In The
Extraordinary Chambers in the Courts of Cambodia (ECCC)

Judicial Investigation Opened Against Kaing Guek Eav (alias 'Duch'); Appeal of the Defense to the Pre-Trial Chamber (PTC)

No. 002/14-08-2006

BRIEF OF STAN STARYGIN, *AMICUS CURIAE* IN SUPPORT OF THE DETAINEE[1]

[1] I chose to use the term 'detainee' here due to the difficulty of reconciling of the civil law system's French term 'personne mise en examen' which literally means 'person under investigation' and the terms of the common law system 'arraigned' and 'indicted'. The Order of Provisional Detention of Kaing Guek Eav uses 'charged person' as 'personne mise en examen''s English counterpart, which is not entirely accurate as when a person is referred to as 'charged' in English, the prosecution is under an obligation to provide more details of the charge to the court than merely its name, which seems to be the case in the civil law system. In addition, it is not clear whether the investigating judge will let the case go to trial, and if so in what form. This relegates the status of such person to somewhere below the level of 'accused' but above the level of 'suspect', and to a level which simply doesn't exist in the common law system. It is an undisputable fact that Kaing Guek Eav was detained by the ECCC as a result of his transfer from the military jurisdiction and a subsequent issuance of the Order of Provisional Detention discussed above. Hence, 'detainee' seems to be a better suited term to describe his current status, and one that seems to reconcile the French terminology with that of English.

Table of Contents

Interest of the *Amicus Curiae*[2]

Amicus Curiae is Stan Starygin[3] who, over the last few years, has conducted extensive research on the status of detention of Kaing Guek Eav vis-à-vis international and Cambodian law and examined the evidence amassed against him in support of the allegations which have been made against Kaing Guek Eav since his arrest in 1999. *Amicus Curiae* has conducted extensive legal research on the issue of procedural guarantees in Cambodian courts and their statutory construction at the national and international level. In this brief *amicus curiae* will present an examination of jurisdictional issues in Cambodian courts and deliver, among others, an argument as to the Extraordinary Chambers in the Courts of Cambodia (hereinafter 'ECCC')'s correlation with the jurisdictions of the regular domestic courts of Cambodia. *Amicus Curiae* will show how the outcomes of this argument may affect the current provisional (pre-trial) detention status of the detainee and pre-trial detention in Cambodia at large.

[2] No consent of the parties to these proceedings was sought prior to the filing of this. This amicus brief was filed directly in response to the relevant solicitation of the Pre-Trial Chamber (PTC) of the Extraordinary Chambers in Courts of Cambodia (ECCC) of 4 September, 2007 in exercise of the PTC's power under Rule 33 of the Internal Rules of the ECCC.

[3] Stan Starygin is a professor of law and international relations. He has published extensively on the various issues of Cambodian legal and judicial reform, particularly focusing on the procedural guarantees of the accused and incarcerated appellants. He has interviewed a significant number of Cambodians who had lived through the period of the rise of the Khmer Rouge (late 1960s to 1975) and the reign of power of the group under the title 'Democratic Kampuchea' (1975-1979) and those who continued living under the Khmer Rouge after the latter became a part of the Coalition Government of Democratic Kampuchea (CGDK). His area of particular interest has been the operation of security prisons during the Democratic Kampuchea period and the detainee's role in the same. He has studied the detainee's life pre- and post-his occupying the position of Chief of Security under Democratic Kampuchea. He has studied extensively existing Cambodian and international law as applied to the case of the detainee. This work has resulted in several law review and otherwise publications. For further information the *amicus* can be contacted at stan.starygin@gmail.com

Statement of the Case

A criminal investigation of Kaing Guek Eav (alias 'Duch') was opened on 6 March, 1999 (case # 397) which resulted in the suspect's arrest on 9 May, 1999. The arresting authority, on the next day, was quoted as saying that "charges might follow"[4]. This was followed up by an order to forward case for investigation (# 029/99) on 10 May, 1999 arraigning Kaing Guek Eav by identifying him as "the director of the Toul Sleng Security Prison" and bringing a charge of "crimes against domestic security with the intention of serving the policies of the Democratic Kampuchea Group committed in Cambodia during the period 1975 to 1979". Articles 2, 3 and 4 of the Law to Outlaw the Democratic Kampuchea Group (1994), and Article 7 of Decree Law 2 (1980)[5] were cited as grounds for the charge. The Military Tribunal of Phnom Penh (hereinafter 'MTPP)'s investigating judge responded to the order to forward for investigation with an order for further investigation (# 140) on the same day (10 May, 1999). The investigating judge issued another order for further detention three months after the issuance of the first one (31 August, 1999). Prior to the expiry of the maximum period of pre-trial detention allowable by law, a new law on temporary/pre-trial detention was adopted (26 August, 1999) which reaffirmed the stipulation of Article 14 of the Provisions Relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia during the Transitional Period (hereinafter 'the UNTAC Law') which limited pre-trial detention to four months and a

