

Ascertaining the Truth through a Partial Procedure: The Limited Obligations of the Co-Investigating Judges to Search for and Seek Exculpatory Evidence

**Gina Cortese
Santa Clara University School of Law 2011
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Background

The Extraordinary Chambers in the Courts of Cambodia’s (ECCC) Internal Rules provide the Co-Investigating Judges with a duty to carry out their investigation impartially and to seek out any inculpatory and exculpatory evidence that may be conducive to ascertaining the truth. However, the duty of the Co-Investigating Judges to respond to the parties, in particular defense requests for investigation, and to what extent they must disclose potentially chargeable modes of liability, their investigation strategy, and their general line of inquiry is unclear.

1. Co-Investigating Judges Duty to Seek the Truth

Pursuant to the ECCC’s Internal Rules, the Co-Prosecutors conduct preliminary investigations to determine if evidence indicates that crimes within the jurisdiction of the ECCC were committed and to identify suspects and potential witnesses.¹ The initial work of the Co-Prosecutors sets the parameters for the investigation. The Co-Prosecutors must provide an Introductory Submission to the Co-Investigating Judges, who may then take any investigative action conducive to ascertaining the truth.² This power of the Co-Investigating Judges is consistent with Article 127 of the Cambodian Code of Criminal Procedure.³

¹ Extraordinary Chambers of the Courts of Cambodia, Internal Rules, Revision 5, February 2010, Rule 50.

² ECCC Internal Rules, Rule 55(5).

³ Cambodian Code of Criminal Procedure, Book Four, Title 1: Investigating Judge: Chapter 1: General Provisions, Article 127, “An investigative judge, in accordance with the law, performs all investigations that he deems useful to ascertaining the truth. An investigative judge has the obligation to collect inculpatory as well as exculpatory evidence.”

The central purpose of any civil law investigation is to ascertain the truth. Scholar Gregory Gordory explains, “This objective, where the main procedural rule is the search for truth, differs from the common law system, where “the truth” is viewed as the natural and logical result of a pre-determined process.”⁴ At the ECCC, as in domestic civil systems, the law gives all necessary power to the investigating judges in order to guarantee freedom of action and enable them to perform their work.⁵ This gives the Co-Investigating Judges broad discretion when deciding how to gather inculpatory and exculpatory evidence in ascertaining the truth. It also is why, according to the Co-Investigating Judges, neither the systems put in place for the functioning of the Office of the Co-Investigating Judges, nor the internal discussions within the Office of the Co-Investigating Judges, are part of the case file or subject to disclosure to the parties.⁶ The rights of the parties to have access to the “results” of the investigations means access to the product of investigations, such as documents and records in the case file, and not information about the procedure followed by investigating authorities in analyzing the evidence that they have collected.⁷

The ECCC Internal Rules limit the discretion of the Co-Investigating Judges by requiring that in all cases they conduct their investigation impartially, whether the evidence is inculpatory or exculpatory.⁸ However, it is difficult to assess whether this occurs in practice when a presumption of impartiality, derived from the Co-Investigating Judges’ oath of office, attaches to

⁴ Gregory S. Gordon, *Toward an International Criminal Procedure: Due Process Aspirations and Limitations*, *Columbia Journal of Transnational Law*, 45 COLUM. J. TRANSNAT’L L. 635, at 643 (2006-2007).

⁵ OCIJ’s Response to the Request for Investigative Action, concerning inter alia the strategy of the COIJ in regard to the judicial investigation, Dec. 11, 2009, paragraph 40 (citing *Traite de l’instruction criminelle*, Faustin Heli, Chapter 4 “Attributions General du Juge d’instruction,” page 158).

⁶ *Id.*

⁷ Decision on Admissibility of Ieng Sary’s Appeal against the OCIJ’s Constructive Denial of Ieng Sary’s Requests Concerning the OCIJ’s Identification of and Reliance on Evidence Obtained Through Torture, May 10, 2010, paragraph 31 and 32.

⁸ ECCC Internal Rules, Rule 55(5).

the judges. This places a high burden on an applicant to displace that presumption,⁹ and as scholar David Ormerod pointed out,¹⁰ leaves little protection for the accused against deliberate or negligent failures to perform the investigative task fairly and effectively.¹¹

These procedural issues need to be analyzed in the overall context in which they arise—a hybrid court trying senior leaders of the Khmer Rouge for crimes against humanity, genocide and violations of the Geneva Conventions. The presumption of innocence tends to change when suspects are accused of mass atrocities. It is indisputable that the acts occurred, and it is nearly impossible to deny the involvement of these specific persons. Ormerod, describing more generally the adversarial criminal justice system, pointed out that under such circumstances, the principal trial objective tends to be a focused inquiry into a single closed question: is the accused guilty of the offence charged?¹² This results in a trial process that is “specific rather than sensitive—akin to the treatment of an ailment that has already been diagnosed where the instance is on resolving the problem, not investigating what the problem is.”¹³

The power of the Co-Investigating Judges to take any action conducive to ascertaining the truth, and to refuse requests based on broad legal principals, raises the issue of whether they have a broad, unchecked discretion, limiting the rights of the parties to play a significant role in their own case, or whether the parties have a right to efficient recourse in the ECCC Internal Rules or international precedent and customary law.

2. Co-Investigating Judges Duty to Respond to Investigative Requests

⁹ Co-Prosecutors Response to Ieng Sary’s Application for Appropriate Measures Concerning the International Judges of the PTC, November 5, 2009.

¹⁰ David Ormerod, *Improving the Disclosure Regime*, 7 INT’L J. EVIDENCE & PROOF 102-129 (2003).

¹¹ *Id.* at 104

¹² *Id.*

¹³ *Id.*

Internal Rule 21(1) regarding fundamental procedural principles states in part:

“The applicable ECCC Law, Internal Rules, Practice Directions and Administrative 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 and adversarial and preserve a balance between the rights of the parties. They shall guarantee separation between those authorities responsible for prosecuting and those responsible for adjudication...

d) Every person suspected or prosecuted shall be presumed innocent as long as his/her guilt has not been established. Any such person has the right to be informed of any charges brought against him/her, to be defended by a lawyer of his/her choice, and at every stage of the proceedings shall be informed of her/her right to remain silent.”¹⁴

Several challenges have been raised during the pre-trial investigation phases of Cases 001 and 002 as to whether these fundamental principles regarding the rights of the accused are being protected. Specifically, the defense teams have raised concerns about the obligation of the Co-Investigating Judges to search the shared materials drive for exculpatory evidence; about the Co-Investigating Judges refusal to conduct witness interviews; and about the Co-Investigating Judges ability to request, seek and review exculpatory evidence.

