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

No. 002/14-08-2006

KANG GUEK EAV (alias DUCH)

On Invitation of the President of the Pre-Trial Chamber to submit written *amicus curiae* briefs pursuant to Rule 33 of the Internal Rules of the ECCC

BRIEF OF PROFESSOR DAVID SCHEFFER, INTERNATIONAL LAW EXPERT, AS *AMICUS CURIAE* IN SUPPORT OF THE CO-INVESTIGATING JUDGES

INTEREST OF THE *AMICUS CURIAE*

Pursuant to the Public Notice of 4 September 2007, *amicus curiae* David Scheffer files this brief with the Pre-Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia (ECCC) in order to bring to the attention of the Pre-Trial Chamber several critical points either overlooked or conceded in the *Appeal Brief Challenging the Order of Provisional Detention of 31 July 2007* (the "Defence Appeal Brief"), which was filed with the Pre-Trial Chamber on 5 September 2007 in relation to Mr. KAING Guek Eav (alias DUCH) and the related *Order of Provisional Detention* signed by the Co-Investigating Judges on 31 July 2007.[1]

[1] Order of Provisional Detention, Case No. 002/14-08-2006, re KAING Guek Eav, alias DUCH, 31 July 2007.

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Professor Scheffer is the former U.S. Ambassador-at-Large for War Crimes Issues (1997-2001) and exercised significant responsibility within the U.S. Government for the investigation and prosecution of atrocity crimes (genocide, crimes against humanity, and war crimes) on a global basis. On behalf of the U.S. Government, he negotiated the statutes of and coordinated support for the international and hybrid criminal tribunals exercising jurisdiction over atrocity crimes and led the U.S. delegation in U.N. negotiations for the International Criminal Court. Professor Scheffer was deeply engaged in the negotiation of the *Law on the Establishment of the Extraordinary Chambers for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea* (the "ECCC Law")[2] and discussions pertaining to the *Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea* (the "UN/Cambodia Agreement").[3] He supervises the professional independent web site dedicated to the trial work of the ECCC (www.cambodiatribunal.org) and is a long-

[2] Law on the Establishment of the Extraordinary Chambers for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (Oct 27, 2004), accessed at http://www.eccc.gov.kh/english/cabinet/law/4/KR_Law_as_amended_27_Oct_2004_Eng.pdf.

[3] Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea (June 6, 2003), accessed at http://www.eccc.gov.kh/english/cabinet/agreement/5/Agreement_between_UN_and_RGC.pdf.

standing member of the New York and District of Columbia Bars and of the American Society of International Law.

SUMMARY OF ARGUMENT

1. The Defence Appeal Brief fails to recognize the independence of the ECCC within the Cambodian legal system. As a separately constituted, independent and internationalized court, which did not exist during the period of Duch's detention by the military court, the ECCC is not responsible for the detention of DUCH by the military court, nor can it be held responsible for any reference by the military court to the ECCC law. It does not have jurisdiction under its constitutional documents to rule on the legality of the detention orders of the investigating judge of the military court.

2. DUCH had knowledge of the domestic Cambodian charges against him while he was detained by the military court, thus significantly distinguishing his situation from the example cited in the Defence Appeal Brief where the defendant did not know the charges against him while in domestic custody prior to international tribunal detention.

3. DUCH lived incognito from 1979 until 1999 when he was detained by Cambodian authorities. Any evidence that might be produced to show that DUCH was not a threat to public safety while living incognito during that period is irrelevant to the situation presented today, when his identity and location is and would be well known to the public. His own safety would be highly problematical if he were released and his opportunity to escape (perhaps with assistance) into hiding again would be significantly

enhanced even if he were under house arrest. The Defence Appeal Brief offers nothing more than opinionated and recklessly optimistic views on the fate of DUCH if he were to be released and misstates who bears the burden of proof in determining whether DUCH should remain detained.