[4] World: Asia-Pacific, UN Official to Meet Khmer Rouge Killer, BBC News, 10 September, 1999, available at http://news.bbc.co.uk/1/hi/world/asia-pacific/340151.stm (last visited: 18 September, 2007)
[5] Decree Law 2 was framed as the criminal law of the People's Republic of Kampuchea (PRK), a regime which didn't exist either between 1975-1979 or at the time Kaing Guek Eav was arrested. Decree Law 2 at the time of Kaing Guek Eav's arrest was superseded by the

maximum of six months with a reasoned opinion of the judge, but which added a new substantive category of crimes (genocide, war crimes and crimes against humanity) for which the period of pre-trial detention was extended to one year and a maximum of three years. The new pre-trial detention law created a framework in which the MTPP could substantively re-charge Kaing Guek Eav once every three years. Kaing Guek Eav was, thus, re-arraigned (re-charged) on 6 Sept, 1999; just short of the expiry date of the four-month period since he was first arraigned (the new law on pre-trial detention was not applied to this case at this time). At the second arraignment (Order to Forward for Investigation # 044/99), there was no reference to the first charge, and a new charge of genocide -- for which Decree Law 1[6] was cited as foundation -- was entered. Five months later, Kaing Guek Eav was re-arraigned (re-charged) again, this time on the basis of Articles 5 and 39 of the newly-adopted Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (2001) (hereinafter 'ECCC Law') and a charge of crimes against humanity (Order to Forward for Investigation # 004/02 of 20 February, 2002) which was promptly responded to by the investigating with a detention order (# 10/03/DK of 22 February, 2002). For the subsequent three years (2003, 2004, 2005) the investigating judge dutifully issued a new detention order on February 22, justifying every subsequent extension of the pre-trial detention of Kaing Guek Eav by the investigating judge's intent to "carry out a good investigation". Kaing Guek Eav was re-arraigned, yet again, in 2005 on a new charge based on Articles 6 and 8 of the ECCC Law and categorized as 'war crimes [and] crimes against internationally protected persons' (Order to Forward for Investigation # 004/05 of 24 February, 2005) with his pre-trial detention's extension being effectuated by a detention order filed shortly after by the investigation judge (# 08/05 of 28 February, 2005). The investigating judges continued filing detention orders based on the charge in question and pursuant to the Temporary (Pre-trial) Detention Law (1999) (hereinafter 'Detention Law') in 2006 and 2007. The detainee was re-arraigned on the charge of crimes against humanity on 31 July, 2007 by

[6] Decree Law 1 was the first law to be adopted by People's Republic of Kampuchea (PRK), the regime which ousted Democratic Kampuchea, and which continued fighting the latter through the 1980s. The law had the purpose of providing a legal foundation for the People Revolutionary Tribunal (PRT), the court that was established in Phnom Penh in summer of 1979 to prosecute 'the Pol Pot-Ieng Sary Clique'.

the ECCC based on Articles 5, 29(new), 39(new) of the ECCC Law with two of them (5 and 39) being the same in substance as the charge of crimes against humanity issued against Kaing Guek Eav by the MTPP. This charge resulted in the issuance of a detention order which stipulated that detention pursuant to this order be "for a period not exceeding a year". None of the previous charges levied against Kaing Guek Eav were mentioned in the latest-to-date order, nor were there any references to other laws than those within the corpus of the tribunal law (the ECCC Law + the ECCC Internal Rules (hereinafter 'ECCC IRs').

Issues Addressed by This Brief

There is one question that the Pre-Trial Chamber (hereinafter 'PTC') needs to answer at this stage of Kaing Guek Eav's detention – whether his current pre-trial detention ordered by the Co-Investigating Judges (hereinafter 'CIJs') should be terminated.

As the issue of Kaing Guek Eav's current and prior detentions is a complex one, its resolution will require a thorough examination into a wide range of underpinning issues. First, the PTC will have to test the CIJs' assertion that the detainee is a flight risk and if released pending trial is prone to a. exert pressure on witnesses, b. be subject to acts that can compromise his personal safety, c. cause disruptions of public order. Second, the PTC will have to test the CIJs' theory of the place which the ECCC occupies within the Cambodian judicial system which will contribute to the creation of the PTC's test of the multiple theories of a nexus between the ECCC and the MTPP. Once the PTC's nexus theory is established, the Chamber will be able to answer the question of whether a. the length and b. the legal basis, in whole or in part, of Kaing Guek Eav's prior detention prejudices the interests of justice the ECCC was set up to uphold. Lastly, the PTC will need to test the relevancy of the precedents, national and international, cited by the CIJs in support of their arguments for continued pre-trial detention of Kaing Guek Eav.

This *amicus* has no way of determining whether the detainee is a flight risk, and if so, to what extent. Nor does he have access to the detainee to attempt to determine the latter's mindset regarding any actions the detainee is liable to take, if released pending trial. This *amicus* will not engage in the discussion of a highly speculative matter of the general public's reaction to Kaing Guek Eav's release, either pending trial or as a result of termination of the proceedings against him, and the level of safety he might enjoy, if granted release on either basis. This *amicus* will not engage in a full-scale debate about the relevancy of the precedents cited by the CIJs as grounds for Kaing Guek Eav's detention within the ECCC, except for questioning the CIJs' utilization of national precedents and their relevancy to the proceedings at the ECCC and high-profile national precedents (such as *Scott, Eichmann,* etc) for the incorporation of which into the corpus of international law, and as of today, there is no agreement between legal scholars and stretching the limits of *stare decisis*[7]. This particularly applies to the precedents cited by the CIJs which had been created prior to the coming into force of the International Covenant on Civil and Political Rights (hereinafter 'ICCPR') on which the defense, in part, bases its argument for release of the detainee.

