Leiden Journal of International Law, 21 (2008), pp. 719–737
 Printed in the United Kingdom doi:10.1017/S092215650800527X

CURRENT LEGAL DEVELOPMENTS

The Doctrine of Abuse of Process: A Comment on the Cambodia Tribunal's Decisions in the Case against Duch (2007)

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Abstract
The Cambodia Tribunal's co-investigating judges' first order, for the provisional detention of Duch, one of the suspects for the atrocities committed by the regime of Democratic Kampuchea in the 1970s, addresses the application of the doctrines of *male captus bene detentus* and abuse of process. The order, confirmed by the pre-trial chamber, states, relying on those doctrines, that Duch's unreasonably long prior detention, ordered by the Cambodian Military Court, does not bar his provisional detention by the Cambodia Tribunal. This article argues that the order is in accordance with applications of the relevant doctrines by the international criminal tribunals in similar cases, and that, absent involvement of the international or hybrid tribunal, abuse of process can, and should, only be successfully applied in case of torture or serious mistreatment of the suspect.

Key words
abuse of process; Extraordinary Chambers in the Courts of Cambodia; international criminal justice; *male captus bene detentus*

The Extraordinary Chambers in the Courts of Cambodia (ECCC) were, after tortuous negotiations between the United Nations and the Cambodian government, established in 2003–4 as an internationalized or hybrid tribunal in which the national side predominates. The tribunal will bring to justice surviving Khmer Rouge members who are most responsible for atrocities committed during the Democratic Kampuchea (DK) regime between 1975 and 1979. After the adoption of the ECCC Internal Rules on 12 June 2007, the ECCC was eventually able to start its official work. On 18 July 2007, the co-prosecutors of the ECCC filed their first introductory submission with the co-investigating judges. On 31 July 2007, the co-investigating judges charged a first person named in the introductory submission, Kaing Guek Eav, alias Duch, and ordered his provisional detention. Duch's provisional detention was upheld by the ECCC pre-trial chamber (PTC) on 3 December 2007.

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In this article I briefly comment on the co-prosecutors' first introductory submission (section 2). The main part of the article (section 3), however, will be devoted to an analysis of the co-investigating judges' order in the case against Duch. This order raises a number of challenging questions as to the application of the doctrine of abuse of process. Pursuant to this doctrine a violation of the defendant's rights, even if committed before the defendant was in the custody of the tribunal and without the tribunal being involved in the violation, could affect the legality of the defendant's detention or the criminal proceedings initiated against him. In the case against Duch the defendant argued that, before he was transferred to the ECCC after its establishment, he had been in prolonged detention at the order of the Cambodian Military Court, in fact since 1999. The length of this detention allegedly violated his rights, and he argued that, on that basis, the co-investigating judges ought to order his release under the abuse of process doctrine. The judges reviewed the doctrine, but concluded that it could only be applied if Duch had been subjected to torture or serious mistreatment, which he had not. This article supports the judges' order for two reasons. First, from a policy perspective, a high standard of applying abuse of process in international criminal law – resulting in less protection for the defendant's rights – is appropriate, in the light of the grave crimes for which the defendants are prosecuted before international criminal tribunals. Second, from a consistency perspective, the ECCC abuse of process standard is in line with applications of the doctrine by the (other) international criminal tribunals.

Before analysing the more technical aspects of the ECCC's case law, however, a brief overview of the mandate and the negotiating history of the ECCC – after all, the youngest of the international(ized) criminal tribunals – will be given.

1. The mandate and negotiating history of the Extraordinary Chambers in the Courts of Cambodia

The ECCC's mandate, as enshrined in its 'statute' (in practice the Cambodian Law on the Establishment of the ECCC and the UN, and an agreement between the United Nations and the government of Cambodia),[1] is to 'bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were

1 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, Phnom Penh, 6 June 2003 (hereinafter Agreement). The text of the Agreement, which had been approved by the UN General Assembly on 13 May 2003 (GA/10135), is available at http://www.eccc.gov.kh/english/cabinet/agreement/5/Agreement_between_UN_and_RGC.pdf. Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, first promulgated on 10 August 2001, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006) (hereinafter Law). The text of the Law is also available at the ECCC website: http://www.eccc.gov.kh/english/cabinet/law/4/KR_Law_as_amended_27_Oct_2004_Eng.pdf.

committed during the period from 17 April 1975 to 6 January 1979'.[2] This mandate, which focuses on 'those most responsible', may appear a restrictive one. However, it should be recalled that reference to 'those most responsible' was in fact made in order to broaden the ECCC's mandate as initially designed by the Cambodian government. Indeed, in 1999 the Cambodian government planned merely to put the Khmer Rouge's military commander Ta Mok on trial. It was only after the UN Group of Experts and the UN Secretary-General criticized this limited mandate[3] that it was broadened to include all senior leaders of the Khmer Rouge and those most responsible for the crimes that had taken place.[4]

This mandate has never been a serious bone of contention in the difficult negotiations between the United Nations and the Cambodian government. During the process, nonetheless, Cambodian Prime Minister Hun Sen made it clear that it was not desirable that all senior leaders or most responsible persons be prosecuted.[5] This influence-peddling raised some concerns that the list of suspects will de facto be predetermined by the Cambodian government.[6] It may be noted that, in the text of the final statute, Cambodian pressure to protect certain individuals from prosecution by the ECCC has resulted in the pardon of Ieng Sary, one of the most senior leaders of Democratic Kampuchea, being subject to review by the Court, instead of being outright nullified.[7] Regardless, the ECCC investigating judges decided on 15 November 2007 provisionally to detain Ieng Sary and his wife Ieng Thirith.[8]

The limited mandate of the ECCC – bringing to justice the senior leaders and those most responsible – as agreed by the Cambodian government and the United Nations, can be explained by a number of factors. Bringing to justice lower-level perpetrators, with the attendant soaring investigatory and trial costs, was financially

2 Art. 1 of both the Agreement and the Law, *supra* note 1.

3 Identical Letters Dated 15 March 1999 from the Secretary-General to the President of the General Assembly and the President of the Security Council, UN Docs. A/53/850 and S/1999/231, 16 March 1999, Report of the Group of Experts for Cambodia Pursuant to General Assembly Resolution 52/135, 18 February 1999, annexed.

4 It has been estimated that that 'no more than 60 cases would fit into these categories, including perhaps 10 senior leaders and 50 of their most responsible subordinates'. See S. Heder, 'The Senior Leaders and Those Most Responsible', in Open Society Justice Initiative, *The Extraordinary Chambers* (2006), 53, 55, available at http://www.soros.org/resources/articles_publications/publications/justice_20060421. See for the list of the main candidates for prosecution S. Heder and B. D. Tittemore, *Seven Candidates for Prosecution: Accountability for the Crimes of the Khmer Rouge*, Documentation Centre of Cambodia, 2004, 153.

5 C. Etcheson, 'A "Fair and Public Trial": a Political History of the Extraordinary Chambers', in Open Society Justice Initiative, *supra* note 4, at 12, n. 31.

6 Heder, *supra* note 4, at 54 ('The problem is that negotiations on the court have been accompanied by the intention (both stated and unstated) to limit prosecutions to a handful of senior Khmer Rouge leaders and a few other notorious perpetrators of crime'). See also M. Bunyanunda, 'The Khmer Rouge on Trial: Whither the Defense?', (2001) 74 *Southern California Law Review* 1581, at 1620 (stating that extra-legal factors will probably determine the outcome of the ECCC process).

