

12  
13 As Mr. Kar Savuth already explained to you, the defence averred that this order neither conforms to  
14 Cambodian national law, neither to international law, as it confirms the provisional detention for more  
15 than eight years and extend it for a ninth year. And with all respect which is due to the  
16 Co-Investigating Judges, it didn't seem possible to accept such an order.

17  
18 Before starting this order *vis-à-vis* international rules, I would like to add a few words so as to set  
19 some guidelines for our debate today. Contrary to what the Co-Prosecutors would like to try, your  
20 Chamber is free of jurisdiction. You are not at all bound by the rules of the International Criminal  
21 Tribunals containing that the Trial Chamber doesn't have jurisdiction, only to examine if the Pre-Trial  
22 Judges have made a mistake in appreciation.

23  
24 In Cambodian law, the principle is either one of the dilutive effect of the appeal; that is to say, the  
25 Appeal Chamber is free of jurisdiction as a choice for jurisdiction, and can substitute its means to

1 solve of the Trial Judges, this principle, which is set out in Article 397 from the Cambodian Code of  
2 Criminal Procedures of 2007, and which is also contained in the Articles 509 and 515 of the French  
3 Code of Criminal Procedure, and also the case law of the French Supreme Court, notably the Criminal  
4 Chamber of the 9th of May 2001.

5  
6 So you will have the possibility to modify the order issued by the investigating Judges and to  
7 substitute your own analysis if you aver, like we do, that it doesn't correspond to the standards of  
8 Cambodian and International Law. The Co-Prosecutors, they are not afraid to contradict themselves  
9 in their briefs, since after asserting in paragraph 25 it doesn't belong to a court of appeal to substitute  
10 its own appreciation to that of a lower jurisdiction. They say exactly the contrary in paragraph 55 in  
11 their brief by saying, "In the absence of conclusions of written submissions from the Co-Investigating  
12 Judges, the Pre-Trial Chamber can substitute its own judgement its own appreciation."

13  
14 But this is not the only contradiction that we can point out in the brief delivered by the Co-Prosecutors.

15  
16 Mr. President, dear madam, dear Judges, your analysis should take into account several basic  
17 principles that I wish to recall here. In accordance to the rule set by Article 21 of the Internal Rules,  
18 you will interpret all the legal texts I am quoting so as to always protect the interests of the suspects  
19 and of the charged person and of the victims. Moreover, in accordance with the case law of the  
20 European Court for Human Rights, you would protect the effective rights of the charged person and  
21 not of the theoretical rights. We are not here to analyze - to make an abstract analysis, even if it could  
22 be very interesting to make an analysis of legal concept of human rights.

23  
24 We are here today to decide on an *in concreto* situation, which is the following: Is it acceptable that  
25 Duch, having spent more – over eight years in provisional detention under the jurisdiction of the

1 Cambodian military tribunal, and considering extending his provisional detention – extend by one  
2 year – extended by the ECCC Co-Investigating Judges? The European Court for Human Rights  
3 keeps repeating that the courts shall protect and make people respect the effective rights – general  
4 rights, and not the theoretical one. Please see the case file *Airey v. Ireland* dated October 9th, 1979,  
5 paragraph 24, from the European Court of Human Rights. The convention is aimed at protecting not  
6 from theoretical and illusional rights, by concrete and effective rights.

7  
8 Everybody can make nice speeches on human rights, and there is no lack of them. But, you, the  
9 Judges, you are the ones who can in a concrete way -- you can help to respect them in a concrete  
10 way. If it's not you who is going to do this, who is going to do it for you? That is why we are asking  
11 you to fully exercise your judicial power, as your colleagues from the Appeals Chamber of the  
12 International Criminal Tribunal for Rwanda in the *Barayagwiza* case file in their appeal dated  
13 November the 3rd, 1999, they themselves, without any prior precedent known, they have  
14 invented - they have created a legal solution to the concrete case they had to decide upon. To reach  
15 this goal they only had to try to implement the fundamental principles of human rights.

16  
17 I want to recall what Professor Perrot used to say, "As long as law exists, the Judge can only  
18 implement it, otherwise he would ruin – he would destroy his authority – his own jurisdiction." He  
19 added that the will to fight of the judicial officer can be exercised in a field which is specific to him and  
20 which is the one of interpretation. There are many legal texts which have come out of the judicial  
21 process completely transform what – today, what we are requiring from you is to have some legal  
22 imagination in respect of the fundamental principle of human rights to solve the concrete case that is  
23 submitted to you.

24  
25 Your colleagues from the Rwanda International Criminal Tribunal have not done something different

1 from that in the *Rwamakuba* that they tried on January 31st, 2007, paragraphs 46 and 49 of the  
2 *Rwamakuba* case file. According to the doctrine of specific powers, any jurisdiction implicitly has all  
3 the powers required necessary to the achievement of its mission. And the Judges added with respect  
4 to the abovementioned principles, and considering the fact that neither the status -- neither the Rules  
5 expressly allows that an organ from the present court grant compensation, reparation -- Chamber  
6 averred that it has the specific power to grant one to a charged person or a formerly charged person  
7 whose rights have been breached, violated. The Court necessarily holds this power because it is  
8 necessary for the Court to exercise its duties, its judicial functions and to fulfill its duties resulting from  
9 international standards in the field of human rights.

10  
11 You would have observed, of course, that we all rely upon -- each side of the bar, we rely upon  
12 numerous case law decisions, but we have different interpretations.