The shared materials drive, or SMD, is a database accessible to all parties and the court through the ECCC search portal, containing documents and videos which have not yet been analyzed and put in the case file but are asserted to be potentially relevant to the case. Documents on the SMD comprise, among other items, records, interviews, newspaper clippings, and evidence of the structure and organization of the Democratic Kampuchea era. Defense teams have argued that the Co-Investigating Judges have a duty to investigate the SMD for potential exculpatory evidence. However, the Co-Investigating Judges have refused to review the

¹⁴ ECCC Internal Rule 21(1), Fundamental Principles.

materials on the SMD for this purpose. The Pre-Trial Chamber has upheld the Co-Investigating Judges decisions on this topic.¹⁵

The defense teams have also expressed their concerns that their clients' right to a fair trial has been impaired by the Co-Investigating Judges refusal to conduct witness interviews on behalf of the defense. The Co-Lawyers for Nuon Chea have requested interviews to be conducted and placed on the case file, but the Co-Investigating Judges have repeatedly denied such requests on the basis that similar or sufficient evidence already exists in the case file.¹⁶ This could potentially limit the right of the accused to have exculpatory evidence available, and ultimately their right to a fair trial.

The defense teams also have argued that their access to witness evidence and exculpatory evidence generally is limited due to a lack of clear investigatory standards and tests, as well as discrepancies in the Internal Rules as to whose burden it is to seek, review and include exculpatory evidence in the case file. Although the parties have a right to request investigative actions, the right offers little assistance when the Co-Investigating Judges have such broad latitude in refusing to comply.

a. Investigative Requests Defined

i. Types of Requests

Under the Internal Rules, the Co-Prosecutors, the Charged Person, or a Civil Party may request the Co-Investigating Judges to make such orders or undertake such investigative action

¹⁵ Decision on the Appeal of the Request to Seek Exculpatory Evidence in the Shared Materials Drive, Paragraph 28, 29, 33. November 18, 2009.

¹⁶ Decision on Appeal Against the OCIJ Order on Nuon Chea's Eighteenth Request for Investigative Action, June 15, 2010.

as they consider necessary for the conduct of the investigation.¹⁷ Also, at any time during an investigation, the Charged Person may request that the Co-Investigating Judges to interview him or her, question witnesses, go to a site, order expertise or collect other evidence on his or her behalf.¹⁸

Nevertheless, the Rules do not clearly define what constitutes an investigative action.¹⁹ The Co-Lawyers for Ieng Sary argued that “investigative action” must not be interpreted so narrowly as to deprive the defense the means to genuinely challenge the decisions of the Co-Investigating Judges in relation to the way in which the judicial investigation is conducted.²⁰ The Pre-Trial Chamber agreed, holding that a broad interpretation of investigative action is appropriate, which by extension, grants a wide right of appeal.²¹

Nor do the Rules define the appropriate scope of an investigative request.²² The Co-Lawyers for Ieng Sary argued that “investigative request” should logically include any action that affects the substance of the investigation—meaning anything that relates to obtaining evidence on the case file which pertains to guilt or innocence.²³ However, the Pre-Trial

¹⁷ ECCC Internal Rules, Rule 55(10).

¹⁸ ECCC, Internal Rules, Rule 58(6).

¹⁹ ECCC Internal Rule 55(10); *See also*, Pre-trial Chambers, Ieng Sary’s Appeal Against the OCIJ’s Order on Translation Rights and Obligations of the Parties.

²⁰ Pre-trial Chambers, Ieng Sary’s Appeal Against the OCIJ’s Order on Translation Rights and Obligations of the Parties, page 3.

²¹ ECCC Internal Rule 74(3)(b) states, “The Charged Person or the Accused may appeal against the following orders or decisions... b) refusing requests for investigative action allowed under these IRs.” *See also*, Pre-trial Chamber Decision on Ieng Sary’s Appeal Against the OCIJ’s Order on Translation Rights and Obligations of the Parties, February 20, 2009.

²² Pre-Trial Chamber Decision on Ieng Sary’s Appeal Against the OCIJS order on Translation Rights and Obligations of the Parties, February 20, 2009.

²³ Ieng Sary’s Appeal Against the OCIJ’s Order on Translation Rights and Obligations of the Parties, Paragraph 3, July 22, 2008.

Chamber found that under Internal Rule 58(6), investigative requests by the charged person refer only to actions aimed at gathering evidence.²⁴

ii. Specificity of Request

Requests by the parties for the Co-Investigating Judges to make orders or undertake investigative action must meet a certain degree of specificity to ensure that the Investigating Judges understand the nature of the request. However, the Internal Rules do not provide a required degree of specificity, leaving it unclear whether the Co-Investigating Judges abuse their discretion to dismiss requests as unreasoned or unspecific, or whether the parties act irresponsibly in submitting requests, thereby impairing judicial economy.

Both the Co-Investigating Judges and the Pre-Trial Chamber have held that requests for investigative action must make out a *prima facie* basis as to why the Co-Investigating Judges should undertake the action. Several of the defense teams, including those for Ieng Thirith, Ieng Sary, and Nuon Chea, have contested the *prima facie* basis requirement, specifically as applied to requests to the Co-Investigating Judges to place additional files from the shared materials drive (SMD) in the Case File.²⁵ On Appeal, the Pre-Trial Chamber held that although there was some indication that the SMD may contain relevant exculpatory material in relation to introductory and supplementary submissions, there was nothing pointing specifically toward its presence. The Chamber held that the fact that the Co-Prosecutors could not exclude the

²⁴ ECCC Internal Rule 58(6) states, "At any time during an investigation, the Charged Person may request the Co-Investigating Judges to interview him or her, question witnesses, go to a site, order expertise or collect other evidence on his or her behalf. The request shall be made in writing with a statement of factual reasons for the request. If the Co-Investigating Judges do not grant the request, they shall issue a rejection order as soon as possible, and in any event, before the end of investigation. The rejection order shall state the factual reasons for rejection. The Charged Person shall immediately be notified of the rejection order. The Charged Person may appeal the rejection order to the Pre-Trial Chamber." See also, PTC decision on Ieng Sary's Appeal Against the OCIJS Order on Translation Rights and Obligations of the Parties.

²⁵ Joint Defense Request to Seek Exculpatory in the Shared Materials Drive, April 20, 2009.

possibility that the SMD contained exculpatory evidence did not constitute a *prima facie* indication that the SMD may effectively contain such evidence.²⁶ Moreover, the Pre-Trial Chamber stated that in the absence of any specific indication that any document on the SMD may be of exculpatory nature, the obligation to investigate exculpatory evidence does not, in itself, oblige the Co-Investigating Judges to review all materials contained in the SMD.²⁷

Thus, the Internal Rules do not stipulate an objective standard for the Co-Investigating Judges to follow in rejecting or accepting a request for investigative action, instead leaving it the discretion of the Co-Investigating Judges on a request-by-request basis.

