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Memorandum

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DATE: September 7, 2010
RE: The Presumption of Confidentiality at the ECCC: The Need for Standards to Protect Private Investigations, Provide Consistent Public Access, and Increase Transparency

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A. Introduction

The Extraordinary Chambers in the Courts of Cambodia (hereinafter ECCC) is unique among internationalized criminal tribunals in that it functions within a domestic legal system. In light of its structure, the ECCC is to both uphold international standards of justice and serve as a model for the country of Cambodia.¹ Following civil law practice, the ECCC operates under procedural rules far different from those of other tribunals; at the ECCC, investigating judges conduct lengthy investigations that are presumed to be confidential,² with many party motions and judicial orders never made public. While the public's right to open proceedings is preserved before the Trial Chamber,³ absent special circumstances, hearings before the Pre-Trial Chamber—addressing primarily appeals from orders of the Co-Investigating Judges (CIJs)—are conducted *in camera*.⁴ As a consequence public information about pre-trial proceedings has been extremely limited.

Yet the ECCC is also required to maintain transparency and keep victims informed throughout proceedings.⁵ Long investigations, large numbers of victims, and the detention of widely-recognized Khmer Rouge officials have led to increased demands for public information. Following the Co-Investigating Judges' controversial order regarding the breach of confidentiality of the judicial investigation in 2009,⁶ and more recently, the Pre-Trial Chamber's warning to journalists for

¹ Introduction to the ECCC, http://www.eccc.gov.kh/english/about_eccc.aspx (last visited Jul. 24, 2010).

² Internal Rules of the Extraordinary Chambers in the Courts of Cambodia [hereinafter ECCC Internal Rules], R. 56.

³ *Id.*, R. 79(6).

⁴ *Id.*, R. 77(5),(6).

⁵ *Id.*, R. 21(1).

⁶ Order on Breach of Confidentiality of the Judicial Investigation, Case No. 002/14-08-2006 (Office of the Co-Investigating Judges, Mar. 3, 2009). The order was the subject of significant media attention and sparked criticism among the public due to the seemingly arbitrary nature in which the Co-Investigating Judges constructed the principle of confidentiality. Without a reasoned decision and in the absence of further guidance, it appeared as though the Co-Investigating Judges forbid the disclosure of any information not presently on the ECCC's website.

unauthorized disclosure of confidential information,⁷ questions regarding the balance of confidentiality and transparency in the ECCC remain.

First, given the unique structure of the ECCC, what are the contours of the presumption of confidentiality during the pre-trial period? Second, does the unique nature of the ECCC warrant additional measures to ensure greater public access?

B. Fundamental Principles of the ECCC: The Protection of Individuals, Transparency, and Inherent Specificities

Fundamental principles of the ECCC, established in Extraordinary Chambers in the Courts of Cambodia Internal Rules [hereinafter Internal Rules], Rule 21 (1) require that

[t]he applicable ECCC Law, Internal Rules, Practice Direction and Administrative Regulations shall be interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims and *so as to ensure legal certainty and transparency of the proceedings, in light of the inherent specificity of the ECCC*, as set out in the ECCC Law and the Agreement.⁸

Rule 21 thus requires that the interests of specific categories of individuals be balanced with the need to maintain legal certainty and transparency, and that these interests be considered in light of the “inherent specificity” of the ECCC. Inherent specificities is a vague reference, yet guidance can be sought from the ECCC’s own articulation of its principles, which can be distilled into two interrelated goals: to apply international standards of justice and to serve as a model for domestic Cambodian courts.⁹

The language of Rule 21 suggests that governing laws of the ECCC, namely the Internal Rules, Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia For the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (new) [hereinafter ECCC Law], and the Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea

⁷ Warning or Unauthorized Disclosure of Confidential Information, Case No. 002/19-09-2007-ECCC/OCIJ (PTC) (Pre-Trial Chamber, Jul. 9, 2010). See also Douglas Gillison, *KRT Prosecutor Says Journalists Face Prosecution*, CAMBODIA DAILY, June 10, 2010.

⁸ ECCC Internal Rules, R. 21(1) (emphasis added).

⁹ Introduction to the ECCC, http://www.eccc.gov.kh/english/about_eccc.aspx (last visited Jul. 24, 2010).

[hereinafter Framework Agreement], be interpreted collectively, with consideration to the underlying purposes of the ECCC, rather than in isolation.

In reversing the order of the Co-Investigating Judges denying the use of video equipment at the ECCC detention center, the Pre-Trial Chamber recently acknowledged the need to interpret the Internal Rules in light of Rule 21.¹⁰ Though the Court was concerned with Ieng Sary's right to a fair trial, its decision provides valuable insight into the application of Rule 21; the Pre-Trial Chamber reasoned that while the right to use video equipment was not expressly established in the Rules, "Rule 21 requires it [the Pre-Trial Chamber] to interpret the Internal Rules in such a way that the Appeal is also admissible on the basis of Rule 21."¹¹ The Court held that the Co-Investigating Judges thus erred by confining their analysis to determining that the applicable law did not contain implicit or explicit use of audio or video equipment and that the charged person's rights were already fully respected by existing resources.¹² In considering the "object and purpose of fair trial guarantees,"¹³ the Pre-Trial Chamber thus modeled the collective interpretation of the Internal Rules.

The need to interpret ECCC rules collectively, in light of Rule 21 and the inherent specificities of the Court, is important when considering issues not specifically addressed in the Internal Rules, ECCC Law, or the Framework Agreement. The contours of the presumption of confidentiality similarly require not only a collective interpretation of the Internal Rules, but an analysis of the purposes behind the principle, as well as guidance from international law.

C. The Trend of Greater Public Access

Legal certainty and transparency, established in ECCC Internal Rule 21, are values shared by other international criminal tribunals. Of key distinction between these tribunals and domestic courts is

¹⁰ Public Redacted Decision on Ieng Sary's Appeal Against Co-Investigating Judges' Order Denying Request to Allow Audio/Video Recording of Meetings with Ieng Sary at the Detention Facility, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 64), ¶ 18 (Pre-Trial Chamber, June 11, 2010).

¹¹ *Id.*

¹² *Id.* ¶ 36.

¹³ *Id.* ¶ 31.

their unique purpose to not only provide justice, but to facilitate national reconciliation. While confidentiality protections remain a concern at these courts, namely to protect victims and witnesses and the integrity of the investigation, as the number of international criminal tribunals has grown around the world, so too has the general trend toward greater public access.

Despite similar court functions, common values of transparency, and shared concerns of confidentiality, a comparative analysis based upon the rules of other tribunals is difficult, as the ECCC's civil-based system and other tribunals' common law influences are not easily reconciled. Yet an analysis of the underlying reasons for confidentiality measures at other courts, notwithstanding procedural differences, is helpful for purposes of delineating the appropriate contours of public access at the ECCC.

Among international tribunals, rules regarding confidentiality are divided into two subsets: 1) those that govern the prosecutor's conduct during the investigation¹⁴ and 2) those that govern the chamber's disclosure of information both in documents generally and the indictment in particular.¹⁵ While investigations are not expressly confidential in other tribunals, the prosecutor is afforded broad discretion during the investigation stage, similar to the discretion afforded Co-Investigating Judges at the ECCC. Nonetheless, the presumption among other international criminal tribunals appears to be that investigations are public, as circumstances that warrant non-disclosure are expressly provided in the rules of procedure. While rules governing both the prosecutor and judges apply at the pre-trial phase of other courts, the ability to keep information confidential becomes more limited once the investigation is complete, as the indictment is expressly deemed public.¹⁶

¹⁴ See International Criminal Tribunal for former Yugoslavia (hereinafter ICTY) Rules of Procedure, R. 39ii (providing that the prosecutor may "undertake such other matters as may appear necessary for completing the investigation and the preparation and the conduct of the prosecution at the trial, including the taking of special measures to provide for the safety of potential witnesses and informants"). See also International Criminal Tribunal for Rwanda (hereinafter ICTR) Rules of Procedure, R. 39; Special Court for Sierra Leone Rules of Procedure (hereinafter SCSL), R. 39; Special Tribunal for Lebanon Rules of Procedure (hereinafter STL), R.39; International Criminal Court (hereinafter ICC) Rome Statute, art. 54 (e),(f).

¹⁵ See ICTY Rules of Procedure, R. 53; ICTR Rules of Procedure, R. 53; Special Court for Sierra Leone, R. 53.

¹⁶ See ICTY Rules of Procedure, R. 52, ICTR Rules of Procedure, R. 52.

