



ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
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Extraordinary Chambers in the Courts of Cambodia
Chambres extraordinaires au sein des tribunaux cambodgiens

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du dossier: SANN RADA

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អង្គបុរេជំនុំជម្រះ
Pre-Trial Chamber
Chambre Préliminaire

In the name of the Cambodian people and the United Nations and pursuant to the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea.

Criminal Case File N° 002/07-07-2010-ECCC/PTC10

Before: Judge PRAK Kimsan, President
Judge Rowan DOWNING
Judge NEY Thol
Judge Catherine MARCHI-UHEL
Judge HUOT Vuthy

Date: 9 September 2010

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PUBLIC

DIRECTIVE ON CLASSIFICATION OF PRE-TRIAL CHAMBER DOCUMENTS

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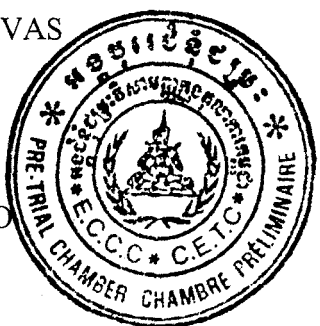
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THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) notes the recent publication of confidential information from Pre-Trial Chamber documents and issues this Directive on Classification of Pre-Trial Chamber documents (“Directive”).

I. BACKGROUND

1. For the purposes of this Directive, “Pre-Trial Chamber documents” (“PTC document(s)”) refers to “any record of information”¹ that has been submitted or filed to the Pre-Trial Chamber by “[a]ny person entitled to file documents before the ECCC”² (“a filing party”), including a document issued by a body of the ECCC over which the Pre-Trial Chamber has jurisdiction.³ This Directive applies equally to PTC documents in whole or in part.⁴
2. The Pre-Trial Chamber notes that confidential information from PTC documents has been published recently by the media.⁵ The Pre-Trial Chamber considers that the publication of this confidential information is cause to recall the law applicable to the classification of PTC documents.
3. The principle underlying this Directive is “the need to balance the confidentiality of judicial investigations and of other parts of judicial proceedings which are not open to the public with the need to ensure transparency of public proceedings and to meet the

¹ Practice Direction on Classification and Management of Case-Related Information, ECCC/004/2009, Article 2.c <http://www.eccc.gov.kh/english/cabinet/courtDoc/361/PD_Classification_Body_EN.pdf> (“Practice Direction on Classification”) (“any record of information (whether physical or electronic), including, but not limited to, any written or paper record, audio/visual records, photographs, plans, drawings and maps”).

² Practice Direction on Filing of Documents before the ECCC, ECCC/01/2007/Rev. 4, Article 2.2 <http://www.eccc.gov.kh/english/cabinet/courtDoc/360/PD_Filing_Revision_4_final_En.pdf> (“Practice Direction on Filing”).

³ E.g., an order of the Co-Investigating Judges that the Co-Prosecutors may appeal pursuant to Internal Rule 74(2). All Internal Rules cited in this Directive are to Revision 5 (9 February 2010), unless otherwise stated.

⁴ See Practice Direction on Classification, Articles 3.2-3.3, 4-6, 9.

⁵ E.g., Douglas Gillison, ‘Nuon Chea Lawyers Renew Call for Political Inquiry,’ *The Cambodia Daily*, 9 July 2010, Volume 46, Issue 1, p. 24; Sebastian Strangio, ‘Lawyers call for KRT probe,’ *The Phnom Penh Post*, 9 July 2010, Volume 20, No. 130, p. 6; Adrien Le Gal, ‘Le retour des “interférences”,’ *Cambodge Soir*, 15 July 2010, p. 10; Douglas Gillison, ‘All Final Pretrial Appeals in Case 002 Decided at Tribunal,’ *The Cambodia Daily*, 16 July 2010, p. 26. See also Open Society Justice Initiative, “Political Interference at the Extraordinary Chambers in the Courts of Cambodia,” 6 July 2010, p. 24 (citing Douglas Gillison, ‘Nuon Chea Team Accuses You Bunleng of Political Bias,’ *The Cambodia Daily*, 28 June 2010); Douglas Gillison, ‘KRT Prosecutor Says Journalists Face Prosecution,’ *The Cambodia Daily*, 10 June 2010.

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purposes of education and legacy.”⁶ The Pre-Trial Chamber classifies PTC documents as ‘Confidential’ or ‘Strictly Confidential’ at the pre-trial stage of a judicial investigation in order to preserve the integrity of the investigation and the rights and interests of the parties.

