Protecting Confidential Investigations or Gagging the Press? Freedom of Expression and Interference with the Administration of Justice at the Extraordinary Chambers in the Courts of Cambodia

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I. INTRODUCTION

At first glance, Tuol Sleng is like any other school in one of Phnom Penh's quiet neighborhoods. Open-aired walkways connect classrooms and benches line sidewalks where children once played. Yet, to museum visitors, the legacy of the Khmer Rouge quickly becomes apparent. Barbed wire lines every entrance, and exercise equipment once used to torture victims still stands in the small courtyard. In former classrooms, blood stains the floor of prison cells, where metal rods and chains used to inflict terror lie untouched, as if it was only days ago that Khmer Rouge soldiers fled upon the invasion of Vietnamese troops.[1]

Tuol Sleng, called S-21 when it was converted into a Khmer Rouge detention center, was but one security center of the Khmer Rouge regime that seized control of Cambodia on April 17, 1975.[2] In the four years that followed, an estimated two million Cambodians perished under the radical communist state of Democratic Kampuchea (DK).[3] In an effort to transform the country into a classless society void of money and private property, the Khmer Rouge evacuated city dwelling "new people" to the countryside, where they were forced to adopt the infamous black cloth-

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1. *See* DAVID P. CHANDLER, VOICES FROM S-21: TERROR AND HISTORY IN POL POT'S SECRET PRISON 36 (1999).

2. DAVID P. CHANDLER, BROTHER NUMBER ONE: A POLITICAL BIOGRAPHY OF POL POT 1 (rev. ed. 1999).

3. DAVID P. CHANDLER, A HISTORY OF CAMBODIA 212 (3d ed. 2000). The precise number of Cambodians who were killed during the Khmer Rouge is unknown, and death estimates range from 1.7 to 3 million. *E.g.*, BEN KIERNAN, THE POL POT REGIME: RACE, POWER, AND GENOCIDE UNDER THE KHMER ROUGE, 1975–79 ix (3d ed. 2009); *Introduction to the ECCC: Summary*, ECCC, http://www.eccc.gov.kh/en/about-eccc/ (last visited June 26, 2011).

ing of the regime and labor in the rice fields.[4] "Angkar Padevat," the anonymous DK government, demanded fierce loyalty—Khmer Rouge cadres executed intellectuals, past government officials, and other suspected traitors without hesitation.[5]

Inside the walls of S-21 prison, an estimated 14,000 people[6] were tortured and killed under the command of Duch, the prison's infamous leader.[7] Thirty-one years later, in July 2010, Duch was found guilty in Case 001 before the Extraordinary Chambers in the Courts of Cambodia (ECCC),[8] a hybrid United Nations and Cambodian-run tribunal established to prosecute the high-ranking Khmer Rouge officials most responsible for the horrific crimes that impacted nearly every Cambodian.[9]

Though Cambodians waited over thirty years for justice, during the judicial investigation, the public was largely deprived of information related to the ECCC's case. In 2008, Duch's return to Tuol Sleng and the Killing Fields—a mass grave in a remote area outside Phnom Penh—as part of the judicial investigation drew widespread attention.[10] Both the public and members of the media arrived in large numbers to witness the historical event. Yet, upon arrival, reporters were stopped by antiriot police, who guarded the premises with AK-47s and barricaded the streets.[11] The ECCC Co-Investigating Judges forbade members of the press and others from observing the events and ordered that Tuol Sleng be closed to the public.[12] Those reporters who managed to get close to the event were warned by tribunal officials that if information appeared in the local

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4. DAVID P. CHANDLER, THE TRAGEDY OF CAMBODIAN HISTORY: POLITICS, WAR, AND REVOLUTION SINCE 1945 241–47 (1991).

5. *See id.*

6. CHANDLER, *supra* note 1, at 36.

7. *Id.* at 20.

8. Prosecutor v. Duch, Case No. 001/18-07-2007/ECCC/TC, Judgment (July 26, 2010), http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/20100726_Judgement_Case_001_ENG_PUBLIC.pdf.

9. Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, as amended and promulgated on Oct. 27, 2004, NS/RKM/1004/006, art. 1 (new) [hereinafter ECCC Law], *available at* http://www.eccc.gov.kh/en/documents/legal/law-establishment-extraordinary-chambers-amended; 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, June 6, 2003, art. 1 [hereinafter Framework Agreement]. In a 2009 study among the Cambodian population, 81% of respondents considered themselves victims of the Khmer Rouge. Ninety-three percent of respondents who lived under the Khmer Rouge considered themselves victims, while 51% of those who had not also considered themselves victims. PHUONG PHAM ET AL., SO WE WILL NEVER FORGET: A POPULATION BASED SURVEY ON ATTITUDES ABOUT SOCIAL RECONSTRUCTION AND THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA 24 (2009).

10. Erika Kinetz & Prak Chan Thul, *Duch Returns to S-21, Discusses Role as Chief*, CAMBODIA DAILY, Feb. 28, 2008, at 25.

11. *Id.*

12. *Id.*

media, those responsible would be blacklisted from the court.[13] Police questioned reporters for hours, destroyed photos, and warned about the dangers of breaching the confidential judicial investigation.[14]

But Tuol Sleng is now a museum open to the public, where visitors are free to roam the halls and encouraged to learn more about Cambodia's dark history[15] and Duch, a notorious man whose identity was far from secret at the time of the investigation.[16] Why the media was totally excluded is uncertain, for the judges gave no clear reasoning for the closures.[17]

The restrictive media access at the Tuol Sleng visit was not an isolated event, but only one instance in a series where the ECCC has restricted public information and shrouded the court in secrecy. Yet, beyond bringing senior leaders of the Khmer Rouge to justice, the ECCC, operating as a unique hybrid court, has two broad goals that highlight the importance of public participation and investment in the tribunal: (1) to serve as a means of national reconciliation for the Cambodian people,[18] and (2) to serve as a model for the domestic Cambodian legal system.[19] The public's lack of information regarding the tribunal's proceedings threatens to hinder the ECCC from achieving its objectives, and the court may leave a legacy of corruption rather than one of justice.

The ECCC's strict presumption of confidentiality during pretrial investigations serves not only as a barrier to achieving justice but also to decrease public investment in the tribunal. ECCC officials have increasingly threatened to sanction journalists for publication of confidential information pursuant to ECCC Internal Rule 35, a provision that allows

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13. *Id.* at 26.

14. *Id.*

15. Tuol Sleng is now home to the Museum of Genocidal Crimes where hundreds of mug shots line the walls, and historical documentation is on display for the public. CHANDLER, *supra* note 1, at 4–6, 27.

16. Duch and the Khmer Rouge operation of S-21 have been documented and discussed at length among historians. *See, e.g.*, CHANDLER, *supra* note 1.

17. Press release, ECCC Co-Investigating Judges, ECCC Media Alert: Public Notice of OCIJ On-Site Investigation (Feb. 22, 2008), http://www.eccc.gov.kh/sites/default/files/media/Public_Notice_of_OCIJ_On Site_Investigation.pdf. The press releases stated in part that

> [a]s part of the ongoing work of the Office of the Co-Investigating Judges, on-site investigations are being held on Tuesday 26 Feb 2008 at Choeung Ek and on Wednesday 27 Feb at Tuol Sleng. Such on-site investigations are a normal part of judicial investigation, which is confidential. On those dates the respective sites and their surrounding areas will be closed to the public, including the press. Appropriate and strict security measures will be in place.

Id.

18. *See* Extraordinary Chambers in the Courts of Cambodia, Internal Rules, pmbl. (June 12, 2007) (2010) [hereinafter ECCC Internal Rules], *available at* http://www.eccc.gov.kh/sites/default/files/legal-documents/IR-Eng.pdf; Framework Agreement, *supra* note 9.

19. *Introduction to the ECCC*, *supra* note 3.

for those who "interfere with the administration of justice" to be disciplined.[20] The threats to journalists who publicize the latest ECCC developments have sparked criticism of the court by the press, nonprofit community, and others.[21] And the lack of media access to information sets a dangerous precedent for the Kingdom of Cambodia, one of the most corrupt countries in the world,[22] where freedom of the press is severely limited and domestic laws of defamation and disinformation are frequently used to target journalists.[23]

Allegations of the media's interference at international courts are not unique, for international criminal tribunals have prosecuted several journalists in contempt proceedings.[24] Yet, what is unique is the ECCC's foundation in principles of civil law and its jurisdiction to prosecute crimes that occurred in the early 1970s.[25] Unlike common law courts that use express confidentiality orders, the ECCC presumes all aspects of pretrial investigations to be confidential, even information that is already in the public domain.[26] As a result, journalists, who may be unaware that the information they divulge is protected, are bound by a duty of confidentiality absent an express court order. These strict presumptions of privacy—coupled with a broad duty of confidentiality and vague standards regarding the use of sanctions pursuant to ECCC Internal Rule 35—are problematic for a court like the ECCC, in which the public is highly invested.

With the sanctioning of journalists in Cambodia becoming a real possibility, this Comment advocates that the ECCC depart from the most recent contempt jurisprudence of the International Criminal Tribunal for

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20. *See, e.g.*, Directive on Classification of Pre-Trial Chamber Documents, Case No. 002/07-07-2010-ECCC/PTC10, ¶ 4 (Pre-Trial Chamber Sept. 9, 2010); Warning for Unauthorized Disclosure of Confidential Information, Case No. 002/19-09-2007-ECCC/OCIJ, ¶ 1 (Pre-Trial Chamber July 9, 2010).

21. *See e.g.*, RECENT DEVELOPMENTS AT THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA: MAY 2008 UPDATE, OPEN SOCIETY JUSTICE INITIATIVE 25 (2008), http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/eccc_20080514/eccc_20080514.pdf.

22. According to Transparency International, Cambodia ranks 154 out of 178 surveyed countries and received a 2.1 out of a possible ten in the annual 2010 Corruptions Index. 2010 CORRUPTION PERCEPTIONS INDEX, TRANSPARENCY INTERNATIONAL (2010), http://www.transparency.org/policy_research/surveys_indices/cpi/2010/results.

23. Special Rapporteur on the Situation of Human Rights in Cambodia, *Technical Assistance and Capacity-Building*, Human Rights Council, ¶ 33, U.N. Doc. A/HRC/15/46 (Sept. 16, 2010) (by Surya P. Subedi).

24. For recent contempt jurisprudence at international criminal tribunals, see Katharina Margetts & Patrick Hayden, *Current Developments at the Ad Hoc International Criminal Tribunals*, 8 J. INT'L CRIM. JUST. 649, 687–691 (2010).

25. ECCC Law, *supra* note 9, art. 1 (new); Framework Agreement, *supra* note 9, art. 1.

26. ECCC Internal Rules, *supra* note 18, r. 56(1).

Former Yugoslavia (ICTY)[27]—which requires neither specific intent nor a material interference with the administration of justice to warrant sanctions—and instead develop a test similar to that used by the European Court of Human Rights, in which infringements on freedom of expression must be legitimate, necessary, and proportionate.[28]

Part II of this Comment explains the ECCC's presumption of confidentiality and restrictions on media access to date, while Part III reviews the most recent contempt jurisprudence from the ICTY. Part IV explains the standard established by the European Court of Human Rights, in which restrictions on freedom of expression must be necessary and proportionate to a legitimate purpose before journalists' freedom of expression can be infringed during confidential judicial investigations. Part V proposes a series of recommendations for the use of sanctions against journalists at the ECCC. In order to achieve the court's objectives of facilitating national reconciliation and serving as a model for Cambodia's struggling justice system, the final sections conclude that the ECCC should first make clear what information is protected by confidentiality orders; second, issue clear warnings when those orders are violated; and third, evaluate the use of sanctions on a case-by-case basis that considers the materiality of the interference, the importance of the confidentiality measure, and the intent of the accused.