The trend toward greater public access in other international criminal tribunals is evident in the International Criminal Tribunal for former Yugoslavia (hereinafter ICTY) Rules of Procedure. ICTY Rule 53 governs non-disclosure during the pre-trial phase,¹⁷ allowing information and documents to be withheld in limited circumstances.¹⁸ Yet a historical analysis of ICTY Rule 53 evidences the trend in amendments to provide for greater public disclosure. In 1996, the power to restrict public information was narrowed, as ICTY Rule 53 was amended to mandate that “exceptional circumstances” exist before information be withheld.¹⁹ In the same ICTY amendments, the allowance for the non-disclosure of information other than that contained in the indictment was also provided.²⁰ The revisions thus appear to reflect the drafters’ intent to allow for the protection of certain information when necessary, but to establish a higher burden to achieve confidential status. The public nature of the indictment and the requirement of “exceptional circumstances” for non-disclosure at the ICTY are consistent with the practice of International Criminal Tribunal for Rwanda (ICTR)²¹ and Special Court for Sierra Leone (SCSL).²²

The newest of the international criminal tribunals, the Special Tribunal for Lebanon (STL), establishes the strongest protections of public access among any international court. Also a hybrid tribunal composed of both national and international judges²³ and one that operates under a blend of both adversarial and inquisitorial models,²⁴ the STL similarly reflects what appears to be a general trend

¹⁷ Notably, Rule 53 is located in Part Five of the Rules of Procedure of the ICTY, entitled “Pre-Trial Proceedings,” so it appears that the presumption of public information exists throughout the entire pre-trial period. See ICTY Rules of Procedure, p. 39.

¹⁸ ICTY Rule 53 in part provides that “(A) In exceptional circumstances, a Judge or a Trial Chamber may, in the interests of justice, order the non-disclosure to the public of any documents or information until further order...(C) A Judge or Trial Chamber may, in consultation with the Prosecutor, also order that there be no disclosure of an indictment, or part thereof, or of all or any part of any particular document or information, if satisfied that the making of such an order is required to give effect to a provision of the Rules, to protect confidential information obtained by the Prosecutor, or is otherwise in the interests of justice.”

¹⁹ See ICTY Rules of Procedure, Rev. 8, 23 Apr. 1996; Rev. 9, 25 June and 5 July 1996.

²⁰ *Id.*

²¹ ICTR Rules of Procedure, R.53.

²² SCSL Rules of Procedure, R.53.

²³ Special Tribunal for Lebanon Annual Report, ¶ 9(i) (2009-2010) available at http://www.stl-tsl.org/x/file/TheRegistry/Library/presidents_reports/Annual_report_March_2010_EN.pdf.

²⁴ *Id.* ¶ 9(iv).

toward increased public access: in addition to the express public nature of the indictment, the presumption of public information is expressly established.

Article 6 of the STL Practice Direction states, “All filings made with the Registry are public records unless they are protected from disclosure by the Statute, the Rules or an order by the Pre-Trial Judge or a Chamber.”²⁵ The Pre-Trial judge will accept the most restricted level of classification, “*Under Seal and Ex Parte with Limited Distribution*,” under two circumstances: if he or she is satisfied that the proposed filing contains information, which, if disclosed, may pose an *exceptionally serious risk* to 1) the integrity of the investigation or 2) the life of a person or persons.²⁶ In addition, an overriding interest that justifies the non-compliance with the standard filing procedures must also exist.²⁷ Moreover, at the STL the judge is not afforded discretion regarding whether to release a public redacted version of withheld documents. Instead, Article 6 (2) requires, “Where a filing has been made confidentially, a public redacted version *shall* be filed as soon as possible.”²⁸ Mandated publication of redacted versions further highlight the stringent protections of public access to information at the STL.

The practice among other international tribunals suggests that despite the ECCC Co-Investigating Judges’ broad discretion to protect their investigation, there are limited justifications for keeping information confidential for that purpose, particularly once the closing order is filed.

D. The Presumption of Confidentiality at the ECCC

Unlike other internationalized criminal tribunals, yet consistent with domestic civil law systems, the Internal Rules of the ECCC establish that judicial investigations shall be presumed confidential. Rule 56 (1) states that

[i]n order to preserve the rights and interests of the parties, judicial investigations shall not be conducted in public. All persons participating in the judicial investigation shall maintain confidentiality.²⁹

²⁵ Filing of Documents Before the Special Tribunal for Lebanon, 15 Jan. 2010 STL, Art. 6.1.

²⁶ *Id.* Art. 8.5 (emphasis added).

²⁷ *Id.*

²⁸ *Id.* Art. 6(2) (emphasis added).

²⁹ *Id.* R. 56.

The confidential nature of ECCC investigations is consistent with Article 121 of the Cambodian Code of Criminal Procedure, which also presumes a confidential investigation.³⁰ According to the Office of the Co-Investigating Judges, as a general rule, all documents and information included in the case file are confidential, even when the document includes common knowledge readily available to the public.³¹

Despite the presumption of confidential investigations, the Office of the Co-Investigating Judges has said that the principle of confidentiality is flexible in order to provide the public with a minimum amount of information.³² Rule 56(2) grants the Co-Investigating Judges discretion to publicize investigations in two circumstances, stating the Co-Investigating Judges, may:

- a) jointly through the Public Affairs Section, issue such information regarding a case under judicial investigation as they deem essential to keep the public informed of the proceedings, or to rectify any false or misleading information; and
- b) jointly grant limited access to the judicial investigation to the media or other non-parties in exceptional circumstances, under their strict control and after seeking observations from the parties to the proceedings. The non-respect of any conditions that the Co-Investigating Judges may impose shall be dealt with in accordance with Rules 35 to 38.³³

Yet ECCC Internal Rules are silent as to standards upon which confidentiality decisions are to be based; similarly, the Office of the Co-Investigating Judges has not established any specific criteria for when it is essential to keep the public informed and has consistently remind the public that decisions are best made on a case-by-case basis.

³⁰ Code of Criminal Procedure of the Kingdom of Cambodia, English Translation, First Edition, Editions Angkor, entered into force 10 August 2007, art. 121 (providing that “[t]he judicial investigation is confidential. Persons who participate in the judicial investigation, especially prosecutors, judges, lawyers, court clerks, judicial police and military police officers, civil servants, experts, interpreters/translators, medical doctors and other persons mentioned in Article 95 (Technical or Scientific Examination) of this code, shall maintain professional confidentiality...).

³¹ Office of the Co-Investigating Judges, http://www.eccc.gov.kh/english/investigating_judges.aspx (last visited Jul. 24, 2010).

³² *Id.* See also Office of the Co-Investigating Judges of the ECCC, press release dated Mar. 3, 2009, *available at* www.eccc.gov.kh/english/cabinet/press/100/OCIJ_press-statement_EN.pdf.

³³ ECCC Internal Rules, R. 56(2)(a),(b).

i. Restrictions on the Release of Documents

Submissions of the Prosecution are expressly protected in ECCC Internal Rule 54, which states that “Introductory, Supplementary and Final Submissions filed by the Co-Prosecutors shall be confidential documents...”³⁴

Absent further stipulations in the Internal Rules, guidance regarding the disclosure of documents must be sought from the ECCC Practice Directions. The Practice Direction on the Filing of Documents, which establishes the presumptive classification-level of documents, states that a party may propose the level of classification; however, there is no express provision that the party’s proposal is binding. The Co-Investigating Judges and the Pre-Trial Chamber are to consider the proposed classification, determine if it is appropriate, and provide the correct classification as needed.³⁵ The Office of the Co-Investigating Judges has reminded counsel that “the classification level indicated by the parties is merely a proposal”³⁶ and is not binding on their decision.

Moreover, the Practice Direction on the Filing of Documents enumerates those documents to be listed as confidential and strictly confidential, yet the only guidance provided for public classification is that items “classified as public by the Co-Investigating Judges”³⁷ or documents “after a decision by the Pre-Trial Chamber that the document is public,”³⁸ are to be presumed public; the Practice Direction does not set out the criteria upon which the Co-Investigating Judges or Pre-Trial Chamber are to base their decisions.

ii. The Presumption of *In Camera* Hearings

ECCC Internal Rule 77 (5) governs the procedure for pre-trial appeals and applications, establishing the presumption that pre-trial hearings be conducted in private, stating in part that

³⁴ ECCC Internal Rules, R. 54.

³⁵ Practice Direction on the Filing of Documents, ECCC/01/2007/Rev.4, 5 June 2009 ECC, art. 3.12.

³⁶ Order Issuing Warnings Under Rule 38, Case No. 002/19-09-2007, ¶ 4 (Office of Co-Investigating Judges, Feb. 25, 2010).

³⁷ Practice Direction on the Classification and Management of Case-Related Information, Art. 5.1(a).

³⁸ *Id.* Art. 5.1(h).

