D138/1/5

BEFORE THE PRE-TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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CO-PROSECUTORS' OBSERVATIONS ON IENG SARY'S APPEAL AGAINST THE CO-INVESTIGATING JUDGES' CONFIDENTIALITY ORDER

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I. INTRODUCTION

1. The Co-Prosecutors file these observations ("Observations") to assist the Pre-Trial Chamber in the determination of IENG Sary's appeal ("Appeal")[1] that seeks the reversal of the Co-Investigating Judges' Order on the Breach of Confidentiality of Judicial Investigation ("Confidentiality Order").[2] The Confidentiality Order found that—by posting certain documents on their privately maintained website ("Defence Website")—the Appellant's national and international counsel (collectively, "Defence Counsel") (1) did not respect the Co-Investigating Judges' "decision" of 15 January 2009 "warning" them from doing so, (2) revealed confidential information pertaining to ongoing pre-trial proceedings, and (3) failed to act in accordance with the standards and ethics of the legal profession. Having made these findings against the Defence Counsel, the Co-Investigating Judges forwarded the Confidentiality Order to their respective Bar Associations for "any appropriate action."[3]

2. The Appeal challenges the Confidentiality Order by arguing, amongst other things, that (1) not all documents filed before the Co-Investigating Judges are protected by confidentiality, (2) the "confidential" documents posted on the Defence Website were "confidential to protect the rights of [the Appellant]" which he may waive, (3) the communication of the Co-Investigating Judges of 15 January 2009 did not constitute a "decision" and, in any case, it did not amount to a statutory "warming" only after which proceedings could be initiated against the Defence Counsel, and (4) the selective publication of documents by the judicial organs of this Court displays "discrimination in treatment" against the Defence Counsel.[4]

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1 *Case of IENG Sary*, Ieng Sary's Appeal Against the OCIJ Order on the Breach of Confidentiality of the Judicial Investigation and Request for Expedited Filing Schedule and Public Oral Hearing, 10 March 2009, D138/1/1, ERN 00287360-00287378 [*hereinafter* Appeal].

2 *Case of IENG Sary*, Order on Breach of Confidentiality of the Judicial Investigation, 3 March 2009, D138, ERN 00284977-00284983 [*hereinafter* Confidentiality Order].

3 Confidentiality Order, p. 7.

4 Appeal, p. 5.

II. SUMMARY OF ARGUMENT

3. The Co-Prosecutors observe that the Pre-Trial Chamber may consider dismissing the Appeal for lack of standing of the Appellant IENG Sary. The Confidentiality Order was issued under Internal Rules 35 and 38 ("Rules") solely against the Defence Counsel. Appellant IENG Sary has, therefore, no standing to file this Appeal; nor does the Confidentiality Order provide him a cause of action to move the Pre-Trial Chamber. Even if the Appellant had the standing and the cause of action, the Appeal is not permissible under Rule 74(3) which exhaustively enumerates the kinds of appeals that a charged person may bring before the Pre-Trial Chamber.

4. If the Pre-Trial Chamber considers this Appeal as having been moved by the Defence Counsel in their personal capacities, then, it raises important issues of law concerning transparency and fairness of proceedings before this Court. In particular, the Appeal raises two questions for the determination of the Pre-Trial Chamber. They are: (1) what are the contours of the principle of confidentiality of pre-trial proceedings and how, and to what extent, information can be disseminated by the Court or the parties, and (2) under what circumstances any person—in particular, a defence counsel mandated to protect the fair trial rights of a defendant—can be sanctioned by this Court for actions taken purportedly to advance those same rights.

III. NATURE OF THESE OBSERVATIONS

5. The matter of interference in the administration of justice, similar to contempt in certain national and international jurisdictions, is principally an issue between the court and the alleged offender.[5] The Co-Prosecutors, therefore, do not consider themselves as full parties to these proceedings but only as an "interested party", being officers of this Court.[6] Given their limited role in this Appeal and the consequential narrow scope of these Observations, the Co-

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[5] *Prosecutor v. Aleksovski*, Judgement on Appeal by Anto Nobilo Against Finding of Contempt, Case No. IT-95-14/1-AR77, ICTY Appeals Chamber, 30 May 2001, para. 24 [*hereinafter* Aleksovski Judgement]; *Laxmi Narayan v. D.D.A*, Judgement of 12 July 2004, The High Court of Delhi at New Delhi, para. 5.

[6] *Prosecutor v. Dusko Tadic*, Appeal Judgement on Allegation of Contempt Against Prior Counsel, Milan Vujin, 27 February 2001, Case No. IT-94-1-A-AR77, ICTY Appeals Chamber, p. 1 [*hereinafter* Tadic Contempt Decision]. In this case of contempt against a former defence counsel, the accused filed a response as an "interested party" while the prosecution was not heard.

Prosecutors do not take any position on all the factual submissions made by the Appellant, except to the extent that the Co-Prosecutors directly address in these Observations.

IV. PRELIMINARY OBSERVATIONS

Appeal may be Dismissed for Lack of Standing and Cause of Action

6. The Appeal, as presented, has been filed by Charged Person IENG Sary.[7] IENG Sary has no standing to file this Appeal; nor does the Confidentiality Order provide him a cause of action to file this Appeal. The Confidentiality Order was not passed against IENG Sary. The Appeal does not demonstrate that he has suffered any prejudice or denial of rights that needs to be remedied, at appeal, by the Pre-Trial Chamber.

7. Even if the Appellant had the standing and the cause of action, the Appeal is not permissible under Rule 74(3) which exhaustively enumerates the kinds of appeals that a charged person may bring before the Pre-Trial Chamber.[8] The Confidentiality Order was directed only against the Defence Counsel.[9] This Appeal, therefore, may be dismissed for (1) want of standing and a cause of action and, in any event (2) for not being permissible under Rule 74(3). In the alternative, the Pre-Trial Chamber may consider dismissing the Appeal, without prejudice to the Appellant. The Defence Counsel may be left to seek recourse to such remedies as may be available to them under the law.

Expedited Filing Schedule is not Required

8. The Appellant had not cited any provision of law or referred to any jurisprudence to seek an expedited filing schedule for other parties to file their responses to this Appeal and, subsequently, for the Appeal to be heard on 3 April 2009. He has only asserted that "despite being permitted to file [his] Appeal within thirty days of the Confidentiality Order, [he has filed the Appeal] within a week of the notification of [that] Order."[10] The moving party's unilateral decision to file early—without any ground of urgency—cannot, in and of itself,

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[7] Appeal, Cover Page (stating "Ieng Sary's Appeal...."). The Appeal has been signed by the Defence Counsel as "Co-Lawyers for Mr. IENG Sary" (Appeal, p. 18). The Appeal regularly makes reference to the submissions on behalf of the "Defence" of IENG Sary (Appeal, paras. 1, 12 17, 28, 31, 37 *etc.*).