13  
14 I would like to make some general consideration on this point: It doesn't seem acceptable for the  
15 Co-Prosecutors to request your Chamber, in paragraph number 20 of their brief, to welcome with  
16 restriction case laws of the European court for human rights or of the Human Rights Committee of the  
17 United Nations on the grounds that they wouldn't deal with case files relating to serious breaches of  
18 humanitarian law. I have never heard such a thing. These two jurisdictions, they are starting from  
19 different (*unintelligible*) cases, some universal principles regarding the respect for human rights.

20  
21 The European court for human rights which decides on procedures of Common Law and also of Civil  
22 Law, this European court keeps repeating that it belongs to her, *in concreto*, to contain effective rights  
23 and not theoretical rights.

24  
25 Regarding the Committee for Human Rights of the United Nations, this is the one which universally

1 decides upon the violation resulting from the non-respect of the Covenant on Civil and Political Rights.  
2 This was ratified by the Kingdom of Cambodia since 1992 and introduced in its legislation. How can  
3 you welcome and push the Pre-Trial Chamber to accept, with restriction, case laws which set  
4 universal principles for respect for human rights.

5  
6 In the *Barayagwiza* case file, which was quoted by the Co-Prosecutors, the Appeals Chamber kept  
7 quoting as a legal source the decision from the Committee of Human Rights and the European Court  
8 of Human Rights. We are asking you, on the contrary, to seek inspiration from these case laws  
9 vis-à-vis the principles that they are setting and to find by yourself the appropriate decision to the  
10 original situation that you have to decide upon. Which legal consequence shall we bring to the fight?  
11 Shall we add to the fact that Duch was detained over eight years in preventive detention before  
12 appearing for the same breaches before the ECCC?

13  
14 Everybody admits that there is a problem. If we consider the legal national or international standards,  
15 the Co-Investigating Judges, they mention it in their order, paragraph 2, and the Co-Prosecutors  
16 themselves, if you look at the last-but-one page of their brief, paragraph 91, in the end they admit  
17 what is the most important thing of our debate. They say the following, "Co-Prosecutors, they do not  
18 negate that the detention by the military tribunal of the charged person could be a problem as regards  
19 legal international standards." Everybody is saying it's a problem, but nobody is proposing a solution,  
20 except for the defence counsel.

21  
22 You would have understood that the aim of our appeal is to find concrete solutions in order to solve  
23 the breaches that – Duch was the victim of these breaches.

24  
25 In order to help you in your legal reflection – your legal in concrete reflection, please allow me to make

1 a last remark before dealing with the essence. In a material way, how have the Co-Investigating  
2 Judges dealt with Duch? Can we imagine that there was no contact with the military investigating  
3 judge who was detaining Duch? And also with the Military Prosecutor, how has the military prison  
4 accepted for Duch to leave since he has been detained for over eight years? Isn't this the material  
5 proof that there was consultation/cooperation between the Military investigating Judge and the  
6 ECCC? So, if the Extraordinary Chambers benefit from the assistance of the military jurisdiction –  
7 and how would it be otherwise? By which means one would come today to maintain that the ECCC  
8 don't have to examine the legality of the provisional detention of Duch for over eight years under the  
9 military jurisdiction authority, in order to attempt to give some answers to the questions – to the issues  
10 which were raised this morning?

11  
12 First of all, if we want to know what -- the defence has done everything possible when Duch was  
13 detained by the military, I want to honour the work which has been done by Mr. Kar Savuth next to  
14 Duch in a completely – he was not interested in the money. I would like to honour him for having  
15 done all what he could to make this situation stop. But, allow me, please, to protest that we can  
16 incriminate the defence not to have done everything which was in its power. It is not up to the  
17 defence to prove, it belongs to the Co-Prosecutors to come and to bring the proof, the evidence, that  
18 the authority detaining Duch, that they have done it legally. It is not up to us. We were not detaining  
19 Duch. This belongs to the military authorities. It belongs to the Office of the Co-Prosecutors to come  
20 to prove that this was done in the legality. If we lodge an appeal, we would have had some chance –  
21 we may have won the appeal. But, please, tell me, ladies and gentlemen of the Judges of the Pre-  
22 Trial Chamber, would we all be here today if the military jurisdiction was able to try Duch with effective  
23 appeals? Why was the ECCC created if not to precisely – because the national jurisdiction was not  
24 able – was not capable to try the events of the Democratic Kampuchea? And, of course, you know as  
25 I do, the constant case law of the European court for human rights that you wouldn't welcome except

1 with restriction, but I hope that you would welcome, that you would fully accept.

2  
3 What does she say? She says that useful appeals are – did you think that they were accessible  
4 appeals? If they were accessible appeals, do you think we would be here today? Please, let's  
5 consider the situation in – the appellant doesn't have to exert – to exercise an internal appeal in the  
6 absence of case law.

7  
8 So ladies and gentlemen, Co-Prosecutors, now it's up to you to bring the proof to the Chamber that  
9 there was a possibility of an effective appeal against the decision.

10  
11 I am going to reiterate what I said. The requestor doesn't have to exercise an internal appeal as the  
12 unsuccess of the appeal is probably due to a well-established case law. Then it's bound to failure,  
13 otherwise, on the contrary, due to the fact that there is no case law attesting its reality. This is how I  
14 was saying that it belongs to the Co-Prosecutors to prove to the Chamber that if Duch had lodged an  
15 appeal against his detention, it might have been a success. So it's up to the Co-Prosecutor to prove  
16 this to you. And the Co-Prosecutor cannot prove it to you, otherwise we would not be here today.

17  
18 We are here today because the Cambodian authorities, and also the authorities of the United Nations,  
19 have agreed together that the national jurisdiction was not in a position to judge - to try in good  
20 conditions, the people most responsible from the Democratic Kampuchea. Please refer to the report  
21 of Mr. Yash Ghai, who is special envoy for human rights in Cambodia, and more specifically to  
22 paragraph 44 of this report concerning the military jurisdiction.