“hearings of the Chamber shall be conducted *in camera*, except as otherwise provided in sub-rule 6.”³⁹

Private pre-trial hearings contrast with the presumption of public hearings before the Trial Chamber.⁴⁰

The Internal Rules allow for public pre-trial hearings, namely in jurisdictional challenges or when a decision is likely to end proceedings.⁴¹ Yet similar to the presumption of confidential documents during the pre-trial investigation, governing ECCC provisions establish no criteria upon which the Pre-Trial Chamber is to base its decisions regarding the holding of public hearings, nor has the Chamber enumerated any such criteria.

iii. The Requirement of Reasoned Decisions

An analysis of documents retained as confidential during the judicial investigation and those released to the public provides little guidance regarding the presumption of confidentiality. An analysis of the inconsistent nature in which pre-trial hearings are decided similarly reveals apparently arbitrary decisions by both the Co-Investigating Judges and the Pre-Trial Chamber. Yet ECCC Internal Rule 77 (14) establishes that Pre-Trial appeals shall be reasoned, providing in part, “All decisions under this Rule, including any dissenting opinions, shall be reasoned and signed by their authors.”⁴² While Internal Rule 77 does not expressly require that the orders of the Co-Investigating Judges be reasoned, the Pre-Trial Chamber has ruled that like Pre-Trial decisions, orders of the Co-Investigating Judges must also be reasoned.

In its decision on Nuon Chea’s appeal regarding the request for annulment of the judicial investigation, the Pre-Trial Chamber reminded the Co-Investigating Judges of their need to provide

³⁹ ECCC Internal Rules, R. 77(5).

⁴⁰ See ECCC Internal Rules, R. 79. ECCC Law, Art. 34 (new) states that “Trials shall be public and open [to] the representatives of foreign States, of the Secretary-General of the United Nations, of the media and of national and international non-government organizations unless in exceptional circumstances the Extraordinary Chambers decide to close the proceedings for good cause in accordance with existing procedures in force where publicity would prejudice the interests of justice”; See also Ruling on the Defence’s Request for a Public Hearing on the Appeal Against Provisional Detention Order and on the Co-Prosecutors’ Request for Redaction of the Defence’s Appeal Brief, (Pre-Trial Chamber, Mar. 3, 2008) p. 3. (Pre-Trial Chamber maintains that provision for *in camera* hearings during pre-trial consistent with laws governing ECCC, in that Article 34 “applies at the trial stage and not during the investigation.”).

⁴¹ See ECCC Internal Rules, R. 77 (6).

⁴² ECCC Internal Rules, R. 77 (14).

reasons in their orders, especially in matters that are largely discretionary.⁴³ Like the rules governing the release of documents, the role of the Co-Investigating Judges in Internal Rule 76(2),⁴⁴ which governs annulment of investigations, is also vaguely worded.⁴⁵ Without any reasons provided by the Co-Investigating Judges in their order on the annulment, the Pre-Trial Chamber was uncertain what criteria was used by the Co-Investigating Judges and had little upon which to base its review; the Chamber thus found that “all decisions of judicial bodies are required to be reasoned, as this is the international standard.”⁴⁶

The Chamber’s mandate of reasoned decisions in the Nuon Chea annulment appeal had support not only from the Defence, but also from the Co-Prosecutors, who submitted that

when the framers of the Rules assigned the function of *issuing an order* to a judicial authority like the CIJs [Co-Investigating Judges], it is expected that they envisaged that that judicial authority would do so by a judicial application of mind by giving reasons. [...] For an appellate authority (like the PTC [Pre-Trial Chamber]) to exercise its appellate review properly it is essential that the impugned order gives reasons—especially when it is an exercise of judicial discretion.”⁴⁷

After the Pre-Trial Chamber’s 2008 ruling, the Co-Investigating Judges were subsequently reminded of the need to provide reasoned decisions. Most recently, in an appeal regarding a request to place additional evidentiary material in the case file, the Pre-Trial Chamber drew attention to the shortcomings of the Co-Investigating Judges’ order, stating that “[t]he Co-Investigating Judges have not provided in the [o]rder sufficient reasoning to disclose their analysis of the requested documents.”⁴⁸ The

⁴³ Decision on Nuon Chea’s Appeal against Order Refusing Request for Annulment, Case No. 002/19-09-2007-ECCC/OCIJ (PTC06), ¶ 21 (Pre-Trial Chamber, Aug. 26, 2008).

⁴⁴ ECCC Internal Rules, R. 76(2) provides “Where, at any time during the investigation, the parties consider that any part of the proceedings is null and void, they may submit a reasoned application to the Co-Investigating Judges requesting them to seize the Chamber with view to annulment. The Co-Investigating Judges shall issue an order accepting or refusing the request as soon as possible and, in any case, before the Closing Order. Such orders shall be subject to appeal in accordance with these IRs.”

⁴⁵ Decision on Nuon Chea’s Appeal against Order Refusing Request for Annulment, ¶ 19.

⁴⁶ *Id.* ¶ 21.

⁴⁷ *Id.* ¶ 20.

⁴⁸ Decision on Co-Prosecutors’ Appeal Against the Co-Investigating Judges Order on Request to Place Additional Evidentiary Material on the Case File Which Assists in Proving the Charged Persons’ Knowledge of the Crimes, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 67), ¶ 22 (Pre-Trial Chamber, June 15, 2010).

Pre-Trial Chamber was more explicit in this decision, outlining two key purposes of reasoned decisions in its analysis and clearly stating the importance of well-drafted orders.

First, the public and parties have rights to reasoned decisions. As such, the Pre-Trial Chamber stated that

[i]t is a fundamental right that parties know the reasons for a decision. This permits a party to know the basis of a decision, placing an aggrieved party in a position to be able to determine whether to appeal, and on what grounds. Equally a respondent to any appeal has a right to know the reasons of a decision for so that a proper and pertinent response may be considered.⁴⁹

Second, reasoned decisions are critical so as to ensure the Pre-Trial Chamber is operating in compliance with the mandate expressed in Internal Rule 77 (14). As the Pre-Trial Chamber stated, “no appellate court can provide such reasoned decisions when the rationale and logic of the decision appealed is not itself disclosed by a reasoned decision.”⁵⁰ Without reasons provided by the Co-Investigating Judges in their order refusing to place additional material in the case file, it was “thus not possible for the Pre-Trial Chamber to be able to fully and properly consider the appropriateness or otherwise of the findings of the fact leading to the expression of the conclusion in paragraph five of the [o]rder and of the correct exercise of their discretion.”⁵¹

The Pre-Trial Chamber thus found that the Co-Investigating Judges erred in law, “as paragraph five of the order fails to disclose the reasons for the exercise of the discretion by the Co-Investigating Judges in so far as they reject documents referred to in the request.”⁵² The reasons for their order, which the Co-Investigating Judges were mandated to provide, were subsequently made public; however, the original order remains undisclosed as of August 2010 and thus the contents of paragraph five are unknown.

⁴⁹ *Id.* ¶ 24.

⁵⁰ *Id.* ¶ 25.

⁵¹ *Id.*

⁵² *Id.*

iv. The Importance of Standards Governing the Scope of Confidentiality at the ECCC

The lack of reasoned decisions or clear standards governing confidentiality has resulted in much criticism of the ECCC, directed by parties themselves, court monitors, and the Cambodian people. Public perceptions of potentially illegitimate court operations are problematic for both domestic and international perceptions of the ECCC, decrease public investment in the tribunals, and hinder the Court's function as a domestic model.

a. Public Perceptions of the ECCC

A critical element to any court's success is the belief among the public that justice is being fairly administered. Yet the non-disclosure of information without clear reasons has resulted in much unwanted attention at the ECCC. Of particular concern has been the Co-Investigating Judges' failure to establishing a clear standard as to what information is confidential and use of sanctions against parties who disclose information to the public.

In March 2009, the Co-Investigating Judges' Order on the Breach of Confidentiality stated that Ieng Sary Defence team had breached ECCC Internal Rule 56(1) by revealing confidential information. The Judges ordered that the Defence team cease posting information or documents related to the judicial investigations other than those documents posted on the ECCC website and remove the offending content.⁵³ Without further stipulations as to why the act of publishing legal motions violated the principle of confidentiality, it appears that the Co-Investigating Judges forbid the disclosure of any information solely on the basis that it is not yet present on the ECCC website.⁵⁴

Significantly, shortly after the Co-Investigating Judges sanctioned the Ieng Sary Defence team, they released what they earlier deemed as "confidential;" several days after the March 2009 order,

⁵³ Order on Breach of Confidentiality of the Judicial Investigation, Case No. 002/14-08-2006 (Office of the Co-Investigating Judges, Mar. 3, 2009). In July 2009, the Pre-Trial Chamber affirmed the Co-Investigating Judges' use of sanctions for breaches of confidentiality when it held that by "proceeding to publish in their website case file documents without first seeking the approval of the relevant judicial authority for each document, [Ieng Sary Defence counsel] acted in defiance of the general rule of confidentiality of investigations..." *See also* Decision on Admissibility on "Appeal Against the Co-Investigating Judges' Order on Breach of Confidentiality of the Judicial Investigation," Case No. 002/19-09-2007-ECCC/OCIJ (PTC18), ¶ 43 (Pre-Trial Chamber, July 13, 2009).

