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Scope of Judicial Discretion over Indictment at the Pre-Trial Level. Specifically addressing whether a Suspect or Charged Person may be indicted by the Co-Investigating Judges for specific criminal events that have not been specifically requested to be investigated in either an Introductory or Supplemental Submission against that Suspect by the Co-Prosecutors? If so, under what conditions?

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CASE WESTERN RESERVE
UNIVERSITY

SCHOOL OF LAW

MEMORANDUM FOR THE OFFICE OF THE PROSECUTOR
EXTRAORDINARY CHAMBERS IN THE COURT OF CAMBODIA

Issue: Scope of Judicial Discretion over Indictment at the Pre-Trial Level.

Specifically addressing whether a Suspect or Charged Person may be indicted by the Co-Investigating Judges for specific criminal events that have not been specifically requested to be investigated in either an Introductory or Supplemental Submission against that Suspect by the Co-Prosecutors? If so, under what conditions?

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Spring, 2016

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I. Introduction

A. Scope

This memorandum analyses the scope of the Co-Investigating Judges' discretion over indictment. Specifically, this memorandum considers the potential conditions under which a Co-Investigating Judge may indict a Charged Person or Suspect for specific criminal events that the Co-Prosecutors' Office did not expressly request in either the Introductory or Supplemental Submission(s).¹ The principle issue is whether the Co-Investigating Judges may exercise their power to indict without being restricted to the criminal events outlined in the Co-Prosecutors' Introductory or Supplemental Submission(s) (hereinafter collectively "Submissions") to the Co-Investigating Judges. This memorandum focuses on the ECCC Jurisdiction, Controlling Documents, and ECCC case law in an attempt to distinguish and define the scope of pre-trial judicial power over indictment at the ECCC.

B. Summary of Conclusions

- i. While there is a presumption of judicial control of indictments at the ECCC, this must be qualified by a respect for the rights of Parties and pursuit of a fair trial.**

The Co-Investigating Judges are restricted in their jurisdiction by the ECCC Law, Internal Rules, and the Agreement (hereinafter collectively "Controlling Documents") on the issue of indictment. Any interpretation of the Controlling Documents on the issue of judicial scope of indictment must safeguard the interests of Suspects, Charged Persons, Accused and Victims and ensure that the ECCC proceeding are fair, preserve a balance between the rights of the Parties, and guarantee separation between Prosecutors and Judges.

* Can a Suspect or Charged Person be indicted by the Co-Investigating Judges for specific criminal events that have not been specifically requested to be investigated in an Introductory or Supplemental Submission against that Suspect by the Co-Prosecutors? If so, under what conditions?

- ii. **The power of the Co-Investigating Judges to indict during a Closing Order should be subject to the same restrictions as their investigative and charging powers.**

Judicial control over indictment is not absolute, even when the Internal Rules are silent on an issue. Valid judicial Indictments must arise from properly conducted investigations. The power of the Co-Investigating Judges to indict during a Closing Order stems from their powers to charge and investigate because these powers are interconnected. Therefore, the power to indict should be subject to the same restrictions that apply to the judicial powers of investigation and charging.

- iii. **Interpretation of judicial scope where the ECCC Internal Rules are silent must serve the interests of justice and be demonstrative of the broader trends in judicial discretion permitted by the Controlling Documents and ECCC case law.**

There is a tradition of broader judicial power at the ECCC as compared to other international courts due to the ECCC's heavily inquisitorial roots. Still, this increased judicial discretion is not absolute. The scope of the Co-Investigating Judges' power is restricted by the Controlling Documents, ECCC Jurisdiction, and an obligation to increase court efficiency and expedite court proceedings to ensure a fair trial for Suspects, Charged Persons, and Civil Parties.

- iv. **The ECCC must maintain a clear separation of the organs of the court or risk making the office of the Co-Prosecutors redundant at the pre-trial level.**

It is ECCC mandate that the Court is made up of separate and independent organs and that any interpretation of the Controlling Documents must guarantee separation between Prosecutors and Judges. However, the ECCC is unlike other international courts in its broad approach to judicial control of indictment. Despite this, if the Co-Investigating Judges had unrestricted discretion over indictment then the Co-Prosecutors' Office would be seemingly redundant at the pre-trial level.

II. Factual Background

A. Khmer Rouge and the Purpose of the ECCC

The Extraordinary Chambers in the Court of Cambodia (hereinafter the “ECCC”) was established in 2006 to “bring to trial senior leaders and those most responsible for crimes committed during the time of the Democratic Kampuchea, also known as the Khmer Rouge regime, which lasted from 17 April 1975 to 6 January 1979.”² During that period, an estimated 1.7 million people died under orders from these leaders, whether from starvation, torture, execution, or forced labour.³

The ECCC was established by domestic law following an agreement between the Cambodian Government and the United Nations. The Agreement between the United Nations and the Royal Government of Cambodia of 2003 (hereinafter “the Agreement”) enumerates the provisions that the ECCC must follow during trial proceedings. Under Article 13 of the Agreement, “the rights of the Accused enshrined in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights (hereinafter the “ICCPR”) shall be respected through the trial process.”⁴

The ECCC is part of the domestic Cambodian court system and is considered a “hybrid” tribunal because of certain special features such as its ability to apply both national and international law.⁵ The hybrid tribunal model is seen as a way to provide full national

² See ECCC at a Glance, available at http://www.eccc.gov.kh/sites/default/files/ECCC%20at%20a%20Glance%20-%20EN%20April%202014_FINAL.pdf [Electronic copy provided in accompanying USB flash drive at Source 59].

³ *Id.*

⁴ *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*, Article 13, 6 June 2003, entered into force April 29 2005, U.N. Doc. A/Res57/228B (Annex)(13 May 2003). [Electronic copy provided in accompanying USB flash drive at Source 1].

⁵ See, ECCC at a Glance, *supra* note 1.

involvement in the trials while simultaneously ensuring that the international standards are met.⁶ Under the Law on the Establishment of the Extraordinary Chambers in the Court of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (hereinafter “ECCC Law”), the court “shall exercise its jurisdiction in accordance with the international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the International Covenant on Civil and Political Rights.”⁷ Under Article 14 of the ICCPR:

‘All Persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law....’⁸

The ECCC was designed within the existing court structure of Cambodia, but the ECCC Trial Chamber has emphasized on several occasions that the ECCC is a “separately constituted, independent and internationalized court,” with a “special and independent character within the Cambodian legal system....designed to stand apart from existing Cambodian courts and rule exclusively on a narrowly defined group of defendants for specific crimes within a limited period”.⁹ Additionally, the Court has sought to distinguish the procedure used by the ECCC from the procedure of domestic Cambodian courts, stating that it has a “self – contained regime of procedural law [to align with its] unique circumstances.”¹⁰ As observed by the Pre-Trial Chamber,

⁶ *Id.*

⁷ *Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea*, Article 33, 27 October 2004 (NS/RKM/1004/006). [Electronic copy provided in accompanying USB flash drive at Source 2].

⁸ *International Covenant on Civil and Political Rights*, opened for signature December 16, 1966, Article 14(1), B.A. res 2200A9XXI, 21 U.N. GAOR Supp. (No. 16), U.N. Doc A/6316(1966), 99 U.N.T.S. 171 (entered into force Mar. 23, 1976). [Electronic copy provided in accompanying USB flash drive at Source 6].

⁹ Jessica Peake, *A Spectrum of International Criminal Procedure: Shifting Patterns of Power Distribution in International Criminal Courts and Tribunals*, 26 Pace Int’l Rev. at 223 (2014), at 223.[Electronic copy provided in accompanying USB drive at Source 44].

¹⁰ *Id.*

the Internal Rules¹¹ “form a self- contained regime of procedural law related to the unique circumstances of the ECCC.”¹² The Pre-Trial Chamber has also held that reference should be made to the Internal Rules as the “primary instrument” where there is a conflict between the Internal Rules and the Code of Criminal Procedure of the Kingdom of Cambodia (hereinafter “CCPC”).¹³

There is “nothing in the Establishment Law, the Agreement, or the Internal Rules that requires ECCC Judges to follow the jurisprudence or rules of Procedure of the international [tribunals]”.¹⁴ Therefore, the jurisprudence from the international tribunals is not binding on the ECCC.¹⁵ However, the ECCC may elect to refer to the rules of procedure of fellow international tribunals as a guideline if they desire.¹⁶ In fact, the Controlling Documents of the ECCC “explicitly incorporate the protections of international human rights instruments, including the ICCPR, the jurisprudence and rules of procedure of international tribunals can be used for guidance.”¹⁷ Despite this, Judges have recently rejected the Co-Prosecutors’ attempts to use procedural rules from other international courts on the basis that the ECCC’s heavily inquisitorial roots sets it apart from many other international courts in practice.¹⁸

¹¹ Extraordinary Chambers in the Courts of Cambodia: Internal Rules (Rev.9), as revised 16 January 2015. [Electronic copy provided in accompanying USB flash drive at Source 3].