[8] *Case of IENG Sary*, Decision on Ieng Sary's Appeal Against the OCIJ Order on Translation Rights and Obligations of the Parties, 20 February 2009, A190/II/9, ERN 0023298-00283310, para. 28.

[9] Confidentiality Order, p. 7.

[10] Appeal, para. 8.

justify compelling the opposite parties to file their responses earlier than the statutorily permitted time limits.

9. In a trilingual legal environment, such as the one in this Court, predicated on cooperation and consultation between the national and international personnel, a reasonable time is required for consultation and the subsequent drafting and translation of legal submissions. Therefore, any applications for shortening of deadlines set in the Practice Directions on Filing of Documents—that were carefully negotiated and determined—must be based on a showing of exceptional circumstances.[11] No such showing has been made here; nor has the Appellant sought an *ex parte* or an *ad interim* relief to justify an expedited schedule. The Pre-Trial Chamber, therefore, appropriately, disallowed an expedited filing schedule.[12]

Oral Hearing

10. The Appellant seeks a public oral hearing of this Appeal as, according to him, it raises "fundamental issues [which are] likely to impact the viability and credibility of the end result of the ECCC proceedings."[13] The Co-Prosecutors observe that the right of hearing does not necessarily mean oral hearing; it may include a reasoned and public determination on written pleadings alone.[14] If the parties are given ample opportunity to put forward their case in writing, and to comment on the submissions of the other parties, a judicial chamber may find that the requirements of fairness are complied with and an oral hearing is not required.[15]

11. While issues in this Appeal are important, a disposal of the Appeal on written pleadings alone cannot be any less public or transparent, if the filings and decision of the Pre-Trial Chamber are made available in the public domain. It has been the practice of the Pre-Trial Chamber to place all the party filings concerning appeals before it and the subsequent decisions on ECCC website. The Pre-Trial Chamber rarely departs from this practice unless

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[11] Practice Directions on Filing of Documents, ECCC/01/2007/Rev.3 [*hereinafter* Practice Directions].

[12] *Case of IENG Sary*, Directions to the Parties Concerning Ieng Sary's Request for Expedited Filing Schedule and Public Hearing of the Appeal Against the OCIJ Order on Breach of Confidentiality of the Judicial Investigation, D138/1/2, ERN 00287681-00287682.

[13] Appeal, para. 11.

[14] *Jussila v. Finland*, Judgment, 23 November 2006, Application No. 73053/01, Grand Chamber of the European Court of Human Rights, para. 41.

[15] *Vilho Eskelinen et al v. Finland*, Judgment, 19 April 2007, Application No. 63235/00, Grand Chamber of the European Court of Human Rights, para. 74.

interests of the parties (particularly, the defendants) are affected.[16] International tribunals—trying cases of similar magnitude and complexity as this Court—regularly decide appeals on written pleadings alone. Indeed, they routinely dismiss applications for oral hearings solely on the ground of "complexity of issues."[17]

12. A clear and consistent practice has emerged regarding the Pre-Trial Chamber's decisions to hold oral hearings. The Pre-Trial Chamber has orally heard all but one of the detention appeals,[18] and such appeals that may lead to the termination of proceedings and the consequential release of a defendant.[19] Therefore, in sum, the liberty of a defendant has been the paramount consideration in the Pre-Trial Chamber's determination on whether to hold a public hearing.[20]

13. The Appellant has erroneously argued that the two criteria adopted by the Pre-Trial Chamber are (1) the importance of the issue involved, and (2) the opinion or consent of the parties.[21] While these factors have been considered by the Pre-Trial Chamber while deciding on holding oral hearings, they have not been the sole determining criteria. The Pre-Trial Chamber has regularly determined appeals raising important matters on written submissions alone. The Co-Prosecutors' appeal against the Duch Closing Order, this Appellant and NUON Chea's appeals on appointment of fitness experts and on conditions of detention, Appellant's appeals on translation rights and on disqualification of an employee of the Co-Investigating Judges, were all determined on written pleadings alone. All these appeals—indeed every appeal before the Pre-Trial Chamber—raised important issues. Further, a judicial chamber comprised of professional judges (as against jurors or lay judges or a combination of lay and professional judges) can adequately deal with an appeal raising

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[16] *Case of IENG Sary*, Ruling Pursuant to Article 3.12 of the Practice Direction on Filing of Documents: Ieng Sary's Appeal Regarding Appointment of an Expert, 24 July 2008, A189/1/6, ERN 00207784-00207785, para. 4.

[17] *Prosecutor v. Marijacic*, Judgement, Case No. IT-95-14-R77.2-A, 27 September 2006, ICTY Appeals Chamber, paras. 9-10 [*hereinafter* Marijacic Judgement].

[18] The Pre-Trial Chamber orally heard five original detention appeals of all the five detainees of this Court. Thereafter, it has concluded one detention extension appeal of IENG Thirith and is in the process of orally hearing the detention extension appeals of IENG Sary and KHIEU Samphan. By agreement of the parties, the detention extension appeal of NUON Chea is expected to be determined on written pleadings alone.

[19] *Case of KHIEU Samphan*, Decision on Khieu Samphan's Request for a Public Hearing, 4 November 2008, A190/1/8, ERN 00226251-00236254, para. 8. This reflects the purpose of Rule 77(6) that public hearings may be held "in particular, where the case may be brought to an end by the [Pre-Trial Chamber's] decision".

[20] *Case of KHIEU Samphan*, Decision on the Co-Prosecutors' Request to Determine the Appeal on the Basis of Written Submissions and Scheduling Order, 6 February 2009, C26/5/13, ERN 0027631-0027633.

[21] Appeal, para. 10.

important issues solely on the basis of written submissions without necessarily taking recourse to an oral hearing. In this determination, while the Pre-Trial Chamber is required to "[consider] the views of the parties," it is not bound by the views of the moving party.[22]

14. The Co-Prosecutors, therefore, request that the Pre-Trial Chamber consider this jurisprudence and practice while deciding whether to hold an oral hearing of this Appeal.

V. SUBSTANTIVE OBSERVATIONS

15. If the Pre-Trial Chamber considers this Appeal as having been moved by the Defence Counsel in their personal capacities, then the Co-Prosecutors' submit that this Appeal raises two important questions for the determination of the Pre-Trial Chamber. These questions are: (1) what are the contours of the principle of confidentiality of pre-trial proceedings and how, and to what extent, information can be disseminated by this Court or the parties to its proceedings, and (2) under what circumstances any person—in particular, a Defence Counsel mandated to protect the fair trial rights of a defendant—can be sanctioned by this Court for actions taken purportedly to advance those same rights. These questions are interconnected and, in the particular context of this Appeal, shall be dealt with sequentially in these Observations.

