

Memorandum

To: Anne Heindel, Legal Advisor, Documentation Center of Cambodia
From: Stephanie Wang, Legal Associate, Documentation Center of Cambodia, Columbia University School of Law 2012
Date: March 28, 2011
Re: Analysis of the Rules of Detention at the ECCC

I. Summary of Argument

The management of the detention facilities of the Extraordinary Chambers in the Courts of Cambodia (ECCC) is structured differently than at other international criminal courts. While those courts delegate responsibility for this area to their main administrative body, the Registrar, the ECCC gives very little responsibility to its main administrative body, the Office of Administration (the OA). Instead at the ECCC, the office in charge of most administrative decisions about detention conditions is the Office of Co-Investigating Judges. This paper examines why that is potentially problematic due to the Co-Investigating Judges' role in leading the investigations of the detainees.

This memo will look at two different areas where this problem exists. The first issue examined is what processes are in place to put a check on discretionary decisions made by the Co-Investigating Judges concerning detention conditions. Although there is a legal review mechanism in place, it differs from the mechanisms at other courts. On one hand, the Pre-Trial Chamber (PTC) of the ECCC has recently found a broader basis than is found at other courts to review administrative decisions. This could potentially bring greater scrutiny to decisions by allowing more to qualify for judicial review. On the other hand, the PTC applies a higher standard of review than is used at other courts for administrative decisions. This

makes it more difficult for detainees to obtain a reversal of such decisions at the ECCC.

Taken together, it is unclear if these differences are either better or worse for the rights of the detainees.

The second issue examined in this memo is how specific detention regulations at the ECCC differ from those in force at other courts. Although most appear similar, three areas have some notable differences compared with standards set forth by the European Human Rights Convention and international courts. In addition to procedural differences, an underlying concern with each of these regulations is the fact that they assign control to an investigative body, not an administrative body.

With currently only three public decisions on challenges to the Co-Investigating Judges' administrative detention decisions, it is hard to know if in practice detainee's rights are more constrained at the ECCC than at other courts. Regardless, the fact that an investigative body, the Office of Co-Investigating Judges, is wielding administrative authority raises questions about that body's ability to keep its investigative functions from biasing its administrative decisions.

II. The Detention Facility's Current Management Structure

Two offices in the ECCC have the responsibility for managing the detention facility: the Office of the Co-Investigating Judges and the Office of Administration. Based on a plain reading of the Rules Governing the Detention of Persons Awaiting Trial or Appeal before the Extraordinary Chambers in the Courts of Cambodia (Detention Facility Rules), the Co-Investigating Judges appear to have the most control over the detention facilities. However, the Office of Administration (OA) still holds some management duties through the Chief of Detention. The detention facility's administration is thus run jointly by two different bodies in contrast with the practice at international courts, where almost all of the detention facility

management is under the control of the Registrar or a member of the Registry. This section will examine the respective duties set out for both the OA and the Co-Investigating Judges Offices, and then compare the ECCC's system to how detention issues are managed in other systems that utilize a Registry.

A. The Role of the Office of Administration

At the ECCC, the Office of Administration (OA) is in charge of general administrative issues. One of its explicit responsibilities in the Court's Internal Rules is adopting mechanisms ensuring that the OA itself will be properly informed about the conditions of detention.¹ However, the Detention Facility Rules do not assign most major discretionary decisions to the OA.² Instead, the Detention Facility Rules give the OA only some control over governance aspects, such as the authority to make decisions that require immediate, on-the-ground attention.

For example, the OA's Chief of Detention is given sole discretionary power during moments of emergency and facilities inspection.³ However, the Detention Facility Rules also stipulates that he or she must inform the Co-Investigating Judges of most decisions, including those regarding the separation of detainees, the approval of religious representatives, approval of visits to the detainees, and any disciplinary decisions.⁴ The only actions that do not need to be shared with the Co-Investigating Judges are minor and routine, such as setting

¹ Extraordinary Chambers in the Courts of Cambodia, Internal Rules, Rule 10(3) (rev. 2010).

² Rules Governing the Detention of Persons Awaiting Trial or Appeal before the Extraordinary Chambers in the Courts of Cambodia (2008). Notably, early in the life of the Court the OA came under a lot of criticism about its ability to handle its management duties. *See, e.g.*, Erika Kinetz, *Report Finds Flaws in ECCC Administration*, Cambodia Daily, 25 Sept. 2007 at 1. The ECCC is a hybrid court, meaning that there are parallel Cambodian and international positions for each office, and there was speculation that the two sides in the OA were unable to function effectively together. *Id.* The OA has also been dogged by corruption concerns, raising questions about its general ability to handle its administrative duties. *See, e.g.*, John A. Hall, *Yet Another U.N. Scandal*, Wall Street J. 21 Sept. 2007 at A15.

³ *Id.*, R. 16, 24 (2008).

⁴ *Id.*, R. 3, 8-10 (2008).

the times of meals and the granting of access to articles and books.⁵ The Chief of Detention is also required to write a report after any emergency incident under Rule 16 and forward it to the Co-Investigating Judges.⁶

B. The Role of the Co-Investigating Judges

The Office of the Co-Investigating Judges is a body that was created in the ECCC due to Cambodian law's roots in the French civil system.⁷ Just like the structure of the OA, in which there are parallel international and Cambodian positions, there are dual international and Cambodian posts in the Co-Investigating Judges Office as well.⁸ The Co-Investigating Judges are in charge of investigating the charges brought by the Co-Prosecutors and compiling evidence.⁹ Their role as described in three main ECCC legal texts — the 2004 Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (ECCC Law), the Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodia Law of Crimes Committed during the Period of Democratic Kampuchea (Framework Agreement), and the Internal Rules — is judicial and impartial in nature.¹⁰ At the same time, the Detention Facility Rules assign them a large administrative role as well.¹¹

The Detention Facility Rules give the Co-Investigating Judges, or the Chambers as appropriate, the authority to handle most decisions dealing with the detainees' detention. The

⁵ *Id.*, R. 7-8 (2008).

⁶ *Id.*, R. 16 (2008).

⁷ David McKeever, *Evidence Obtained Through Torture Before the Khmer Rouge*, 8 J. Int'l Crim. Just. 615, 618 (2010).

⁸ Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, Chapter III, Article 9 (amended 2004).

⁹ *Id.* Chapter VII, Article 23 (amended 2004).

¹⁰ 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 5(2) (2003).

¹¹ Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, Article 5; Unofficial Translation by the Council of Jurists and the Secretariat of the Task Force, Revised 23 Nov. 2004; Extraordinary Chambers in the Courts of Cambodia, Internal Rules, Rule 14 (rev. 2010).