II. THE PRESUMPTION OF CONFIDENTIALITY AND MEDIA ACCESS AT THE ECCC

While the three major sources of law governing the tribunal—the U.N. Framework Agreement, ECCC Law, and ECCC Internal Rules—all convey a desire for strong protection of public access to tribunal proceedings, they also include express provisions for confidentiality during pretrial investigations. Section A provides a brief overview of the ECCC and those provisions that protect public access, while section B summarizes confidentiality provisions during the pretrial period. Section C highlights the tension between public access and confidential investigations through a review of media access in Cambodia and the treatment of journalists covering the ECCC, and ends with an analysis of the most recent ECCC jurisprudence regarding the use of sanctions.

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27. ECCC Law, Article 33 (new) provides that "[i]f these existing procedure[s] do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application or if there is a question regarding their consistency with international standard[s], guidance may be sought in procedural rules established at the international level." ECCC Law, *supra* note 9, art. 33 (new). Because of its long history and developed jurisprudence, the ICTY has been very influential among international criminal tribunals and serves as strong persuasive authority for the ECCC.

28. *See, e.g.*, Dupuis v. France, 47 Eur. Ct. H.R. 52, 1152–54 (2007).

A. A Hybrid Court to Serve as a Means of National Reconciliation and Model for the Kingdom of Cambodia

The ECCC is the product of arduous negotiations between the Kingdom of Cambodia and the United Nations.[29] After much debate regarding the structure of the court, its optimal location, the limited scope of its jurisdiction, and the composition of court staff, the ECCC was established as a hybrid tribunal.[30] Rather than function as an ad hoc United Nations court, the ECCC was established within the Cambodian domestic legal system, yet it invites foreign participation and guidance though its internationalized nature.[31]

The tribunal's procedure must be in accordance with Cambodian procedural law, but the Framework Agreement provides that where Cambodian law does not address a particular matter, where there is uncertainty in Cambodian law, or where Cambodian law is inconsistent "with international standards, guidance may also be sought in procedural rules established at the international level."[32] Prior to the adoption of the Cambodian Code of Criminal Procedure (CPC) in August 2007, the ECCC promulgated the "Internal Rules" under their implicit rulemaking power.[33] The Internal Rules are thus "the primary instrument to which reference should be made in determining procedures before the ECCC where there is a difference between the procedures in the Internal Rules and the CPC."[34]

Hybrid courts like the ECCC aim "to marry the best of two worlds—the expertise of the international community with the legitimacy

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29. *See* John D. Ciorciari, *History & Politics Behind the Khmer Rouge Trials*, *in* ON TRIAL: THE KHMER ROUGE ACCOUNTABILITY PROCESS 67–81 (John D. Ciorciari & Anne Heindel, eds., 2009).

30. The history of the ECCC negotiations spans over ten years and is beyond the scope of this Comment. For a detailed chronicle of the negotiations, see Ciorciari, *supra* note 29; Helen Horsington, *The Cambodian Khmer Rouge Tribunal: The Promise of a Hybrid Tribunal*, 5 MELBOURNE J. INT'L L. 462, 480 (2004); *Composite Chronology of the Evolution and Operation of the Extraordinary Chambers in the Courts of Cambodia*, CAMBODIA TRIBUNAL MONITOR, http://www.cambodiatribunal.org/images/CTM/eccc%20chronology%201994-may%202009.pdf?phpMyAdmin=KZTGHmT45FRCAiEg7OLlzXFdNJ4 (last visited June 27, 2011).

31. Hybrid courts are a unique form of international criminal justice because they employ a combination of international and domestic law. For more information regarding the origin and goals of hybrid courts, see, e.g., Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT'L L. 295, 295 (2003).

32. Framework Agreement, *supra* note 9, art. 12(1).

33. Robert Petit & Anees Ahmed, *A Review of the Jurisprudence of the Khmer Rouge Tribunal*, 8 NW. U. J. INT'L HUM. RTS. 165, 10 (2010).

34. Case of Nuon Chea, Case No. 002/19-09-2007-ECCC-OCIJ (PTC 06), Decision on Nuon Chea's Appeal Against Order Refusing Request for Annulment, ¶ 14 (Pre-Trial Chamber Aug. 26, 2008).

of local actors."[35] Negotiators adopted the unique hybrid structure of the ECCC not only to facilitate the tribunal's goal of bringing former senior leaders of the Khmer Rouge to justice but also to further two essential functions of the ECCC: to serve as a means of national reconciliation,[36] and to serve as a model for the domestic Cambodian legal system.[37]

1. A Hybrid Court to Facilitate National Reconciliation

One of the ECCC's central goals is to facilitate national reconciliation for the Cambodian people through its truth-seeking function.[38] It has been argued that hybrid tribunals have great potential to produce a near complete historical record because trials are conducted in the country where the crimes occurred, evidence is easier to obtain, and the local population has greater access to court proceedings.[39] The creation of an accurate historical record is an important interest for the Kingdom of Cambodia, for despite the large number of Khmer Rouge victims and the legacy of violence left in the wake of the killings, the public knows very little about the Khmer Rouge government and its motivations for inflicting widespread violence.[40] Moreover, what survivors recall of the nation's dark history is seldom discussed due to cultural norms, and until recently, Cambodian schoolchildren received little instruction on Khmer Rouge history.[41]

The ECCC both expressly and implicitly recognizes the importance of national reconciliation. Both the ECCC Internal Rules preamble and the Framework Agreement recitals specifically "recognize the legitimate concern of the government and the people of Cambodia in the pursuit of . . . national reconciliation."[42] Specific provisions for transparency and the presence of the ECCC in Phnom Penh further the realization of national reconciliation. Fundamental principles of the ECCC, established in

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35. James Cockayne, *The Fraying Shoestring: Rethinking Hybrid War Crimes Tribunals*, 28 FORDHAM INT'L L.J. 616, 619 (2005).

36. ECCC Law, *supra* note 9, art. 1 (new); Framework Agreement, *supra* note 9, recitals.

37. *Introduction to the ECCC*, *supra* note 3.

38. Framework Agreement, *supra* note 9, recitals.

39. Lindsey Raub, *Positioning Hybrid Tribunals in International Criminal Justice*, 41 N.Y.U. J. INT'L L. & POL. 1013, 1021 (2009).

40. Eighty-one percent of respondents in Berkeley's recent survey who did not live under the Khmer Rouge regime described their knowledge of the period as poor or very poor. Eighty-four percent identified family and friends as their main source of information, while 6% identified school. PHAM ET AL., *supra* note 9, at 26. Scholars have often referenced the lack of public education policies in Cambodia and the resulting lack of knowledge regarding the Khmer Rouge. *Id.*

41. Ciorciari, *Introduction*, *in* ON TRIAL: THE KHMER ROUGE ACCOUNTABILITY PROCESS, *supra* note 29, at 18–19. The Ministry of Education recently approved *A History of Democratic Kampuchea (1975–1979)*, the first Cambodian-authored textbook chronicling the history of the Khmer Rouge.

42. ECCC Internal Rules, *supra* note 18, pmbl.; Framework Agreement, *supra* note 9, recitals.

Internal Rule 21, require that applicable laws be interpreted "so as to ensure legal certainty and transparency in proceedings" whenever possible.[43] Moreover, the ECCC's location in Phnom Penh facilitates national reconciliation by affording greater court access to the Cambodian people. While ad hoc international tribunals, such as the ICTY, are often inaccessible to the very individuals for whom they were established, hybrid tribunals are not geographically removed from victimized populations.[44] The ECCC provision that "[t]he Extraordinary Chambers established in the trial court and the Supreme Court Chamber shall be located in Phnom Penh"[45] thus facilitates the inclusion of civil parties, concerned citizens, and local schools in tribunal proceedings.[46]

2. A Hybrid Court to Serve as a Model for the Domestic Judiciary

A second objective of the ECCC is to strengthen the domestic Cambodian legal system and to "provide a new role model for court operations in Cambodia."[47] The unique hybrid structure of the court establishes the ECCC within the Cambodian court system and also integrates international cooperation in court proceedings.[48] The structure protects the Cambodian government's autonomy and seeks to ensure that objective and impartial proceedings meet international standards of justice.[49] Domestic prosecution of former Khmer Rouge leaders is important to assure Cambodians that the judiciary and legal system is "stable, trustworthy, competent, credible, and reliable."[50]

In establishing the court to prosecute former Khmer Rouge officials, "Cambodia invited international participation due to the weakness of the Cambodian legal system and the internationalized nature of the crimes, and to help in meeting international standards of justice."[51] The educative effect of the ECCC is important not only for the people of Cambodia but also for the Cambodian judiciary.[52] During the reign of the Khmer Rouge, the DK government nearly eradicated the judicial system by dismantling existing laws, killing attorneys, and destroying legal

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43. ECCC Internal Rules, *supra* note 18, r. 21(1).

44. David Cohen, *"Hybrid" Justice in East Timor, Sierra Leone, and Cambodia: "Lessons Learned" and Prospects for the Future*, 43 STAN. J. INT'L L. 1, 5 (2007).

45. ECCC Law, *supra* note 9, art. 43 (new).

46. For more information on the Tribunal's outreach efforts, see *Outreach Events*, ECCC, http://www.eccc.gov.kh/en/event/outreach (last visited June 27, 2011).

47. *Introduction to the ECCC*, *supra* note 3.

48. *Id.*

49. Horsington, *supra* note 30, at 480.

50. *Id.* at 481.

51. *Introduction to the ECCC*, *supra* note 3.

52. Horsington, *supra* note 30, at 479.

records.[53] Following the Khmer Rouge era, an estimated ten law graduates, including five judges, survived and remained in the country.[54] Years later, the Cambodian legal system still lacked resources, expertise, and experience.[55] Today, the ECCC offers a unique opportunity to alleviate some of the key shortcomings of the Cambodian justice system identified by the United Nations prior to the establishment of the ECCC as "a trained cadre of judges, lawyers and investigators; adequate infrastructure; and a culture of respect for due process."[56]

The function of the ECCC as a model is apparent in its composition of lawyers, in which both international and Cambodian individuals make up teams of Co-Investigating Judges[57] and Co-Prosecutors,[58] and both Cambodian and international attorneys comprise defense teams.[59] In addition, both Cambodian and international judges comprise the Pre-Trial Chamber, Trial Chamber, and Supreme Court Chamber.[60] The rationale behind international teams is that expertise will be transferred to Cambodian court staff,[61] and that through transparent proceedings, both legal practitioners and the Cambodian people will develop a greater understanding of the Cambodian justice system. Such side-by-side working arrangements have been recognized as one of the unique benefits of hybrid tribunals.[62] These broader objectives of the ECCC—to serve as a means of national reconciliation and as a model for domestic Cambodian courts—must be balanced with the need to provide for confidential judicial investigations.[63]

B. The Presumption of Confidentiality During Pretrial Investigations at the ECCC

Pretrial proceedings at the ECCC operate under a presumption of confidentiality, enforced through Internal Rules that explicitly protect the secrecy of the investigation and require that hearings be conducted in

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53. Suzannah Linton, *Putting Cambodia's Extraordinary Chambers into Context*, 11 SING. Y.B INT'L L 195, 198 (2007).

54. *Id.* at 199.

55. U.N. Secretary-General, *Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135*, ¶ 4 (Feb. 18, 1999) (by Kofi A. Annan).

56. *Id.* ¶ 126.

57. ECCC Law, *supra* note 9, art. 23 (new).

58. *Id.* art. 16 (new).

59. For current defense teams, see *Defence Teams*, ECCC, http://www.eccc.gov.kh/en/dss/defence-teams (last visited June 27, 2011).

60. ECCC Law, *supra* note 9, art. 9 (new).

61. *See* Ciorciari, *supra* note 29, at 20.

