ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ
Kingdom of Cambodia
Nation Religion King

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia

ការិយាល័យសហចៅក្រមស៊ើបអង្កេត
Office of the Co-Investigating Judges
Bureau des Co-juges d'instruction

សំណុំរឿងព្រហ្មទណ្ឌ
Criminal Case File /Dossier pénal
លេខ/No: 002/14-08-2006

លេខស៊ើបសួរ/Investigation/Instruction
លេខ/No: 001/18-07-2007

ដីកាសម្រេចឃុំខ្លួនបណ្តោះអាសន្ន
Order of Provisional Detention
Ordonnance de placement en détention provisoire

We, **You Bunleng** and **Marcel Lemonde**, the Co-Investigating Judges of the Extraordinary Chambers in the Courts of Cambodia,

Noting the law on the establishment of the Extraordinary Chambers in the Courts of Cambodia dated 27 October 2004,

Noting Rule 63 of the Internal Rules of the Extraordinary Chambers,

Noting the judicial investigation opened against :

Last Name : **KAING**
First Name : **Guek Eav**
Alias : **Duch**
Born on November 17, 1942, in the village of Poevveuy , Commune Peam Bang, District Stoeung Province Kompong Thom, Nationality: Cambodian, Profession: teacher
Residing at village O Tuntim, Commune Ta Sagn, District Somlot, Province Battambang,

Charged with Crimes against Humanity, crime(s) set out and punishable under articles 5, 29(new) and 39(new) of the Law on the establishment of the Extraordinary Chambers in the Courts of Cambodia dated 27 October 2004.

Noting today's adversarial hearing,

GROUNDS FOR THE DECISION

Whereas the following is the result of the judicial investigation to date :

I . STATEMENT OF THE FACTUAL AND LEGAL SITUATION

1. To date, (and without prejudice to the outcome of the ongoing investigations, which may identify other offences referred to in the introductory submission that may implicate the person concerned), KAING GUEK EAV alias DUCH is accused of directing the Security Prison S-21 between 1975 and 1979 where, under his authority, countless abuses were allegedly committed against the civilian population (arbitrary detention, torture and other inhumane acts, mass executions, etc.), which occurred within a political context of widespread or systematic abuses and constitute crimes against humanity. He is implicated by many documents and several witnesses.

The Co-Prosecutors of the Extraordinary Chambers request Duch's placement into provisional detention on the grounds that there are well founded reasons to believe that he participated in the crimes stated in the introductory submission; that provisional detention is necessary to prevent pressure on witnesses, notably those witnesses who worked under Duch's authority; that given the risk of flight it is necessary in order to ensure the presence of the charged person during the proceedings; that it is also necessary to protect his personal safety; and finally, that it is necessary to preserve public order.

The Charged Person's lawyer states that DUCH has been detained for more than eight years, which is contrary to both Cambodian Law and international standards; that the Extraordinary Chambers are responsible for ensuring that international norms of justice are respected, in particular those set out in Article 14(3)(c) of the International Covenant on Civil and Political

Rights and Article 5(3) of the European Convention on Human Rights; that furthermore, the conditions necessary to impose provisional detention under Rule 63 of the Internal Rules have not been satisfied, as evidenced by the fact that while Duch was at liberty from 1979 to 1999 there were no incidents and, specifically, no pressure was placed upon any person; that Duch was not a senior leader of Democratic Kampuchea and that "more than two thousand persons" held positions as heads of security centres.

The Charged Person's lawyer adds that the other suspects remain at liberty and, therefore, requests that the Court release Duch from detention and impose a bail order instead.

Duch states that he was indeed the Head of S21, that because he is ready to reveal the crimes committed by the Khmer Rouge there is no reason to believe that he will exert pressure on witnesses and, moreover, he does not know the identity of any witnesses.