¹² Michael G. Karnavas, *Bringing Domestic Cambodian Cases into Compliance with International Standards*, 3 Cambodia & Policy Rev, (December 2014), at 9 [Electronic copy provided in accompanying USB flash drive at Source 49].

¹³ *Id.*

¹⁴ *Id.*, at 12.

¹⁵ *Id.*, at 13.

¹⁶ *Agreement*, at Article 12.

¹⁷ Karnavas, *Bringing Domestic Cambodian Cases into Compliance*, at 9.

¹⁸ Anees Ahmed and Robert Petit, *A Review of the Jurisprudence of the Khmer Rouge Tribunal*, 8 Nw. J. Int'l Hum. Rts. 165 (2010) at 169 [Electronic copy provided in accompanying USB flash drive at Source 38].; *Decision on Severance of Case 002 Following Supreme Court Chamber Decision of 8 February 2013*, 002/19-09-2007/ECC/TC, 26 April 2013. at 7-8 [Electronic copy provided in accompanying USB flash drive at Source 17].

B. The Pre- Trial Judicial Process at the ECCC.

Despite being established to solve conflicts between the Co-Prosecutors and Co-Investigating Judges, the Pre-Trial Chamber has developed into a near full-fledged investigative chamber. This investigative chamber resembles those found in the Cambodian legal system as well as those generally found in the French legal system during its colonial occupation of Cambodia.¹⁹

There are crucial differences between the procedural rules at the ECCC, especially in the investigation stage, and the procedural rules of the other international courts, which tend to draw on the experience of common law systems.²⁰ The ECCC is based on an inquisitorial system.²¹ Cambodian law, which is the basis of the ECCC, is founded on the Continental European inquisitorial model of criminal procedure.²² Thus, because the ECCC employs the French model of the investigating judge (juge d’instruction), pre-trial investigations are carried out not by the Prosecution and the Defense teams, but by the two Co-Investigating Judges.²³ The Co-Investigating Judges are responsible for collecting evidence to determine whether the Suspect or

¹⁹ Franziska Eckelmans, *The ECCC in the Context of Cambodian Law*, in *Introduction to Cambodian Law*, Konrad – Adenauer – Stiftung, Cambodia, pp. 437-475, 2012. [Electronic copy provided in accompanying USB flash drive at Source 37] at 449, see also, John D. Ciorciari and Anne Heindel, *Hybrid Justice; The Extraordinary Chambers in the Courts of Cambodia*, The University of Michigan Press, 2017 at 48.

²⁰ Daniel Tilley, *The Non-Rules of Evidence in the ad hoc Tribunals*, *The International Lawyer*, Vol. 45, No. 2 (SUMMER 2011), pp. 695-724 at 707 [Electronic copy provided in accompanying USB flash drive at Source 40]; See also, Eckelmans, *The ECCC in Context of Cambodian Law* at 467.

²¹ **Note:** Consider that the Cambodian Penal Code of 1956 is based on French law of a contemporary period not accounting for the Sarkozy reforms of the French judicial system in 2009 that narrowed the scope of France’s inquisitorial system considerably. Cambodian law has largely retained that Inquisitorial system in current law. See A delicate judgment, *The Economist*, Paris, September 10, 2009, available at <http://www.economist.com/node/14416851> [Electronic copy provided in accompanying USB flash drive at Source 55]; Bruce, Crumley, French Judges Strike to Stop Sarkozy's Meddling, *Time*, 08 February 2011, available at <http://content.time.com/time/world/article/0,8599,2046972,00.html> [Electronic copy provided in accompanying USB flash drive at Source 56]; and, Henry, Samuel, Nicolas Sarkozy to abolish controversial French magistrate, *The Telegraph*, 7 January 2009, available at <http://www.telegraph.co.uk/news/worldnews/europe/france/4160680/Nicolas-Sarkozy-to-abolish-controversial-French-magistrate.html> [Electronic copy provided in accompanying USB flash drive at Source 62]; John D. Ciorciari and Anne Heindel, *Hybrid Justice; The Extraordinary Chambers in the Courts of Cambodia*, The University of Michigan Press, 2017 at 48.

²² Anees Ahmed and Robert Petit, *A Review of the Jurisprudence of the Khmer Rouge Tribunal*, at 169.

²³ Ahmed and Petit, *A Review of the Jurisprudence of Khmer Rouge Tribunal*, at 169-170.

Charged Person under investigation is to be indicted and sent to trial, or whether the case against them should be dismissed.²⁴

There are two stages of Investigation at the pre- trial level. First, the preliminary investigation is carried out by the Co-Prosecutors where they create Submissions to guide the investigation of the Co-Investigating Judges.²⁵ The Co-Investigating Judges' investigation is based entirely on the facts within the Co-Prosecutors' Submissions.²⁶

The Co-Prosecutors, by themselves or at the request of one of the Parties, may conduct a preliminary investigation in order to determine if there is evidence showing that crimes within the jurisdiction of the ECCC may have been committed, and to identify potential suspects and witnesses.²⁷ If the Co-Prosecutors have reasons to believe that such crimes have been committed, they will send an Introductory Submission to the Co-Investigating Judges which lists the facts, the alleged offences, the applicable law and – if already known – the name(s) of the person(s) to be investigated.²⁸ The Co-Prosecutors may later file Supplementary Submission(s) if new facts come to light that require an amendment of or addition to the original allegations.²⁹

The Co-Investigating Judges determine subject matter jurisdiction by investigating the facts included within the Submissions and then determining whether these facts constitute crimes within the jurisdiction of the ECCC in accordance with the ECCC Law.³⁰ The Co-Investigating Judges also determine personal jurisdiction of the Suspect or Charged Person by investigating

²⁴ Ciorciari and Heindel, *Hybrid Justice; The Extraordinary Chambers in the Courts of Cambodia* at 44.

²⁵ Ahmed and Petit, *A Review of the Jurisprudence of Khmer Rouge Tribunal*, at 169-170.

²⁶ Ciorciari and Heindel, *Hybrid Justice; The Extraordinary Chambers in the Courts of Cambodia* at 44.

²⁷ *Id.*

²⁸ Ahmed and Petit, *A Review of the Jurisprudence of the Khmer Rouge Tribunal*, at 169-170.

²⁹ *Id.*

³⁰ *ECCC Law*, at Articles 1-8.

whether the Suspect or Charged Person was either a senior leader or one of the persons “most responsible for crimes committed during the Khmer Rouge Regime.”³¹ They are restricted to the facts provided by the Co-Prosecutors in the Submissions.³² The Co-Investigating Judges have absolute power to charge any Suspects included within the Introductory Submission. After the conclusion of the judicial investigation, the Co-Investigating Judges must either indict or dismiss at Closing Orders.

C. Scope of ECCC Jurisdiction

The ECCC has clear and distinctive restrictions on its subject matter jurisdiction laid out in the ECCC Law and the Agreement. The ECCC Judges are restricted to the purpose of the ECCC, that is “to bring to trial senior leaders of Democratic Kampuchea and those were most responsible for the crimes and serious violations of Cambodian laws related to crimes, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.”³³

The ECCC Law permits application of both national and international substantive and procedural law at the ECCC.³⁴ Concerning substantive criminal law, the ECCC is permitted to prosecute persons for (1) crimes under the Cambodian Penal Code of 1956, (2) crimes under the Genocide Convention of 1948, (3) enumerated crimes against humanity, (4) grave breaches of

³¹ *Agreement*, at Article 1, 2(1).

³² Ciorciari and Heindel, *Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia*, at 44.

³³ *Agreement*, at Article 1.

³⁴ *ECCC Law*, at Articles 1-8; See also, Ahmed and Petit *A Review of the Jurisprudence of Khmer Rouge Tribunal*, at 169.

the Geneva Conventions of 1949, (5) crimes under the Hague Convention for the Protection of the Cultural Property in the Event of Armed Conflict of 1954, and (6) “crimes” under the Vienna Convention on Diplomatic Relations of 1961.³⁵

The Agreement requires that the ECCC’s procedure be in accordance with Cambodian procedural law.³⁶ However, until the adoption of the CCPC in August 2007—much later than the drafting of the ECCC’s basic documents—there was a lack of clarity regarding the sources of the Cambodian procedural law. Therefore, where (1) Cambodian law does not deal with a particular matter, (2) there is uncertainty in Cambodian law, and (3) Cambodian law is inconsistent with international standards, the Agreement provides that “guidance may be sought [from] procedural rules established at the international level.”³⁷ The applicable procedural law at the ECCC must, therefore, be consistent with “international standards of justice, fairness and due process of law.”