62. Dickinson, *supra* note 31, at 307.

63. *See* ECCC Internal Rules, *supra* note 18, r. 21; ECCC Practice Direction on Classification and Management of Case-Related Information, art. 1.2 (amended June 5, 2009) [hereinafter ECCC Practice Direction].

camera, absent a compelling reason for public access. Further directives governing the court establish that the duty of confidentiality applies broadly and is not limited to ECCC staff. The result is journalists' great uncertainty regarding what information is private and what is protected.

1. Judicial Investigations

Both the ECCC and the domestic Cambodian legal system are modeled after the French civil system, in which investigating judges conduct private investigations.[64] Pursuant to ECCC Internal Rules, Co-Prosecutors file an introductory submission that outlines the boundaries of the investigation,[65] and the Co-Investigating Judges are prohibited from investigating any matters not enumerated in the submissions of the Co-Prosecutors.[66] The Co-Investigating Judges are then to collect both inculpatory and exculpatory evidence, and defense teams are prohibited from conducting their own investigations; however, defense counsel are permitted to submit investigative requests to the Co-Investigating Judges.[67] At the end of the investigation, Co-Investigating Judges issue a closing order, the equivalent of an indictment in a common law system.[68]

During the judicial investigation, the ECCC Pre-Trial Chamber has jurisdiction to settle disagreements between the Co-Prosecutors and between the Co-Investigating Judges, as well as jurisdiction to hear appeals against decisions of the Co-Investigating Judges.[69] Like the Trial Chamber, the Pre-Trial Chamber is comprised of five judges—three Cambodian and two international.[70]

2. The Scope of Confidential Judicial Investigations

The investigations conducted by the Co-Investigating Judges are presumed to be confidential in order to ensure the quality of the judicial process.[71] ECCC Internal Rule 56 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

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64. *See* Framework Agreement, *supra* note 9, art. 5; Linton, *supra* note 53, at 252–56.

65. ECCC Internal Rules, *supra* note 18, r. 53.

66. *Id.* r. 55.

67. *Id.* r. 55(10).

68. *Id.* r. 67.

69. *Id.* r. 71, 72, 73.

70. ECCC Law, *supra* note 9, art. 20 (new).

71. Press Release, ECCC Co-Investigating Judges, The Co-Investigating Judges Publish a Number of Documents (Mar. 26, 2009), http://www.eccc.gov.kh/sites/default/files/media/Press_Release_OCIJ_EN_0.pdf; *Co-Investigating Judges*, ECCC, *available at* http://www.eccc.gov.kh/en/ocij (last visited June 27, 2011).

shall maintain confidentiality."[72] In addition, ECCC Internal Rules establish a presumption that pretrial hearings are to be held in camera.[73] The Office of the Co-Investigating Judges consistently cites three specific reasons to protect the privacy of investigations: the guarantee of the protection of privacy of those persons mentioned in the case file; the presumption of innocence; and efficiency and effectiveness in investigations.[74]

ECCC Practice Directions provide three categories of classification: public, confidential, and strictly confidential. In determining the appropriate classifications of filings before the court, the Practice Directions suggest balancing several factors:

> The principle underlying this Practice Direction is the need to balance the confidentiality of the 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 purposes of education and legacy.[75]

The presumption of confidentiality applies to all aspects of the judicial investigation, and evidence is protected regardless of its content or whether the information is already in the public domain.[76] Although the Internal Rules grant the Co-Investigating Judges discretion to release information when it is essential to keep the public involved or to grant media access in exceptional circumstances,[77] the court has been unclear in its reasoning regarding the release of public information.[78] The Practice Directions enumerate those documents that are "in principle" confidential and strictly confidential,[79] yet the only guidance provided for the

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72. ECCC Internal Rules, *supra* note 18, r. 56.

73. ECCC Internal Rule 77 states in part that "[h]earings of the Pre-Trial Chamber shall be conducted *in camera*." ECCC Internal Rules, *supra* note 18, r. 77.

74. Press Release, *supra* note 71.

75. ECCC Practice Direction, *supra* note 63, art. 1.2. As in the ECCC Internal Rules, the Practice Direction thus acknowledges that the purpose of the tribunal to serve as a means of national reconciliation by ensuring education and legacy is an integral component of the ECCC's truth-seeking function. But the Practice Direction provides little support in *how* such classifications ought to be determined.

76. Directive on Classification of Pre-Trial Chamber Documents, Case No. 002/07-07-2010-ECCC/PTC10, ¶ 5 (Pre-Trial Chamber Sept. 9, 2010). Article 5.2 of the Practice Direction specifically states, "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." ECCC Practice Direction, *supra* note 63, art. 5.2.

77. ECCC Internal Rules, *supra* note 18, r. 56(2).

78. Krista Nelson, *The Presumption of Confidentiality at the ECCC: The Need for Standards to Protect Private Investigations, Provide Consistent Public Access, and Increase Transparency,* SEARCHING FOR THE TRUTH, Fourth Quarter 2010, at 38, http://www.dccam.org/Projects/Magazines/Image_Eng/pdf/4th_Quarter_2010.pdf.

79. ECCC Practice Direction, *supra* note 63, art. 4, 5, 6.

classification of public documents is that items "classified as public by the Co-Investigating Judges,"[80] or documents "after a decision by the Pre-Trial Chamber that the document is public,"[81] are presumed to be public. Filing parties are to propose the appropriate level of classification according to the Practice Direction,[82] but they are often reminded by the Co-Investigating Judges that their classifications are just that—proposals.[83] The Co-Investigating Judges and Pre-Trial Chamber have the ultimate discretion as to the appropriate level of classification for those documents filed at the ECCC.[84]

The Pre-Trial Chamber recently responded to public criticism for the lack of standards governing the presumption of confidentiality and enumerated six factors for the court to consider when making classification determinations.[85] The factors include (1) the interests of justice; (2) the integrity of the preliminary investigation and the judicial investigation; (3) fair trial rights; (4) public order; (5) transparency; and (6) any protective measures authorized by the court.[86] While these factors provide additional guidance regarding what information the Co-Investigating Judges or Pre-Trial Chamber ought to consider, they do not provide a definitive standard regarding what type of material is protected. In the absence of further guidance, ECCC jurisprudence suggests that unless a document is found on the ECCC website, it is to be presumed confidential.[87]

3. The Duty of Confidentiality

Despite the lack of guidance regarding the contours of the presumption of confidentiality, the Practice Directions broadly define the scope of those bound by the duty:

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80. *Id.* art. 4(a).

81. *Id.* art. 4(f).

82. *Id.* art. 3.1.

83. Directive on Classification of Pre-Trial Chamber Documents, Case No. 002/07-07-2010-ECCC/PTC10, ¶ 4 (Pre-Trial Chamber Sept. 9, 2010).

84. *See, e.g.*, *id.* ¶ 7.

85. *Id.*

86. *Id.*

87. *See* Order on the Breach of Confidentiality of the Judicial Investigation, Case No. 002/14-08-2006 (ECCC 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).

> *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.[88]

The express definitions of "authorised court staff"[89] and "court"[90] in the Practice Direction, and their omission in the provision outlining the duty of confidentiality, suggest that "all those having access" to protected information is not limited to ECCC personnel or court staff.[91] The absence of any qualification to "access" further suggests that one need only be exposed to confidential information to be bound by the duty, regardless of whether he or she knows the information is privileged.

The absence of clear standards governing the classification of information during the pretrial investigation, coupled with the broad scope of those bound under the duty of confidentiality, is problematic considering the tribunal's objective to keep the public informed. Given the absence of standards regarding public information, individuals exposed to information that may be part of the judicial investigation have little guidance as to whether the information is protected.

The presumption that all information is confidential, even that which is widely known to the public, hinders the ECCC's achievement of its objectives discussed in section A—to encourage national reconciliation and to serve as a model of the Cambodian judicial system—because its effect is to dissuade many individuals from publicly discussing court proceedings.[92] Those most immediately impacted by the sweeping standards are individuals entrusted to keep the public informed—journalists.

C. Media Access and the ECCC's Use of Sanctions

1. Freedom of Expression in Cambodia

Media access at the ECCC cannot be fully understood outside the context of Cambodia's treatment of the press and its obligations under both domestic and international law to respect freedom of expression.

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88. ECCC Practice Direction, *supra* note 63, art. 8.1 (emphasis added).

89. The Practice Direction defines "[a]uthorised court staff" as "staff approved by the Co-Investigating Judges or a Chamber, as appropriate, for the purposes of this Practice Direction." *Id.* art. 2(a).

90. The Practice Direction defines "court" as "the Co-Investigating Judges or a Chamber, as appropriate." *Id.* art. 2(b).

91. *See id.* art. 2.

92. *See, e.g.*, Erika Kinetz, *Tensions Mount Between ECCC Officials, Media*, CAMBODIA DAILY, Mar. 3, 2008, at 1–2.

Article 41 of the Cambodian Constitution affirms that freedom of expression, press, publication, and assembly are guaranteed to Khmer citizens pursuant to domestic law.[93] Moreover, Article 31 of the Cambodian Constitution mandates that Cambodia "recognize and respect human rights as stipulated in the Universal Declaration of Human Rights (UNDR) and other covenants and conventions related to human rights."[94] Both the UNDR[95] and the International Covenant on Civil and Political Rights (ICCPR),[96] a widely recognized covenant on human rights, expressly protect freedom of expression. Yet, despite Cambodia's mandate to respect freedom of expression under both domestic and international law, restrictions on the media continue to be a problem.

The ECCC was established to serve as a model for the domestic Cambodian legal system for good reason: freedom of expression is a longstanding problem in Cambodia.[97] A 2010 U.N. Human Rights Council report highlighted freedom of expression as one of the major areas of concern in Cambodia,[98] and it noted that "the courts do not seem to interpret the law and restrictions on freedom of expression according to domestic laws, much less international standards binding Cambodia."[99]

Restrictions on freedom of expression appear to be increasing.[100] Of particular concern is Cambodia's promulgation of defamation and disinformation laws in 2009, the implementation of which, according to the U.N., has failed to strike a proper balance between safeguarding private reputations and publicizing information concerning matters of public interest.[101] Similarly, Human Rights Watch recently highlighted as particularly problematic the Cambodian government's threats of arrest and legal action against journalists, and it suggested that such measures are

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93. CONSTITUTION OF CAMBODIA, Sept. 21, 1993, art. 41.

94. *Id.* art. 31.

95. Article 19 of the Universal Declaration of Human Rights states, "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

96. Article 19 of the International Covenant on Civil and Political Rights provides, "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any media of his choice." International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. RES/2200A(XXI) (Dec. 16, 1966).

97. Special Rapporteur on the Situation of Human Rights in Cambodia, *supra* note 23, ¶ 33.

98. *Id.*

99. *Id.*

100. HUMAN RIGHTS WATCH, WORLD REPORT: EVENTS OF 2010 295 (2011), *available at* http://www.hrw.org/en/reports/2011/01/24/world-report-2011.

101. Special Rapporteur on the Situation of Human Rights in Cambodia, *supra* note 23, ¶ 33. For a recent summary of domestic prosecutions of journalists in Cambodia, see *id.* ¶ 33–39.

often used as a means to restrict free speech.[102] Notably, Human Rights Watch also reported that ten journalists were killed in Cambodia during the past fifteen years.[103]

In serving as a model for the Cambodian judiciary, the ECCC thus has the potential to either help alleviate the troubling domestic judicial practices or to further contribute to deterioration of freedom of expression in Cambodia.

2. Media Access During Judicial Investigations at the ECCC

The Co-Investigating Judges and Pre-Trial Chamber have made few exceptions to the presumption of confidentiality during the pretrial investigation. On several occasions, the court has warned journalists of possible sanctions for reporting stories related to confidential court proceedings.