This *amicus*'s contribution, therefore, will be limited to an examination of the jurisdictional issues which he believes fall within the ambit of the question of a nexus which may exist between the ECCC and the rest of the judicial system of Cambodia, particularly focusing on the existence of such a nexus with the MTPP, and an examination into the legality of Kaing Guek Eav's prior detention and the impact it might have on the judicial system of Cambodia as a whole, if left unaddressed by the PTC.

[7] The concept of *stare decisis* does not exist in Cambodian law, nor is there a system in place which establishes the abidance by fixed points of inquiry.

Summary of Argument

This brief advances the following arguments and makes the following assertions: (1) the ECCC was established on the basis of a law adopted by Cambodian Parliament with the intent to operate as a specialized Cambodian jurisdiction within the existing structure of Cambodian courts; (2) Cambodian law has primacy in the ECCC jurisdiction, with international law playing a fallback role, thus, applicable in cases where Cambodian law is not clear or conflicts with established international standards of justice, (3) predicated on several factors the PTC has jurisdiction to examine Kaing Guek Eav's pre-ECCC detention, (4) Kaing Guek Eav's pre-ECCC detention was illegal due to the following: (a) the MTPP had no jurisdiction over Kaing Guek Eav, (b) the laws on which the pre-ECCC charges against Kaing Guek Eav were based either had been abrogated by the time of their application, or were specialized which should have prevented the MTPP from applying them, (c) no quality investigation was conducted by the MTPP during the 8 years of pre-ECCC detention to justify the excessive length of Kaing Guek Eav's detention, (d) the successive extensions of the statute of limitations of the 1956 Penal Code prejudiced Kaing Guek Eav's rights under Cambodian and international law, (4) the CIJs' decision to re-introduce the charge of crimes against humanity against Kaing Guek Eav, although does not violate the principle of *ne bis in idem* substantially, puts him in jeopardy of detention twice for the same crime, the charge for which is based on the same law as previously.

Argument

1. Jurisdictional Positioning of the ECCC and Primacy of Law (Cambodian v. international)

The discussion of the nature of a tribunal for trying some of the members of the Khmer Rouge was opened by then First Prime Minister Norodom Rannaridh and Second Prime Minister Hun Sen sending a letter of request to the Secretary General of the United Nations (hereinafter 'UN') in 1997. Among other issues, the letter addressed the question of the nature of a tribunal the then Co-Prime Ministers of Cambodia were looking to establish. The key elements underpinning its nature were predicated on the request for this tribunal to be "international", further specifying that the foundation of the tribunal for which UN assistance was being sought was to be the same as that of "the International Criminal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)"[8].

In 1999, the concept behind the 1997 request later changes to a request of UN assistance for a tribunal established within the Cambodian judicial system[9]. On 2 August, 1999, Cambodia re-iterates its prior pronouncement about the nature of the tribunal for which UN assistance is sought, this time describing it as "a national tribunal". Later that month Prime Minister Hun Sen in his interview with a Japanese newspaper[10] expands on the meaning of "national tribunal" and asserts that the proceedings will "be conducted by the

[8] Copy of the letter is on file with this *amicus*
[9] This incidentally happened two days after the Group of Experts for Cambodia Pursuant to General Assembly Resolution 52/135 issues a report of its findings vigorously criticizing the Cambodian judicial system as "lacking independence, impartiality and competence".
[10] Cambodia New Vision, Kyoto News Agency, Number 20, August 1999

existing courts of Cambodia and with the international assistance and participation of foreign judges and prosecutors included". This language resonates in the text of the agreement reached by the Royal Government of Cambodia (hereinafter 'RGC') and the UN (hereinafter 'Agreement'). Article 12 of the Agreement stipulates that "the procedure shall be in accordance with Cambodian law". This clause provides for a few caveats where the tribunal's jurists may resort to "procedural rules established at the international level". These exceptions are as follows: a. where Cambodian law does not deal with a particular matter, b. where there is uncertainty regarding the interpretation or application of a relevant rule of Cambodian law, c. where there is a question regarding consistency of such a rule with international standards. Article 33(new) of the ECCC Law re-iterates these principles and asserts that proceedings must be conducted "in accordance with existing procedures in force".