³⁸ The Controlling Documents also bound the ECCC to the fair trial rights embodied in Articles 14 and 15 of the ICCPR.³⁹

Irrespective of the judicial scope of indictment, the limitations on subject-matter jurisdiction, substantive law, and procedural law must be respected. The material, geographical and temporal scope of the ECCC jurisdiction is clearly defined. However, it is worth noting that the scope of personal jurisdiction is not clearly defined within the Controlling Documents. Two criteria have been developed by international jurisprudence, and retained by the Co-Investigating Judges to

³⁵ *Id.*

³⁶ *Agreement* at Article 1, 2, and 12. See also, Ahmed and Petit *A Review of the Jurisprudence of Khmer Rouge Tribunal* at 169-171.

³⁷ *ECCC Law*, at Article 2(1).

³⁸ *Agreement*, at Article 12(2).

³⁹ *Id.*

assess the personal jurisdiction of Suspects and Charged Persons: (1) the gravity of the crimes alleged against the Suspect; and, (2) level of responsibility of the Suspect, Charged Person, or Accused.⁴⁰ The ECCC Judges are explicitly restricted on the subject matter jurisdiction and the personal jurisdiction outlined above. Consequently, any Indictment by the Co-Investigating Judges must satisfy these controlling factors.

III. Law and Analysis

Defining the scope of judicial powers of indictment in this respect is a new issue before the ECCC and extremely diverse within the international and domestic legal communities. As this is a procedural issue, there is no customary international law upon which the ECCC may base its decision. Although it has been employed in the past, the ECCC is such a unique international court that international procedural precedent does not provide much guidance on an issue of judicial scope.⁴¹ Previous attempts by the Co-Prosecutors to use international precedent at the ECCC were explicitly rejected by the Co – Investigating Judges.⁴² The Co-Investigating Judges maintain that other international courts are predominantly adversarial and thus rejected their procedural guidance as irrelevant to ECCC procedural disputes.⁴³ Thus, in this memorandum the issue is analyzed narrowly in an attempt to provide the Court with a definite

⁴⁰ *Decision on Personal Jurisdiction and Investigative Policy Regarding Suspect 003/07-09-2009-ECCC-OCIJ*, 02 May 2012, at 8. [Electronic copy provided in accompanying USB flash drive at Source 26], *Note*: see *Id.* at 8-11 for a full description of relevant factors that define elements (1) and (2) of the Personal Jurisdiction Test as defined by case law.

⁴¹ Ang, Udon and Karnavas, Michael, *Re: Case 003 Defense Observations to the Co-Prosecutors "Rule Amendment Proposals to Ensure More Efficient Investigations (Rule 55) and Trials (Rule 89TER)"*, 28 March, 2014 at II.A, II.B (pp. 3-7). [Electronic copy provided in accompanying USB flash drive at Source 23]

⁴² *Decision on Co-Prosecutors' Request for Reconsideration of the Terms of the Trial Chambers' Severance Order and Related Motions and Annexes*, 002/19-09-2007/ECCC/TC at 2-4. [Electronic copy provided in accompanying USB flash drive in Source 15]

⁴³ *Id.*

answer. The analysis primarily relies upon ECCC case law, the Controlling Documents, and the ICCPR.

A principle concern is that the ECCC Internal Rules does not properly or adequately define the scope of judicial control of indictment like it does for the roles of Co – Investigating Judges and Co-Prosecutors on other issues such as investigative powers and charging powers. The Controlling Documents and the CCPC are silent on this issue but there may be some guidance with existent ECCC case law.

The ECCC does not regulate pre-trial judicial power of indictment beyond Internal Rules 66, 66*bis*, and 67. Therefore, it is crucial to consider the more elaborate restraints on investigating and charging powers which are the source of the indictments and Closing Orders at the ECCC.⁴⁴ Although the Internal Rules explicitly regulates whom may be charged, the document is silent on the topic of Co-Investigating Judges charging or indicting Suspects or Charged Persons for specific criminal events not specifically requested for investigation in the Co-Prosecutors' Submissions. This gray area must be carefully considered to avoid infringing upon the Co-Prosecutors traditional authority as an independent organ of the Court and to avoid denying Suspects, Charged Persons, and Civil Parties the rights guaranteed by the ICCPR and the Controlling Documents.

Due to the lack of clear or controlling precedent, it is important to consider factors such as ECCC subject matter jurisdiction, personal jurisdiction, and the existent restrictions on judicial power in the Internal Rules. Equally, it is crucial to analyze more abstract issues such as the independence of the separate organs of the Court as well as the rights of all Parties to notice and representation.

⁴⁴ *Internal Rules*, at Rule 66, 66*bis*, and 67.

A. While there is a presumption of judicial control of indictment at the ECCC this must be qualified by a respect for the rights of Parties and pursuit of a fair trial.

Although there is a tradition of broader judicial power at the ECCC as compared to other international courts, this increased discretion is not unrestricted.⁴⁵ The scope of the Co-Investigating Judges' power must be qualified by adherence to the Controlling Documents, a respect for ECCC Jurisdiction, and a desire to both increase court efficiency and expedite court proceedings to ensure a fair trial for Suspects, Charged Persons, and Civil Parties.⁴⁶ The Co – Investigating Judges must work in the interest of justice and must provide sound legal reasoning for their decisions.⁴⁷

i. The Co-Investigating Judges must adhere to the standards of fair notice and fair trial set by the Controlling Documents, ECCC case law, and international precedent.

The ECCC has been soundly criticized in the past for its failings to ensure impartial proceedings.⁴⁸ The nature of the court structure, the inquisitorial leanings, and the failure to allow the accused to face their accuser all contribute to this issue.⁴⁹ It is crucial that the ECCC take steps to ensure it is adhering to the international standards for fair trial proceedings and the provisions of the Agreement and ECCC Law.⁵⁰ To this end, both the Controlling Documents

⁴⁵ Ahmed and Petit, *A Review of the Jurisprudence of Khmer Rouge Tribunal* at 169-171.

⁴⁶ *Internal Rules*, at Rule 21

⁴⁷ *Id.*, at Rule 55(10), and 67(4).

⁴⁸ Joel Brinkley, *JUSTICE SQUANDERED: Cambodia's Khmer Rouge Tribunal*, World Affairs, Vol. 176, No. 3 (SEPTEMBER/OCTOBER 2013), pp. 41-48, at 47-48 [Electronic copy provided in accompanying USB flash drive at Source 45]; See also, Seeta, Scully, *Judging the Successes and Failures of the Extraordinary Chambers of the Courts of Cambodia*, http://blog.hawaii.edu/aplpj/files/2012/01/APLPJ_13.1_Scully-1-31-Final.pdf at 325-337 [Electronic copy provided in accompanying USB flash drive at Source 63]; *Note of the International Reserve Co-Investigative Judge to the Parties on the Egregious Dysfunctions within the ECCC Impeding the Proper Conduct of Investigations in Case 003 and 004* 003/07-09-2009-ECCC-OCIJ and 004/07-09-2009-ECCC-OCIJ, 21 March 2012.[Electronic copy provided in accompanying USB flash drive at Source 36]; Kheang Un, *Cambodia in 2011: A Thin Veneer of Change*, Asian Survey, Vol. 52, No. 1 (January/February 2012), pp. 202-209, at 205. [Electronic copy provided in accompanying USB flash drive at Source 48].

⁴⁹ *Id.*

⁵⁰ *Agreement*, at Article 12, 13.

and Article 14 of the ICCPR must be respected at every stage of the pre - trial proceedings to ensure that all parties have fair and impartial treatment.⁵¹ Allowing Co-Investigating Judges to indict based on specific criminal events at Closing Orders instead of during the investigation is unfair to all parties. This practice would not seem impartial even if the Co-Investigating Judges are *functus officio* after the pre-trial level and do not participate in the adjudication process.

1. The Co-Investigating Judges must respect the rights of all Suspects and Charged Persons to Fair notice under Article 14 of the ICCPR.

A judicial failure to notify a Suspect or Charged Person of charges levied against him before a judgment is unheard of and may constitute a violation of ICCPR. According to Article 14(3)(a) of the ICCPR, every Charged Person has the right to know the full extent of the charges against him before a judgment.⁵² The ICCPR requires that “In the determination of any criminal charge against him, everyone shall be entitled to ... minimum guarantees...[including the right to be]... informed promptly and in detail in a language which he understands of the nature and cause of the charge against him...”.⁵³ A lack of fair notice of charges also violates ICCPR Article 14(3)(b) which states that a Charged Person must “have adequate time and facilities for the preparation of his defence...”.⁵⁴ Without notice of the charges levied against him, a Charged Person would be unable to properly prepare his defense.⁵⁵

⁵¹ *Id.*

⁵² ICCPR, at Article 14(3)(a).

