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ECCC in Pre-Trial Action: Was There Good Reason to Order Pre-Trial Detention of the ECCC Defendants

*By Stan Starygin**

INTRODUCTION

To date, the Extraordinary Chambers in the Courts of Cambodia (ECCC) has denied all motions for pre-trial release. On July 31, 2007 the reputed commandant of the central security prison (S-21) of Democratic Kampuchea (popularly known as the “Khmer Rouge regime”), Kaing Guek Iev, was transferred into ECCC custody from the military prison of Phnom Penh where he had been held without trial for eight years prior on orders from the Military Tribunal of the Kingdom of Cambodia (Military Tribunal). The Co-Investigating Judges (CIJs) promptly ordered Kaing’s pre-trial detention. On December 3, 2007 the Pre-Trial Chamber (PTC) denied Kaing’s appeal.

Noun Chea, the Democratic Kampuchea’s alleged Communist Party of Kampuchea (CPK) Secretary and presumed second in command to Pol Pot, was the first person arrested directly on orders by the ECCC. On March 20, 2008 the PTC rejected Noun’s appeal of a CIJ order for his pre-trial detention. Similarly, on orders of the ECCC, Ieng Thirith, Democratic Kampuchea’s Minister of Social Affairs (Action), and Ieng Sary, Democratic Kampuchea’s Deputy Prime Minister for Foreign Affairs were arrested and ordered to pre-trial detention. The PTC rejected appeals against pre-trial detention in both cases in decisions on July 9 and October 17, 2008, respectively.

Finally, on November 19, 2007, the ECCC also arrested Khieu Samphan, who had allegedly held numerous high-level positions within Democratic Kampuchea. Khieu filed an appeal with the PTC, which was later withdrawn as part of defense counsel’s pre-trial strategy, but subsequently filed an additional appeal requesting his release on the basis of an alleged abuse of process. Despite Khieu’s appeals, the decision by the CIJs to detain has stood throughout the process.

On account of the Internal Rules of the ECCC that limit orders for pre-trial detention to a maximum length of one year at a time,¹ defendants continue to appeal extension of orders for pre-trial detention without success.² Operating in an environment of endemic abuse of legal process and abuse³ of the state power to detain individuals pending trial in particular, the ECCC has sought to set clear standards of the rule of law and resist the



Photo courtesy of the ECCC.

Co-Lawyers and Nuon Chea sit in Pre-Trial Chamber during his appeal against provisional detention.

coercive powers of the State. This paper seeks to examine the reasons by which the ECCC has substantiated their denials of appeal against pre-trial detention, and attempts to answer the question of whether such reasons had a solid legal foundation in the ECCC’s pre-trial detention test.

THE PRE-TRIAL DETENTION TEST (PTDT)

One manner of restraining the coercive powers of the state in decisions pertaining to pre-trial detention was to create a narrowly constructed and construed pre-trial detention test (PTDT). The Cambodian legislature set out the parameters for the PTDT by linking the test to Cambodian law, stating that “[t]he procedure shall be in accordance with Cambodian law,”⁴ and that all chambers of the court “shall follow existing procedures in place.”⁵ The legislature’s stipulation of the application of “existing procedure” is unambiguous, and is therefore a direct reference to the two criminal procedure codes that existed in 2006, the Criminal Procedure Code of the State of Cambodia (CPCSoC) and the Provisions Relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia During the Transitional Period (UNTAC Code).⁶ The CPCSoC did not contain a PTDT and, therefore, the ECCC would have been limited to the PTDT of the UNTAC Code if the ECCC did not develop a method of their own. The UNTAC Code stated that a defendant may be detained pending trial if:

- (1) there is a risk of escape or non-appearance manifested by the absence of such factors as: (a) a job, (b) a family, or (c) a home; [or] (2) if there is a reason to

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believe that the accused will influence witnesses or the conduct of the investigation if released.⁷

There are two attributes of the UNTAC PTDT that are of particular relevance to rights of the accused: (1) it eliminates judicial discretion by spelling out specific factors which may result in a non-appearance; and (2) it places the burden of proving that there is “a reason to believe” the accused will interfere with the administration of justice if released on the prosecution. The ECCC chose to disregard this PTDT, even though this was the only source of law that fully complied with the legislature’s command at the time of the ECCC’s inception.