3. Reasoned Opinion

The ECCC Internal Rules provide the Co-Investigating Judges with the discretion to reject requests generally for lack of specificity, yet maintain that it is the Co-Investigating Judges' duty to provide reasons when granting or rejecting requests for investigative action.²⁸ When the Co-Investigating Judges reject requests, with the only reason being lack of specificity, the lawyers are not given enough information to be able to amend their request satisfactorily to have the investigative action performed. The requirement that the rejection of requests be accompanied by articulated reasons follows from Articles 133, 134 and 135 of the Cambodian Code of Criminal Procedure, which provides that at any time during a judicial investigation, the charged person may make a request to the investigating judge request that shall be in writing with a statement of reasons.²⁹ The Judges' responding order must likewise state the reasons for

²⁶ Pre-Trial Chamber's Decision on Appeal Against the Order to Seek Exculpatory Evidence on the Shared Materials Drive, November 18, 2009.

²⁷ *Id.*

²⁸ ECCC Internal Rule 55(10); *See also*, Internal Rule 58(6).

²⁹ Cambodian Code of Criminal Procedure, September 2008, Book Four, Title 1: Investigating Judge: Chapter 1: General Provisions, Article 133, 134, 135.

its decision.³⁰ Similarly, under French Criminal Procedure, the legal system upon which the Cambodian National Law is based, the accused and the victim may call on the juge d' instruction by a written request, accompanied by reasons that certain investigations be carried out—for example, interrogation, confrontation, hearing of a witness or parties civiles, visit to the scene of the crime, or production of important objects of evidence. The judge may only refuse this request by an order accompanied by reasons.³¹

According to the ECCC Pre-Trial Chamber, it is a fundamental right that the parties know the reason for a decision for the rejection of an investigative request so that they can better assist the inquiry on behalf of their clients.³² Ideally, this rule serves to provide the parties with awareness of the Investigating Judges' investigative strategy—that is, an understanding of how the investigation is being conducted and what type of specificity is required in order to have their requests accepted. However, the Co-Investigating Judges have often failed to provide reasons, or have vaguely stated their rationale in dismissing requests, or have dismissed requests stating that the requests themselves were not sufficiently reasoned.³³ This has, at times, made it impossible for the parties to determine the Investigating Judges' actual basis for acceptance or rejection of their requests.³⁴

³⁰ *Id.*

³¹ French Code of Criminal Procedure, See Title III "Investigating Jurisdiction," Chapter I: The Investigating Judge, Article 81.

³² Pre-Trial Chamber Decision on Appeal Against the OCIJ Order on Nuon Chea's Eighteenth Request for Investigative Action, June 15, 2010.

³³ Pre-Trial Chamber Decision on Appeal Against the Order Seeking Exculpatory Evidence on the Shared Materials Drive; See also, Pre-Trial Chamber Decision on Co-Prosecutors Appeal Against the COIJ's Order on Request to Place Additional Evidentiary Material on the Case File Which Assists in Proving the Charged Persons' Knowledge of the Crime, June 15, 2010.

³⁴ Pre-Trial Chamber's Decision on Appeal Against the OCIJ order on Nuon Chea's Eighteenth Request for Investigative Action, June 15, 2010.

The Co-Investigating Judges failure to provide coherent reasons for their decisions undermines the ability of the Pre-Trial Chamber to render decisions on appeal.³⁵ In addition to requiring that the Co-Investigating Judges provide reasons, the Internal Rules stipulate that all decisions of the Pre-Trial Chambers shall be reasoned.³⁶ The Pre-Trial Chamber, in its Decision on the Co-Prosecutors Appeal against the Co-Investigating Judges Order on Request to Place Additional Evidentiary Material on the Case File, found that it was impossible to tell which documents were rejected by the Co-Investigating Judges and on what basis.³⁷ The Pre-Trial Chamber explained that although Internal Rule 77(14) requires that it provide reasons, no appellate court can provide a reasoned decision when the rationale and logic of the decision appealed is not itself disclosed by a reasoned decision.³⁸ The Pre-Trial Chamber was unable to provide any further analysis and remanded the issue to the Co-Investigating Judges.³⁹

Although the ECCC Internal Rules may require that the Co-Investigating Judges provide reasons, the usefulness of this requirement is lost when it is supplanted by the Co-Investigative Judges right to deny requests on the vague reason that the requests are unspecific. In turn, the lawyers and the Pre-Trial Chambers are left unclear on how to make their requests more specific, making it harder for them to perform their own duties.

³⁵ Pre-Trial Chamber Decision on Co-Prosecutors Appeal Against the OCIJ Order on Request to Place Additional Evidentiary Material on the Case File Which Assists in Proving the Charged Persons' Knowledge of the Crime, June 15 2010.

³⁶ ECCC Internal Rules, Rule 77(14).

³⁷ Pre-Trial Chamber Decision on Co-Prosecutors Appeal Against the OCIJs Order on Request to Place Additional Evidentiary Material on the Case File Which Assists in Proving the Charged Persons' Knowledge of the Crime, June 15 2010.

³⁸ Internal Rule 77(14) states, "All decisions under this Rule, including any dissenting opinions, shall be reasoned and signed by their authors..." See also, Pre-Trial Chamber Decision on Co-Prosecutors Appeal Against the OCIJs Order on Request to Place Additional Evidentiary Material on the Case File Which Assists in Proving the Charged Persons' Knowledge of the Crime, June 15 2010.

³⁹ Pre-Trial Chamber Decision on Co-Prosecutors Appeal Against the OCIJs Order on Request to Place Additional Evidentiary Material on the Case File Which Assists in Proving the Charged Persons' Knowledge of the Crime, June 15 2010.

a. Standard of Review of Investigative Requests

i. Exculpatory Evidence Defined

A significant issue with regard to the balancing of rights is whether the duty of the Co-Investigating Judges to seek exculpatory evidence is limited to evidence that is determined to be exculpatory in nature, or whether it also extends to *potentially* exculpatory evidence.