⁵³ *Id.*

⁵⁴ ICCPR, at Article 14(3)(b).

⁵⁵ *Meas Muth's Submission on Reconsideration of RICIJ's Personal Jurisdiction Decision and Decision to Grant Access to the Case File the Notification of Suspect's Rights*, 003/07-09-2009-ECCC/OCIJ, 30 July 2014, at 5. [Electronic copy provided in accompanying USB flash drive at Source 27]; *Meas Muth's Request for Clarification of the Way in which the Co-Investigating Judges intend to Respect his Rights Concerning the Remainder of Pre-Trial Proceedings*, 003/07-09-2009-ECCC/OCIJ, 2 November 2014, at 5-6. [Electronic copy provided in accompanying USB flash drive at Source 28].

Although the Agreement explicitly states that the Internal Rules take precedence over any other international procedural material, they are still beholden to the ICCPR.⁵⁶ While such a stringent degree of notice may not be required in the ECCC's Pre-Trial Chamber, other international courts have imposed stringent notice requirements on their Pre-Trial Chambers and it is difficult to argue against such overwhelming uniform precedent. While the Charged Person is not being denied "a fair and public hearing by a competent, independent and impartial tribunal..." at the ECCC, there is certainly a persuasive argument that the notification requirement must be satisfied at every stage and every chamber of the Court.⁵⁷

A crucial issue with the scope of judicial indicting powers at the pre-trial level is that Article 14(3) of the ICCPR does not define the scope of "in determination of charges against him."⁵⁸ It is unclear whether the investigation and indictment done by the Pre-Trial Chamber would count as a "determination of any criminal charge" or if this is a fair trial issue left to adjudication at the Trial Chamber.⁵⁹ The purpose of the Pre-Trial Chamber is to determine if there is evidence to substantiate a case against a Charged Person, not to adjudicate the case. However, the Controlling Documents allow the ECCC to look to international precedent and the persuasive evidence in support of more stringent notice requirements in the procedural rules is overwhelming.

⁵⁶ *Agreement*, at Article 12.

⁵⁷ *ICCPR*, at Article 14.

⁵⁸ *Id.*

⁵⁹ *Id.* **Note:** There may be some guiding precedent on the issue of proper notification of charges at ECCC at *Order Concerning the Co-Prosecutors' Request for Clarification of Charges*, 002/19-09-2007/ECCC/OCIJ, 20 November 2009. [Electronic copy provided in accompanying USB flash drive at Source 21], wherein at 4, the Co-Investigating Judges state "charging is the process by which a person is notified of the potentially criminal nature of the acts under investigation. By definition it consists in notifying the person of the acts and their legal characterisations as envisaged at this stage of the judicial investigation."

The ECCC procedural law significantly differs from the prevailing international interpretation of ICCPR Article 14(3)(a).⁶⁰ Although “at the time of initial appearance the Co-Investigating Judges shall record the identity of the Charged Person and inform him or her of the charges, the right to a lawyer, and the right to remain silent”, there is no further procedural requirement for notification regarding additional charges issued throughout the investigation or legal re-characterization of facts throughout the remainder of the investigation period.⁶¹ Moreover, the only other instance of required pre-trial notification in the Internal Rules is after Closing Orders. Here, the Co-Investigating Judges “must immediately notify” all parties only after they have already issued the Closing Order.⁶² In comparison, the International Criminal Court (hereinafter “ICC”), the Special Court of Sierra Leone (hereinafter “SCSL”), and the International Criminal Tribunal for the Former Yugoslavia (hereinafter “ICTY”) all require stringent notice requirements at the pre-trial level that indicate a broad and encompassing approach to ICCPR 14(3)(a) throughout the investigation and indictment proceedings.⁶³

Although the Charged Person is not being denied “a fair and public hearing by a competent, independent, and impartial tribunal....” at the ECCC because the trial process has not yet begun, there is certainly a persuasive argument that the notification requirement must be

⁶⁰ See *Rules of Procedure and Evidence*, International Criminal Court, 10 September 2002, U.N. Doc. ICC-ASP/1/3. At Rule 127, 128, and 129. [Electronic copy provided in accompanying USB flash drive at Source 7]; See also *Rules of Procedure and Evidence*, International Criminal Tribunal for the Former Yugoslavia, U.N. Doc A/CONF. 183/9 (1998) at Rule 50, Rule 51 [Electronic copy provided in accompanying USB flash drive at Source 9]; See also, *Rules of Procedure and Evidence*, Special Court for Sierra Leone, as amended 7 March 2003, at Rule 50. [Electronic copy provided in accompanying flash drive at Source 11].

⁶¹ *Internal Rules* at Rule 21; See also, the discussion on limitations of pre-trial charging in *Order Concerning the Co-Prosecutor's Request for Clarification of Charges* at 6, ‘ prior to the conclusion of the judicial investigation, the Charged Persons will be summoned for clarification of the charges for which they may be indicted; on that occasion, they will be notified of any further charges’, this clearly eliminates Suspects from Indictment as Suspects must be charged, and have those charges clarified prior to Indictment under ECCC case law. [Electronic copy provided in accompanying flash drive at Source 21].

⁶² *Internal Rules*, at Rule 67.

⁶³ *ICC Rules of Procedure and Evidence*, at Rule 127, 128, 129; *ICTY Rules of Procedure and Evidence* at Rule 50, 51; *Rules of Procedure and Evidence*, Sierra Leone at Rule 50.

satisfied at every stage and every level of the Court.⁶⁴ Equally, although a Charged Person would have notice of the charges included in the Indictment in time to prepare their trial defense, it is unnecessary to delay any charges until Closing Orders. According to a general consensus of the other international courts, notice is required for all charges prior to Closing Orders under ICCPR 14(3)(a) and (b) irrespective of whether the Chamber is adjudicating or investigating.⁶⁵ While there is clear need due to the age of the Charged Person(s) to expedite proceedings and minimize delay at trial level, this objective should never be pursued in a manner that is inconsistent with any Suspect's or Charged Person's fundamental human rights.⁶⁶

2. The rights of Civil Parties to a fair trial, representation, and reparations must be respected by the Court.

The ECCC is innovative in its inclusion of victims as Civil Parties within the trial proceedings and it must not take action that would prove counterproductive to their inclusion.⁶⁷ Under Internal Rule 23(1), a Civil Party applicant must “demonstrate as a direct consequence of at least one of the crimes alleged against the Charged Person,[and] that he or she has in fact suffered physical, material, or psychological injury upon which a claim of collective and moral reparation might be based.”⁶⁸ However, “a [v]ictim who wishes to be joined as a Civil Party shall submit such application in writing no later than fifteen (15) days after the Co-investigating Judges notify the parties of the conclusion of the judicial investigation pursuant to IR 66(1)...”⁶⁹

⁶⁴ ICCPR, at Article 14.

⁶⁵ ICC Rules of Procedure and Evidence, at Rule 127, 128, 129; ICTY Rules of Procedure and Evidence at Rule 50, 51; Rules of Procedure and Evidence, Sierra Leone at Rule 50.

⁶⁶ David Scheffer, What has been ‘Extraordinary’ About International Justice in Cambodia?, *Cambodia Tribunal Monitor*, 25 February 2015. at 3 [Electronic copy provided in accompanying USB flash drive at Source 57]

⁶⁷ John D. Ciorciari and Anne Heindel, *Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia*, at 202-204

⁶⁸ Internal Rules, at Rule 23(1).

⁶⁹ *Id.* at Rule 23bis(2).

If the Co-Investigating Judges issued an Indictment on specific charges unrelated to and outside the scope of the Submissions this would bar potential victims of these crimes from both applying for and being represented as Civil Parties and receiving reparations for their suffering.

Potential Civil Party members should not be barred strictly due to lack of notice.⁷⁰ While it is still possible for current Civil Parties to be excluded if the Co-Investigating Judges reduce the scope of the indictment, these individuals are not actually being denied representation or moral reparation because the indictment has changed in nature and scope to exclude them.⁷¹

This type of exclusion is distinctive from that of Civil Party members being excluded due to lack of notice which would be inevitable if Co-Investigating Judges were allowed to wield unlimited power to alter the Indictment outside the scope of the Submissions. It is unjust and illogical to deny multiple Khmer Rouge victims potential legal representation or reparations for crimes that are being tried at the ECCC that pertain to their suffering. If the purpose of the ECCC is to bring the senior leaders of the Khmer Rouge to justice and to provide closure and moral reparations to the people of Cambodia, then the exclusion of victims of the Khmer Rouge from the Civil Party collective seems counterintuitive and in contradiction of the true purpose of the Court.

