

**ASSESSING THE POTENTIAL CRIMINAL LIABILITY OF JOURNALISTS  
FOR DISCLOSURES OF CONFIDENTIAL ECCC INFORMATION**

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On June 8, 2011, the US-based newspaper Christian Science Monitor (CSM) quoted extensively from a confidential prosecution document that asked for judicial investigations into the Extraordinary Chambers in the Courts of Cambodia (ECCC) Case 003.<sup>1</sup> According to the newspaper, the confidential document identified two suspects, the crimes alleged against them, and detailed accounts of the suspects' alleged participation in these crimes.<sup>2</sup>

One day after the article went to press, the Court's Co-Investigating Judges (CIJs), the office responsible for confidential pre-trial investigations, issued a statement warning that anyone who publishes information from the Co-Prosecutors' document may face contempt charges under ECCC Internal Rule 35: Interference with the Administration of Justice.<sup>3</sup> While it is indisputable courts have inherent power to punish contemptuous conduct, in the absence of judicial precedent and clearly articulated standards, there are many questions about how this rule can be applied by the ECCC to journalists.

**ECCC Internal Rule 35: Interference with the Administration of Justice**

**A. Subject Matter Jurisdiction**

Internal Rule 35 states in part:

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<sup>1</sup> Jared Ferrie, *Leaked Document Casts Doubt on Impartiality of Khmer Rouge Judges*, CHRISTIAN SCIENCE MONITOR, June 8, 2011.

<sup>2</sup> *Id.*

<sup>3</sup> Press Release, Office of the Co-Investigating Judges, Public Statement by the Co-Investigating Judges, 9 June 2011.

(1) The ECCC may sanction or refer to the appropriate authorities, any person who knowingly and wilfully interferes with the administration of justice, including any person who:

a) discloses confidential information in violation of an order of the Co-Investigating Judges or the Chambers.<sup>4</sup>

This enumerated act is one of several types of conduct explicitly listed under Rule 35(1)<sup>5</sup> and the most appropriate with which to charge a journalist with contempt. Its language is nearly identical to Rule 77(A)(ii) at the International Criminal Tribunal for the Former Yugoslavia (ICTY) which has formed the basis of a number of contempt prosecutions of journalists.<sup>6</sup> Rule 77(A)(ii), provides in relevant part:

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<sup>4</sup> ECCC, Internal Rules, as amended 23 February 2011, Rule 35(1) [hereinafter ECCC Internal Rules]

<sup>5</sup> The additional acts, as stated in ECCC Internal Rule 35(1) are as follows:

b) without just excuse, fails to comply with an order to attend, or produce documents or other evidence before the Co-Investigating Judges or the Chambers;

c) destroys or otherwise tampers in any way with any documents, exhibits or other evidence in a case before the ECCC;

d) threatens, intimidates, causes any injury or offers a bribe to, or otherwise interferes with a witness, or potential witness, who is giving, has given, or may give evidence in proceedings before the Co-Investigating Judges or a Chamber;

e) threatens, intimidates, offers a bribe to, or otherwise seeks to coerce any other person, with the intention of preventing that other person from complying with an order of the Co-Investigating Judges or a Chamber;

f) knowingly assists a Charged person or Accused to evade the jurisdiction of the ECCC;

or

g) incites or attempts to commit any of the acts set out above.

Additionally, ECCC Internal Rule 35 (1)(a)-(g) is a non-exhaustive list. The ECCC is empowered to punish conduct not explicitly stated in the rule but which equally threatens the integrity of the judicial process. See ICTY, Decision to Deny the Accused Josip Jovic's Preliminary Motion to Dismiss the Indictment on the Grounds of Lack of Jurisdiction and Defects in the Form of the Indictment, *Prosecutor v. Josip Jovic*, Case No. IT-95-14 & 14/2-R-77, 21 December 2005, par. 28 (affirming that Rule 77(A)(i)-(v) "are non-exhaustive examples of material elements by which the offense of contempt is constituted").