Judges are in charge of approving visitors, recognizing the defense team to allow them privileged access, hearing requests and complaints, opening letters and parcels, approving access to records, allowing telephone calls, and authorizing the monitoring of telephone calls.¹² Some of the provisions state that the Co-Investigating Judges should consult with the OA's Chief of Detention, while others only require them to inform the Chief of Detention of their decisions.¹³

Not only are the Co-Investigative Judges in charge of many of the discretionary decisions at the facility, but they are also kept apprised of almost any activity or decision made by the Chief of Detention or his subordinates. These activities range from who the Chief of Detention allowed to make phone calls to the detainees, to if there was any disciplinary action taken toward the detainees.¹⁴ The detention rules also explicitly grant the judicial branch a large amount of discretion in applying the rules. Rule 1 of the Rules of Detention says, “[t]he application of these rules to individual cases may be varied by order of the ECCC Co-Investigating Judges or the ECCC Chambers.”¹⁵

C. The Registrar's Role at International Courts

Management of the detention facilities at the ECCC is handled very differently than it is at international criminal courts. This is due to the fact that the ECCC is comprised of a different set of internal structures to handle administrative functions of the court. Unlike the other courts, the ECCC does not have a Registry. At the International Criminal Tribunal of the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), the International Criminal Court (ICC), and the Special Court of Sierra Leone (SCSL), the Registry is a powerful organ in charge of most administrative decisions, including detention

¹² Detention Facility Rules, R. 4-5, 9, 13-14, 30 (2008).

¹³ Compare *Id.*, R. 30 (2008) with *Id.*, R. 9(19) (2008).

¹⁴ *Id.*, R. 10, 30 (2008).

¹⁵ *Id.*, R. 1 (2008).

management.¹⁶ Additionally, several of these courts have set up extensive administrative systems to run detention facilities. The ICTY has set up the United Nations Detention Unit at The Hague, overseen by the Registry, and the ICTR established the Defence Counsel and Detention Management Section under the authority of the Registry.¹⁷

The exclusive control over the management of detention facilities that the ICTY, ICTR, and ICC give to their registries is very different from the amount of control given to the OA at the ECCC. Rather, most of the powers that are given to the Registrar at international courts are given to the Co-Investigating Judges at the ECCC. For example, the Registrars at the ICTY, ICTR, and the SCSL courts decide whether to approve of defense counsel, whether to inspect correspondence, whether to monitor telephone calls, and are also given control of the detainees' records.¹⁸ At the ICC, the Chief Custody Officer, who is a member of the Registry, makes many of these decisions.¹⁹ Without a Registry or a Registrar, the ECCC ends up assigning many of these same powers to the Co-Investigating Judges.²⁰

D. Limits on the Co-Investigating Judges' Discretionary Power

¹⁶ International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Rules of Procedure and Evidence, IT/32/Rev. 44, (Dec. 10, 2009), R. 33(A); International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, R. 33(A) (Feb. 9, 2010); Rome Statute of the International Criminal Court, A/CONF.183/9, Article 13 (entered into force Jul. 1, 2002). The only other court that included a Co-Investigating Judge was the Special Panels for Serious Crimes in East Timor. However, the Special Panels for Serious Crimes in East Timor eventually created a Judge Coordinator position after administrative difficulties with the hybrid system. See David Cohen, "Hybrid" Justice in East Timor, Sierra Leone, and Cambodia: "Lessons Learned" and Prospects for the Future, 43 Stan. J. Int'l L. 1, 13 (2007).

¹⁸ See International Criminal Tribunal for the Former Yugoslavia, Rules Governing the Detention of Persons awaiting Trial or Appeal before the Tribunal or otherwise Detained on the Authority of the Tribunal, R. 58-59, 65 (Rev. 2005); International Criminal Court, Regulations of the Registry, Reg. 156, 169, 175, 59, 65 (2006); International Criminal Court, Regulations of the Court, Reg. 75(2), 92 (2004); International Criminal Tribunal of Rwanda, Rules Covering the Detention of Persons Awaiting Trial or Appeal before the Tribunal or Otherwise Detained on the Authority of the Tribunal, R. 9, 59 (1998); Special Court for Sierra Leone, Rules Governing the Detention of Persons Awaiting Trial or Appeal before the Special Court for Sierra Leone or Otherwise Detained on the Authority of the Special Court for Sierra Leone, R. 6, 44, 46 (amended 2005).

¹⁹ ICC Regulations of the Registry (2004).

²⁰ Rules Governing the Detention of Persons Awaiting Trial or Appeal before the Extraordinary Chambers in the Courts of Cambodia (2008).

Despite the broad scope of their power, the Co-Investigating Judges are constrained in how they make discretionary administrative decisions. Texts such as the Detention Facility Rules and the Internal Rules provide guidelines on how the Co-Investigating Judges should make such decisions, and their decisions are subject to judicial review. International courts also provide for review of administrative decisions; however, the ECCC has a different system of review and a different standard of review, which are both compared below.

1. ECCC Internal Rules and Regulations that Limit the Co-Investigating Judges

The Internal Rules and Framework agreement set out general principles that are to be adhered to regarding detainees. Internal Rule 21 states in part:

1. The applicable ECCC Law, Internal Rules, Practice Directions and Administration Regulations shall be interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims and so as to ensure legal certainty and transparency of proceedings, in light of the inherent specificity of the ECCC, as set out in the ECCC Law and the Agreement. In this respect:
 - a) ECCC Proceedings shall be fair [...]
2. Any coercive measures to which such a person may be subjected shall be taken by or under the effective control of the competent ECCC judicial authorities. Such measures shall be strictly limited to the needs of the proceedings, proportionate to the gravity of the offence charged and fully respect human dignity.²¹

Additionally, the Framework Agreement also sets out principles to protect the detainees in Article 13, which states, “The rights of the accused enshrined in Article 14 and 15 of the 1966 International Covenant on Civil and Political Rights shall be respected throughout the trial process.”²² Both of these provisions impose limits that prevent the Co-Investigating Judges from making decisions that would be unfair, disproportionate, or infringe on human dignity.

²¹ Extraordinary Chambers in the Courts of Cambodia, Internal Rules, Rule 21(1)-21(2) (rev. 2010).

²² 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 (2003).

2. Legal Bases for Review

As mentioned earlier, Rule 1 of the Detention Facility Rules grants the Co-Investigating Judges the ability to vary the application of the rules as necessary.²³ Moreover, the Detention Facility Rules provide sparse guidance as to what factors the Co-Investigating Judges should consider when making discretionary decisions. As a consequence, the Co-Investigating Judges have broad license in carrying out decisions relating to the detention of the detainees. However, the Pre-Trial Chamber has found a basis for review in both the Internal Rules and the Detention Rules, and has gradually expanded its potential review authority. One potential critique of using the Pre-Trial Chamber to conduct the initial review of Co-Investigating Judges' detention decisions is that it possibly leads to a slower process compared to other courts, where a smaller judicial body, the Presidency, conducts the review.

a. Review of Co-Investigating Judges' Decisions at the ECCC

There is little mention in the ECCC legal framework of a procedure to review a Co-Investigating Judges' administrative decision. The only suggestion that those who drafted the Detention Facility Rules considered any sort of review possible is in Rule 30(9), which says, "The detainee may at any time request the Pre-Trial Chamber to reverse any such decision [about monitoring telephone calls] by the Co-Investigating Judges or the Chambers."²⁴ However, in three public decisions so far, the Pre-Trial Chamber has found that it has the authority to review decisions concerning other administrative detention issues as well.

