

គណៈកម្មាធិការប្រព្រឹត្តិកម្ម ទៃ អង្គការសមាគមការពារសិទ្ធិមនុស្សកម្ពុជា

CAMBODIAN HUMAN RIGHTS ACTION COMMITTEE

ADHOC - CARAM Cambodia - CCPCR - CDP - CHHRA - CKIMHRDA - CSD- CWCC - GENEROUS - HROTP
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No.:.....037/07 CHRAC

**Declassified to Public
06 September 2012**

Judges of Pre-Trial Chamber

Extraordinary Chambers in the Courts of Cambodia (ECCC)
National Road 4, Chaom Chau Commune,
Dangkao District, Phnom Penh, Cambodia
P.O. Box: 71, Phnom Penh
Tel: 023 219 814
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Phnom Penh, 03 October 2007

Re: Submitting CHRAC Amicus Brief in relation to Detention of DUCH by ECCC

Dear Honorable Judges of Pre-Trial Chambers,

The Cambodian Human Rights Action Committee (CHRAC), a coalition of 23 local NGOs, is interested in submitting an amicus curiae brief regarding the appeal on the detention of Kaing Guek Eay, alias "Duch", according to the public announcement issued by the Pre-Trial Chambers of the Extraordinary Chambers in the Courts of Cambodia (ECCC) on 4 September 2007.

CHRAC is in agreement with the court that it is necessary to carefully review and consider the detention order issued by the Co-Investigating Judges of the ECCC. We are confident that the hearing of appeal by the Pre-Trial Chamber will be held in accordance with international standards and urge the court to continue to strive to ensure that the human rights of all are respected throughout this process.

Please find attached, the amicus curiae brief for your consideration.

Sincerely yours,



THUN SARAY
Chairman of CHRAC
President of ADHOC

Cc:
- Office of Administration

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AMICUS CURIAE BRIEF

RELATING TO THE APPEAL BY KAING GUEK EAV, ALIAS DUCH, AGAINST THE ORDER OF PROVISIONAL DETENTION BY THE CO-INVESTIGATING JUDGES

Respectfully Submitted By:

**The Cambodian Human Rights Action Committee
(CHRAC)**

Phnom Penh, October 2, 2007

For more information, please contact CHRAC Representatives :

- Mr. THUN Saray, Chairman of CHRAC/President of ADHOC (Tel : 016 880 509)
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INTEREST OF THE AMICI CURIAE

The Cambodian Human Rights Action Committee (CHRAC), a coalition of 23 local NGO members, was established in 1994 to address the human rights situation in Cambodia. CHRAC also has the Khmer Rouge Trials Project, which works on outreach, advocacy and monitoring in relation to the Extraordinary Chambers in the Courts of Cambodia (ECCC). CHRAC submits a brief to the ECCC as amicus curiae based on its long relationship with the court, its connection with the people of Cambodia, and its extensive background on issues relating to the ECCC.

STATEMENT OF FACTS

KAING GUEK Eav, alias DUCH, has appealed the Order of Provisional Detention filed by the Office of the Co-Investigating Judges of the Extraordinary Chambers in the Courts of Cambodia on July 31, 2007. Duch bases his appeal on the opinion that his detention in the Military Court of Phnom Penh from 1999 until 2007, and his subsequent transfer to detention within the ECCC, constitutes a violation of both Cambodian Law and international standards regarding the right to be tried within a reasonable period of time.

SUMMARY

CHRAC is of the opinion that the continued detention of Duch by the ECCC is imperative, and that the Co-Investigating Judges were correct in their application of the law regarding *male captus, bene detentus*, and of Rule 63 of the Internal Rules of the ECCC.

This brief examines the same question discussed within the Order of Provisional Detention, namely whether Duch's prior detention in the Military Court of Phnom Penh affects the proceedings of the ECCC. The principles of *male captus, bene detentus*, abuse of process and proportionality will be considered, and the application of Rule 63 of the Internal Rules will be examined. Additional arguments will also be offered on arguments raised by Duch in his appeal and on the possibilities regarding sentencing should Duch be convicted by the ECCC.

The longstanding imprisonment of Duch in the Military Court of Phnom Penh can be seen as illegal and should be condemned as contrary to international standards. It is CHRAC's opinion, however, that this detention in the Military Court of Phnom Penh does not affect the status of Duch's detention at the ECCC, and does not provide sufficient reason for his release.

As will be shown by the reasoning provided in the following brief, CHRAC is of the opinion that the continued detention of Duch by the ECCC is not in violation of international standards. Rather, the ECCC has acted in accordance with international principles and is able to rely on precedence and the principle of proportionality to justify the detention order.

