

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

Case File No. : 001/18-07-2007-ECCC/TC
Date of Document : 10 April 2009
Party Filing : Co-Lawyers for the Civil Parties - Group 1
Original Language : English
Type of Document : Public

**GROUP 1--CIVIL PARTIES' CO-LAWYERS' REQUEST TO DENY ADDITIONAL
COMPENSATION TO THE ACCUSED DUE TO ILLEGAL PROVISIONAL
DETENTION**

Filed by:

Co-Lawyers for Civil Parties:

Mr. Karim A. A. Khan
Ms. TY Srinna
Mr. Alain WERNER
Ms. Brianne McGONIGLE

Distributed to:

The Trial Chamber:

Judge NIL Nonn, President
Judge Silvia CARTWRIGHT
Judge YA Sokhan
Judge Jean-Marc LAVERGNE
Judge THOU Mony

Copied to:

Accused:

Mr. KAING Guek Eav
alias "Duch"

Counsel for the Accused:

Mr. KAR Savuth
Mr. François ROUX

Office of the Co-Prosecutors:

Ms. CHEA Leang
Mr. Robert PETIT
Mr. YET Chakriya
Mr. William SMITH
Mr. PICH Sambath
Mr. Alex BATES

ឯកសារដើម
ORIGINAL DOCUMENT/DOCUMENT ORIGINAL
ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/Date de reception): 10 / 04 / 2009
ម៉ោង (Time/Heure): 14 - 05
មន្ត្រីទទួលបន្ទុកសំណុំរឿង/Case File Officer/L'agent chargé du dossier: S.A.N.N. R.A.D.A

ឯកសារច្បាប់ដើមត្រូវបានបញ្ជាក់
CERTIFIED COPY/COPIE CERTIFIÉE CONFORME
ថ្ងៃ ខែ ឆ្នាំ ត្រឹមត្រូវ (Certified Date/Date de certification): 10 / 04 / 2009
មន្ត្រីទទួលបន្ទុកសំណុំរឿង/Case File Officer/L'agent chargé du dossier: Ratanak

Co-Lawyers for Civil Parties

Mr. KIM Mengkhy
Ms. MOCH Sovannary
Ms. Martine JACQUIN
Mr. Philippe CANONNE
Mr. KONG Pisey
Mr. HONG Kimsuon
Mr. YUNG Panith
Ms. Silke STUDZINSKY
Mr. Pierre-Oliver SUR

I. Introduction

1. On 10 May 1999 the Accused was arrested by the authorities of the Kingdom of Cambodia. From 10 May 1999 – 28 February 2005 the investigating judge of the Military Court carried out judicial investigations involving the Accused and crimes committed during 1975 through 1979. The Accused was subsequently indicted for crimes against domestic security,¹ the crime of genocide,² crimes against humanity³ and finally for war crimes and crimes against internationally protected persons.⁴
2. Since February 2002 the charges against the Accused and the orders holding him in detention were based explicitly on the ECCC Law (2001). On 30 July 2007 the Co-Investigating Judges (“CIJ”) issued a warrant to bring the Accused before them.⁵ He was then transferred from the Military Court Detention Center (“MCDC”) to the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) detention center. Therefore from 10 May 1999 – 30 July 2007 he was kept in provisional detention by the MCDC for 8 years, 2 months and 20 days. However, the Accused has only been held under the authority of the ECCC since 30 July 2007.⁶

II. Procedural History

3. On July 31 2007 the CIJ issued the Order of Provisional Detention for the Accused, in which they found that while the detention before the MCDC was contrary to the Cambodian Law and International standards, the ECCC does not “have jurisdiction to determine the legality of Duch’s prior detention.”⁷ In reaching its decision, the CIJ extensively analyzed international applications of the principles of *male captus bene*

¹ See the “Order to Forward Case for Investigation” from the Military Prosecutor of 10 May 1999, No. 029/99

² See “Order to Forward Case for Investigation” from Military Prosecutor of 6 September 1999

³ See the Detention Order rendered by the investigating judge of the Military Court of 22 February 2002, No. 19/04/DK

⁴ See the Detention Order rendered by the investigating judge of the Military Court of 28 February 2006, No. 05/06/DK

⁵ *Case of Kang Guek Eav*, 001/18-07-2007-ECCC/OCIJ, Arrest Warrant, 30 July 2007, Doc. No. C1/1.