During the investigation in Case 001 against Duch in 2008, Tracey Shelton, a reporter for the *Phnom Penh Post*, was questioned for several hours by local police outside Tuol Sleng on the day of Duch's return, and her digital photographs were later erased.[104] The *Cambodia Daily* reported that same day that John Vink, a Magnum photographer, "was warned by a tribunal official that if he published a photograph of Duch he would be blacklisted from the court."[105] General Manager of the Cambodian Television Network (CTV), Glen Felgate, also reported that he was told by the former U.N. public affairs officer, Peter Foster, not to air CTV footage collected that day.[106]

During Duch's return to Tuol Sleng, ECCC staff issued clear warnings that journalists could be sanctioned for documenting the confidential event. As reported by the *Cambodia Daily*, ECCC Public Affairs Chief Helen Jarvis warned that "under the tribunal's internal rules *any person, whether an employee of the court or not*, who knowingly discloses confidential information in violation of a judicial order is subject to sanction by the tribunal, Cambodian authorities, or the United Nations."[107] The *Cambodia Daily* also reported that an ECCC official expressly warned journalists that they could be prosecuted for violating the tribunal's confidentiality.[108]

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102. HUMAN RIGHTS WATCH, *supra* note 100, at 295.

103. *Id.*

104. Erika Kinetz & Prak Chan Thul, *ECCC, Journalists Clash Over Tribunal Access*, CAMBODIA DAILY, Feb. 28, 2008, at 26.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

The experience of journalists during the investigation of Case 001 has led many to think twice before reporting on controversial subjects. The head of the Asia-Pacific desk of Reporters Without Borders, Vincent Brossel, expressed his concern at what he called a "growing tension between the press and the tribunal officials."[109] Another local reporter, Ek Madra, who was told to leave the area when Duch visited the infamous Choeung Ek Killing Fields, expressed his frustration at having to rely on "second source[s]" of information.[110]

During the investigation for Case 002, in which four senior members of the Khmer Rouge are being tried,[111] the Pre-Trial Chamber issued a series of warnings that confidential information from Pre-Trial Chamber documents had been published by the media. In July 2010, the Pre-Trial Chamber warned that two *Cambodia Daily* newspaper articles addressing the public's growing concerns of political bias at the court breached the confidential judicial investigation because the Pre-Trial Chamber did not expressly give the author access to the information.[112] The Pre-Trial Chamber did not elaborate on why a breach of confidentiality occurred, and it only referred to the protected material generally—as "the matters."[113]

In September 2010, the Pre-Trial Chamber again warned parties of the consequences of leaking confidential information, yet failed to explain why such articles breached confidentiality measures or what information was protected.[114] Like the July 2010 warning, the articles related to charges of political interference, a topic that is the subject of much controversy at the ECCC.[115] At least one of the articles referenced a de-

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109. *Id.*

110. Kinetz, *supra* note 92, at 1–2.

111. The Closing Order for Case 002 against Ieng Sary, Nuon Chea, Ieng Thirith, and Khieu Samphan, was filed on September 15, 2010. Ieng Sary, former Deputy Prime Minister for Foreign Affairs; Nuon Chea, former Chair of the People's Representative Assembly; Khieu Samphan, former Chair of the State Presidium; and Ieng Thirith, former Minister of Social Affairs are being tried in proceedings that began in 2011. Closing Order, Case No. 002/19-09-2007-ECCC-OCIJ (Office of the Co-Investigating Judges Sept. 15, 2010).

112. Warning for Unauthorized Disclosure of Confidential Information, Case No. 002/19-09-2007-ECCC/OCIJ, ¶ 1 (Pre-Trial Chamber July 9, 2010). The warning referenced the following articles as breaching the confidentiality of judicial investigations: Douglas Gillison, *Nuon Chea Team Accuses You Bunleng of Political Bias*, CAMBODIA DAILY, June 28, 2010, at 30; Douglas Gillison, *Ieng Sary Lawyers Push for Tribunal Inquest on Government*, CAMBODIA DAILY, June 23, 2010, at 20.

113. *Warning for Unauthorized Disclosure of Confidential Information*, Case No. 002/19-09-2007-ECCC/OCIJ, ¶ 1.

114. Directive on Classification of Pre-Trial Chamber Documents, Case No. 002/07-07-2010-ECCC/PTC10, ¶ 5 (Pre-Trial Chamber Sept. 9, 2010).

115. *Id.* Articles cited include Douglas Gillison, *All Final Pretrial Appeals in Case 002 Decided at Tribunal*, CAMBODIA DAILY, July 16, 2010, at 26; Douglas Gillison, *Nuon Chea Lawyers Renew Call for Political Inquiry*, CAMBODIA DAILY, July 9, 2010, at 24; Douglas Gillison, *KRT*

fense team filing not yet present on the ECCC website that "accused the government of pursuing a 'concerted policy' to prevent the questioning of government officials and derail investigations into additional regime figures."[116]

The lack of media access is perhaps most troubling with respect to the Case 003 investigation, during which the Co-Investigating Judges failed to release any information before announcing the end of investigations in April 2011 thus preventing victims from applying as civil parties.[117] In response, International Co-Prosecutor Andrew Cayley issued a public statement, the purpose of which was "to ensure that the public is duly informed about ongoing ECCC proceedings."[118] Cayley discussed specifics of Case 003 and stated his belief that "the crimes alleged in the Introductory Submission have not been fully investigated."[119] The Co-Investigating Judges found that Cayley breached the duty of confidentiality by disclosing details of Case 003 and thus ordered that he retract the information.[120]

Several days later, the press was again the target of ECCC warnings when a June 2011 article, "Leaked Document Casts Doubt on Impartiality of Khmer Rouge Judges" appeared in the *Christian Science Monitor*.[121] Referencing a 2008 confidential court document that "raises questions about the UN-backed court's ability to independently prosecute members of the brutal regime," the article was critical of the Co-Investigating Judges' ability to conduct impartial investigations.[122] The following day, the Judges issued another press release addressing the

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Prosecutor Says Journalists Face Prosecution, CAMBODIA DAILY, June 10, 2010; Adrien Le Gal, *Le retour des "interferences,"* CAMBODGE SOIR, July 15, 2010, at 10; Sebastian Strangio, *Lawyers call for KRT probe*, PHNOM PHEN POST, July 9, 2010, at 6; POLITICAL INTERFERENCE AT THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA, OPEN JUSTICE SOCIETY INITIATIVE 24 (2010) (citing Douglas Gillison, *Nuon Chea Team Accuses You Bunleng of Political Bias*, CAMBODIA DAILY, June 28, 2010).

116. Strangio, *supra* note 115, at 6.

117. Notice of Conclusion of the Judicial Investigation, Case No. 003/07-09-2009-ECCC-OCIJ (Co-Investigating Judges Apr. 29, 2011).

118. Press release, Statement by the International Co-Prosecutor Regarding Case File 003 (May 9, 2011), *available at* http://www.eccc.gov.kh/en/media-center/press-releases.

119. *Id.*

120. Order on the International Co-Prosecutor's Public Statement Regarding Case File 003, Case No. 003/07-09-2009-ECCC-OCIJ (Co-Investigating Judges May 18, 2011). Cayley filed an appeal shortly after the order. International Co-Prosecutor's Appeal Against the "Order on International Co-Prosecutor's Public Statement Regarding Case File 003," Case No. 003/07-09-2009-ECCC/OCIJ (International Co-Prosecutor May 25, 2011).

121. Jared Ferrie, *Leaked Document Casts Doubt on Impartiality of Khmer Rouge Judges*, CHRISTIAN SCI. MONITOR, June 8, 2011; *see also* Douglas Gillison, *File on Sou Met, Meas Muth Leaks From Court*, CAMBODIA DAILY, June 10, 2011; James O'Toole, *KRT Judges Warn Press on 003*, PHNOM PENH POST, June 10, 2011.

122. Ferrie, *supra* note 121.

"disloyal staff member of the ECCC" who disclosed the information.[123] The press release was targeted to journalists and warned that "anyone publishing information from [the] confidential document is liable to be subjected to proceedings for Interference with the Administration of Justice pursuant to Internal Rule 35."[124]

By apparently operating without clear standards and by failing to provide reasons why certain documents breached confidential investigations, the ECCC is sacrificing public access for what appear to be baseless confidentiality needs. While allegations of political interference call into question the integrity of the judicial investigation and ECCC staff, generalized information regarding the call for a corruption probe has seemingly little impact on the quality of the investigations themselves.

Moreover, the journalists who published confidential information had no way of knowing that their sources provided information that may breach the confidentiality of the investigation, for the journalists themselves were not bound by an express protective order. Members of the media have already expressed the frustration of having to rely on secondary sources of information,[125] and, given the widespread corruption of the judiciary in Cambodia,[126] relying on government officials as the only source of information undermines the media's role as a watchdog. Thus, the alternative implicitly suggested by the ECCC—requiring members of the media to first check with the tribunal to ensure that information is not confidential—is not only impractical but would also be a serious restraint on freedom of the press in Cambodia.

Despite its mandate to serve as a model for domestic courts and attempt to correct the culture of corruption in Cambodia, the ECCC continues to maintain a strict presumption of confidentiality during judicial investigations. Increased warnings to the press create a disincentive to report to the public,[127] which ultimately hurts the Cambodian people by undermining their access to justice and reconciliation. The disincentive to report sensitive information, like allegations of political bias, is only exacerbated by the threat to sanction journalists pursuant to ECCC Internal Rules.

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123. Press Release, ECCC Co-Investigating Judges, Public Statement by the Co-Investigating Judges (June 9, 2011) *available at* http://www.eccc.gov.kh/en/articles/public-statement-co-investigating-judges.

124. *Id.*

125. Kinetz, *supra* note 92, at 1–2.

126. Special Rapporteur on the Situation of Human Rights in Cambodia, *supra* note 23, ¶ 52.

127. *Id.*

3. Sanctioning Lawyers at the ECCC: Rule 38

While the Co-Prosecutors, Office of Co-Investigating Judges, and Pre-Trial Chamber have threatened to use sanctions on numerous occasions, sanctions have been applied at the ECCC only once.[128] In March 2009, the Co-Investigating Judges sanctioned Ieng Sary's international defense lawyer, Michael Karnavas, pursuant to ECCC Internal Rule 38 for revealing confidential information on his website.[129] The judges ordered the defense team to remove the offending content and cease posting information or documents related to the judicial investigations other than those posted on the ECCC website.[130]

The sanctioning of the Ieng Sary defense team sparked widespread criticism of the ECCC because the information posted mostly related to Ieng Sary himself and his deteriorating medical condition.[131] Many members of the public were concerned that the true reason for the sanctions was not to protect the confidential judicial investigations but rather to hide the ECCC's own shortcomings.[132] A letter written by the Ieng Sary defense team in response to the sanctions stated in part that

> [t]he current practice by the Judicial Chambers and the 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

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128. At the time of this Comment's publication, Michael Karnavas is the only individual to have been sanctioned by the ECCC. *See* Kinetz, *supra* note 92, at 1–2.

129. Order on the Breach of Confidentiality of the Judicial Investigation, Case No. 002/14-08-2006 (ECCC Office of the Co-Investigating Judges Mar. 3, 2009). The prohibited information posted by the Ieng Sary defense team related to Ieng Sary's medical condition. The information was posted by defense counsel, who argued that Ieng Sary was deprived fair-trial rights because the Co-Investigating Judges withheld public information regarding their client's health. Relevant portions of ECCC Internal Rule 38 provide that "[t]he Co-Investigating Judges or the Chambers 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." ECCC Internal Rules, *supra* note 18, r. 38.

130. *Order on the Breach of Confidentiality of the Judicial Investigation*, Case No. 002/14-08-2006.