A. Confidentiality of Pre-Trial Proceedings and Permissible Disclosure

Fundamental Principles Governing this Court's Proceedings re Confidentiality

16. While establishing this special hybrid Court with its unique mandate, the United Nations and the Government of Cambodia agreed ("Agreement") that this Court shall exercise its jurisdiction in accordance with international standards of justice, fairness and due process of law as set out in Articles 14 and 15 of the International Covenant on Civil and Political Rights ("ICCPR").[23] The Agreement envisaged that, in the interest of "securing a fair and public hearing and the credibility of the procedure," the international community, the media and non-governmental organisations shall "at all times have access to the proceedings" of this Court. Any exclusion of these entities from the proceedings "shall be only to the extent

[22] Internal Rules, rule 77(3)(b) [*hereinafter* Rules].

[23] Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of the Crimes Committed Under the Period of Democratic Kampuchea, 6 June 2003, art. 12(2)) [*hereinafter* Agreement].

strictly necessary" where publicity would prejudice interests of justice.[24] This Agreement applies as law in the Kingdom of Cambodia and binds this Court.[25]

17. Article 14 of the ICCPR—applicable before this Court—contains minimum "fair trial rights" of a defendant before this Court.[26] The term "fair trial rights" has become a term-of-art and it does not necessarily refer to rights enjoyable by a defendant only at trial. Indeed, many of these "fair trial rights" such as the right to counsel, the right not to testify, right of presumption of innocence necessarily come into play during the investigative and pre-trial phases of this Court's proceedings. Accordingly, quoting Article 35(new) of the Law on the Establishment of this Court ("ECCC Law"), the Pre-Trial Chamber noted that defendants before this Court enjoy fair trial rights "from the beginning of the judicial investigation."[27] In a similar vein, the International Criminal Court ("ICC")—whose investigative phase is not materially dissimilar to that of this Court—has held that fair trial guarantees are not limited to trial itself, but also extend to processes preceding the trial, indeed to every aspect of the proceedings.[28]

18. While the Agreement and the ECCC Law are the founding documents of this Court, the Internal Rules—drawn by the Plenary of its Judges—consolidate applicable procedural law before this Court as mandated by Article 12(1) of the Agreement and Articles 20(new), 23(new) and 33(new) of the ECCC Law.[29] Therefore, the spirit of the Agreement and the ECCC Law must imbue the Rules. Consistent with this spirit and given the "inherent specificity" of this Court, Rule 21(1) entrenches the following "fundamental principles:"

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[24] Agreement, art. 12(2)

[25] Law on the Establishment on the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, amended pursuant to the Agreement on 27 October 2004, NS/RKM/1004/006, art. 47*bis* new [*hereinafter* ECCC Law].

[26] ECCC Law, art. 35(new).

[27] *Case of NUON Chea*, Decision on Nuon Chea's Appeal Regarding Appointment of an Expert, D54/5/6, ERN 00233617-00233627, para. 25.

[28] *Situation in the Democratic Republic of the Congo, in the case of the Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeal of the Prosecutor against the Decision of Trial Chamber I entitled "Decision on the Consequences of Non-disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements and the Application to Stay the Prosecution of the Accused, Together with Certain other Issues raised at the Status Conference on 10 June 2008, ICC-01/04-01/06 OA 13, 21 October 2008, Separate Opinion of Judge Georghios M. Pikis, para 44.

[29] Rules, Preamble.

i. All the basic documents of this Court (including the Rules and the Practice Directions) must be interpreted "to always safeguard the interests of the [defendants] and victims and so as to ensure [...] transparency of proceedings."[30]

ii. The proceedings before this Court shall be "fair and adversarial."[31]

iii. This Court shall ensure that the victims are "kept informed" and their rights are respected throughout the proceedings.[32]

Public Access of Information During this Court's Pre-Trial Proceedings

19. The Cambodian Criminal Procedure Code ("CPC")—applicable to ordinary crimes in municipal courts of Cambodia—recognises that judicial investigation by investigating judges is confidential.[33] However, given the "inherent specificity" of the ECCC, its Rules embody an important departure from this general principle of pre-trial confidentiality. Rule 56(1)—dealing exhaustively with the issue of public information by the Co-Investigating Judges during judicial investigation—clarifies that the purpose of confidentiality during that phase is to "preserve the rights and interests of the parties."[34] Rule 77(6)—dealing exhaustively with the issue of public proceedings before the Pre-Trial Chamber during judicial investigation—clarifies that public hearings may be held "if it is in the interest of justice and it does not affect public order or protective measures authorised by [this] Court."[35]

Rules of Confidentiality before a Comparable International Jurisdiction: ICC

20. The nature and scope of the pre-trial mandate of the Office of the Prosecutor of the ICC possesses characteristics similar to those of the Co-Investigating Judges of this Court. For example, "in order to establish the truth," the ICC Prosecutor is bound by the Rome Statute of the ICC—like the Co-Investigating Judges of this Court—to "investigate incriminating

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[30] Rules, rule 21(1).
[31] Rules, rule 21(1)(a).
[32] Rules, rule 21(1)(c).
[33] Code of Criminal Procedure of the Kingdom of Cambodia, English Translation, First Edition, Editions Angkor, entered into force 10 August 2007, art. 121.
[34] Rules, rule 56(1).
[35] Rules, rule 77(6).

and exonerating circumstances equally."[36] The Rome Statute imposes an express obligation on the Prosecutor to investigate and collect exculpatory evidence on behalf of the accused and to then disclose that material to the defence once it has been collected.[37] Article 54(1) of the Rome Statute envisions a Prosecutor with a "high level of neutrality and impartiality," who should act as an "officer of justice rather than a partisan advocate."[38] Given this mandate of the ICC Prosecutor and its similarity with work of the Co-Investigating Judges of this Court, the Rome Statute does not impose any greater rules of confidentiality during the investigative stages than what it imposes on the parties to the ICC proceedings during other stages of its proceedings. For example, the Rome Statute requires that the Prosecutor shall—during investigation and prosecution of crimes—take measures for the protection of victims and witnesses and their participation in the proceedings. These measures, however, shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.[39] These provisions underscore that (1) the fair trial rights of the defendants are available, in full equality and vigour, even during the investigative stage, and (2) that there is no greater obligation of confidentiality than the protection of victims and witnesses and their participation in the proceedings.