7 See Art. 11(2) of the ECCC Agreement, observing that 'there has been only one case, dated 14 September 1996, when a pardon was granted to only one person [Ieng Sary] with regard to a 1979 conviction on the charge of genocide. The United Nations and the Royal Government of Cambodia agree that the scope of this pardon is a matter to be decided by the Extraordinary Chambers'. Art. 11(1) of the Agreement provides that '[t]he Royal Government of Cambodia shall not request an amnesty or pardon for any persons who may be investigated for or convicted of crimes referred to in the present Agreement'.

8 In their written provisional detention order of Ieng Sary, at paras. 11–14, the co-investigating judges, while reserving the final determination of the effect of Ieng Sary's pardon or amnesty to a later stage, decided that an earlier genocide conviction and a subsequent pardon and amnesty 'do not currently establish any obstacles to prosecution before the ECCC'. Order available at http://www.eccc.gov.kh/english/cabinet/indictment/11/Provisional_detention_order_IENG_Sary_ENG.pdf.

hardly feasible.[9] Also, as a number of Khmer Rouge cadres had joined the Cambodian government's ranks, it was feared that their prosecution could destabilize the (fragile) government.[10] Irrespective of resource constraints and domestic politics, the limited mandate may mainly be informed by the implicit assumption that there was a 'top-down conspiracy' by the members of the central command of the Khmer Rouge, even if, as Heder noted, 'in fact, this was not the case'.[11]

While, as early as 1999, the Cambodian government and the United Nations were in broad agreement on the ECCC's mandate, agreement on the ECCC's institutional design and procedure proved elusive until 2003.[12] The United Nations initially received the Cambodian government's request for international assistance in prosecuting the Khmer Rouge in 1997, and in 1998 the UN Group of Experts proposed to set up a truly international tribunal along the lines of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).[13] The United Nations quickly abandoned this proposal in favour of a 'mixed' or 'hybrid' tribunal, with a majority of international staff (1999). Although this proposal provided for substantial Cambodian input, it was rejected by the Cambodian government, which instead suggested a domestic tribunal with some international input. Concerned about the lack of judicial capacity in Cambodia and the risk of political interference, the United Nations refused to give in, and by late 1999 a deadlock was apparent.

Thanks to US mediation, however, in December 1999 the Cambodian government submitted a revised proposal which provided for more substantial international participation. The United Nations was rather charmed by the proposal. It abandoned its insistence on a majority of international staff in return for a 'super-majority' voting system (pursuant to which a decision could only be taken if at least one international judge supported it),[14] and submitted a Memorandum of Understanding in mid-2000. While final agreement appeared in sight, the Cambodian government refused to give its consent until the Cambodian parliament had adopted a law on the ECCC. In terms of international input and due-process protection, that law, finally approved in August 2001 by the Cambodian king, differed substantially from the

9 Financial problems have dogged the ECCC since its inception. See on its resources D. Cohen, 'Hybrid Justice in East Timor, Sierra Leone, and Cambodia: "Lessons Learned" and Prospects for the Future', (2007) 43 *Stanford Journal of International Law* 1, at 30–5; T. Ingadottir, 'The ECCC: Financial Challenges and Their Possible Effects on Proceedings', (2006) 4 *Journal of International Criminal Justice* 294. See on recent budgetary problems and 'scandals' C. Ryngaert, 'Current Developments: First Proceedings in the Cambodian Extraordinary Chambers', Center for Global Governance Studies, K. U. Leuven, working paper No. 4, October 2007, at 14–16.

10 Cohen, *supra* note 9, at 30. Incorporation of Khmer Rouge deserters was a deliberate strategy of the Cambodian People's Party to consolidate its power base. See D. PoKempner, 'The Khmer Rouge Tribunal: Criticisms and Concerns', in Open Society Justice Initiative, *supra* note 4, 32, at 33. See for criticisms of leaving out lower-level perpetrators ibid., at 39 (submitting that 'their indictment and investigation may be needed to assist in building cases against their superiors').

11 Heder, *supra* note 4, at 57.

12 See for more detailed information on the negotiating history Etcheson, *supra* note 5; PoKempner, *supra* note 10; C. Etcheson, 'The Politics of Genocide Justice in Cambodia', in C. P. R. Romano, A. Nollkaemper, and J. K. Kleffner (eds.), *Internationalized Criminal Courts and Tribunals: Sierra Leone, East Timor, Kosovo, and Cambodia* (2004), 181–205.

13 See Report of the Group of Experts, *supra* note 3.

14 Art. 4 of the Agreement, *supra* note 1; Art. 14 of the Law, *supra* note 1.

2000 Memorandum, at least in the opinion of the United Nations, which thereupon decided to leave the negotiating table in early 2002.

Again, mediation by individual states broke the deadlock. In the course of 2002 a group of interested, mainly Western, states seized the initiative. By the end of 2002, they had come to an agreement with Cambodia on a draft 'statute'. When they brought pressure to bear on the UN Secretariat, the United Nations had almost no other choice than to submit a fresh Memorandum of Understanding to the Cambodian government along the lines of the new draft. The agreement was adopted by the UN General Assembly and the Cambodian government in spring 2003.[15] The Cambodian parliament amended the 2001 Cambodian law in 2004; while the new statute was clearly an improvement on the 2001 law, concerns over inadequate due-process protection and political influence-peddling remained.[16] Those concerns were later somewhat eased when elaborate Internal Rules, modelled on the ICC Rules of Procedure and Evidence, were adopted by the Court on 12 June 2007.[17]

2. The first introductory submission of the Office of the Co-Prosecutors

Only a month after the adoption of the Internal Rules, on 18 July 2007 the ECCC co-prosecutors filed their first introductory submission with the ECCC co-investigating judges. In this submission (which is confidential), according to the public statement of the co-prosecutors,[18] '[p]ursuant to their preliminary investigations, the Co-Prosecutors have identified and submitted for investigation twenty-five distinct factual situations of murder, torture, forcible transfer, unlawful detention, forced labor and religious, political and ethnic persecution as evidence of the crimes committed in the execution of this common criminal plan'. According to the co-prosecutors, '[t]he factual allegations in this Introductory Submission constitute crimes against humanity, genocide, grave breaches of the Geneva Conventions, homicide, torture and religious persecution. . . . The preliminary investigation has

15 See for UN General Assembly, Approval of Draft Agreement between UN, Cambodia on Khmer Rouge Trial, GA/10135, 13 May 2003.

16 See, e.g., the concerns of Linton, who argued in 2006 that '[f]ive star justice, such as that practiced at the international tribunals, is out of the question at the [ECCC]' and that '[t]he omens [for an ECCC process that has some integrity] are not good and the struggle for fair trial and due process is going to be uphill all the way'. See S. Linton, 'Safeguarding the Independence and Impartiality of the Cambodian Extraordinary Chambers', (2006) 4 *Journal of International Criminal Justice* 327, at 329 and 341.

17 The Rules were slightly revised on 1 February 2008. See for the updated text http://www.eccc.gov.kh/english/cabinet/fileUpload/27/Internal_Rules_Revision1_01-02-08_eng.pdf. For a comment see G. Acquaviva, 'New Paths in International Criminal Justice? The Internal Rules of the Cambodian Extraordinary Chambers', (2008) 6 *Journal of International Criminal Justice* 129.

