

**The Scope of the Co-Investigating Judges' Duty to Investigate**

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**I. BACKGROUND**

Alone among the special tribunals mandated to end impunity for the perpetrators of grievous human rights violations, the Extraordinary Chambers in the Courts of Cambodia (ECCC) tasks investigating judges with the sole responsibility for conducting investigations in proceedings before the Court. The role of the Court's Co-Investigating Judges (CIJs) derives from Cambodian and, by extension, French criminal procedure. As with investigations conducted by their domestic counterparts, the scope of the CIJs' investigation is explicitly confined to the facts set out in submissions filed by the prosecution. However, the precise contours of the CIJs' duty to investigate within this sphere remain ambiguous under the ECCC's governing laws, and Cambodian and French procedural rules offer little additional clarity. Throughout the course of proceedings before the ECCC, this ambiguity has proven problematic, repeatedly raising questions about what, if any, limits are imposed on the CIJs' discretionary authority as well as what, if any, investigative standard should be met in the conduct of investigations before the Court.

The issue arose most recently in the context of Case 003. The International Co-Prosecutor filed introductory submissions to open

investigations into Cases 003 and 004 on September 7, 2009.<sup>1</sup> After sixteen months, the Co-Investigating Judges issued a public statement noting that they had “established joint working groups” to “examin[e] and analyz[e] the documents available on the Case Files,” although “no field investigation” had been conducted, or was scheduled to be undertaken.<sup>2</sup> On April 29, 2011, the CIJs announced that they were closing their investigation<sup>3</sup> – apparently without interviewing a single witness, visiting a single crime site, or informing the accused persons that they were under investigation.<sup>4</sup> Their decision came in the wake of the Cambodian government’s vocal opposition to Case 003.<sup>5</sup>

In response to the CIJs’ notice, the International Co-Prosecutor publicly stated that the CIJs had failed to meet their “obligation under . . . the Law of the ECCC to conduct their investigation impartially and to take investigative action conducive to ascertaining the truth,” and requested several additional investigative actions<sup>6</sup> – all of which were rejected by the Office of the Co-

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<sup>1</sup> Statement of the Acting International Co-Prosecutor: Submission of Two New Introductory Submissions. 8 September 2009. P1.

<sup>2</sup> Statement from the Co-Investigating Judges regarding Case Files 003 and 004 (Feb. 2, 2011). Available at: <http://www.eccc.gov.kh/en/articles/statement-co-investigating-judges-regarding-case-files-003-and-004>.

<sup>3</sup> Notice of Conclusion of Judicial Investigation, Case File No: 003/07-09-2009-ECCC-OCIJ (Office of the Co-Investigating Judges, Apr. 29, 2011).

<sup>4</sup> See James O’Toole, *Alarm Sounded on KRT*, Phnom Penh Post, June 15, 2011, Available at: <http://www.phnompenhpost.com/index.php/2011061549748/National-news/alarm-sounded-on-krt.html>.

<sup>5</sup> See Sebastian Strangio, *Limited Liability for Khmer Rouge Tribunal*, May 13, 2011. Southeast Asia Times Online. Available at: [www.atimes.com/atimes/Southeast\\_Asia/ME13Ae02.html](http://www.atimes.com/atimes/Southeast_Asia/ME13Ae02.html). Prime Minister Hun Sen expressly stated that the Tribunal’s hearings would end with Case 002, and that further prosecutions would “not [be] allowed,” and the government’s spokesperson, Khieu Kanharith bluntly asserted, “[i]f [the foreign staff] want to go into Case 003 or 004, they should just pack their bags and return home.” *Id.*

<sup>6</sup> Press Release, Office of the International Co-Prosecutor, Statement by the International Co-Prosecutor (June 14, 2011). Available at: <http://www.eccc.gov.kh/sites/default/files/media/COP%20Press%20Release%2014June%2011%20FinalEng.pdf>.

Investigating Judges (OCIJ) on a technicality.<sup>7</sup> As a result, the Court has been plunged into a maelstrom of recriminations, controversy, and acrimony.<sup>8</sup> The public response to the Case 003 investigation dramatically illustrates the importance of clarifying the scope of the CIJs' duty to investigate, which is necessary to reaffirming the public faith in the independence and impartiality of the Court, as well as to fulfilling the high expectations that the ECCC will bring justice and national reconciliation to Cambodia.