Instead, the ECCC looked to the Criminal Procedure Code of the Kingdom of Cambodia (CPC KoC) Bill, which at the time of inception of the Chambers, in 2006, was expected to imminently become law (and which did so in August 2007).⁸ The standard for pre-trial detention contained in the CPC KoC included six components:

- (1) guarantee the presence of the accused during the proceedings against him; (2) prevent any harassment of witnesses or victims or prevent any collusion between the accused and his accomplices; (3) stop the offense or prevent the offense from happening again; (4) preserve evidence and exhibits; (5) protect security of the accused; (6) preserve public order from any disturbance caused by the offense.⁹

This standard differs from the UNTAC PTDT in two important aspects: (1) it creates room for judicial discretion by the non-inclusion of elements in any of its prongs; and (2) at least in some instances, it visibly places the burden of proof on the accused. The ECCC did not accept the CPC KoC PTDT in its entirety in the form envisioned by the legislature and elected to introduce changes that resulted in the following PTDT within article 63(3) of the ECCC Internal Rules:

- (a) there is well-founded reason to believe that the person may have committed the crime or crimes specified in the Introductory or Supplementary Submission; and
- (b) the Co-Investigating Judges consider Provisional Detention to be a necessary measure to:
 - (i) prevent the charged person from exerting pressure on any witnesses or victims, or prevent any collusion between the charged person and accomplices of crimes falling within the jurisdiction of the ECCC;
 - (ii) preserve evidence or prevent the destruction of any evidence; (iii) ensure the presence of the charged person during the proceedings;
 - (iv) protect the security of the charged person;
 - (v) preserve public order.¹⁰

Therefore, the ECCC PTDT diverges from the standards promulgated by the Cambodian legislature in a number of important ways. First, the ECCC PTDT includes a requirement that the CIJs or the Chamber satisfy themselves with the existence of the material element of the charge. In essence, the CIJs or the Chamber (most often PTC) must be able to find that there is “well-founded reason to believe” that the suspect committed the offenses alleged by the prosecution. This analysis is to be done on the basis of, inter alia, the Introductory Submission, which in simple terms is the untested opinion of the prosecution on the guilt of the suspect.¹¹ As such, it is not difficult to predict that the PTC will inexorably find itself satisfied with the existence of “well-founded reason to believe,” as it neither has the independent capacity to test what is proffered by the prosecution, nor a mandate to undertake such a task. Second, a far larger amount of implicitly permitted judicial discretion, particularly compared to that permitted by the UNTAC PTDT,

brought about by the non-existence of elements of the test discussed earlier. Third, a shift of the burden of proof from the prosecution to the suspect/accused as evidenced in the pronouncement that the CIJs must consider it to be “a [mere] necessary measure,” rather than that of “a reason to believe” enshrined in the UNTAC PTDT. Fourth, the exclusion of the phrase “stop the offense or prevent the offense from happening again” from the ECCC PTDT. This is likely to have been done due to a belief that the possibility of recidivism within the jurisdiction of the ECCC by suspects/accused individuals is extremely remote at present.

[I]t was critical that
the ECCC set clear
standards of the rule
of law and restraint of
the relevant coercive
powers of the State.

ECCC’S APPLICATION OF THE PRE-TRIAL DETENTION TEST

The following analysis will be a composite of the positions of the prosecution and the defense regarding the interpretation of the individual prongs of the ECCC PTDT, and the orders and decisions regarding the application of the same handed down by the CIJs and the PTC, respectively. By the time of this writing,¹² the CIJs, the PTC, and the Trial Chamber (TC) have applied the ECCC’s PTDT to all five suspects currently before their respective Chambers.¹³

It is important to note that the ECCC PTDT was designed as a conjunctive test. Both prongs, the “well-founded reason to believe” and the “necessary measure” must be satisfied.¹⁴ Considering that the “well-founded” prong appears first in the text of the PTDT, there is an implicit imperative that it be satisfied first, the failure of which renders the argument for pre-trial detention fatal (regardless of the meritorious strength of the facts adduced to satisfy the elements of the “necessary measure” prong). A detailed discussion of both prongs of the test and the ECCC’s application of them will follow.