18 The legal basis of the public statement is Rule 54 of the ECCC Internal Rules. Pursuant to this rule, a submission of the co-prosecutors shall be confidential. However, 'mindful of the need to ensure that the public is duly informed of ongoing ECCC proceedings, the Co-Prosecutors may provide the public with an objective summary of the information contained in such submissions, taking into account the rights of the defence and the interests of Victims, witnesses and any other persons mentioned therein, and the requirements of the investigation'. It is unclear whether the co-prosecutors have to give such a summary jointly, or whether any one of them could take the initiative without involving or having the consent of the other. Rule 54 in fine may be cited in support of the second interpretation, as, unlike the first part of the rule, it provides specifically for joint action to 'correct any false or misleading information' when the case is still under preliminary investigation.

resulted in the identification of five suspects who committed, aided, abetted and/or bore superior responsibility for those crimes'.[19]

The crimes were, in the co-prosecutors' view, committed as part of a common criminal plan, the purported motive of which 'was to effect a radical change of Cambodian society along ideological lines'.[20] In view of this formulation, the suspects may eventually be charged with participation in a joint criminal enterprise.[21] In addition, because all the suspects participated in the same criminal plan, and because the ECCC is set to close its doors after three years,[22] they may be jointly tried.[23] One suspect, however, Duch (the alias of Kaing Guek Eav, the warden of the notorious Tuol Sleng prison) – the first to be arrested on the authority of the co-investigating judges, on 31 July 2007 – will be tried separately.[24]

In civil law systems such as Cambodia's, initial submissions are often brief, limited to the facts and sent to the investigating judge without many enquiries regarding possible perpetrators and evidence. The investigating judge, who is seized *in rem*, will then investigate all the facts listed in the initial submission without being bound by the prosecutor's qualification or the prosecutor's naming of suspects. The preliminary inquiry which led to the first introductory submission by the ECCC co-prosecutors, however, was reportedly thorough and comprehensive, and comprised thousands of pages.[25] There is reason to assume that the co-prosecutors' first introductory submission covers a wide range, if not the entire range, of the atrocities committed in Democratic Kampuchea. Possibly, the co-prosecutors will, after filing the introductory submission, limit themselves to filing supplementary submissions, thereby requesting the co-investigating judges to widen the scope of their investigation (e.g. to include certain specific acts) if need be. When monitoring the investigations by the co-investigating judges, the co-prosecutors may also request them to conduct specific investigative acts.

Accordingly, for reasons of procedural economy, there may be only one introductory submission by the co-prosecutors, one investigation by the co-investigating judges, and one trial, with all suspects being charged with participating in a joint

19 Statement by the Office of the Co-Prosecutors upon filing its first introductory submission with the Office of the Co-Investigating Judges on 18 July 2007, 4, available at http://www.eccc.gov.kh/english/cabinet/press/33/Statement_of_Co-Prosecutors_18-July-2007_.pdf.

20 Ibid., at 3.

21 The doctrine of joint criminal enterprise was coined by the ICTY in its judgment in *Prosecutor v. Tadić*, Case No. IT-94-1-T, App. Ch., Judgement, 15 July 1999, para. 185.

22 While it was initially planned that the ECCC would operate until December 2009, in January 2008 the tribunal proposed to donors an extension until March 2011, according to a document obtained by the Associated Press (AP) on 13 February 2008. An extra US$114 million, in addition to the initial $56 million, would be needed to fund the tribunal. According to the same document, no more than eight defendants would be tried. AP, 14 February 2008.

23 See also Open Society Justice Initiative, 'Recent Developments at the Extraordinary Chambers in the Courts of Cambodia: August 2007 Update', 4.

24 Statement of Co-Investigating Judges, 1 November 2007 (announcing the separation of Duch's case file and thus implying that the other accused may be investigated and tried together), available at http://www.eccc.gov.kh/english/cabinet/press/46/Office of the Co-Investigating Judges_Media_Update_EN_01_11_2007.pdf.

25 Interview with staff member of the Office of the Co-Prosecutors, Phnom Penh, June 2007.

criminal enterprise, except for the trial of Duch (which is scheduled to take place by mid-2008).[26] This may allow the ECCC to wrap up its proceedings by 2011.

3. The order of provisional detention of Kaing Guek Eav (Duch)

The co-investigating judges received the co-prosecutors' introductory submission on 18 July 2007. Shortly thereafter, on 31 July 2007, they charged Duch, probably one of the suspects identified in the submission, with crimes within the jurisdiction of the ECCC, and ordered his provisional detention at the request of the co-prosecutors.[27]

Duch had already been placed in provisional detention, along with Ta Mok, the leader of Democratic Kampuchea's national army, since 1999, at the order of the Military Court of Phnom Penh. Unlike other ringleaders, they had been arrested because they were the first to have fallen from grace with the Cambodian government, having refused to co-operate with it. In addition, they could not draw on a support base; this made them a harmless sacrifice to placate the international community's desire to see justice done for the Killing Fields.[28] After the death in captivity of Ta Mok in 2006, Duch was the only DK responsible provisionally detained under the authority of the Cambodian Military Court for crimes committed during the DK regime. He was charged with murder, torture, and membership of an outlawed group.

Duch had remained in provisional detention for an astonishing eight years, throughout the process of setting up the ECCC, until the ECCC co-investigating judges opened a judicial investigation. Hearing his case in July 2007, they observed that '[h]is continued provisional detention is problematic in light of international standards, and more specifically, articles 9(3) and 14(3)(c) of the International Covenant on Civil and Political Rights (ICCPR), which states that any individual arrested or detained for a criminal offence shall be entitled to a trial within a reasonable time

26 Statement of Co-Investigating Judge Marcel Lemonde at a press conference in Pailin, Cambodia, on 16 January 2008, cited in Open Society Justice Initiative, 'Recent Developments at the Extraordinary Chambers in the Courts of Cambodia: February 2008 Update', 12, available at www.osji.org/db/resource2/fs/?file_id=18923. It is, however, not excluded that a new investigation may be opened on the basis of facts listed in complaints submitted by victims. Victims may come forward in greater numbers since the issuance of an ECCC Practice Direction (2/2007) on Victim Participation in September 2007, available at http://www.eccc.gov.kh/english/victims_unit.aspx. At the time of writing, accessible information on victims' complaints was lacking, as the Victims Unit was still in the process of establishment.

27 Office of the Co-Investigating Judges (OCIJ) detention order (hereinafter OCIJ detention order, *Duch*). For the full text see http://www.eccc.gov.kh/english/cabinet/indictment/1/Order_of_Provisional_Detention-DUCH-EN.pdf. It is hardly surprising that Duch is the first person charged. Unlike some senior Khmer Rouge leaders, Duch could not exercise meaningful political leverage and has fallen from grace with the Cambodian government. There is, in addition, abundant evidence implicating Duch in Khmer Rouge crimes (contained *inter alia* in the Tuol Sleng Archives). See on the relatively easy case against Duch, *inter alia*, J. Fromholz, 'Proving Khmer Rouge Abuses: Uses and Limitations of the Available Evidence', in J. D. Ciorciari (ed.), *The Khmer Rouge Tribunal* (2006), 107 at 118–21. It may be noted that the category of 'those most responsible', which is, apart from 'the most senior leaders', the only category of persons over which the ECCC could exercise jurisdiction (Art. 1 of the UN–Cambodia Agreement and the Cambodian ECCC Law), was in fact tailor-made for Duch. Duch was the warden of the Tuol Sleng/S-21 prison in Phnom Penh. While he did not qualify as a senior leader having responsibilities in the central command., it was unthinkable to let him, the infamous symbol of the era of Democratic Kampuchea, off the hook. See, e.g., H. Uñac and S. Liang, 'Delivering Justice for the Crimes of Democratic Kampuchea', in Ciorciari, 133 at 143.