ARGUMENT

I. THE ECCC MAY NOT RULE ON THE LEGALITY OF DUCH'S PRIOR DETENTION BECAUSE IT IS NEITHER RESPONSIBLE FOR THAT DETENTION NOR DOES IT HAVE JURISDICTION OVER THE MILITARY COURT OF PHNOM PENH.

A. The independent character of the ECCC prohibits it from ruling on the legality of the military court's detention orders.

Although the ECCC operates within the framework of Cambodian and international law, it is completely independent from the rest of the Cambodian judicial system. The structure of the ECCC is radically different from the structure of other Cambodian courts.[4] The Internal Rules under which the ECCC operates (the "Internal Rules)[5] are unique. Furthermore, there is no right of appeal to another Cambodian court from the Supreme Court Chamber of the ECCC.[6] By virtue of its independence and narrow mandate, the ECCC may not rule on the legality of DUCH's prior detention.

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[4] For background on the history of negotiations and the constitutional structure of the ECCC, see David Scheffer, *The Extraordinary Chambers in the Courts of Cambodia*, an abridgement of the lengthier and footnoted book chapter: David Scheffer, *The Extraordinary Chambers in the Courts of Cambodia*, in Cherif Bassiouni, ed., INTERNATIONAL CRIMINAL LAW (Martinus Nijhoff Publishers, 3rd ed., 2008 [forthcoming]), reprinted with permission of Koninklijke Brill NV, accessed at http://www.cambodiatribunal.org/index/php?Itemid=148&option=com_content.

[5] Internal Rules, Extraordinary Chambers in the Courts of Cambodia (12 June 2007), accessed at http://www.eccc.gov.kh/english/internal_rules.aspx.

[6] ECCC Law, art. 36new.

During the years of negotiations leading to the establishment of the ECCC as a *de jure* and operational court of special ("extraordinary") and independent character within the Cambodian legal system, it was never envisaged that the ECCC would sit in judgment of the rulings of civil or military Cambodian courts. As demonstrated by the wording of the ECCC Law and the UN/Cambodia Agreement, the ECCC is intended to stand apart from existing Cambodian courts and rule exclusively on a narrowly-defined group of defendants for specific crimes committed over a limited period of time. There is no explicit or implicit provision anywhere in the ECCC Law, the UN/Cambodia Agreement, or the Internal Rules (the "ECCC Constitutional Documents") that empowers the ECCC to exercise jurisdiction over any other Cambodian court or to review or sit in judgment of another Cambodian court's rulings. The foreign Co-Investigating Judge and the foreign judges are not qualified to sit in judgment of a decision by a domestic Cambodian court operating exclusively pursuant to and within the adjudicatory framework of Cambodian law. Indeed, there is no procedural basis to be found in the ECCC Constitutional Documents for starting investigations or prosecutions before a domestic Cambodian court and concluding them before the ECCC. There is no procedural bridge between the domestic Cambodian court and the ECCC for judicial review of the domestic Cambodian court's rulings. Thus the ECCC has no jurisdiction over the domestic Cambodian court and DUCH's case against it.

B. The ECCC cannot be held responsible for the detention of DUCH.

If the ECCC was responsible for DUCH's prior detention, it might properly be asked to take that detention into account in ordering further provisional detention.

However, despite the representations of the Defence Appeal Brief, the ECCC bears no responsibility for the detention of DUCH at the hands of the military court. The Defence Appeal Brief states, "In February 2002, the charges against Mr. KANG [DUCH] and the orders placing and holding him in detention were based explicitly on the Law on the Establishment of the Extraordinary Chambers of 10 August 2001 . . ."[7] It appears that new charges brought against DUCH in February 2005 also were based on the ECCC Law.[8] According to the Defence Appeal Brief, this means that the proceedings at the ECCC are "inextricably linked" to DUCH's detention at the hands of the military court.[9]