As the International Co-Prosecutor has filed his notice to appeal the Co-Investigating Judges' Order closing the Case 003 investigation without additional investigative action, it will fall to the Pre-Trial Chamber to decide whether the Co-Investigating Judges have met their legal obligations. In reaching their determination on this issue, it is crucial that the PTC articulate an investigatory standard capable of consistent application, one which can be referenced in future appeals to rejected requests for investigatory action in Case 002,<sup>9</sup> as well as in the

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<sup>7</sup> Decision on Time Extension Request and Investigative Requests by the International Co-Prosecutor Regarding Case 003, Case File No. 003/07-09-2009-ECCC/OCIJ, ¶¶ 1, 12 (Office of the Co-Investigating Judges, June 7, 2011). Significantly, these requests were all rejected by the CIJs, not on the basis that the investigative actions requested were unwarranted, but because the International Co-Prosecutor acted unilaterally in submitting the requests, and opening the Case 003 investigation. This reasoning allowed the CIJs to sidestep sticky questions of the scope of their duty to investigate, and whether they had fulfilled their investigatory obligations.

<sup>8</sup> James O'Toole. *Disorder in the Court*, Phnom Penh Post. June 13, 2011. Available at: <http://www.phnompenhpost.com/index.php/2011061349718/National-news/disorder-in-the-court.html>. (Noting that several staffers resigned their positions with the OCIJ due to "discontent over [the] handling" of the investigation). Robert Carmichael. *Cambodian Khmer Rouge Tribunal Monitor Calls for UN Investigation into Judges*. June 14, 2011. Available at: <http://www.voanews.com/english/news/asia/southeast/Cambodian-Khmer-Rouge-Tribunal-Monitor-Calls-for-UN-Investigation-into-Judges-123804064.htm> (Describing concerns that "the judges . . . may have ignored their legal obligations"). Victims and victims' rights groups likewise expressed their discontent with the conduct of the investigation, describing Case 003 as "a farce" endanger of "fail[ing] the victims of the Khmer Rouge." O'Toole, *Alarm Sounded on KRT*, *supra* note 4.

<sup>9</sup> Case 002, the largest and most important case before the ECCC, concerns charges of crimes against humanity, grave breaches of the Geneva Conventions of 1949, and additional domestic crimes arising out of the 1956 Cambodian Penal Code against four defendants: Nuon Chea, the former Deputy Secretary of the Communist Party of Kampuchea, Ieng Sary, the former Deputy

conduct of the remaining investigation into Case 004.<sup>10</sup> In defining such a standard, guidance should be sought in the internationally established standards for investigations into human rights violations, which expressly link the duty to effectively investigate such violations with the State's obligation to end impunity. International jurisprudence has enumerated four elements crucial to an effective investigation sufficient to discharge the duty to end impunity: (1) ability to facilitate punitive sanctions, (2) independence, (3) transparency, and (4) promptness. Although implicit, these same elements find traction within both the governing laws and jurisprudence of the ECCC. Thus, demanding that the CIJs' undertake an effective investigation – one which is designed to facilitate punitive sanctions, transparent, independent, and prompt – ensures both that the investigation meets standards expected by the ECCC's own governing laws and jurisprudence, and that the ECCC satisfactorily discharges its obligation to end impunity for the perpetrators of the grievous human rights violations endured by the victims of the Khmer Rouge.

## **II. APPLICABLE LAW**

### **A. ECCC Law is unclear about the Scope of the Duty to Investigate.**

Proceedings before the ECCC are governed by the Court's Internal Rules (IRs), which "form a self-contained regime of procedural law related to the

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Prime Minister of Foreign Affairs, Khieu Samphan, the former Head of State and Ieng Thirith, the former Minister of Social Affairs. The Pre-Trial Chamber sent Case 002 to trial on January 12, 2011 and trial officially commenced on June 27, 2011. Additional information is available online at: <http://www.eccc.gov.kh/en/case/topic/2>.