The first PTC decision on this topic reversed the Co-Investigating Judges' decision to continue segregation of Ieng Sary and his wife Ieng Thirith.²⁵ The second decision reversed

²³ Detention Facility Rules, R. 1 (2008).

²⁴ ECCC, Detention Facility Rules, R. 30(9) (2008).

²⁵ See Decision on the Admissibility of the Appeal Lodged by Ieng Sary on Visitation Rights, Case No. 002/19-09-2007-ECCC/OCIJ (PTC05), ¶ 10 (Pre-Trial Chamber, Mar. 21, 2008).

the general segregation of the detainees from each other,²⁶ and the third reversed a prohibition on the defense teams from bringing recording equipment for their visits with the detainees.²⁷ These decisions cite three legal bases for review of the Co-Investigating Judges' administrative decisions. First, all three decisions found legal justification for review in the fair trial provisions of Rule 21 of the Internal Rules.²⁸ This provision does not provide any explicit review power to the Chambers. It states only that any coercive measures should be strictly limited to the needs of the proceedings, proportional to the gravity of the charged offense, and fully respect human dignity.²⁹ However, all three decisions found it within their jurisdiction to assess compliance with this rule.

Second, the court cited for all three decisions Rule (74)(3)(f) of the Internal Rules.

This rule says in part:

The Charged Person or the Accused may appeal against the following orders or decisions of the Co-Investigating Judges:

....

f) relating to provisional detention or bail.³⁰

For the first two cases, the Pre-Trial Chamber applied Rule 74(3)(f) in conjunction with Rule 21 to find the matters admissible because they dealt with coercive measures relating to detention that could infringe upon the right to respect for human dignity.

²⁶ See Decision on Nuon Chea's Appeal Concerning Provisional Detention Conditions, Case No. 002/19-09-2007-ECCC/OCIJ (PTC09). ¶ 10 (Pre-Trial Chamber, Sept. 26, 2008).

²⁷ See Decision on Ieng Sary's Appeal against Co-Investigating Judges' Order Denying Request to Allow Audio/Video Recording of Meetings with Ieng Sary at the Detention Facility, Case No. 002/19-09-2007-ECCC/OCIJ (PTC64), ¶¶ 17-18 (Pre-Trial Chamber, June 11, 2010).

²⁸ See Admissibility of Visitation Rights Decision, Case No. 002/19-09-2007-ECCC/OCIJ (PTC05), at ¶ 10; Nuon Chea's Appeal Decision, Case No. 002/19-09-2007-ECCC/OCIJ (PTC09). at ¶ 10; Audio/Visual Decision Case, No. 002/19-09-2007-ECCC/OCIJ (PTC64), at ¶ 18.

²⁹ Internal Rule R. 21(2).

³⁰ Extraordinary Chambers in the Courts of Cambodia, Internal Rules, Rule 74(3) (rev. 2010).

Third, the most recent Pre-Trial Chamber case reviewing conditions of detention also cited as a basis for review, Rule 1 of the Detention Facility Rules: “The application of these rules to individual cases may be varied by order of ... the ECCC Chambers.”³¹ The use of this rule as justification greatly expanded the appellate review powers of the Pre-Trial Chamber. It also interpreted the previous decisions’ application of Rule 74(3)(f) to mean that “[a]ny aspect of the modalities of pre-trial detention thus shall be under the effective control of the competent ECCC judicial authorities and strictly limited to the needs of the proceedings.”³²

Rule 74 of the Internal Rules had previously appeared to apply only to decisions about proportional coercive measures or fair trial rights, but the third decision seemed to extend the right to appeal under Rule 74 further. Although the decision does not go into any detail as to how the Pre-Trial Chamber was interpreting Rule 1 to allow it to hear the appeal, it implies that any administrative decisions taken with relation to the detention facilities can be appealed to the Pre-Trial Chamber as Rule 1 has no internal limitations in its text.

b. Review of Detention Decisions at International Courts

At the ICTY, ICTR, ICC, and other courts where there is a Registry, the Registrar acts under the authority of the President—the chief judicial officer—and reports directly to him or her.³³ In these systems, the President has the power of review over administrative decisions. The rules often explicitly provide for review by the President, but even when they don’t, courts have found that the rules should be read expansively to allow some sort of review, as

³¹ Audio/Visual Decision, No. 002/19-09-2007-ECCC/OCIJ (PTC64) at ¶19 (citing ECCC Detention Facility Rules, R. 1 (2008)).

³² Audio/Visual Decision, No. 002/19-09-2007-ECCC/OCIJ (PTC64), at ¶ 11.

³³ International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Rules of Procedure and Evidence, IT/32/Rev. 44, (Dec. 10, 2009), R. 33(A); International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, R. 33(A) (Feb. 9, 2010); Rome Statute of the International Criminal Court, A/CONF.183/9, Article 13 (entered into force Jul. 1, 2002).

“...texts should be read as affording some avenue for review in the absence of any explicit provision....”³⁴

Detainees in some circumstances have the ability to ask the Trial Chambers in addition to the President of these international courts to review an administrative decision by the Registrar. The parties can generally choose to bring a challenge to an administrative decision to the Trial Chamber instead of the President if two conditions are present: 1) the decision impacts the detainee’s right to a fair trial, and 2) the court’s regulations do not outline another procedure for review.

The ICTR has stated that the Trial Chamber’s ability to review the Registrar’s decision depends on whether a court’s rules expressly provide for such review. If so, the procedure outlined must be followed. If the court’s regulations do not expressly provide for a review of a decision, and fair trial rights are implicated, the Trial Chamber is competent to review the decision in the light of its effect upon the fairness of the trial.³⁵

Similarly, the ICTY has held that the Trial Chamber’s basis of reviewing administrative decisions “rests with the power and duty to guarantee a fair trial and proper administration of justice as set forth in the statute of the International Tribunal.”³⁶ The distinction between those decisions that affect the proper administration of justice and those that do not is illustrated by the difference between privileged and non-privileged phone calls. The SCSL, which uses the same standard as the ICTY for review of administrative

³⁴ Prosecutor v. Thomas Lubanga Dyilo, Case No. 01/04-01/06, Decision on the “Urgent Request for the Appointment of a Duty Counsel,” ¶ 18 (The Presidency, June 29, 2007).

³⁵ Prosecutor v. Theoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze, Anatole Nsengiyumva, Case No. ICTR-98-41-T, Decision on the Defence Motions for the Reinstatement of Jean Yaovi Degli as Lead Counsel for Gratien Kabiligi, ¶ 24 (Trial Chamber I, Jan. 19 2005).