<sup>6</sup> See ICTY, Special Chamber, Judgment on Allegations of Contempt, *In Re Hartmann*, Case No. IT-02-54-R77.5, 14 September 2009 [hereinafter ICTY Hartmann Trial Judgment]; ICTY, Trial Chamber I, Judgment on Allegations of Contempt, *Prosecutor v. Haxhiu*, Case No. IT-04-84-R77.5, 24 July 2008 [hereinafter ICTY Haxhiu Trial Judgment]; ICTY, Appeals Chamber, Judgment, *Prosecutor v. Jovic*, Case No. IT-95-14 & 14/2-R77-A, 15 March 2007 [hereinafter ICTY Jovic Appeals Judgment]; ICTY, Trial Chamber I, Sentencing Judgment, *Prosecutor v. Margetic*, Case No. IT-95-14-R77.6, 7 February 2007 [hereinafter ICTY Margetic Trial Judgment]; ICTY, Appeals Chamber, Appeals Chamber Judgment, *Prosecutor v. Marijadic & Rebic*, Case No. IT-95-14-R77.2-A, 26 September 2006 [hereinafter ICTY Marijadic & Rebic Appeals Judgment].

(A) The Tribunal in the exercise of its inherent power may hold in contempt those who knowingly and willfully interfere with its administration of justice, including any person who

(ii) discloses information relating to those proceedings in knowing violation of an order of a Chamber[.]<sup>7</sup>

With regard to Rule 77, the ICTY Trial Chamber has found:

The power to provide for contempt is not expressly mentioned in the Statute of the Tribunal but is part of the inherent power of judges to deal with any issues necessary for the conduct of matters falling within their jurisdiction. . . . [This power] exists independently of any statutory reference, to punish conduct which tends to obstruct, prejudice or abuse the Tribunal's administration of justice. This power is necessary to ensure that the Tribunal's exercise of jurisdiction is not frustrated and its basic judicial functions are safeguarded.<sup>8</sup>

To date, the ECCC has never initiated Rule 35(1)(a) contempt proceedings, but would likely find for the same reasons that it has inherent subject matter over this type of crime.

### **B. Personal Jurisdiction: "Any Person" may be held in Contempt of Court**

Rule 35's broad authorization to sanction "any person" for conduct interfering with the administration of justice authorizes seemingly unlimited personal jurisdiction. The Cambodian Penal Code of 2010 similarly sanctions unlawful interference in judicial public functions; however, the applicable article is silent on what category of persons may be sanctioned.<sup>9</sup> In the first case where the ICTY initiated contempt proceedings against a journalist, that journalist questioned "whether the Tribunal has the power to prosecute this person or this category of

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<sup>7</sup> ICTY, Rules of Procedure and Evidence, IT/32/Rev. 45, adopted 11 February 1994, as amended 8 December 2010, at Rule 77.

<sup>8</sup> ICTY, Trial Chamber I, Judgment on Contempt Allegations, *Prosecutor v. Beqaj*, Case No. IT-03-66-T-R77, 27 May 2005 par. 9 [hereinafter ICTY Beqaj Trial Judgment] (citations omitted).

<sup>9</sup> Cambodian Penal Code of 2010, Article 634.

persons for the crime of contempt.”<sup>10</sup> The Trial Chamber held that the power of a court to prosecute a person for the crime of contempt is “not limited to individuals who are parties to proceedings before the Tribunal, nor to any other category of individuals.”<sup>11</sup> Citing to an earlier contempt case in which a relative of an accused at the Tribunal had interfered with witnesses, the chamber found that ICTY jurisprudence affirmed that the court had the power to prosecute any person.<sup>12</sup> As the ECCC and ICTY contempt provisions are similarly worded, the ECCC may find likewise that it has unlimited personal jurisdiction over this crime.

Notably, the ICTY and its sister tribunal in Rwanda were established by a Chapter VII United Nations’ Security Council resolution and are independent of any national judicial system.<sup>13</sup> In contrast, the ECCC was established by a Cambodian law, pursuant to an agreement between the United Nations and the Royal Government of Cambodia, as a special court within the Cambodian judiciary.<sup>14</sup> As a consequence, the ECCC, unlike those *ad hoc* international courts, lacks the power to enforce the surrender of suspects outside the territory of Cambodia.<sup>15</sup> While this difference has yet to obstruct the core mandate of the Court—as thus far all suspects are located within Cambodian territory—it would limit the ECCC’s ability to secure custody of journalists located of outside the country.