<sup>10</sup> Judicial investigation into Case 004 was opened on September 7, 2009, along with the investigation into Case 003. It is currently still under investigation and to date, no persons have been charged. Additional information is available online at: <http://www.eccc.gov.kh/en/case/topic/98>.

unique circumstances of the ECCC” and are “the primary instrument to which reference should be made in determining procedures before the ECCC.”<sup>11</sup>

Although Article 12 of the Agreement between the United Nations and the Kingdom of Cambodia provides that ECCC procedure “shall be in accordance with Cambodian law,”<sup>12</sup> the Pre-Trial Chamber has held that the Cambodian Code of Criminal Procedure (CPC) “should only be applied where a question arises which is not addressed by the Internal Rules.”<sup>13</sup> Where there are lacunas or ambiguities in the provisions of both the IRs and the CPC, the Court may turn for guidance to international procedural rules.<sup>14</sup> In particular, the Pre-Trial Chamber has consulted the jurisprudence of international tribunals, including the Inter-American Court of Human Rights and the European Court of Human Rights.<sup>15</sup>

The Internal Rules are unclear about the scope of the duty to investigate. On the one hand, investigations into crimes within the ECCC’s jurisdiction are

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<sup>11</sup> Decision on Nuon Chea’s Appeal against Provisional Detention Order of Ieng Sary, Case. No. 002/19-09-2007-ECCC/OCIJ (PTC06), ¶14 (Pre-Trial Chamber, Aug. 26, 2008).

<sup>12</sup> 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 [hereinafter ECCC Agreement] (June 6, 2003), art. 12(1).

<sup>13</sup> Decision on Nuon Chea’s Appeal against Provisional Detention Order of Ieng Sary, *supra* note 11 at ¶15.

<sup>14</sup> ECCC Agreement, *supra* note 12 at art. 12(1). Similarly, art. 23 new of the ECCC Law expressly provides that the Co-Investigating Judges “may seek guidance in procedural rules established at the international level” in order to clarify the “interpretation or application” of the “existing procedures in force” in fulfilling their investigative function. Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, (hereinafter ECCC Law), as amended and promulgated on Oct. 27, 2004, NS/RKM/1004/006, art. 23 new.

<sup>15</sup> See, e.g. Public Decision on Ieng Sary’s Appeal Against the Closing Order, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 75), ¶¶153-57 (Pre-Trial Chamber, Apr. 11, 2011). (Discussing the Inter-American Court of Human Rights’ consideration of the *ne bis in idem* principle in cases where those allegedly responsible for human rights violations were acquitted through domestic proceedings, as well as the provisions of the ECHR Protocols related to *ne bis in idem*, in determining whether the *ne bis in idem* principle bars proceedings against Ieng Sary in Case 002).

compulsory,<sup>16</sup> and strictly confined to the “facts set out” in the Prosecutors’ submissions.<sup>17</sup> Within this sphere, the Co-Investigating Judges must impartially seek both inculpatory and exculpatory evidence in order to “ascertain the truth.”<sup>18</sup> Expansive investigatory power, and concomitantly, expansive discretionary authority, is granted to the Co-Investigating Judges to facilitate their truth-seeking function, including, *inter alia*: the authority to summon and question suspects and charged persons, conduct witness interviews, obtain expert opinions, issue rogatory letters, conduct on-site investigations, and take protective measures to ensure the safety of potential witnesses.<sup>19</sup> However, the Rules provide only that the CIJs “may” chose to yield these powers;<sup>20</sup> they are under no compulsion to do so. Thus, the ways in which their expansive authority should be wielded in conducting an investigation, and what an investigation must entail, remains ambiguous. Since the governing laws of the ECCC are silent on the scope of the duty to investigate within the sphere of the facts set out in the Prosecutors’ submissions, it is appropriate to seek guidance in the CPC.

**B. Cambodian Rules of Criminal Procedure offer little clarity in determining the scope of the duty to investigate.**

Although the role of the Co-Investigating Judges derives from the Cambodian legal system, the CPC offers little guidance in clarifying the scope of the obligation to investigate within the set of facts submitted by the Prosecutors.