131. The Ieng Sary defense team website is accessible at http://sites.google.com/site/iengsary defence/letters-1 (last visited June 30, 2011).

132. The Ieng Sary defense team was supported by the Co-Prosecutors, 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 Mar. 25, 2009); Civil Party lawyers, 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 Mar. 27, 2009), and the media in its criticism of the use of sanctions for breaches of confidentiality, *e.g.*, RECENT DEVELOPMENTS AT THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA: MAY 2008 UPDATE, *supra* note 21.

> decision-making process, must be discontinued without exception . . . . 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.[133]

While the Ieng Sary defense team letter raises concerns over defendants' rights to a fair trial, it also touches upon a very real concern that confidentiality measures are not being used to protect sensitive investigations but rather to shield the Co-Investigating Judges and ECCC officials from public scrutiny. The measures are problematic, for absent compelling reasons to maintain a strict presumption of confidentiality, in order to fulfill its mandate to serve as a means of national reconciliation and as a model for the Cambodian legal system, the ECCC should provide open access to court proceedings. If the defense team chose to publicize information about Ieng Sary, there seems to be no compelling reason why such a practice should be forbidden. And any reasons of the Co-Investigating Judges are unknown, for the order lacked clear reasoning.[134]

4. Sanctioning Any Person Who Interferes with the Administration of Justice: Rule 35

A separate, broader-reaching ECCC Internal Rule governs interference with the administration of justice as it expressly applies to *any person*. Rule 35 states in part that

> 1. The ECCC may sanction or refer to the appropriate authorities, *any person* who knowingly and wilfully interferes with the administration of justice, including any person who
>
> a) discloses confidential information in violation of an order of the Co-Investigating Judges or the Chambers;
>
> . . . .
>
> d) threatens, intimidates, causes any injury or offers a bribe to, or otherwise interferes with a witness, or potential witness, who is giving, has given, or may give evidence in proceedings before the Co-Investigating Judges or a Chamber;

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133. Letter from Ang Udom & Michael G. Karnava, Co-Lawyers for Ieng Sary, to Sean Visoth, Kranh Tony, & Knut Rosanhaug (Dec. 18, 2008), *available at* http://sites.google.com/site/iengsarydefence/letters-1. *See also Order on the Breach of Confidentiality of the Judicial Investigation*, Case No. 002/14-08-2006, ¶ 2 (emphasis added).

134. *See Order on the Breach of Confidentiality of the Judicial Investigation*, Case No. 002/14-08-2006.

. . . .[135]

No journalists have been sanctioned by the ECCC, but should the threats become a reality, members of the media will be sanctioned pursuant to Rule 35(1)(a).[136]

While no Rule 35 sanctions have been applied by the ECCC, the contours of Rule 35 were addressed in a series of recent decisions regarding the refusal of six witnesses—all former officials of Democratic Kampuchea and current government officials—to comply with court summons.[137] While the decisions relate to Rule 35(1)(d) sanctions for intimidating witnesses, they provide valuable guidance regarding the standards of proof for initiating investigations of alleged interference with the administration of justice. In its decision, the Pre-Trial Chamber relied heavily on jurisprudence from the ICTY, suggesting that if the ECCC does sanction journalists pursuant to Rule 35, it will likely place great weight on the ICTY's most recent contempt decisions.

In September 2010, the Pre-Trial Chamber adopted the ICTY's three standards of proof relevant to Rule 35 that were first articulated in a series of contempt proceedings against journalists covering the ICTY.[138] First, to initiate investigations pursuant to Rule 35, there need only be reason to believe an individual interfered with the administration of justice, identified by the Pre-Trial Chamber as an "extremely low threshold"[139] that does not require an inquiry into the merits but simply a material basis for initiating investigations.[140] Second, to instigate proceed-

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135. ECCC Internal Rules, *supra* note 18, r. 35 (emphasis added).

136. *See* Press Release, *supra* note 123.

137. The six witnesses summoned by International Co-Investigating Judge Marcel Lemonde include Senate President Chea Sim, Letter from the Co-Investigating Judges to Witness Chea Sim (Sept. 25, 2009) (requesting appearance as witness); National Assembly President Heng Samrin, Letter from the Co-Investigating Judges to Witness Heng Samrin (Sept. 25, 2009) (requesting appearance as witness); Foreign Minister Hor Nam Hong, Letter from the Co-Investigating Judges to Witness Hor Nam Hong (Sept. 25, 2009) (requesting appearance as witness); Finance Minister Keat Chhon, Letter from the Co-Investigating Judges to Witness Keat Chhon (Sept. 25, 2009) (requesting appearance as witness due to past statements); and Senator Ouk Bunchhoeun, Letter from the Co-Investigating Judges to Witness Ouk Bunchhoeun (Sept. 25, 2009) (requesting appearance as witness due to past statements). The identity of the sixth witness is unknown.

138. Second Decision on Nuon Chea's and Ieng Sary's Appeal Against OCIJ Order on Requests to Summon Witnesses (Public Redacted), Case No. 002/19-09-2007-ECCC/OCIJ, ¶ 32–39 (Pre-Trial Chamber Sept. 9, 2010). The Pre-Trial Chamber relied on *Prosecutor v. Haraqija and Morina*, Case No. IT-04-84-R77.4, Judgment on Allegations of Contempt (Int'l Crim. Trib. for the Former Yugoslavia Dec. 17, 2008); *Prosecutor v. Beqaj*, Case No. IT-03-66-T-R77, Judgment on Contempt Allegations (Int'l Crim. Trib. for the Former Yugoslavia May 23, 2005); and *Prosecutor v. Seselj*, Case No. IT-03-67-AR77/2, Decision on the Prosecution's Appeal Against the Trial Chamber's Decision of 10 June 2008 (Int'l Crim. Trib. for the Former Yugoslavia July 25, 2008).

139. *Second Decision on Nuon Chea's and Ieng Sary's Appeal Against OCIJ Order on Requests to Summon Witnesses*, Case No. 002/19-09-2007-ECCC/OCIJ, ¶ 36–37.

140. *Id.* ¶ 37.

ings related to Rule 35, there must be sufficient grounds showing interference with the administration of justice.[141] Finally, before sanctions can be imposed on an individual for a violation of Rule 35, the burden of proof must be satisfied beyond a reasonable doubt.[142]

The Pre-Trial Chamber decision not only illustrates the contours of Rule 35 but also highlights the need for a free press to cover ECCC developments. At issue in the proceeding that produced the September 2010 decision was an allegation of political interference on behalf of a current government official who reportedly urged summoned witnesses not to testify before the tribunal.[143] Despite government spokesman Khieu Kanharith's statement that while the six summoned witnesses "could appear in court voluntarily, the government's position was that they should not give testimony,"[144] the Co-Investigating Judges dismissed several requests for investigative action and Rule 35 investigations filed by defense teams.[145]

On appeal, the Pre-Trial Chamber failed to reach a majority decision on whether the statement of Khieu Kanharith constituted a "reason to believe" that there was an interference with the administration of justice under Rule 35.[146] The Pre-Trial Chamber was sharply divided. The two international judges stated "no reasonable trier of fact could have failed to consider" that there was a reason to believe an interference with the administration of justice pursuant to Rule 35(1)(d) had occurred.[147]

In contrast, the Cambodian judges distinguished Khieu Kanharith's use of the term "should not" from use of the term "shall" and concluded that there was no absolute order that the individuals should not testify.[148] The Cambodian judges also reasoned that because the statement was reported by the *Phnom Penh Post*, it was an inadequate and unreliable source of information.[149] In addition, the Cambodian judges considered that because Khieu Kanharith was of a lower status, rank, and title than

141. *Id.*

142. *Id.* ¶ 39.

143. Sebastian Strangio & Cheang Sokha, *Government Testimony Could Bias KRT: PM*, PHNOM PENH POST, Oct. 9, 2009.

144. *Id.*

145. *Second Decision on Nuon Chea's and Ieng Sary's Appeal Against OCIJ Order on Requests to Summon Witnesses*, Case No. 002/19-09-2007-ECCC/OCIJ, ¶ 4–5.

146. *Id.* ¶ 41.

147. *Id.* ¶ 6 (opinion of Judges Catherine Marchi-Uhel and Rowan Downing) (noting that the Pre-Trial Chamber should investigate the matter because the Co-Investigating Judges have "repeatedly refused to investigate this matter and may not, in these circumstances be the body most suitable to conduct an investigation into these allegations of interference").

148. *Id.* ¶ 7 (opinion of Judges Prak Kimsah, Ney Thol, and Huot Vuthy).

149. *Id.* ¶ 8.

the six dignitaries summoned, he was "in principle not entitled to order or coerce those of higher status to follow . . . orders."[150]

The division among the Pre-Trial Chamber raises great concern regarding the potential for political interference at the ECCC, especially considering Cambodia's domestic culture of corruption in the judiciary.[151] The division among international and domestic judges, a common occurrence at the ECCC, raises red flags and highlights the importance of a free press to cover ECCC proceedings not only to fulfill the tribunal's objective to serve as a model for domestic Cambodian courts but also to ensure that ECCC proceedings themselves are fair and grounded in the law. Without public scrutiny, the ECCC has little accountability during the pretrial period, and the Cambodian people are deprived of vital information during confidential investigations that span the course of several months.[152]

While the Pre-Trial Chamber has established some of the procedural requirements regarding Rule 35, it has not yet applied those standards to allegations of media interference with the administration of justice. In potential sanctions against journalists, the Co-Investigating Judges and Pre-Trial Chamber are likely to rely on recent contempt jurisprudence at the ICTY since Cambodian domestic law has no similar provision for sanctioning the press.[153] The most recent case, *Prosecutor v. Hartmann*,[154] will likely prove very influential and is the first ICTY contempt case to balance confidentiality orders with freedom of expression.

III. CONTEMPT AT THE ICTY: DELIBERATE VIOLATION OF A PROTECTIVE ORDER

Unlike the ECCC, the ICTY, like most other international tribunals, operates under adversarial procedural rules, and its contempt jurisprudence is based on breaches of protective orders that occurred during trial

150. *Id.* ¶ 9.

151. Special Rapporteur on the Situation of Human Rights in Cambodia, *supra* note 23, ¶ 52.

152. In Case 001 against Duch, prosecutors filed their introductory submission on July 18, 2007 thus beginning the judicial investigation. Closing Order indicting Kaing Guek Eav alias Duch (Public Redacted), Case No. 001/18-07-2007-ECCC-OCIJ, ¶ 4 (Office of the Co-Investigating Judges Aug. 8, 2008). The investigation ended nearly a year later on May 15, 2008, *id.* ¶ 7, and the closing order was issued on August 8, 2008. In Case 002, the prosecutors filed their introductory submission on July 18, 2007, and the closing order was not filed until September 15, 2010. Closing Order, Case No. 002/19-09-2007-ECCC-OCIJ, ¶ 3–14 (Office of the Co-Investigating Judges, Sept. 15, 2010).

153. *See* CAMBODIAN CODE OF CRIM. P.

154. Prosecutor v. Hartmann, Case No. IT-02-54-R77.5, Judgment on Allegations of Contempt (Int'l Crim. Trib. for the Former Yugoslavia Sept. 14, 2009).

proceedings otherwise presumed public.[155] Nonetheless, the ECCC relies heavily on ICTY jurisprudence, and recent contempt proceedings of the ICTY are likely to prove highly influential should the tribunal sanction pursuant to Rule 35.

Section A explains the contours of protected information at the ICTY, while section B summarizes the current state of the law. Section C analyzes the most recent ICTY contempt case, *Prosecutor v. Hartmann*, and concludes by suggesting that *Hartmann* should hold little persuasive value at the ECCC.