### **C. The Requirement of an “Order” under Rule 35(1)(a)**

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<sup>10</sup> See ICTY, Trial Chamber, Decision on Motions to Dismiss the Indictment Due to Lack of Jurisdiction and Order Scheduling a Status Conference, *Prosecutor v. Marjagic & Rebic*, Case No. IT-95-14-R77.2, 7 October 2005.

<sup>11</sup> *Id.* (citing ICTY Beqaj Trial Judgment).

<sup>12</sup> *Id.* at fn 5.

<sup>13</sup> Statute of the International Criminal Tribunal for the Former Yugoslavia, UN Security Council Resolution 827 (1993); Statute of the International Criminal Tribunal for Rwanda, UN Security Council Resolution 955 (1994).

<sup>14</sup> ECCC, 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 (2003).

<sup>15</sup> Sarah Williams, *The Cambodian Extraordinary Chambers: A Dangerous Precedent for International Justice?*, 53 INT’L COMPARATIVE L. QUARTERLY 227, 231 (2004).

Rule 35(1)(a) states that the disclosure of confidential information must occur “in violation of an order of the Co-Investigating Judges or the Chambers.”<sup>16</sup> In March 2009, the ECCC CIJs sanctioned Co-Defense Lawyers Michael Karnavas and Ang Udom for posting confidential documents on a website the two had created to publicize the defense team’s court filings.<sup>17</sup> Although finding the defense team’s appeal inadmissible, the Pre-Trial Chamber determined that the CIJs were incorrect in sanctioning the Co-Defense Lawyers under Rule 35.<sup>18</sup> The Pre-Trial Chamber believed the Co-Defense Lawyers had violated the confidentiality of investigations; however, the Chamber found that the lawyers’ conduct did not fall within the scope of Rule 35(1)(a). Noting that the existence of an order is a necessary prerequisite to finding a violation of the rule, the Pre-Trial Chamber determined that the CIJs’ letter warning the Co-Defense Lawyers about the confidential status of investigatory documents not yet published on the ECCC website did not constitute a valid “court order.”<sup>19</sup>

In all but one contempt prosecution of a journalist at the ICTY, the accused had been charged with disclosing confidential information in violation of an ordered protective measure. These were either oral or written non-disclosure orders or orders on the status of protected victims or witnesses. However, in *In Re Hartmann*, the accused was charged with contempt for disclosing confidential information in violation of two decisions the ICTY Appeals Chamber ordered to be filed confidentially.<sup>20</sup> The Appeals Chamber held, “The confidential issuance of a decision by a Chamber constitutes an order for the non-disclosure of the information

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<sup>16</sup> ECCC Internal Rules.

<sup>17</sup> ECCC, Office of the Co-Investigating Judges, Order on Breach of Confidentiality of the Judicial Investigations, *Case 002*, Case No. 002/19-09-2007-ECCC-OCIJ, 3 March 2009.

<sup>18</sup> ECCC, Pre-Trial Chamber, Decision on Admissibility on “Appeal Against the Co-Investigating Judges’ Order on Breach of Confidentiality of the Judicial investigation,” *Case 002*, Case No. 002/19-09-2007-ECCC/OCIJ, 13 July 2009, par. 43 [hereinafter ECCC Decision on Admissibility on Breach of Confidentiality of the Judicial Investigation].

<sup>19</sup> *Id.* at par 44.