The aforementioned political pronouncements -- which later resulted in statutory language -- firmly establishes the ECCC as part of the Cambodian judicial system and grounds its proceedings on existing Cambodian law. It is clear from the language of the Agreement and the ECCC Law that guidance can be sought in procedural rules established at the international level only as a matter of last resort and after a fair consideration of the domestically established procedures. This rule was ignored by the CIJs in the Order of Provisional Detention issued against Kaing Guek Eav. The CIJs misread the language of Article 12 of the Agreement which they believe "expressly states that the Extraordinary Chambers shall exercise their jurisdiction in accordance with international standards of justice" as to construe this part of the text as a statement of primacy of international law, similar to that adopted earlier by Security Council-established international criminal tribunals. This argument is untenable for two reasons. One, the manner in which Article 12 was constructed was to place the provision relevant to establishing the primacy of Cambodian law in the first paragraph of this article which opens with "the procedure shall be in accordance with Cambodian law". This demonstrates the intent of the drafters to secure the primacy of Cambodian law in the functioning of the ECCC. Two, Article 12's deference to "the international standards of justice" is not as comprehensive as the CIJs intended to lead us to believe. In fact, the

language of this paragraph of Article 12 clearly refers to the international standards of justice as they are enshrined in Articles 14 and 15 of the ICCPR, thus, effectively limiting the substantive scope of the "the international standards of justice" clause, for the purposes of the functioning of the ECCC. This serves as a clear indication of the hierarchy of laws intended to be established by the ECCC Law and the Agreement, which puts Cambodian law in the position of primacy and leaves international law the position of supplementarity[11].

Jurisdictionally, the CIJs assert that the ECCC had not been acting "in concert with the military court [MTPP]" since the former "only became operational on 22 June, 2007". The Cambodian law, upon which the jurisdictional aspect of the ECCC is predicated, does not provide for an exemption from the burden of resolving the issues of prior detention in another national jurisdiction. In fact, courts in Cambodia are vested with the same authority – and presumably responsibility – under existing laws[12]. This *amicus*, therefore, maintains that no valid argument, whether based on statute or precedent, can be made to support the CIJs' contention that the ECCC has no jurisdiction to examine Kaing Guek Eav's prior detention ordered by the investigating judge of the MTPP. In addition, it is critical to note that none of the precedents cited by the CIJs in the Order of Provisional Detention issued against Kaing Guek Eav are grounded on cases which reflect a similar jurisdictional pattern to that in which the ECCC operates – a special court with international participation within a national jurisdiction[13].

[11] This statement should not be construed as prejudicial towards the international laws to which Cambodia has acceded and which, by virtue of accession, have entered in the corpus of domestic Cambodia law.
[12] Law on the Organization of the Courts, 8 February, 1993.
[13] CIJs' reliance on the case-law of the Special Court for Sierra Leone (SCSL) would have been understandable and most commendable due to the host of similarities between these two tribunals. This comparison was never drawn by the CIJs. Although a detailed analysis of the relevant case-law of the SCSL falls outside the scope of this brief, it is recommended that the PTC avail itself of such at the reviewing of the present issue of pre-trial detention.

2. Legality of Kaing Guek Eav's Pre-ECCC Detention

Before engaging in a full-scale discussion of Kaing Guek Eav's pre-ECCC detention, it is important to note that its entire length was due to the expectation of the establishment of the ECCC, a process fraught with numerous delays caused by factors unrelated to the Cambodian judiciary or the detainee[14]. The purpose of this detention had been corroborated by some of the top RGC officials prior to the establishment of the ECCC[15]. The two detainees, Kaing Guek Eav and Ung Choeun, had, for an extended period of time, served the purpose of insurance to the international community that the RGC would be able to deliver potential defendants, if the ECCC was to be established. Had this not been the case of awaiting the establishment of the ECCC, the detainee would have been tried by a national court with jurisdiction to act in such a manner. Prior to the adoption of the ECCC Law, there had been nothing preventing a national court from trying Kaing Guek Eav. This is a well-established factor which is known to the community. It will be an exercise in futility, if the ECCC attempts to continue ignoring it.

2.1. Pre-ECCC Charges based on the People's Republic of Kampuchea (PRK) Laws

Throughout his pre-ECCC detention Kaing Guek Eav had been charged on the basis of the following laws adopted by the different regimes which ruled Cambodia between 1979 and 1999: Decree Law 1 (1979) (to established the People's Revolutionary Tribunal (hereinafter 'PRT') adopted by the People's Republic of Kampuchea (hereinafter 'PRK'),

[14] For the sake of efficiency of the use of the allocate space and manageability of this brief, this *amicus* will not engage in a full-scale discussion of the chronology of ECCC-related negotiations. There are a number of comprehensive publications on the issue, which will assist the PTC better, should such assistance be at all necessary.
[15] *Supra* 9.

Decree Law 2 (1980) (criminal code of the PRK), and various articles of the ECCC Law (2001; amended in 2004). Below is the individual treatment of the aforementioned laws.

Decree Law 1, the basis upon which Kaing Guek Eav was charged with genocide, was adopted in 1979 by the then newly-formed PRK, and with in the intention of establishing a tribunal to prosecute 'the Pol Pot-Ieng Sary Clique (Gang)' for the crime of genocide. The term genocide was defined in Article 1 of Decree Law 1 as

"planned massacres of groups of innocent people; expulsion of inhabitants of cities and villages in order to concentrate them and do hard labor in conditions leading to their physical and mental destruction; wiping out religion; destroying political, cultural and social structures and family and social relations"

This definition conflicts with the definition of genocide in Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide (1948) (hereinafter 'Genocide Convention') where it is defined as

"any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) killing members of the group, (b) causing serious bodily harm to members of the group, (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, (d) imposing measures intended to prevent births within the group, (e) forcibly transferring children of the group to another group".