WELL-FOUNDED REASON TO BELIEVE THAT A PERSON MAY HAVE COMMITTED THE CRIME OR CRIMES SPECIFIED IN THE INTRODUCTORY OR SUPPLEMENTARY SUBMISSION

The first organ of the court to apply the ECCC PTDT is the CIJs. Despite the requirement that each Provisional Detention Order must contain a “Reasons/Grounds for the Decision,”¹⁵ the CIJs have not provided reasoning for their findings of a well-founded reason to believe that the accused may have committed the alleged crimes.¹⁶ Instead, in each case, the CIJs agreed with the prosecution without re-stating the prosecution’s arguments (with the exception of the order to provisionally detain Khieu, in which the CIJs went into some detail on this matter).¹⁷

Defense teams have responded by criticizing the CIJs for what they perceive as reaching decisions based on not “anything more than a very cursory review of the case file”¹⁸ and failing to exercise “particular diligence.”¹⁹ Further in the process, some of the defense teams conceded (at least to a certain degree) to the existence of “well-founded reason” in the contexts of their clients’ cases,²⁰ but continued to criticize the CIJs for the initial lack of reasoned arguments.²¹ On request, the CIJs refused to elaborate on the reasons for their satisfaction of the “well-founded” prong and proceeded to re-iterate their essential agreement with the sufficient volume of evidence adduced by the prosecution through the Introductory Submissions. It appears that there is a growing consensus among the defense teams that it is the CIJs’ diligence in testing the “well-founded” prong that has been called into question. This view is accordant with the simple mathematics involved in the CIJ’s review, which betrays the CIJs’ intention to create an impression of having been able to canvass a large number of documents of the Introductory Submission in a very short period of time, denying it the plausibility of an independent observer.²²

Moving from the CIJs to the PTC, the PTC addressed whether well-founded reason to believe the accused was responsible for the alleged criminal activity where doing so was warranted by the facts of the case.²³ In instances where the PTC has addressed the substantive basis of the “well-founded” prong, the PTC juxtaposed the definition of the prong in French law with that in the jurisprudence of the European Court of Human Rights (ECtHR) to find that the standard of proof is lower at the pre-trial level than it might be at more advanced stages of the proceedings.²⁴ Like the CIJs, the PTC has also not set forth a clear explanation of the application of the “well-founded” prong, but instead has declared itself satisfied that the conditions of the test have been met without conducting the necessary evidentiary analysis.²⁵ In addition, considering the fact that the PTC applied the same prong to each of the five suspects, the PTC used widely differing means for determining whether the conditions of the prong had been met without any articulated reasoning, and arguably used different conditions as the substance of the prong.²⁶

In *Prosecutor v. Noun et al*, the TC’s judgment reads as an opinion written in much haste and without a thorough review of the CIJs’ Closing Order. The TC declared itself satisfied with the existence of *prima facie* evidence to meet the requirements of the “well-founded” prong²⁷ in relation to the three accused,²⁸ but did not substantiate this finding beyond its recognition of the Closing Order and the PTC’s confirmation of such a finding.

Photo courtesy of the ECCC.



Former Democratic Kampuchea foreign minister Ieng Sary stands for the first time in the Pre-Trial Chamber 30 June, 2008 with public in the background.

THE CO-INVESTIGATING JUDGES CONSIDER PROVISIONAL DETENTION TO BE A NECESSARY MEASURE

As previously noted, an analysis of this prong – or any of its elements – can only be undertaken if the decision-making organ of the court is satisfied with the existence of the conditions of the “well-founded” prong. The five elements of the “necessary measure” prong are disjunctive (which is evinced through the conjunction ‘or’ between the final two elements) with only one being necessary to satisfy the conditions of the entire prong. It is equally salient to note that the burden of proving the existence of the conditions of each or any of the elements of the “necessary measure” prong rests upon the CIJs.

- (i) *[P]revent the Charged Person from exerting pressure on any witnesses or Victims, or prevent any collusion between the Charged Person and accomplices of crimes falling within the jurisdiction of the ECCC;*
- (ii) *preserve evidence or prevent the destruction of any evidence*²⁹

CIJs did not follow the ECCC PTDT in a sequential manner. A simple comparative analysis of the initial detention orders issued by the CIJs will demonstrate that the CIJs’ reasoning cannot be described by an objective observer as hewn to the PTDT. In some orders the CIJs failed to discuss the above elements,³⁰ while in others they expanded on the circumstances spelled out in the elements without adducing any evidence to support their assertions.³¹ Yet in others, the CIJs stretched the PTDT to create a *de facto* bar to pre-trial release based on the rights to confrontation and access to the case file (the exercise of these rights by the suspects, in the opinion of the CIJs, provided material evidence to demonstrate the existence of the “pressure” sub-element of this element).³² Instead of adducing evidence to determine whether the circumstances of this element were met, the CIJs often merely re-stated the sub-elements of this element. This practice demonstrates a lack of understanding of the fact that the purpose of the PTDT is to test arguments for pre-trial detention put forward by the prosecution, not to serve as a list for the CIJs to pick more fitting reasons for detention. Although the CIJs have begun to undertake somewhat more in-depth analysis of the PTDT following scathing remarks from the defense regarding the CIJs’ performance,³³ the format of the CIJs’ reasoning remains the same.³⁴