2. Given that the Co-Investigating Judges are responsible for evaluating all elements in favour of both the Defence as well as the Prosecution, it is important to account for the particular circumstances of the concerned person before deciding whether to place him in provisional detention. DUCH is currently in proceedings before the Military Court of Phnom Penh due in part to facts outside the competence of the Extraordinary Chambers and in part to facts relevant to ECCC jurisdiction. Within the context of these military proceedings, he was placed in provisional detention beginning 10 May, 1999 and he remains in detention to this date. His continued provisional detention is problematic in light of international standards of justice and, more specifically, articles 9(3) and 14(3)(c) of the International Covenant on Civil and Political Rights, which states that any individual arrested or detained for a criminal offence shall be entitled to a trial within a reasonable time period or to be released.

3. Article 12 of the Agreement between the United Nations and the Royal Government of Cambodia dated 6 June, 2003 expressly states that the Extraordinary Chambers shall exercise their jurisdiction in accordance with international standards of justice. It is necessary, therefore, to examine if DUCH's prior detention affects the proceedings for which the concerned person is before us today. The issue may be phrased in these terms: Does the more than 8 year detention of the Charged Person in separate proceedings before another jurisdiction taint the present proceedings? Or rather, is such detention so excessive and prejudicial to the rights of the defence as to affect the very ability to bring this case within the jurisdiction of the Extraordinary Chambers (which was established within the Cambodian Judicial organization but constitutes an independent institution having a separate structure from the national

jurisdictions), to no longer allow the detention of the Charged Person within the jurisdiction of the Extraordinary Chambers, or even to require the Co-Investigating Judges to stay the proceedings?

II. JURISPRUDENCE

4. The alternatives before the Co-Investigating Judges today are as follows: must the adage *Male captus, bene detentus* be applied or, on the contrary, should the theory of abuse of process take precedence? Before concluding, both theories shall be reviewed.

A. MALE CAPTUS, BENE DETENTUS

5. Many examples exist in domestic as well as international law which apply this maxim, whereby the circumstances which bring an Accused before a tribunal have no effect on the judgement of the Accused. Although most of these precedents are based on the initial arrest of the Charged Person, and more rarely on the conditions of their prior detention, in both cases the reasoning is the same as that with which we are now confronted. Without pretending to provide an exhaustive account of this subject, it is nonetheless useful to recall the principal opinions on the subject.

6. Starting in the beginning of the 19th century, the principle *Male captus, bene detentus* was applied in England in the *Scott* case. There, a British woman sought for perjury was apprehended in Belgium and sent back to the United Kingdom. In response to a Defence motion on jurisdiction, the [court] stated, "The question, therefore, is this, whether if a person charged with a crime is found in this country, it is the duty of the Court …to consider the circumstances under which she was brought here. I thought, and still continue to think, that we cannot inquire into them."[1] The same solution was adopted in *Elliott*[2] (although with a nuance, as Lord Goddard added, "it may influence the court [in its judgment] if they think there was something irregular or improper in the arrest"). English jurisprudence then evolved, as will be explained below in the discussion of abuse of procedure doctrine.

[1] *Ex parte Susanna Scott* (1829) 9 B. & C. 446, 109 E.R. 106
[2] *R. v O/C Depot Batallion, RASC Colchester (Ex parte Elliott)* (1949), 1 All E.R. 373 KB , p.376 et 377

7. The Supreme Court of the United States has always been particularly favorable to *male captus, bene detentus*. In *Ker v. Illinois*, the defendant, a United States national kidnapped from Peru and brought back to the United States against his will, challenged the jurisdiction of the U.S. courts. The Court held, "such forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such an offence, and presents no valid objection to his trial in such court »[3]. In 1952, similar reasoning was applied in *Frisbie v. Collins*[4] . This issue later was the subject of a lively debate in the United States: as will be elaborated below, (Cf B, N°13), in 1974, a Federal Appeals Court refused to apply the holding from *Ker* and *Frisbie* in *Toscanino*[5]. However, the U.S. Supreme Court maintained its traditional position in favor of *male captus, bene detentus* in the *Alvarez-Machain*[6] case (although this decision was deemed « monstrous » by the dissenting judges…).