3. Suspects must be Charged prior to Closing Orders.

Suspects at the ECCC must be charged prior to Closing Orders unless the Co-Investigating Judges intend to dismiss their case. The Controlling Documents do not explicitly state when a Suspect becomes a Charged Person but there is guidance in the ECCC case law.⁷²

⁷⁰ **Note:** Civil Parties may be barred at the discretion of the CIJ and the Trial Chamber for a variety of reasons, see *Internal Rules* at Rule 23bis(2) and 23bis(3).

⁷¹ *Id.*

⁷² *Meas Muth's Request for Clarification of the Way in which the Co-Investigating Judges intend to Respect his Rights Concerning the Remainder of Pre-Trial Proceedings*, 003/07-09-2009-ECCC/OCIJ, 2 November 2014, at 8.

The recent controversy with the charging and notification of charges in the case of defendant Meas Muth indicates that the initial hearing is extremely significant in relation to notification of the investigation and charging. When Meas Muth refused to recognize the Co-Investigating Judges' summons to appear, the Co-Investigating Judges charged him *in absentia* using international precedent.⁷³ The Co-Investigating Judges notified him of the investigation, the facts, and the present charges, despite his refusal to appear in person.⁷⁴ Meas Muth's refusal to appear and the Co-Investigating Judges' charging him *in absentia* indicate that the initial appearance is the point in the investigation where a Suspect is officially charged and becomes a Charged Person.⁷⁵

While the Controlling Documents are silent on the timeframe of charging Suspects, it is clear that Suspects and Charged Persons must be summoned for clarification of the charges levied against them prior to Closing Orders. The Co-Investigating Judges have previously stated that "prior to the conclusion of the judicial investigation the Charged Person will be summoned for clarification of the charges for which they may be indicted; on that occasion they will be notified of any further charges."⁷⁶ This order clearly eliminates Suspects from being indicted

⁷³ *Summons to Initial Appearance*, 003/07-09-2009, 26 November 2014 [Electronic copy provided in the accompanying USB flash drive at Source 33]; *Decision to Charge Meas Muth in Absentia*, 003/07-09-2009-ECCC-OCIJ, 3 March 2015, at 8-12 [Electronic copy provided in accompanying USB flash drive at Source 18].

⁷⁴ *ANNEX: Notification of Charges against MEAS Muth*, 003, 3 March 2015. [Electronic copy provided in accompanying USB flash drive at Source 24]; *Response to the Notice Concerning Meas Muth's Decision not to Recognize Summons, dated 3 December, 2014 ("Letter")*, 003/07-09-2009-ECCC-OCIJ, 4 December 2014. [Electronic copy provided in accompanying USB flash drive at Source 32]; Ang, Udon and Karnavas, Michael *Re: Notice Concerning Mr. MEAS Muth's Decision not to Recognize Summons*, 3 December, 2014. [Electronic copy provided in the accompanying USB flash drive at Source 31].

⁷⁵ **Note:** The Co-Investigating Judges charged a defendant *in absentia* for the first time in the Tribunal's history due to Muth's refusal to appear when officially summoned to be charged. Clearly there is a pressing need for a person to be formally charged and the Tribunals actions here indicate that the initial interview is a crucial element of the charging process because they created new case law and issued Muth a notification of charges in an attempt to circumvent his refusal to acknowledge the official summons to appear. See, *Decision to Charge Meas Muth in absentia*, at 13-15; *Decision on Meas Muth's Appeal Against Co-Investigating Judge Harmon's Notification of Charges Against Meas Muth*, 003/07-09-2009-ECCC/OCIJ(PTC22), 03 February 2016, at 1-3. [Electronic copy provided in accompanying USB flash drive at Source 25]; *Meas Muth's Request for Clarification of the Way in Which the Co-Investigating Judges intend to Respect his Rights Concerning the Remainder of the Pre-Trial Proceedings*, 003/07-09-2009-ECCC/OCIJ, 3 November 2014, at 8-9.

⁷⁶ *Order Concerning the Co-Prosecutors' Request for Clarification of Charges*, at 6.

because only Charged Persons may be indicted under ECCC case law.⁷⁷ Suspects must be initially charged either in person or *in absentia*, and have these charges further clarified at a later date but prior to the conclusion of the judicial investigation unless the Co-Investigating Judges intend to dismiss.

B. The power of the Co-Investigating Judges to indict during a Closing Order should be subject to the same restrictions as their investigative and charging powers.

Judicial control over indictment is not unlimited even where the Internal Rules are silent. Valid judicial indictments must arise from the Co-Investigating Judges' investigation. The power of the Co-Investigating Judges to indict during a Closing Order stems from their powers to charge and investigate as these are interconnected. Therefore, the power to indict should be subject to the same restrictions that apply to the judicial powers of investigation and charging.

i. The Internal Rule restrictions on judicial investigative powers must also apply to judicial indictment powers.

The Internal Rules limit certain investigative powers of the Co-Investigating Judges by subjecting them to approval by the Co-Prosecutors Office. The Co-Investigating Judges “shall only investigate the facts set out in an Introductory Submission or a Supplemental Submission.”⁷⁸ The Internal Rules state that “If, during an investigation, new facts come to the knowledge of the Co-Investigating Judges, they shall inform the Co-Prosecutors... where such new facts have been referred to the Co-Prosecutors, the Co-Investigating judges shall not investigate them unless they receive a Supplemental Submission.”⁷⁹ The Co-Investigating

⁷⁷ *Id.* at 3-6.

⁷⁸ *Internal Rules*, at Rule 55(2).

⁷⁹ *Id.*, at Rule 55(3).

Judges are clearly restricted by new facts during investigation.⁸⁰ However, there is a caveat that allows the Co-Investigating Judges to continue investigating without approval from the Co-Prosecutors. The Co-Investigating Judges are allowed to continue investigating when the newly discovered facts are “limited to aggravating circumstances relating to an existing Submission.”⁸¹

Thus, it is evident that no judicial action may stem from facts outside the scope of the Submissions unless the new facts arise from aggravating circumstances relating to an existing Submission. If a Co-Investigating Judge is not able to investigate new facts without the Co-Prosecutors’ approval, then there can be no basis for judicially sourced indictments outside the scope of the Co-Prosecutors’ Submissions.

Consequently, no specific criminal event may even be investigated let alone incorporated into an Indictment by the Co-Investigating Judges unless it arises properly under Internal Rule 55.⁸² The Co-Investigating Judges may not indict a Charged Person for any specific criminal event that is based on facts falling outside the scope of the Co-Prosecutors’ Submissions unless the charges arise from facts and material reasonably connected to the facts in the Submissions according to Rule 55(3).

ii. The Co – Investigating Judges’ charging powers are limited by the persons not the crimes provided in the Submissions.

The Co-Investigating Judges “have the power to charge any Suspects names in the Introductory Submission.”⁸³ This is an incredibly open ended statement and there is no

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Internal Rules*, at Rule 55.

⁸³ *Id.*, at Rule 55(4).

indication that judicial discretion on charging is restricted to the crimes specifically requested in either the Submissions. Judicial discretion is only explicitly restricted in regards to charging persons listed in the Introductory Submission.⁸⁴

The Internal Rules clearly separate the treatment of Suspects from the treatment of “any other persons” and the judicial discretion for charging Suspects named in the Introductory Submission has no explicit restrictions.⁸⁵ There may be a degree of guidance in the Co-Investigating Judges’ need for Co-Prosecutors’ approval when charging “any other persons against whom there is clear and consistent evidence that such person may be criminally responsible for the commission of a crime referred to in an Introductory Submission or a Supplemental Submission, even where such persons were not named in the submission.”⁸⁶ Here, the Co-Investigating Judges are restricted in their charging of “any other persons” and limited strictly to crimes referred to in the Submissions.⁸⁷ The inclusion of this caveat may allow for a more expansive interpretation of the Internal Rules regarding the charging of Suspects. There is no comparative restriction on charging Suspects strictly for the crimes contained within the Submissions.

There is nothing in the Internal Rules to indicate how the Co- Investigating Judges must proceed with charging Suspects or Charged Persons where the facts support evidence for specific criminal events not specifically requested for investigation by the Co –Prosecutors in the

⁸⁴ In fact, the judicial discretion to characterize facts suggests a broader judicial discretion on indictment at the ECCC; See, *Lead Co-Lawyers’ Rule 92 Submission on the Confirmation of the Scope of Case 002/02 Concerning the Charges of Rape Outside the Context of Forced Marriage* 002/19-09-2007-ECCC/TC, 18 March 2016, at 4. [Electronic copy provided in accompanying USB flash drive at Source 20]; *Co- Prosecutor’s Submissions on Potential Recharacterisation of the Crimes*, 002/19-09-2007-ECCC/SC, 6 November 2015, at 3-5. [Electronic copy provided in accompanying USB flash drive at Source 15].

⁸⁵ *Internal Rules*, at Rule 55(4).