CHRAC strongly believes that the continued detention of Duch is necessary to uphold the integrity of the court in the eyes of the Cambodian people.

ARGUMENTS

It is imperative that the human rights of all persons be respected at all times and in all places. The fact that an individual is accused of committing particular acts which offend the sensibilities of the general population does not alter the fact that the presumption of innocence must prevail and the accused persons' human rights must be preserved. Duch has contended that his continued detention and lack of trial within a reasonable period of time violate his human rights. It is for this reason that CHRAC

has carefully reviewed this case before reaching the conclusion that the Order of Provisional Detention of Duch must stand.

The Principles of *Male Captus, Bene Detentus*, Abuse of Process, and Proportionality

As discussed in the Order of Provisional Detention, the principle of *male captus, bene detentus* is exceptionally relevant to the case at hand. The principle, which literally translated means “badly captured, well detained” states that a court may exercise jurisdiction over an accused person regardless of how that person has come into the jurisdiction of the court. This principle is limited in its application by the doctrine of “abuse of process”, meaning that a court may discontinue proceedings against an accused where there have been serious violations of the accused’s rights, in order to preserve the integrity of the court. This doctrine of abuse of process is widely acknowledged and applied but is also limited in its own application by the requirement of proportionality. Where abuse of process occurs, the court must consider the proportional relationship between the crimes allegedly committed by the accused and the potential effect of the remedy sought by the accused.

It is clear from the case law of various states and from precedent established by the international tribunals that in order for abuse of process to act as a constraint on the principle of *male captus, bene detentus*, the violation of the accused’s rights must be considered serious and egregious.¹ The case of *Nikolic* in the International Criminal Tribunal for the Former Yugoslavia was cited by the Co-Investigating Judges and appears as the strongest statement of the law on this matter, “in order to prompt a Chamber to use this doctrine, it needs to be clear that the rights of the Accused have been egregiously violated.”² In this instance, one must consider whether the continued detention of Duch amounts to a serious violation of his rights, so much so that this violation could be considered to outweigh the crimes for which he is accused and require his release.

It is the opinion of CHRAC that the crimes allegedly committed by Duch constitute a serious injustice to the people of Cambodia and cannot be dismissed lightly. Crimes against humanity are so named because they are of such an egregious nature so as to constitute a crime not only against those who directly suffered, but against humanity as a whole. The proposed remedy in this case, the release of Duch, would be entirely disproportionate to the crimes he has allegedly committed, and thus do not meet the requirements of proportionality even with stringent bail conditions attached. It is true that Duch has been detained for what can be considered an improper amount of time; however, CHRAC hopes that the ECCC will rectify this by proceeding with his trial in a fair and expeditious manner from the moment that it was granted the jurisdiction to do so. There is no indication from Duch in his appeal that he suffered such treatment during his detention so as to elevate his detention to the level of a serious or egregious abuse of his rights when compared to the crimes with which he is charged.

Thus, CHRAC agrees with the conclusions of the Co-Investigating Judges that the doctrine of ‘abuse of process’ does not apply in the present case as the abuse suffered by Duch during his lengthy detention cannot be considered significantly serious or egregious so as to outweigh the crimes for which he has been accused.

Jurisdiction

It is the opinion of CHRAC that the ECCC can in no way be seen to be acting in concert with the Military Court responsible for holding Duch since 1999. The ECCC had, and continues to have, no legal capacity to act with jurisdiction over the Military Court and had no ability to influence the prior

¹ A summary of national case law and of international precedents can be found in the Order of Provisional Detention. A more detailed overview can be found in *Nikolic* ICTY Trial Chamber II, 9 October 2002, IT-94-2-PT.

² *Nikolic* ICTY Trial Chamber II, 9 October 2002, IT-94-2-PT, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal.

detention of Duch. Once the ECCC became operational in June of 2007 it acted swiftly and in full consideration of due process and respect for the rule of law in detaining and charging Duch. It can be argued, contrary to the submissions of the defendant, that the ECCC has followed international standards by issuing the arrest warrant as soon as was possible to do so, by placing Duch in an above-standard detention facility, by proceeding without delay to trial, and by providing Duch with the full rights of defense. In this way, the ECCC has demonstrated a respect for international standards and has acted to uphold them as soon as it retained the capacity to do so.