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<sup>16</sup> IR 55(1) provides “An investigation is compulsory for crimes within the jurisdiction of the Court.” Internal Rules of the Extraordinary Chambers in the Courts of Cambodia [hereinafter ECCC Internal Rules], R. 55(1).

<sup>17</sup> IR 55(2) provides that “the Co-Investigating Judges shall only investigate the facts set out in an Introductory Submission or a Supplementary Submission.” *Id.* at R. 55(2).

<sup>18</sup> IR 55(5) provides in part that “the Co-Investigating Judges may take any investigative action conducive to ascertain the truth. In all cases, they shall conduct their investigation impartially, whether the evidence is inculpatory or exculpatory.” *Id.* at R. 55(5).

<sup>19</sup> *Id.* at R. 55(5)(a)-(d).

<sup>20</sup> *Id.* at 55(5).

Like the IRs, the CPC explicitly requires an investigation into serious violations of domestic law.<sup>21</sup> As with the IRs, the scope of the investigation is explicitly limited to the “facts specified in the introductory submission” filed by the Prosecutor,<sup>22</sup> and the investigating judge is expected to “perform[] all investigations that he deems useful to ascertaining the truth,” including “collect[ing] inculpatory as well as exculpatory evidence.”<sup>23</sup> Accordingly, investigating judges are vested with broad authority to undertake investigative action: they may conduct site visits,<sup>24</sup> issue rogatory letters<sup>25</sup>, and “question any person whose response is deemed useful to the revelation of the truth.”<sup>26</sup> However, as with the provisions of the IRs, it is unclear from the statutory language of the CPC how thorough the investigating judge must be in his quest to “ascertain the truth.”

C. Provisions of the French Code Pénal are similarly silent on the extent of the duty to investigate.

The Pre-Trial Chamber has at times sought guidance in the provisions of the French Code Pénal for clarifying ambiguities in the Internal Rules.<sup>27</sup> In this matter, however, French procedural rules offer little guidance beyond the bare provisions echoed in the CPC and the IRs. Under French law, the investigating

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<sup>21</sup> Art. 44. provides that “in the case of a felony, the Prosecutor shall open a judicial investigation.” In contrast, in the case of a misdemeanor, the prosecutor may open an investigation, but is not obligated to do so. CODE OF CRIMINAL PROCEDURE OF THE KINGDOM OF CAMBODIA [CPC] art.44, 45 (Jeurgen Translation). Thus, an investigation is not mandatory for a minor offense, but a felony violation of Cambodian criminal law compels an investigative action.

<sup>22</sup> *Id.* at art. 125.

<sup>23</sup> *Id.* at art. 127.

<sup>24</sup> *Id.* at art. 130.

<sup>25</sup> *Id.* at art. 131.

<sup>26</sup> *Id.* art. 153.

<sup>27</sup> See, e.g. Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Material Drive, Case No. 002/19-09-2007-ECCC/OCIJ (PTC24) (Pre-Trial Chamber, Nov. 18, 2009) ¶44, footnote 56, (noting that the “. . .French system[] has been used to assist the Pre-Trial Chamber” in interpreting the Internal Rules).

judge has the sole responsibility for conducting the investigation;<sup>28</sup> he is limited by the “submission made by the . . . prosecutor;”<sup>29</sup> and he can only commence an investigation “after having been seised of the case by a submission.”<sup>30</sup> Once an investigation is opened, “the investigating judge undertakes . . . any investigative step he deems useful for the discovery of the truth,” and “seeks out evidence of innocence as well as guilt.”<sup>31</sup> These broad investigative powers are justified by the historical importance of the pre-trial investigation to traditional inquisitorial legal procedure, which used the trial largely as a mechanism to “confirm[] earlier findings.”<sup>32</sup> Similarly, today, “the emphasis continues to be on obtaining and evaluating all the relevant information during the pre-trial phase,” and thus the investigating judges retain vast authority.<sup>33</sup>

Practically, the provisions of the French Code create a system heavily reliant on “having competent and conscientious . . . judicial officers.”<sup>34</sup> Investigating judges must be “neutral” and determined to “act[] in the public interest.”<sup>35</sup> This requires “includ[ing] . . . that which is favourable and that which

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<sup>28</sup> Code Pénal [C. Pén.] art.79. (Fr.). (providing that, “[a] preliminary judicial investigation is compulsory where a felony has been committed”).