28 See, e.g., M. Lieberman, 'Salvaging the Remains: The Khmer Rouge Tribunal on Trial', (2005) 186 *Military Law Review* 164, at 167.

period or be released.'[29] It may be noted that Duch's case is in no way an exception: unwarranted protraction of the pre-trial detention period has been identified as a major human rights concern in Cambodian criminal proceedings.[30]

Duch's protracted detention may have been a violation of international standards, as implied by the co-investigating judges, but that was not the issue before the ECCC. Rather, the ECCC – characterized by the pre-trial chamber in the case of Nuon Chea as 'a separate and independent court with no institutional connection to any other court in Cambodia'[31] – had to examine whether the detention of Duch for more than eight years in separate proceedings before another jurisdiction – these are the proceedings before the Military Court – tainted the proceedings before the ECCC.[32] Duch obviously argued that his protracted detention indeed tainted the ECCC proceedings against him, and that this would warrant his release.

The co-investigating judges took Duch's concerns seriously. They extensively analysed international applications of the principles of *male captus bene detentus* (discussed in section 3.1) and abuse of process (discussed in section 3.2), but eventually dismissed Duch's challenge to his continued detention. Pointing out that his release could imperil his own safety, and that it could be feared that he might flee any legal action, they subsequently considered the requirements for provisional detention to be met, and ordered his detention.

The co-investigating judges' order of provisional detention is carefully reasoned and makes abundant references to foreign and international case law. In fact, although the ECCC is technically speaking part of the Cambodian court system, the order cites no Cambodian law or precedents in order to decide the legal questions possibly raised by the continued detention of Duch. The judges probably wanted to dispel any doubt about the role of international rules in the ECCC. They demonstrated that they were willing to apply Article 12(1) of the Agreement between the United Nations and Cambodia, which provides, *inter alia*, that '[w]here Cambodian law does not deal with a particular matter, or where there is uncertainty regarding the interpretation or application of a relevant rule of Cambodian law, guidance may also be sought in procedural rules established at the international level.'[33] They have shown, at the very outset of the ECCC proceedings, that this article is not a cosmetic provision, as some may have feared, but that, on the contrary, it may provide the legal basis for invoking important international principles of due process. This is reason for optimism, for it is precisely the ECCC's compliance with international

29 OCIJ detention order, *Duch*, *supra* note 27, para. 2.

30 See UN Commission on Human Rights, Resolution 2003/79 on the situation of human rights in Cambodia, 25 April 2003, para. 13; UN General Assembly Resolution on the situation of human rights in Cambodia, 28 February 2002, UN Doc. A/RES/56/169, para. III.1. See also G. Sluiter, 'Due Process and Criminal Procedure in the Cambodian Extraordinary Chambers', (2006) 4 *Journal of International Criminal Justice* 314, at 315.

31 PTC, Public Decision on the Co-Lawyers' Urgent Application for Disqualification of Judge Ney Thol Pending the Appeal against the Provisional Detention Order in the case of Nuon Chea, No. 002/19-09-2007-ECCC/Office of the Co-Investigating Judges (PTC01), 4 February 2008, available at http://www.eccc.gov.kh/english/cabinet/courtDoc/32/PTC_disqualification_ney_thol_C11_29_EN.pdf (hereinafter Public Decision), para. 30.

32 OCIJ detention order, *Duch*, *supra* note 27, para. 3.

33 See for some critical observations on 'international standards and guidance', Sluiter, *supra* note 30, at 319–22.

https://doi.org/10.1017/S092215650800527X Published online by Cambridge University Press

standards, and the attendant perception of fairness, that will determine the quality of the ECCC's legacy and the success of Cambodian political reconciliation.

Duch later appealed against the co-investigating judges' order to the pre-trial chamber of the ECCC. The PTC rendered its decision on 3 December 2007.[34] Not surprisingly, it upheld the co-investigating judges' order. From a technical legal perspective, the decision on appeal of the PTC is less well reasoned than the co-investigating judges' order. It contains few references to foreign or international case law and does not enter the debate over the application of the principle of *male captus bene detentus* or of the doctrine of abuse of process. In fact, it merely limits itself to observing that the ECCC has no direct relationship to the Military Court, and that there is no evidence either that the Military Court acted on behalf of the ECCC in detaining Duch or of any concerted action between any organ of the ECCC and the Military Court.[35] True, the PTC's simplified style was intended by the Court: at the outset of its decision, the PTC noted 'the significant public interest in the proceedings and the need for members of the public, without legal training, to understand and appreciate the meaning of its decision'.[36] Therefore it wrote 'in a style reflecting this need'.[37] Whether or not the PTC's assertion has merit,[38] it nevertheless remains unfortunate that the PTC, being a higher judicial organ than the Office of the Co-Investigating Judges, did not adequately follow up the arguments developed by the latter. The PTC could have done so in footnotes, which would have allowed it to keep the main text understandable to the layman.

Because the PTC did not discuss the abuse of process doctrine, but only focused on the argument of 'concerted action' between the ECCC and the Cambodian Military Court, it is unclear whether the PTC in fact repudiated the abuse of process doctrine. It is possible that the PTC, being part of the Cambodian civil-law system, may indeed have implicitly done so on the grounds that the doctrine is a common-law doctrine.[39] On the other hand, it cited approvingly the decision of the Appeals Chamber of the International Criminal Court (ICC) in the *Lubanga* case. In this decision the

34 Pre-Trial Chamber, Decision on Appeal against Provisional Detention Order of Kaing Guek Eav alias 'Duch', Criminal Case File No. 001/18-07-2007-ECCC-Office of the Co-Investigating Judges (PTC01), 3 December 2007 (hereinafter PTC, *Duch*). In this case, the pre-trial chamber president, Ney Thol, recused himself on 6 November 2007. See http://www.eccc.gov.kh/english/cabinet/files/ptc/recusal_notification/061107.pdf. While no reasons for the recusal were given, it was probably based on Ney Thol's involvement as a judge in the Cambodian Military Court, under whose authority Duch was held in detention prior to his transfer to the ECCC. See Open Society Justice Initiative (OSJI), Recent Developments at the Extraordinary Chambers in the Courts of Cambodia: 7 December 2007 Update, at 8, available at www.osji.org/db/resource2/fs/?file_id=18923.

35 PTC, *Duch*, *supra* note 34, at 8.

36 Ibid., at 2.

37 Ibid.

38 Stan Starygin, a professor of law at Pannasastra University of Cambodia, after conducting a short study of whether ordinary Cambodian people understood the PTC's decision, pointed out that 'the PTC's assertion that the style of the decision is conducive to its understanding and appreciation by persons with no prior legal training is farfetched at best', and that, in fact, 'this assertion seems . . . largely unfounded, unresearched and manifestly flawed'. S. Starygin, 'Quality and Potential Effects of the Pre-Trial Chamber (PTC)'s Assertions in the Decision on Appeal against Provisional Detention of Kaing Guek Eav', posting of 22 December 2007, available at http://ecccreparations.blogspot.com.