The fact that the military court relied upon a law that could not yet be enforced and for which the requisite court was not yet established (namely, the ECCC) in order to frame its charges against DUCH begs explanation, but it does not provide a basis for ECCC review. The ECCC Law could not be enforced with respect to any target of investigation prior to 12 June 2007 (when the ECCC finally became operational with adoption of the Internal Rules) and any charges premised upon its subject matter jurisdiction must be presented by the ECCC Co-Prosecutors and approved by the ECCC Co-Investigating Judges, none of whom had yet been appointed in 2002 or 2005.[10] The mere invocation by the military court of the ECCC law in framing its charges against DUCH is insufficient to link DUCH's detention at the hands of the military court to the current proceedings.

[7] Defence Appeal Brief, par. 3.
[8] Defence Appeal Brief, par. 28.
[9] Defence Appeal Brief, par. 73.
[10] DUCH indeed may have a cause of action against the military court and he is free to seek remedies before that court and before any properly established appeals court within the domestic Cambodian judiciary. *See* SOC Law on Criminal Procedure, arts. 157 and 202 (1993).

The ECCC cannot be held responsible for the actions of the military court over which it has no jurisdiction, especially when the ECCC did not even *exist* at the time of those actions (in 2002 and 2005). In all of the examples cited in the Defence Appeal Brief,[11] the courts adjudicating the cases not only existed during the problematic detentions but also had concurrent and/or primary jurisdiction over the courts or officials responsible for the detentions. In stark contrast, however, the ECCC does not have jurisdiction over the military court and did not exist for practically the entire duration of the period for which DUCH seeks remedies. The ECCC cannot now review his case which arose from and would be properly argued before the military court.

Despite the military court's reliance upon the ECCC law to frame the charges against DUCH that provided the basis for his previous detention, the ECCC itself bears no responsibility. As established above, it stands entirely separate from the military court and the rest of the Cambodia judicial system and it did not even exist when those charges were filed, let alone orchestrate or acquiesce in them. Nonetheless, as the Defence Appeal Brief concedes,[12] the prior history of DUCH's detention pursuant to the military court's orders may be factored into decisions reached by the ECCC at the end of the proceedings. In the event DUCH is acquitted, he might be awarded reparations in compensation. In the event he is convicted, his sentence might be mitigated to account for the time already spent in detention. But the availability of such remedies post-trial

[11] *See The Prosecutor v. Barayagwiza*, Case No. ICTR 97-19, Appeals Chamber, Decision, ¶54 (Nov. 3, 1999) (ICTR and Cameroon exercised concurrent personal jurisdiction over defendant); *The Prosecutor v. Ramush Haradinaj*, Case No. IT-04-84-T, Trial Chamber, Decision on Motion on Behalf of Ramush Haradinaj for Provisional Release, ¶30 (June 6, 2005) (ICTY exercised sole jurisdiction over defendant); *Prosecutor v. Hadzihasonovic*, Case No. IT-01-47-PT, Trial Chamber, Decision Granting provisional release to Enver Hadzihasanovic, ¶14 (Dec. 19, 2001) (ICTY exercised sole jurisdiction over defendants).
[12] Defence Appeal Brief, pars. 127-133.

does not entitle DUCH to the pre-trial remedies of unqualified release, release on bail, or house arrest.[13]

II. DUCH HAD KNOWLEDGE OF THE CHARGES AGAINST HIM WHILE IN DETENTION ORDERED BY THE MILITARY COURT.

The Defence Appeal Brief concedes that throughout DUCH's detention on order of the military court, from the first day of detention on 10 May 1999 through the final indictment issued on 28 February 2005, and thus up to 30 July 2007 when DUCH was charged by and transferred to the ECCC, he was charged with crimes under Cambodian law.[14] Cambodian law appears to require that DUCH had to be informed of each of the charges when the military court ordered them against him.[15] No evidence is presented in the Defence Appeal Brief to suggest that DUCH was not so informed on or about 10 May 1999, 22 February 2002, and 28 February 2005 when the three sets of charges were ordered by the military court.[16]