⁸⁶ *Id.*

⁸⁷ *Id.*

Submissions. Still, Internal Rule 55(4) provides that the Co- Investigating Judges have the discretion to charge any Suspects named in the Introductory Submission without being subject to the Co-Prosecutors’ approval.⁸⁸ However, while there is never any judicial obligation to charge any Suspects, the Co-Investigating Judges retain the power to dismiss.

The Co-Investigating Judges have previously defined their scope of charging outside of the Internal Rules by employing French and Cambodian precedent to confine their power to charges arising from facts and changes to legal characterizations of these facts. The Co-Investigating Judges previously determined that “where the Co-Investigating Judges decide to charge a person, they are free to do so when they choose.”⁸⁹ The Co-Investigating Judges notify Suspects based on the facts of the Submissions available at the time of the initial interview and specifically provide in these notifications that future charges or changes to legal characterizations may be brought based on the facts in the Submissions subject to discovery during investigation.⁹⁰

As power of indictment must stem from investigative and charging powers under case law, the Co-Investigating Judges have the discretion to indict any persons named in the Introductory Submission without seeking the Co-Prosecutor’s approval under Internal Rule 55(4), subject to Internal Rule 21(1),⁹¹ and to the discussion above.⁹² The Co-Investigating Judges are restricted to the facts provided in the Submissions but maintain absolute discretion on

⁸⁸ *Id.*

⁸⁹ *Order Concerning Co-Prosecutors’ Request for Clarification of Charges* 002/19-09-2007/ECCC/OCIJ 20 November 2009, at 3-5; **Note:** this source draws from French legal precedence citing Crim 14 Fevrier 1984 Bull Crim N. 58 in Footnote 7: [translation] ‘*The investigating Judge possesses unfettered power to decide when to charge, where applicable, after having conducted all necessary investigations.*’. This application does not include additional charging at indictment, refer to notes 61 and 75 *supra*; **Note:** The Co-Investigating Judges notify Suspects based on the facts of the Introductory and Supplemental Submissions available at the time and provide that future crimes based on these facts may be subject to change or the legal characterizations altered dependent on further investigation; See, *Id.* at 2-5.

⁹⁰ *Order Concerning Co-Prosecutors Request for Clarification of Charges* 002/19-09-2007/ECCC/OCIJ 20 November 2009, at 4-5.

⁹¹ *Internal Rules* at Rule 55, Rule 21(1), and Rule 57.

⁹² See, III.B.i *supra*.

whether they wish to charge, when to charge, and what charges and legal characterizations of the facts they wish to include in an Indictment at Closing Orders.

C. Interpretation of judicial scope where the ECCC Internal Rules are silent must serve the interests of justice and demonstrate the broader trends in judicial discretion permitted by the Controlling Documents and ECCC case law.

The Controlling Documents are very clear on the Co-Investigating Judges' scope in many respects. Judicial power on the whole is broad regarding subject matter jurisdiction and personal jurisdiction of Suspects and Charged Persons provided that it falls within the scope of the Controlling Documents and current ECCC case law.⁹³

The Co-Investigating Judges have absolute power to conclude their investigations, reduce the scope of judicial investigation, and issue Closing Orders.⁹⁴ While the Internal Rules explicitly allow the Trial Chamber to reduce the scope of an Indictment and provide Co-Investigating Judges the power to reduce a the scope of the judicial investigation the Co-Investigating Judges do not have the discretion to expand. The Internal Rules do not explicitly provide for any independent expansion of the scope of investigative action or fact finding without the Co-Prosecutors' pre-approval at the pre-trial level.⁹⁵

i. The ECCC allows greater judicial discretion where it serves the interest of fairness and expedited trial proceedings but limits judicial power where it would complicate trial proceedings.

The Co-Investigating Judges have the unfettered discretion to reduce the scope of judicial investigation provided that the action serves the interest of justice. Internal Rule 66 provides that:

⁹³ *ECCC Law* at Articles 1-8; *Agreement* at Article 1 and 2; *Decision on Personal Jurisdiction and Investigative Policy Regarding Suspect*, at 8-10; and, *Order Concerning Co-Prosecutors Request for Clarification of Charges*, at 3-5.

⁹⁴ *Internal Rules* at Rule 66, 66bis, and 67.

⁹⁵ *Id.*, at Rule 55(4), 70, and 98.

In order to ensure a fair, meaningful, and expeditious judicial process, in consideration of the specific requirements of the proceedings before the ECCC, the Co-Investigating Judges may, at the time of notification of conclusion of investigation, decide to reduce the scope of judicial investigation by excluding certain facts set out in an introductory submission or any Supplemental Submission(s). The Co-Investigating Judges shall ensure that the remaining facts are representative of the scope of the Introductory Submission and any Supplemental Submission(s).⁹⁶

It is clear that any action the Co-Investigating Judges take must serve the interest of fairness for all Parties and expedite the judicial process. The Co-Investigating Judges must maintain the original scope of the Co-Prosecutors' Submissions.⁹⁷ Still, while Co-Investigating Judges must notify the Co-Prosecutors and allow them to file 15 days to file submissions, they are not required to seek approval from the Co-Prosecutors prior to eliminating facts from the Submissions.⁹⁸ This is not the case when they seek to expand the scope of judicial investigation by including new facts in the investigation.⁹⁹

It is uncertain why there is a restriction on expanding the scope of investigation, however an interpretation of the Internal Rules reveals a clear pattern of attempts to avoid prolonging judicial investigations and delaying trial proceedings by restricting judicial discretion only to excluding facts. Co-Investigating Judges must seek approval before investigating new material. Thus, the Internal Rules are drafted to give Co-Investigating Judges power to ensure “expeditious judicial process” while preserving the nature of the Co-Prosecutors’ case and so should not be interpreted in any manner which may complicate or delay trial proceedings, or damage the nature of the Co-Prosecutors’ case.

⁹⁶ *Id.*, at Rule 66(1).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*, at Rule 66(1), and 55(3).

ii. When issuing a Closing Order and indicting a Charged Person, the Co-Investigating Judges are not bound by the Co-Prosecutors' Submissions.

The Co-Investigating Judges are not bound by the Co-Prosecutors Submissions during Closing Orders.¹⁰⁰ Once the Co-Investigating Judges consider that an investigation is concluded, they must notify all the parties and their lawyers, however they are not required to obey any requests filed for further investigative action.¹⁰¹ Additionally, “the Co-Prosecutors may request that the Co-Investigating Judges either indict the Charged Person and send him or her for trial, or to dismiss the case.”¹⁰² in their Final Submission(s), the Co-Investigating Judges are not bound by these Final Submissions in any way when drafting their Indictment.¹⁰³

iii. There is no evidence that the Co-Investigating Judges are bound to the specific crimes listed in the Submission(s) as a basis for the Closing Order.

There is no evidence that the Co-Investigating Judges are restricted to the crimes and charges listed within the Submission(s). While it is clear that the Co-Investigating Judges may only indict based on personal and subject matter jurisdiction, the Co-Investigating Judges have an otherwise broad discretion over the indictment.¹⁰⁴ The Internal Rules stipulate only that a Closing Order must outline “the identity of the Accused, a description of the material facts and their legal characterization by the Co-investigating Judges, including the relevant criminal provisions and the nature of the criminal responsibility.”¹⁰⁵ There is no provision in the Controlling Documents that could support the theory that the Co-Investigating Judges are

¹⁰⁰ *Id.* at Rule 67(1).

¹⁰¹ *Id.* at Rule 66(1).

¹⁰² *Id.* at Rule 67(1).

¹⁰³ *Id.*

¹⁰⁴ *ECCC Law*, Article 1-8; *The Agreement*, Article 2.

¹⁰⁵ *Internal Rules*, at Rule 67(2).

restricted to the specific crimes and legal characterizations provided by the Co-Prosecutors in their Introductory, Supplemental Submission(s), or Final Submission(s) when issuing their Closing Orders.

However, it appears that the Co- Investigating Judges are functionally bound to the facts set out in the Introductory and Supplemental Submissions provided by the Co-Prosecutors.¹⁰⁶ Using a practical application of Internal Rule 55, the actual charges that comprise the Closing Order must arise from the facts provided in the Submissions.¹⁰⁷ The Co-Investigating Judges may not simply invent new charges or indict a Charged Person on specific crimes without any factual basis or investigation. Thus, the power of indictment is not absolute but subject to Rule 55(3) and Rule 55(4).