³⁶ Prosecutor v. Vidoje Blagojevic, Dragan Jokic, Case No. IT-02-60-T, Decision on Independent Counsel for Vidoje Blagojevic’s Motion to Instruct the Registrar to Appoint New Lead and Co-Counsel, ¶ 24 (Trial Chamber I, Jul. 3, 2003) (citing Prosecutor v. Enver Hadzihasanovic, Mehmed and Amir Kubura, Case No. IT-01-47-PT, Decision on Prosecution’s Review of the Decision of the Registrar to Assign Mr. Rodney Dixon as Co-Counsel to the Accused Kubura (March 26, 2002)).

decisions,³⁷ has found that not allowing telephone calls to people other than the detainee's counsel does not impact the detainee's right to a fair trial, removing it from the purview of the Trial Chamber.³⁸ By contrast, the ICTY Trial Chamber has found that monitoring a privileged conversation between a detainee and his counsel affects fair trial rights and thus falls under the purview of the Trial Chamber.³⁹

The ICC also has implied that it would uphold this fair trial requirement for judicial review of an administrative decision. The ICC said that "an administrative decision taken by the Registrar and reviewed by the Chamber could be *appealable* only if it involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial," (emphasis added),⁴⁰ implying that the Trial Chamber can review even non-fair trial administrative decisions as a matter of first review. However, this occurred in a case where the ICC's regulations specifically provided the Trial Chamber competence to review this type of administrative decision.⁴¹ In other cases, the ICC has implied that it will follow the other criminal courts in restricting the Trial Chamber from reviewing administrative decisions to only those that implicate fair trial rights. It has stated that it does not intend to "become the arbiter" of "internal ICC administrative dispute[s]" and that the

³⁷ Prosecutor v. Charles Ghankay Taylor, Case No. SCSL-03-1-PT, Decision on the Defence Oral Application for Orders Pertaining to the Transfer of the Accused to the Hague, ¶ 20 (Trial Chamber, June 23, 2006).

³⁸ Prosecutor v. Charles Ghankay Taylor, Case No. SCSL-03-1-PT, Decision on the Defence Oral Application for Orders Pertaining to the Transfer of the Accused to the Hague, ¶ 20 (Trial Chamber, June 23, 2006).

³⁹ Prosecutor v. Vojislav Seselj, Case No. IT-03-67-T, Redacted Version of the "Decision on Monitoring Privileged Communications of the Accused with Dissenting Opinion by Judge Harhoff in Annex," ¶ 20 (Trial Chamber III, Dec. 1, 2008).

⁴⁰ The Office of the Prosecutor v. Former *Ad Hoc* Counsel for the Defence, Case No. ICC-02/05, Decision on the Request for Leave to Appeal the Decision Issued on 15 March 2007, ¶ 8 (Pre-Trial Chamber I, March 27, 2007).

⁴¹ ICC, Regulations of the Court, Section 4, Regulation 83 ("Decisions by the Registrar on the scope of legal assistance paid by the Court as defined in the regulation may be reviewed by the relevant Chamber on application by the person receiving legal assistance.").

Trial Chamber should only step in where an administrative decision has both administrative and judicial aspects.⁴²

The ICTR has found there to be a public policy reason as to why not all administrative decisions may be impugned by review by the Trial Chamber. “It would be impossible to conduct day to day administration if every decision of an administrator were subject to review. The threshold condition is variously formulated in national jurisdictions, but a common theme is that the decision sought to be challenged must involve a substantive right that should be protected as a matter of human rights jurisprudence or public policy.”⁴³

As a result, compared to most other courts, the recent decision made by the Pre-Trial Chamber at the ECCC appears to allow larger number of administrative decisions related to detention be reviewed by a judicial body. Although international courts allow judicial review by their Trial Chambers for administrative decisions, the basis for such review at the ICTR, and the ICTY is limited to fair trial issues. However, unlike in other systems where administrative review by the president is always available, at the ECCC only a judicial chamber, specifically the Pre-Trial Chamber, appears to have the power to review such decisions by the Co-Investigating Judges. This lack of administrative review by a single person likely makes the process slower at the ECCC because any review has to go through a Chamber that considers many judicial issues as well.

3. The ECCC’s Lack of Appellate Review for Decisions by the Pre-Trial Chamber on Administrative Issues

⁴² Situation in Uganda, Case No. ICC-02/04-01/05, Decision on the Prosecutor’s Application that the Pre-Trial Chamber Disregard as Irrelevant the Submission filed by the Registry on Dec. 2005, ¶ 73, 77 (Pre-Trial Chamber II, March 9, 2006).

⁴³ Prosecutor v. Joseph Nzirorera, Case No. ICTR-98-44-T, The President’s Decision on Review of the Decision of the Registrar Withdrawing Mr. Andrew McCartan as Lead Counsel of the Accused Joseph Nzirorera, ¶ 6(xi) (President, May 13, 2002).

No party can appeal the Pre-Trial Chamber’s review of an administrative decision. According to the Establishment Law, decisions made by the Pre-Trial Chamber are not appealable.⁴⁴ At international courts, after the Trial Chamber or the Presidency issues its decision about an administrative issue, parties can appeal to the Appeals Chamber. Like the Trial Chambers, the Appeals Chambers only have jurisdiction to hear appeals closely related to the fairness of the trial.⁴⁵

4. Standards of Review for Administrative Decisions about Detention

At the ECCC, the Pre-Trial Chamber has used a higher standard of review of Co-Investigative Judges administrative decisions than the standard used by the body of first review at international courts—the Trial Chambers. Instead the standard is similar to the one used by the Appeals Chambers—the second level of review—at the ICTY and the ICTR. In its decision reversing the prohibition on audio visual equipment, the Pre-Trial Chamber wrote that the “[d]iscretionary decision of a Co-Investigating Judge may only be overturned if the Appellant demonstrates that the decision was (1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of the Co-Investigating Judges’ discretion.”⁴⁶ Previous Pre-Trial decisions had not set out a standard for review of Co-Investigating Judges discretionary decisions, instead overturning them on the basis that the Co-Investigating Judges had not provided any reasons for their coercive measures.

⁴⁴ Article 20, Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea.

⁴⁵ Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze v. Prosecutor, Case No. ICTR-99-52-A, Decision on Hassan Ngeze’s Request to Grant Him Leave to Bring His Complaints to the Appeals Chamber, ¶ 5 (Pre-Appeal Judge, Dec. 12 2005). Although Appeals Chambers have jurisdiction to review these types of decisions, international courts have ruled that they are only allowed to do so after a detainee has followed the requisite complaints procedure in the Detention Rules. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze v. Prosecutor, Case No. ICTR-99-52-A, Decision on Barayagwiza’s Urgent Motion Requesting Privileged Access to the Appellant Without Attendance of Lead Counsel, ¶ 11 (Appeals Chamber, Aug. 17, 2006).

⁴⁶ Audio/Visual Decision, No. 002/19-09-2007-ECCC/OCIJ (PTC64), at ¶ 22.