39 Cf. ICC Appeals Chamber, *Prosecutor v. Lubanga*, Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to Art. 19(2)(a) of the Statute of 3 October 2006, Case No. ICC-01/04-01/06-772, 14 December 2006, para. 33 ('The doctrine of abuse of process as known to English law finds no application in the Romano-Germanic systems of law').

ICC pointed out that serious violations of the rights of the suspect resulting from concerted action between an organ of the Court or alternatively abuse of process may provide justification for refusing to exercise jurisdiction.[40] In the final analysis, the gravamen of the defendant's argument on appeal was that there was abuse of process precisely because the ECCC acted in concert with the Cambodian Military Court,[41] which may explain why the PTC did not enter into the specific debate over the wider abuse of process doctrine.[42]

This article will address abuse of process in relation to both 'concerted action' and its absence in the commission of violations of the accused's rights. It will situate in a broader international criminal procedure framework the arguments related to abuse of process that were developed in the ECCC co-investigating judges' order and in the ECCC PTC's decision, and make an attempt at discerning consistency of application of the abuse of process doctrine by the various international criminal tribunals.

3.1. *Male captus bene detentus*

The ECCC co-investigating judges addressed the abuse of process doctrine after they had first rejected application of the *male captus bene detentus* principle. This is logical, because if the judges had ruled that violations of the accused's rights prior to his detention by the ECCC had a bearing on the legality of his detention (i.e., *male captus male detentus*), there would be no need to apply abuse of process. The abuse of process doctrine may indeed be seen as a doctrine that limits the unjust results of a court's upholding of the *male captus bene detentus* principle in a specific case. Alternatively, however, the ECCC co-investigating judges may have resorted to abuse of process precisely because they were not entirely sure whether the *male captus bene detentus* principle could be applied to a situation like that of Duch, where the defendant's rights were not violated as a result of his previous illegal apprehension (*male captus*), but rather as a result of his previous illegal detention (*male detentus*).[43]

At any rate, while the analogy may indeed not appear entirely apt, the co-investigating judges reasoned that the maxim *male captus bene detentus* could also be applied to the rarer situation of a prior detention, as opposed to an initial arrest.[44] In the judges' view, Duch's argument that the illegality of his prior detention affects the legality of his later detention order by another court could be compared to Eichmann's argument that the illegality of his capture in Argentina by Israeli agents and Alvarez-Machain's argument that the illegality of his capture in Mexico by US drug enforcement agents affected the legality of their detention and trial. The maxim *male*

40 Ibid., para. 25.

41 Brief filed on behalf of Duch, paras. 65 ff., available at http://www.eccc.gov.kh/english/cabinet/indictment/3/Duch_Appeal_Brief_2007-09-05-EN.pdf.

42 PTC, *Duch*, *supra note* 34, §13.

43 It may be noted that, as a matter of explicit legal reasoning, the co-investigating judges did *not* view abuse of process as an alternative argument. See OCIJ, *Duch*, para. 11, submitting that, while there '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', '*this tradition is limited by the doctrine of "abuse of process"*' (emphasis added).

44 OCIJ detention order, *Duch*, *supra* note 27, para. 5.

https://doi.org/10.1017/S092215650800527X Published online by Cambridge University Press

captus bene detentus gainsays this argument. As the judges rightly noted,[45] the maxim is firmly anchored in international practice, although it should not be overlooked that a number of writers take issue with it.[46]

The principle of *male captus bene detentus* is typically applied to challenges to the legality of a defendant's capture outside the normal criminal justice system – for example, capture by government agents outside the jurisdiction. In international criminal law, tribunals similarly take the view that they are only responsible for acts that were the result of their orders. As the ECCC investigating judges noted, the ICTR has refused to review the conditions of arrest and detention under another entity's authority, typically another state.[47] The judges could also have cited the ICTY's *Nikolić* Opinion, in which the tribunal ruled that NATO's Stabilization Force in Bosnia and Herzegovina (SFOR) and/or the ICTY prosecution were not involved in the allegedly illegal transfer and arrest of Nikolić by unknown individuals in the former Republic of Yugoslavia, and that there were no indicia that SFOR or the prosecution offered any incentives to these individuals.[48] The ECCC co-investigating judges in *Duch* similarly argued that the ECCC was not responsible for Duch's prior detention; as the ECCC only became operational on 22 June 2007, it could not reasonably be argued that it acted in concert with the Cambodian Military Court which ordered Duch's detention in 1999.[49]

As a result, because of the application of the maxim *male captus bene detentus*, the ECCC co-investigating judges did not need to determine the legality of Duch's prior detention – for which they had, in their view, no jurisdiction anyway.[50] Whether or not Duch's right to a trial within a reasonable time period was violated during his detention under the military court order,[51] any legality challenge was bound to fail due to the inflexibility of the *male captus bene detentus* maxim. As noted, however, the injustice caused by application of the maxim could be eased through application of the abuse of process doctrine. It is this doctrine that is addressed in the second part of the ECCC co-investigating judges' order in *Duch*, and also in the second part of our analysis.

3.2. Abuse of process

It is established that, irrespective of the application of the *male captus bene detentus* maxim, in exceptional cases a violation of the defendant's rights before his detention under the jurisdiction of the court could still affect the legality of his detention, or the entire judicial process for that matter. Under the doctrine of abuse of process, which has common-law origins but is also applied by the international criminal tribunals,

45 Ibid., paras. 6–11.
46 See, e.g., *Prosecutor v. Nikolić*, Case No. IT-92-2-PT, T. Ch. II, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, 9 October 2002, para. 78; C. Van den Wyngaert, *Strafrecht, Strafprocesrecht & Internationaal Strafrecht* (2003), II, 1127.
47 OCIJ detention order, *Duch*, *supra* note 27, para. 10, with ICTR references in n. 10 of the order.
48 *Prosecutor v. Nikolić*, Decision on Defence Motion, *supra* note 46, para. 101.
49 OCIJ detention order, *Duch*, *supra* note 27, para. 20.
50 Ibid.
51 This right is enshrined in Art. 14(3)(c) of the International Covenant on Civil and Political Rights (ICCPR). The ECCC, and thus also its co-investigating judges, are required to respect Art. 14 ICCPR pursuant to Art. 12(2) of the Agreement, *supra* note 1.

serious and egregious prior violations of the accused's rights could result in a court declining to exercise its jurisdiction. The doctrine was previously invoked by the ICTR (*Barayagwiza*, 1999),[52] the ICTY (*Nikolić*, 2002),[53] and the ICC (*Lubanga*, 2006), with the ICC Appeals Chamber pointing out that, while the ICC Statute does not as such provide for stay of proceedings for abuse of process,[54] there is a human rights principle according to which '[w]here the breaches of the rights of the accused are such as to make it impossible for him/her to make his/her defence within the framework of his rights, no fair trial can take place and the proceedings can be stayed.'[55]

In *Duch* the ECCC co-investigating judges, confronted with the accused's allegations that his due-process rights were violated as a result of his prolonged detention by the Cambodian Military Court, discussed the abuse of process doctrine at length. Enunciating the abuse of process standard of review, the judges were, however, only willing to stay the proceedings against Duch in the case of his rights having been 'seriously affected'.[56] This high threshold was called for, in the judges' view, because Duch stood accused of crimes against humanity, and these are particularly heinous crimes.[57] For such crimes,

> [w]here it is has not been established or even alleged that Duch suffered incidents of torture or serious mistreatment prior to this 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.[58]

In so deciding, the ECCC judges created the impression that, were it not for the extremely grave accusations against Duch, they might have stayed the proceedings against him on the grounds that his due-process rights had been violated. Put differently, they created the impression that the defendant in international criminal proceedings, by committing heinous crimes or rather by being accused of committing such crimes, forfeits some of his due-process rights.