A. The Contours of Protected Information at the ICTY

The ICTY operates under an adversarial system in which trial proceedings are open to the public.[156] During the trial period, protective orders may be granted at the request of parties pursuant to ICTY Procedural Rule 69, which ensures the protection of victims and witnesses. In addition, a judge or trial chamber may order the nondisclosure of documents or information in exceptional circumstances, pursuant to ICTY Rule 53.[157]

Historically, individuals who were granted access to confidential information by the tribunal were put on clear notice. For example, in a 2003 decision on a motion for nondisclosure, the ICTY trial chamber permitted defendant Vojislav Seselj access to the identity of witnesses protected pursuant to Rule 69.[158] The order provided clear instructions that detailed what information was protected.[159] The trial chamber also made clear that if Seselj found it necessary to disclose information to others in building his case, he was obligated to instruct the other individuals that the material was not to be copied, reproduced, publicized, or disclosed in any manner.[160] The protective order ended with a clear direction that any breach would result in contempt proceedings in accordance

155. *See*, *e.g.*, ICTY R. P. & EVID., Rev. 45, 8 Dec. 2010, r. 69; r. 53 (requiring affirmative steps to protect victims, witnesses, and information).

156. *See id.* r. 69 (allowing for protection of victims and witnesses); r. 53 (allowing for nondisclosure of information); r. 75 (allowing for in camera hearings to protect victims and witnesses).

157. *Id.* r. 53(a).

158. Vojislav Seselj, Assistant Professor of political science at the University of Sarajevo, was charged with fourteen counts of crimes against humanity and violations of the laws and customs of war. In 2009, Seselj was found to have knowingly and willfully interfered with the administration of justice by disclosing confidential information contained in orders granting protective measures to three witnesses and by disclosing excerpts of a protected witness statement in a book that he authored. Prosecutor v. Seselj, Case No. IT-03-67-R77.2, Decision on Allegations of Contempt (Int'l Crim. Trib. for the Former Yugoslavia Jan. 21, 2009).

159. *See, e.g.*, Prosecutor v. Seselj, Case No. IT-03-67-PT, Decision on Prosecution's Motion for Order of Non-Disclosure, ¶ 3 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 13, 2003).

160. *See, e.g.*, *id.* ¶ 4.

with ICTY Rule 77.[161] Thus, recipients of confidential information at the ICTY, like Seselj, were informed not only of the contours of the protected information but were also given notice regarding their obligations to keep that information private, and were warned of the potential use of sanctions should protected information be disclosed.

B. Contempt at the ICTY: Current State of the Law

ICTY Procedural Rule 77 governs contempt of the tribunal. The language of ICTY Rule 77 is nearly identical to that of ECCC Internal Rule 35,[162] and relevant portions state that

> (A) The Tribunal in the exercise of its inherent power may hold in contempt those who knowingly and wilfully interfere with its administration of justice, including any person who . . .
>
> (ii) discloses information relating to those proceedings in knowing violation of an order of a Chamber . . . .[163]

The ICTY has prosecuted several reporters pursuant to Rule 77(ii), and until *Hartmann*, divulging the identity of a protected witness was a substantive interference with the administration of justice that resulted in the convictions.[164]

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161. *See, e.g.*, *id.* ¶ 7.

162. In addition, the International Criminal Tribunal for Rwanda Rules of Procedure and Evidence Rule 77 and the Special Court for Sierra Leone Rules of Evidence and Procedure Rule 77 are identical to ICTY Rule 77.

163. It is important to note that the ICTY is modeled after a common law system in which there is no express presumption of confidentiality, and investigations are conducted by prosecutors as opposed to Co-Investigating Judges. And while Rule 77 has been applied only during trial proceedings, legislative history suggests that it is intended to be applied at any phase of proceedings; for example, in December 1998, the word "Trial" was omitted from the rule, suggesting that Rule 77 is to be applied at any stage of the proceedings, despite the fact that Rule 77 is located in Part Six of the ICTY Rules of Procedure and Evidence: Proceedings before Trial Chambers. *See* ICTY R. P. & EVID., Rev. 12, 10 July 1999; ICTY R. P. & EVID., Rev. 14, 4 Dec. 1998.

164. In March 2006, Editor in Chief of *Hrvatski List*, Ivica Marijacic, was convicted and sentenced to pay a fine of 15,000 Euros after he published an article in which the identity of a protected witness, the statement of the witness, and the fact that the witness had testified in nonpublic proceedings before the tribunal were made public. Prosecutor v. Ivica Marijacic & Markica Rebic, Case No. IT-95-14-R77.2, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Mar. 10, 2006). In February 2007, freelance journalist Domagoj Margetic was sentenced to three months imprisonment and a fine of 10,000 Euros when he published a complete confidential witness list from the case *Prosecutor v. Tihomir Blaskic* on his website. Prosecutor v. Domagoj Margetic, Case No. IT-95-14-R77.6, Judgment on Allegations of Contempt (Int'l Crim. Trib. for the Former Yugoslavia Feb. 7, 2007). In March 2007, Editor in Chief of the *Slobadna Dalmacija*, Josip Jovic, was sentenced to pay a fine of 20,000 Euros for disclosing the identity and testimony of a protected witness. Prosecutor v. Jovic, Case No. IT-95-14 & 14/2-R77-A, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Mar. 15, 2007). In July 2008, Baton Haxhiu, former editor of a Kosovo newspaper, was sentenced to pay a fine of 7,000 Euros after he revealed the identity of a protected witness in an article he wrote and

A violation of ICTY Rule 77 requires that an individual knowingly and willfully interfere with the administration of justice. The requisite mens rea for a violation of Rule 77(ii) is knowledge that the disclosure in question violates an order of a chamber.[165] The disclosure must be deliberate and may be inferred from circumstantial evidence. While willful blindness and reckless indifference can establish intent, mere negligence is insufficient.[166] Specific intent to interfere with the administration of justice is not required.[167]

The requisite actus reus under Rule 77(A)(ii) "is the physical act of disclosure of information relating to proceedings before the [t]ribunal, where such disclosure [objectively] breaches" either a written or oral order of a chamber.[168] The ICTY requires no materiality of harm, nor does it make an exception for information that is already in the public domain—once a knowing violation of a chamber's order is proved, no additional proof of harm to the tribunal's administration of justice is required in order to sustain a conviction of contempt.[169] Thus, a violation of a court order "as such" constitutes an interference with the tribunal's administration of justice.[170]

C. Contempt at the ICTY: The Case Against Florence Hartmann

Prosecutor v. Hartmann is not only the most recent ICTY contempt case but it is also the first case to find a journalist guilty of contempt for discussing the existence of a confidential appellate chamber document that she herself had not seen. Hartmann's offense is thus very similar to breaches of confidentiality at the ECCC, in which reporters were warned for referencing confidential documents to which they had no access.[171] While there are striking similarities between *Hartmann* and the sort of case likely to come before the ECCC, there are also very important pro-

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published. Prosecutor v. Haxhiu, Case No. IT-04-84-R77.5, Judgment on Allegations of Contempt (Int'l Crim. Trib. for the Former Yugoslavia July 24, 2008).

165. Prosecutor v. Seselj, Case No. IT-03-67-R77.2-A, Judgment, ¶ 26 (Int'l Crim. Trib. for the Former Yugoslavia May 19, 2010) (citing Prosecutor v. Jovic, Case No. IT-95-14 & 14/2-R77-A, Judgment, ¶ 27 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 15, 2007).

166. Prosecutor v. Hartmann, Case No. IT-02-54-R77.5, Judgment on Allegations of Contempt, ¶ 22 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 14, 2009).

167. *Id.* ¶ 53.

168. *Id.* ¶ 20–21.

169. *Seselj*, Case No. IT-03-67-R77.2-A, ¶ 29 (citing *Jovic*, Case No. IT-95-14 & 14/2-R77-A, ¶ 20).

170. *Id.* ¶ 20.

171. *See* Warning for Unauthorized Disclosure of Confidential Information, Case No. 002/19-09-2007-ECCC/OCIJ, ¶ 1 (Pre-Trial Chamber July 9, 2010); Directive on Classification of Pre-Trial Chamber Documents, Case No. 002/07-07-2010-ECCC/PTC10, ¶ 5 (Pre-Trial Chamber Sept. 9, 2010).

cedural differences governing the ICTY and the ECCC—differences that warrant departure from *Hartmann*'s precedent.

1. The Protection of Legal Reasoning and Extraneous Information

Hartmann was convicted for releasing politically sensitive information regarding the role of Serbia in the massacre of Bosnian Muslims—information the tribunal likely worried could impact peace in the region and spark political unrest. In 2007, Hartmann, a former spokesperson for ICTY Prosecutor Carla del Ponte,[172] published a book, *Peace and Punishment: The Secret War between Politics and International Justice*, and a 2008 article entitled *Vital Genocide Documents Concealed*.[173] In her publications, Hartmann wrote that in the case against Slobodan Milosevic, the appeals chamber failed to release certain transcripts that evidenced the involvement of Serbia in the massacre of Bosnian Muslims. Hartmann stated that "ICTY judges kept key material from the public for the sole purpose of shielding Serbia from responsibility before another UN court."[174] In her discussion, Hartmann referenced two confidential appeals chamber decisions, and according to the ICTY specially appointed chamber, Hartmann addressed their contents and purported effect.[175]

The specially appointed chamber ruled that Hartmann interfered with the administration of justice by knowingly disclosing information contained in confidential decisions in the case of *Prosecutor v. Slobodan Milosevic*.[176] Hartmann disclosed the date of the decisions, their confidential character, the identity of Serbia as an applicant for protective measures, and the existence of underlying documents, but the special chamber also ruled that the legal reasoning contained in the decisions was itself protected by the order:

> [L]egal reasoning by its very nature requires the application of the law to the facts, and therefore requires the whole reasoning to be protected. The law is public while the facts often are not. The application of the law to the facts is confidential by virtue of the mix of the two.[177]

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172. Carla del Ponte was also restricted from discussing controversies regarding the ICTY's disclosure practices, discussed at length in the recent memoir, *Madame Prosecutor*. *See* Katie Paul, *Silent Warrior*, NEWSWEEK, Feb. 27, 2009, *available at* http://www.newsweek.com/2009/02/26/silent-warrior.html.

173. *Hartmann*, Case No. IT-02-54-R77.5, ¶ 4.

174. Florence Hartmann, *Vital Genocide Documents Concealed*, BOSNIAN INST., Jan. 21, 2008, http://www.bosnia.org.uk/news/news_body.cfm?newsid=2341.

175. *Hartmann*, Case No. IT-02-54-R77.5, ¶ 33.

176. *Id.* ¶ 2.

177. *Id.* ¶ 35.

In so holding, the specially appointed chamber greatly expanded the scope of protective measures at the ICTY.

2. No Requirement of Specific Intent

Despite Hartmann's defense that she did not intend to breach an order of the tribunal, the specially appointed chamber found that Hartmann possessed the requisite intent and failed to require specific intent to breach a protective order under Rule 77.[178] Unlike in previous cases of contempt at the ICTY, such as *Seselj*,[179] Hartmann never saw the appeals chamber decisions herself, nor did she sign a receipt for a protective order; rather, Hartmann relied on an informational interview of another individual.[180] Yet, the chamber refused to consider that Hartmann's intent had been undermined.[181] What did matter, the chamber reasoned, was that Hartmann became aware of the confidential information and the fact of its confidential status but chose to disclose the information nonetheless.[182] The chamber placed great weight on Hartmann's knowledge of the confidential status, apparent from her articles' explicit reference to the documents' "confidential" nature, as well as a warning from the ICTY registrar sent to Hartmann before publication.[183] Despite the fact that Hartmann never read the confidential decisions or signed a receipt for a protective order, she was found to possess the necessary mens rea under Rule 77.