As mentioned earlier, at international criminal courts, either the President of the Tribunal or the Trial Chamber reviews challenges to administrative detention decisions. Regardless of which body examines the challenge, this first review is “guided by standards applied by international and national courts” and “is concerned initially with the propriety of the procedure by which [the] Registrar reached the particular decision and the manner in which he reached it.”⁴⁷

This review takes into account five factors in determining whether an administrative decision will be quashed when the President or the Trial Chamber has examined the Registrar’s decision. Those instances are when the Registrar has (1) failed to comply with the legal standard of the Directive; (2) failed to act with procedural fairness towards the person affected by the decision; (3) taken into account irrelevant material; (4) failed to take into account relevant material; (5) or reached a conclusion which no sensible person who applied his mind to the issue could have reached. However, there can be no interference with the margin of appreciation of the finding of facts or the merits of the case to which such an administrative decision is entitled.⁴⁸

If the parties invoke a fair trial concern and thus are able to appeal the President or the Trial Chamber’s decision to the Appeals Chamber, a higher standard of review is applied. The appellate standard is that a decision is overturned only if there is a “discernible error.” There are three ways that this could occur for a discretionary decision: (1) if the decision is based on an incorrect interpretation of governing law; (2) based on a patently incorrect

⁴⁷ Prosecutor v. Radovan Karadzic, Case No. IT-95-5/18-AR73.2, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on Adequate Facilities, ¶ 10 (Appeals Chamber, May 7, 2009) (citing Prosecutor v. Miroslav Kvočka, Mlado Radic, Zoran Zigic, & Dragoljub Prcać, Case No. IT-98-30/1-A, Decision on Review of Registrar’s Decision to Withdraw Legal Aid from Zoran Zigic, ¶ 13 (Appeals Chamber, Feb. 7, 2003).

⁴⁸ See Prosecutor v. Théonete Bagosora, Gratien Kabiligi, Aloys Ntabakuze, Anatole Nsengiyumva, Case No. ICTR-98-41-T, Decision on the Defence Motions for the Reinstatement of Jean Yaovi Degli as Lead Counsel for Gratien Kabiligi, ¶ 37 (Trial Chamber I, Jan. 19, 2005) (citing *Kvočka et al.*, Case No. IT-98-30/1-A at ¶ 13).

conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.⁴⁹

This is the same standard applied by the Pre-Trial Chamber to the Co-Investigating Judges' detention decisions at the ECCC. As a result, the Co-Investigating Judges are treated not like an administrative organ, such as a Registrar, but as a court of first review. A high standard is applied to its decisions, allowing a review of the legal interpretation and the facts only when they are patently incorrect. At other courts, the standard for the initial review of an administrative decision is lower, for example allowing review if there was consideration of irrelevant material or failure to consider relevant material. Thus, the first-level review of a Co-Investigating Judges administrative detention decision at the ECCC is treated like a second-level review at international courts. This conflates the Co-Investigating Judges' administrative and judicial roles: they are being treated as a judicial body for such decisions, even though they are acting in an administrative capacity similar to a Registrar.

5. Conclusion to Reviews of Co-Investigating Judges' Administrative Decisions

There appear to be three main differences between the ECCC and international courts in how they handle review of administrative detention issues: 1) the ECCC Pre-Trial Chamber has a potentially broader basis for reviewing decisions made by the Co-Investigating Judges in their administrative capacity because it is not limited to consideration of fair trial issues; 2) reviews made by the Pre-Trial Chamber can apparently not be appealed whereas international courts allow a second review where fair trial rights are impacted; and 3) the Co-Investigating Judges' administrative decisions are reviewed using a standard typically applied to a judicial, not an administrative, body. The Pre-Trial Chamber has ruled in favor of the defense for all three of the detention issues it has publicly decided, so it is unknown

⁴⁹ Prosecutor v. Radovan Karadzic, Case No. IT-95-5/18-AR73.2, Decision on Interlocutory Appeal of the Trial Chamber's Decision on Adequate Facilities, ¶ 11 (Appeals Chamber, May 7, 2009).

whether these differences have had or will have any large impact on the detainees' rights at the ECCC in practice. However, the lack of a superior court review means there is less opportunity for the judiciary to review these decisions than at other international courts even when fair trial rights are implicated. There also is the possibility that some non-public decisions were made by the Pre-Trial Chamber using an inappropriately high standard of review that treats the CIJ similar to a lower court.

III. Specific Provisions of the ECCC Detention Facility Rules

Despite the unique structural differences of the ECCC, specific procedures established in the Detention Facility Rules are mostly similar to international criminal courts around the world. However, a few rules differ substantially from those applied at international courts, in some cases giving the ECCC's Co-Investigating Judges more power than the Registrar in the other systems. The provisions that appear to be the least in line with standard international practice are Rules 5 and 6—management of the detention files, Rule 14—monitoring of correspondence, and Rule 30—managing telephone calls.

Those rules will be also compared with requirements established by the European Court of Human Rights (ECHR). ECHR decisions have been cited by the ECCC in detention condition cases,⁵⁰ and arguably are more influential than those of international courts in this context. Unlike international courts, the ECHR assesses state practice and the ECCC is, at least nominally, a Cambodian court applying Cambodian procedural rules.

In hybrid courts, the domestic legal system is often also used as a model to determine the appropriateness of certain provisions. However, many Cambodian regulations are not readily available or applied in reality, making it difficult to compare the ECCC's detention rules with the local standards set out in Cambodian law.

⁵⁰ Audio/Visual Decision, No. 002/19-09-2007-ECCC/OCIJ (PTC64), at ¶ 32.

A. Access to Correspondence and Packages

Rule 14 of the ECCC Detention Facility Rules governs how received packages and letters are checked by the detention facility. The Chief of Detention is able to confiscate packages or letters from outside the facility based on guidelines provided by the Co-Investigating Judges, at which point the Co-Investigating Judges or someone they designate can open the letter or parcel in front of the detainee.⁵¹

The Detention Rules state that in making decisions related to the conditions of detention, the Co-Investigating Judges shall take into account the “necessity to maintain the good order in the Detention Facility and the proper conduct of the proceedings” and that they shall “seek the Chief of Detention’s view on whether any letter or parcel sent or received by a detainee may pose any threat to the security and good order of the ECCC Facility.”⁵² The rules don’t explicitly limit the confiscation to only correspondence under those circumstances. However, it is probable that confiscation of packages without a security justification would be a violation of Rule 21 of the Internal Rules of the ECCC because it would be a disproportional method of coercion.⁵³

Generally, international criminal courts have allowed the Chief Detention Officer to solely oversee the censorship of packages without notifying the Registrar or other officials. At the SCSL, the Chief of Detention may refuse an item intended for a detainee if it endangers the security and good order of the Detention Facility; endangers the health and safety of the detainee or any member the staff of the Detention Facility; or could facilitate an attempted escape by a detainee from the Detention Facility.⁵⁴ The rules of detention for both

⁵¹ ECCC Detention Facility Rules, R. 14 (2008).

⁵² ECCC Detention Facility Rules, R. 14(4) (2008).

⁵³ Extraordinary Chambers in the Courts of Cambodia, Internal Rules, Rule 21(1)-21(2) (rev. 2010).