The question arises whether that is unfortunate. Is it to be regretted that a person suspected of having committed crimes against international humanitarian law could successfully invoke the abuse of process doctrine only when his rights have been 'seriously affected', in particular when he has been seriously mistreated or tortured? Is it to be regretted that due-process protection is in fact a sliding scale, dependent on the gravity of the crime?

To start with, it may be noted that the regional human rights courts do not take into account the gravity of the crime in order to determine the scope of due-process protection. 'Gravity of the crime' has not been considered as an appropriate yardstick for assessing whether the right to a trial within a reasonable time, the due-process right of which Duch alleged a violation, is complied with. The European

52 *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19, App. Ch., Decision, 3 November 1999, paras. 73–77.
53 *Prosecutor v. Nikolić*, Decision on Defence Motion, *supra* note 46, paras. 106–115.
54 *Prosecutor v. Lubanga*, *supra* note 39, para. 35.
55 Ibid., paras. 39, 44.
56 OCIJ detention order, *Duch*, *supra* note 27, para. 21.
57 Ibid.
58 Ibid. (emphasis added).

https://doi.org/10.1017/S092215650800527X Published online by Cambridge University Press

and Inter-American courts of human rights, which have developed a considerable amount of case law on the scope of Article 6(1) of the European Convention on Human Rights and Article 8(1) of the Inter-American Convention on Human Rights respectively[59] – these are the provisions that give everyone a right to a fair trial within a reasonable time – have only considered the complexity of the case, the conduct of the applicant, and the conduct of judicial authorities to be relevant.[60] Admittedly, 'gravity of the crime' could be linked with the 'complexity of the case'. While grave crimes are, of course, not necessarily complex (e.g. homicide), such international crimes as crimes against humanity – widespread or systematic attacks against the civilian population – will often be just that in view of the high number of accused and witnesses, and the extensive evidentiary material. Yet it would be wrong to presume that international crimes are, as a matter of course, complex crimes. In every case judges should arguably ascertain whether the complexity of the crime really warrants the length of the proceedings or of the accused's continued pre-trial detention for that matter. In fact, serious concerns may be raised over the use of the gravity of the crime as a free-standing criterion – that is, as unconnected from the genuine complexity of the proceedings – in terms of the presumption of innocence. While Duch may be accused of grave and heinous crimes, he should remain innocent until a trial judge has determined his guilt – even if he is ready to confess and reveal the crimes committed by the Khmer Rouge. It would therefore appear unfair to rely on a presumption of his having committed grave crimes, a presumption that may tip the balance in favour of not staying the proceedings. Irrespective of the gravity of his crime(s), should not every suspect be entitled to the same due-process protection?

Sluiter, however, has submitted, precisely in the context of the ECCC (but well before the *Duch* order), that it is not unfair, pointing out that '[w]hen prosecuting the most serious crimes, mandatory release [in case of blatant violations of important protections, including unlawful arrest and/or detention] may appear disproportionate to the human rights violations of which the suspect is accused.'[61] This commentator tends to concur, and will in the next section flesh out more thoroughly the appropriateness of taking into account the character of the crime in the context of applications of the abuse of doctrine.

3.3. The appropriateness of the 'gravity of the crime' criterion

In order to answer the question of whether an abuse of process analysis could be a factor in 'gravity of the crime', it should be kept in mind that the doctrine of abuse of process may be invoked as a matter of discretion, unlike the concept of reasonable time as a fair trial guarantee. It is typically invoked in relation to tainted, often foreign, proceedings prior to the transfer of the suspect to the tribunal, proceedings

59 Those conventions are evidently not applicable as such in Cambodia. Nonetheless, the fair trial principles embodied in the conventions may well constitute general principles of law on which the ECCC could rely. After all, the co-investigating judges relied in their *Duch* order on such principles as *male captus bene detentus* and abuse of process as derived from foreign national case law.

60 See for an overview of relevant cases before the Court K. Reid, *A Practitioner's Guide to the European Convention on Human Rights* (2004), 146–50; and before the Inter-American Court L. Hennebel, *La Convention américaine des droits de l'homme* (2007), 504, nr 594, n. 2056.

61 Sluiter, *supra* note 30, at 317–18.

https://doi.org/10.1017/S092215650800527X Published online by Cambridge University Press

whose legality the tribunal may not be able to review.[62] It is a doctrine that the tribunal is not required to invoke, but that it may do if it believes that the fairness of the entire proceedings may suffer as a consequence of the prior violations. Because the tribunal's decision is a discretionary one, it may rely on any criteria it deems fit in order to assess whether application of the abuse of process doctrine to the case would be warranted. There is no reason why gravity of the crime could not be one of them.

Gravity is, in fact, a proper criterion, because the societal return of not staying the proceedings initiated against those who committed heinous crimes, in terms of deterrence and political reconciliation, may outweigh the societal value associated with strict protection of non-fundamental human rights standards, such as the right to a trial within a reasonable time. While international criminal tribunals should obviously uphold human rights standards, the international community may 'tolerate' non-severe violations of the individual rights of perpetrators of international crimes committed prior to their transfer to the tribunal. As long as a slippery slope is averted, by not requiring the human rights violations to be absurdly serious before the abuse of process doctrine could be applied, this seems to be a legitimate option to take.

In the past, this option has in fact already been taken, when one of the most prominent Nazis, Adolf Eichmann, was tried in Israel for his Holocaust crimes, after being abducted from Argentina by Israeli agents. While the extraterritorial abduction led to international protest and, indeed, quite probably violated international law,[63] the international community abstained from further protest against the trial of Eichmann. Apparently it believed that, given the magnitude and heinousness of the accused's crimes, it would be improper to require that a procedural flaw such as an unlawful abduction affect the legality of the further proceedings against him. Along similar lines, Scharf has argued that, in cases where the manner of apprehension of a person indicted by an international criminal tribunal violates international law, the 'Eichmann exception' ought to apply to the most severe crimes, and the unlawful apprehension should not be allowed to affect the subsequent proceedings and trial.[64] This implies that, more generally, violations of the defendant's international human rights which occurred prior to his surrender to a tribunal, for example during or as a result of his detention by a state, may not affect the subsequent proceedings where the defendant is accused of particularly heinous crimes, or at least should affect them to a lesser extent than if the defendant were accused of lesser crimes.

62 Cf. ICC Appeals Chamber, *Lubanga*, *supra* note 39, para. 41 ('The Court does not sit in the process . . . on judgment as a court of appeal on the identificatory decision of the Congolese judicial authority').

63 The UN Security Council condemned the abduction in its Resolution 138 (1960), in which the Council declared that 'acts such as that under consideration which affect the sovereignty of a Member State and therefore cause international friction, may, if repeated, endanger international peace and security', and requested 'the Government of Israel to make appropriate reparation in accordance with the Charter of the United Nations and the rules of international law' (operational paras. 1 and 2).

64 M. Scharf, '*The Prosecutor v. Slavko Dokmanović*: Irregular Rendition and the ICTY', (1998) 11 LJIL 369, at 381 (commenting on the ICTY case against Dokmanović, who was lured by a member of the ICTY's Office of the Prosecutor into Croatia, where he was arrested by UN peacekeepers and surrendered to the ICTY – which ruled that the manner of Dokmanović's arrest did not violate international law).