II. APPLICABLE LAW

4. The Pre-Trial Chamber recalls the following from its previously notified “Warning for Unauthorized Disclosure of Confidential Information”:⁷

- a) A filing party may propose that a document be classified as ‘Public’ in accordance with the provisions of the Practice Direction on the Classification and Management of Case-Related Information. However, until the issuance of the Closing Order and the determination of any appeal against the Closing Order, the Pre-Trial Chamber shall consider whether the proposed classification is appropriate and, if not, determine the appropriate classification.⁸
- b) Subject to a different classification in accordance with a Court decision, filings to the Pre-Trial Chamber are in principle confidential until the Chamber has decided on the matter.⁹
- c) ...
- d) ‘Confidential’ “means open only to the Judges, the Co-Prosecutors, lawyers for the civil parties, defence counsel, authorised court staff and any other person expressly given access by the Court.”¹⁰
- e) The duty of confidentiality states:

All persons having access to confidential or strictly confidential information are under a duty of confidentiality. They shall not disclose such information to any person, except in accordance with this Practice Direction. Further, they shall not act in a manner which would lead to unauthorised disclosure of any confidential or strictly confidential information.¹¹

⁶ Practice Direction on Classification, Article 1.2.

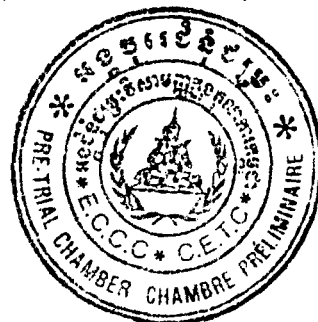
⁷ This public version of the Warning (ERN 00548882-00548885) was notified on 9 July 2010.

⁸ Practice Direction on Filing, Article 3.12.

⁹ Practice Direction on Classification, Article 5.1.h.

¹⁰ Practice Direction on Classification, Article 2.d.ii.

¹¹ Practice Direction on Classification, Article 8.1.



A violation of this duty shall result in a sanction in accordance with the Internal Rules.¹²

- f) Pursuant to Internal Rule 56(1), “All persons participating in the judicial investigation shall maintain confidentiality.”

THE PRE-TRIAL CHAMBER THEREFORE ISSUES THE FOLLOWING WARNING:

1. In accordance with Internal Rule 35(1), the Pre-Trial Chamber may sanction or refer to the appropriate authorities any person it has found to have knowingly and wilfully interfered with the administration of justice, including any person who discloses confidential information not in accordance with the Practice Direction on the Classification and Management of Case-Related Information, or who is otherwise in breach of Internal Rule 56(1) insofar as a matter relates to a judicial investigation.
 2. In accordance with Internal Rule 38(1)-(2), the Pre-Trial Chamber may, after a warning, impose sanctions against or refuse audience to a lawyer if, in their opinion, his or her conduct is considered offensive or abusive, obstructs the proceedings, amounts to abuse of process, or is otherwise contrary to Article 21(3) of the Agreement. The Pre-Trial Chamber may also refer such misconduct to the appropriate professional body.
5. The Pre-Trial Chamber also recalls the following:
- i. [F]ilings received and materials generated during a judicial investigation are in principle confidential.¹³
 - ii. The duty of confidentiality relating to the contents of the case file that are generated during a judicial investigation, as provided in Internal Rule 56, continues to apply after the conclusion of the investigation, subject to Article 9.1 of the Practice Direction on Classification.¹⁴
 - iii. The fact that specific evidence is being considered by the Co-Investigating Judges as part of the investigation, irrespective of the content of such evidence, is confidential information.¹⁵
 - iv. The duty of confidentiality applies prior to such time as a filing party submits a PTC document to the Court Management Section of the ECCC (“CMS”) or the Pre-Trial Chamber for filing, as well as between the time when the document is submitted and when CMS notifies it under the classification indicated by the Pre-Trial Chamber Greffier.

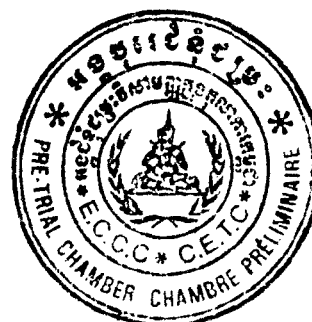
¹² Practice Direction on Classification, Article 11.

¹³ Practice Direction on Classification, Article 5.1.b.

¹⁴ Practice Direction on Classification, Article 8.2.

¹⁵ Practice Direction on Classification, Article 5.2.