Still, this restriction does not preclude the Co-Investigating Judges from charging Suspects or Charged Persons for specific crimes arising out of provided facts, even if the specific crimes were not outlined for investigation in the Co-Prosecutors' Submissions. At the trial level, Judges are also bound by the facts set out in the Indictment provided by the Co-Investigating Judges. However, "the Chamber may...change the legal characterization of the crime as set out in the Indictment, as long as no new constitutive elements are introduced..."¹⁰⁸ The ECCC Trial Judges are not restricted by the ICCPR or required to seek approval from any party before they change a legal characterization of facts, although they must provide sound legal reasoning.¹⁰⁹ The Co-Investigating Judges exercise this power during investigation in addition to indictment, as when they altered the legal characterizations of the facts after charging Meas Muth *in*

¹⁰⁶ *Id.* at Rule 55(3).

¹⁰⁷ *Id.* at Rule 55.

¹⁰⁸ *Id.* at Rule 98

¹⁰⁹ *Order Concerning the Co-Prosecutors' Request for Clarification of Charges*, at 4-5.

abstentia.¹¹⁰ The ECCC does not require Judges to notify either Charged Persons or Co-Prosecutors prior to changing to the legal characterization of facts during investigation or judgment.¹¹¹ There is little basis for barring the Co-Investigating Judges from adding investigated facts to an Indictment for a case that has yet to be adjudicated so long as the changes or additions align with the subject matter jurisdiction and personal jurisdiction requirements in the Controlling Documents and case law.¹¹²

On the issue of specific criminal events that were not requested for investigation there is no reason to assume that the Co-Investigating Judges are bound by the crimes listed in the Submissions. Internal Rule 67(2) requires only that an Indictment provide a description of the material facts and their legal characterization, in addition to the relevant criminal provisions.¹¹³ The rule does not stipulate or imply that the legal characterization and relevant criminal provisions must be drawn from the Submissions or that the Co-Investigating Judges are subject to the approval of the Co-Prosecutors.¹¹⁴

If Trial Judges may alter legal characterization of a judgment despite ICCPR Article 14, then there is no reason to deny the Co-Investigating Judges the power to add additional specific criminal events to the Indictment.¹¹⁵

¹¹⁰ *Decision to Charge Meas Muth In Abstentia; Annex: Notification of Charges Against Meas Muth; Decision on Meas Muth's Appeal Against Co-Investigating Judge Harmon's Notification of Charges Against Meas Muth.*

¹¹¹ *Internal Rules*, at Rule 98(2).

¹¹² *Agreement* at article 1, and 2; *ECCC Law* at Articles 1-8; *Decision on Personal Jurisdiction and Investigative Policy Regarding Suspect*, at 3-5; *Order Concerning the Co-Prosecutors' Request for Clarification of Charges*, at 4-5; *Co-Prosecutors Submissions on Potential Recharacterisation of the Crimes*, at 3-5; **Note:** Provided that the ECCC case law on charging outlined in *Order Concerning the Co-Prosecutors' Request for Clarification of Charges* is adhered to and the Charged Persons are only subject to Indictment on facts which they were notified about previously.

¹¹³ *Internal Rules*, at Rule 67(2).

¹¹⁴ *Id.*, at Rule 67

¹¹⁵ Provided that the Suspects or Charged Persons have already been charged in relation to the facts. See, *Order Concerning the Co-Prosecutors' Request for Clarification of Charges*, at 5.

iv. The judicial tradition of severing an Indictment is clearly distinguishable from indicting Charged Persons on additional specific crimes not included in the Submissions.

The Trial Chamber is obligated to ensure a fair and expedient trial for all parties. For this reason, the Trial Chamber is vested with the power to sever an Indictment into multiple cases “when the interest of justice so requires.”¹¹⁶ According to Internal Rule 89 “...the Trial Chamber may at any stage order the separation of proceedings in relation to one or several accused and concerning part or the entirety of the charges contained in an Indictment.”¹¹⁷ The power to sever is not absolute. It must be backed by sound legal reasoning and none of the content of the Case to be severed should be excluded; instead it should be divided into more manageable cases to ensure that trial proceedings continue as fairly and expeditiously as possible.¹¹⁸ This was the situation with Case 002 where there were multiple defendants and thousands of documents.¹¹⁹ Considering the age of the defendants, there was an urgent need to facilitate swift conclusion of the trial process while adhering to a fair trial standard.¹²⁰

While an argument could be made that the unfettered power to sever cases supports the theory of absolute judicial control over indictments, this is not the case. The ECCC intended for Trial Judges to use severance as a tool and specifically drafted Internal Rule 89ter.¹²¹ Thus, the

¹¹⁶ *Id.*, at Rule 89

¹¹⁷ *Id.*

¹¹⁸ *Id.*; See also, *Severance Order Pursuant to Internal Rule 89TER* 002/19-09-2007-ECCC/TC, 22 September 2011. at 2. [Electronic copy provided in accompanying USB flash drive at Source 22]; *Lead Co-Lawyers and Civil Party Lawyers Request for Reconsideration of the Terms of Severance Order E124* 002/19 – 09-2007-ECCC/TC, 18 October 2011. at 14-16. [Electronic copy provided in accompanying USB flash drive at Source 19].

¹¹⁹ Sarah Williams, *The Severance of Case 002 at the ECCC*, *Journal of International Criminal Justice*, 13 815-843 (2015). At 819-19 [Electronic copy provided in accompanying USB flash drive at Source 52]; See also, Kheang Un, *Cambodia in 2011: A Thin Veneer of Change*, at 204-205.

¹²⁰ *Id.*

¹²¹ **Note:** This is clearly indicated by the inclusion of a clear ECCC procedural rule allowing Trial Judges the discretion to employ Severance at the trial level, a clear intent which is lacking with the present issue which remains undefined by both the ECCC Internal Rules and the ECCC case law.

true distinguishing factor between the two types of judicial control over indictment is that severance as a judicial instrument serves the interest of the parties while an undefined judicial power to indict on specific criminal events does not.¹²² The purpose of severance is to take a burgeoning indictment and break it down into more manageable sections.¹²³ Equally, any interpretation of judicial power must facilitate the interests of justice.¹²⁴ Allowing Co-Investigating Judges discretion to expand the scope of an indictment by substantially altering the nature of the Co-Prosecutors' case would effectively create the opposite effect of severance. Expanding the scope of an Indictment could only impede the trial proceedings. Unexpected charges contained in the Indictment would only delay trial proceedings by triggering multiple appeals from all Parties involved.

The judicial power of severance, though broad, cannot be used to support an issue of judicial scope that would impede the efficiency of trial proceedings because Severance is both explicitly granted under the Internal Rules and a tool to make trial proceedings more fair and efficient. Judicial discretion to indict on criminal events not requested by the Co-Prosecutors is not prohibited. However, it has the potential to seriously impede trial efficiency and raise fair trial concerns and it must be narrowly defined to avoid this.

¹²² **Note:** attaching additional charges, criminal events, or facts which occur outside of the scope of the Submissions would severely delay the trial proceedings and potentially force the Co-Prosecutors' Office to conduct additional investigations as well as generate appeals from all parties, See *Lead Co-Lawyer' Rule 92 Submission on the Confirmation of the Scope of Case 002/02 Concerning the Charges of Rape outside the Context of Forced Marriage*, at 4-11, and *The Co-Prosecutors Submissions on Potential Recharacterisation of the Crimes*, at 3-9, where the legal re-characterization of the facts of rape at the trial level caused significant debate. Even Severance, a power specifically afforded to the Judiciary by the Internal Rule 89 has created conflict and multiple appeal actions which has slowed trial proceedings despite the necessity of the action in Case 002 where the case consisted of thousands of documents and victims and multiple charges and a 400-page indictment. See, Williams, *The Severance of Case 002*, at 819.

¹²³ This was the legal reasoning provided by the Trial Judges in Case 002 where the Case was so broad and had so many components it would have been nigh impossible to prosecute fairly and in a reasonable time frame which the ICCPR requires courts to meet. See, *The Severance of Case 002*, at 819-820; *Decision on Co-Prosecutors' Request for Reconsideration of the Terms of the Trial Chambers' Severance Order and Related Motions and Annexes*, 002/19-09-2007/ECCC/TC, at 4-5. [Electronic copy provided in accompanying USB flash drive at Source 13]

¹²⁴ *Internal Rules*, at Rule 21(1).

D. The ECCC must maintain a clear separation of the organs of the court or risk making the Office of the Co-Prosecutors redundant at the pre-trial level.

Arbitrary expansion of the Co-Investigating Judges powers threatens the independence of the Co-Prosecutors Office and risks rendering the organ redundant at the pre-trial level.

Exploiting gray areas in the ECCC law and creating unrestricted expansion of judicial power would threaten the balance of the Court. The Controlling Documents clearly state the intent to establish each organ as an independent body.¹²⁵ There can be no debate that each organ is a separate, independent, and distinct entity within the ECCC and they must remain separate.¹²⁶ However, the independence of the separate organs of the court cuts both ways - the Co-Prosecutors' Office may not encroach on the independence of the ECCC Judges.

i. The ECCC is set apart from the other international courts on issues of judicial scope.