Exculpatory evidence is defined as evidence tending to establish a criminal defendant's innocence.⁴⁰ The Co-Lawyers for Nuon Chea argued that including in the case file even potentially exculpatory evidence is critical to the right of the accused to play a viable role in his own defense.⁴¹ The Co-Lawyers asserted that if a document potentially contains exculpatory evidence, its analysis could lead to the exclusion of the charges and/or specific modes of liability in the closing order, in relation to which the Appellant would not have to present a defense to later. They argued that issues surrounding the inclusion of exculpatory evidence should be examined on the merits sooner rather than later so as to avoid consequences to the right to a fair trial.⁴²

ii. Standard of Inclusion

Although the Internal Rules require that the Co-Investigating Judges provide factual reasons when ruling on requests for investigative action, the legal test for accepting or rejecting a request is unclear. The standard by which the Co-Investigating Judges must evaluate requests for investigative action turns on whether fulfilling such a request is conducive to ascertaining the truth. However, the Co-Investigating Judges appear to have used several different tests as their

⁴⁰ Black's Law Dictionary, "Evidence, Exculpatory Evidence," 8th Edition (2004).

⁴¹ Pre-Trial Chamber Decision on Appeal Against the OCIJ Order on Nuon Chea's Eighteenth Request for Investigative Action, June 15, 2010.

⁴² Pre-Trial Chamber Decision on Appeal Against the OCIJ Order on Nuon Chea's Eighteenth Request for Investigative Action, June 15, 2010.

basis for evaluating whether certain requests are conducive to ascertaining the truth.⁴³ This has raised concern as to whether the investigation is a focused inquiry, or whether it is being directed by a partial and subjective discretion of the Co-Investigating Judges.

Absent a standard of investigative review in the ECCC Internal Rules, the Investigating Judges may act on an ad hoc basis without considering constraints on their power. For instance, the Co-Investigating Judges may have exceeded their power to reject requests when they determined that any investigative action that could have the effect of delaying the proceedings may be dismissed.⁴⁴ The Co-Investigating Judges justified this statement, saying that the right to an unduly delayed trial is now a prominent feature of international instruments.⁴⁵ They found that the law dictates a right and a duty to dismiss requests where the judges do not consider such requests to be conducive to ascertaining the truth. For example, the Co-Investigating Judges declined to conduct an interview requested by Nuon Chea's defense lawyers.⁴⁶ The Nuon Chea defence team had requested an interview of Nuon Chea, alleging that he would be able to provide information regarding certain documents as well as an account of the alleged hostilities with Vietnam.⁴⁷ The Co-Investigating Judges declined on the grounds that conducting an interview would not sufficiently facilitate the ascertaining of truth beyond that which was already available on the case file to justify further delaying the proceeds.⁴⁸ The Co-Prosecutors defended the Co-Investigating Judges finding by saying that they do not mean to put the right to

⁴³ *E.g.*, The Co-Investigating Judges have at times referred to a sufficiency standard, a relevancy standard, and a *prima facie* basis standard.

⁴⁴ Co-Prosecutors Combined Response to the Appeals by Ieng Thirith, Nuon Chea, Khieu Samphan and Ieng Sary Against the OCIJ Order Denying A Joint Defense Request for Investigative Action to Seek Exculpatory Evidence in the Shared Materials Drive, August 10, 2009.

⁴⁵ OCIJ's Order Denying a Joint Defense Request for Investigative Action to Seek Exculpatory Evidence in the SMD, paragraph 10, June 19, 2010 (The Judges were referencing ICCPR Article 14(3)).

⁴⁶ Pre-Trial Chamber Decision on Appeal Against the OCIJ Order on Nuon Chea's Eighteenth Request for Investigative Action, June 15, 2010.

⁴⁷ *Id.*

⁴⁸ *Id.*

a speedy trial before the right to a fair trial, but rather they mean to put the two rights on same footing and apply them cumulatively. Allegedly, the Co-Investigating Judges do protect the accuseds' rights by dismissing imprecise and unspecific requests.⁴⁹

Despite the Co-Investigating Judges' assessment that the right to an unduly delayed trial may be a reason for the preclusion of additional evidence, Article 14 of the ICCPR does not provide a hierarchy of the rights of the accused.⁵⁰ In fact, the right to be tried without undue delay is a minimum guaranteed right, part of the collective right of the accused to a fair trial. Thus, if any hierarchy were to be implied, the right to trial without undue delay would have to be weighed against whether protecting that right would contribute to or impair the fairness of the proceedings as a whole. The rights of the accused should not be divided to cut against one another. Nor may the right to a speedy trial be used as an excuse for the Co-Investigating Judges to avoid a comprehensive investigation into exculpatory evidence—the right belongs to the accused and to the accused alone to ensure his right to a fair trial.⁵¹

The Co-Investigating Judges and Pre-Trial Chambers have put forth two requirements that must be met in order for the Co-Investigating Judges to agree to a request. The request must relate to a probative fact under investigation and the request must not be for something that would be unduly repetitive given the materials already in existence on the case file.

1. Must Relate to a Probative Fact Under Investigation

⁴⁹ Co-Prosecutors Combined Response to the Appeals by Ieng Thirith, Nuon Chea, Khieu Samphan and Ieng Sary Against the COIJ Order Denying A Joint Defense Request for Investigative Action to Seek Exculpatory Evidence in the Shared Materials Drive, August 10, 2009.

⁵⁰ International Covenant on Civil and Political Rights, Article 14.

⁵¹ Joint Defence Appeal from the COIJ Order on the Request for Investigative Action to Seek Exculpatory Evidence in the SMD of 19 June 2009, Paragraph 33, July 24, 2009.

The Pre-Trial Chamber has stated that in order for the Co-Investigating Judges to fulfill their obligation to establish the truth regarding matters under investigation, they must assess the relevance of any particular piece of evidence. The Co-Investigating Judges considered this to mean that in deciding whether a piece of evidence can assist in establishing the truth, it must be shown to relate to a probative fact under investigation. For an investigation to establish the truth, investigations must focus solely on the seized matters for which the truth is required, without being distracted by manifestly irrelevant materials, the truth of which the investigation is not required to establish.⁵² The Co-Investigating Judges determined that materials relating to treatment of Buddhists, forced marriage, and rape were “sufficiently relevant” in ascertaining the truth, but other material were too general in nature or did not refer to any specific aspect under investigation.⁵³ Unfortunately, the Co-Investigating Judges did not specifically identify why these other materials were irrelevant or too general, leaving it unclear as to the definition of “relevance” the Co-Investigating use in determining what evidence to include in the case file. In the aforementioned example, the Co-Investigating Judges explained that a number of papers pertained to matters falling beyond the scope of the defined investigation, either because they did not describe a particular crime site or facts nationwide or because they did not contain information that would determine jurisdictional elements.⁵⁴ The Co-Investigating Judges described a newspaper article as having too low a probative value to necessarily be included in the case file.⁵⁵ The Co-Investigating Judges did not explain their basis for finding that

⁵² Order in Response to the Decision of the Pre-Trial Chamber on Co-Prosecutor’s Appeal Against the Co-Investigating Judges’ Order on Request to Place Additional Evidentiary Material on the Case File which Assists in Proving the Charged Persons’ Knowledge of the Crimes, Paragraph 4, June 21, 2010.