Consideration of Rule 63 of the Internal Rules

As was noted by the Co-Investigating Judges, the conditions outlined in Rule 63 of the Internal Rules must be satisfied in order to detain Duch. First, it is necessary that the court have a well-founded reason to believe that the person may have committed the crimes they are accused of. In this case, it is apparent that sufficient evidence has been gathered by the prosecution in order to support the charge. Also, it is noted that Duch has admitted to being the leader of S-21 and that he is ready to reveal the crimes committed by the Khmer Rouge.

Among the other reasons for holding Duch in detention, the Co-Investigating Judges cited the need to ensure the presence of Duch at his trial, the necessity to ensure his security, and the necessity to preserve public order. CHRAC agrees strongly with these assessments. First, should Duch be released, the court would be unable to ensure his presence at the trial. A potential conviction of crimes against humanity could carry with it a life sentence, a punishment which may encourage Duch to flee from Cambodia. The necessity of ensuring the presence of Duch during his trial is of utmost concern.³ As there are no provisions for trial in absentia at the ECCC, this situation must be avoided. Second, the increased levels of publicity associated with his detention and his trial have the potential to place him in a vulnerable position. The court would have no way of guaranteeing his safety were he to be released. Third, it is likely that should Duch be released, public order may be compromised. It is clear to CHRAC that the people of Cambodia do not hold significant trust in their domestic courts and in the ECCC, and that the release of a key defendant would further jeopardize their faith in the ability to the courts to provide justice. The people of Cambodia have long suffered and would likely feel betrayed should the court choose to release Duch, even under strict conditions. The pursuit of justice must be continued in order to ensure that the memories of those who suffered under the Khmer Rouge regime are respected.

Response to other arguments raised in the appeal

Two other issues which arose in the defendant's arguments warrant discussion at this time. First, Duch comments that he was not a senior leader of Democratic Kampuchea and that there were "more than two thousand persons" who held positions as heads of security centres; therefore he should not be considered a possible defendant. CHRAC agrees with the assessment that Duch was not a senior leader of the Khmer Rouge regime; however, it does believe that his presumed actions could easily result in his classification of 'most responsible', another categorization of defendant under the Internal Rules of the ECCC⁴. S-21, the prison commanded by Duch, was the setting of catastrophic abuses allegedly committed against the civilian population and stands as a primary example of the horror of

³ *Khmer Institute for Democracy*, "Survey on the Khmer Rouge Regime and the Khmer Rouge Tribunal", 2004, <http://www.bigpond.com.kh/users/kid/KRT-Tribunal.htm>. In total 536 interviews were conducted in Phnom Penh and ten provinces between the 16th and 27th August 2004. 96% respondents wanted to have trials for Khmer Rouge leaders.

⁴ Preamble to the Extraordinary Chambers in the Courts of Cambodia Internal Rules.

the Khmer Rouge regime. S-21 was considered the highest level security centre and evidence suggests that a possible 14,000 persons were interrogated, tortured and killed.⁵

The second issue that must be addressed is the argument by Duch that he should not be held while other suspects remain at liberty. This position has been refuted by the recent arrest and charging of Noun Chea, a.k.a. Brother Number Two, by the ECCC. Regardless of this arrest, however, the argument of Duch holds little weight, as the cases of other possible defendants hold no bearing on his own, and as leeway must be granted to the court to allow it time to develop each case in its own time frame.

Recommendations

While CHRAC does not support the pre-trial release of Duch, we support his right to a speedy trial before the ECCC. We urge the ECCC to consider the following points.

Trial

CHRAC implores the court to refrain from considering the illegal prior detention in the Military Court of Phnom Penh when determining the verdict in Duch's case. We believe that doing so may impact the independence of the trial by encouraging prejudgment of the case. If Duch is found not guilty at trial, we urge the ECCC to use the illegal detention by the Military Court to order compensation by the Government of Cambodia.

Sentencing

If Duch is found guilty at trial, his prior detention in the Military Court of Phnom Penh could be taken as a mitigating circumstance. CHRAC encourages the court to refrain from considering the prior detention in the determination of the proper and fitting sentence; however, it could be taken into consideration in the implementation of the sentence.

CONCLUSIONS

It is important that the actions of the Military Court of Phnom Penh and of the ECCC not be mixed or confused. CHRAC believes that it is necessary to condemn the actions of the Military Court and the lengthy detention of Duch under its authority. We do not, however, believe that he should be released from his present detention by the ECCC because of his prior detention.

It is the opinion of CHRAC that the Co-Investigating Judges were correct in their application of the law in ordering the detention of Duch. We urge the judges to proceed with the trial as expediently as possible, continuing to ensure that international standards are upheld.

⁵ *A History of Democratic Kampuchea (1975-1979)*, Documentation Centre of Cambodia, 2007.