⁵⁴ Rules Governing the Detention of Persons Awaiting Trial or Appeal before the Special Court for Sierra Leone or Otherwise Detained on the Authority of the Special Court for Sierra Leone, R. 55 (amended 2005).

the ICTY and the ICTR state that all correspondence and mail should be inspected for explosives and restricted materials. The head administrator of the detention facility for both courts is to work with the Registrar to decide on conditions for inspection to maintain order and to prevent attempted escapes.⁵⁵

The ICC's Regulations of the Registry say that all packages and correspondence are to be examined unless they are from privileged parties such as the detainee's counsel or a consular representative. However, it restricts confiscation of any correspondence and packages to only when the Chief Custody Officer has reasonable grounds to believe that the detainee may be attempting to (a) arrange an escape; (b) interfere with or intimidate a witness; (c) interfere with the administration of justice; (d) otherwise endanger the maintenance of the security and good order of the detention center; or (e) jeopardize public safety or the rights or freedom of any person.⁵⁶ The ICC also requires the Chief Custody Officer to notify the detainee of the reasons for the confiscation. In contrast, the ECCC does not require the detainee to be notified of the reasons why their packages were confiscated.⁵⁷

The ECCC's regulations do not deviate greatly from international courts in terms of general restrictions on opening packages, with both the ECCC and international courts allowing officials great latitude in interfering with a detainee's correspondence. Unlike international courts though, the ECCC uses regulations promulgated by the Co-Investigating Judges' to guide the Chief of Detention in its determination of the opening of packages. Other courts solely grant that authority to the head detention official on premises. The lack of public access to the regulations put forth by the Co-Investigating Judges makes it difficult to assess

⁵⁵ International Criminal Tribunal for the Former Yugoslavia, Rules Governing the Detention of Persons awaiting Trial or Appeal before the Tribunal or otherwise Detained on the Authority of the Tribunal, R. 59 (rev. 2005); and International Criminal Court, Regulations of the Court, Reg. 75(2), 92 (2004); International Criminal Tribunal of Rwanda, Rules Covering the Detention of Persons Awaiting Trial or Appeal before the Tribunal or Otherwise Detained on the Authority of the Tribunal, R. 59 (1998).

⁵⁶ International Criminal Court, Regulations of the Registry, Reg. 169(3)(b) (2006).

⁵⁷ *Id.*, Reg. 169(4)(a)-(b) (2006).

in comparison with international courts which although they give full discretion to the officers, nominally limit their ability to search to security concerns.

Although the ability to easily open packages and letters of detainees is fairly common in the international court system, the ECCC's procedure is possibly not consistent with ECHR's requirement that there be a "compelling reason" to monitor detainee correspondence.⁵⁸ Without a compelling reason, the ECHR has found the monitoring of correspondence to be a violation of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention), guaranteeing the right to respect for private and family life.⁵⁹ Such interference violates Article 8 unless it can be shown that it was "in accordance with the law," pursued one or more legitimate aim or aims as defined within the European Convention and was "necessary in a democratic society" to achieve those aims.⁶⁰ Even when a country's own internal regulations allow monitoring, the ECHR has stated that it is still a violation of "being in accordance with the law" if there are no clear guidelines for when correspondence can be monitored.⁶¹

The guidelines set forth by the Co-Investigating Judges and applied by the Chief of Detention as to which letters and packages must be brought to the Co-Investigating Judges are not publicly available. There also have not been any public challenges to any letters or packages that have been confiscated. As a result, it is uncertain how often correspondence is opened and whether the guidelines require good cause. The ECCC's regulations are difficult to assess without these guidelines, but on the basis of if such a challenge were to be brought,

⁵⁸ Peers v. Greece, App. No. 28524/95, ¶ 84 (ECHR, Apr. 19, 2001), <http://www.echr.coe.int/eng>.

⁵⁹ *Id.*

⁶⁰ Bochev v. Bulgaria, App. No. 73481/01, ¶ 86 (ECHR, Nov. 13, 2008), <http://www.echr.coe.int/eng> (citing the Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, Apr. 11, 1950, CETS No.: 005).

⁶¹ *Id.*

it is arguably most appropriate for the Pre-Trial Chamber to resolve it in line with the ECHR rulings in order to meet international standard for domestic court practices.

B. Rule 30 - Telephone Call Monitoring

1. Justification for Monitoring

ECCC Detention Rule 30 outlines the procedure for monitoring telephone calls made by detainees. This rule provides the most specificity about what considerations should guide the Co-Investigating Judges' decisions. The Judges are only allowed to monitor telephone calls when they have a reasonable belief that the detainee may be (1) attempting to escape, (2) interfering with a witness; (3) making unauthorized media contact; or (4) otherwise disturbing the maintenance of good order in the Detention Facility.⁶² This is also the only situation where the Detention Facility Rules explicitly lay out a method of challenging a decision if the detainee feels the monitoring is unlawful.⁶³ Despite these limitations, the Co-Investigating Judges still must approve each telephone call before it can be placed, so they still maintain a high level of control over the detainee's ability to make telephone calls.⁶⁴

International courts' rules for telephone monitoring in their detention facilities vary greatly. The ICC automatically records all telephone calls, but only allows those recordings to be listened to under certain circumstances.⁶⁵ The SCSL Rules of Detention, like those of the ECCC, only allow monitoring in certain cases.⁶⁶ The ICTY's Rules of Detention merely state that non-privileged telephone monitoring is allowed if it is necessary in the interests of

⁶² ECCC Detention Facility Rules R. 30(10), 2008.

⁶³ ECCC, Detention Facility Rules, R. 30(9) (2008).

⁶⁴ *Id.*, Rule 30(2), 2008

⁶⁵ International Criminal Court, Regulations of the Registry, Reg. 174-175 (2006).

⁶⁶ Rules Governing the Detention of Persons Awaiting Trial or Appeal before the Special Court for Sierra Leone or Otherwise Detained on the Authority of the Special Court for Sierra Leone, R. 47(A) (amended 2005).

the administration of justice or security and good order.⁶⁷ The ICTR rules do not mention telephone monitoring at all. Notably, unlike the ECCC, none of these courts require prior approval for calls to be made to or from detainees.

ECHR standards for telephone monitoring are much higher than most international courts. Telephone monitoring generally is considered to fall under Article 8 of the Convention and requires a similar analysis as the monitoring of correspondence, where any interference has to be “in accordance with the law” and “necessary in a democratic society.” In *Doerga v. The Netherlands*, the ECHR determined that phone monitoring “in accordance with the law” meant that the monitoring not only had to be allowed by domestic law, but also that it had to be “accessible” and “foreseeable.” As a result, “it is essential to have clear, detailed rules on the subject.”⁶⁸ ECCC’s Detention Facility Rules appear to be fairly clear and detailed, particularly compared with international courts such as the ICTR, so they likely meet ECHR standards. There does not appear to be any case law from the ECHR about requiring pre-authorization for phone calls, so it is difficult to say whether the ECCC’s general regulations about phone calls would be acceptable according to ECHR’s standards.

2. Length of Monitoring

The ECCC Detention Rules do not allow privileged phone calls to be monitored for longer than a month, but do not provide any time limit for the monitoring of non-privileged calls.⁶⁹ Most international courts do not allow indefinite monitoring for both privileged and unprivileged calls, but instead set up a system of review so that any monitoring order is periodically reviewed. The ICC requires for both privileged and non-privileged calls a joint

⁶⁷ International Criminal Tribunal for the Former Yugoslavia, Rules Governing the Detention of Persons awaiting Trial or Appeal before the Tribunal or otherwise Detained on the Authority of the Tribunal, R. 58, 61 (rev. 2005).

⁶⁸ *Doerga v. The Netherlands*, App. No. 50210/99, ¶49 (ECHR, Apr. 27, 2004).