⁵³ *Id.* paragraph 5

⁵⁴ Order in Response to the Decision of the Pre-Trial Chamber on Co-Prosecutor’s Appeal Against the Co-Investigating Judges’ Order on Request to Place Additional Evidentiary Material on the Case File which Assists in Proving the Charged Persons’ Knowledge of the Crimes, Paragraph 6, June 21, 2010.

⁵⁵ *Id.* at Paragraph 6-10

newspaper articles have too low a probative value, nor what the “too low a probative value” threshold is, nor whether they determine each piece of evidence independently for probative value, or rather, whether they have made blanket determinations as to what type of evidence is probative.

2. May Not be Unduly Repetitive

The ECCC Internal Rules leave it unclear as to how much evidence must be included in the case file, or whether the Judges’ discretion to end the investigation may override requests to include additional evidence. This issue was raised when the Co-Prosecutors’ requested to place additional evidentiary material on the case file that would assist in proving the charged persons knowledge of the crimes.⁵⁶ The materials consisted of 268 documents from a public source. The Co-Investigating Judges discussed their obligations, stating that they,

“Perform their own legal analysis of the requested documents to determine whether they may be conducive to ascertaining the truth. The Co-Investigating Judges take into consideration whether the evidence is relevant to the facts under investigation, having special regard to exculpatory material, limited to the matters of which the Co-Investigating Judges are seized and whether or not the evidence is unduly repetitive in relation to evidence already on the Case File concerning the same issues.”⁵⁷

The Co-Investigating Judges accepted 70 documents while rejecting 198 of the documents.⁵⁸

They went on to state that they were unable to determine how the additional materials would be relevant as they did not refer to any specific aspect under the scope of investigation.⁵⁹

Even where the Investigating Judges concede that certain evidence is relevant as exculpatory or potentially exculpatory, there have been disputes over the scope of exculpatory

⁵⁶ Pre-Trial Chamber Decision on Co-Prosecutors’ Appeal Against the Co-Investigating Judges Order on Request to Place Additional Evidentiary Material on the Case File which Assists in Proving the Charged Persons’ Knowledge of the Crimes, June 15, 2010.

⁵⁷ *Id.* at Paragraph 3.

⁵⁸ *Id.* at Paragraph 8.

⁵⁹ *Id.*

evidence that may be included in the case file. This was somewhat clarified when the Pre-Trial Chamber reviewed the Co-Investigating Judges rejection of Nuon Chea's request to place additional potentially exculpatory documents on the case file.⁶⁰ The Co-Investigating Judges had based their rejection of the request on a finding that sufficient evidence already existed in the case file. The Pre-Trial Chamber held that the correct test as to whether evidence should be included in the case file is whether it is conducive to ascertaining the truth, and not whether it is more conducive than other documents already in the file.⁶¹

This argument made by the Nuon Chea Co-Lawyers, regarding the right to have access to all potential evidence, was similar to one made by the defense in the International Criminal Court (ICC)'s *Lubanga* case. An issue in *Lubanga* was whether the Prosecutors violated their right to utilize confidential sources as lead evidence. The Prosecution argued that it had a right to keep its sources confidential and that regardless, it had no duty to disclose the material because similar evidence had already been provided. The defense lawyers contested this justification, arguing that the fundamental right of the accused is to receive the totality of exculpatory materials and that no confidentiality agreement could justifiably form an obstacle to this fundamental right.⁶² The Chamber agreed, stating their grave reservations as to whether making available other, similar evidence can ever provide an adequate substitute for disclosing a particular piece of exculpatory evidence; the accused has a right to both items.⁶³

Reviewing the Orders filed by the Co-Investigating Judges, two standards are seemingly clear for the inclusion of evidence into the case file—evidence must relate to a probative fact

⁶⁰Pre-Trial Chamber Decision on Appeal Against the OCIJ order on Nuon Chea's Eighteenth Request for Investigative Action, June 15, 2010.

⁶¹ *Id.*

⁶² *The Prosecutor v. Thomas Lubanga Dyilo*, International Criminal Court, Case No. ICC-01/04-01/06, Decision, Paragraph 43.

⁶³ *Id.* at Paragraph 60.

under investigation and the particular item of evidence must not be unduly repetitive given what is already included in the case file. Unfortunately, as explained above, neither standard is clear in practice when the Co-Investigating Judges do not explain their methodology in applying these standards. The defense teams need to understand what the Judges will consider “probative” and what exactly is included in the case file in order to be able to make efficient requests for investigative action.

4. Burden

a. Standard to be Applied

The responsibility of the Investigating Judges to collect and review evidence has been a particular issue for the defense lawyers, and one which they have contested before the Co-Investigating Judges and Pre-Trial Chambers.⁶⁴ Structurally, the civil law system places the Prosecution and Co-Investigating Judges in a leading position to collect and review evidence and set the parameters of the case. This potentially narrows the line of inquiry and places the defense in a more passive position as compared with its adversarial and highly active role in the common law system. The defense teams alleged that the Investigating Judges have indeed focused only on proving the guilt of the accused, thereby impairing the right of the accused to the inclusion of exculpatory evidence in the case file.

A main issue of debate is whether the burden rests with the Co-Investigating Judges or with the defense teams to present and review exculpatory evidence, and more specifically whether the onus is on the defense to persuade the Investigating Judges to include exculpatory

⁶⁴ OCIJ’s Response to the Request for Investigative Action, Concerning Inter Alia the Strategy of the OCIJ in Regard to the Judicial Investigation, Dec. 11, 2009; *See also*, Joint Defence Appeal from the OCIJ Order on the Request for Investigative Action to Seek Exculpatory Evidence in the SMD of 19 June 2009, Paragraph 10-20, July 24, 2009,.

evidence it seeks to include in the case file. The Pre-Trial Chamber has held that the obligation of the Co-Investigating Judges to investigate exculpatory evidence—regarding documents and other evidence—is limited to reviewing materials where there is a *prima facie* reason to believe that they may contain exculpatory evidence.”⁶⁵ The Defense teams have argued that the Co-Investigating Judges cannot stand by and wait for possible requests by the defense for investigative action before undertaking exculpatory actions.