<sup>20</sup> ICTY Hartmann Trial Judgment at par. 2. The accused had disclosed this information in a book and article she published after being employed at the ICTY as spokesperson for the prosecutor.

contained therein, and it is not for a party to decide which aspects of a confidential decision may be disclosed.”<sup>21</sup>

The ICTY Appeals Chamber in *In Re Hartmann* impliedly concludes that court orders include judicial decisions filed confidentially. At the ECCC, the information recently disclosed by the Christian Science Monitor came from a prosecutorial document sent to the CIJs, as opposed to a judicial decision or order. As a consequence, the confidential information revealed may not fall under the ambit of a “court order” as interpreted by the ICTY Appeals Chamber. Nevertheless, it is notable that ECCC Internal Rule 54, which mandates the confidentiality of all investigative submissions by the Co-Prosecutors, was adopted by the ECCC judges during a judicial decision-making conference.<sup>22</sup> Thus, in theory, any Internal Rules mandating the confidentiality of specific documents could be categorized as judicial “orders” falling under Internal Rule 35(1)(a).

#### **D. Elements of the Offense of Contempt**

As in the case with any criminal allegation, prosecution for contempt must prove beyond a reasonable doubt every element of the offense—the *actus reus* (the material element), and the *mens rea* (the mental element).

##### **1. Actus Reus**

The *actus reus* required under the *chapeau* of Rule 35(1) is the “interference with the administration of justice.” ICTY precedent has established that each enumerated act in ICTY Rule 77(A)(i)–(v) is a subset of independent elements that each fulfills the elements of the Rule 77(A) *chapeau*. Thus, violation of any subset “as

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<sup>21</sup> ICTY, Appeals Chamber, Judgment, *In Re Hartmann*, Case No. IT-02-54-R77.5-A, 19 July 2011, par. 52 [hereinafter ICTY Hartmann Appeal Judgment].

<sup>22</sup> ECCC Internal Rule 1(1).

such constitutes an interference with the . . . administration of justice.”<sup>23</sup> There is an automatic presumption that that the enumerated act in each subset amounts to interference and no proof of actual harm to the administration of justice is required.<sup>24</sup>

The ECCC Pre-Trial Chamber’s *Second Decision on Nuon Chea’s and Ieng Sary’s Appeal Against OCIJ Order on Requests to Summons Witnesses*<sup>25</sup> adopted a similar interpretation of Rule 35(1)(a)-(g). In that situation, defense lawyers alleged that comments made by members of the Cambodian government negatively “impacted upon the ability or willingness” of six high-level government witnesses to be interviewed by the ECCC CIJs.<sup>26</sup> The defense lawyers insisted that members of the government be held liable under Rule 35(1)(d) for “threaten[ing] [or] intimidate[ing] . . . [a] potential witness . . . [who] may give evidence in a proceedings before the Co-Investigating Judges or a Chamber.”<sup>27</sup> Lacking any ECCC or Cambodian precedent, the Pre-Trial Chamber relied heavily on ICTY jurisprudence, recognizing the “demonstrable similarities” between each court’s provision concerning the interference with the administration of justice.<sup>28</sup>

When discussing the *actus reus* element under Rule 35, the Pre-Trial Chamber considered only the enumerated act and found no separate requirement to satisfy the general material element under the *chapeau*—“interference with the

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<sup>23</sup> ICTY *Marijadic & Rebic Appeals Judgment* at par. 44; ICTY *Jovic Appeals Judgment* at par. 30; ICTY *Hartmann Trial Judgment* at par. 21.

<sup>24</sup> ICTY, Trial Chamber III, Judgment, *Prosecutor v. Marijadic & Rebic*, Case No. IT-95-14-R77.2, 10 March 2006, par. 19 [hereinafter *ICTY Marijadic & Rebic Trial Judgment*]; ICTY *Jovic Appeal Judgment* at par. 30; ICTY *Hartmann Trial Judgment* par. 21.

<sup>25</sup> ECCC, Pre-Trial Chamber, *Second Decision on Nuon Chea’s and Ieng Sary’s Appeal Against OCIJ Order on Requests to Summons Witnesses*, Case 002, Case No. 002/19-09-2007-ECCC/OCIJ, 9 September 2010 [hereinafter *ECCC Second Decision to Summons Witnesses*].