⁶ *Id.*

⁷ *Case of Kang Guek Eav*, 001/18-07-2007-ECCC/OCIJ, Order of Provisional Detention, 31 July 2007, Doc. No. C3/10. Paras. 1, 20.

detentus and abuse of process, after which it dismissed the Accused's challenge to his continued detention.⁸

4. The Accused appealed the CIJ's order to the Pre-Trial Chamber ("PTC") of the ECCC.⁹ The PTC rendered its decision on 3 December 2007, upholding the CIJ's order to continue the Accused's provisional detention.¹⁰ The PTC agreed that "[t]he Agreement, the ECCC Law, the Internal Rules and Cambodian law do not explicitly or implicitly give any jurisdiction to the co-investigating judges or the Pre-Trial Chamber to rule upon any matter related to decisions or actions of the investigating judges of the Military Court or any other court within the Cambodian court system. The jurisdiction of the Pre-Trial Chamber and other organs of the ECCC is expressly limited to the subject matter of the ECCC Law. There is no interaction between the ECCC and any other judicial bodies within the Cambodian court structure."¹¹
5. On April 6 2009, the Defense raised two distinct issues with respect to the sentencing of the Accused. The Defense firstly held that any time served by the Accused in the MCDC should be deduced from the final sentence rendered against him.¹² The Defense secondly argued that the Accused should be further compensated for the time spent in illegal detention at the MCDC, by reducing additional time from the sentence.¹³

III. The violations of the Accused's rights by the MCDC cannot be imputed to the ECCC.

6. While the Co-Lawyers for Civil Party Group-1 ("CPG-1") do not dispute that the sentence rendered against the Accused should take into account the time spent illegally at the MCDC, the Co-Lawyers for CPG-1 do strongly contest the Defense's assertion that the Accused is entitled to *additional* compensation in the form of further reduction of years from any sentence rendered, on top of the years already taken into account.

⁸ *Id.*

⁹ *Case of Kang Guek Eav*, 001/18-07-2007-ECCC/PTC, Appeal Brief Challenging the Order of Provisional Detention of 31 July 2007, Doc. No. C5/5.

¹⁰ *Case of Kang Guek Eav*, 001/18-07-2007-ECCC/COIJ (PTC01), Decision on Appeal against Provisional Detention Order of Kaing Guek Eav alias 'Duch', 3 December 2007, Doc. No. C5/45.

¹¹ *Id.* at par. 17.

¹² *Case of Kang Guek Eav*, 001/18-07-2007-ECCC/TC, Draft Transcript of Proceeding,

¹³ *Id.*

7. Consistent with the view taken by the CIJ and the PTC in their previous decisions, the ECCC does not bear any responsibility for the prior illegal arrest and detention of the Accused, which was not pursuant to the order of the ECCC.¹⁴ The CIJ correctly reasoned that it does not have the jurisdiction to entertain this review, as the ECCC did not act “in concert with the military court: the Extraordinary Chambers only became operational on June 22, 2007.”¹⁵
8. Whilst the ECCC was, as explained by the CIJ’s, “established within the Cambodian Judicial organization ... [it] constitutes an *independent* institution having a separate structure from the national jurisdictions.”¹⁶ The ECCC is a hybrid court, created pursuant to an international agreement between the United Nations and the Cambodian Government.¹⁷ Similarly, the Special Court for Sierra Leone (“SCSL”) found that its court was a “new jurisdiction operating in the sphere of international law” that was “vested with juridical capacity” by a treaty between the UN and Sierra Leone.¹⁸ Consequently, it found that the court is “an autonomous and independent institution,”¹⁹ and not part of the domestic judiciary of Sierra Leone.²⁰
9. As the ECCC is not part of the Cambodian judiciary, it cannot be held accountable for any violation arising out of the detention of the Accused at the MDCM and the Court is thus under no obligation to remedy said violation by awarding the Accused compensation in the form of additional time off of his final sentence.

¹⁴ *Id.* at paras. 1, 20. See also *See Laurent Semanza v. Prosecutor*, Case No. ICTR-97-20-A, Decision, par. 104 (Appeals Chamber, 31 May 2000); *Situation in the Democratic Republic of the Congo in the Case of Prosecutor v. Thomas Lubanga Dyilo*, CaseNo. ICC-01/04-01/06 (OA4), Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to Article 19(2)(a) of the Statute of 3 October 2006, par. 42 (Appeals Chamber, 14 Dec. 2006)

¹⁵ *Id.*

¹⁶ *Case of Kang Guek Eav*, 001/18-07-2007-ECCC/COIJ OJIC, Order of Provisional Detention, 31 July 2007, Doc. No. C3/10, par. 3.(Emphasis added.)