DUCH's knowledge of the charges ordered against him by the military court throughout his detention by that court distinguishes his situation from a key example presented in the Defence Appeal Brief. The Defence cites the *Barayagwiza* judgment[17] of the Appeals Chamber of the International Criminal Tribunal for Rwanda (ICTR) and the provisional detention that occurred in that case for its "inescapable conclusion…that the Appellant's right to be promptly informed of the charges against him was violated." The Appeals Chamber of the ICTR held that, "the fact remains that the Appellant spent

[13] Internal Rules, Rule 67.
[14] Defence Appeal Brief, pars. 2-4.
[15] UNTAC Penal Code, art. 13 (1992).
[16] Defence Appeal Brief, par. 2.
[17] *The Prosecutor v. Barayagwiza*, Case No. ICTR 97-19, Appeals Chamber Decision (Nov. 3, 1999).

an inordinate amount of time in provisional detention without knowledge of the general nature of the charges against him."[18] Such a situation simply did not and does not exist with respect to DUCH. It would appear that he knew from the first day of detention in 1999 about the charges of the military court against him and he has known from the first day of provisional detention at the ECCC the specificity of the charges he faces before the ECCC. He had ample opportunity to contest the charges of the military court from the commencement of his detention there in 1999. He has every opportunity under the Internal Rules to challenge the charges of the ECCC being investigated now by the Co-Investigating Judges of the ECCC. In this case, there does not exist the knowledge gap that so concerned the Appeals Chamber of the ICTR in the *Barayagwiza* case.

III. DUCH'S PRE-DETENTION LIFE IN CAMBODIA STANDS IN STARK CONTRAST TO HIS PROBABLE STATUS IF RELEASED PRIOR TO THE CLOSING ORDER AND THUS THE CONCERNS OF THE CO-INVESTIGATING JUDGES SHOULD BE UPHELD AND PROVISIONAL DETENTION SUSTAINED

A. The Defence's misleading version of DUCH's whereabouts and behavior from 1979 to 1999 obscures the fact that DUCH meets at least three of Internal Rule 63(3)'s conditions for provisional detention.

The Defence Appeal Brief attempts to show that DUCH does not fulfill the conditions set by the Internal Rules for provisional detention.[19] The Defence Appeal

[18] Defence Appeal Brief, par. 83.
[19] Internal Rules, Rule 63.

Brief cobbles together a version of the past 28 years that is remarkably incomplete. It states that "Mr. KANG [DUCH] was free from 1979 to 1999 without any resulting disturbance of the public order. Only this piece of evidence in the case file gives any indication of the possible public reaction to Mr. KANG's [DUCH's] release."[20] The status of DUCH in Cambodian society prior to his detention in 1999 and today (and particularly if he were to be released prior to the Closing Order) are as different as night and day. DUCH probably was no threat to public order prior to his arrest in 1999. He was in hiding, living under a false name, and intentionally withdrawn from mainstream society. As far as we know from public sources of information, DUCH sought to survive in anonymity, not to continue the crusade of horrors for which he is charged before the ECCC or to perpetuate anything remotely associated with the Pol Pot regime. In that capacity he had every reason not to become a threat to the public order and above all else to ensure his personal safety during those decades in hiding.

Now, however, DUCH is a public figure again, as he was during the reign of the Khmer Rouge. If he were released pending trial, his identity and location would be well known to all. No one, including his counsel, can prove that DUCH would be personally safe anywhere outside of a secure detention facility in Cambodia today any more than the Pre-Trial Chamber can prove that he would be the target of a specific risk. There are tens of thousands of surviving family members of the tens of thousands of victims of Tuol Sleng Prison walking the streets and working the fields of Cambodia today. Defence counsel cannot assure the Pre-Trial Chamber that each and every one of those surviving family members poses no threat whatsoever to DUCH if he were to be released prior to

[20] Defence Appeal Brief, par. 105.

the Closing Order; it is more likely that many of these survivors pose a real and significant threat.