⁵⁴ *See* Order on the Breach of Confidentiality, (Office of Co-Investigating Judges, March 3, 2009).

information regarding the issue of Joint Criminal Enterprise at the ECCC was released to the public, after the Office of the Co-Investigating Judges made a commitment to keep the public better informed of ECCC proceedings.⁵⁵ A press release detailing the list of newly public classified documents stated that as a first step, the Co-Investigating Judges had made public “all documents on the case file relating to the important issue whether Joint Criminal Enterprise may be applied before the ECCC.” Accordingly, Defence team requests, responses of the Co-Prosecutors, Co-Investigating Judges’ orders, and parties’ briefs were made public.⁵⁶ Yet considering that the Co-Investigating Judges’ earlier sanction of the Ieng Sary Defence team was partially issued in response to information regarding Joint Criminal Enterprise present on the Ieng Sary website,⁵⁷ the question arises whether those documents should have been considered confidential in the first place.

In response to the Co-Investigating Judges’ order on the breach of confidentiality, the Ieng Sary Defence team authored a letter to Deputy Director of the ECCC Office of Administration, Mr. Knut Rosandhaug, which accused the Co-Investigating Judges of hiding their own shortcomings from the public by strictly construing confidentiality measures. The letter stated in part,

The current practice by the Judicial Chambers and Co-Investigating Judges at the ECCC, of suppressing Defence filings which may be embarrassing or which call into question the legitimacy and judiciousness of acts and decisions of the judges, all under the fig leaf that these are necessary measures to protect the supposed confidentiality and integrity of the investigations or judicial decision-making process, must be discontinued without exception. Submissions which are solely the work of the Defence team and which do not relate to the substance of the ongoing judicial investigation but relate solely to legal issues, must be debated under the watchful eye of the public. To allow non-confidential issues to be debated behind closed doors not only deprives Mr. I[eng] Sary of a fair and public trial but also deprives Cambodia of a demonstration of how complex trials for the most serious crimes can be conducted openly and transparently.⁵⁸

⁵⁵ See Co-Investigating Judges of the ECCC, press release dated Mar. 3, 2009.

⁵⁶ Co-Investigating Judges of the ECCC press release dated Mar. 26, 2009.

⁵⁷ See Co-Investigating Judges of the ECCC, press release dated Mar. 3, 2009.

⁵⁸ Letter to Rosandhaug, p. 2 (Ieng Sary Defence counsel, December 18, 2008) *available at* <http://sites.google.com/site/iengsarydefence/letters-1>. See also Order on the Breach of Confidentiality, ¶ 2 (Office of Co-Investigating Judges, March 3, 2009).

The Ieng Sary Defence team was supported by the Co-Prosecutors⁵⁹, Civil Parties,⁶⁰ and the media⁶¹ in its criticism of the use of sanctions for breaches of confidentiality. The order drew much negative attention to the court and left many wondering why such strict privacy measures at the ECCC were necessary. Subsequent threats to journalists who report on “confidential” material⁶² have only exacerbated criticism of the ECCC and generated additional questions regarding the purpose of such stringent confidentiality measures. The establishment of clear rules defining the standard would go a long way toward rectifying the public perception that confidentiality measures are taken either arbitrarily or for the purpose of hiding information.

b. Investment in the Khmer Rouge Tribunals

In addition to poor public perception, the lack of clear confidentiality standards decreases public investment in the justice system, as the culture of secrecy at the ECCC closely resembles the corruption that has plagued Cambodia for decades. The lack of public investment in the ECCC is especially troublesome, as a significant proportion of the population identifies as a victim of the Khmer Rouge and one of the main functions of the ECCC is to serve as a means of reconciliation for the Cambodian people.

At a minimum, the establishment of confidentiality standards, even without additional measures for public access, will increase investment in the ECCC. The Council of Europe, an international body comprised of forty seven member nations with the goal of developing democratic principles based on the European Convention on Human Rights, outlined its reasons for supporting the release of public

⁵⁹ See Co-Prosecutors’ Observations on Ieng Sary’s Appeal Against the Co-Investigating Judges’ Confidentiality Order, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 18) (Office of Co-Prosecutors, March 25, 2009).

⁶⁰ Statement of Co-Lawyers for Civil Parties on Ieng Sary’s Appeal Against the OCIJ Order on Breach of Confidentiality of the Judicial Investigation, Case No. 002/19-09-2007-ECCC/OCIJ (PTC18) (Office of Co-Lawyers for Civil Parties, March 27, 2009).

⁶¹ See, eg. OPEN SOCIETY JUSTICE INITIATIVE, RECENT DEVELOPMENTS AT THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA: MAY 2008 UPDATE 25-25 (2008), available at www.justiceinitiative.org/activities/ij/krt.

⁶² See Warning or Unauthorized Disclosure of Confidential Information, Case No. 002/19-09-2007-ECCC/OCIJ (PTC) (Pre-Trial Chamber, Jul. 9, 2010).

information in a publication entitled the Document Access Guide.⁶³ Among the benefits of public access listed in the report is the facilitation of informed public participation, which leads to greater accountability of public authorities, and in turn increases efficiency, as the public authorities are held to a higher standard under the watchful eye of the public.⁶⁴ The benefits of publicity to increase public investment have also been addressed by the ICTY; in *Prosecutor v. Delalic*, the court stated that publicity “offers protection against arbitrary decisions and builds confidence by allowing the public to see justice administered.”⁶⁵

Similarly, knowledge that the ECCC is operating under clear standards will assure the public that there is a legitimate basis for confidential information, and that even though some information is protected, justice is being fairly administered; efficiency at the ECCC will likewise increase, as should the Co-Investigating Judges deviate from the standard or fail to provide reasoned decisions, they will be accountable to the parties and the public.

c. The ECCC’s Role as a Model Court

Lastly, the lack of reasoned decisions and standards is problematic considering the ECCC’s function as a model for domestic courts. The unique hybrid-approach of the ECCC was intended to “provide a new model for court operations in Cambodia,”⁶⁶ both for the development of Cambodia’s own legal system and for the Cambodian people’s investment in the justice system. As such, the ECCC was established as a Cambodian court independent of the United Nations and the ECCC Internal Rules are largely consistent with the Cambodian Code of Criminal Procedure;⁶⁷ however, international

⁶³ Directorate General of Human Rights, Document Access Guide 6, Council of Europe (2004) available at <http://www.coe.int/aboutCoe/index.asp?page=quisommesnous&l=enaboutus> (while the Council of Europe’s Guide governs the release of official documents by public authorities, a classification in which judicial bodies are not included, the principles of access to information are valuable for purposes of public disclosure in the ECCC).

⁶⁴ *Id.*

⁶⁵ *Prosecutor v. Delalic*, Case No. IT-96-21, Decision on the Motions by the Prosecution on Protective Measures for the Prosecution Witness Pseudonymed “B” Through to “M,” ¶ 33-34 (Apr. 28, 1997).

⁶⁶ See ECCC introductory materials, available at http://www.eccc.gov.kh/english/about_eccc.aspx.

⁶⁷ See Cambodian Code of Criminal Procedure, R. 121 (providing for confidential investigations).

participation was integrated into ECCC operations due to the weak domestic system and international nature of crimes.

Yet in not educating the public about how a legitimate judicial investigation functions, the ECCC is doing little to provide the domestic Cambodian legal system any assistance. A recent UN report compiled by a group of experts acknowledged three main shortcomings of the Cambodian justice system, stating: “It is the opinion of the Group that the Cambodian judiciary presently lacks three key criteria for a fair and effective judiciary: a trained cadre of judges, lawyers and investigators; adequate infrastructure; and a culture of respect for due process.”⁶⁸ Without information on how a legitimate judicial investigation functions, domestic judges, lawyers and investigators will not obtain the training they require; similarly, without clear standards upon which confidential decisions are based, the ECCC is not only doing little to help cultivate respect for due process, but is leaving the door open for widespread corruption to continue within the domestic system.

Therefore, while judicial discretion in the classification of documents and the holding of *in camera* hearings are undoubtedly an important aspect of a well-functioning pre-trial investigation, at the same time they must be subject to clear rules that evidence legitimate court proceedings.