Law of Confidentiality as Considered by an Advanced Regional Jurisdiction: ECHR

21. The European Court of Human Rights ("ECtHR") has repeatedly reminded that public access to judicial proceedings constitutes a fundamental fair trial principle enshrined in the European Convention on Human Rights ("ECHR"). This protects litigants "against administration of justice in secret with no public scrutiny." It is also one of the means whereby the confidence of the courts can be maintained. By rendering the administration of

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[36] Rome Statute of the International Criminal Court, art. 54(1)(a)[*hereinafter* Rome Statute]. This duty, as framed in the Rome Statute, is unique amongst international tribunals. This provision was inserted in the Rome Statute as a harmonisation of investigative approaches in adversarial and inquisitorial systems, and is intended to lessen the equality gap between the parties. At the International Criminal Tribunal for the former Yugoslavia ("ICTY"), for example, while Rule 68 of its Rules of Procedure and Evidence provides for disclosure to the defence of potentially exculpatory material which the Prosecutor has in his possession, there is no corresponding duty to actively and objectively search for such material.

[37] Rome Statute, arts. 54(1)(a) & 67(2). Please note the word 'shall' in Article 54(1) to indicate the non-discretionary nature of the mandate of the Prosecutor to collect both incriminatory and exculpatory evidence.

[38] C. Kress, The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise, 1 Journal of International Criminal Justice (2003) 603–617. See also Cassese, International Criminal Law (2nd ed) (Oxford: OUP, 2008) at 440.

[39] Rome Statute, art. 68(1).

justice transparent, publicity contributes to the achievement of the aim of Article 6, paragraph 1 of the ECHR, namely a fair trial, "the guarantee of which is one of the fundamental principles of any democratic society."[40]

Law and Practice of Confidentiality before a National Jurisdiction: France

22. Article 11 of the French Code of Criminal Procedure ("French Code") provides that "except where the law provides otherwise and *subject to the defendant's rights*, the judicial investigation is "*secret*".[41] This confidentiality, however, is subject to limitations and exceptions. For example, (1) it is subject to the rights of the defendant,[42] or (2) a witness, not a party to the proceedings, can disclose information to the press that he obtained during the course of his interview with the magistrates,[43] (3) provisional detention hearings may be held in public before the *juge des libertés et de la détention* (JLD),[44] *etc.* In this statutory background, a distinguished authority on French criminal procedure, Jean Pradel, has noted the practical reality of a steady erosion of strict rules of confidentiality owing, according to him, to the development of communications technology, public media and greater access of parties to the case files.[45] Journalists write and experts comment about ongoing judicial proceedings.[46] In large measure, "the confidentiality of investigation [in France] is dead".[47] Pradel cites, *inter alia*, the following arguments in favour of greater openness of judicial investigation: (1) the freedom of the press and the right of the concerned citizens to information,[48] (2) public nature of criminal procedure because "secrecy can sometimes protect illegalities, injustices or unreasonable acts,"[49] and (3) avoidance of rumours.[50]

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[40] *Werner v. Austria,* Judgement, 24 November 1997, 138/1996/757/956, para. 45.
[41] Jean Pradel, *Manuel de Procedure Penale*, 13 Edition 2006-2007, Edition Cujas, p. 463 [*hereinafter* Pradel] (citing the French Code of Criminal Procedure [*hereinafter* French Code]). Emphasis added.
[42] Pradel, p. 466.
[43] Pradel, p. 466.
[44] French Code, art. 145.
[45] Pradel, p. 466.
[46] Pradel, pp. 470-1 (stating, *inter alia*, that "some Investigating Judges invite journalists in their offices and provide the information directly").
[47] Pradel, p. 471.
[48] Pradel, p. 471(citing Article 11 of the Declaration of the Rights of the Man, Article 19 of the Universal declaration of Human Rights of 1948 and Article 10 of the European Convention of Human Rights[*hereinafter* ECHR]).
[49] Pradel, pp. 471-2.
[50] Pradel, p. 472. In this context, quoting other authorities and the European Court of Human Rights [*hereinafter* ECtHR], Pradel states that the press can play the role of the watchdog of democracy.

Relevant Factors for Consideration to Determine the Scope of Confidentiality

23. This Court was established to bring justice to the people of Cambodia for egregious violations of international humanitarian law committed on the territory of Cambodia during 1975-1979. The widespread and systematic nature of the crimes as well as the delay of thirty years in bringing justice to the Cambodian people makes this Court's objectives unlike those of any other ordinary court. Additional objectives of this Court, amongst many others, include providing an example in Cambodia of justice that meets international fair trial standards and adding to the historical record of what happened during the period of Democratic Kampuchea.

24. The Pre-Trial Chamber has recognised the special nature of this Court and its unique mandate. Given this mandate, the Pre-Trial Chamber found that this Court has specialised and self-contained Rules that respond to its "unique circumstances".[51] Normal Cambodian procedure is only applicable before this Court when a question arises that is not addressed by the Rules.[52]

25. Reasonable access to this Court's proceedings at all stages is expected to enhance its opportunity to achieve its objectives. Public scrutiny is an essential condition of all public institutions, including courts, as a foundation for public confidence. Confidentiality in portions of court proceedings, however, is equally necessary to protect 1) the rights of defendants, 2) witnesses and informants, and 3) the integrity of investigation. These goals are of considerable importance and a court—such as this Court—must have the ability to selectively close proceedings and protect information in order to respect them. However, policies about confidentiality must be balanced against the high value in transparency of public institutions generally and the unique goals and circumstances of this Court.

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[51] *Case of NUON Chea*, Decision on Nuon Chea's Appeal Against Order Refusing Request for Annulment, D55/1/8, 00219322-00219333, para. 14 [*hereinafter* Annulment Decision].

[52] Annulment Decision, para. 15.

26. Circumstances, in the Co-Prosecutors' submission, that justify rules and procedures permitting greater public access to this Court's proceedings and documents include the following:

a. This Court has a unique hybrid structure with participation of international and national officials. This demonstrates the stake that the Cambodian people and the international community have in the success of its mandate.

b. The Agreement acknowledges the need for this Court's proceedings to meet international fair trial standards and be subject of scrutiny by the international community, non-governmental organisations and the media.[53]

c. An important goal of this Court is to be a model of best practices in judicial administration and conducting fair trials for other Cambodian courts. This Court should also play an important role in rule of law reform in Cambodia.

d. This Court's commitment to international fair trial standards, set out in Articles 14 and 15 of the ICCPR, need to be demonstrated and monitored at all stages of the proceedings, including pre-trial stages. Many core international standards requirements, as stated above, come into play during the investigative phase of the proceedings. To the extent that these proceedings are not held in public, the ability to test whether the court is meeting those standards is diminished. Strict confidentiality of proceedings could be interpreted as placing a charged person or his lawyer at risk of sanctions for publicly stating that there may have been a violation of his fair trial rights.

e. The crimes that are the subject of the jurisdiction of this Court took place about thirty years ago. This Court will only be charging persons alleged to be senior leaders of Democratic Kampuchea or those most responsible for crimes under that regime. These crimes and their principal perpetrators are already well known and are subject of shared history of almost the entire population of this country. This

[53] Agreement, art. 12(2).