23  
24 So I am going back on my explanations. The Judge from the upper chamber of the International  
25 Criminal Tribunal for Rwanda, what they have done in the *Barayagwiza* case file in facing a situation

1 that the Judge found unacceptable, your Chamber can also do it and be the creator of law. I recall  
2 paragraph 112 of the *Barayagwiza* case file of November 3rd, 1999. The violations addressed were  
3 different, but the principle set remained the same. The Judges state that the Court:

4  
5 "The goal was to ensure that justice is done. I shouldn't carry on with such violations.  
6 Nothing less than the integrity of the Tribunal is at stake. The audience – this institution is  
7 ensuring the rights of all the individuals, including the ones who have been accused of  
8 unimaginable crimes. These would be the serious consequences to allow that the trial is  
9 held, despite such breaches to these rights. It might be very difficult for different people to  
10 accept this conclusion, but this is a specific role of independent justice, that to terminate this  
11 prosecution so that nowhere there would be no other justice."

12  
13 In this very case, in this case file, in this *Barayagwiza*, the Appeal Judges have annulled the  
14 prosecution and have forbidden the Prosecutors to start proceedings again. The credibility of the  
15 Court was at stake, and the charged person was one of the most important of the main responsible  
16 charged persons in Rwanda. This appeal then, lately, was revised, and the Appeals Chamber has  
17 decided that the appellant would be entitled to compensation – to financial compensation if he was  
18 acquitted on completion of the hearing, or the sentence would be reduced if he is convicted. And that  
19 is what happened when he was convicted.

20  
21 In our brief, I am referring to paragraph 131 of the *Barayagwiza* case file. *Barayagwiza* has been  
22 convicted to a life sentence, but in compensation of the violation, then the Chamber reduced the  
23 sentence to 35 years, and then the Appeals Chamber withdrew from the 35-year length from  
24 preventive detention.  
25



1 If you allow me, I would like to make a small remark on the excellent report which was done this  
2 morning on the case file. It was mentioned that the defence counsel was requesting that in case of  
3 conviction, the eight years spent in detention should be deducted from the sentence. The defence  
4 counsel also asked, like in the *Barayagwiza* case file, the sentence should be reduced. So there are  
5 two things: to reduce the sentence to compensate the violation; and, of course, deduction of the  
6 years spent in preventive detention.

7  
8 What we wanted to say when we were quoting this *Barayagwiza* case file, you would have  
9 understood, it was before this problematic situation you are facing, you hold the power to find legal  
10 solutions – legal means to solve the issue.

11  
12 I am now going to talk about the essence of this issue. Regarding the detention which was  
13 pronounced by the military court, which was from 1979 to June 2007, defence Counsel Kar Savuth  
14 this morning explained to you how this provisional detention is unlawful with respect to Cambodian  
15 law. We have developed in our brief, the articles of international law which recalls the right to be tried  
16 in due time limits or to be released. And we mentioned many instances of the case law where the  
17 European Court of Human Rights -- where the United Nations Human Rights Committee sanctioned  
18 penalised preventive detention which were not considered to be reasonable. As I was saying a few  
19 moments ago, we agreed finally with the Co-Prosecutors and also with the Co-Investigating Judges to  
20 say that this detention is considered a problem. I am observing that all the *amicus curiae* briefs,  
21 except from David Scheffer, have concluded that the prior detention of Duch was unlawful as it was  
22 breaching his right to be tried within (sic) undue time limits or to be released. And we are saying that  
23 Co-Investigating Judges had to decide upon the issue.

24  
25 The Co-Investigating Judges, in some way, have said this is a problem, but it is not our problem. To

1 this, we are answering: it poses a problem and you have the duty to solve this issue.

2  
3 Are you aware that to follow the explanation of the Co-Investigating Judges, then it would mean that if  
4 Duch is convicted, so the eight years spent in provisional detention wouldn't be taken into account?

5 So if we go to the reasoning of the Co-Investigating Judges that is where we get to. So if the  
6 Extraordinary Chambers were to convict Duch, then we could not deduct the eight years spent in  
7 prison. This is not acceptable, and you know it.

8  
9 I am going to skip some pages. I am going to go a bit faster because time is running, and I am going  
10 to go to page 17. I am sending you to the implementation of case law of *Barayagwiza*, who said, in  
11 substance:

12  
13 "Even if the violation of the right of the charged person cannot be – the International  
14 Tribunal has to examine the legality of the decision and to recognise a violation when it  
15 does exist. Even if the International Tribunal is not liable for a violation of the rights of a  
16 charged person, it has to examine its legality."

17  
18 Everybody has agreed that the Co-Investigating Judges should recognise that the right of the charged  
19 person has been breached, especially the *amicus curiae* of the Centre for Social Development and  
20 Asian International Justice Initiative, paragraph number 13. It seems clear that this Honourable  
21 Chamber shall exercise and not avoid – shall exercise discretion and knowledge that the prior  
22 detention constitutes a violation of the right of the appellant to be tried without undue time limit in  
23 accordance with, *inter alia*, the Article 14 in paragraph 3 of the Covenant on Civil and Political Rights.

24  
25 And still on the *Barayagwiza* case, I am going to quote the *amicus curiae*, the Appeals Chamber of

1 the International Criminal Tribunal for Rwanda. So the Rwanda Tribunal requested in an affirmative  
2 way that in its decision – sorry - the violation of the rights of the charged person should be recognised  
3 by the International Criminal Tribunal for which the charged person is seeking remedy, even if this  
4 violation cannot be attributed to him. That is what the Appeals Chamber of the International Criminal  
5 Tribunal for Rwanda was saying.