b. Party Bearing Burden

The Internal Rules do not stipulate the extent of the Investigative Judge’s duty to search for exculpatory evidence, leaving the Co-Investigating Judges, Pre-Trial Chambers, and parties to imply standards from other Internal Rules. The Co-Investigating Judges stated that they have no duty to go on fishing expeditions in search of exculpatory evidence as long as they satisfy the requirement of sufficiency—that is, collecting “sufficient evidence to indict a person.”⁶⁶ However, the Co-Investigating Judges have not provided any legal basis for a “sufficiency standard.” The Pre-Trial Chamber on review clarified that if appellants want to allege that the Co-Investigating Judges have not met their obligations to actively search for and file exculpatory evidence, then applying relevant international principles, they must submit *prima facie* proofs that such evidence exists and that it is in possession or within reach of the Co-Investigating Judges.⁶⁷ This validates the Co-Investigating Judges understanding that their duty to search for alternative versions of events on their own motion is necessarily limited to exculpatory evidence

⁶⁵ OCIJ’s Response to the Request for Investigative Action, Concerning Inter Alia the Strategy of the OCIJ in Regard to the Judicial Investigation, Paragraph 43, Dec. 11, 2009.

⁶⁶ Co-Prosecutors Combined Response to the Appeals by Ieng Thirith, Nuon Chea, Khieu Samphan and Ieng Sary Against the COIJ Order Denying A Joint Defense Request for Investigative Action to Seek Exculpatory Evidence in the Shared Materials Drive, Paragraph 27, August 10, 2009 (“An investigative judge may close a judicial investigation once there is sufficient evidence to indict a person.”).

⁶⁷ *Id.*

such as reasonably can be identified *proprio motu* by the Co-Investigating Judges based on the case file.⁶⁸

This decision is similar to the Pre-Trial Chamber's decision on Nuon Chea's request for an interview to be placed in the case file. There, the Co-Investigating Judges denied the request for an interview on the basis that there was already sufficient historical research and evidentiary material on the case file concerning the issues.⁶⁹ Although the Pre-Trial Chamber disagreed with the standard applied by the Co-Investigating Judges, it nevertheless held that the burden was on the appellant to show that the Judges' finding was erroneous.⁷⁰ The Co-Investigating Judges would have had an obligation to fulfill the request had appellant made out a *prima facie* showing that it was of exculpatory nature.⁷¹ However, neither decision sets out what constitutes *prima facie* reasons for why certain exculpatory or potentially exculpatory evidence should be placed in the case file.

The Co-Investigating Judges' obligation to search for evidence conducive to ascertaining the truth is discharged by taking actions *which the judges deem useful to ascertaining the truth*, and such action may be initiated by the Investigating Judges *proprio motu*, or by a specific request of one of the parties.⁷² Thus, it is left to the Investigating Judges to decide whether they have fulfilled their duty of searching for evidence. This approach leaves little oversight as to whether the Co-Investigating Judges have in good faith fulfilled their obligations.

⁶⁸ Co-Investigating Judges Response to Request for Investigative Action Concerning Inter Alia, the Strategy of the Co-Investigating Judges in Regard to the Judicial Investigation, Paragraph 43, December 11, 2009.

⁶⁹ Decision on Appeal Against the OCIJ order on Nuon Chea's Eighteenth Request for Investigative Action, Paragraph 25, June 15, 2010.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Co-Prosecutors Combined Response to the Appeals by Ieng Thirith, Nuon Chea, Khieu Samphan and Ieng Sary Against the COIJ Order Denying A Joint Defense Request for Investigative Action to Seek Exculpatory Evidence in the Shared Materials Drive, August 10, 2009.

Thus, the question arises whether this means that there is an explicit or implied burden on the defense, rather than the Co-Investigating Judges to seek and review exculpatory evidence. Regarding the shared materials drive, the Pre-Trial Chamber found that because the SMD is digitized, allowing for full text searches, the parties have easy means for searching for evidence that they consider relevant and to then propose it to the Co-Investigating Judges for consideration.⁷³ They therefore held that the burden to seek out and find exculpatory evidence rests on the defense. While the Internal Rules have left it unclear as to whose burden it is to search for exculpatory evidence, in this particular decision, the burden was affirmatively placed on the defense to search for exculpatory evidence and to persuade the Co-Investigating Judges to review it.

A similar issue with a more favorable outcome for the defense was addressed before the International Criminal Tribunal for the Former Yugoslavia (ICTY). The statute of the ICTY is silent concerning many procedural rules on pre-trial, trial and appeal proceedings, including rules on disclosure and duties, if any, of the Prosecution with regard to any exculpatory evidence that might come into its possession.⁷⁴ In clarifying some of these issues, the ICTY has adopted several amendments to Rule 68 of its Rules of Procedure and Evidence. The December 2003 amendment arguably restricts the defendants' rights to exculpatory evidence, despite its intended purpose being to clarify the investigative procedures. The new rule changes the language of the Prosecutor's duty to disclose exculpatory evidence, from requiring "evidence known to the Prosecutor," to now requiring only "actual evidence known to the Prosecutor" to mitigate or

⁷³ Co-Prosecutors Combined Response to the Appeals by Ieng Thirith, Nuon Chea, Khieu Samphan and Ieng Sary Against the COIJ Order Denying A Joint Defense Request for Investigative Action to Seek Exculpatory Evidence in the Shared Materials Drive, August 10, 2009.

⁷⁴ Salvatore Zappala, *Prosecutor's Duty to Disclose Exculpatory Materials and the Recent Amendment to Rule 68 ICTY RPE*, 2 J.INT'L CRIM. JUST. 620-630, at 620 (2004).

suggest innocence.⁷⁵ Nevertheless, the ICTY Chambers have held that the new rule requires that the Prosecution both disclose and search for evidence.⁷⁶ Rule 68(b) requires that, “the Prosecutor shall make available to the defense, in electronic form, collections of relevant material held by the Prosecutor, together with appropriate computer software with which the defense can search such collections electronically.” The Chambers found Rule 68(b) to require more than merely making the database available to the defense—it must indicate which specific materials are exculpatory.⁷⁷ The Chambers found, “While it is laudable to allow the defendants to possess an electronic collection of materials which can be used to prepare a defense, it has been made clear that under the new rule, the burden of searching for exculpatory evidence is not on the defense.”⁷⁸

In *Lubanga*, the ICC reviewed international precedent to determine the requirement for the disclosure of evidence to the parties.⁷⁹ The defense argued that due to the structure of the system, it lacked the same resources as the prosecution and therefore the prosecution had an obligation to disclose exculpatory and mitigating evidence to the defense.⁸⁰ The Court looked at two European Court of Human Rights cases, *Jespers versus Belgium* and *Blascik*, both of which held that the ECHR principle of equality of arms imposes on prosecuting and investigating

⁷⁵ ICTY Rules of Procedure and Evidence, Rule 68: Disclosure of Exculpatory and Other Relevant Material. *See also*, Salvatore Zappala, *The Prosecutor’s Duty to Disclose Exculpatory Materials and the Recent Amendment to Rule 68 ICTY RPE*, 2 J.INT’L CRIM. JUST. 620-630, at 624 (2004).