E. Contours of the Principle of Confidentiality at the ECCC

Due to the ECCC’s lack of established rules or reasoned court decisions regarding the contours of confidentiality measures, guidance for appropriate limitations on the presumption of confidentiality requires an analysis of both the purposes of the principle of confidentiality, as articulated by the Court, as well as guidance from other international criminal tribunals. While consistency with domestic Cambodian procedure is an important factor to consider in drafting such standards, so too are the unique specificities of the ECCC. The Pre-Trial Chamber acknowledged the ECCC’s unique nature and differences from the domestic civil system in a 2008 decision, noting that “the focus of the ECCC differs

⁶⁸ Introductory Note of Secretary-General Kofi Annan, Report of the Group of Experts for Cambodia established pursuant to General Assembly resolution 52/135, February 18, 1999, ¶ 4, <http://www.unakrt-online.org/Docs/Other/1999-02-18%20Experts%20Report.pdf>.

substantially enough from the normal operation of Cambodian criminal courts to warrant a specialized system,”⁶⁹ thereby supporting deviations from Cambodian law in circumstances where it is so warranted.

i. Confidential Documents

The language of ECCC Internal Rule 56 establishes that the overarching principle behind confidentiality is to “protect the rights and interests of the parties.” The Office of the Co-Investigating Judges has also consistently articulated three specific reasons for the requirement of confidential investigations in order to *ensure the quality of the judicial process*: 1) the guarantee of the protection of privacy of those persons mentioned in the case file, 2) the presumption of innocence, and 3) efficiency and effectiveness in investigations.⁷⁰ Effectiveness and efficiency in investigations appear to be used interchangeably in ECCC documents.⁷¹ While the Co-Investigating Judges have said little more regarding the purposes of confidentiality, an analysis of those documents kept from the public, as well as the practice among international courts, is useful for determining the contours of the principle.

a. The Privacy of Those Mentioned in the Case File: Protection of Victims and Witnesses

The protection of victims and witnesses is the most often cited reason for restricting confidential information among international criminal tribunals. Considering the thousands of individuals who submitted complaints to the ECCC and have been incorporated into the case file, the number of persons potentially included in the privacy provision of confidentiality is expansive.

While the Co-Investigating Judges have said little regarding the protection of victims and witnesses, in practice they have limited the disclosure of information about people connected to the investigation. For example, in the public version of the closing order indicting Kaing Guek Eav alias

⁶⁹ Decision on Nuon Chea’s Appeal Against Order Refusing Request for Annulment, Case No. 002/19-09-2007-ECCC/OCIJ (PTC06), ¶ 14 (Pre-Trial Chamber, August 26, 2008).

⁷⁰ Co-Investigating Judges of the ECCC, press release The Co-Investigating Judges publish a number of documents dated Mar. 26, 2009, *available at* http://www.eccc.gov.kh/english/cabinet/press/105/Press_Release_OCIJ_EN.pdf; *See also* Office of the Co-Investigating Judges, http://www.eccc.gov.kh/english/investigating_judges.aspx (last visited Jul. 24, 2010).

⁷¹ *See* Office of the Co-Investigating Judges of the ECCC, press release dated Mar. 3, 2009, *available at* www.eccc.gov.kh/english/cabinet/press/100/OCIJ_press-statement_EN.pdf (efficiency used in place of effectiveness as reason for presumption of confidentiality).

“Duch” [hereinafter Duch], rather than include names, the Co-Investigating Judges identified those mentioned in the case file via letters, as “Witness A” and “Person B.”⁷² Similarly, while information regarding Duch’s alleged involvement with the Khmer Rouge was provided, the sources of the information were omitted.⁷³

Yet the Office of the Co-Investigating Judges has demonstrated its willingness to disclose the identity of witnesses on several occasions. In September 2009, Co-Investigating Judge Lemonde issued several letters to high ranking government officials requesting that they serve as witnesses in Case 002. Among those whose involvement was requested were Hor Nam Hong, Vice Prime Minister of Foreign Affairs and International Cooperation;⁷⁴ Keat Chhon, Vice Prime Minister of Economics and Finance;⁷⁵ Ouk Bunchhoeun, Senator;⁷⁶ Samdech Chea Sim, President of the Senate;⁷⁷ and Samedech Hen Samrin, President of the National Assembly.⁷⁸

More recently, the Co-Investigating Judges disclosed witness identities when they permitted a French documentary film crew access to the judicial investigation, access that apparently included an interview with a Case 002 witness.⁷⁹ The subsequent ruling of the Pre-Trial Chamber denying the Ieng Thirith Defence team’s request for annulment of the judicial investigation due to the disclosure indicates the Chamber’s belief that media projects not released until after the proceedings, especially those that

⁷² See Public Redacted Closing Order Indicting Kaing Guek Eav alias Duch, Case No. 002/14-08-2006, (Office of the Co-Investigating Judges, Aug. 8, 2008).

⁷³ *Id.* ¶ 9.

⁷⁴ Letter from the Co-Investigating Judges to Witness Hor Nam Hong (Sep. 25, 2009) (requesting interview as witness).

⁷⁵ Letter from the Co-Investigating Judges to Witness Keat Chhon (Sep. 25, 2009) (requesting appearance as witness due to past statements).

⁷⁶ Letter from Co-Investigating Judges to Witness Ouk Bunchheoun (Sep. 25, 2009) (requesting appearance as witness due to past statements).

⁷⁷ Letter from the Co-Investigating Judges to Witness Samdech Chea Sim (Sep. 25, 2009) (requesting appearance as witness).

⁷⁸ Letter from Co-Investigating Judges to Witness Samedech Hen Samrin (Sep. 25, 2009) (requesting appearance as witness).

⁷⁹ Decision on Ieng Thirith’s Appeal Against the Co-Investigating Judges’ Order Rejecting the Request to Seize the Pre-Trial Chamber with a View to Annulment of All Investigations (D233/1), Case No. 002/19-09-2007-ECCC/OCIJ (PTC 41), ¶ 51 (Pre-Trial Chamber, Jun. 25, 2010).

have historical significance, amount to an exceptional circumstance in which the media may be afforded access to the investigation. Yet not addressed in the Co-Investigating Judges' reasoning is why certain members of the media were afforded access to the historically significant events, yet others were excluded.

In another release of information in February 2010, the Co-Investigating Judges issued a request that filmmaker Robert Lemkin produce his film *Enemies of the People* to the court for purposes of assisting the investigation of Case 002.⁸⁰ The letter was made public, as was the email response of Mr. Lemkin, who offered to arrange a public screening when the film was complete.⁸¹ The subsequent response of the Co-Investigating Judges requested that the then unpublished film be made available because "[m]edia reports suggest your film contains interviews with Nuon Chea which may be of interest to our investigation."⁸² The Judges' letter assured Lemkin that the request was made on a confidential basis and that film would not be released to the public.

Yet the release of the correspondence between the Co-Investigating Judges and Lemkin, which included the personal email address of the filmmaker, illustrates that in circumstances where witnesses are non-cooperative, the court is willing to release the names of individuals and their personal information to the public. Similarly, in the absence of further reasoning, it appears as though the Co-Investigating Judges concluded that when uncooperative high ranking officials are involved or "historical" reasons necessitate, the protection of witnesses is not required.

However given the unique nature of the ECCC, there may be other situations in which protections of victims and witnesses are no longer required. In Cambodia, the number of Khmer Rouge victims totals thousands. The country's tragic history makes victims abundant and many of these more than willing to share their stories. Thus the underlying purpose of confidentiality to protect victims'

⁸⁰ Letter of the Co-Investigating Judges to Robert Lemkin (Feb. 3, 2010).

⁸¹ Email of Robert Lemkin to the Co-Investigating Judges (Feb. 9, 2010).

⁸² Letter of the Co-Investigating Judges to Robert Lemkin (Feb. 15, 2010).

privacy may no longer be necessary when those whom the provision is intended to protect voluntarily waive its application.

The ICTY, International Criminal Tribunal for Rwanda (ICTR) and International Criminal Court (ICC) all limit the protection of individuals to when there is objective basis for protection. The ICTY has stated that “the determination of the need to order protective measures for witnesses cannot be made purely on the *subjective* basis of either fear expressed by witnesses or their willingness to testify at trial if their security is guaranteed. Rather, the Chamber must be satisfied that an *objective* situation exists whereby the security of the said witnesses is or may be at stake, which accounts for such a fear. Only in this case would protective measures be warranted.”⁸³ Furthermore, among international criminal tribunals, even when the objective test for witness protection is satisfied its confines are strictly construed. In a decision regarding the public release of a document redacted for purposes of parties’ protection, the ICC has made clear that “the scope of redactions cannot exceed what is strictly necessary in light of the applicant’s security situation.”⁸⁴

In the case of the ECCC, protective measures for victims and witnesses fearful of having information disclosed could be applied pursuant to the objective tests utilized in other tribunals; however, where victims are not fearful and are willing to share their stories, there is little reason to withhold information for their protection. This proves especially true when considered in light of the ECCC’s role as a model court, which requires balancing the needs of specific individuals with the court’s greater obligations of legal certainty and transparency as established in Internal Rule 21.