Certainly in the case of a defendant's challenge of his provisional detention on abuse of process grounds, as was the case in *Duch*, it is defensible not to stay the proceedings before an international criminal tribunal. After all, an order to place a defendant in provisional detention does not deprive him of an eventual remedy for the prejudice caused by his prior detention. As the co-investigating judges pointed out in *Duch*, the Chambers may reduce his sentence, or order other remedies in the trial phase.[65] The application of the abuse of process doctrine may indeed differ depending on the stage of the proceedings and the remedy sought. In their order of provisional detention, the co-investigating judges could therefore rule that the remedy sought by the defence – release from detention and the imposition of a bail order instead – was *not* proportionate to the alleged violation – the eight-year period of his detention at the order of the Cambodian Military Court.[66] It should not be ruled out that, at a later stage, when another remedy could be sought, such a remedy could be proportionate to the same alleged violation.

3.4. The abuse of process doctrine before the international criminal tribunals: consistency of interpretation?

In *Duch*, the ECCC co-investigating judges pointed out that they followed the international criminal tribunals' standards of application of the abuse of process doctrine. They cited in particular the ICTR's *Barayagwiza* judgment, the ICTY's *Nikolić* judgment, and the ICC's *Lubanga* judgment.[67] In this section, whether these standards are coterminous, and whether the interpretation of abuse of process in *Duch* was indeed in line with the established case law of the international criminal tribunals, will be examined. It will be argued that, while some inconsistencies in the tribunals' interpretation of the doctrine may be discerned, the inconsistency is more apparent than real. In cases where the tribunal was not involved in the violations of the defendant's rights, the tribunals have only been willing to find abuse of process – and on that basis stay the proceedings – if the defendant was subjected to torture or serious mistreatment. It was also this rather high standard that was applied by the ECCC co-investigating judges in *Duch*.

In the first case in which abuse of process surfaced – in *Barayagwiza* before the ICTR – the tribunal held that, under the doctrine of abuse of process, it might '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'.[68] It then went on to find that the facts of the case indeed justified the invocation of the doctrine, believing that such violations as delay in informing the defendant of the general nature of the charges, the failure to resolve his writ of habeas corpus, and the Prosecutor's failure with respect to her obligation to

65 OCIJ detention order, *Duch*, *supra* note 27, para. 21 in fine.
66 Cf. also Pre-Trial Chamber, Decision on Appeal against Provisional Detention Order of Duch, para. 25 ('The release from provisional detention due to the mere fact of the length of such detention should only be considered when it would clearly exceed any likely sentence that may be given.').
67 OCIJ detention order, *Duch*, *supra* note 27, para. 17–19.
68 *Prosecutor v. Barayagwiza*, *supra* note 52, para. 73.

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prosecute the case with due diligence, constituted sufficiently serious and egregious violations.[69]

In contrast, in *Nikolić*, the ICTY – although drawing on the abuse of process doctrine as set out in *Barayagwiza* – only found a legal impediment to the exercise of jurisdiction 'in a situation where an accused is very seriously mistreated, maybe even subjected to inhuman, cruel or degrading treatment, or torture, before being handed over to the Tribunal'.[70] Assessing the level of violence against the accused, the tribunal concluded that the treatment of the accused was not of an egregious nature.[71]

In a similar vein, the ICC pre-trial chamber in *Lubanga* noted that the abuse of process doctrine 'has been confined to instances of torture or serious mistreatment by national authorities of the custodial State in some way related to the process of arrest and transfer of the person to the relevant international tribunal'.[72] The pre-trial chamber found no evidence of torture or serious mistreatment in the case.[73]

On appeal in *Lubanga*, the ICC Appeals Chamber endorsed the pre-trial chamber's findings with respect to the absence of torture or serious mistreatment,[74] and thus appeared to vindicate the latter's high standard of abuse of process (which was in turn based on the ICTY's *Nikolić* decision). However, it left the door conspicuously open for a wider ambit of the standard.[75] In fact, it ascertained whether Lubanga's arrest and appearance before the Congolese authority involved or entailed *any* violation of his rights (it did not).[76] In so doing, it seemed to reject the 'Eichmann exception': no exception to the rights of the accused could be tolerated, not even for the most heinous crimes over which the international criminal tribunals have jurisdiction. As the ICC Appeals Chamber held,

> In those circumstances [i.e. in case of breaches of the rights of the accused], the interest of the world community to put persons accused of the most heinous crimes against humanity on trial, great as it is, is outweighed by the need to sustain the efficacy of the judicial process as the potent agent of justice.[77]

Admittedly, the Appeals Chamber clarified, relying on common-law case law, that only gross violations would make it 'unacceptable for justice to embark on its

69 Ibid., para. 101.
70 *Prosecutor v. Nikolić*, Decision on Defence Motion, *supra* note 46, para. 114.
71 Ibid.
72 *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06-512, PT. Ch., Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to Article 19(2)(a) of the Statute, 3 October 2006, at 10.
73 Ibid.
74 *Prosecutor v. Lubanga*, *supra* note 39, para. 43 (holding that they 'have not been shown to be erroneous in any way').
75 Ibid., para. 40 ('The findings of the Pre-Trial Chamber to the effect that the appellant was not subjected to any ill-treatment in the process of his arrest and conveyance before the Court *sidelines the importance of the precise ambit of the test* applied as a guide to the resolution of this appeal' (emphasis added)).
76 Ibid., para. 41.
77 Ibid. The Appeals Chamber also cited the following passage in the *Case of Teixeira de Castro v. Portugal*, Decision of 9 June 1998 before the European Court of Human Rights: 'The general requirements of fairness embodied in Art. 6 [ECHR] apply to proceedings concerning all types of criminal offences, from the most straightforward to the most complex.'

course',[78] and thus that only gross breaches of the rights of the accused might lead to a stay of proceedings pursuant to the abuse of process doctrine. Yet violations other than torture and mistreatment could arguably also rise to the level of gross violations, as was apparent from the Appeals Chamber's wider review of the conditions of Lubanga's arrest in the Democratic Republic of the Congo (DRC).

When the international criminal tribunals' case law is reviewed, it appears that the most liberal interpretation of the abuse of process doctrine is espoused by the ICTR and by the ICC Appeals Chamber. In fact, however, the liberal standard of interpretation applies only to specific situations. In the ICTR's *Barayagwiza* case, for one, the fault for the violations lay mainly with the organs of the tribunal.[79] Lesser due-process violations should doubtless be allowed to derail the proceedings if the tribunal itself carries responsibility. Similarly, if the violations result from 'concerted action' of the Prosecutor and a non-tribunal entity (e.g. a state), a more liberal standard should apply, as in that case the tribunal also carries responsibility for the violations. In fact, the liberal standard enunciated by the ICC Appeals Chamber in *Lubanga* was applied in respect of allegations that the Prosecutor was involved in the Congolese procedures of investigation and detention, and thus acted in concert with the DRC.[80] The same liberal standard was applied by the ECCC pre-trial chamber in *Duch*: the PTC was willing to take any violation of Article 9 of the ICCPR ('Everyone has the right to liberty and security of person') into account, provided that 'the organ responsible for the violation was connected to an organ of the ECCC, or had been acting on behalf of any organ of the ECCC or in concert with organs of the ECCC' (no concerted action was found).[81]

If, however, the tribunal does *not* carry responsibility for violations of the rights of the accused, a higher standard applies and should apply.[82] Proceeding with the trial of the accused would arguably only amount to a mockery of justice if such serious due-process violations as torture or mistreatment, involving violence against the person of the accused, could be identified. Careful analysis of the tribunals' case law, including the ICC Appeals Chamber's *Lubanga* decision, demonstrates that all tribunals that have heard abuse of process challenges relating to violations of the rights of the accused in which the tribunal itself played no role (either because it did not commit them, or because it did not act in concert with the responsible state) apply this same strict standard; only torture or serious mistreatment could give rise to a stay of the proceedings. It is in that context, indeed, that in *Lubanga* the ICC Appeals Chamber endorsed the pre-trial chamber's finding that the accused

78 Para. 31, relying on, among others, the recent case of *Jones v. Whalley*, House of Lords, 26 July 2006, [2006] 4 All ER 113. See also para. 30 ('Not every infraction of the law or breach of the rights of the accused in the process of bringing him/her to justice will justify stay of proceedings').