<sup>29</sup> *Id.* at art. 80. (providing that “[t]he investigating judge may only investigate in accordance with a submission made by the district prosecutor”).

<sup>30</sup> *Id.* at art. 51.

<sup>31</sup> *Id.* at art. 81.

<sup>32</sup> JACQUELINE HODGSON, *FRENCH CRIMINAL JUSTICE: A COMPARATIVE ACCOUNT OF THE INVESTIGATION AND PROSECUTION OF CRIME IN FRANCE*, 222 (Hart Publishing 2005). Although the investigating judge has “extensive powers” at his disposal in order to ascertain the truth, the “role of the JI can also be constrained in significant ways by [his] dependence on the [prosecutor].” It is the prosecutor who opens an investigation, refer cases for investigation, decides how to frame charges against the suspect, oversees the police enquiry, among other duties. *Id.* P210-211.

<sup>33</sup> *Id.* at 222.

<sup>34</sup> Renee Lettow Lerner, *The Intersection of Two Systems: An American on Trial for an American Murder in the French Cour D'Assises*, 2001 U.ILL.L.REV., 791, 801 (2001).

<sup>35</sup> Hodgson, *supra* note 32 at 223.



is unfavourable”<sup>36</sup> on the case file, and striking a balance between the interests of society, and the interests of the individual.<sup>37</sup>

Accordingly, the French legal system utilizes a variety of mechanisms to overcome judicial inertia and ensure a competent investigation: Judges receive “special training in truth-finding” that enables them to “represent the government in its truth-seeking function;”<sup>38</sup> civil parties play an active role in “push[ing] the investigative judge . . . into vigorous investigation;”<sup>39</sup> and each trial employs “many different types of judicial officials, who are able to act as backstops for each other.”<sup>40</sup> These “backstops” serve as vital checks against potential judicial incompetence and carelessness, and highlight the importance of a “vigorous investigation” to the “truth-seeking” function of the French judicial system.

While the French system manifestly anticipates a thorough and “vigorous” investigation, the plain language of the Code Pénal nonetheless fails to enumerate specific guidelines for determining the necessary scope of a judicial investigation. Given the ambiguities in the Internal Rules, Cambodian Code of Criminal Procedure and the French Code Pénal, it is appropriate to look to the standards articulated at the international level for guidance in establishing the scope of the

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<sup>36</sup> *Id.* at 222.

<sup>37</sup> *Id.*

<sup>38</sup> Lerner, *supra* note 34 at 810.

<sup>39</sup> *Id.* at 820.

<sup>40</sup> *Id.* at 855. Nonetheless, the close relationship between the investigating judge and the prosecutor can lead to the former adopting the latter's perspective, which can result in an investigation focused to a larger extent on inculpatory rather than exculpatory evidence. Still, the investigating judge “will seek to verify information and to produce a case that is solid and which will withstand scrutiny at trial,” and thus, during the course of the investigation “witnesses [are] re-interviewed, facts (even where uncontested) and assertions followed up, and expert evidence . . . commissioned.” Hodgson, *supra* note 32, at 222, 227.

Co-Investigating Judges' duty to investigate allegations of crimes within the jurisdiction of the ECCC.

D. International investigative standards offer guidance absent in ECCC and domestic laws.

International jurisprudence has explicitly linked the duty to investigate human rights violations – such as those within the ECCC's mandate – to the State's duty to end impunity for violators. This link is particularly relevant in assessing the Co-Investigating Judges' duty to investigate, since the ECCC was established in partnership with the United Nations at the behest of the Cambodian government, in order to assist the State in addressing “the legacy of [] impunity” that “haunts Cambodia,”<sup>41</sup> and to “respond[] to past serious violations of Cambodian and international law as a means of bringing about national reconciliation, strengthening democracy and addressing the issue of individual accountability.”<sup>42</sup> Accordingly, this note will now examine the elements of an investigation sufficient to meet the State's obligation to combat impunity described at the international level, as well as how each of these elements comports with the governing law and jurisprudence of the ECCC. By applying these international standards to the Co-Investigating Judges' investigation, the Court can discharge its obligation to end impunity for the perpetrators of some of the most heinous human rights violations of the twentieth century, and remain true to the standards it has articulated for itself.