3. No Mistake-of-Fact Defense

In its decision, the chamber suggested that Hartmann should have first checked with the tribunal to ensure that her publications were in compliance with the law, and that her failure to do so precluded her from using a mistake-of-fact defense.[184] Although the information Hartmann disclosed was generally known to the public and was the subject of media discussion prior to her publications, the chamber failed to consider that Hartmann could have reasonably believed the information was no longer confidential.[185] Instead, the chamber reasoned, Hartmann should have checked with the United Nations or the tribunal prior to publication.[186]

178. *Id.* ¶ 55.
179. *See supra* text accompanying note 158.
180. *Hartmann*, Case No. IT-02-54-R77.5, ¶ 56.
181. *Id.* ¶ 57.
182. *Id.* ¶ 57.
183. *Id.* ¶ 64.
184. *Id.* ¶ 64.
185. *Id.*
186. *Id.*

4. Freedom of Expression

Prosecutor v. Hartmann is the first ICTY contempt case to specifically balance the need for confidentiality with the protection of freedom of expression. In a brief discussion, the chamber noted jurisprudence of the European Court of Human Rights (ECHR), which requires that an interference with freedom of expression be legitimate, necessary, and proportionate in order to be permissible.[187] Yet, the chamber failed to conduct an adequate balancing test under the ECHR framework and ultimately concluded that the use of sanctions was not an infringement on Hartmann's freedom of expression.

First, the chamber considered the protective order that shielded the appellate court opinions and its purpose. According to the chamber, the purpose of the provision was to secure the cooperation of a foreign state, Serbia, as well as the public interest in receiving information.[188] The contours of the protected information were made clear through an express order.[189] Therefore, whether the public was entitled to the information was to be determined by the tribunal, not reporters. The tribunal sharply criticized Hartmann and stated that "[i]ndividuals, including journalists, may not—with impunity—publish information in defiance of such orders on the basis of their own assessment of the public interest in accessing that information."[190] Because Hartmann published her work in violation of a legitimate express order, the chamber concluded that Hartmann undermined the confidence of the tribunal and potentially undermined "the level of cooperation that is vital to the administration of international justice."[191]

While the chamber acknowledged the ECHR test, it was inadequately applied when the chamber determined that there was no interference with Hartmann's freedom of expression. The chamber conducted an incomplete analysis of the public's interest in receiving the information and held that the contempt proceedings were proportionate absent substantial reasoning.[192] In holding that there was no interference with Hartmann's freedom of expression, the chamber deviated from well-established precedent, the implications of which could be far-reaching.

The chamber's decision only briefly addressed what constitutes a wealth of jurisprudence at the ECHR—jurisprudence that specifically addresses the role of the press in confidential judicial investigations in

187. *Id.* ¶ 68.
188. *Id.*
189. *Id.* ¶ 72–73.
190. *Id.* ¶ 71.
191. *Id.* ¶ 74.
192. *Id.*

civil law courts.[193] Due to its specific application in civil law systems and the wealth of case law available, the ECHR jurisprudence regarding infringement on freedom of expression serves as a better basis upon which the ECCC should develop its case law.

IV. SANCTIONS AT THE EUROPEAN COURT OF HUMAN RIGHTS: A NECESSARY AND PROPORTIONATE INFRINGEMENT ON FREEDOM OF EXPRESSION

ICTY Rule 77 is nearly identical to ECCC Internal Rule 35; however, Rule 77 applies at ICTY trial proceedings, which are presumed to be public at both the ECCC and ICTY, and are protected only after the court issues an affirmative protective order.[194] The ECHR has expressly ruled on media access and breaches of confidentiality during confidential judicial investigations in countries that use civil law systems and thus establishes more appropriate jurisprudence for use at the ECCC.

Unlike the ICTY, violations of protective orders or breaches of confidential judicial investigations are not "as such" considered to be interferences; the ECHR applies a case-by-case balancing test to determine whether an infringement on freedom of expression is permissible. First, there must be a legitimate aim for establishing a confidentiality order;[195] second, the legitimate aim must be a necessary infringement in a democratic society, demonstrable by a pressing social need;[196] and finally, the interference must be proportionate to the legitimate aims pursued, and the reasons justifying the interference must be relevant and sufficient.[197]

In evaluating international standards regarding sanctions under Internal Rule 35, the ECCC may seek guidance in procedural rules established at the international level, and there is no mandate that any one source should be given greater deference in such inquires.[198] Thus, there is no compelling reason why the ECCC should provide the ICTY contempt jurisprudence more deference than ECHR jurisprudence. In fact, because the ECHR applies in countries that use a civil law system, its

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193. *See, e.g.*, Dupuis v. France, 47 Eur. Ct. H.R. 52, 1152–54 (2007); Hrico v. Slovakia, 41 Eur. Ct. H.R. 18, 311 (2004); Fressoz v. France, 31 Eur. Ct. H.R. 654, 43 (1999); Weber v. Switzerland, 12 Eur. Ct. H.R. 508, 510–11 (1990).

194. *See* ICTY R. P. & EVID. r. 69 (allowing for protection of victims and witnesses), r. 53 (allowing for nondisclosure of information), and r. 75 (allowing for in camera hearings to protect victims and witnesses); ECCC Internal Rule 79(6) (Hearings of the trial chamber shall be conducted in public.).

195. *Hrico*, 41 Eur. Ct. H.R. at 311.

196. *Id.*

197. *Id.*; *see also Dupuis*, 47 Eur. Ct. H.R. at 1152–54.

198. Framework Agreement, *supra* note 9, art. 12(1); ECCC Law, *supra* note 9, art. 23 (new).

case law is more specifically tailored to the unique procedural laws of the ECCC.

A. Watchdogs of Democracy and Privacy Interests of Public Officials

The ECHR not only recognizes the necessary and proportionate balancing test during confidential judicial investigations but also the importance of a free press to facilitate political debate. For instance, in *Dupuis v. France*, two journalists were found guilty of possessing information obtained through a breach of confidentiality.[199] The offense occurred when the journalists published information relating to the judicial investigation of a telephone-tapping program initiated by the former French president.[200] On an appeal brought by the convicted French journalists, the ECHR affirmed that freedom of expression is an essential foundation of democratic society and that the safeguards afforded to the press hold special importance.[201] The court recognized not only the media's task of imparting such information and ideas but also the public's right to receive such information.[202]

Dupuis stands for the principle that in cases involving important matters of public debate, the ECHR requires a greater showing of necessity to infringe on freedom of expression. The court considered that when journalists report information obtained though a breach of a confidential investigation, yet contribute to an important public debate, they serve as "watchdogs" of democracy and should be afforded greater access to information.[203] Thus, in weighing the legitimate purpose of confidentiality and the public's interest in the information the two journalists divulged, the ECHR found that the French court violated the journalists' freedom of expression.[204]

Also of importance in *Dupuis* is the court's recognition that limits of freedom of expression are more difficult to justify when the rights of politicians are involved, for such individuals knowingly subject themselves to close scrutiny and must therefore display a greater degree of tolerance: "The Court attaches the highest importance to freedom of expression in the context of political debate and considers that very strong

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199. *Dupuis*, 47 Eur. Ct. H.R. at 1142.

200. *Id.* at 1141.

201. *Id.* at 1153.

202. *See id.*

203. *Id.* at 1157; *see also* Fressoz v. France, 31 Eur. Ct. H.R. 654, 43 (1999) ("The press plays an essential role in a democratic society. Although it must not overstep certain boundaries, in particular the protection of the reputation and rights of others and the need to prevent the disclosure of confidential information, its duty nonetheless is to communicate information and views on every matter in the public interest.").

204. *Dupuis*, 47 Eur. Ct. H.R. at 1142.

reasons are required to justify restrictions on political speech."[205] Because the French president's privacy interests were at stake, and because his role as president exposed him to greater public scrutiny, the interests of the public outweighed the interests of privacy.[206]

Similarly, journalists threatened with sanctions at the ECCC are those covering important proceedings, including those related to allegations of political bias at the court.[207] Like in *Dupuis,* the journalists are serving as watchdogs of democracy by ensuring that the tribunal is accountable to a well-informed public. Moreover, the individuals whose privacy interests are at stake are also former public officials. Like the French president in *Dupuis,* the former senior leaders of the Khmer Rouge sacrificed their privacy when they assumed leadership positions. Therefore, their privacy interests are considerably less than members of the general population, and the public interest should prevail.

B. Materiality is an Important Consideration in Infringements on Freedom of Expression

In weighing the concerns of freedom of expression and confidential investigations, the ECHR considers the materiality of the breach and whether information was already in the public domain at the time of the alleged breach. For instance, in *Weber v. Switzerland*, the court determined that information already in the public domain at the time it was divulged by a journalist was outside the scope of confidentiality protections.[208] In *Weber*, a Swiss journalist was charged for breaching the confidentiality of a judicial investigation when he made statements at a press conference that revealed the existence of a judicial investigation.[209] The trial court found it of little importance that the matter discussed was already known to the public and ruled that the actus reus of the crime was met, even if the offense had been committed inadvertently.[210]

On appeal, the ECHR considered that the information was already in the public domain, and because there was no material breach, the infringement on freedom of expression was improper.[211] The court agreed that the imposition of a fine for Weber's alleged breach was an unjustified interference with his right to freedom of expression.[212] While the

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205. *Id.* at 1155.

206. *Id.*

207. *See* Directive on Classification of Pre-Trial Chamber Documents, Case No. 002/07-07-2010-ECCC/PTC10, ¶ 5 (Pre-Trial Chamber Sept. 9, 2010).

208. Weber v. Switzerland, 12 Eur. Ct. H.R. 508, 510–11 (1990).

209. *Id.*

210. *Id.* at 511–12.

211. *Id.*

212. *Id.*

government's interest in ensuring proper conduct of the investigation was necessary,[213] the imposition of a penalty was not, for the interest in maintaining the confidentiality no longer existed when Weber disclosed information that was already in the public domain.[214] *Weber* thus establishes an important principle: although protection of confidential investigations may be necessary, when information is already in the public domain, disclosure of the existence of confidential judicial investigations, or the contents of information that are already known to the public, does not itself constitute a violation worthy of court action.[215]

The principle articulated in *Weber* is very important considering much of the information contained in confidential judicial investigations at the ECCC is already in the public domain. For instance, the identity of Duch and his involvement with S-21 is well-known and documented.[216] Moreover, the ECCC only has jurisdiction to prosecute individuals for crimes that occurred over thirty years ago.[217] Considering the length of judicial investigations, which span months,[218] unintended breaches of confidentiality are often immaterial because there is no considerable impact on the outcome of the investigations if select facts become known to the public. Given the public interest in information regarding the ECCC and the court's mandate to keep the public informed, breaches without a material impact should not serve as a basis for Rule 35 sanctions.

V. RECOMMENDATIONS TO THE ECCC REGARDING THE USE OF SANCTIONS AGAINST JOURNALISTS PURSUANT TO INTERNAL RULE 35(1)(A)

Due to its foundation in principles of civil law, the ECCC is a unique international criminal tribunal that operates under procedural rules far different from those that govern the ICTY and many other tribunals. Thus, the adoption of a per se rule that any breach of a confidential judicial investigation operates as a violation of ECCC Internal Rule 35(1)(a) ignores the unique nature of the court and its obligations to keep the public informed at all stages of proceedings.

Section A briefly suggests that the ECCC establish clear standards governing the release of information. Section B suggests that in its warnings to journalists who breached the confidentiality of the investigation,

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213. *Id*. at 523.

214. *Id.* at 524–25.

215. *Id.*

216. *See generally* CHANDLER, *supra* note 1.

217. The ECCC has jurisdiction to prosecute only those crimes that occurred between the years of 1975 and 1979. ECCC Law, *supra* note 9, art. 1 (new); Framework Agreement, *supra* note 9, art. 1.