<sup>26</sup> *Id.* at par. 24 (quoting ECCC, Confidential Decision on Nuon Chea and Ieng Sary’s Appeal Against OCIJ Order on Requests to Summons Witnesses, 8 June 2010, D314/1/8 and D314/2/7 par 44).

<sup>27</sup> ECCC Internal Rule 35(1)(d).

<sup>28</sup> *Id.* at par. 32 (“Given the demonstrable similarities . . . [the ECCC] has drawn upon the approach adopted by the ICTY where appropriate.”).

administration of justice.”<sup>29</sup> The Chamber adopted verbatim the interpretation of the *actus reus* for punishing contempt under the equivalent ICTY rule.<sup>30</sup> Therefore, based on the ECCC’s adherence to ICTY jurisprudence, *the mere physical act of disclosing confidential information in violation of a court order* would constitute interference with the administration of justice at the ECCC and satisfy the *actus reus* element of contempt.

## **2. Mens Rea**

The only *mens rea* required to satisfy ECCC Internal Rule 35(1) is “knowingly and willfully.” The ICTY equivalent includes the same general *chapeau* requirement under 77(A), but also an additional mental element in subsection (ii) specifically addressing the disclosure of confidential information—“knowing.” Seemingly, this ICTY rule thus requires two *mens rea* determinations to convict for contempt.<sup>31</sup> A recent ICTY Appeals Chamber decision held that the *mens rea* is satisfied under Rule 77(A)(ii) if the accused had “knowledge that the disclosure in question is in violation of an order of a Chamber.”<sup>32</sup> The knowing and willful interference with the administration of justice is presumed from the disclosure. The Chamber found:

It is sufficient to establish that the conduct which constituted the violation was deliberate and not accidental. This may be inferred from circumstantial evidence. Where it is established that an accused had knowledge of the existence of a Court order, a finding of intent to violate the order will almost necessarily follow. Willful blindness to the

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<sup>29</sup> ECCC Second Decision to Summons Witnesses at par. 33.

<sup>30</sup> *Id.* (quoting ICTY, Trial Chamber I, Judgment on Allegations of Contempt, *Prosecutor v. Haraqija & Morina*, Case No. IT-04-88-R77.4, 17 December 2008, par. 18).

<sup>31</sup> ICTY, Decision on Motion for Acquittal Pursuant to Rule 98 *bis*, *Prosecutor v. Brdjanin: Concerning Allegations against Milka Maglov*, Case No. IT-99-36-R77, 19 March 2004, par. 13; ICTY, Judgment on Appeal by Anto Nobile Against Finding of Contempt, *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-AR77, 30 May 2001, par. 42; ICTY, Judgment on allegations of Contempt Against Prior Counsel, Milan Vujin, *Prosecutor v. Tadic*, Case No. IT-94-1-A-R77, 31 January 2001, par. 14; ICTY Beqaj Trial Judgment at par. 33.

<sup>32</sup> ICTY Hartmann Appeal Judgment at par. 127. See also ICTY Marijadic & Rebic Trial Judgment at par. 19; ICTY, Trial Chamber III, Judgment, *Prosecutor v. Jovic*, Case No. IT-95-14 & IT-95-14/2-R77, 30 August 2006, par. 11 [hereinafter ICTY Jovic Trial Judgment].

existence of the order, or reckless indifference to the consequences of the act by which the order is violated may satisfy the mental element. Mere negligence in failing to ascertain whether an order had been made is insufficient.<sup>33</sup>

Despite the apparent additional *mens rea* requirement in the equivalent ICTY rule, the ECCC Pre-Trial Chamber decision in its *Second Decision to Summon Witnesses* is in agreement with ICTY jurisprudence. The Chamber determined that Rule 35(1)(d)'s *mens rea* element required "that the accused acted willingly and with the knowledge that his conduct was likely to deter or influence a witness or potential witness."<sup>34</sup> As applied to subsection (a), the requisite *mens rea* is likely that the accused acted willingly by disclosing confidential information and with the knowledge the conduct was in violation of a court order.<sup>35</sup>

As applied to journalists, it would have to be shown that the individual knew of the non-disclosure order and deliberately violated that order by disclosing the confidential information to the public. For example the journalist responsible for the June 8th CSM article seemingly knew the information contained within the document was confidential as the journalist explicitly acknowledged the confidential nature of the document and yet willingly published the information.<sup>36</sup>

### **3. Defenses**

#### **i. Mistake of law**

The ECCC has not considered whether the mistake of law defense would be applicable to a charge of contempt. However, ICTY cases appear settled that a

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<sup>33</sup> ICTY Hartmann Appeal Judgment at par. 128 (quoting ICTY Hartmann Trial Judgment).