Since Cambodia ratified the Genocide Convention in 1950, the only valid definition of genocide in Cambodian law has since been that of the Genocide Convention. The passage and subsequent enforcement of any law, therefore, which provides for a definition inconsistent with that of the Genocide Convention, must, therefore, be deemed as null and void. This makes Decree Law 1 null and void and inapplicable to Kaing Guek Eav's pre-trial detention.

Decree Law 2 was adopted by the PRK in 1980 as the regime's criminal law, which predominantly criminalized a variety of "acts against the revolution"[16]. The revolutionary course predicated on Marxism-Leninism taken by the PRK was abandoned at the Cambodian People's Party's congress on 17-18 October, 1990[17]. Decree Law 2, or any other law adopted by the PRK, never established a statute of limitations for the acts it criminalized, which makes it impossible to know the period of time for which offenses falling under "crimes against domestic security with the intention of serving the policies of the Democratic Kampuchea Group" could be prosecuted. What is well-known is that the new criminal law, as part of the UNTAC Law, effectively abrogated "any text, provision, or written or unwritten rule which is contrary to the letter or the spirit of the present text"[18]. Decree Law 2 clearly violates both the letter and spirit of the UNTAC Law, for which reason it was effectively abrogated in 1992, if not earlier and pursuant to other legal arguments which might be advanced to this effect. Considering the fact that at the time of bringing of the relevant charge against him in 1999 the UNTAC Law was still in force – as it is at the writing of this[19] -- Kaing Guek Eav could not have legally been arraigned and detained on the basis of Decree Law 2.

2.2. Pre-ECCC Charges based on the ECCC Law

Charges brought against Kaing Guek Eav based on the ECCC Law although numerous do not merit separation, for the purposes of this brief, and can be addressed as a group.

[16] In the parlance of the day this meant crimes against the PRK, as the latter hailed itself as the regime which had brought the Cambodian revolution on the right track after it was detailed by the Communist Party of Kampuchea (CPK).
[17] Evan Gottesman, Cambodia After the Khmer Rouge: Inside the Politics of Nation Building, Yale University Press, 2002, at 354
[18] UNTAC Law, Article 73
[19] The UNTAC Law consists of 3 thematic parts: the principles for the judiciary, the substantive criminal law and the criminal procedure. The principles of the judiciary part was abrogated by the adopted of the Constitution (1993) and the provisions on the criminal procedure part was declared null and void by the new Criminal Procedure Code (2007). The substantive criminal law part remains in force and will continue to be valid until the passage of the Draft Penal Code (the Code has yet to be adopted at the writing of this).

The four articles upon which ECCC Law-grounded charges were based are Articles 5 and 39, and 6 and 8. These articles establish subject-matter jurisdiction of the ECCC to deal with crimes against humanity, war crimes and crimes against internationally protected persons, respectively. The issue that the PTC needs to address here is by what authority the MTPP was utilizing provisions of the law -- which had been adopted to establish the legal foundation for the creation of the ECCC -- to make charges against Kaing Guek Eav.

This *amicus* maintains that there is no authority, explicit or implicit, to utilize any provisions of the ECCC Law by any other national tribunal that can be derived from the legislative intent or the written text of the ECCC Law. It is plain to see the law establishing the MTPP (the UNTAC Law) specified that it only had jurisdiction over military offenses which are defined in the law as "[…] those involving military personnel, whether enlisted or conscripted" and two deal with two types of offenses – "discipline within the armed forces" and "harm to military property"[20]. It is evident from this provision that for the MTPP to establish jurisdiction over a person, the person in question had to be enlisted or conscripted in the Royal Cambodian Armed Forces (hereinafter 'RCAF'), which did not include the Democratic Kampuchea units at any given point before or after Kaing Guek Eav was an officer in the latter. The issue of jurisdiction of the MTPP is so plain in Kaing Guek Eav's case that it merits no further investigation, and would have failed the probable cause test[21], if such a test was administered. This *amicus*, thus, contends that the MTPP acted in violation of Article 11 of the UNTAC Law, and its specific pronouncements which beyond a reasonable doubt placed Kaing Guek Eav outside its jurisdiction.

The MTPP, in addition, acted illegally by utilizing the ECCC Law to bring charges against Kaing Guek Eav since the ECCC Law was adopted with the creation of a special court in mind, which expressly limited its application to the ECCC.

[20] *Ibid*, Article 11
[21] Probable cause under Cambodian law is established after the suspect has been arrested

The CIJs aver that the ECCC has no obligation to examine the pre-ECCC detention of Kaing Guek Eav simply because the ECCC did not collaborate with the MTPP and the charges had been made before the ECCC was established. This is not good enough. This *amicus* believes that the sheer use of the ECCC Law by the MTPP to detain a person with the intent for the latter to be later transferred to the ECCC for further detention is in itself a nexus requisite for the PTC to address this issue at this early stage of the proceedings.