Lastly, the ECCC’s obligation to protect victims may also necessitate greater disclosure to the public in general, due to the large numbers of individuals harmed by the Khmer Rouge regime. The ECCC obligation is outlined in Internal Rule 21(c), which states that “[t]he ECCC shall ensure that victims are

⁸³ Decision on the Defence Motion for Protective Measures for Witnesses, *Nteziryayo* (ICTR-97-29-T), ¶ 6 (Trial Chamber II, Sep. 18, 2001).

⁸⁴ Decision on Protective Measures Requested by Applicants 01/04-1dp to 01/04-6/dp, Situation in the Democratic Republic of Congo, (ICC Pre-Trial Chamber I, July 25, 2005).

kept informed and that their rights are respected throughout the proceedings.”⁸⁵ Yet the Internal Rules state that the term victim “refers to a natural person or legal entity that has suffered harm as a result of the commission of any crime within the jurisdiction of the ECCC.”⁸⁶ Newer courts define both “victims” and “victims participating in proceedings” in their Internal Rules Glossary, thereby distinguishing those people who have suffered harm in general from those who are formal parties.⁸⁷ Thus the broad definition of the term “victim” and the lack of the term “civil parties” in Rule 21 appears to indicate an obligation on behalf of the ECCC to provide information about proceedings to the public in general, due to the millions of Cambodians who suffered during Democratic Kampuchea.

b. Privacy and the Presumption of Innocence: Protection of Defendant’s Rights

International courts appear to have said little regarding the importance of protecting accused persons’ privacy and the presumption of innocence. Though Co-Investigating Judges’ public orders do not expressly cite the need for protecting the rights of the accused, it appears to be the primary objective of the privacy purpose of confidentiality frequently referenced at the ECCC.⁸⁸

Absent reasons articulated by the Co-Investigating Judges, an analysis of confidential information protected at the ECCC reveals several occasions where information may presumably have been withheld to protect the charged person. First, the medical information regarding Khieu Samphan was redacted from public documents.⁸⁹ Pursuant to Internal Rule 64(2),⁹⁰ in their 2008 request for release, the Khieu Samphan Defence counsel argued Khieu’s poor health was incompatible with

⁸⁵ ECCC Internal Rules, R. 21(c).

⁸⁶ *Id.*, Glossary.

⁸⁷ See Special Tribunal for Lebanon Rules of Procedure and Evidence, R. 2(A).

⁸⁸ See Co-Investigating Judges of the ECCC, press release dated Mar. 3, 2009; Co-Investigating Judges of the ECCC press release dated Mar. 26, 2009.

⁸⁹ Public Redacted Order Refusing Request for Release, Case No. 002/14-08-2006 (Office of the Co-Investigating Judges, Mar. 28, 2008).

⁹⁰ ECCC Internal Rules, R. 64(2) governs the release of a charged person and provides that “[a]t any moment during the period of the Provisional Detention, the Charged Person or his or her lawyer may submit an application for the release to the Co-Investigating Judges...”

continued provisional detention.⁹¹ Khieu's suffering of a stroke, his subsequent "good recovery," names of his doctors, and his ability to continue with the investigation were made public in the Co-Investigating Judges' order. Yet the specific nature of Khieu's recovery was omitted, thus reflecting what appears to be intent to protect the privacy of the accused.⁹²

Similarly, the Pre-Trial Chamber redacted evidence from public documents as per the request of the Defence in what appears to be an attempt to maintain the presumption of innocence. In December 2007, the Pre-Trial Chamber issued a ruling on the Duch Defence counsel's request for redaction of some parts of the Co-Prosecutor's response to Duch's appeal against the Co-Investigating Judges' order of provisional detention.⁹³ The redactions were permitted and matters of which Duch was accused were omitted from the public document. General information that the case file contained "in detail the scope of criminal acts committed at S-21," as well as an outline of Duch's authority and witness testimony from survivors and staff was made public in the document.⁹⁴ Also made public was the Court's possession of evidence, including meeting minutes, telegrams, and other documents.⁹⁵ Yet notations that read "evidence redacted from public document" in the Co-Prosecutor's brief indicate specific evidence was omitted from the public version.⁹⁶

Yet the accused themselves have on occasion sought to waive their protections in an effort to disclose information to the public. The Ieng Sary Defence team's posting of information on their independent website, for which they were sanctioned, was expressly stated by the Defence team to be

⁹¹ Public Redacted Order Refusing Request for Release, ¶ 33 (Office of the Co-Investigating Judges, Mar. 28, 2008).

⁹² *Id.* ¶ 34-36.

⁹³ Ruling on Defence Request for Redaction of Some Parts of Co-Prosecutor's Response to Appeal Brief- Order of Provisional Detention, Case No. 001/18-07-ECCC-OCIJ (PTC01), (Pre-Trial Chamber, Dec. 6, 2007).

⁹⁴ Co-Prosecutors' Response to Defence Appeal Against Co-Investigating Judges' Order on the Provisional Detention of Kang Kech Iev alias Duch on 31 July 2007, Case No. 002/14-08-2006, ¶ 34-35 (Office of the Co-Prosecutors, Oct. 3, 2007).

⁹⁵ *Id.*

⁹⁶ *Id.* ¶ 40, 46, 56, 60.

an attempt on behalf of the accused to waive his privacy protections.⁹⁷ The majority of the information posted on the website related to Ieng Sary's poor medical condition.⁹⁸ Absent the discussion of witnesses or victims, or any other express reasons articulated by the court, there appears to be few reasons why the public distribution of this information was forbidden. In addition, the Ieng Sary Defence argued that the ability for parties to waive confidentiality measures created for their protection is supported by the plain language of Rule 56, which reads that the presumption is intended to "protect the rights and interests of the parties."⁹⁹ This may be especially true when considered in light of Internal Rule 21's mandate to balance the protection of parties with the public's right to transparent proceedings.

c. Efficiency and Effectiveness in Investigations: Required Judicial Discretion

The terms "efficiency in investigations" and "effectiveness of investigations" have been used interchangeably by the Co-Investigating Judges as justifications for the principle of confidentiality¹⁰⁰ and are also highlighted reasons for the non-disclosure of information at other international criminal tribunals. It is likely that these two purposes principally aim to ensure speedy proceedings and impartial investigations, and the number of public withholdings that could arguably fall under this purpose of confidentiality is large.

Efficiency as a reason for confidential investigations aims to ensure that the investigation is conducted as quickly as possible. In their order on the breach of confidentiality, the Co-Investigating

⁹⁷ Ieng Sary's Appeal Against the OCIJ Order on Breach of Confidentiality of the Judicial Investigation and Request for Expedited Filing Schedule and Public Oral Hearing, Case No. 002/19-09-2007-ECCC-OCIJ, ¶ 30 (The Defence for Ieng Sary, March 10, 2009).

⁹⁸ Ieng Sary Defence, *available at* <http://sites.google.com/site/iengsarydefence/>.

⁹⁹ Ieng Sary's Appeal Against the OCIJ Order on Breach of Confidentiality of the Judicial Investigation and Request for Expedited Filing Schedule and Public Oral Hearing, ¶ 30 (The Defence for Ieng Sary, March 10, 2009). *See also* ECCC Internal Rules, R. 56.

¹⁰⁰ *See* Co-Investigating Judges of the ECCC, press release dated Mar. 26, 2009, *available at* http://www.eccc.gov.kh/english/cabinet/press/105/Press_Release_OCIJ_EN.pdf.

Judges mentioned the “judicial calendar”¹⁰¹ and scheduling concerns as factors to consider when determining whether documents should be issued publically. Yet the Judges also expressed the need to take into account the interests of all the parties,¹⁰² reflecting the need to balance efficiency with the other purposes of confidentiality.

Effectiveness as an underlying purpose of confidentiality has not been addressed often by the Co-Investigating Judges. While the Judges mentioned impartiality of the judicial investigation as a reason for confidentiality in their order on the breach of confidentiality,¹⁰³ impartiality was not included in any subsequent press releases, nor is it listed as a purpose of confidentiality on the ECCC website. Without further guidance by the Co-Investigating Judges, it may be surmised that efforts to ensure impartiality also contribute to effective proceedings, for neutrality and lack of political pressure are key elements of fair proceedings, and in order for proceedings to be effective, they must be fair.

The preservation of evidence also ensures the effectiveness of the investigation. In its ruling on the Co-Prosecutors’ request for redaction of the Defence’s appeal brief concerning Khieu Samphan, the Pre-Trial Chamber approved the request and redacted material before it was made public. The Chamber noted in its decision that the Defence brief referred to the introductory submission and made specific evidentiary assertions,¹⁰⁴ and therefore the request was granted.