⁶⁹ ECCC Detention Facility Rules, R. 40(8) (2008).

review by the Registrar and the Chief Custody Officer after fourteen days.⁷⁰ Comparatively, a monitoring order for any call at the SCSL is effective for only six months, with the Registrar able to renew the order.⁷¹

Although the detention rules of ICTY do not place any time limits on monitoring, the court in *Seselj* found that the indeterminate duration of a monitoring order made it unlikely that the monitoring was justified.⁷² However, the decision dealt with a privileged phone call, and it is uncertain if the court would apply the same standard to non-privileged calls.

The ECCC's regulations are less strict than those at the ICC and the SCSL, where regardless of whether it is privileged, any monitoring order has a temporal limit. On the other hand, the ECCC may be consistent with the ICTY's decision in *Seselj* since the Rules of Detention do place a limit on privileged phone calls, and the ICTY decision does not speak to whether the monitoring of non-privileged calls require a time limit as well.

3. The Party Overseeing the Phone Monitoring

The ECCC's Detention Facility Rules give decision making authority over phone monitoring solely to the Co-Investigating Judges or the Chambers, as appropriate. Details of all monitored calls are forwarded to the Judges, who make a determination whether to listen or to have the call transcribed.⁷³ The language of Rule 40(12) suggests that the Chief of Detention may also listen to the calls.⁷⁴

⁷⁰ International Criminal Court, Regulations of the Registry, Reg. 175(2), 175(4) (2006).

⁷¹ Rules Governing the Detention of Persons Awaiting Trial or Appeal before the Special Court for Sierra Leone or Otherwise Detained on the Authority of the Special Court for Sierra Leone, R. 47(C) (amended 2005).

⁷² The Prosecutor v. Vojislav Seselj, Case No.: IT-03-67-T, Redacted Version of the "Decision on Monitoring the Privileged Communications of the Accused with Dissenting Opinion by Judge Harhoff in Annex," ¶ 31, (Trial Chamber III, Dec. 1, 2008).

⁷³ ECCC Detention Facility Rules, R. 40(11) (2008).

⁷⁴ ECCC Detention Facility Rules, R. 40(12) (2008) (providing in part: "[i]f, having reviewed a call, the Chief of Detention, Co-Investigating Judges or the Chambers, as appropriate...").

At international courts, the Registrar is allowed to listen to conversations, but no rules suggest that any other body, whether the chambers or the prosecutors, may likewise listen to a monitored conversation. At the ICC, the Registry Regulations explicitly state that any transcriptions of monitored conversations should be retained by the Registrar, and only handed over to the judges as evidence of contempt of court if notice has been provided to the detainee's legal counsel.⁷⁵

Overall, with regard to phone monitoring, the ECCC's Detention Facility Rules appears to be consistent with international courts, and may even conform to the higher standard required by the EHCR that requires accessible and foreseeable regulations with regard to monitoring. There is no time limit in the ECCC's rules for monitoring non-privileged calls, unlike at the SCSL and the ICC, but they are still potentially consistent with the ICTY rules.

Nevertheless, this is an area where the Co-Investigating Judges' dual role as both an investigative and administrative office creates a potential conflict of interest. Unlike at international courts, at the ECCC there is no purely administrative intermediary listening into or reviewing the phone calls. Additionally, both privileged and non-privileged phone calls can be monitored. Therefore, the Co-Investigating Judges (and in some cases the Chambers) can under certain circumstances listen to potentially privileged information relevant to the case under consideration even though their primary role is not administrative, but judicial: conducting the investigation and compiling evidence.

C. Management of the Detainees' Records

⁷⁵ International Criminal Court, Regulations of the Registry, Reg. 175(10) (2006).

Rules 4 and 5 of the ECCC's Detention Facility Rules govern how all detainees' books and records should be handled.⁷⁶ These two rules are more specific about which books and records the Chief of Detention must maintain than those in force at international courts.⁷⁷ At the ECCC, the Chief of Detention must keep a cell count record book; detention register of visits; official visitor record book; defence visit record book; official register of detainees; personal file for each detainee; medical file for each detainee; detention health report book; register of requests and complaints; register of letters and parcels; personal property of each detainee; daily detainee record book; "manipulation of detainee's file register"; report incidents form; and telephone call register.⁷⁸ Two of these files are considered to be confidential: the personal file and the medical file.⁷⁹

1. Access to Non-Confidential Records

The ECCC's Detention Facility Rules allow both the Co-Investigating Judges and the Chambers to access the books and records of the Detention Facility. Rule 4, Section 2 reads:

The Chief of Detention will check all books and records periodically. The Co-Investigating Judges and the Chambers, as appropriate, can inspect these books and records and make copies as they consider necessary. Any confidential information copied from these books and records shall be destroyed after use or placed in the case file.⁸⁰

There is nothing in the rules that limits access to any Detention Facility records and books except for the two confidential files. Comparatively, according to the detention rules of ICTY, ICTR, ICC, and the SCSL, all information concerning the detainees is

⁷⁶ See ECCC Detention Facility Rules, R. 40(11) (2008).

⁷⁷ Compare *id.* with International Criminal Tribunal for the Former Yugoslavia, Rules Governing the Detention of Persons awaiting Trial or Appeal before the Tribunal or otherwise Detained on the Authority of the Tribunal, R. 34(D) (rev. 2005); International Criminal Court, Regulations of the Registry, Reg. 156 (2006); International Criminal Tribunal of Rwanda, Rules Covering the Detention of Persons Awaiting Trial or Appeal before the Tribunal or Otherwise Detained on the Authority of the Tribunal, R. 9 (1998); Rules Governing the Detention of Persons Awaiting Trial or Appeal before the Special Court for Sierra Leone or Otherwise Detained on the Authority of the Special Court for Sierra Leone, R. 19 (amended 2005).

⁷⁸ ECCC Detention Facility Rules, R. 4(1) (2008).

⁷⁹ ECCC Detention Facility Rules, R. 5(6)-(7) (2008).

⁸⁰ ECCC Detention Facility Rules, R. 4 (2) (2008).

considered confidential.⁸¹ None of the international court rules mention non-confidential files, and it appears that access to such information is generally limited to the detainee, his counsel and persons authorized by the Registrar. Unlike the ECCC's detention rules, which allow the Chambers to inspect and copy the books and records, the rules at the other internalized courts do not allow the Chambers access to any records without the Registrar's authorization.

2. Access to Confidential Personal Files

Personal files of ECCC detainees are considered to be confidential. Detention Rule 5(6) outlines which parties may have access to confidential information in the detainee's personal file: (1) persons with a statutory right to have the information; (2) the Co-Prosecutors and the assigned defense team; (3) the detainee concerned unless the Co-Investigating Judges or Chambers, as appropriate, think that it will endanger another person or affect the security and good order; (4) the Chief of Detention and authorized detention guards; the Co-Investigating Judges or the Chambers, as appropriate, along with those approved by them; (5) other persons approved by the General Director of the General Department of Prisons and the Deputy Director of the Office of Administration.