Court has no mandate to charge crimes that are of an ongoing nature or dealing with a large number of defendants.

f. Because the great majority of Cambodians were either directly affected or are the children of those directly affected by the Democratic Kampuchea regime, there is a heightened personal and public interest in the proceedings that does not attach to ordinary domestic crimes. The proceedings before this Court relate to circumstances that are of deep personal and historic interest to the people of Cambodia and the world.

g. The Rules allow for victims of crimes investigated and charged by this Court to participate as civil parties with rights to access the case files, participate in and request investigative actions, and participate in appeals before the Pre-Trial Chamber. Millions of Cambodians are victims or closely related to victims of crimes that are likely to be charged by this Court. The rights of victims to become civil parties before this Court is undermined if they are not aware about the nature, scope and extent of the charged crimes, scope of investigations, names of the detained charged persons and other relevant information that may assist them in concluding that they have relevant information to assist this Court or claim reparations.

h. Victims, even if they do not choose to become civil parties because of the logistical difficulties of taking that step, have interests in, and moral rights to, information that matches that of civil parties. Increased level of public information is necessary to ensure that this large pool of victims receive sufficient information to fully understand the process and are not discriminated against because they chose not to or are unable to become civil parties.

i. This Court's ability to get the assistance of victims, witnesses and complainants is inhibited by the inability of those individuals to volunteer in the absence of reasonable information regarding ongoing judicial investigation.

27. Fair trial rights of defendants that primarily get adjudicated and settled during pre-trial proceedings may be addressed in public without undermining the integrity of the substantive investigation or the protective measures for the victims and witnesses. For instance, a defendant has a right to public proceedings to ensure that his fair trial rights are protected. The interests of the defendant to proceedings that meet international standards are best served by a public scrutiny of the proceedings unless the interests of the defendant himself are affected by public proceedings. However, the investigation stage, and to a lesser extent the pre-trial appellate proceedings, may involve investigative steps that could be undermined by public disclosure. For instance, the testimony of witnesses could be improperly influenced if his name or testimony is unreasonably disclosed; likewise, the Co-Investigative Judges could not be required to reveal their focus of investigation by conducting each step publicly. These concerns must be dealt with but can be addressed by limiting public access to those kinds of proceedings and while granting reasonable access to other proceedings.

28. The protection of the identities of victims and witnesses is a critical consideration for any court, and especially for a Court like this that deals with mass crimes with severe penalties and a very few surviving witnesses. However, the need for protection may be balanced with the requirements of regulated public access and by sanctioning breaches instead of a presumption of confidentiality in respect of all actions of the Court during the pre-trial stage. Confidentiality provisions for the protection of witnesses must be designed in response to specific needs and requests. Limits on the public nature of proceedings should be to the "extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."[54]

Co-Prosecutors' Observations on the Confidentiality Order re Confidentiality of Proceedings

29. The Confidentiality Order was issued, *inter alia*, under Article 3.12 of the Practice Directions that states that while the parties may indicate the suggested status of document they file ("Public", "Confidential" or "Under Seal"), it is for the relevant judicial body to determine the categorisation of that document.[55] Invoking that provision, the Confidentiality Order found that the Defence Counsel posted "nine case file documents on [the Defence Website]

[54] International Covenant on Civil and Political Rights, art. 14.
[55] Confidentiality Order, p. 1.

which had not been authorised by the Judges."[56] The nine "offending" [57] documents have not been identified in the Confidentiality Order.[58] The Confidentiality Order also directed the Defence Counsel to cease posting information relating to judicial investigation on the Defence Website "other than those documents published on the ECCC website."[59]

30. The Co-Prosecutors request the Pre-Trial to consider the reasonableness of the Confidentiality Order in the light of the following, amongst other, factors:

A. Whether the Rules create a positive obligation on the judicial organs of this Court—including during judicial investigation—to keep the victims informed of the proceedings of this Court Rule 21(1)(a) states the "fundamental principle" that this Court shall ensure "that victims (and not just the registered civil parties) are kept informed and that their rights are respected throughout the proceedings."

B. Whether there are guidelines in this Court determining which documents during the judicial investigation—and within what timeframe—are to be treated as confidential and others as public.

C. Whether the practice of the Pre-Trial Chamber of issuing a reasoned decision classifying a party's publicly filed document as "confidential" has been adopted in respect of all the documents that have been reclassified from "public" to "confidential."[60]

D. Whether a reasoned decision for reclassification is essential for a party to seek appellate or other procedural remedies? Whether this decision should identify the "confidential *information*" because of which the document has been classified as "confidential."[61]

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[56] Confidentiality Order, para. 5.
[57] Confidentiality Order, p. 7.
[58] Confidentiality Order, para. 5.
[59] Confidentiality Order, p. 7.
[60] *Case of IENG Sary*, Ruling Pursuant to Article 3.12 of the Practice Direction on Filing of Documents: Ieng Sary's Appeal Regarding Appointment of an Expert, A189/1/6, ERN 00207784-00207785, para. 4.
[61] Rule 35(1)(a) sanctions disclosure of confidential "information" (as against a confidential "document").

E. Whether filings before the Co-Investigating Judges should be notified to the parties with reasonable dispatch for the parties to seek recourse against their classification?

F. Whether the Confidentiality Order has rightly read restrictively the term "public" in Article 3.12 of the Practice Directions to mean only the "documents published on the ECCC website."[62]

G. Whether the Confidentiality Order expanded the scope and extent of confidentiality in Rule 56(1) by adding considerations like requirements of "judicial calendar."[63] Rule 56(1) makes confidentiality only subject to the "rights and interests of the parties."[64]

H. Whether the breach of confidentiality of a document filed before a particular judicial organ of this Court, as a matter of judicial discipline, should be dealt with by that particular organ alone.