6  
7 We have not requested that the procedure be annulled. This is not our request. So, please, don't use  
8 against us the *Lubanga and Nikolic* case law. In this case file, the defence was asking for the  
9 annulment of the whole procedure. And international criminal jurisdictions were setting very high  
10 international standards so as to annul procedure. We are not requesting the annulment of the  
11 procedure before the Extraordinary Chambers. We request that the Extraordinary Chambers say that  
12 there has been a violation, a breach of the charged person, and that this violation requires  
13 compensation. That is all. That is what we are requesting.

14  
15 I am now referring to page 22. Since I have asked you to examine this case file *in concreto*, I would  
16 like to quote the *amicus curiae* from paragraph number 12, where it is saying to us something very  
17 concrete. Before engaging in a full-scale discussion of Kaing Guek Eav's pre-ECCC detention, it is  
18 important to note that its entire length was due to the expectation of the establishment of the ECCC, a  
19 process fraught with numerous delays caused by factors unrelated to the Cambodian judiciary or the  
20 detainee. The purpose of this detention had been corroborated by some of the top, high-ranking  
21 officials within the Cambodian Royal Government prior to the establishment of the ECCC.

22  
23 The two detainees, Kaing and Ung Choeun, had for an extended period of time served the purpose of  
24 assurance to the international community that the Royal Government of Cambodia would be able to  
25 deliver potential defendants if the ECCC was to be established. Had this not been the case of

1           awaiting the establishment of the ECCC, the detainee would have been tried by national court with  
2           jurisdiction to act in such a manner.

3  
4           Prior to the adoption of the ECCC law, there had been nothing preventing a national court from trying  
5           Kaing Guek Eav. This is a well-established factor which is known to the community. It will be an  
6           exercise in futility if the ECCC continues ignoring it. And, now, I am referring – and this is the reason  
7           why the ECCC has been created. And this is the reason why Mr. Duch and his defence counsel are  
8           not responsible for the length of the detention.

9  
10          In our brief we have developed the different decisions of the international criminal tribunals which  
11          lack -- as we request, have averted that when there was a violation, a breach, even if this breach was  
12          not due to the responsibility – it belonged to the responsibility of the International Criminal Tribunal, it  
13          was its responsibility to try it.

14  
15          And one last thing, page 28, the Co-Investigating Judges have replied it's not at the stage of  
16          proceedings that we have to decide upon this. And this is the goal of our appeal. We precisely think  
17          that it's at the stage of the proceedings, so at the stage of your Chamber, that we have to decide on  
18          the principle of reparation for the charged person.

19  
20          And now, I am sending you to the *Barayagwiza* case law. And the case had been brought before the  
21          Appeals Chamber. It was the Appeals Chamber that said, first of all, there was a breach, a violation.  
22          Secondly, this breach was not due to the International Criminal Tribunal; and, in the third place, it  
23          belongs to the International Criminal Tribunal to grant compensation/reparation. And, in the fourth  
24          place, the Appeals Chamber has said, "We set the law today. We are saying that at the moment  
25          when *Barayagwiza* will be tried, then his right for compensation will have to be taken into account."

1 And this is what we have come here to request from you. Please, render a decision in which you  
2 observe – you note that the rights of Duch to be tried without undue time limits. This right has been  
3 violated – has been breached. Say that in your decision, don't only say that it is a problem, it  
4 constitutes a problem; give the solution – state the solution. And the solution is the release, and then  
5 there is a continuation of the procedure, because we are not requesting the annulment of the  
6 procedure. If it's not the release, then it's reparation at the time of the hearing -- judgement.

7  
8 Just before stopping, I would like to add that the Office of the Co-Prosecutors has tried to convince  
9 you that when we face serious breaches – serious crimes it is not common use to release people – to  
10 set them free. This is not correct. It's not exact. We have many case law decisions of the  
11 International Criminal Tribunal for Rwanda, and for this one there is only one, in the *Bagilishema* case  
12 file, one release. On the other hand, for the International Criminal Tribunal for the Former Yugoslavia,  
13 13 decisions of release. And I am saying "release", not provisional release; this does not exist, only  
14 detention is provisional, dear madam and dear sir, Co-Prosecutors. So there is a decision to release  
15 before hearing; 13 decisions from the Tribunal for Yugoslavia.

16  
17 For such serious charges against Duch, I also allow myself to quote some decisions rendered in  
18 Kosovo by the Tribunal of the District in the case file of *Selim Krasniqi*, who was prosecuted on the  
19 grounds of war crimes. Also, please allow me to recall two decisions which have just been rendered,  
20 pronounced by your colleagues, the Judge from the Tribunal of Paris, concerning two case files  
21 regarding genocides: There was the case file of *Bucyibaruta, Laurent*, then the court issued the  
22 decision of release. So we are saying that contrary to what the Co-Prosecutors assert, it is neither  
23 rare nor exceptional to set the charged persons accused of serious crimes -- it's not rare to set them  
24 free, to release them. As Mr. Kar Savuth said this morning, it will be an important decision from  
25 Extraordinary Chambers, which for the first time will implement the new code of criminal procedure

1 which contain the release of a charged person on bail. It would be interesting for the ECCC to set the  
2 example to the other jurisdictions, to be the first to implement this new code of criminal procedure.

3  
4 This is the minimum compensation that you owe the charged person, even if it is difficult to  
5 understand for the victims. The *amicus curiae*s were not wrong when they said: Human rights, if we  
6 do respect them, we must fully respect them. You are not mocking the victims when we release Duch  
7 today in order to compensate the eight years he spent in prison. It is not mocking the victim; it is  
8 simply respecting human rights.