<sup>34</sup> ECCC Second Decision to Summons Witnesses at par. 35.

<sup>35</sup> ECCC Internal Rule 35(1)(a).

<sup>36</sup> Ferrie, *supra* note 1 ("As an international tribunal prepares to bring former Khmer Rouge leaders to trial beginning June 27, a *confidential document* obtained by The Christian Science Monitor raises questions about the UN-backed court's ability to independently prosecute members of the brutal regime." (emphasis added)).

person's mistake of law does not excuse contemptuous conduct.<sup>37</sup> ICTY Trial Chambers have held that "[i]f mistake of law were a valid defense . . . a Chamber's authority to control its proceedings, from which the power to punish contempt in part derives, would be hobbled."<sup>38</sup> Therefore, regardless of a person's belief regarding the legality of a court order, any person subject to the court's jurisdiction is bound by that order.<sup>39</sup> Journalists charged with publishing confidential information in violation of an ECCC court order thus would unlikely be able to assert a misunderstanding of ECCC Law or Internal Rules as a defense.

## ii. Mistake of fact

Journalists at the ICTY have raised a mistake of fact defense to alleged acts of contempt. In considering this defense, ICTY chambers determine whether the accused "acted under a reasonable belief that the information . . . [disclosed] was public."<sup>40</sup> In *In Re Hartmann*, the ICTY Appeals Chamber noted that while mistake of fact is a valid defense, the accused in that case could not pursue this defense based on her own words and deeds. The accused explicitly stated in the book she published that the information was confidential, implied in the judicial interview her awareness the information was confidential, and failed to inquire with the court prior to publication about the confidential status of the information. Thus her mistake of defense failed.<sup>41</sup> While unstated, it appears from the decision that the ICTY looks at how closely one is involved with the court in determining whether there had been a mistake of fact. As the journalist in *In Re Hartmann* had at one time been a

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<sup>37</sup> See ICTY Hartmann Appeal Judgment ("It is not a valid defense that one did not know that disclosure of the protected information in violation of an order of a Chamber was unlawful." (quoting Jovic Appeal Judgment at par. 27)); ICTY Jovic Trial Judgment at par. 21; ICTY Haxhiu Trial Judgment at par. 29.

<sup>38</sup> ICTY Jovic Trial Judgment at par 21.

<sup>39</sup> *Id.* at par. 16, 21.

<sup>40</sup> ICTY Hartmann Trial Judgment at par. 64.

<sup>41</sup> *Id.*

spokesperson at the ICTY, the chamber clearly assumed she had knowledge about the confidentiality of the decisions.<sup>42</sup>

At the ECCC, the presumption of confidentiality of all information during pre-trial investigations suggests that a mistake of fact defense could be meaningless in practice. For example, ECCC Internal Rule 54 explicitly states that submissions by the prosecution requesting the co-investigating judges to open investigations are confidential documents. However, if the ECCC were to follow ICTY jurisprudence, the court would likely take into account whether or not the journalist was familiar with the ECCC system and understood which documents were confidential.

## **E. Enforcement**

ECCC Internal Rule 35(2) states:

When the Co-Investigating Judges or the Chambers have reason to believe that a person may have committed any of the acts set out in sub-rule 1 above, they may:

- a) deal with the matter summarily;
- b) conduct further investigations to ascertain whether there are sufficient grounds for instigating proceedings; or
- c) refer the matter to the appropriate authorities of the Kingdom of Cambodia or the United Nations.