The lack of any evidence-based arguments in the decisions issued by the CIJs with respect to the “pressure + collusion + destruction” element made them an easy target for the defense. Citing other international tribunals, the defense inveighed against the CIJs’ treatment of this element on the following grounds: (1) the risks must be based on specific facts, not abstract perception of the prevailing situation; (2) unsubstantiated claims based on general assertions must be rejected; (3) the fact that the suspect may retain some level of influence does not automatically presume that s/he will use it unlawfully (i.e. to attempt to intimidate witnesses and destroy evidence).³⁵ The defense teams, however, compromised their credibility – and thus their ability to drive strong and valid arguments through to their completion – before the Chambers by committing blatant errors of legal reasoning.³⁶ However, these errors can be seen as examples of zealous advocacy clouding defense counsel’s judgment, and may raise issues substantiated by little evidence or procedural weight.³⁷

Appeals based on matters of disagreement between the defense and the CIJs provided the PTC with its first opportunity to offer its judicial review on the manner in which the “pressure + collusion + destruction” element was intended to be satisfied. The PTC began this process by averring that essentially the suspect’s present situation (absence of a position of authority, absence of resources, etc.) is of no consequence, but that the suspect’s “mere presence” in society and the PTC’s finding that “weapons [were] easily accessible” would intimidate witnesses. According to the PTC, “there are very few remaining witnesses who can testify to the Charged person’s involvement in the alleged crimes,” and therefore they should employ all necessary means to protect witnesses. While the “mere presence” argument is not that of the PTC’s invention,³⁸ the PTC introduced it into the context of the ECCC without a comparative analysis of the very different circumstances of the other international criminal tribunals (ICTs) *vis-à-vis* the ECCC. The PTC explained their “mere presence” argument through the existence of “a ubiquitous feeling of fear.”³⁹

Thus, similar to the CIJs, in most cases the PTC failed to adduce any evidence to support their declarations of satisfaction with the presence of evidence of the “pressure + collusion + destruction” element.⁴⁰ The PTC often treated this requirement under the single sub-element of “pressure,” while not addressing the sub-element of “collusion,” and by lumping “destruction” with “pressure.”⁴¹ However, it should be noted that unlike the

CIJs, the PTC appeared to have had no difficulty following the ECCC PTDT and did so by addressing each of its elements through the statutorily ordered sequence.⁴² Substantively, the PTC introduced at least three *de facto* bars to pre-trial release relevant to this element that do not appear in the CIJs’ detention orders (“mere presence,” “weapons easily accessible,” and “very few witnesses”) which are insurmountable to the accused because they pertain to external circumstances, imaginary or real, as opposed to the character of the accused. In all other aspects, the PTC agreed with the CIJs, including the most blatant abuse of the rights of the accused: converting the accused’s rights to confrontation and access to the file into a *de facto* bar to pre-trial release.⁴³ The TC rejected all of the prosecution’s

arguments – and by extension, the arguments of the CIJs and PTC where they were in agreement with the prosecution – relating to the existence of conditions sufficient to satisfy the “pressure + collusion + destruction” element of the ECCC PTDT for “lack of substantiation.”⁴⁴ The TC found the lack of substantiation to be a fatal flaw of the prosecution’s arguments for “the above reasons”⁴⁵ which the TC never enunciated either above or below.

Despite the requirement that each Provisional Detention Order must contain a ‘Reasons/Grounds for the Decision,’ the CIJs have not provided reasoning for their findings of a well-founded reason to believe that the accused may have committed the alleged crimes.

(iii) [E]nsure the presence of the Charged person during the proceedings

As was pointed out to be the case with the “pressure + collusion + destruction” element, the CIJs’ application of the “presence” element lacked adherence to the ECCC PTDT. This is instantiated in the CIJs’ different treatment of very similarly situated persons.⁴⁶ While other arguments had been advanced (residence abroad, financial means, absence of an extradition treaty between Cambodia and certain countries, general negative attitude towards the ECCC, and disappearance from the public view⁴⁷), the cornerstone of the CIJs’ argument for the existence of the conditions of the “presence” element was in the CIJs’ opinion that the projected length of imprisonment would induce the suspects to flee the ECCC process.⁴⁸ In some cases, the defense responded to this argument by asserting that the CIJs failed to adduce evidence to support its assertions that the suspects were a flight risk.⁴⁹ The PTC essentially accepted the arguments advanced by the CIJs and added a substantial number of its own arguments, such as the likelihood of the accused’s “disappearance from public view,”⁵⁰ and “the situation is no longer the same now that he is under investigation of the ECCC,”⁵¹ however the “projected length of imprisonment” remained the cornerstone of the PTC’s argument.