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<sup>41</sup> U.N. Group of Experts for Cambodia [hereinafter Group of Experts Report] established pursuant to General Assembly resolution 52/135, Rep., transmitted by letter dated Feb. 18, 1999 from the Chairman of the Group of Experts established pursuant to resolution 52/135 concerning the situation in Cambodia, addressed to the Secretary-General, ¶1, (Feb. 18, 1999). Available at: <http://www.unakrt-online.org/Docs/Other/1999-02-18%20Experts%20Report.pdf>

<sup>42</sup> *Id.* at ¶5. (Quoting Letter from Hun Sen, First Prime Minister of Cambodia, and Norodom Ranariddh, Second Prime Minister of Cambodia (June 21, 1999).

### **III. The Duty to End Impunity and the Obligation to Investigate Human Rights Abuses.**

#### **A. The duty to investigate human rights abuses.**

States are under a general obligation to “take effective action to combat impunity,”<sup>43</sup> which is defined as the “overall lack of investigation, arrest, prosecution and conviction of those responsible” for human rights violations.<sup>44</sup> This obligation requires that States undertake certain actions to combat impunity, and to guarantee the fundamental rights to know,<sup>45</sup> to justice,<sup>46</sup> and to redress,<sup>47</sup>

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<sup>43</sup> See Independent Expert to Update the Set of Principles to End Impunity [hereinafter Set of Principles], *Promotion and Protection of Human Rights: Impunity*, Rep. and Add. 1, ESCOR, UN Doc. No. E/CN.4/2005/102, Principle 1 (Feb. 18, 2005) (by Diane Orentlicher), Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/111/03/PDF/G0511103.pdf?OpenElement>. See also United Nations, *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions* [hereinafter Minnesota Protocol] recommended by ESCOR, resolution 1989/65, ¶1,4 (May 24, 1989) (noting that Governments “shall prohibit by law all extra-legal, arbitrary and summary executions and shall ensure that any such executions . . . are punishable” by providing “[e]ffective protection through judicial or other means”); U.N. OFFICE OF THE HIGH COMM’R FOR HUMAN RIGHTS, *MANUAL ON THE EFFECTIVE INVESTIGATION AND DOCUMENTATION OF TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT*, [hereinafter Istanbul Protocol], ¶10, U.N. Doc. No. HR/P/PT/U/Rev.1, Sales No. E.04.XIV.3, (2004). (Emphasizing that international conventions and treaties “establish certain obligations that States must respect to ensure protection against torture”).

<sup>44</sup> *Gutierrez-Soler v. Colombia*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No.132, ¶95 (Sept. 12, 2005).

<sup>45</sup> The right to know has both individual and collective components. On a collective level, it vests all people with “the inalienable right to know the truth about past events concerning the perpetration of heinous crimes,” thereby warding against future violations. Set of Principles, *supra*, note 43, at Principle 2. Moreover, it imposes on the State a duty to preserve memory as a mechanism of protecting the “heritage” and “history” of a people. *Id.*, at Principle 3. On an individual level, the right to know provides that “victims and their families have the imprescriptible right to know the truth about the circumstances in which violations took place.” *Id.* at Principle 4. States give effect to the right to know by “ensur[ing]. . . the effective operation of the judiciary.” *Id.* at Principle 5.

<sup>46</sup> The inalienable right to justice gives rise to the State’s duty to prosecute those responsible for human rights violations. To guarantee this right for all persons within its jurisdiction, the State must “undertake prompt, thorough, independent and impartial investigations of violations of human rights and international humanitarian law . . . by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished.” *Id.* at Principle 19.