### ***1. "Reason to Believe" There Are "Sufficient Grounds" to Proceed with Investigations***

Before contempt proceedings may be initiated at the ECCC, the CIJ or the Chambers need "reason to believe" a person may have committed a proscribed act under Rule 35(1). This standard of proof merely requires an existing "material basis or reason" for believing the interference was committed.<sup>43</sup> The Chambers do not need to inquire into the merits of the allegations; a subjective examination into the

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<sup>42</sup> *Id.* at 63–64.

<sup>43</sup> See ECCC Second Decision to Summon Witnesses at par. 37 (emphasis omitted).

nature of the offense is sufficient.<sup>44</sup> Once this lowest threshold is satisfied, the CIJs or the Chamber are warranted in taking further action—dealing with the matter immediately, conducting further investigations, or referring the matter to the appropriate authorities of the Kingdom of Cambodia or the United Nations.<sup>45</sup>

Rule 35(2) also requires that “sufficient grounds” exists to proceed against a person for contempt.<sup>46</sup> While the Rule is not clearly worded, the ECCC Pre-Trial Chamber in *Second Decision to Summons Witness* held that “[t]he sufficient grounds standard must be satisfied to instigate proceedings, deal with the matter summarily, or refer the matter to the authorities of Cambodia or the United Nations.”<sup>47</sup> Guided by ICTY jurisprudence, the Pre-Trial Chamber interpreted this standard to require only a *prima facie* showing that contempt has been committed.<sup>48</sup> The Chamber need only consider whether the evidence before the court is sufficient to prove the underlying allegations, not make a final determination on whether interference with the administration of justice had in fact been committed.<sup>49</sup>

## **2. “Proof Beyond a Reasonable Doubt” Required to Convict**

International courts have long recognized that contempt of court is a criminal charge.<sup>50</sup> Indeed, ECCC Internal Rule 35 allows for the commencement of criminal actions against a person, affords the right to legal assistance to persons subject to

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<sup>44</sup> *Id.*

<sup>45</sup> ECCC Internal Rule 35(2).

<sup>46</sup> ECCC Internal Rule 35(2)(b).

<sup>47</sup> ECCC Second Decision to Summon Witnesses at par. 36 (emphasis omitted).

<sup>48</sup> *Id.* at par. 38 (“The Pre-Trial Chamber has previously noted with approval the comparison between the sufficient grounds and *prima facie* thresholds.”).

<sup>49</sup> ICTY, Appeals Chamber, Judgment, *Prosecutor v. Seselj*, Case No. IT-03-67-R77.2-A, 19 May 2010, par. 16.

<sup>50</sup> ICTR, Decision on Kajelijeli’s Motion to Hold Members of the Office of the Prosecutor in Contempt of the Tribunal (Rule 77(C)), *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-T, 15 November 2002, par. 9. See Megan Fairlie, *Contempt: Commentary*, in 19 ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS 305 (2010); Goran Sluiter, *The ICTY and Offences Against the Administration of Justice*, 2 J. INT’L CRIMINAL JUSTICE 631, 637 (2004); Michael Bohlander, *International Criminal Tribunals and Their Power to Punish Contempt and False Testimony*, 12 CRIMINAL LAW FORUM 91 (2001).

proceedings, and imposes sanctions on persons found to have committed the acts.<sup>51</sup> Thus, consistent with any criminal charge at the ECCC, “In order to convict the accused, the Chamber must be convinced of guilt beyond reasonable doubt.”<sup>52</sup> This standard of proof must be satisfied before the Chamber may impose sanctions for violations of Rule 35(1).<sup>53</sup>

## **F. Sanctions**

Once it has been found that an accused committed an act that amounts to interference with the administration of justice, the co-investigating judges or a chamber may impose sanctions. Pursuant to Rule 35(4), “Cambodian Law shall apply in respect [to] sanctions imposed.” It is unclear to which Cambodian law this refers. The closest analog in the Cambodian Penal Code appears to be article 634 sanctioning “unlawful interference in the performance of one of public functions which is reserved for the authorized person only.” This violation is “punishable by an imprisonment from 1 (one) year to 3 (three) years and a fine from 2,000,000 (two million) Riels to 6,000,000 (six million) Riels.”<sup>54</sup> However the ECCC has not thus far referred to this provision and it is not clear if it would be found relevant.