Pol Pot's suspicious demise in March 1998 as he was about to be apprehended on the Thai-Cambodian border is illustrative of the threats to DUCH's safety. I was the U.S. Ambassador-at-Large for War Crimes Issues at the time and deeply involved in efforts on the ground to reach Pol Pot's location and secure his custody. Security personnel were within hours of reaching Pol Pot in his hideout when media reports revealed the imminence of his arrest. Overnight he died mysteriously.[21] His untimely death set back the quest for accountability for the Khmer Rouge atrocities for many years. The danger to prominent individuals charged with atrocity crimes should never be underestimated, for they are at the mercy of countless enemies with a variety of motivations including revenge and self-protection. Pol Pot himself was under a form of house arrest by the Khmer Rouge when he died so suddenly and conveniently for those wishing to avoid justice.

Defence counsel cannot prove that DUCH would not seize the opportunity to flee and resume a life of hiding from authorities now that his identity and judicial circumstances are so well known in Cambodia—in contrast to his relative obscurity and hence security living incognito prior to his arrest in 1999. His world has changed dramatically. To argue—as the Defence Appeal Brief appears to do—that somehow his secluded secret life of years past can be resurrected to ensure his own safety and *guarantee* his availability for trial if he is indicted stretches the imagination beyond

[21] Philip Shenon & Eric Schmitt, *U.S. Is Planning a Move to Seize Pol Pot for Trial*, N.Y. TIMES, Apr. 9, 1998, at A1; Philip Shenon, *Death of Pol Pot: The Questions*, N.Y. TIMES, Apr. 17, 1998, at A1; Seth Mydans, *For Pol Pot, An Endgame*, N.Y. TIMES, Apr. 12, 1998, at A1; Seth Mydans, *Pol Pot is Dead, Thai Army Says; Made Cambodia a 'Killing Field,'* N.Y. TIMES, Apr. 16 2006, at A1.

reality. The norms set forth in two leading human rights treaties (one of which, the International Covenant on Civil and Political Rights, the Royal Government of Cambodia is a state party) require such a guarantee of appearance for trial before discretionary decisions pertaining to pre-trial release can be reached by judicial panels.[22]

The Defence Appeal Brief's incomplete description of DUCH's whereabouts and activity over the past 28 years[23] obscures the nature of the risk to public order just as it obscures the nature of the risk to DUCH's safety and the risk of his flight. During many of the years of DUCH's freedom, Cambodia was in a state of internal armed hostilities and was an extremely insecure environment . The freedom of Khmer Rouge figures like DUCH (regardless of his personal role during this period) fueled that instability and armed conflict. Furthermore, in contrast to the relative anonymity he enjoyed from 1979 to 1999, today DUCH's alleged crimes have been publicized and the public is well aware of his detention at the ECCC. It is very likely that his release will inflame the Cambodian population, as the Co-Investigating Judges concluded.

In the event that the Pre-Trial Chamber were to embrace the argument that DUCH's release would pose no risk of public disorder, that holding would not be dispositive of the Pre-Trial Chamber's examination of the other requirements of Internal Rule 63(3)(iii) (namely, to "ensure the presence of the Charged Person during the proceedings") and Internal Rule 63(3)(iv) (namely, to "protect the security of the Charged Person"), which, as discussed above, are of prominent concern given the probabilities and circumstances of Cambodia today. A finding by the Pre-Trial Chamber

[22] *International Covenant on Civil and Political Rights*, art. 9 (3) ("…release may be subject to guarantees to appear for trial…"); *European Convention for the Protection of Human Rights and Fundamental Freedoms*, art. 5 (3) ("Release may be conditioned by guarantees to appear for trial.").
[23] Defence Appeal Brief, pars. 105, 112.

that either or both of these requirements are met would justify provisional detention of DUCH.