⁷⁶ *Id.*

⁷⁷ Salvatore Zappala, *Prosecutor’s Duty to Disclose Exculpatory Materials and the Recent Amendment to Rule 68 ICTY RPE*, 2 J.INT’L CRIM. JUST. 620-630, at 625 (2004).

⁷⁸ *Id.*

⁷⁹ *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06

⁸⁰ *Lubanga* paragraph 11.

authorities an obligation to disclose any material in their possession or to which they could gain access.⁸¹

The international precedent suggests that the defense should not bear the burden of searching for exculpatory evidence—that instead the Judges or Co-Prosecutors should bear the burden as both, due to the structure of the Court, have a more active role in the collection of evidence. The Co-Prosecutors thus should initially bear a strict burden of searching for and presenting evidence as part of the preliminary process of gathering materials to make out the case for the Investigative Judges. In overseeing an impartial investigation, the Co-Investigating Judges should ensure that the defense has the means to gather exculpatory evidence—whether this is through the Judges directly providing the means or through enforcing the Co-Prosecutors’ duty to do so.

5. Timing for Consideration

a. Internal Rules

The ECCC’s Internal Rules stipulate that if the Co-Investigating Judges do not agree with an investigative request, they shall issue a rejection order as soon as possible, and in any event, before the end of the judicial investigation.⁸² The lack of a specific timeframe in which the Investigating Judges must respond to investigative requests raises several concerns for the parties. If the Co-Investigating Judges choose to wait until the close of the investigation to reject a request, not only do the parties lose the motion, but also their right to effectively appeal the decision.

⁸¹ *Lubanga*. See also, *Jespers v. Belgium* and *Blaskic* paragraph 81.

⁸² ECCC Internal Rules, Rule 55(10).

The omission of a rule within the ECCC Internal Rules setting a deadline for consideration diverges from Cambodian national law, which sets out a specific deadline for the Judges. Under Article 133, 134 and 135 of the Cambodian Code of Criminal Procedure, at any time during a judicial investigation, the charged person may ask the investigating judge to interrogate him, question a civil party or witness, conduct a confrontation or visit a site.⁸³ If the investigating judge does not grant the request, he shall issue a rejection order *within one month* after receiving the request. The Prosecutor and the charged person shall be notified of the order without delay. If the investigating judge has not decided *within one month*, the Royal Prosecutor can seize the Investigation Chamber who shall have the power to decide in the place of the investigating judge. Similarly, under French Criminal Procedure, the judge may only refuse this request by an order delivered *at the latest one month* after receiving the request.⁸⁴

The Prosecution is the only organ with an obligation under the ECCC Internal Rules to disclose exculpatory evidence in a timely manner. The ECCC Internal Rules do not make clear why the Prosecution is obligated to disclose in a certain time frame whereas the Co-Investigating Judges are not obliged to follow the same rule. Internal Rule 53(4) states,

“The Co-Prosecutors shall, as soon as practicable, disclose to the Co-Investigating Judges any material that in the actual knowledge of the Co-Prosecutors may suggest the innocence or mitigate the guilt of the Suspect or the Charged Person or affect the credibility of the prosecution evidence.”⁸⁵

This rule is consistent with the ICC’s Rome Statute, which similarly states that the Prosecution shall disclose to the defense all exculpatory evidence that shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of

⁸³ Cambodian Code of Criminal Procedure Articles 133, 134, 135.

⁸⁴ French Code of Criminal Procedure, See Title III “Investigating Jurisdiction,” Chapter I: The Investigating Judge, Article 81.

⁸⁵ ECCC Internal Rule 53(4).

prosecution of evidence.⁸⁶ The ICC has stated that Article 67(2) of the Rome Statute requires that the Prosecutor disclose evidence as soon as practicable.⁸⁷ In contrast, the Special Court for Sierra Leone's rules of evidence and procedure provide that, the Prosecutor must, within 14 days of receiving the defense case statement, disclose the existence of evidence known to the prosecutor which may be relevant to issues raised in the Defense Case Statement.⁸⁸ Furthermore, within 30 days of the accused person's appearance, the Prosecution must disclose any evidence that tends to suggest the innocence or mitigate the guilt of the accused.⁸⁹

Thus, there appears to be agreement among international courts and tribunals that the prosecution is obligated to disclose the existence of exculpatory evidence to the defense. Implementing similar procedural rules for investigative judges regarding the disclosure of exculpatory evidence might better ensure a defense's right to access, and receipt of, pertinent evidence to its case. Furthermore, the ECCC could benefit from mirroring procedural rules in place at other international courts and tribunals, such as Rule 84 of the ICC permitting the Trial Chamber to make any necessary orders for disclosure of documents or information not previously disclosed.⁹⁰ The ECCC may use such a rule to outline the timing and duties of the

⁸⁶ Kai Ambos, *Confidential Investigations (Article 54(3)(E) ICC Statute) v. Disclosure Obligations: The Lubanga Case and National Law*, 12 NEW CRIM.L. REV. 543-568 (2009).

⁸⁷ International Criminal Court, Rome Statute, Article 67(2) ("In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide. "). See also, Kai Ambos, *Confidential Investigations (Article 54(3)(E) ICC Statute) v. Disclosure Obligations: The Lubanga Case and National Law*, 12 NEW CRIM.L. REV. 543-568 (2009).

⁸⁸ Special Court for Sierra Leone, Rule 68(a) of the Rules of Evidence and Procedure.

⁸⁹ Special Court for Sierra Leone, Rule 68(b) of the Rules of Evidence and Procedure.

⁹⁰ International Criminal Court, Rules of Procedure and Evidence, Rule 84, "In order to enable the parties to prepare for trial and to facilitate the fair and expeditious conduct of the proceedings, the Trial Chamber shall, in accordance with article 64, paragraphs 3 (c) and 6 (d), and article 67, paragraph (2), and subject to article 68, paragraph 5, make any necessary orders for the disclosure of documents or information not previously disclosed and for the production of additional evidence. To avoid delay and to ensure that the trial commences on the set date, any such orders shall include strict time limits which shall be kept under review by the Trial Chamber."