I. Whether documents pertaining to the health of a defendant and such others that are necessary for the protection of his fair trial rights should be considered presumptively public.[65]

J. Whether publicly available or privately obtained documents filed as attachments to filings before this Court are also "confidential."[66]

K. Whether Rule 29—dealing with protective measures—and the Practice Directions on Protective Measures do not provide sufficient powers and mechanism to this Court to ensure protection of victims and witnesses while performing its

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[62] Confidentiality Order, p. 7 (Disposition para. 1(a)).
[63] Confidentiality Order, para. 12.
[64] Rules, rule 56(1).
[65] Confidentiality Order, paras. 16-17. The Report of Dr. Falke mentioned in paragraph 16 of the Confidentiality Order was a private report given by a doctor to the Defence Counsel which was subsequently filed before the Pre-Trial Chamber. The defence appeal mentioned in paragraph 18 pertained to the health conditions of the Appellant.
[66] Confidentiality Order, para. 16.

obligation to keep the "victims informed"—under Rule 21(1)(a)—throughout the proceedings.[67]

31. Inherent in the fundamental right to be heard and to a reasoned decision pursuant to that hearing in a public proceeding, is the right of a party to a public disclosure of its submissions before the judicial authority. This allows an independent observer to assess the arguments of the parties on which the judicial body based its decision. This permits an analysis of what considerations weighed in the decision of the judicial body and whether they were relevant. It allows an assessment of the fairness of the proceedings before that judicial authority. The Pre-Trial Chamber has consistently followed this practice by publicly disclosing not just its decisions but also the party filings on which these decisions were based.

32. Having made these observations, the Co-Prosecutors note that it is also one of the duties of the counsel appearing before this Court to cooperate with the judicial chambers and seek their orders in respect of any grievance that they may have. This includes their grievances in respect of classification of documents as "confidential". In this behalf, the Co-Prosecutors note that the Appellant did not seek the approval of the Pre-Trial Chamber to place his appeal on the appointment of a psychiatric expert on the Defence Website. Despite the Appellant's assertion, and the reality that the document did not contain any protected material except references to the Appellant's health record that he could waive, the appropriate course for the Appellant was to have sought the permission of the Pre-Trial Chamber to make it public by reclassifying it as "public." This is because, by a reasoned order, the Pre-Trial Chamber had designated that filing as "confidential."

B. Scope, Nature and Procedure of Sanctions for Breach of Confidentiality

Applicable Law on Sanctions for Breach of Confidentiality

a. Interference with administration of justice

33. Rule 35 deals with sanctions against persons—including defence counsel—who "[interfere] with the administration of justice".[68] It authorises sanction or "reference to appropriate

[67] Practice Directions on Protective Measures, ECCC/03/2007/Rev.1, 29 April 2008.
[68] Rules, rule 35(1).

authorities" of a person who "knowingly and wilfully" interferes with the administration of justice by disclosing "confidential information" in violation of an order. Therefore, for the punitive sanction of this provision to trigger (1) a person must interfere with the administration of justice, (2) this interference must be done knowingly and wilfully, (3) the person must disclose confidential "information", and (4) this disclosure must be in violation of an "order".

34. A punitive sanction under Rule 35 can be initiated after the relevant judicial authority has a reason to believe that a person may have committed an act leading to interference with the administration of justice. Upon this belief, the judicial authority may (1) deal with the matter summarily, (2) conduct further investigation, or (3) refer the matter to the appropriate authorities of the Government of Cambodia or the United Nations.[69]

35. Any person subject to proceedings under Rule 35 "shall" be entitled to legal assistance.[70] Cambodian law applies "in respect of sanctions imposed" against the person found to be in breach of Rule 35.[71]

b. Misconduct of a lawyer

36. If a lawyer is found to be in breach of Rule 35 for interfering in the administration of justice—as is the case in the current Appeal—the relevant judicial authority may also determine that such interference amounts to misconduct of the lawyer under Rule 38.[72]

37. Under Rule 38, a judicial body of this Court may impose sanctions against a lawyer appearing before this Court if it is found that his conduct is (1) offensive or abusive, (2) obstructs the proceedings, (3) amounts to abuse of process, or (4) is otherwise contrary to Article 21(3) of the Agreement.[73] Article 21(3), in terms, mandates that any counsel

[69] Rules, rule 35(2).
[70] Rules, rule 35(3).
[71] Rules, rule 35(5).
[72] Rules, rule 35(2).
[73] Rules, rule 38(1).

appearing before this Court shall "act in accordance with [the] Agreement, the Cambodian Law on the Statutes of the Bar and recognized standards and ethics of he legal profession."[74]

38. Any finding of misconduct can only be made "after a warning."[75]

Rules of Sanction before Comparable International Jurisdictions

39. All current international tribunals, prosecuting crimes similar to this Court and using the services of counsel from multi-national and multi-jurisdictional backgrounds, have adopted provisions to address interference in the administration of justice or misconduct by the counsel. The Rome Statute of the ICC, for example, has created "*offences* against administration of justice" and prescribed punishment for them.[76] It also prescribes penalties for "misconduct" including "refusal to comply with [the Court's] directions".[77] For offences against the administration of justice, the ICC Rules of Procedure and Evidence ("ICC Rules") provide an elaborate mechanism of consultation, investigation, arrest, prosecution and trial of those charged for "offences against the administration of justice" before sanctions can be imposed against them.[78] These proceedings are clearly criminal in nature. For misconduct in the form of refusal to comply with the direction of the Court, the ICC Rules provide for sanctions after "a warning of sanctions in case of breach" and after "giving an opportunity of being heard before a sanction [is] imposed."[79]

40. Similar proceedings—penal in nature—are also provided under the contempt jurisdictions of the International Criminal Tribunals for the Former Yugoslavia ("ICTY") and Rwanda ("ICTR") and the Special Court for Sierra Leone ("SCSL").[80] Those Tribunals have found that they possess an inherent jurisdiction, deriving from their judicial functions, to ensure that their exercise of the jurisdiction is not frustrated and that their basic judicial functions are safeguarded.[81] The ICTY has cautioned, however, that the law of contempt is not designed to

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74 Agreement, art. 21(3).
75 Rules, rule 38(1).
76 Rome Statute, art. 70. Emphasis added.
77 Rome Statute, art. 71.
78 ICC Rules of Procedure and Evidence, rules 162-9.
79 ICC Rules of Procedure and Evidence, rule 171.
80 ICTY Rules of Procedure and Evidence, rule 77; ICTR Rules of Procedure and Evidence, rule 77; SCSL Rules of Procedure and Evidence, rule 77.
81 Tadic Contempt Decision, para. 13 (citing jurisprudence of the International Court of Justice ("ICJ") and the ICTY).