9  
10 I wish now to conclude. I would like to conclude now. All the parties involved by the establishment of  
11 this tribunal, the United Nations, as much as the Royal Government of Cambodia have acknowledged  
12 the importance for the Cambodian people and also for the international community, that the ECCC be  
13 a court which fully respects human rights, His Excellency, Prime Minister Hun Sen, has stated in May  
14 2007:

15 "We will do everything in our power for the ECCC to reach the level of international  
16 standards upon which we agreed and which are required to meet the needs for justice of the  
17 Cambodian people and humanity."

18  
19 Also, Mr. Co-Prosecutor, Mr. Robert Petit, himself expressed how it was important to him that the  
20 ECCC respect international standards. Since, Mr. Co-Prosecutor, you have been quoted – cited in an  
21 article, saying that you would leave the Extraordinary Chambers if this process were not conforming to  
22 legal internationally accepted standards. And this is in the name of these standards, internationally  
23 recognised standards, that the defence requests the compensation of detention of whom Duch was  
24 the victim.

1 MR. PRESIDENT:

2 Before we continue, I would like the co-lawyers to provide the written documents in regard to this  
3 morning's submissions, and just now's submissions.

4  
5 So, next, the hearing would take 15 minutes' break. The president of the security guards, please take  
6 the charged person to the room.

7 *(Court recessed from 1500H to 1529H)*

8 MR. CHUON SOKREASEY:

9 Please sit down. We would like to continue our hearing and I would like to have our submission in  
10 response to a submission by the co-lawyers this morning. Before the response, I would like to show  
11 that this charged person called Kaing Guek Eav, alias Duch, was issued an introductory submission in  
12 2007 on July.

13 MS. CHEA LEANG:

14 The Co-Prosecutors charged the person on four counts, but the Co-Investigating Judges put the tried  
15 person under two counts only, the crimes against humanity and war crimes. So after having  
16 forwarded the introductory submission by the Co-Prosecutor's Office so a provision of detention was  
17 issued on the 31st of July 2007. In the order of the provisional detention of the charged person the  
18 parties of the charged person have lodged an appeal against that order. Because the charged person  
19 and the lawyers haven't agreed on the following points: First, the lawyers see that the decision to  
20 detain provisionally the charged person was not pursuant to the Rule 3 of the Internal Rules. Number  
21 two, because the defence lawyer noticed that the detention of his client for more than eight years  
22 already violated his client's right, as stated in the civil rights and political rights. So what the defence  
23 lawyers have lodged an appeal in regard to this violations so that Co-Prosecutors would like to draw  
24 attention of the whole hearing of the Pre-Trial Chambers that now we are considering only the  
25 provisional detention of the charged person whether it is legal according to the legality of the detention

1 or not.

2

3 Before elaborating these points I would like to also indicate some issues that raised by Mr. François  
4 Roux in regard to the extraction of some points in the submission response by the Co-Prosecutors to  
5 the office of the defence counsel because these relate to the issue before the merit. If the  
6 Co-Prosecutors have not identified any point in the facts, then it does not indicate whether the  
7 detention based upon which points. As disseminated publically already whether -- which -- aware of  
8 the facts has been received that the Co-Prosecutor have decided to extract some witnesses and  
9 some source of information and these other points to be addressed also.

10

11 In relation to the response of the Co-Prosecutor office I would like, along with my Co-Prosecutor,  
12 entitle to sign on the response of which legal. What is interesting, in the introductory submission the  
13 Co-Prosecutor looked into Rule 63.3 of the Internal Rules, both representatives of the prosecutors  
14 agreed solely on the detention of the charged person provisionally. Because in Article 63 the  
15 Co-Investigating Judges have the right to make a decision to detain provisionally based on the fact  
16 that the tried person has committed crimes in the Democratic Kampuchea region from 1975 to 1979  
17 and these crimes are serious, and also Article 63.3(b) the detention of the tried person provisionally is  
18 the very necessary measure. As a measure to present the tried person before the Chamber to avoid  
19 pressure on witnesses and to secure the personal safety of the tried person, and along with these we,  
20 the Co-Prosecutors, submitted to avoid destruction of evidence left over from that regime.

21

22 Next I would like to respond to what the national lawyer has raised this morning and it is time the Co-  
23 Prosecutor give the response accordingly. The national lawyer raised in relation to the legal issue.  
24 These legal issues we should consider the agreement between the United Nations and the Royal  
25 Government of Cambodia in regard to the very long negotiations because the characteristics of



1 practice which can have some kind of loophole that needs to be filled, so the Pre-Trial Chambers in  
2 the Courts of Cambodia has established a special provision, the extraordinary laws for the  
3 Extraordinary Chambers, and we also examined the Internal Rules. These Internal Rules if you take  
4 into consideration seriously, they are the points that collected from the national procedures to be  
5 implemented in our proceedings. So we can say that why this Chambers has its unique laws. In the  
6 law itself, it stipulates some special features and uniqueness separate from the national courts. If you  
7 look into the system of law and the participation of Court, Judges and Co-Prosecutor who are the staff  
8 of the Chambers, we can see that they are not only participation of national judges, but there are also  
9 international judges' participation and this decision cannot be made alone; there must be a majority  
10 vote. So this is not really pursuant only to the national law.

11  
12 So the uniqueness of this law, I would like to look into one other case whether this law is special or is  
13 the same as the existing national law. If you look into the Constitution, the amnesty stated in the  
14 Constitution, one of the points is not considered or used. This law is unique. The government has not  
15 asked for any pardon so this is the uniqueness of the laws already. And the pardon of the previous  
16 sentences is at the discretion of the Chamber, however, it pardon anyone in our Chambers. I would  
17 like to draw your attention before we come to why the Co-Prosecutors believe in the crime committed  
18 by the charged person. These are the results of the preliminary investigation and also the  
19 investigation of the Co-Investigating Judge so far.