8. The District Court of Jerusalem, in its *Adolf EICHMANN* decision dated December 11-12, 1961, adopted the same position, reasoning in the following terms: "It is an established rule of law that a person standing trial for an offence against the laws of a state may not oppose his being tried by reason of the illegality of his arrest, or of the means whereby he was brought to the area of jurisdiction of the state. The courts in England, the United States and Israel have ruled continuously that the circumstances of the arrest and the mode of bringing of the accused into the area of the state have no relevance to his trial, and they consistently refused in all cases to enter into an examination of these circumstances."[7]

9. Similarly, the French Court of Cassation, in the *ARGOUD* opinion of June 1964, decided that "*les conditions dans lesquelles un inculpé (…) a été appréhendé et livré à la justice, constitueraient-elles une atteinte à la loi pénale ou aux principes traditionnels de notre droit, ne sont pas de nature, si déplorables qu'elles puissent apparaître, à entraîner par elles-mêmes la nullité de la poursuite, dès lors que la recherche et l'établissement de la vérité ne s'en sont pas trouvés viciés fondamentalement, ni la défense mise dans l'impossibilité d'exercer ses droits devant les juridictions d'instruction et de jugement* »[8]. The Court, in the *BARBIE*

[3] *Ker v. Illinois* (1886) 119, U.S. 436
[4] *Frisbie v. Collins* (1952), 342 U.S. 519
[5] *US v. Toscanino* (1974) 500 F 2d 267
[6] *US v. Alvarez-Machain* (1992) 504 US 655
[7] District Court of Jerusalem, *Israel v. Adolf Eichmann*, Aff 40/61, 11-12 décembre 1961, Sessions 115 à 119, § 41
[8] Cass crim 4 juin 1964, Bull. 192, JCP 1964, II, n° 13806 Rapport Comte

opinion dated October 6, 1983, reiterated its analysis, using roughly the same terms: *« Il n'existe aucun obstacle à l'exercice de l'action publique contre l'inculpé(…), dès lors que la plénitude des droits de la défense lui est librement assuré devant les juridictions d'instruction et de jugement* [9] ».

10. The International Criminal Tribunal for Rwanda ("ICTR") has stated on many occasions that it was not responsible for the illegal arrest and detention of a defendant if the act was not the result of its order. It specified, in the *Rwamakuba*[10] opinion, that it was not empowered to rule upon the conditions of a defendant's detention period which occurred prior to any Tribunal request and that any relief in this respect must be directed toward the court that authorized such detention.

11. There therefore exists a solid tradition supporting the strict separation of, on the one hand, a legal procedure before one jurisdiction and, on the other hand, the prior illegal arrest and detention ordered by a different authority. However, this tradition is limited by the doctrine of "*abuse of process*."

B. ABUSE OF PROCESS

12. The "*abuse of process*" doctrine has been progressively elaborated in common law. In its opinion, *Barayagwiza*, the ICTR defined abuse of process as follows: a tribunal may decline to exercise jurisdiction where, "in light of serious and egregious violations of the accused's rights, [it] would prove detrimental to the court's integrity," and continuing with the proceedings would "contravene the court's sense of justice."[11]

13. In 1974, the Second Circuit Court of Appeals of the United States applied the abuse of process doctrine in *Toscanino*. The defendant, an Italian national, was forcibly abducted from Uruguay and taken against his will to Brazil, where he was detained and tortured for three weeks. He

9 Cass crim 6 octobre 1983, Bull., JCP 1983, II, n° 20107 Rapport Le Gunehec, Concl Dontenwille
10 Rwamakuba, Trial Chamber II, December 12, 2000, Decision on the Defence Motion Concerning the Illegal Arrest and Illegal Detention of the Accused, Case n° ICTR 98-44-T, par. 30 ; see also, Semanza, Appeal chamber, 31 May 2000, n° ICTR-97-20-A, par. 79 ; or in addition Kajelijeli, 8 May 2000 n° ICTR 98-44-1, par 35
11 Barayagwiza, Appeal Chamber, 03 nov. 99, n° TPIR-97-19-AR72

was later taken to the United States, where he was prosecuted for drug-related crimes. The Court reasoned as follows: "Accordingly we view due process as now requiring a court to divest itself of jurisdiction over the person of a defendant where it has been acquired as the result of the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights."[12] The Court stated that any other decision in such a situation would "reward police brutality and lawlessness."