"buttress the dignity of the judges or to punish mere affronts or insults to a court or a tribunal".[82] Therefore, those Tribunals have not criminalised all forms of infractions, including for the disclosure of confidential information. In *Ntakirutimana*, the ICTR found that the disclosure in violation of witness protection order was not sufficiently serious to be tantamount to contempt.[83] In *Furundzija*, the ICTY took the view that the patterns of violation of its orders by the prosecution were not sufficiently serious to amount to a crime of contempt since only the most serious interferences with the administration of justice were intended to be prosecuted under that heading.[84] In *Brdjanin*, the ICTY found that one count of the charge of contempt did not meet the threshold as the information that was said to have been disclosed in violation of a court order was already in public domain.[85]

41. A violation of court order, as such, constitutes interference in the administration of justice.[86] A court order remains in force until a chamber decides otherwise.[87] The *actus reus* of the offence of violation of a court order is the physical act of disclosure of information relating to proceedings in breach of an order of a chamber.[88] Disclosure is to be understood as revelation of information that was previously confidential to a third party or to the public. An order of the judicial chamber must be "objectively breached."[89] The *mens reas* required for this offence is the knowledge of the accused that his disclosure of the particular information is done in violation of a court order. Either wilful blindness or reckless indifference to the existence of the order granting protective measures is sufficiently culpable conduct to be dealt with as contempt.[90]

Procedure to be Followed in Contempt Proceedings

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[82] Tadic Contempt Decision, para. 16.
[83] *Prosecutor v. Ntakirutimana,* Decision on Prosecution Motion for Contempt of Court and on Two Defence Motions for Disclosure, 16 July 2001, ICTR Trial Chamber, paras. 10-12.
[84] *Prosecutor v. Furundzija,* The Trial Chamber's Formal Complaint to the Prosecutor Concerning the Conduct of the Prosecution, 5 June 1998, ICTY Trial Chamber, para. 11.
[85] *Prosecutor v. Brdjanin,* Decision on Motion for Acquittal Pursuant to Rule 98*bis*, 19 March 2004, ICTY Trial Chamber, paras. 9-10.
[86] Marijacic Judgement, para. 44.
[87] Marijacic Judgement, para. 45.
[88] *Prosecutor v. Haxhiu*, Judgement on Allegations of Contempt, Case No. IT-04-84-R77.5, 24 July 2008 ICTY Trial Chamber, para. 10 [*hereinafter* Haxhiu Judgement].
[89] Haxhiu Judgement, para. 10.
[90] Haxhiu Judgement, para. 11.

42. Owing to the punitive nature of the contempt and "interference in the administrative justice" proceedings, international tribunals trying these cases have devised a detailed procedure to be followed before a judgement is issued on the guilt or innocence of the alleged offender. The ICC, for example, provides for investigation, prosecution and trial of such allegations before a judgement is entered. Other tribunals routinely appoint special chambers or special *amici* prosecutors to prosecute such cases.[91] These chambers or prosecutors are usually different from the ones before whom the alleged contempt or interference was committed.[92] The ICTY has noted that for a judicial body to be both the prosecutor and the judge in relation to a charge of contempt has the danger of it overlooking "the ordinary procedures and protections for the parties".[93] The Tribunal noted that the order by which the alleged offender is charged should "identify the precise charge he has to answer" and should give him the opportunity to debate what is required to be proved so that a fair trial is afforded to him.[94]

43. An adequate and speaking warning should be issued to an alleged contemnor or interferer in the administration of justice before proceedings are initiated against him or her.[95] The proceedings, thereafter, are initiated in the form of an indictment or an order in lieu of indictment.[96]

Co-Prosecutors' Observations on the Confidentiality Order re Sanction for Breach

44. The Confidentiality Order found that the Defence Counsel (1) did not respect the communication of the Co-Investigating Judges of 15 January 2009, (2) breached Rule 56(1) by revealing confidential information, and (3) breached Article 21(3) of the Agreement by failing to act in accordance of the standards and ethics of the legal profession. The Confidentiality Order noted that this "breach may be sanctioned under Rules 35 and 38".[97]

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[91] *In the Case Against Florence Hartmann*, Prosecutor's Pre-Trial Brief, Case No. IT-02-54-RR77.5, ICTY Special trial Chamber, 8 January 2009, p.1[*hereinafter* Florence Hartmann Brief].
[92] Florance Hartmann Brief, p.1.
[93] Aleksovski Judgement, para 55.
[94] Aleksovski Judgement, para 55.
[95] *Prosecutor v. Musema*, Warning and Notice to Counsel in Terms of Rule 46A of the Rules of Procedure and Evidence, Case No. ICTR-96-13-I, 31 October 1997.
[96] *In the Case Against Florence Hartmann*, Order in Lieu of Indictment on Contempt, Case No. IT-02-54-RR77.5, ICTY Special trial Chamber, 27 August 2008.
[97] Confidentiality Order, p. 7.

45. After finding these breaches, the Confidentiality Order directed the Defence Counsel to (1) cease posting "information and documents related to judicial investigation other than those documents published on the ECCC website", and (2) to remove the "offending content" from the Defence website or face legal consequences for further breach.[98] The Co-Investigating Judges also forwarded the Confidentiality Order to the respective controlling professional bodies of the Defence Counsel "so that these bodies may decide on any appropriate action".[99]

46. Although it is not entirely clear from the disposition of the Confidentiality Order,[100] the Co-Prosecutors believe that that Order was passed pursuant to findings of breach by the Defence Counsel under Rules 35 and 38.[101] The Co-Prosecutors consider the findings of interference in the administration of justice and misconduct—if this is what the Confidentiality Order found—very serious. This seriousness is compounded when the persons found in breach are counsel appearing before this Court. Lawyers, besides having a duty to their clients, have an overarching duty towards a court, as its officers. This duty is reflected in codes of ethics for lawyers cutting across jurisdictional and national boundaries.

47. The Co-Prosecutors note that the Defence Counsel did not take diligent steps to settle the issues raised in the Co-Investigating Judges' communication dated 15 January 2009 that led to the issuance of the impugned Confidentiality Order.

48. Given the seriousness of the issues involved and findings against the Defence Counsel and the subsequent reporting to their controlling professional bodies, the Co-Prosecutors request the Pre-Trial Chamber to consider the appropriateness of the Confidentiality Order in the light of its observance of the procedural and substantive safeguards contained in Rules 35 and 38. The Pre-Trial Chamber may consider the following factors:

    A. Whether the Confidentiality Order was passed after hearing the parties to the proceedings in Case File No. 002 in which the offending conduct took place. For a meaningful appellate process before the Pre-Trial Chamber, the impugned order

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[98] Confidentiality Order, p. 7.
[99] Confidentiality Order, p. 7.
[100] Confidentiality Order, p. 7. Co-Prosecutors treat the Disposition to constitute paragraphs following "FOR THESE REASONS".
[101] Confidentiality Order, para. 20.

should be passed after (1) the subordinate judicial authority had notified its intention to decide an issue, (2) hearing the parties after giving a reasonable opportunity to brief, (3) considering and dealing with party submissions and then providing reasons for accepting and rejecting those submissions. The Co-Prosecutors note that parties to Case File No. 002 did not brief the Co-Investigating Judges before the Confidentiality Order was issued. Therefore, the parties are presenting their views for the first time before this appellate forum.