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- v. The Pre-Trial Chamber has the authority to amend the distribution list used by CMS to notify the filing of PTC documents.¹⁶
- vi. A public version of a confidential or strictly confidential document may be created for the purposes of placement in the public section of the case file, on instruction of the Co-Investigating Judges or a Chamber, as appropriate. The public version will be produced by:
 - a) creating a copy of the original document
 - b) redacting from the copy all confidential and/or strictly confidential information, as applicable, and
 - c) submitting the redacted version to the Co-Investigating Judges or the Chamber for review and approval, prior to its placement in the public section of the case file.

If a public version of a confidential or strictly confidential document is to be prepared at the request of a party, any redactions shall be undertaken by the requesting party and submitted for approval in accordance with Article 9.2.(c).¹⁷

- vii. Where required in the interests of justice, Co-Investigating Judges or a Chamber seized of a case may re-classify any document on the case file. Affected parties will be given an opportunity to be heard either prior to such a decision being made, or during any period of a temporary re-classification necessary to protect information that may be confidential or strictly confidential. In any event, parties to the case will be notified of any temporary re-classification and of any decisions on re-classification.¹⁸ Documents or information can be re-classified (and placed in a section of the case file with a different level of confidentiality) only pursuant to an order of the Co-Investigating Judges or a Chamber, as appropriate.¹⁹

6. The Pre-Trial Chamber further recalls the following procedures:

- a) In order to preserve the rights and interests of the parties, judicial investigations shall not be conducted in public.²⁰

¹⁶ See Practice Direction on Filing, Article 3.15 (relating to Strictly Confidential documents); Practice Direction on Classification, Article 2.d.ii (“‘Confidential’ means open only to . . . authorised court staff and any other person expressly given access by the Court”); Practice Direction on Classification, Article 2.a (“‘Authorised court staff’ means staff approved by the Co-Investigating Judges or a Chamber”).

¹⁷ Practice Direction on Classification, Articles 9.2-9.3.

¹⁸ Practice Direction on Filing, Article 3.14.

¹⁹ Practice Direction on Classification, Article 9.1.

²⁰ Internal Rule 56(1). See also ECCC Agreement, Article 23; Internal Rule 20.4(e), 29.5.
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- b) Pre-Trial Chamber proceedings are conducted *in camera* unless otherwise provided.²¹
- c) The Pre-Trial Chamber may decide that all or part of a hearing be held in public, 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.²²
- d) All decisions and default decisions of the Pre-Trial Chamber, including any dissenting opinions, shall be published in full, except where the Chamber decides that it would be contrary to the integrity of the Preliminary Investigation or to the Judicial Investigation.²³

III. CONSIDERATIONS

- 7. Where appropriate in deciding on the classification and re-classification of PTC documents as outlined below, the Pre-Trial Chamber will consider the following factors: the interests of justice, the integrity of the Preliminary Investigation and/or the Judicial Investigation, fair trial rights, public order, transparency and any protective measures authorised by the Court (“the factors”).
- 8. Where a filing party submits a PTC document that relates to the judicial investigation, such as an appeal under Internal Rule 74.3(b), the Pre-Trial Chamber will, in principle, classify it as ‘Confidential’ or ‘Strictly Confidential’ in accordance with Internal Rule 56(1), subject to the Chamber’s discretion.²⁴
- 9. Where a filing party submits a PTC document that does not relate to the judicial investigation, such as an application for disqualification under Internal Rule 34, the Pre-Trial Chamber will, in principle, classify it as ‘Public’ in order to ensure transparency,²⁵

²¹ Internal Rule 77(5).

²² Internal Rule 77(6).

²³ Internal Rule 78.

²⁴ Decision on “Request for an Oral Hearing” on the Appeals PTC 24 and 25, 002/19-09-2007-ECCC/OCIJ (PTC 24 and 25), 20 August 2009, D164/4/3, para. 5; Decision on Request to Reconsider the Decision on Request for an Oral Hearing on the Appeals PTC24 and 25, 002/19-09-2007-ECCC/OCIJ (PTC 24), 20 October 2009, D164/4/9, paras. 14-31.

²⁵ For example, the Pre-Trial Chamber classified as public the filings in Ieng Sary’s challenge to the independence of Judges Katinka Lahuis and Rowan Downing (Case File No. 002/20-10-2009-ECCC/OCIJ (PTC 03), Decision on Ieng Sary’s Request for Appropriate Measure Concerning Certain Statements by Prime Minister Hun Sen Challenging the Independence of Pre-Trial Judges Katinka Lahuis and Rowan Downing, 30 November 2009, Doc. No. 5, ERN 00404595-00404601). In this instance, the Request was based on a public *Directive on Classification of Pre-Trial Chamber Documents*



subject to the Chamber's discretion. If information contained in such a PTC document relates to the judicial investigation, or otherwise requires a classification other than 'Public' based on the Pre-Trial Chamber's consideration of the factors,²⁶ the Chamber will classify such information or the entire PTC document as 'Confidential' or 'Strictly Confidential.'