Co-Investigative Judges to disclose relevant evidence in place in other international courts and tribunals. The ECCC may operate more efficiently if such a rule corresponded with specific, articulated duties as to who must ensure the disclosure and within what time frame, rather than leaving it to the parties to make redundant requests for the disclosure of evidence and later appeal when requests are denied. Procedural rules providing for a more active role on the part of the Co-Investigative Judges would also facilitate the introduction of evidence at trial—helping to ensure that evidence is disclosed sooner, guaranteeing a more efficient trial.⁹¹ This would potentially improve judicial economy in that the judges and prosecutors would be required to disclose and search for evidence in the preliminary aspects of the investigation, as opposed to minimal or nonexistent disclosure which may increase delays due to appeals.

b. **Constructive Dismissal**

Under Article 134 of the Cambodian Code of Criminal Procedure, the Prosecutor and the charged person shall be notified of the order without delay. If the investigating judge has not decided within one month, the Royal Prosecutor can seize the Investigation Chamber, who shall have the power to decide in the place of the investigating judge. This is derived from the French legal system where,

“He [the accused] may ask the juge d’instruction for an order to drop the case or to send it for trial once a year has passed from the start of the mise en examen. If the juge d’instruction fails to make such an order, giving reasons within one month, the person may apply for it directly to the Chambre de l’instruction. The Chambre de l’instruction has the power to call in the case and continue the instruction itself. Once seized, it may order any investigation is considers useful, either ex officio or by request of the prosecutor.”

⁹¹ International Criminal Court Rules of Procedure and Evidence, Rule 81(5), “Where material or information is in the possession or control of the Prosecutor which is withheld under article 68, paragraph 5, such material and information may not be subsequently introduced into evidence during the confirmation hearing or the trial without adequate prior disclosure to the accused.”

Similarly, the Pre-Trial Chamber at the ECCC has upheld the parties' right to seek recourse through constructive dismissal. The Pre-Trial Chamber found that the failure of the Co-Investigating Judges to rule on a request as soon as possible, in the circumstances where a delay in making a decision deprives the Charged Person of the possibility of obtaining the benefit he seeks, amounts to a constructive refusal of the application which can be appealed under Internal Rule 74.⁹² Furthermore, the Pre-Trial Chamber acknowledged that with the passage of time, the failure of Co-Investigating Judges to decide on a Request makes it impossible for the Charged Person to obtain the benefit which he sought. The Pre-Trial Chamber noted that in the case of *Boodhoo and others v. Attorney General of Trinidad and Tobago*, the Privy Council found that delay in producing a judgment would be capable of depriving an individual of his right to the protection of the law in circumstances where the parties were unable to obtain from the decision the benefit (such as request for exculpatory evidence or a request for a witness interview) which they should.⁹³

That being said, the Pre-Trial Chamber has made it clear that it would be improper to use the notion of constructive refusal to found a right of appeal where no substantive right exists.⁹⁴ The Pre-Trial Chamber has stated its view that requests to put documents on the case file, such as requests to translate a document, qualify as requests for the Co-Investigating Judges to make an order, not a request for investigative action.⁹⁵ The Pre-Trial Chamber noted that this difference is important, because only requests for investigative action contribute to ascertaining the truth. Under Internal Rule 74(3)(b) the right of the accused to appeal is limited to decisions on requests

⁹² Decision on Ieng Sary's Appeal against the CO-Investigating Judges' Constructive Denial of Ieng Sary's Third Request for Investigative Action, Paragraph 6, December 22, 2009.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ Decision on Appeal Against the OCIJ order on Nuon Chea's Eighteenth Request for Investigative Action, June 15, 2010.

for investigation action, not requests to make such orders. This limits what the accused may appeal and what may be considered a constructive dismissal, in that the request must be appealable under Internal Rules 55(10) and 74(3)(b)—making it necessary that the request was for investigative action, and not merely for the Investigating Judges to act.⁹⁶ In this way, the rights of the accused to recourse against the Co-Investigating Judges' decisions are severely limited depending on how the request is categorized by the Judges and the Chambers.

Conclusion

The most pertinent lacunae in the ECCC Internal Rules with regard to exculpatory evidence are rules surrounding the scope of exculpatory evidence that should be included in the case file, and whether it is the Co-Investigating Judges or the defense teams' burden to seek, investigate, and review exculpatory evidence. It is arguable that a necessary and natural component of the investigation in a civil legal system is for the Judges to be left with broad discretion in undertaking investigation and responding to requests. However, it is equally tenable that a lack of clear and finely drafted procedural rules results in a significant deficiency in judicial oversight. Judicial discretion when used improperly through ill-intentions or incompetence, jeopardizes the credibility of trial proceedings as a whole. The fact that the Pre-Trial Chamber has corrected the Co-Investigating Judges on the standard by which to respond to requests for investigative requests suggests that the lack of procedural guidelines as to the obligations of the Co-Investigating Judges has left too much discretion to Judges' in their investigative process to ensure fairness. Although the Pre-Trial Chamber provides some oversight, it is questionable whether the rights of the defense are any better served when the Pre-

⁹⁶Pre-Trial Chamber Decision on Ieng Sary's Appeal Against the Co-Investigating Judges Constructive Denial of Ieng Sary's Requests Concerning the Co-Investigating Judge's Identification and Reliance on Evidence Obtained through Torture Investigative Action, Paragraph 12, May 10, 2010.

Trial Chamber sends requests back to the Co-Investigating Judges on remand.⁹⁷ Without a procedural mechanism or the threat of sanctions ensuring that the Co-Investigating Judges review the request on remand in a timely manner with the correct standard, the only purpose the Pre-Trial Chamber's review serves is to further delay the Court proceedings.

Implementing procedural concepts from the civil law system into the ECCC Internal Rules has been a challenge given the unique circumstances of the Court. The Court's cases involve national and international law, foreign lawyers with backgrounds in varying legal systems, a range of legal experience and competence, mixed national and international lawyer and judicial teams, and inflammatory charges stemming from a brutal history. Applying vague civil system procedure rules without considering how they fit into the context of the ECCC ignores the complexity of the Court and the challenges it inherently faces as a new court that won't be around long enough to perfect its process through practice.

Furthermore, if Cambodia is able to justly try the senior leaders of the Khmer Rouge for international crimes, such success may be the most important component to the country's reconciliation process and future. Alternatively, an impartial and unjust trial would not only leave questions as to the usefulness of the trials, but it could reaffirm international doubts of Cambodia's competence, potentially leaving Cambodia in the same position as it was before the establishment of the ECCC.

⁹⁷ Pre-Trial Chamber Decision on Co-Prosecutors Appeal Against the OCIJs Order on Request to Place Additional Evidentiary Material on the Case File Which Assists in Proving the Charged Persons' Knowledge of the Crime, June 15 2010.