14. New Zealand, in the *Hartley* case, was one of the first jurisdictions to apply these principles. In this case, which also concerned a covert extradition, Judge Woodhouse stated: "this must never become an area where it will be sufficient to consider that the end has justified the means. The issues raised by this affair are basic to the whole concept of freedom in society. "[13]

15. The South African Court of Appeals, in the *Ebrahim*[14] case, reasoned: "the individual ha(s) to be protected against unlawful detention and against abduction, the limits of territorial jurisdiction and the sovereignty of states ha(s) to be respected, the fairness of the legal process guaranteed and the abuse thereof prevented so as to protect and promote the dignity and integrity of the judicial system. The state (i)s bound by these rules and ha(s) to come to court with clean hands."

16. The House of Lords applied the same rule in a similar case, *Bennett* [15]. Lord Bridge of Harwich's opinion summarized the decision: "To hold that the court may turn a blind eye to executive lawlessness beyond the frontiers of its own jurisdiction is, to my mind, an insular and unacceptable view. Having then taken cognisance of the lawlessness it would again appear to me to be a wholly inadequate response for the court to hold that the only remedy lies in civil proceedings at the suit of the defendant or in disciplinary or criminal proceedings against the individual officers of the law enforcement agency who were concerned in the illegal action taken. Since the prosecution could never have been brought if the defendant had not been illegally abducted, the whole proceeding is tainted. (…) To hold that in these circumstances the court may decline to exercise its jurisdiction on the ground that its process has been abused may be an extension of the doctrine of abuse of process but is, in my view, a wholly proper and necessary one."

[12] *US v. Toscanino* (1974) 500 F 2d 267, p.275
[13] Ibid. 216-217
[14] *State v. Ebrahim*, 1991 (2) S.A. 553
[15] *Re v. Horseferry Rd Magistrates' Court (Ex parte Bennett)* 24 juin 1993, [1994] 1 A.C. 42

17. The ICTR applied this theory in *Barayagwiza*[16], justifying its decision as follows: "Even if fault is shared between the three organs of the Tribunal—or is the result of the actions of a third party, such as Cameroon—it would undermine the integrity of the judicial process to proceed. Furthermore, it would be unfair for the Appellant to stand trial on these charges if his rights were egregiously violated. Thus, under the abuse of process doctrine, it is irrelevant which entity or entities were responsible for the alleged violations of the Appellant's rights. It is important to stress that the abuse of process doctrine may be invoked as a matter of discretion. It is a process by which Judges may decline to exercise the court's jurisdiction in cases where to exercise that jurisdiction in light of serious and egregious violations of the accused's rights would prove detrimental to the court's integrity. The crimes for which the Appellant is charged are very serious. However, in this case the fundamental rights of the Appellant were repeatedly violated. (…) We find this conduct to be egregious and, in light of the numerous violations, conclude that the only remedy available (…) is to release the Appellant and dismiss the charges against him."[17]

18. However, abuse of procedure arguments were dismissed by the International Criminal Tribunal for the former Yugoslavia ("ICTY") in *NICOLIC* [18]. In this decision, the ICTY held that the this theory could only apply where the Accused had been subject to serious mistreatment, specifying that "Whether such a decision should be taken also depends entirely on the facts of the case and cannot be decided in the abstract. Accordingly, the level of violence used against the Accused must be assessed. Here, the Chamber observes that the assumed facts, although they do raise some concerns, do not at all show that the treatment of the Accused by the unknown individuals amounts was of such an egregious nature."

19. In *Lubanga,*[19] the International Criminal Court adopted the same solution, where the court held that the violation of the rights of the defendant at the time of his prior arrest and detention could only be taken into account in two cases: if the court acted in concert with the external authorities, or if the defendant was the victim of acts of torture or serious mistreatment.

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[16] In which case, it is important to recall that the accused was kept in detention from 21 February until 19 November 1997 at the request of the Prosecutor of the ICTR, without being transferred before that jurisdiction.

