

JOINT STATEMENT OF NGOS
Concern about the Restrictions on Transparency
Resulting from the Co-Investigating Judges Order on Breach of Confidentiality

PHNOM PENH, 6 March 2009

As members of civil society actively engaged in supporting and monitoring the work of the Extraordinary Chambers in the Courts of Cambodia, we are concerned about the impact of the action taken by the Co-Investigating Judges in their Order on Breach of Confidentiality of the Judicial Investigation of 3 March 2009 which applies a harsh rule that unnecessarily limits public information and places defense counsel in a difficult position in representing their clients without risk of contempt of court.

Transparency is an essential condition of all public institutions, including courts, as a foundation for public confidence, and a bulwark against corruption and improper political influence. Secrecy and confidentiality in portions of court proceedings are necessary to protect 1) the rights of accused persons; 2) witnesses and others providing information; and 3) the integrity of ongoing investigations. These goals are of considerable importance and a court must have the ability to close proceedings and protect information in order to respect them. However, policies about secrecy must be balanced against a high value in transparency of public institutions generally and the unique goals and circumstances of the ECCC.

In its Order on Breach of Confidentiality, the Co-Investigating judges stated that “[t]he CIJ reiterate that the confidentiality of the case file for which the Internal Rules provide concerns all filings thereon, including the filings drafted by the parties.... As previously noted, it is for the Judges, and not for the parties, to decide when and how to disclose confidential case file material.” While we do not expect public access to information that would harm the investigation or endanger witnesses, the strict rule of blanket confidentiality for all information contained in the case file is counter to the goals of the ECCC. Civil society has repeatedly urged the court to devise a better system that balances legitimate needs to protect confidentiality when warranted, while still protecting defendants’ rights to speak about the case, and provide meaningful and routine information to the public. The current practice where the presumption is in favor of confidentiality and only the judges can decide what information to release is arbitrary. It is essential that the ECCC demonstrates a model of transparency in judicial proceedings if it is to leave a positive legacy for the national courts of Cambodia. In this way, it could serve as a model to increase - rather than further undermine - the level of public trust in justice processes.

The current controversy between the Co-Investigating Judges and the defense teams should be seen against a background in which the Office of the Co-Investigating Judges have failed to meet public demands and expectations for a reasonable level of disclosure of information regarding the pre-trial phase, and to fulfill their promises to make more information public. Recalling the clash between journalists and ECCC officials over the site-reconstruction in case 001 on 28 February 2008, the Co-Investigating Judges

promised to hold a monthly conference with media. We are unaware of a single press conference held by the judges in the last year.

While we respect the principle of le secret de l’instruction as a fundamental part of civil procedure, this principle should be balanced against the need to exemplify international fair trial standards at all stages of the proceedings. We believe this Order on Breach of Confidentiality places too high a priority on the need for secrecy, and does not adequately respect the protections that should be afforded to defense counsels when pursuing the best interests of their client. While we accept that any breach of confidentiality on the part of the defense that specifically undermines reasonable requirements for confidentiality should be reprimanded, we believe the Order to extend the requirements for confidentiality beyond what is reasonably required, and the actions taken by the OCIJ in this instance were unduly harsh towards the defense. As a result, the Order further contributes to broader perceptions of pervasive practices of non-transparency at the ECCC. We support the public release of documents of the kind that the Ieng Sary Defence Team has posted on their website—documents of procedural, legal or administrative nature, not dealing with the facts of the investigation, and urge the judges and the court to adopt policies that allow for their release.

In their Press Release on March 3, 2009, the Co-Investigating Judges committed to “communicate more systematically about their activities in future, . . .and publish an increased number of documents with regard to the judicial investigation.” This commitment to greater procedural transparency is encouraging and we look forward to seeing the judges uphold its promise and spirit.

List of designated members of civil society

No	Name of NGOs	Contact Names
1	Cambodian Defenders Project and Chairman of Cambodian Human Rights Action Committee	Mr. SOK Sam Oeun
2	Cambodian Human Rights & Development Association	Mr. THUN Saray
3	The Center for Social Development	Ms. Theary C. SENG
4	Khmer Institute of Democracy	Mr. HANG Chhaya
5	International Center for Transitional Justice	Ms. Caitlin Reiger
6	Asian International Justice Initiative	Ms. Michelle Staggs Kelsall
7	Cambodia Justice Initiative	Mr. Panhavuth LONG