This *amicus* asserts that had there been no intention to establish the ECCC at the time of the arrest of Kaing Guek Eav, the judicial system of Cambodia would have dealt with him in a much more expeditious manner than it in fact did[22]. The system would have had no reason to keep Kaing Guek Eav in pre-trial detention for 8 years, which would have likely resulted in a speedy trial or, in the worst case scenario, a trial within the average length of pre-trial detention currently maintained by Cambodian courts[23]. In conclusion, without engaging in a discussion of the substantive aspects of the four aforementioned articles of the ECCC Law, this *amicus* contests the MTPP's jurisdiction to avail itself of the ECCC Law and believes that the PTC is now in a position to address this issue and its corollaries.

The next issue to address in this section is that of the extension of the statute of limitations enshrined in the 1956 Penal Code "to an additional 30 years"[24] since the commission of the alleged acts. The original version of the ECCC Law, adopted in 2001, contained an extension of the statute of limitations of the 1956 Penal Code to "an additional 20 years", during which the drafters were hoping the ECCC would be established and the alleged crimes tried. This was not to be. The drafters then went back and amended the ECCC Law by extending the statute of limitations to "an additional 30 years". This type of action by the legislature is atavistic, as it goes the very grain of the

[22] The case of Chhouk Rin, a mid-ranking KR commander, is most instructive to understand the normal expeditiousness with which courts dealt with KR cases.
[23] This *amicus* is not aware of any studies done to quantify the current duration of pre-trial detention in Cambodia. From the reports of a number of NGOs, it is clear, however, that excessive pre-trial detention remains ubiquitous. This said, be this average what it may, it is doubtless doesn't come near an 8-year period. Throughout *amicus's* tenure of work with the Cambodian legal system, he was never made aware of a single case where pre-trial detention would come near an 8-year period. This shows that it is definitely far from the national average of pre-trial.
[24] ECCC Law, Article 3(new)

statute's objective to provide "finality and predictability"[25]. The US Supreme Court, defining 'statutes of limitations', said that "statutes of limitations, like the equitable doctrine of laches, in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared"[26]. No finality and predictability can be established in cases where the legislature takes the liberty of extending the duration of a statute of limitations in anticipation of a particular event (in this case the establishment of the ECCC), rather than to ensure fairness of the proceedings. This practice, therefore, becomes inimical to the very substantive core of the statute of limitations and adversely affects the accused's right to due process. In Kaing Guek Eav's case, the PTC will predictably find itself between the rock and a hard place, as it will have to answer a host of preliminary questions before it can address the substantive issue of the extension of the 1956 Penal Code's statute of limitations for homicide, torture and religious persecution in the 2001 ECCC Law and its 2004 amendment. At the heart of the issue lie questions such as (1) is the extension of the 1956 Penal Code's statute of limitations a political question? (2) although courts routinely are barred from answering political questions, can the PTC take the politics of the issue into consideration? (3) if the PTC finds it within its purview to answer take political issues into consideration, a certain degree of limitation, can the PTC answer this question? (4) is the PTC bound by decisions of the Cambodian Constitutional Council (hereinafter 'CC') which found the extension of the statute of limitations in question constitutional[27]? (5) can the PTC overrule the CC's decision, modify or ignore it? (6) what is the relationship between the CC and the PTC, and the ECCC at large?

The last issue is that of the MTPP filing, in most cases, substantively new orders to forward for investigation every time the previous order was about to expire or had already expired. Over an 8-year period the prosecution filed charges of 'crimes against domestic security', 'genocide', 'crimes against humanity', one by one and over extended

[25] Bryan A. Garner, Henry Campbell Black, Black's Law Dictionary 1422, (West Publishing Company, 7th ed.)
[26] *Order of RR Telegraphers v. Railway Express Agency*, 321 U.S. 342, 348-49, 64 S. Ct. 582, 586 (1944)
[27] Constitutional Council, Decision No. 040/002/2001 (02/12/01)

periods of time, and 'grave breaches of the four Geneva Conventions' combined with 'crimes against internationally protected persons'. Without resorting to a discussion of the substantive aspects of these charges, there are two questions which need to be answered: (1) what prevented the prosecution from filing all these charges at the same time and in the same order to forward for investigation and (2) on what factual and merits-related foundation were the MTPP investigating judge's detention orders based when, starting 2001, they were extended for the maximum period allowable by law, 3 years.

This *amicus* is convinced that, as to question (1) there were no justifiable reasons for the prosecutors that would prevent the MTPP prosecutor from filing all the charges at the same time. This *amicus* is willing to entertain an argument that the ECCC Law had yet to be drafted and adopted at the time of filing of the original charge, which prevented the military prosecutor from knowing its contents and, thus, forming relevant charges. This argument, although not without foundation, is not that of strength, as the laws upon which the ECCC Law-based charges would be predicated had been adopted long before the filing of the first charge against Kaing Guek Eav[28] and were entered in the corpus of customary international law by then. The prosecutor of the MTPP, thus, had no reason to wait for the adoption of the ECCC Law to file the additional charges. There is no question in this *amicus*'s mind that regardless of the above argument, the first and the second charges filed against Kaing Guek Eav and predicated on Cambodian law could have been filed as one charge, which would have cut down the period of Kaing Guek Eav's pre-trial detention since it is the filing of the detention order that starts the clock, and not the number of charges it is based upon.