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In contrast, international courts limit the access to confidential files to a fewer number of persons: (1) the detainee, (2) his counsel, and (3) persons authorized by the

⁸¹ International Criminal Tribunal for the Former Yugoslavia, Rules Governing the Detention of Persons awaiting Trial or Appeal before the Tribunal or otherwise Detained on the Authority of the Tribunal, R. 34(D) (rev. 2005); International Criminal Court, Regulations of the Registry, Reg. 156 (2006); International Criminal Tribunal of Rwanda, Rules Covering the Detention of Persons Awaiting Trial or Appeal before the Tribunal or Otherwise Detained on the Authority of the Tribunal, R. 9 (1998); Rules Governing the Detention of Persons Awaiting Trial or Appeal before the Special Court for Sierra Leone or Otherwise Detained on the Authority of the Special Court for Sierra Leone, R. 19(amended 2005).

⁸² ECCC Detention Facility Rules, R. 5(6) (2008).

Registrar.⁸³ Their rules also have no provisions allowing limitations on the detainee's ability to see his or her own file, unlike ECCC detention rule 5(6)(3) granting the Co-Investigating Judges the power to block the detainee's access in some cases.

Like most international courts, the ECCC requires the detainee to be notified when their confidential file is disclosed to any other person.⁸⁴ However, the ICC allows the detainee greater say regarding third party requests for their personal file. Its rules require that any request for the file be made known to the detainee and allow them to express their views on whether or not to allow the access.

3. Access to “Strictly Confidential” Medical Records

According to the ECCC's Detention Facility Rules, medical records are considered “strictly confidential.”⁸⁵ The detainee, and with his or her consent, the defense team, are the only people with automatic access.⁸⁶ All other requests to view a medical record have to be submitted to the Co-Investigating Judges or the Chambers, as appropriate. If they deny a request, they have to explain the denial.⁸⁷

Both the ICTY and the ICC have stricter regulations than the ECCC governing access to medical records of detainees. The ICTY does not allow information contained in the detainee's medical record to be disclosed unless it is for medical reasons and the detainee consents, or in the interest of justice and the good administration of trial after consultation

⁸³ International Criminal Tribunal for the Former Yugoslavia, Rules Governing the Detention of Persons awaiting Trial or Appeal before the Tribunal or otherwise Detained on the Authority of the Tribunal, R. 34(D) (rev. 2005); International Criminal Court, Regulations of the Registry, Reg. 156 (2006); International Criminal Tribunal of Rwanda, Rules Covering the Detention of Persons Awaiting Trial or Appeal before the Tribunal or Otherwise Detained on the Authority of the Tribunal, R. 9 (1998); Rules Governing the Detention of Persons Awaiting Trial or Appeal before the Special Court for Sierra Leone or Otherwise Detained on the Authority of the Special Court for Sierra Leone, R. 19 (amended 2005).

⁸⁴ ECCC Detention Facility Rules, R. 5(6)-(7) (2008).

⁸⁵ ECCC Detention Facility Rules, R. 5(7) (2008).

⁸⁶ *Id.*

⁸⁷ *Id.*

with the medical officer.⁸⁸ The ICC similarly has stringent confidential regulations for releasing medical records. The medical officer maintains the medical record, and only medical personnel have access to the file. It can only be disclosed only with the written consent of the detained person, unless there is a danger to the health and safety of the detained person concerned or any person in the detention center.⁸⁹

At the SCSL, the medical officer also maintains the medical record but there is nothing in the detention rules that distinguishes access to it from other confidential records.⁹⁰ The ICTR's detention rules similarly do not distinguish medical records from other confidential records.⁹¹ So the ICTR and the SCSL have less stringent requirements about who has access, but having the record in the hands of the medical officer emphasizes its primary use is medical, as it is at the ICC and ICTY.

The requirement that the Co-Investigating Judges must give an explanation if they deny a request for a medical file makes the ECCC's detention rules appear to be weighted in favor of broader disclosure. In contrast, access at international courts is more limited because they generally require or emphasize medical purposes. Except at the ICTR, the rules of most international courts indicate that the medical file should be primarily for medical purposes. The SCSL and the ICC give the medical officer control of the file and the ICTY requires consultation with the medical officer before disclosure. Thus, all the international courts use a medical professional as a gatekeeper for access to medical records of the detainees, whereas

⁸⁸ International Criminal Tribunal for the Former Yugoslavia, Rules Governing the Detention of Persons awaiting Trial or Appeal before the Tribunal or otherwise Detained on the Authority of the Tribunal, R. 34(D) (rev. 2005).

⁸⁹ International Criminal Court, Regulations of the Registry, Reg. 156 (2006).

⁹⁰ Rules Governing the Detention of Persons Awaiting Trial or Appeal before the Special Court for Sierra Leone or Otherwise Detained on the Authority of the Special Court for Sierra Leone, R. 19(amended 2005).

⁹¹ International Criminal Tribunal of Rwanda, Rules Covering the Detention of Persons Awaiting Trial or Appeal before the Tribunal or Otherwise Detained on the Authority of the Tribunal, R. 9 (1998).

the ECCC use the Co-Investigating Judges. Unlike most of the international courts, the ECCC also presumes a grant of access to these records to third parties.

D. Conclusion for Specific Rules of the ECCC Detention Facility Rules

Compared to international criminal courts, the ECCC gives the detainees less control over their records and allows more persons to have access to records, including confidential personal records. The ECCC's Co-Investigating Judges, unlike Registrars at international courts, even have the power to prevent the detainee from accessing their own records. Additionally, the Co-Investigating Judges and the ECCC Chambers can automatically access books and records at the facility and have more power to determine who can access medical records than most Registrars. International courts have been cautious about keeping records, particularly confidential medical records, solely in the hands of administrative and medical officers. None of the international criminal courts allow investigative or judicial bodies automatic access to records. For this reason, the ECCC's rules again appear to create a conflict between the Co-Investigating Judges administrative role and their investigative role. There are conceivable scenarios where they could even improperly use that information during their investigation. The propriety of making available records that contain sensitive information about the detainees to the officials investigating them could be questionable. Although there are reasons for a solely administrative body to be aware of such information, it is harder to justify allowing those in other positions to be granted access to such private documents. By giving the Co-Investigating Judges the primary administrative responsibility for detention, the ECCC has made the ability to make that separation impossible.

IV. Conclusion

The ECCC Detention Facility Rules give the Co-Investigating Judges a large role to play when it comes to detention facility matters. Although they are not the only authority

managing the detention facilities, they have the power to make a majority of the discretionary administrative decisions. In the core ECCC documents, the Co-Investigating Judges were not assigned to run an administrative office, but rather to head an investigative legal office. As a result there is some line blurring between their two roles.

The Pre-Trial Chamber applies a standard of review to decisions of the Co-Investigative Judges as though they were a legal body, even when they are making administrative decisions related to detention. The lack of oversight by an official such as the Pre-Trial Chamber President over the Co-Investigating Judges' decisions also means that any review has to go through a slower judicial process, even when it does not implicate fair trial rights.

Additionally, the fact that the Co-Investigative Judges' administrative duties allow them access to the detainee's files, telephone conversations, and correspondence, potentially creates a conflict of interest with their investigative role. Although no conflict issues have been publicly brought to light, the overlap does raise questions of the Co-Investigating Judges' ability to act impartially and draw a strict line between their administrative functions and their primary investigative duties.