The TC similarly found that circumstances existed to satisfy the requirements of the “presence” element, but rejected all of the arguments of the prosecution – and by proxy the arguments previously advanced by the CIJs and the PTC when they were in agreement with the prosecution – advanced at the hearing on January 31, 2011. The one exception pertained to the “projected length of imprisonment”⁵² argument, which was buttressed by an argument the TC advanced regarding “detailed information regarding viable alternatives.”⁵³ As with the CIJs and PTC, the TC failed to provide a factual basis to support the “projected length of imprisonment” argument and provide reasons that justified the argument’s application to the accused with no regard for their personal circumstances and character. Instead, the TC shifted the burden of proving that the accused would appear for trial to the defense by creating an expectation that the defense would provide “viable alternatives” to detention.

disagreed with the CIJs – and by extension with the prosecution – in a groundbreaking statement that it was not satisfied with the existence of the circumstances of the “ensure the security” element due to the fact that it found “no evidence in the Case File” nor “[had] any been submitted by the Co-Prosecutors.”⁵⁸ This disagreement helped create a perception that while the ECCC continued to maintain the principle that “detention must be the rule,” and “pre-trial release the exception,” the PTC began undertaking meaningful review of the CIJs’ orders. Laudable as this departure was, the PTC continued to be mired in abstractions that it repeatedly adduced to its findings relevant to the “ensure the security” element.⁵⁹

The TC rejected the arguments of the prosecution – and by extension, those of the CIJs and the PTC, where they were in agreement with the prosecution – regarding the “ensure the security” element by stating that the prosecution’s arguments

The Trial Court’s approach therefore does not demonstrate a change in quality but merely replaces the defense with the prosecution as the party at a disadvantage, since the prosecution will find it difficult to appeal the TC’s decision due to the same exact reasons the defense had difficulty appealing decisions of the CIJs and the PTC.

(iv) [P]rotect the security of the Charged person

In the cases of the five accused individuals who have faced pre-trial detention, the CIJs did not offer any factual basis for finding the existence of the conditions of the “protect the security” element. Instead, the CIJs offered unsubstantiated (there appears to be no academic literature to attest to the CIJs’ claims; nor did the CIJs commission their own study of such) abstractions such as that of “the gravity of [crimes] which . . . still profoundly disrupt public order,” “fragile context of today’s Cambodian society,” and “risks of indignation which could lead to violence,” and “the situation [not being] the same now that the official prosecution has commenced.”⁵⁴

The defense teams responded to the abstractions, with some calling them “legally impermissible and factually spurious.”⁵⁵ Others restated their claim that, similar to the treatment of the other elements of the PTDT by the CIJs, the treatment of the “ensure the security” element lacks a factual basis.⁵⁶

The PTC approached the appeals of detention orders in all five cases with what appears to be an intention to ground their findings in facts. It did so where reasonably adducible facts were available.⁵⁷ Where adducible facts were not available, the PTC

were untenable for “lack of substantiation.”⁶⁰ The TC made this determination on the basis of “the above reasons” which it did not enunciate either above or below.⁶¹

(v) [P]reserve public order

The “public order” element is the most ambiguous of the ECCC PTDT elements. A reasonable observer would expect proof of the possibility of violent public reaction to the release of the suspect. The CIJs offered no such proof in any of the five cases, and unceremoniously hid behind such proffered abstractions as the “gravity of [crimes] [capable] of profoundly disrupt[ing] the public order,” “the fragile context of today’s Cambodian society,” and “indignation which could lead to violence.”⁶² The defense appealed against the one-size-fits-all approach of the CIJs and the lack of a factual basis in the CIJs’ reasoning. The defense referred to the CIJs reasoning as “impermissible and spurious”⁶³ and made specific references to the international jurisprudence that required evidence of a possibility of disruption of the public order and a finding that this possibility decreases over time.⁶⁴