The ECCC has attempted to sanction according to Rule 35 only once. When Michael Karnavas and Ang Udom posted confidential court documents on their website, the Pre-Trial Chamber ordered as sanctions that the documents be removed and the Co-Defense Lawyers cease posting any additional confidential information concerning the judicial investigations in Case 002 on the site.<sup>55</sup> On appeal the Pre-Trial Chamber did not discuss the merits of the sanctions imposed. While the

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<sup>51</sup> ECCC Internal Rule 35(2)–(4).

<sup>52</sup> ECCC Internal Rule 87(1).

<sup>53</sup> ECCC Second Decision to Summon Witnesses at par 39.

<sup>54</sup> Cambodian Penal Code of 2010, Article 634.

<sup>55</sup> ECCC Decision on Admissibility on Breach of Confidentiality of the Judicial Investigation at page 7. The CIJs also forwarded a copy of the order to the Cambodian Bar Association, the American Bar Association, the Alaska Bar Association, and the ECCC Defense Support Section under Rule 38(2) (regarding misconduct of a lawyer).

decision offers little guidance, it suggests if a journalist were found guilty of contempt of court at the ECCC, one possible sanction would be an order to retract the information previously disclosed and to refrain from publishing any additional confidential information.

Notably, ICTY chambers take account of the “gravity of the conduct and the need to deter repetition and similar action by others” when determining the appropriate sanctions to impose in contempt cases.<sup>56</sup> In all ICTY cases concerning journalists who disclose confidential information, the journalists have been sentenced to pay a fine from 7,000 to 20,000 Euros.<sup>57</sup> However, in *Prosecutor v. Margetic*, in addition to a fine the Chamber sentenced him to three months imprisonment<sup>58</sup> as the disclosure on his website of the names of “a high number of protected individuals, with no effort to distinguish between the vulnerability of these individuals” was found to have aggravated the necessary punishment.<sup>59</sup>

Because the ECCC Internal Rules do not clarify which “Cambodian law” applies, they appear to countenance broad discretion in selecting an applicable law and determining an appropriate penalty, creating the potential for arbitrary application.

## **G. Conclusion**

While Rule 35(1)(a) likely provides the ECCC the power to prosecute journalists for contemptuous conduct, the Court’s ability to sanction journalists working in countries other than Cambodia is problematic. In addition, it is unclear what may be found to constitute a valid court order—the existence of which is a prerequisite to finding a contempt violation. Although mistake of fact has been recognized as a

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<sup>56</sup> ICTY Margetic Trial Judgment at par. 84 (citing ICTY Marijadic & Rebic Trial Judgment at par. 46; ICTY Jovic Trial Judgment at par. 26).

<sup>57</sup> See ICTY Hartmann Trial Judgment at par. 90 (7,000 Euros); ICTY Haxhiu Trial Judgment at par. 40 (7,000 Euros); ICTY Jovic Trial Judgment at par. 27 (20,000 Euros); ICTY Margetic Trial Judgment at par. 94 (10,000 Euros); ICTY Marijadic & Rebic Trial Judgment at par. 53 (15,000 Euros each).

<sup>58</sup> ICTY Margetic Trial Judgment at par. 94.

<sup>59</sup> *Id.* at par. 86.

valid defense by the ICTY, due to the confidential nature of the entire investigation by the Co-Investigating Judges, it is not clear if it would provide a valid defense for a journalist accused of revealing information about unnamed suspects and crime sites. Finally, once a journalist is found to have knowingly disclosed confidential information, the type and seriousness of sanctions available for a judge to impose at the ECCC are unclear. As a consequence of these uncertainties, it is debatable whether the threat of applying ECCC Internal Rule 35(1)(a) can act as an appropriate deterrent to prevent disclosure of confidential information or merely risks chilling discussion by journalists based within Cambodia of information already publically available internationally via the internet.