79 *Prosecutor v. Barayagwiza*, *supra* note 52, para. 73.

80 *Prosecutor v. Lubanga*, *supra* note 39, para. 42.

81 PTC, *Duch*, *supra* note 34, para. 15.

82 In eventually reaching their solution in *Duch*, the ECCC co-investigating judges cited only *Nikolić* and *Lubanga* (*supra* note 27, para. 21), and left out *Barayagwiza*, although they had opened their discussion of the abuse of process doctrine with this last case (para. 12). It may be argued that they did so on purpose: the lower standard of *Barayagwiza* should arguably not apply because the violations of the accused's rights could not be attributed to the ECCC.

had not suffered torture or serious mistreatment at the hands of DRC authorities. It is in that context that the ICTY trial chamber in *Nikolić* held that the unorthodox arrest of the accused by unknown individuals in the former Republic of Yugoslavia was not of a sufficiently egregious nature.[83] And it is in that context that the ECCC co-investigating judges in *Duch* held that the prolonged detention of the accused under the jurisdiction of the Cambodian Military Court before his transfer to the ECCC could not be considered a sufficiently grave violation of these rights.[84]

Consequently, in spite of appearances, there is in reality no contradiction between the application of the abuse of process doctrine by the international (or internationalized) criminal tribunals; in the absence of concerted action by the tribunals and the entity responsible for the violations (typically the state in whose custody the accused was before being transferred to the tribunal), only torture or serious mistreatment by that entity will lead to a stay of proceedings on the basis of abuse of process. As argued above, this principle deserves support, as, under specific circumstances, the international community's desire to bring perpetrators of heinous crimes to justice may outweigh the accused perpetrator's 'less fundamental' due-process rights.

4. Concluding remarks

A tribunal designed to bring the Khmer Rouge leaders to justice has finally been established, thirty years after the atrocities took place. It has been up and running since mid-2007. Yet difficult times lie ahead. Will the ECCC be able to withstand political pressure? Will sufficient funds be allocated? Will victims be sufficiently involved? An affirmative answer to these questions will determine the ECCC's legacy and its role as a facilitator of political reconciliation and rule of law entrenchment in Cambodia.[85] For if the ECCC were to be seen as a political ploy serving the needs of the elite, confidence in the justice system may be fatally undermined and thirty-year-old wounds will continue to fester.[86]

While the challenges to the ECCC may appear daunting, it has in fact made a fairly good start. On filing their first introductory submission with the co-investigating judges, the co-prosecutors made an extensive public statement on the content of the submission. Moreover, the co-investigating judges' first order, relating to the provisional detention of Duch, one of the suspects, teems with references to relevant international and foreign case law applying such due-process doctrines as *male captus bene detentus* and abuse of process. As shown in this article, the application of these principles is consistent with existing case law. Abuse of process should indeed only be invoked, absent involvement of the court, if the suspect has been tortured or seriously mistreated prior to being transferred to the court. The co-investigating

83 *Prosecutor v. Nikolić*, Decision on Defence Motion, *supra* note 46, para. 114.
84 OCIJ, *Duch*, *supra* note 27, para. 21.
85 See, e.g., S. Linton, *Reconciliation in Cambodia* (2004), 30 (pointing out that '[t]rials at the ECCC will provide a space within which [a positive mindset towards reconciliation] can be further developed into genuine and lasting reconciliation').
86 Ibid. (stating that '[t]he process should engender a minimum basis of trust so that there can be a degree of cooperation that takes Cambodians beyond merely tolerating each other').

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judges' order raises the bar for other ECCC actors. Quality may now be expected from the pre-trial chamber and the trial chamber.

While in the *Duch* case the PTC's decision on appeal may have been somewhat disappointing because of its terse language and its relative absence of conceptual clarification, it should not be forgotten that the PTC confirmed the co-investigating judges' order, and may be said to agree with their analysis. Moreover, the PTC is, in its own opinion at least, called on to write in a style reflecting the need of the wider public in Cambodia to understand the issues. Indeed, if the court were not able adequately to explain to the wider public its decisions relating to the Khmer Rouge atrocities, it is difficult to see how the dark pages of Cambodian history could be turned, and how political reconciliation could ensue.[87] Nonetheless, balancing those needs and the demands of conceptual clarity will remain a challenge for the court.

Finally, as far as the fears over a predetermined list of suspects are concerned, it should be observed that the most senior leaders of the Khmer Rouge central command (Ieng Sary, Khieu Samphan, and Nuon Chea) and the person outside this circle considered most responsible for the atrocities (Duch) had been provisionally detained by the ECCC by late 2007, whether they were previously pardoned (Ieng Sary), were allowed to remain at large by the Cambodian government (Khieu Samphan and Nuon Chea), or had fallen from grace with the government (Duch). Objectivity appears to prevail.[88] It is to be hoped that, in the pre-trial and trial stage also, the Court will continue on this path.

87 It may be noted that the PTC's proceedings in the *Duch* case were praised by the often critical Open Society Justice Initiative (the main non-governmental organization monitoring the ECCC's proceedings). OSJI, *supra* note 34, at 8.

88 Some due-process concerns were nevertheless raised during early pre-trial proceedings, notably in the case against Nuon Chea. Nuon Chea's lawyers had moved to disqualify Judge Ney Thol on the grounds that his 'position as a serving military officer and his participation in highly questionable judicial decision "would lead a reasonable observer, properly informed, to reasonably apprehend bias" against Mr Nuon and the Khmer Rouge and in favor of the [Cambodian People's Party].' See Public Decision, *supra* note 31, para. 14. On 4 February 2008, the PTC rejected the application on the grounds that Ney Thol did 'not occupy his position as a Pre-Trial Chamber Judge of the ECCC in the capacity of a [Royal Armed Forces of Cambodia] officer but in his personal capacity'. Ibid., para. 24. The PTC's decision was criticized by the Open Society Justice Initiative on the grounds that there should be no presumption of impartiality in Cambodian courts; instead of relying on that presumption, the court should arguably have conducted a 'more searching analysis of concerns about judicial independence by the chamber'. See Open Society Justice Initiative, Recent Developments at the Extraordinary Chambers in the Courts of Cambodia, February 2008 Update, available at http://www.osji.org/db/resource2?res_id=104050, p. 10. For a commentary see C. Ryngaert, 'The Cambodian Pre-Trial Chamber's Decisions in the Case against Nuon Chea on Victims' Participation and Bias', (2008) 3 *Hague Justice Journal* (forthcoming).