218. *See supra* text accompanying note 152.

the ECCC should include clear reasoning sufficient to put journalists on appropriate notice so as to not create a disincentive to report on sensitive matters. Finally, section C recommends a case-by-case approach to evaluating the use of sanctions against journalists—one that considers the materiality of the interference, the importance of the confidentiality need, and the intent of the accused journalist.

A. The ECCC Should Establish Clear Standards Regarding What Information is Protected During Confidential Judicial Investigations

At the ECCC, there is great uncertainty regarding what information is public and what is protected by confidential judicial investigations. In a country where a significant percentage of the population identifies as a survivor of the Khmer Rouge, it is neither possible to keep information secret, nor is it in the country's best interests to do so.[219] Considering that crimes for which defendants are being tried happened over thirty years ago, a great amount of information is already in the public domain. In order to keep the public informed in pursuit of its obligation to serve as a means of national reconciliation and as a model for the domestic Cambodian court, the ECCC should operate under clear standards that govern the distribution of public information.[220]

Absent standards for protected information, the disincentive to report on sensitive matters at the ECCC will continue. The disincentive will further undermine the public's access to knowledge and hinder the establishment of a free press. In *Hartmann*, the ICTY found that Hartmann should have verified the information in her book with the court before publication,[221] but requiring ECCC journalists to verify their information with the tribunal prior to publication is unrealistic and not in the public interest. Such requirements would only increase the public's speculation of political interference and further jeopardize the success of the tribunal by increasing opportunities for corruption and bias.[222]

Moreover, clear standards differentiating private and public information would not only encourage media reporting of the ECCC while ensuring the protection of serious confidentiality needs but would also provide a positive example for domestic courts. The current practice of disclosing information on a basis that lacks consistency or well-reasoned decisions only exacerbates the problems of corruption and secrecy

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219. *See supra* text accompanying note 9.

220. *See* Nelson, *supra* note 78.

221. Prosecutor v. Hartmann, Case No. IT-02-54-R77.5, Judgment on Allegations of Contempt, ¶ 64 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 14, 2009).

222. Jaya Ramji-Nogales, *Designing Bespoke Transitional Justice: A Pluralist Process Approach*, 32 MICH. J. INT'L L. 1, 42 (2010).

among domestic courts. Without clear standards at the ECCC, there is little incentive for domestic courts to provide for greater transparency. Absent transparency at both the ECCC and local courts, the public will continue to lose faith in the judiciary, and the legacy of the ECCC will be undermined.

B. The ECCC Should Issue Clear Warnings When the Confidentiality of Investigations Has Been Breached

Because the ECCC presumes that information during pretrial investigations is entirely confidential, it is imperative that the ECCC issue clear warnings or orders before imposing sanctions on journalists. The plain language of Rule 35(1)(a) itself requires that in order to find an interference with the administration of justice, an individual must have disclosed "confidential information *in violation of an order* of the Co-Investigating Judges or the Chambers."[223]

Although the ECCC does issue warnings to journalists enumerating what articles breached the confidentiality of judicial investigations, such orders fail to include any further explanation.[224] The warnings do not disclose what information triggered the violation or why divulging such information was forbidden.[225] The result is that journalists are forced to make difficult decisions that balance their professional obligations to keep the public informed with their own personal fears of being sanctioned by the ECCC. Members of the press are thus dissuaded from reporting on important issues at the ECCC, which hinders the court's goals of national reconciliation and serving as a model for the domestic Cambodian system.[226] The ECCC should therefore disclose what information triggered the violation of the investigation so as to ensure that sensitive material is protected but allow as much public access as possible.

C. The ECCC Should Engage in a Case-by-Case Inquiry to Determine if an Interference with the Administration of Justice Occurred

The vague standard of confidential document filings, coupled with the broad duty of confidentiality outlined in the ECCC Practice Direction and broad applicability of Rule 35 sanctions, warrants departure from the ICTY's determination that violations of protective orders "as such"

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223. ECCC Internal Rules, *supra* note 18, r. 35 (emphasis added).

224. *See* Warning for Unauthorized Disclosure of Confidential Information, Case No. 002/19-09-2007-ECCC/OCIJ (Pre-Trial Chamber July 9, 2010); Directive on Classification of Pre-Trial Chamber Documents, Case No. 002/07-07-2010-ECCC/PTC10, ¶ 5 (Pre-Trial Chamber Sept. 9, 2010).

225. *See, e.g.*, *Warning for Unauthorized Disclosure of Confidential Information*, Case No. 002/19-09-2007-ECCC/OCIJ, ¶ 1.

226. *See* Kinetz, *supra* note 92.

amount to interference with the administration of justice. Rather, the presumption of confidential judicial investigations and the absence of express protective orders necessitates a case-by-case balancing test of the purported government interest and interference with freedom of expression. The case-by-case analysis should consider three factors: the materiality of the interference, the legitimacy of the confidentiality need, and the intent of the journalist.

1. Material Interference

First, in its case-by-case approach, the ECCC should require a material interference with the administration of justice before issuing sanctions pursuant to Rule 35. While the ICTY's departure from such a showing may be warranted because it issues clear, affirmative protective orders,[227] the ECCC operates under different standards. Due to the fact that all information is presumed confidential, and a great deal of information is already in the public domain, the ECCC should encourage public access to information by loosening restrictions on journalists. Because of the great uncertainty regarding what information is protected, anything less than a material violation is unfair to journalists who are acting as watchdogs of democracy in a country plagued with corruption. Enforcing sanctions without a material interference only amounts to the protection of confidential investigations absent a compelling reason and will only operate to further erode public opinion of the ECCC.[228]

2. Legitimacy of the Confidentiality Provision

Second, the ECCC should carefully consider the underlying nature of the information that warrants protection before deciding whether to infringe on freedom of expression, for national reconciliation cannot be realized without establishing the truth.[229] The public has a strong interest in ECCC proceedings, and therefore, the ECCC should require that a legitimate purpose outweigh the public's interest in information before infringing on journalists' freedom of expression.

Requiring legitimate reasons for confidentiality provisions is important to ensure not only that the public receives adequate information but also that the ECCC is held in high regard and therefore supports—and does not undermine—the public perception of the judiciary. As re-

227. *See, e.g.*, Prosecutor v. Seselj, Case No. IT-03-67-PT, Decision on Prosecution's Motion for Order of Non-Disclosure, ¶ 3 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 13, 2003).

228. *See* Letter from Ang Udom & Michael G. Karnava, Co-Lawyers for Ieng Sary, to Sean Visoth, Kranh Tony, & Knut Rosanhaug, *supra* note 133.

229. *E.g.*, Transcript of Prosecutors v. Duch at 69–70, Case No. 001/18-07-2007/ECCC/TC (Trial Chamber July 26, 2010) (E1/75.1).

cently as September 2010, the United Nations Human Rights Council noted that in Cambodia, "[t]here does not seem to be a proper . . . balance between safeguarding private reputation and making public information concerning matters of public interest.[230] The Cambodian government admitted that "the judiciary has not yet gained full confidence from the public,"[231] and Cambodian citizens have sought alternative methods of justice.[232] Adopting a balancing test that considers the legitimacy of the protective interest would thus provide a good example to the domestic Cambodian courts that sanctions for breaches of confidentiality should be implemented only when a legitimate confidentiality need exists. Absent public trust in the ECCC, the Cambodian people will continue to distrust the domestic judiciary, and the ECCC will not fully achieve its objective to leave a legacy of democratization.

3. Intent of Journalists

The ECCC should sanction only journalists who act with the intent to interfere with the administration of justice, and the mistake-of-fact defense should be available to journalists who mistakenly disclose confidential information. In light of the absence of clear standards regarding the disclosure of information, broad duty of confidentiality, and the well-known nature of many of the facts involved in the investigation, holding journalists responsible for their inadvertent disclosure of protected information would not only be unfair but it would also further the disincentive to report on sensitive information.

While in *Hartmann* the ICTY rejected a requirement of specific intent to interfere with the administration of justice[233] and failed to recognize Hartmann's mistake-of-fact defense,[234] the procedural rules at the ECCC are far different from those at the ICTY. First, in most cases at the ICTY, individuals are put on greater notice that they have been exposed to confidential information because affirmative protective orders are issued pursuant to Rules 69 and 53.[235] With so much information already in the public domain, and in the absence of affirmative protective orders, the ECCC should require a greater showing of intent than that required at the ICTY to ensure that sanctions are issued only to those who did in fact *knowingly* interfere with the administration of justice.

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230. Special Rapporteur on the Situation of Human Rights in Cambodia, *supra* note 23, ¶ 33.

231. *Id.* ¶ 40.

232. *Id.* ¶ 42.

233. Prosecutor v. Hartmann, Case No. IT-02-54-R77.5, Judgment on Allegations of Contempt, ¶ 56–57 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 14, 2009).

234. *Id.*

235. *See, e.g.*, Prosecutor v. Seselj, Case No. IT-03-67-PT, Decision on Prosecution's Motion for Order of Non-Disclosure, ¶ 3 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 13, 2003).

VI. CONCLUSION

As the first hybrid court that is supported by the United Nations but operates completely within a domestic court system, the ECCC is uniquely poised to lead the international community as a model for justice and reconciliation. In serving as both a domestic model and means of national reconciliation, the ECCC has the potential to help eradicate corruption in Cambodia and contribute to the development of a legitimate, stable judiciary.[236]

Yet, in order to fulfill its objectives and its mandate to provide transparent proceedings whenever possible, the ECCC must regularly provide the public with information. Inconsistent disclosures undermine the legitimacy of the court and further contribute to the deterioration of the domestic legal system.

While the presumption of confidential judicial investigations is consistent with other civil law courts, it must not be abused. During the course of investigations that span months and include much information already in the public domain,[237] citizens should not be deprived of vital information—nor should journalists be forced to speculate what information is protected and what is not.[238] Rather, the ECCC should operate under clear standards that govern the disclosure of information to reduce the number of inadvertent disclosures. If confidential information is released, the ECCC should issue clear warnings. Yet, the notice should not simply list the sources of leaked confidential information. Instead, the ECCC should make efforts to narrowly tailor the confidentiality measures so as to provide for as much public access as possible. Clear standards, coupled with specific notice of alleged breaches of confidentiality, will likely reduce the potential for the use of sanctions pursuant to Rule 35. But if the opportunity to issue sanctions should arise, the ECCC should adopt a case-by-case test for contempt proceedings that departs from recent jurisprudence established in *Hartmann*.

While the ICTY serves as a model for many international criminal tribunals, its most recent jurisprudence regarding journalists and contempt is troubling. The sweeping provisions established most recently in *Hartmann* undermine the freedom of expression by unnecessarily protecting confidentiality provisions and rejecting the need for showings of material interference and specific intent. If applied at the ECCC, in the absence of express protective orders and where broad confidentiality provisions are coupled with equally broad duties of confidentiality,[239]

236. *Id.* ¶ 63–64.
237. *See supra* text accompanying note 152.
238. *See* Kinetz, *supra* note 92.
239. *See* ECCC Practice Direction, *supra* note 63, art. 8.

such standards would prove detrimental to the court's success by hindering national reconciliation and undermining the legitimacy of the court in the eyes of the public.

The balancing test established by the ECHR, which requires a showing of a legitimate interest in confidentiality, that the interest be a necessary infringement on freedom of expression, and that the interference is proportionate considering the public interest, offers a more appropriate standard to guide the development of ECCC case law. By using a case-by-case approach, the ECCC can ensure that journalists are not dissuaded from performing their vital functions of keeping the public informed. If these recommendations are adopted, the ECCC can continue to facilitate national reconciliation and ensure that the court serves as a model for the domestic Cambodian system by using transparent proceedings that are legitimate in the eyes of those for whom the tribunal was established—the Cambodian people.