[17] *Barayagwiza*, Appeal Chamber, 03 nov. 99, n° TPIR-97-19-AR72, par 73 à 76

[18] *Nikolic* ICTY Trial Chamber II, 9 October 2002, IT-94-2-PT

[19] ICC, Appeal Chamber, Pros. v. Lubanga, Case ICC-01/04-01/06, 14 Dec.06, par. 42-43 ss

III. PRESENT SOLUTION

20. In light of the theories recalled above, the Co-Investigating Judges consider that they do not have jurisdiction to determine the legality of DUCH's prior detention. The fact that the Extraordinary Chambers is part of the judicial system of the Kingdom of Cambodia does not lead to the conclusion that this special internationalised Tribunal acted in concert with the military court: the Extraordinary Chambers only became operational on June 22, 2007, the date of the entry into force of the Internal Rules. Prior to the initiation of this judicial investigation, the Co-Investigating Judges (who together form the sole authority empowered to decide upon matters of provisional detention) had no means of intervening. Once they were in a position to do so, they dealt with the issue. Thus, the time lapse between the lodging of the Introductory submission and the arrest warrant (12 days) cannot seriously be considered excessive or be characterised as negligence, given the time needed to review the case file.

21. The abuse of process doctrine does not apply to the present case. The courts that have applied this doctrine have always considered the proportional relationship between the alleged violations and the proposed remedy. It is obvious that in a case of crimes against humanity, the proceedings should be stayed only where the rights of the accused have been seriously affected, at least, for example, to the degree in *Toscanino*. The Co-Investigating Judges are therefore compelled to follow the solution adopted in *Nikolic* and *Lubanga* which requires, for the application of the abuse of procedure doctrine, the existence of grave violations of the rights of the Accused. Where it has not been established or even alleged that DUCH suffered incidents of torture or serious mistreatment prior to his transfer before the Extraordinary Chambers, the prolonged detention under the jurisdiction of the Military Court, in comparison with the crimes against humanity alleged against the Accused, cannot be considered a sufficiently grave violation of the rights of the Accused. The present proceedings by no means deprive the concerned person of his full rights of defence and thus may follow their course. To clarify, an eventual remedy for the prejudice caused by the prior detention (in the form of a reduction of sentence or by any other means decided by the Chambers) is not at issue during the investigative phase.

22. The sole remaining issue is therefore as follows: Is DUCH's provisional detention necessary today, in the context of these proceedings opened before the Extraordinary Chambers? On this

issue, the decision of the Co-Investigating Judges is as follows: 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 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.

23. Consequently, taking into consideration that there is a well-founded belief that KAING GUEK EAV, alias DUCH, committed the crimes with which he is charged, that provisional detention is necessary to guarantee that the Charged Person remains at the disposition of justice and to protect his safety; and that, finally, it is necessary to preserve public order; because furthermore, no bail order would be rigorous enough to ensure that these needs would be sufficiently satisfied and therefore detention remains the only means to proceed ;

On these grounds,

We order that **KAING GUEK EAV**, alias Duch, be placed in provisional detention for a period not exceeding one year.

Done at Phnom Penh, on 31 July, 2007

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Co-Investigating Judges
Co-juges d'instruction

We,....., have provided a copy of this order to the persons listed below on

…….....

Charged Person	Lawyer of Charged Person	Co-Prosecutors	Office of the Administration	Greffier

Through this notification, the Charged Person is informed that :

- S/He has the right to appeal this order, pursuant to the conditions outlined in Rule 75 of the Internal Rules of the Extraordinary Chambers;
- S/He has the right to be personally brought before the Co-Investigating Judges at least every 4 (four) months and to be given an opportunity to discuss his or her treatment and conditions during Provisional Detention ;
- During his or her presentation before the Co-Investigating Judges, s/he may formulate a request, upon which the Co-Investigating Judges shall decide ;
- S/He may submit an application for release to the Co-investigating Judges at any moment during the period of Provisional detention;
- If his or her conditions have changed since his or her last application, the Charged Person may file a further application not less than 3 (three) months after the final determination of the previous application for release.