B. The decisions of the Co-Investigating Judges regarding DUCH's detention merit considerable deference and are in accord with the Internal Rules and foreign (U.S.) and international law.

Most importantly, the Defence Appeal Brief errs when it thrusts onto the Co-Investigating Judges the burden of proving that "a genuine threat to Mr. KANG's [DUCH's] safety exists"[24] or proving that he may flee any legal action.[25] When courts are confronted with these types of judgmental decisions about the possibility or probability of events unfolding in connection with a suspect who seeks release from custody prior to trial, there is considerable deference afforded to the judge(s) and their reasoned determination as to what might transpire. Here it is the collective judgment of the Co-Investigating Judges that is being called into question.

The Pre-Trial Chamber may find instructive the experience of courts in the United States on the issue of pre-trial detention of suspects like DUCH and those charged with far lesser crimes. In the United States, the Bail Reform Act (the "Bail Act") governs the burdens of proof with respect to pretrial detentions.[26] The Bail Act weighs in favor of allowing bail, except in (1) cases where the judge is not reasonably assured of the appearance of the person at trial, and/or (2) "the *most serious* of crimes."[27] (emphasis added) These "serious crimes" include crimes of violence for which the maximum

[24] Defence Appeal Brief, par. 114.
[25] Defence Appeal Brief, par. 118.
[26] 18 U.S.C.A. § 3142 (2006).
[27] 18 U.S.C.A. § 3142(e); *United States v. Salerno,* 481 U.S. 739, 747 (1987).

sentence is at least 10 years, and offences for which the maximum sentence is life imprisonment or death.[28]

A serious crime triggers a rebuttable presumption that "no condition or combination of conditions will reasonably assure a defendant's appearance before the court or the safety of the community."[29] Once this presumption is established, the accused bears a limited *burden of production* to offer evidence that he does not pose a flight risk.[30]

After the accused produces evidence, the burden shifts to the government (i.e., prosecutor) to prove *by a preponderance of the evidence* that the defendant presents a flight risk.[31] In making its ultimate determination, the court must weigh the suspect's evidence of non-risk against: (1) the nature and circumstances of the offense charges, (2) the weight of evidence against the person, (3) the history and characteristics of the person, and (4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release.[32] Courts have also factored the term of incarceration if convicted and the suspect's access to financial resources in assessing the likelihood of flight.[33]

In ***Mercedes***, the appeals court overturned the trial court's release of three defendants charged with armed robbery.[34] In the court's analysis, the first defendant failed to offer any evidence to overcome the presumption, and was thus a flight risk.[35] The second defendant rebutted the presumption of risk with evidence of his U.S.

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[28] 18 U.S.C.A. § 3142(f); *see also United States. v. Salerno*, 481 U.S. at 747.
[29] *Salerno*, 481 U.S. at 750.
[30] *United States. v. Mercedes*, 254 F.3d 433, 436 (2nd Cir. 2001).
[31] *Mercedes*, 254 F.3d at 436 (quoting *United States v. Martir*, 782 F.2d 1141, 1144 (2d Cir. 1991)).
[32] 18 U.S.C.A. § 3142(g).
[33] *United States v. Sabhnani*, 493 F. 3d 63, 76 (2d Cir. 2007).
[34] 254 F. 3d at 436.
[35] Id.

citizenship, his lack of a criminal history, his strong ties to his suretors, and his lack of financial resources.[36] However, the government sustained its burden of proof by emphasizing the violent nature of the crime alleged and his history of domestic abuse.[37] The third defendant's claim of no criminal history was overcome by the government's showing of his unemployment, the fact that he was not a U.S. citizen, and the small amount of surety.[38]

Like the court in ***Mercedes***, the court in ***U.S. v. Abad*** was willing to overlook strong evidence rebutting the presumption of flight risk where the alleged crime was sufficiently severe. In ***Abad***, a Filipino citizen was accused of statutory rape.[39] He rebutted the statutory presumption by offering evidence that his family would act as third-party custodians, letters of reference attesting that he was not a flight risk, and surety of $65,000 equity interest against his family home.[40] However, the court found that these assurances were outweighed by his lack of citizenship, the strong evidence of his guilt, and the potential severity of his sentence (30 years).[41]