The ECCC was not designed to mirror the judicial scope of other international courts this best exemplified in the broad discretion the ECCC Judges have as compared to judges at other international courts. At the ICC, the Co-Prosecutors are wholly responsible for conducting the investigations.¹²⁷ Internal Rule 15(2) clearly defines the roles of Co-Prosecutors and Co-Investigating Judges, during investigation: "The Co-Prosecutors shall direct and coordinate the action of the Judicial Police until a judicial investigation has been initiated. Once such a judicial investigation has been initiated, the Judicial Police shall carry out their duties as instructed by the

¹²⁵ *Id.*, at Rule 13.

¹²⁶ *Id.*

¹²⁷ Anees Ahmed and Robert Petit, *A Review of the Jurisprudence of the Khmer Rouge Tribunal*, at 169-171; *Internal Rules*, at Rule 15(2), and 55. *ICC Rules of Procedure and Evidence* at Rule 104, 105, and 106.

Co-Investigating Judges." ¹²⁸ The investigation is completely under the control of the Co-Investigating Judges once the judicial investigation has been initiated and this is a stark contrast from Courts such as the ICC, the ICTY, and the Special Tribunal for Lebanon (hereinafter "STL") where the Prosecutors maintain almost absolute control over investigating, legal characterization of facts, and drafting the Indictment for judicial review.¹²⁹ This is why the other international courts and tribunals may not provide effective guidance on an issue of judicial scope. A comparative analysis of the statutes of the different international courts provides conclusive evidence that there is a significant divergence in the roles and expectations of Judges and Prosecutors between the ECCC and other International Courts.

The restrictions on the Co-Investigating Judges are explicit in the Internal Rules and are intended to prevent any undue burden on the Co-Prosecutors.¹³⁰ Unbridled judicial power of indictment would absolutely infringe on the Co-Prosecutors' rights and duties. However, so long as the Co-Investigating Judges adhere to their restrictions on investigation and charging they cannot damage the autonomy of the Co-Prosecutors' Office or the nature of the Co-Prosecutors case in any meaningful way. The ECCC has set clear limits on the investigative and charging powers of the Co-Investigating Judges and thus prevents them from unduly burdening the Co-Prosecutors during Indictment.

¹²⁸ *Internal Rules*, at Rule 15(2).

¹²⁹ *ICC Rules of Procedure and Evidence*, at Rule 104, 106, 128, 129; *ICTY Rules of Procedure and Evidence* at Rule 47, 50, 51; *Rules of Procedure and Evidence*, Sierra Leone at Rule 47, 50, 51; *Rome Statute of the International Criminal Court*, adopted by the Security Council on 17 July 1998, U.N. doc A/CONF.183/9, 1998, at Article 53 and Article 54. [Electronic copy provided in the accompanying USB flash drive at Source 8]; *Rules of Procedure and Evidence*, Special Tribunal for Lebanon, corrected 3 April 2014, at Rule 61 [Electronic copy provided in the accompanying USB flash drive at Source 10].

¹³⁰ *Internal Rules* at Rule 55(3), 55(4), and 70.

ii. The Co-Investigating Judges are not required to defer to the Co-Prosecutors on issues of indictment.

The Co-Investigating Judges are not bound by the Co-Prosecutors Submissions during Closing Orders. The Co-Investigating Judges are the source of the indictment, not the Co-Prosecutors.¹³¹ There is no indication that the Co-Investigating Judges' Indictment was ever intended to mirror the Final Submission of the Co-Prosecutors. Unlike the Prosecutors at the ICC, ICTY, and the STL, the ECCC Co-Prosecutors do not send an Indictment for judicial review and verification.¹³² Rather, the Co-Prosecutors are permitted to submit a Final Submission advising the Co-Investigating Judges how to rule. However, the Co-Investigating Judges are not bound by the Final Submissions and instead draft their own Indictment during Closing Orders.¹³³ The Controlling Documents and prevailing ECCC case law give the Co-Investigating Judges broad discretion on indictment.¹³⁴

Judicial investigative and charging powers are interconnected with Indictment and should be considered where the Internal Rules are silent on an issue of judicial scope to preserve the independence of the separate organs of the ECCC. For Co-Investigating Judges to have the power to indict outside of the Submissions they must first have the power to investigate or charge based on new facts. The Co-Investigating Judges do not have this power.

If the Co-Investigating Judges indicted Charged Persons for specific criminal events based on facts discovered outside of the scope of their original investigation without receiving additional Submissions or even notifying the Co-Prosecutors, they would, in effect, have both violated Internal Rule 55(3) and 55(4) and would be forcing the Co-Prosecutors to prosecute charges at the trial level

¹³¹ *Id.* at Rule 67; see also *Order Concerning the Co-Prosecutor's Request for Clarification of Charges*, at 4-5.

¹³² *Internal Rules*, at Rule 66(5); *ICTY Rules of Procedure and Evidence*, at 47; *ICC Rules of Procedure and Evidence*, at 128; *Rome Statute*, at Article 61; *STL Rules of Procedure and Evidence*, at Rule 68.

¹³³ *Internal Rules* at Rule 67.

¹³⁴ *Id.* at Rule 67, 89, and 98.

which the Co-Prosecutors had either purposefully excluded or never investigated during their preliminary investigations. Forcing the Co-Prosecutors to prosecute based on facts falling outside the scope of the preliminary investigation infringes on their autonomy to decide what charges to prosecute and also nullifies the purpose of both the Co-Prosecutors' preliminary investigation and the Submissions.

However, indicting for specific crimes not requested but still falling within the scope of the Submissions is a separate issue. At first glance it appears to be the same issue as forcing the Co-Prosecutors to prosecute on specific criminal events and charges they either did not pursue or elected to exclude from their Submissions, it is a distinguishable. While there is international precedent that cedes considerable control of indictment to the Co-Prosecutors, the ECCC is set apart from the more adversarial international courts.¹³⁵ The ECCC is rooted in the domestic Cambodian system which is inquisitorial; the Controlling Documents explicitly cedes control of indictment to the Co-Investigating Judges.¹³⁶

IV. Conclusion

The ECCC judges have a broad discretion over indictment compared to other international courts, but this discretion is subject to restrictions on judicial investigation, charging, and indictment as imposed by the Controlling Documents and ECCC case law. Despite the lack of official ECCC procedural law concerning the transition from Suspect to Charged Person, it is apparent from ECCC case law that a Suspect becomes a Charged Person upon official notification of charging, either in person or *in absentia*. The only time a Suspect may not be charged prior to the

¹³⁵ John D. Ciorciari and Anne Heindel, *Experiments in International Criminal Justice: Lessons from the Khmer Rouge Tribunal*, at 372.

¹³⁶ *Id.*

conclusion of the judicial investigation is when the Co-Investigating Judges intended to dismiss the case.

It is accepted case law that Indictments must arise from investigation and charging. It is indisputable that Co-Investigating Judges are bound to the facts in the Co-Prosecutors' Submissions while conducting their investigation and determining who to charge. If the facts were included within the Submissions then the Co-Investigating Judges are obligated to investigate said facts under the Internal Rules and charge based on their findings; provided that all the facts arose properly under Internal Rule 55.

Consequently, the "specifically requested" element of the question is irrelevant. If the facts that the Co-Prosecutors provide in their Introductory and Supplemental Submissions amount to a specific criminal event then it is within the scope of the Co-Investigating Judges' obligation to investigate, and the Co-Investigating Judges must pursue the facts. If the specific criminal event does not stem from the facts within the Co-Prosecutors' Submissions, then the Co-Investigating Judges have no basis for including that specific criminal event in a charge or Indictment. Thus, if the Co-Prosecutors do not wish to prosecute a person for a 'specific criminal event', then they must ensure that the facts that relate to that specific criminal event are not included in their Submissions. A Co-Investigating Judge is free to charge any Suspect included in the Introductory Submission based on any facts within the Submissions prior to the conclusion of the judicial investigation.

Under current case law, Suspects and Charged Persons must be notified of the investigation pending, the facts within the Introductory and Supplemental Submissions, the charges, and the possibility of future additional charges or legal characterization of facts prior to the conclusion of the judicial investigation. The Co-Investigating Judges have previously determined that Charged Persons may be indicted for all facts imputed to them by the Co-Prosecutors in their

Submissions, subject to the condition that those persons have been charged beforehand by the Co-Investigating Judges in relation to such facts. A Co-Investigating Judge may not indict a person for facts in relation to which he or she has not first been charged.

Therefore, the Co-Investigating Judges have discretion to indict a Charged Person for specific criminal events that the Co-Prosecutors did not specifically request for investigation in either their Introductory or Supplemental Submission(s) provided that the Co-Investigating Judges follow the rules for investigation, notification, charging, and indicting in the ECCC procedural law and case law.