20  
21 We have received information and documents and inculpatory evidence that this person has  
22 committed crimes in that regime. Because the charged person was the head of security office S-21  
23 during that time and at the beginning he was the deputy chief and then he was the chairman of the  
24 S-21. In the name of the charged person as the chairperson of S-21 the charged person has  
25 managed all the victims. The destiny of more than 15,000 victims already smashed and before being

1           smashed the victims were tortured savagely, for example like, the victims were electrocuted and their  
2           fingernails were punctured or pulled out, that's what the torture in S-21.

3  
4           If you look into the system of S-21, you can see that the persons who practice, exercised, monitored  
5           the S-21 were under the supervision or order of the chief of the S-21. So everything that the  
6           chairperson did not allow his subordinates to exercise their activities then, they could never have been  
7           allowed to do so. So next if you look into the jurisdiction whether it is recognised in relation to the  
8           legal issues whether this Extraordinary Chamber should continue their proceedings from the  
9           Cambodian Court, I would like to stress out some key points in relation to the detention of Duch in  
10          more than eight years.

11  
12          I think the lawyers would like the Chambers to practice the continuity of the proceedings of the  
13          Cambodian Court when he was detained in 1999. But the Chamber would like to appeal to the Pre-  
14          Trial Chambers that what the lawyer wishes cannot be accepted here because there is a uniqueness  
15          or special features that we do not have any connection between the military court, which is the  
16          national court, and the Extraordinary Chambers in the Courts of Cambodia. But Mr. Lawyer has not  
17          considered that the military court is the trial court of the national court and in the trial court actually  
18          there is a Supreme Court and an Appeal Court that has authority to monitor the military courts. So if  
19          you think that the decision by the military courts was not legal, then the lawyers could also appeal to  
20          the Supreme Court or upper courts in the national court systems.

21  
22          So the Chambers here has its opposite feature from those structures of the national court. Here we  
23          only have the trial court and we have the Pre-Trial Chambers and the supreme Chambers, and the  
24          system is somehow different. This is two separate bodies. Accordingly, we have not seen any laws  
25          in the law of the ECCC or in any Internal Rules of the Chambers that impose these Extraordinary

1 Chambers to practice or continue the jurisdiction applied by the military court so far. Some errors or  
2 the mistake between that you think made by the military court, I think there is a supreme or upper  
3 court there to make a decision or to accept the appeal against the violation of your client. If you look  
4 into the point that relates to the legal issue, especially the agreement between the United Nations and  
5 the Cambodian Government, they agreed to establish these Chambers and this is the special court  
6 which applies international standards, so that's why this law has been established for both the  
7 national and international judges to implement only things that are pursuant to the international  
8 standards.

9  
10 I think that our Internal Rules of the Chambers have expressly stated the proceedings to be  
11 implemented here which are mostly pursuant to the legal system of Cambodia. If we think that any  
12 points in the agreement are somehow not international standards, we can look into other alternative  
13 points to substitute so that it can have the international standards in place. So the jurisdiction of the  
14 military has nothing to do with the Extraordinary Chambers.

15  
16 Next, I would like to add a response to the brief of the lawyers in regard to whether the examination of  
17 the legal issues -- or the decision by the Co-Investigating Judges. And I think that the decision by the  
18 Co-Investigating Judges, we knew that the parties have the right to lodge an appeal. So this doesn't  
19 mean that these Chambers are completely new Chambers that have never looked into the facts.

20 Before making a decision the Co-Investigating Judges have examined the facts. So, today's hearing  
21 is considered as the supreme court to monitor or to examine the decision made by the Co-  
22 Investigating Judges; whether it is legal or not. And the Co-Prosecutors still support this decision,  
23 because it is a necessary measure to detain the charged person, because it links to the facts in  
24 Article 63.3.

1 The first fact describes the charged person, whether he will appear before the Chambers. We also  
2 need to look into the crimes accused by the Co-Prosecutors because it is a serious crime. So the  
3 charged person knew that his crime could be sentenced to life imprisonment; that we cannot  
4 guarantee his appearance before the Court. So we also look into whether he appears before the  
5 Chambers in relation to what the lawyer has raised, because the lawyer says that his name or the  
6 changes of his name and residence is just normal. But, based on the information we have collected  
7 so far, and through interviews, and through the DC-Cam, we notice that through the interviews, the  
8 charged person has changed name repeatedly and his residential addresses have also been changed  
9 because he avoids to hide his identity or whereabouts. And after the liberation day, 1979, the  
10 charged person did not go to live in his home town. Even in his mother's interview, his mother did not  
11 know where he lived. So he didn't come back to his home town because he is afraid someone would  
12 know him. So, this is his wish, to abscond.

13  
14 Now in relation to personal safety and public or social security, the Co-Investigating Judges, as stated  
15 in the introductory submission, we of course support these points. The lawyers say that in relation to--  
16 the security or the absconding of the charged person will not happen because the person has lived  
17 peacefully for 20 years. But the question is: during the past 20 years has he lived – or has the public  
18 known where he lived, or has the public learned that he has changed his name? So, no one knows.

19  
20 So, if we look into another point, we know now that the Extraordinary Chambers in the Courts of  
21 Cambodia has to be in public. Even the provisional detention order and everything in relation to the  
22 charged person is publicised through newspaper, television, radios. So the public, not only national  
23 public but international public, has already known the charged person, and that that charged person  
24 was the suspect charged by the Co-Prosecutors.