10. Until the issuance of a Closing Order and the determination of any appeal against the Closing Order, the Pre-Trial Chamber may re-classify a PTC document based on the Chamber's consideration of the factors. The Pre-Trial Chamber will give the filing party an opportunity to be heard in circumstances in which the Chamber has determined that an objective observer could reasonably view the re-classification as compromising one of the factors. Where appropriate, reasons for the re-classification will be provided upon request of the filing party.²⁷
11. The Pre-Trial Chamber may re-classify information as 'Public' that is contained within a 'Confidential' or 'Strictly Confidential' PTC document by, for example, reproducing such information in a public order or decision. In these circumstances, the Pre-Trial Chamber will, as appropriate, give the filing party an opportunity to be heard if the Pre-Trial Chamber has determined that an objective observer could reasonably view the re-classification as compromising one of the factors.²⁸
12. After the issuance of a Closing Order and the determination of any appeal against the Closing Order, in the interests of justice, the Pre-Trial Chamber may order the re-classification of a PTC document or information pursuant to Article 3.14 of the Practice Direction on Filing and Article 9.1 of the Practice Direction on Classification. In these circumstances, the Pre-Trial Chamber will give the affected parties an opportunity to be

speech given by Prime Minister Hun Sen, and the substance of the accusations and the resolution of this matter did not require queries into the internal mechanisms of the Court or the substance of the judicial investigation. Accordingly, the Pre-Trial Chamber concluded that classifying the filings and the decision as 'public' was appropriate in the interests of justice.

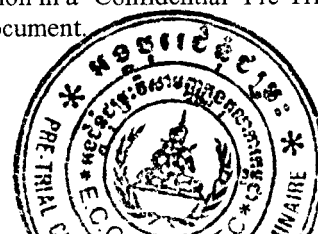
²⁶ See also ECCC Code of Judicial Ethics, Article 4

<http://www.eccc.gov.kh/english/internal_rules_otherDoc.aspx> (“[I]nformation obtained in the discharge of their [judges'] judicial functions and the secrecy of deliberations”).

²⁷ E.g., using the Request for Correction form.

²⁸ Internal Rule 77(6). The same considerations apply to the reproduction in a 'Confidential' Pre-Trial Chamber order or decision of information from a 'Strictly Confidential' PTC document.

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heard in accordance with Article 3.14 of the Practice Direction on Filing. The Pre-Trial Chamber will notify the affected parties of any temporary re-classification and of any decisions on re-classification.

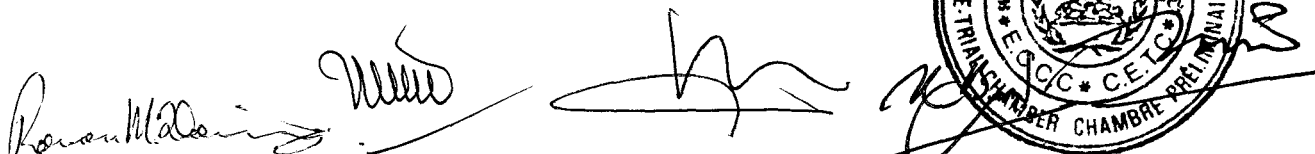
13. Where the Pre-Trial Chamber has determined that the appropriate classification of all PTC documents relating to a matter is 'Public,' the Pre-Trial Chamber will, in general, issue only a 'Public' order or decision on the matter. Where the Pre-Trial Chamber has determined that the appropriate classification of some or all PTC documents relating to a matter is 'Confidential' and/or 'Strictly Confidential,' the Pre-Trial Chamber will, as appropriate, issue a 'Public' order or decision on the matter, including appropriate redactions as necessary, and a 'Confidential' or 'Strictly Confidential' PTC order or decision on the matter.²⁹

IV. CONCLUSIONS

14. All persons entitled to file documents before the ECCC are reminded of their obligations to comply with the law applicable to the classification of PTC documents, including as set forth in this Directive.
15. In due course, the Pre-Trial Chamber will conduct a review of the classifications of PTC Documents in Case 002 for the purpose of lifting confidentiality, as appropriate, in accordance with the law applicable to the classification of PTC documents, including as set forth in this Directive.

Phnom Penh, 9 September 2010^{ch}

Pre-Trial Chamber


 Rowan DOWNING NEY Thol Catherine MARCHI-UHEL HUOT Vuthy PRAK Kimsan



²⁹ Practice Direction on Classification, Article 9.2 ("A confidential version of a strictly confidential document may be created in a similar manner").