In deciding appeals relevant to the “public order” element, the PTC relied on the establishment of certain historical facts

to justify its conclusion. For example, the PTC concluded that “1.7 million Cambodians died”⁶⁵ during the stewardship of Democratic Kampuchea. This is not an uncontested number.⁶⁶ The PTC also offered its expertise in medical sciences, asserting that a portion of the population that lived through the period from 1975 to 1979 suffers from Post-Traumatic Stress Disorder (PTSD). Moreover, the PTC claimed that PTSD would be re-activated if the suspects were to be released pending trial.⁶⁷ The PTC managed to arrive at this conclusion without as much as summoning a single medical expert before it. Again, the PTC used abstractions such as the “great public interest in the proceedings,”⁶⁸ and “the grave nature of the crimes,” and the PTC’s perception of relevance of the anti-Thai riots in Cambodia in 2003 as a way of projecting what might happen.⁶⁹

The TC rejected the arguments of the prosecution – and by extension those of the CIJs and the PTC where they were in agreement with the prosecution – regarding the “public order” element by stating that the prosecution’s arguments were untenable for “lack of substantiation.”⁷⁰ The TC reached this conclusion on the basis of “the above reasons” which it did not enunciate either above or below.⁷¹

CONCLUSION

The CIJs have misapplied the ECCC PTDT by breaking the statutory sequence of the test and by advancing arguments without explaining their evidentiary support. The shortcomings of the determination of the CIJs negatively affected the PTC, by forcing the PTC to go beyond the detention orders to address the issues raised by the defense on appeal. The format of the TC’s most recent intervention to rectify what it sees as the mistakes of other decision-making organs of the court (CIJs and PTC) entailed reinstating the rights of the accused and granting the accused relief for the previous mistakes of law. However, similar to the CIJs and PTC, the TC lacks substantiation and betrays the hastiness with which the TC handed down its decision. The TC’s approach therefore does not demonstrate a change in quality, but merely replaces the defense with the prosecution as the party at a disadvantage since the prosecution will find it difficult to appeal the TC’s decision due to the same exact reasons the defense had difficulty appealing decisions of the CIJs and the PTC – absence of factual basis.

Photo courtesy of the ECCC.



Court Building for the Extraordinary Chambers in the Courts of Cambodia.

Underneath these convoluted matters of criminal procedure are the rights of individuals. Although the individuals whose plight in pre-trial detention awaiting trial in the ECCC do not often evoke an outpouring of local or international empathy, they too like anyone interfacing with the criminal process, have the right to be presumed innocent until proven guilty in a court of law and have the right to have the necessity of their pre-trial detention determined by the court on the basis of a standard specified by statute in the pre-trial detention test.

The tide may be turning. On February 16, 2011, the TC invalidated all of the prosecution’s arguments for the existence of conditions to satisfy all but one of the elements of prong two of the ECCC PTDT. By doing so, the TC implicitly invited the defense to proffer “viable alternatives” to detention⁷² and suspended the requirement to “establish a change in circumstances”⁷³ (on which the prosecution has heavily relied) in subsequent motions for provisional release by the defense. The overall tone of the TC’s decision of February 16, 2011, indicates that the TC would be amenable to ordering provisional release if the defense managed to proffer “viable alternatives” to allay the TC’s concerns of the risk of flight. This marks the first real opportunity for provisional release of any individual accused by the CIJs since the establishment of the ECCC. **HRB**

ENDNOTES: Was There Good Reason to Order Pre-trial Detention of the ECCC Defendants

¹ ECCC Internal Rules, R. 63/6/a.b.

² On January 13, 2011, for example, the PTC rejected another motion for pre-trial release with a promise (rather than a handing-down) of a reasoned decision.

³ See recognition of the endemic problems with the Cambodian judiciary in a study which paved the way to the establishment of the ECCC: Group of Experts’ Report to the Secretary General (Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution, G.A. Res. 52/135 ¶¶ 102-111, U.N. Doc. A/53/850), U.N. Doc S/1999/231 (1999) at 47-48.

⁴ The 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 ECCC Agreement (ECCC Agreement), art. 12. It is incontrovertible that the legislature’s combined use of the terms “Cambodian law” and “existing procedures in place” excludes any possibility of encompassing judge-created rules (e.g. ECCC Internal Rules) for the following reasons: (1) starting 1998 and throughout the Cambodian government consistently maintained a position that the ECCC would be “a national court with international participation” (Hun Sen’s Interview with Kyodo News (1999) available at http://www.cnv.org.kh/cnv_html_pdf/CNV20.PDF; Statement from the Royal Government of Cambodia In Response to the Announcement of UN Pullout from Negotiations on Khmer Rouge Trial