25

1 So, for already 20 years, as the lawyers say, the charged person has lived in various places. He lived  
2 in the remote area next to the border. But, after 1999, only the Western journalists discovered him  
3 through a photo. And this is a point that the public has not paid good attention because they never  
4 know him. But, now, he is known to the world and to the whole country. So, if he is released, the pain  
5 and suffering of the victims and witnesses, we are afraid there would be revenge. As you already  
6 know, during those regimes, a lot of victims died during the Democratic Kampuchea regime from 1975  
7 to 1979.

8  
9 Another issue in the decision is that the Co-Investigating Judges have not made a decision on the  
10 submission by the Co-Prosecutor that the Office of the Co-Prosecutors consider that the release of  
11 the charged person, the charged person can put pressure on the witnesses. On this issue, the Co-  
12 Prosecutors still believe why there is still pressure on witnesses. We have to understand that all  
13 witnesses who have testified or implicate the charged person, they have been victims, and they have  
14 been combatants, or they have been the security guards at S-21, and they are still alive. So if the  
15 Court allows the charged person to be free, what problems will be imposed on those witnesses?

16  
17 So, if you look into the evidence, this evidence issue has been addressed in regard to the provisional  
18 detention submission. We have received a lot of information that the charged person has met and  
19 has contacted with other senior leaders of the Democratic Kampuchea, and in some points the senior  
20 leaders have blamed the charged person for not destroying the left-over evidence during the period.  
21 So this indicates that the other senior leaders of the Khmer Rouge regime forced this person to  
22 destroy evidence left over from the regime.

23  
24 Meanwhile, the lawyers this morning raised the detention. This detention, the military court used the  
25 Extraordinary Chambers' law to detain their client from the very beginning, since the Chamber was

1 not yet established. So I see the points you have raised, whether it is the error or a violation, it is  
2 more the authority or competence of the supreme — or the upper courts of the military court.  
3 Because, whether the military court used the Chambers' law without the establishment of the  
4 Chambers.

5  
6 We looked into, as I already stated earlier, the legal issues, both laws are not the same. If you look  
7 into the Extraordinary Chambers in the Courts of Cambodia established on the 22nd of June 2007, so  
8 what you raised in regard to the use of the law of the ECCC, you said that this law had been  
9 implemented since 2002. So it is not correct. So, who made a decision to say whether the practice of  
10 the law is correct or not? It is not the competence of the Chambers to do so. And why we did not  
11 receive or accept that jurisdiction, because if you look into the introductory investigation of the Co-  
12 Prosecutors, we started our proceedings from the 10th of July 2007. But this investigation is a  
13 separate investigation that's not taken over from the military court. So the Co-Prosecutors conducted  
14 the investigation themselves. And the Co-Investigating Judges of the Chambers investigated and  
15 searched for the truth and evidence based on the introductory submission by the Co-Prosecutors'  
16 office. So this indicates that we did not have anything to do with the jurisdiction by the military court.

17  
18 When the Co-Prosecutors' office made a decision to issue an introductory submission in 2007, the  
19 Co-Investigating Judges, after 12 days after receiving the submission, they conducted a further  
20 investigation. So the Co-Investigating Judges are not responsible for what the military court has  
21 practised before. So, what they are implementing now, the submission issued by the Co-Prosecutors'  
22 office, so what happened in the past has nothing to link with the jurisdiction of the Extraordinary  
23 Chambers. So I would like the Pre-Trial Chamber to examine the independence of the Chambers and  
24 the uniqueness or the separateness of the military court. And, at the same time, the Chambers have  
25 not agreed with the military court on any activities practised by the military court. So the Extraordinary

1 Chambers has not shown any other evidence to prove this legally or any other functions were jointly  
2 practiced together. And the Extraordinary Chambers does not have any jurisdiction to revise any  
3 action or activity by the local authority or the national authorities. If you look into the Internal Rules  
4 actually, there is no article stipulating in regard to this point and the Extraordinary Chambers in the  
5 Courts of Cambodia has no obligation to practice or to force other national courts to enter into its  
6 orders. So, we are, again, a unique body, a separate body.

7  
8 So the Extraordinary Chambers established by United Nations and the Royal Government of  
9 Cambodia through agreement before the law on the ECCC established, including the Internal Rules in  
10 order to identify serious crimes that the charged person. So this is a uniqueness to be noticeably  
11 taken into account. And these are serious international crimes, for example, genocide, crimes against  
12 humanity or war crimes; all law that the charged person has committed the crimes stipulated in the  
13 Criminal Codes of Cambodia and other treaties that Cambodia is a signatory to. So, we have also  
14 identified those special laws concerning some group of individuals or certain individuals to be  
15 punished or sentenced, which include the senior and most responsible people of the Khmer Rouge  
16 regime. And these are the unique issues of the Chambers' law. And, again, in the law, it states also  
17 the commission of the charged person in the limited period of time from 1975 to the 6th of January  
18 1979. So this is also the uniqueness of the law. So I can see, as my colleague has understood, it has  
19 nothing to link with the national court.

20  
21 And the Extraordinary Chambers in the Courts of Cambodia does not accept or try any appeal from  
22 any other courts. And the Supreme Court considered the appeal by the lower court. So the lower  
23 court here is – if there is any evidence or any decision is not legal, then all parties have the right to  
24 appeal the decision.

1 The next point the lawyer of the charged person raised is that during that time there is no appeal  
2 against the provisional detention of the military court. I think this morning the Pre-Trial Chamber has  
3 already asked to clarify this. And the lawyer said they waited until the submission of the authority  
4 chamber. I noticed a document submitted this morning. In this document the lawyer did not of course  
5 lodge an appeal, but before the charged person was brought to the Extraordinary Chambers, I think  
6 those documents indicate that he lodged an appeal. Whether his appeal is legitimate or not, I cannot  
7 make any judgement, because I think this appeal was lodged on the 5th of March 2007. And of  
8 course the appeal lodged while the Extraordinary Chambers was already functioning, but the charged  
9 person was not brought in yet. So we don't know whether we accept the appeal. I think it is the  
10 decision of the military court, it is not that of the Chambers.