Under the American legal system, the severity of crimes for which DUCH has been charged clearly would trigger a presumption that he is a flight risk. DUCH might try to rebut this presumption by producing the scant representations already contained in the Defence Appeal Brief, but ultimately the severe nature of his alleged crimes are a strong indicator of flight. Further, any strong evidence of DUCH's accountability that is in possession of the Co-Investigating Judges would weigh in favor of detention. Access

[36] Id. at 437.
[37] Id.
[38] Id. at 438.
[39] *United States v. Abad*, 350 F. 3d 793, 796 (8th Cir. 2003).
[40] Id., at 799.
[41] Id.

to financial resources, including from relatives and former colleagues in the Khmer Rouge with the means to help DUCH escape, would also militate against release.

Further, under the American system, if a suspect fails to overcome the severity of crimes test described above, he would be unable to request a less restrictive method of detention. Typically, even if a U.S. court is not reasonably assured that an accused will appear at trial, the court "shall order the pretrial release of the person. . . subject to the *least restrictive further condition,* or combination of conditions, that . . . will reasonably assure the appearance of the person as required."[42] These further conditions may include remaining in the custody of a third person, maintaining employment, abiding by restrictions on association, remaining under house arrest, executing a bond, and satisfying "any other condition that is *reasonably necessary* to assure the appearance of the person."[43] In the United States, the government has the burden to prove the absence of such conditions by a *preponderance of the evidence*.[44]

DUCH argues for a less restrictive method of securing his appearance, but if he argued that position in a U.S. court, he would find that less restrictive methods *do not* apply to *serious crimes* that trigger a presumption of flight risk.[45] Courts are consistently unwilling to apply the "least restrictive" test to perpetrators of serious crimes.[46] The International Criminal Court (ICC) recognizes this principle in Article 59(4) of the Rome Statute of the ICC, which requires that in deciding upon any application for interim

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[42] 18 U.S.C.A. §3142(c)(emphasis added).
[43] Id. (emphasis added).
[44] *U.S. v. Sabhnani*, 493 F. 3d 63 at 75 (2d Cir. 2007).
[45] Id. ("Certain crimes trigger a statutory presumption that no condition or combination of conditions will reasonably assure a defendant's appearance before the court.")
[46] See *United States v. Orena*, 986 F. 2d 628, 632 (2nd Cir., 1993) (house arrest and electronic surveillance do not alleviate mobster's danger to community); *see also Mercedes*, 254 F. 3d at 437 (electronic monitoring, home detention, and supervision by fiancée insufficient to outweigh strong evidence of armed robber's flight risk); *Abad*, 350 F. 3d at 799 (electronic monitoring and family supervision insufficient to assure sexual predator's appearance at trial).

release, "the competent authority in the custodial State shall consider whether, given the gravity of the alleged crimes, there are urgent and exceptional circumstances to justify interim release and whether necessary safeguards exist o ensure that the custodial State can fulfill its duty to surrender the person to the Court."[47] Similar standards apply once the person is in the custody of the ICC.[48] Under the American legal system, the crimes with which DUCH is charged would fall under the category of 18 U.S.C.A. §3182(f) crimes, and hence, create a presumption of flight risk. Given this presumption, he would not be eligible to request less restrictive methods of detention. Further, the severity of his crimes militates strongly against a more lax method of detention.