¹⁷ 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, art. 1.

¹⁸ *Prosecutor v. Augustine Gbao*, Case No. SCSL-2004-15-AR72(E), Decision on Preliminary Motion on the Invalidity of the Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court, par. 6 (Appeals Chamber, 25 May 2004) (citing *Prosecutor v. Morris Kallon & Broma Bazzy Kamara*, Case Nos. SCSL-2004-15-AR72(E), SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction, par. 14 (Appeals Chamber, 13 Mar. 2004)).

¹⁹ *Id.*

²⁰ See *Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-2003-01-I, Decision on Immunity from Jurisdiction, par. 41(a) (Appeals Chamber, 31 May 2004).

IV. The ECCC should deny the request for additional compensation

10. While a violation of the Accused's rights may warrant an effective remedy pursuant to Article 2(3)(a) of the International Convention on Civil and Political Rights, where the violation has not been of an egregious nature, the Trial Chamber of the ICTR has held that the Accused shall receive a reduction in his sentence.²¹ There is, however, no reference to an additional compensation provided for in the ECCC Internal Rules or the Law on the Establishment of the ECCC.
11. Moreover, even if the Trial Chamber finds that the violations of the Accused's rights are to be imputed to the ECCC, the interests of the international community call for denial of any form of supplementary compensation for the Accused. As the ICTY Appeals Chamber has reiterated when considering the appropriate remedy for an alleged violation of the rights of the accused, a "balance must ... be maintained between the fundamental rights of the accused and the essential interests of the international community in the prosecution of persons charged with serious violations of international humanitarian law."²²
12. Where, as here, the Accused has *admitted* to the commission of serious violations of international humanitarian law and has asked for forgiveness before the Trial Chamber, the appropriate remedy simply cannot go beyond the detraction of the time spent in illegal detention²³ and certainly does not consist of any compensation in the form of further reduction of time off the final sentence for rights harmed.

²¹ *Juvénal Kajelijeli v. Prosecutor*, Case No. ICTR-98-44A-A, Judgment, par. 255 (Appeals Chamber, 23 May 2005), par. 255. See also *Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, Judgment and Sentence, par. 129. (Trial Chamber, 15 May 2003); *Prosecutor v. Barayagwiza*, Decision "Prosecutors Request for Review or Reconsideration", Case No. ICTR-97-19-AR72, App. Ch., 31 March 2000, par. 75.

²² *Prosecutor v. Nikolic*, IT-94-2-AR73, Decision on Interlocutory Appeal Concerning Legality of Arrest, 5 June 2003, par. 30. *Prosecutor v. Brdjanin*, IT-99-36-T, Decision on the Defence Objection to Intercept Evidence, 3 October 2003, par. 61 apply the same principles to other alleged violations of rights.) See also *Juvénal Kajelijeli v. Prosecutor*, Case No. ICTR-98-44A-A, Judgment, par. 232 (Appeals Chamber, 23 May 2005), par. 206.

²³ See *Juvénal Kajelijeli v. Prosecutor*, Case No. ICTR-98-44A-A, Judgment, par. 232 (Appeals Chamber, 23 May 2005), par. 255. See also *Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, Judgment and Sentence, par. 580 (Trial Chamber, 15 May 2003) (affirmed by the Appeals Chamber in *Laurent Semanza v. Prosecutor*, Case No. ICTR-97-20-A, Judgment, paras. 325-26 (Appeals Chamber, 20 May 2005).

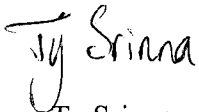
V. Request


13. For the reasons adumbrated above, the Co-Lawyers for Civil Parties' Group 1 pray that the Trial Chamber deny the Defense's request to award additional compensation to the Accused in the form of a deduction of years from any sentences to be rendered against him.

Respectfully submitted by

Co-Lawyers for Civil Party Group 1

Signed in Phnom Penh on 10 April 2009

A/c
AMR 
Ty Srinna

A/c
AMR 
Alain Werner