Yet in other circumstances, the ECCC has released information after deeming it was essential to keep the public informed. For example, the Office of the Co-Investigating Judges made public additional

¹⁰¹ Order on the Breach of Confidentiality, (Office of Co-Investigating Judges, March 3, 2009), ¶ 12 (judicial calendar cited as a reason for confidentiality by Co-Investigating Judges only in the order on the breach of confidentiality, omitted from later press releases and absent from ECCC website).

¹⁰² *Id.*, fn. 2.

¹⁰³ *Id.* ¶ 12.

¹⁰⁴ Ruling on the Defence’s Request for a Public Hearing on the Appeal Against Provisional Detention Order and on the Co-Prosecutors’ Request for Redaction of the Defence’s Appeal Brief, Case No. 02/19-09-2007-ECCC-OCIJ (PTC04), p. 2 (Pre-Trial Chamber, Mar. 3, 2008).

facts regarding the investigation of Case 002 in a November press release.¹⁰⁵ The Co-Investigating Judges stated that

...[i]n order to assist any members of the public who wish to apply to become a Civil Party prior to [the] deadline and assist in the judicial investigation of Case file 002, the Co-Investigating Judges, pursuant to rule 56.2 a) of the Internal Rules hereby provide information outlining the facts falling within the scope of the ongoing investigations.¹⁰⁶

The press release provided a list of cooperatives and work sites currently under investigation; security centers and execution sites under investigation; and acts directed against the population and groups of persons currently under investigation, including the displacements of persons from specific provinces, purges, forced marriages, and the treatment of Buddhists, Vietnamese, and Cham populations.¹⁰⁷ Yet the release was issued well into the investigation of Case 002 and left victims very little time to formally apply as civil parties, evidencing a low standard for releasing information when public knowledge is essential.

Therefore, while the need for efficiency and effectiveness during the investigation remains an important consideration at the ECCC, the Co-Investigating Judges have acknowledged the need to release information when it is essential to keep the public informed. Other circumstances when it is essential to keep the public informed may similarly outweigh the need for confidentiality measures.

First, given the complex nature of the cases before the ECCC, the pre-trial period during which the public may be deprived of information is far longer than in most domestic civil systems that try less complex cases. Therefore, the need for efficient and effective investigations may no longer be as pressing over time when investigations span the course of many months.

At international tribunals, confidential status is limited to only the duration in which its purpose is served and no longer. In the Special Tribunal for Lebanon, though documents are presumed to be

¹⁰⁵ Co-Investigating Judges of the ECCC, press release Statement from the Co-Investigating Judges Judicial Investigation of Case 002/19-09-2007-ECCC-OCIJ and Civil Party Applications, dated Nov. 5, 2009.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

public; they may be classified as confidential when it is necessary for the effective conduct of the investigation.¹⁰⁸ Yet the confidential status lasts only as long as it is needed, until disclosure of the document “would no longer cause an exceptionally serious risk.”¹⁰⁹

Furthermore, confidentiality measures for reasons of efficiency at the ECCC may also be reduced in light of Rule 21’s interest in transparency; though the ECCC is intended to serve as a model for Cambodian courts that utilize a confidential judicial investigation, in order to fulfill its mandate, the public must have some degree of understanding as to the basic proceedings of the Court. The public interest may therefore outweigh judicial efficiency in matters beyond those articulated by the Co-Investigating Judges.

ii. *In Camera* Hearings

Despite the presumption of *in camera* hearings, ECCC Internal Rule 77(6) grants the Pre-Trial Chamber discretion to hold pre-trial hearings in public, providing that

[t]he Chamber may, at the request of any judge or party, decide that all or part of a hearing be held in public, in particular where the case may be brought to an end by its decision, including appeals or applications concerning jurisdiction or bars to jurisdiction, if the Chamber considers that it is in the interests of justice and it does not affect public order or any protective measures authorized by the court.¹¹⁰

The Pre-Trial Chamber has not articulated any specific reasons for the presumptions of *in camera* hearings, nor do the Internal Rules establish any purposes behind the provision. Yet it appears that at least one underlying purpose for the presumption of *in camera* hearings is to uphold the integrity of confidential investigations, particularly confidentiality measures intended to protect victims and witnesses. Here, consistent with document release, in light of the lack of express standards, it is instructive to consider three purposes of confidentiality—the protection of the parties, presumption of innocence, and efficiency and effectiveness of investigations—for guidance regarding standards for public hearings before the Pre-Trial Chamber.

¹⁰⁸ Special Tribunal for Lebanon Practice Directions on Filing, Art. 8(5).

¹⁰⁹ *Id.* Art. 8(10).

¹¹⁰ ECCC Internal Rules, R. 77(6).

Consistent with Rule 77(6), an established exception to the presumption of *in camera* hearings are circumstances in which a case may be brought to an end by a decision of the Pre-Trial Chamber. In November 2008, the Khieu Samphan Defence team argued that the decision to deny their request for translation of the case file warranted a public hearing pursuant to Internal Rule 77(6), in that the denial resulted in a serious violation of Khieu's rights, enough to bring an end to the case and order for his release.¹¹¹ The Pre-Trial Chamber recognized that the denial of translated documents could end the proceedings and considered whether the confidentiality of the judicial investigation would be compromised by a public hearing before granting the request. The Pre-Trial Chamber reasoned that the hearing was best held in public, as "[b]oth the [a]ppeal and the [r]esponse of the Co-Prosecutors have been published on the ECCC website as it is in the interests of justice for the proceedings in the [a]ppeal to be made public."¹¹²

In its decision, the Pre-Trial Chamber recognized that one of the primary bases for holding a public hearing is to allow public scrutiny of the fairness of proceedings.¹¹³ The Chamber's decision in Khieu's request for a public hearing thus supports the premise that there are some matters so important to the accused person's rights, that a public hearing is necessary to ensure the preservation of fair trial rights; based on the Court's decision in the case of Khieu Samphan, it appears that the denial of translated documents is once such instance.

Other circumstances that may warrant a public hearing are unclear, as decisions appear to be made on a case-by-case basis. For example, decisions regarding investigative requests have consistently been held *in camera*. In an August 2009 decision, the Pre-Trial Chamber denied the Co-Lawyers for Ieng Thirith, Nuon Chea and Khieu Samphan an oral hearing regarding their request for investigative action to

¹¹¹ Decision on Khieu Samphan's Request for a Public Hearing, Case No. 002/19-09-2007-ECCC/OCIJ (PTC11), ¶ 2 (Pre-Trial Chamber, Nov. 4, 2008).

¹¹² *Id.*, ¶ 8.

¹¹³ *Id.*

seek exculpatory evidence.¹¹⁴ The Pre-Trial Chamber reasoned that as a general rule, appeals of orders refusing requests for investigative actions are considered on the basis of written submissions alone.¹¹⁵ In a later decision denying the Defence teams a public hearing regarding an appeal of the earlier Pre-Trial Chamber decision, the Pre-Trial Chamber considered the confidentiality of the judicial investigation and whether it would be compromised by a holding public hearing, stating that an appeal regarding an investigative request “may reveal information in relation to the conduct of the investigation and, as such, need to be considered as confidential.”¹¹⁶

Yet the publicity of hearings regarding the appeals of pre-trial detention orders have been inconsistent. For example, the first pre-trial detention hearing regarding Duch was originally scheduled as public;¹¹⁷ however, considering the later parties’ request that the hearing be held *in camera*, the Pre-Trial Chamber stated that “as a preparatory hearing, aimed at ensuring readiness for the first public hearing of the ECCC, the Directions Hearing on this occasion is more suited to being held in camera...”¹¹⁸ It would therefore appear that the parties’ request is a significant factor in the Pre-Trial Chamber’s decisions regarding hearing.

However, later pre-trial detention hearings have been held partially in public and partially *in camera*. In Khieu Samphan’s appeal against his provisional detention, the Defence team requested that the hearing be in public. The Co-Prosecutors requested the hearing be *in camera*, as their appeal brief involved a “detailed discussion of material in the case file,”¹¹⁹ yet they had no objection to holding in public those aspects of the hearing that discussed the grounds for provisional detention; as such, the

¹¹⁴ Decision on “Request for an Oral Hearing” on the Appeals PTC 24 and 25, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 25 and 25), ¶ 5 (Pre-Trial Chamber, August 20, 2009).

¹¹⁵ *Id.*

¹¹⁶ Decision on Request to Reconsider the Decision on Request for an Oral Hearing on the Appeals PTC 24 and PTC 25, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 24), ¶ 30 (Pre-Trial Chamber, Oct. 20, 2009).

¹¹⁷ Decision on Public Hearing, Case No. 002/14-08-2006 (Pre-Trial Chamber, Oct. 9, 2007).

¹¹⁸ Revised Scheduling Order, Case No. 02/14-08-2006-ECCC/PTC-70-C9 (Pre-Trial Chamber, Oct. 26, 2007).