As to question (2), there have been no references to any investigative work done by the military investigating judge who had ordered detention in all cases when Kaing Guek Eav was charged. There were no pronouncements made to the general public of the existence of any factual findings garnered by these investigating efforts which raise the issue of due

[28] The Geneva Conventions were adopted between 1864 – 1949, the Vienna Convention of Diplomatic Relations in 1961, the Statute of the International Military Tribunal (for crimes against humanity) in 1945.

diligence. Detention orders based on the same charge, nevertheless, were extended year after year to reach the maximum of 3 years allowable by law in cases of genocide, war crimes and crimes against humanity, accompanied by a reference that every subsequent detention was necessary "to conduct a good investigation". 8 years of reported investigative work should have manifested themselves in a wealth of evidence relevant to the charges for which the investigations were ordered. The PTC, as a part of the Cambodian judiciary and dealing with the same person accused of the same crime (crimes against humanity is an overlapping charge between the MTPP and the ECCC), can subpoena the results of these investigations and examine their contents further to establish whether the principle of due diligence was violated.

This *amicus* finds -- although he is not in possession of any direct evidence -- that all circumstantial evidence attests to an assertion that no investigative work worth 8 years in the opinion of a reasonable person had been performed by the investigating judge of the MTPP throughout the entire 8-year period of detention of Kaing Guek Eav. This shows that the MTPP was merely implementing a political decision while employing judicial means to do so. This, if found by the PTC, will amount to a violation of the detainee's right to due diligence.

Besides, the MTPP's clear violation of Cambodian law, the court's behavior also came into conflict with the rules established at the international level which Cambodia had promised to "recognize and respect" in its constitutional text[29] and by ratifying individual instruments. One of such instruments is the International Covenant of Civil and Political Rights (hereinafter 'ICCPR') which set the minimum guarantees to be afforded to persons in criminal cases. The MIPP, this *amicus* argues, had, thus, violated Kaing Guek Eav's right to be tried without undue delay[30] enshrined in Article 14(3)(c) of the ICCPR.

[29] Article 31 of the Cambodian Constitution

[30] Although 'undue delay' is not expressly defined, jurisdictions with a long history of due process guarantees have established rules predicated on their treatment 'undue delay' which, some jurisdictions, have created significant benefits for the accused. In the United States, for example, the McNabb-Mallory Rule was established at the federal level which stipulated that undue delays in arraignment hold null and void any confession, no matter how voluntary, if derived from lengthy delays in bringing the suspect to justice. This demonstrates the weight which the federal law of the US places on the stipulation disallowing undue delays.

This *amicus* contends that Kaing Guek Eav's detention continuously ordered by the MTPP exceeds, in its sheer length, the intent enshrined in the ICCPR under 'undue delay', regardless of the fact that there is no clear numerical statutory definition of 'undue delay' available at the international level[31].

2.3. ECCC Charge based on the ECCC Law

Under the Order of Provisional Detention issued against Kaing Guek Eav by the CIJs, he was charged with "crimes against humanity, crimes set out and punishable under Articles 5, 29(new) and 39(new) of the [ECCC Law]. This charge is problematic in this particular person's case considering the history of his prior detention. The core of the problem here stems from the fact that Kaing Guek Eav had already been charged with the same crime for which the same articles of the same law were cited as foundation. Furthermore, this charge had already resulted in three detention orders (2002, 2003, 2004; *see* 'Statement of the Case' of this brief for more details), which, in turn, had resulted in 3 years of pre-trial detention of this charge, the maximum allowable by the 1999 Law on Pre-Trial Detention (hereinafter 'Detention Law'). This *amicus* finds no modification in the content of the charge that would allow the CIJs to argue that this indeed is a new charge in one or several of its elements. When the charge was first entered, the MTPP had 3 years of an opportunity to prosecute Kaing Guek Eav on the basis of this charge which it, this *amicus* believes, purposefully (*see* 'Pre-ECCC Charged Based on the ECCC Law' of this brief for more details), squandered. The language of the Detention Law does not provide for a possibility of detaining the same person on the basis of the same charge in different jurisdictions of Cambodia. Instead, the Detention Law for a single detention "in any circumstances […] not exceeding 3 years in total". This *amicus*, as he is convinced the PTC, is aware of the Rome Statute of the International Criminal Court (hereinafter 'the Rome Statute')'s position on the question of *ne bis in idem,* or double jeopardy, which

[31] The ICCPR Committee in its most recently released (July, 2007) comments on Art. 14 pointed out that the length of pre-trial detention does not always amount to 'undue delay' and cited several domestically adjudicated cases where the Committee believed this was not the case.

the Rome Statute stipulates be limited to cases in which a conviction or acquittal was secured[32], and even if a mistake of fact or law was found in dealing with such it does not constitute "a ground for excluding criminal responsibility unless it negates the mental element required by the crime"[33]. This *amicus*, therefore, does not intend to argue[34] that the CIJs' re-introduction of a charge which had been brought prior and against the same person is so grave that it prejudices his position vis-à-vis the *ne bis in idem* protection, but merely asserts that the charge's procedural aspect must be separated from its substantive aspect. By this token, although it would be within the bounds of the applicable law to continue the ongoing investigation of the allegations filed by the Co-Prosecutors (hereinafter 'CPs') on their respective merits, it will be in breach of the applicable law to continue the detention ordered by the CIJs on 31 July, 2007. This detention, if allowed to go on by the PCT, will put Kaing Guek Eav in jeopardy of detention twice -- although without violating the principle of *ne bis in idem* substantially -- for the same crime, the charge for which is based on the same law and to which the same procedural rules apply.