B. Whether the Confidentiality Order—being a penal order sanctioning Defence Counsel and reporting them to their professional bodies—is sufficiently precise as to indicate the offending conduct, its *mens rea* and *actus reus*, and the precise provisions of law under which the sanctions have been imposed. Similar tribunals considering conduct amounting to interference with the administration of justice and counsel's misconduct, issue detailed indicting documents to notify the offender of the precise nature of charges he has to meet. Judgements/decisions on these indicting documents are then issued after hearing the alleged offender and considering witness testimony and documentary proof, if required. These judgements/decisions detail the party submissions and the precise provisions of law under which the alleged offender is found guilty or otherwise. This ensures a meaningful appellate process, especially if there is only one appellate remedy available. The Co-Prosecutors note that there is no accusatory document on record that (1) identified in details the offending acts, (2) stated that those acts were done "knowingly and wilfully" and how, (3) how this amounted to interference with the administration of justice, (4) what confidential "information" was disclosed and in violation of which judicial "order."[102] This document was particularly necessary if sanctions were being considered to be imposed "summarily"[103]

C. Whether those who were being considered for punitive sanction were advised of the entitlement of legal assistance before the issuance of the Confidentiality Order. This is a mandatory requirement under Rule 35(3) as indicated by the use of the term

[102] Rules, rules. 35(1) & 35(1)(a).
[103] Rules, rule. 35(2)(a).

"shall."[104] There is nothing available on the record to conclude whether this opportunity was afforded to the Defence Counsel.

D. Whether the Confidentiality Order, or any warning or an accusatory document preceding it, identified the provisions of the Cambodian law that compulsorily applies "in respect of sanctions imposed on a person [under Rule 35(1)]." There is no record to conclude that this clarity was provided in any document.

E. Whether a warning—as mandated by Rule 38(1)—was given to the Defence Counsel before they were found to have committed misconduct under that Rule. International jurisprudence entrenching standards binding on this Court requires that a person considered in breach should be duly warned before sanctioning him or restricting his rights.[105] The warning should "*specifically* indicate that the [offending] conduct, if it persists, could result in a specific restriction. In this way, there can be no question that the [alleged offender] has been put on notice that the warning is serious and could lead to [sanctions] if it is not heeded.[106] The Pre-Trial Chamber may consider whether the communication of the Co-Investigating Judges of 15 January 2009 satisfied these requirements of a very specific warning.

F. Whether it was appropriate for one judicial body—like the Co-Investigating Judges—to sanction Defence Counsel for misconduct for allegedly violating the orders of another judicial body—like the Pre-Trial Chamber—when that other body was a more appropriate forum to determine the breach as the "offending" documents were filed before the latter and it could better conclude, in law and in equity, whether breach needs to be sanctioned and, if so, to what extent.

G. Whether the summary findings of interference in the administration of justice and misconduct against the Defence Counsel and the consequent communication to their

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[104] Rules, rule. 35(3).
[105] *Prosecutor v. Seselj*, Decision on Appeal Against the Trial Chamber's Decision on Assignment of Counsel, Case No. IT-03-67-AR73.3, ICTY Appeals Chamber, 20 October 2006, para. 23[*hereinafter* Seselj Decision].
[106] Seselj Decision, para. 25.

controlling professional bodies is proportionate to the "offence."[107] The Co-Prosecutors note that the Confidentiality Order does not allege that any confidential and protected "*information*"[108] concerning victims or witnesses or investigation was disclosed. While violation of a judicial order—if proved after providing the offender an opportunity of hearing—is a very serious matter, a judicial body should not be seen to penalise counsel for protection of the fair trial rights of their clients.

H. Whether there should be a showing of an actual interference in the administration of justice before a person is sanctioned under Rule 35.

49. The Co-Prosecutors reiterate that any proven violation of an order of a court—especially by counsel—is a serious matter as it affects the administration of justice. Any breach, if proved to have been committed knowingly and wilfully, must be visited by appropriate penal consequences. However, given this very seriousness, the breaches, if any, must be determined after given the alleged offender a proper opportunity to be heard after a clear warning of serious penal consequences if that breach was continued. Once the offender continues the breach despite specific warning, proceedings may be initiated against him with a very specific accusatory document to afford him an opportunity of a defence, if any. The alleged offender, even if he is a lawyer, should be permitted to seek legal assistance, as mandated by Rule 35(3). Only after such procedural safeguards are adopted, should a serious finding of "interference with the administration of justice" and "misconduct of a lawyer" be entered.

50. From a review of the facts and the documents of the Case File, the Co-Prosecutors observe that that the interests of justice would be served if the Pre-Trial Chamber considered remanding the Appeal to the Co-Investigating Judges for reconsideration after observing the procedural safeguards guaranteed under Rules 35 and 38.

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[107] *Handyside v. United Kingdom*, Judgement, 7 December 1976, Series A No. 24 (1979-1980) 1 EHHR 737, paras. 48-50.

[108] Rules, rule. 35(1)(a). Emphasis added.

VI. CONCLUSION

51. In conclusion, the Co-Prosecutors make the following submissions for the consideration of the Pre-Trial Chamber:

i. The Pre-Trial Chamber may consider dismissing the Appeal for a lack of standing and a cause of action of the Appellant IENG Sary and for being barred under Rule 74(3), or;

ii. The Pre-Trial Chamber may consider dismissing the Appeal, without prejudice, leaving the Defence Counsel to seek recourse to such remedies as may be available to them under the law, or;

iii. In the alternative, the Pre-Trial Chamber may admit the Appeal as having been filed by the Defence Counsel in their individual capacities, and;

iv. In the facts and circumstances of this Appeal, the Pre-Trial Chamber may consider remanding the matter back to the Co-Investigating Judges for disposal after giving an appropriate opportunity of hearing to the Defence Counsel. The Pre-Trial Chamber may consider issuing certain guidelines regarding confidentiality of documents during pre-trial proceedings which would govern the decision of the Co-Investigating on remand.

YET Chakriya
Deputy
Co-Prosecutor

Robert PETIT
Co-Prosecutor

Signed in Phnom Penh on this twenty-seventh day of March 2009.