¹¹⁹ Ruling on the Defences’ Request for a Public Hearing on the Appeal Against Provisional Detention Order and on the Co-Prosecutors’ Request for Redaction of the Defence’s Appeal Brief, Case No. 02/19-09-2007-ECCC-OCIJ (PTC04), p. 2 (Pre-Trial Chamber, Mar. 3, 2008).

hearing was held *in camera* except for those proceedings that discussed the basis for pre-trial detention under the ECCC's Internal Rules.

The Pre-Trial Chamber issued no further reasoning as to why the discussion of the grounds for pre-trial detention were held in public, yet the ruling in Khieu Samphan's appeal was consistent with earlier rulings, as the Nuon Chea pre-trial detention hearings were held partially *in camera* and partially in public.¹²⁰ The provision for public discussion of ECCC Internal Rules regarding provisional detention suggests that the public has greater rights of access to pre-trial proceedings when administrative issues are addressed.

Numerous other pre-trial hearings have been held *in camera*, without any express reasons provided by the Chamber. Such hearings involve appeals against orders of the Co-Investigating Judges, including those related to the denial of a request for a second expert opinion;¹²¹ the denial to conduct audio and video recordings at the ECCC detention facility;¹²² the denial to place on the case file documents relating to Khieu Samphan's real activity;¹²³ and an appeal on the order on Ieng Sary's motion against the application of command responsibility.¹²⁴ While all these scheduling orders provide for *in camera* hearings, none provide any reasons as to why the hearings were held in private.

a. Partial Public Hearings at the Request of the Parties

One appropriate basis for determining whether or not to hold pre-trial hearings *in camera* may be the request of parties. Open proceedings are a fundamental right in a fair trial, as provided in the International Covenant on Civil and Political Rights;¹²⁵ however, it is common practice among other

¹²⁰ Scheduling Order, Case No. 002/19-09-07-ECCC-OCIJ (PTC01) (Pre-Trial Chamber, Dec. 19, 2007) (deciding that the hearing regarding Nuon Chea's appeal against provisional detention order shall be held in public, but noting that part of the hearing may need to be conducted in camera).

¹²¹ Scheduling Order, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 66), ¶ 4 (Pre-Trial Chamber, May 11, 2010).

¹²² Scheduling Order, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 64), ¶ 4 (Pre-Trial Chamber, May 11, 2010).

¹²³ Scheduling Order, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 63), ¶ 4 (Pre-Trial Chamber, May 11, 2010).

¹²⁴ Scheduling Order, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 60), ¶ 4 (Pre-Trial Chamber, May 11, 2010).

¹²⁵ International Covenant on Civil and Political Rights, Art. 14(1), Dec. 16, 1966 (stating in part that "[a]ll persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law").

international courts, including the ECCC, that the right to open proceedings does not apply during the pre-trial period. Nonetheless, as stated by the European Court of Human Rights, the public character of proceedings “protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to...a fair trial.”¹²⁶

In compliance with Rule 21’s mandate to balance the protection of accused persons and the needs for transparency, the ECCC should strongly consider public hearings when parties, especially the Defence, seek increased public scrutiny.

Recently, in the Co-Prosecutors’ appeal regarding their request to place additional material in the case file which assists in proving the charged persons’ knowledge of the crimes, both the Ieng Sary¹²⁷ and Nuon Chea¹²⁸ Defence teams requested the hearing be held publically. Yet the Pre-Trial Chamber held the hearing *in camera*, and provided no basis for its decision.¹²⁹ The request of the Co-Prosecutors is unknown, as their intent to be heard was not publically available as of August 2010. Yet in the absence of privacy concerns for the Defence, even if the Co-Prosecutors expressed concerns regarding the disclosure of information regarding the investigation, the Pre-Trial Chamber could have held the hearings partially in private and partially in public, as it has done in issues regarding pre-trial detention. Allowing for public discussions of administrative matters would thus fulfill the ECCC’s transparency obligations under Internal Rule 21, and likewise protect the rights of victims and witnesses, also a concern addressed in Rule 21 and underlying purpose for the presumption of confidentiality.

¹²⁶ ECHR, *Werner v. Austria*, Judgment of November 24, 1997, ¶ 45.

¹²⁷ Ieng Sary’s Notice of Intent to be Heard Concerning the OCP’s Appeal Regarding Request to Place on Case File Additional Evidentiary Material Which Assists in Proving the Charged Persons’ Knowledge of the Crimes, Case No. 002/19-09-2007-ECCC/OCIJ(PTC 67) (The Defence for Ieng Sary, May 12, 2010).

¹²⁸ Notice of Intent to be Heard, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 67) (Nuon Chea Defence Team, May 18, 2010).

¹²⁹ Public Scheduling Order, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 67), ¶ 4 (Pre-Trial Chamber, May 11, 2010).

B. Public Hearings When Confidentially Matters are no Longer Required

A second basis for holding public hearings at the pre-trial state is when the purposes for confidentiality are no longer necessary, especially considering ECCC Internal Rule 21's mandate to provide for transparency whenever possible.

Limiting the presumption of *in camera* hearings at pre-trial has support from both the Prosecution and Defence teams before the ECCC, as Defence teams have consistently advocated for more public pre-trial hearings. In addition, in their response to the Duch Defence team's appeal brief regarding the order of provisional detention for Duch, the Co-Prosecutors highlighted the importance of public hearings, stating that

...as far as it is permissible under the applicable laws, and with due respect to the protection of witnesses and victims, the Co-Prosecutors submit that court hearings before the ECCC should be held in public for justice to be seen to be done. As a general principle of international law, court hearings, including hearings on detention, should be in public. The fair and efficient functioning of criminal justice systems is a matter of public concern, all the more so when the subject-matter concerns the entire international community.¹³⁰

In comments on the Internal Rules, Court monitoring groups have also urged the ECCC to adopt procedures that require the Pre-Trial Chamber to be open to the public.¹³¹

While public hearings may lengthen what are already complex and time-consuming proceedings, additional public access would not only provide the ECCC an opportunity to operate as a model for domestic courts, but would also increase public investment in the Khmer Rouge Tribunals by facilitating greater knowledge among the public. Similar to the establishment of standards governing document release, at the very least, clearly established factors for determining when pre-trial hearings may be held in public would provide the public with some sense that decisions are firmly grounded in the law.

¹³⁰ Co-Prosecutors' Response to Defence Appeal Against Co-Investigating Judges' Order of the Provisional Detention of Kang Keck Iev alias Duch on 31 July 2007, Case No. 002/14-08-2006, ¶ 13 (Co-Prosecutors, October 3, 2007).

¹³¹ Comments on the ECCC Draft Internal Rules, 17 Nov. 2006, Cambodian Human Rights Action Committee. Pg. 3

F. Conclusion

An analysis of both the Co-Investigating Judges' release of information to the public and the Pre-Trial Chambers' allowance of public hearings reveals a seemingly arbitrary basis for granting public access to information at the ECCC. The absence of procedural rules defining the contours of the principle of confidentiality and the lack of reasoned decisions provided by the Court evidence the need for standards to establish the confines of the presumption. The creation of standards will rectify poor public perceptions of the court, increase public investment in the tribunals, and help the ECCC fulfill its obligation to serve as a model for domestic Cambodian courts.

The purposes of confidentiality articulated by the Co-Investigating Judges, namely the protection of persons mentioned in the case file, the presumption of innocence, and the efficiency and effectiveness of investigations, are consistent with many non-disclosure provisions among other international criminal tribunals. The underlying purposes of confidentiality articulated by the ECCC therefore provide a basis upon which to discern standards for both the release of documents and public hearings during the pre-trial period.

Yet in the establishment of standards, it is important to consider the unique nature of the ECCC and its departure from a traditional domestic civil law courts. The large number of Khmer Rouge victims, function of the ECCC as a model court, and complex nature of international cases, as well as the Cambodian people's investment in the Khmer Rouge Tribunals, necessitate special provisions that allow for greater public access.

In regard to document access, the ECCC should consider lessening stringent confidentiality measures created for the purpose of protecting victims and witnesses when those individuals are willing to speak publicly about their experiences and are not in objective danger. Similarly, the ECCC should consider allowing defendants to waive confidentiality measures created for their protection. Judicial discretion in confidentiality measures created for efficient and effective investigations should likewise be limited, considering transparency requirements of the Court established in Internal Rule 21.

Moreover, considering the unique nature of the ECCC, the Pre-Trial Chamber should revisit—and provide reasoning in—its decisions regarding *in camera* hearings. Greater deference to the requests of parties and strictly construing the presumption of *in camera* hearings would not only protect the fair trial rights of defendants, but also ensure that the ECCC is fulfilling its mandate to provide for transparency whenever possible.