Because the Bail Act and the Internal Rules share structural similarities, the Pre-Trial Chamber should consider a similar approach to determine whether detention for DUCH is proper. The Internal Rules allow detention when there is well founded reason to believe that the person may have committed the crime, and additionally, as a necessary measure to 1) prevent the charged person from exerting pressure on witnesses; 2) preserve evidence or prevent destruction of evidence; 3) ensure the presence of the charged person during the proceedings; 4) protect the security of the charged person, or 5) preserve the public order.[49] Similarly, the Bail Act recommends detention in cases involving 1) a serious risk that the accused will flee, or 2) a serious risk that he will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate a prospective witness or juror.[50] However, the Bail Act is significantly more liberal in releasing the accused than are the Internal Rules. This discrepancy is necessary considering the

[47] Rome Statute of the International Criminal Court, art. 59(4).
[48] Id., art. 60(2).
[49] Internal Rules, Rule 63(3).
[50] 18 U.S.C.A. § 3142 (f)(2).

differing roles of the two sets of courts. The Bail Act applies in U.S. courts to the masses of criminals committing common or serious crimes and it therefore promotes greater flexibility. The Bail Act is structured so that freedom on bail or recognizance is the default pathway for an accused. Only for a select class of serious crimes is bail disfavored.

On the other hand, the ECCC's jurisdiction is composed entirely of the narrow class of perpetrators of atrocity crimes, the sort of serious crimes for which bail is rarely granted in U.S. courts. Release under the Internal Rules is, and ought to be, entirely discretionary because of the enhanced danger to public order and the accused himself, not to mention the enhanced risk of flight attendant to such crimes.[51] The Co-Investigating Judges need only "consider Provisional Detention to be a necessary measure" to further the enumerated conditions of the court.[52] Finally, unlike the Bail Act, the Internal Rules do not set forth any guidelines for less restrictive detentions, such as house arrest or electronic surveillance. This is appropriate in light of concerns regarding the accused's flight and fears for his safety outside the scope of the ECCC.

Therefore, there is considerable support under foreign (U.S.) law and international human rights law as well as the Internal Rules for the view that the Co-Investigating Judges acted properly in concluding that "the acts alleged against the Charged Person are of a gravity such that, 30 years after their commission, they profoundly disrupt the public order to such a degree that it is not excessive to conclude that the release of the person concerned risks provoking, in the fragile context of today's Cambodian society, protests of indignation which could lead to violence and perhaps imperil the very safety of the

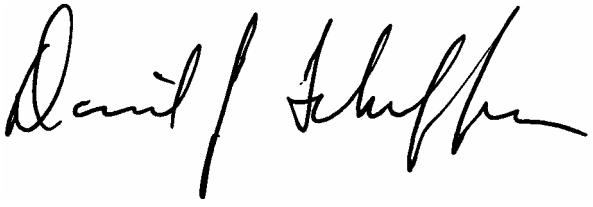
[51] Internal Rules, Rule 65 ("The Co-Investigating Judges *may* order that a Charged Person remain at liberty or be released from detention.") (emphasis added).
[52] Internal Rules, Rule 63(3)(b).

person concerned. Furthermore, because DUCH may be sentenced to life imprisonment, it is feared that he may seek, as a consequence, to flee any legal action."[53] The Pre-Trial Chamber ought to uphold that conclusion and order DUCH's detention until the Co-Investigating Judges issue their Closing Order.

CONCLUSION

The independence of the ECCC within the Cambodian legal system is required because of its singular and limited purpose, the internationalized character of the ECCC, and its uniquely crafted constitutional structure. DUCH seeks a remedy the ECCC can only address within the four corners of its own constitutional mandate, including the authority of the ECCC to award reparations in the event there is no indictment or there is an acquittal following trial, or to mitigate the duration of any sentence in the event of a conviction. The factors that the ECCC must consider when examining provisional detention reflect the experience of foreign and international law and, in the case of DUCH, those factors compel continued provisional detention under the Internal Rules until the Co-Investigating Judges issue a Closing Order with respect to DUCH.

Respectfully submitted,



DAVID SCHEFFER

[53] Order of Provisional Detention, Case No. 002/14-08-2006, re KAING Guek Eav, alias DUCH, 31 July 2007, at par. 22.

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