11  
12 The second issue in regard to what I already stated is that we haven't got any agreement of any  
13 national court or the military to give us any document or transfer any document to the Extraordinary  
14 Chambers. The lawyer this morning stated that he received documents. And the question is whether  
15 the document you received has received any letter – or you have notified any information that the Co-  
16 Prosecutors contacted the military court in regard to the submission of their document. So in regard  
17 to the source of information, we can do whatever we can to make sure we gather information. So this  
18 doesn't mean that when there is a document, then it means that the Prosecutors' office contacts the  
19 military court to submit them.

20  
21 So, since the establishment of these Extraordinary Chambers, up to now we noticed that haven't got  
22 any communication or contact with the military court. And the reason that the military court used the  
23 Extraordinary Chambers Court, it is again not the jurisdiction or the competence of the Chamber to  
24 make any judgement, as in our criminal procedures it states clearly that if the lawyers think it is not  
25 legal, then you can lodge an appeal to the court during that time – to the Supreme Court.



1 I am sorry that I didn't raise an appeal. You raised the duration, the eight years' detention of your  
2 client. Of course, your client was detained in 1999. And why did you wait until your client was  
3 detained up to eight years? Why didn't you lodge an appeal consecutively?  
4

5 The Chambers here, it is the court that has nothing to do with an agreement with the national court.  
6 May I remind you that the lawyers in the courtroom raised the case of *Barayagwiza* at the ICTR, which  
7 is the criminal tribunal court in Rwanda. This practice, of course, cannot be applied at the Chambers  
8 here. As proposed, whether reparation or whether this decision is made by the Chamber, whether  
9 there is a violation on the charged person and how it can be solved, I think this cannot be solved now.  
10 This is another separate issue, although we accept that other international tribunals have their own  
11 strategies for implementation. But a condition of one country in the context of another country is  
12 sometimes not relevant, some relate to the facts, some relate to the issues before the merit. If the  
13 Judges see that it is a violation on his client's right, then the Judges can use any decision to reduce  
14 sentences or something according to the discretion of Judges. We have not discussed this issue, we  
15 have only discussed about the detention of the charged person whether it is really a necessary  
16 measure or whether he should be released, which is really a primary issue to be addressed now.  
17

18 What I am also interested is in relation to the appearance as the Pre-Trial Chambers, and as the  
19 reporting Judges also read out the report, we should also look to see whether the charged person  
20 appear the court through what means whether the military court was asked to transfer him to the  
21 court, but here the Co-Investigating Judge issued an order for him to be brought before the court  
22 there. So this means that the office of Co-Investigating Judge does not recognise any jurisdiction of  
23 any military court so that what transfer means different from the order we have not asked any court to  
24 transfer him, so here means the Co-Investigating Judge issues the arrest warrant and it does not state  
25 that the military court transferred the charged person to the Chambers.

1 So based on those reasons and important conditions raised the support the detention measures  
2 which is necessary for ensuring the appearance of the charged person before the Court, and this is  
3 pursuant to the political and civil rights and also pursuant to the law of the ECCC as stated in  
4 Article 35(d) that the charged person has to be present before the Chambers. And also it relates to  
5 the civil and political rights especially that the charged person is tried in his presence that it is  
6 reasonable and has to be accepted.

7  
8 Another issue in relation to the point raised by the lawyer this morning especially in regard to the  
9 violation on the procedures or the extent of the detention, still the Co-Prosecutor support the decision  
10 by Co-Investigating Judges as it is not really seriously violating the rights in compared to the acts  
11 allegedly committed by the Co-Investigating Judge, and we can see that we have not seen any  
12 specific violation on the charged person because the charged person has not been receiving any  
13 severe or inhuman acts actually during his detention and the lawyers of the charged person has not  
14 addressed this clearly in our Chambers.

15  
16 The reason that we see that this violation is not serious and that doesn't need immediate solution, we  
17 have faced or encountered the practice in the international court as stated only if we noticed that there  
18 is any torture or serious torture on the charged person that the case is considered. So this case now  
19 has no evidence to prove as what is stated or practised or happened in the International Tribunal  
20 especially in regard to this torture or severe punishment on the charged person. And this is a  
21 completely different case that cannot be applied at the Chambers. Here, if there is a proof to indicate  
22 that the charged person was badly treated, then we would consider the cases.

23  
24 I would like to indicate that this charged person is not in the investigating stage so I would not like to  
25 elaborate things that is far beyond the legal issues that lead to the issue before the merit. So the

1 Co-Prosecutor would like to maintain or upheld the detention order of the charged person and we  
2 would like the Pre-Trial Chambers to not discuss this issue before the closing order by the  
3 Co-Investigating Judge. We have some other response to the *amicus curiae* briefs and I will give the  
4 floor to my colleague, the Co-Prosecutor of course, to respond to the *amicus curiae* briefs, and as we  
5 already sent a letter to the Pre-Trial Chambers we would already respond verbally today so whether  
6 the Co-Prosecutor have anything to respond to the *amicus curie* brief, then my colleague will of  
7 course have something to respond to this. Now the floor probably to him.

8 MR. CHUON SOKREASEY:

9 The hearing would like to adjourn to 9:00 a.m. tomorrow. So the chief of the security, please take the  
10 charged person to the detention facility.

11 (*Court adjourns at 1625H*)

12

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