Conclusion

The PTC has a daunting task before it: resolving the issue of detention which was ordered 8 years before the establishment of the institution of which it is a part, and which was ordered for the crimes allegedly committed 30 years ago. The solution the PTC is currently seeking will have to strike a balance between the interests of justice for alleged heinous crimes and the rights of a detainee with the prosecutors and co-investigating judges arguing that release of the detainee pending trial will adversely affect the proceedings, and the defense arguing prejudice against the rights of their client.

[32] Article 20 of the Rome Statute
[33] Article 32 of the Rome Statute
[34] Prior to the signing of the Rome Statute, similar rules had been established in several domestic jurisdictions

This brief set out to analyze and provide, in some cases, statutory construction for substantives laws, rules and procedures which have been used as grounds for Kaing Guek Eav's detention throughout which this *amicus* offered a wide range of insights. Some of the highlights of these insights for the PTC to consider are (1) the assertion of this brief the ECCC is a part of the Cambodian judicial system and, therefore, is linked to other jurisdictions within this system, such as the MTPP, (2) the contention that the PTC, thus, has jurisdiction to examine the pre-ECCC detention of Kaing Guek Eav, (3) that the laws upon which the detainee was arraigned and detained prior to the establishment of the ECCC had, by then, been abrogated, or were not compliant with Cambodia's international obligations, or were adopted with the intent to be applicable to the proceedings before the ECCC only, and not other jurisdictions, (4) the length of the pre-ECCC detention is excessive and its justification by the MTPP through its intention to "conduct a good investigation" is without foundation, (5) the length of Kaing Guek Eav's pre-trial detention is excessive by international standards and prejudices against the rights of the detainee, which are protected by the *erga omnes* obligations of the Cambodian state, (6) the CIJs' ordered detention on 31 July, 2007 was ordered on the basis of the same offense, based on the same law predicated on which a prior detention had been ordered and exhausted the maximum duration of its statutory run.

This *amicus* concludes that two factors merit Kaing Guek Eav's release pending trial: (1) the amount of erroneous decisions of application of law made against him and (2) the fact that he already was once pre-trial detained on the basis of the same crime, enshrined in the same law, the detention which had exhausted its maximum statutory run. This *amicus* has had, throughout this brief, no intention to argue for a release for procedural error, as he feels that the gravity of the current charge against Kaing Guek Eav, in this case, may not be outweighed by the cumulative amount of errors of law made by the MTPP and the ECCC up to this point. It is, thus, recommended that Kaing Guek Eav be released pending trial and on the basis of the two aforementioned factors. The PTC can impose conditions of such release which may include, but not be limited to 24-hour surveillance, a written promise to appear at trial, a written promise to maintain a permanent address, a bail bond, etc. With this said, the PTC will still have to make a determination about the

foundation of the grounds for detention filed by the CPs and upheld by the CIJs, such as whether the detainee is a flight risk, what the general public's reaction to his release might be, and any action the detainee is liable to take to tamper with the evidence against him – all of which fall outside the scope of the analysis undertaken by this brief, but are, nonetheless, integral to the answering of the question of release of the detainee.

This *amicus* is convinced that whichever of the above arguments the PTC chooses to utilize, it is aware of its historic mission not only to participate in the adjudication of cases of select members of Democratic Kampuchea, but also the impact which its decision will have on the progress of the legal and judicial reform in Cambodia. The PTC at this stage has a chance to contribute to the ending of the culture of impunity by sending a message that the law will rule regardless of what political ambitions and agendas may be behind the prosecution of particular individuals by this court or any other court in the nation.

Submitted 27 September, 2007

Stan V. Starygin

Note

This *amicus* doubtless appreciates the PTC's decision to avail itself of its authority under Rule 33 of the ECCC IRs to solicit *amicus curiae* briefs from non-governmental organizations and members of the public. However, considering the fact that Rule 33 does not provide for a definite timeframe in which briefs must be produced and submitted, thus, leaving it up to the judges to determine time limits which may apply, it is recommended that the current time limit of 30 days be reconsidered for the purposes of such future solicitations. One reason which may substantiate said reconsideration is that of some of the *amici* responding to such solicitations may not necessary operate, for the purpose of the solicitation, within the framework of an established organization or any other infrastructure-providing structure, and might be limited in the amount of hours they can contribute weekly to such endeavors. This might, in some cases, prejudice the quality of material submitted to the PTC or completely work against potential contributors' intention to produce such briefs. With this in mind, it is, thus, requested that the current time allowance be doubled.