<sup>47</sup> The right to redress requires that “all victims . . . have access to a readily available, prompt and effective remedy” including “access to applicable international and regional procedures.” *Id.* at Principle 32. Moreover, the right to redress imposes on the State a duty to prevent recurrence of future violations, by “undertak[ing] institutional reforms” and any other necessary steps to

which must be restored in the wake of human rights violations.<sup>48</sup> These measures include: establishing the truth about violations; prosecuting, trying, and punishing perpetrators; providing redress and reparations to victims; restoring public faith in governmental institutions; and preventing the recurrence of future violations.<sup>49</sup> Because an investigation is indispensable to successfully carrying out these measures, the duty to combat impunity necessarily encompasses the duty to effectively investigate human rights violations.<sup>50</sup>

International human rights courts have recognized the intrinsic link between the duty to restore and protect basic human rights, and the duty to effectively investigate violations of these rights. The European Court of Human Rights has emphasized that “the obligation to protect the right to life” and “the State’s general duty . . . to secure” basic rights and freedoms “to everyone within [its] jurisdiction . . . requires . . . that there should be some form of effective official investigation” when those rights and freedoms have been violated.<sup>51</sup> Similarly, the Inter-American Court of Human Rights has found that the State “is obligated to investigate every situation involving a violation of [fundamental human] rights.”<sup>52</sup>

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“ensure respect for the rule of law, foster and sustain a culture of respect for human rights, and restore or establish public trust in government institutions.” *Id.* at Principle 35.

<sup>48</sup> *See generally, id.* (linking the duty to end impunity with the fundamental rights to know, to justice, and to redress, and describing the scope of these rights as well as the measures necessary to safeguarding them).

<sup>49</sup> *Id.* at principle 1.

<sup>50</sup> *Id.*

<sup>51</sup> *Hugh Jordan v. The United Kingdom*, Application no. 24746/94, (Third Section) (Eur. Ct. H.R.) ¶105 (May 4, 2001).

<sup>52</sup> *Velásquez-Rodríguez v. Honduras*, Merits, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 1, ¶177 (June 26, 1987); The Inter-American Commission on Human Rights has similarly found that the State’s “duty to respect [fundamental rights and freedoms] entails that the States must ensure the effectiveness of all rights” which creates “a duty to prevent violations and [a] duty to investigate any that occur.” *Chiumbivilcas v. Peru*, Case 10.559, Report No. 1/96, Inter-Am. C.H.R. at 136.

International jurisprudence has identified four elements necessary to fulfill the duty to investigate violations effectively. These mirror the measures that a State must undertake in order to successfully combat impunity and restore the right to know, the right to justice and the right to redress for all people within its territory. To be effective, an investigation must be (1) designed to facilitate punitive sanctions — that is, undertaken to ascertain the truth about the circumstances in which a violation occurred, which is necessary to affixing and assigning criminal responsibility, and to successfully prosecuting, trying and punishing perpetrators; (2) transparent — both to the public, in order to restore faith in the rule of law, and to the individual victims, in order to restore their right to know the truth; (3) independent — conducted by impartial judges and serving only the interests of justice, rather than any ulterior purposes, thereby preserving the legitimacy of the investigation, trial and judgment as a whole; and (4) prompt — investigated with due diligence, and in a manner that preserves and protects the rights of the parties in general and the victims in particular.<sup>53</sup> Only an investigation meeting these standards is capable of protecting and restoring the right to know, the right to justice, and the right to redress.

**B. The ECCC has undertaken a duty to end impunity for human rights violators.**

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(March 1, 1996) (noting that the investigation must be “an effective search for the truth by the government”).

<sup>53</sup> *Hugh Jordan v. The United Kingdom*, *supra* note 51 at ¶¶106-109, (holding that an effective investigation must be undertaken by independent authorities, “capable of leading to . . . the identification and punishment of those responsible” as well as prompt and expeditious, and open to “public scrutiny.”); *Minnesota Protocol*, *supra* note 43 at ¶9 (providing that an investigation, to be effective and satisfy a state’s obligation to prevent extrajudicial executions, must be “thorough,” “prompt” and impartial; *Istanbul Protocol*, *supra* note 43 at ¶¶74-75, 77. (requiring, at a minimum, that an investigation into reported incidents of torture be undertaken “promptly and impartially” by “independent” investigators and that the investigation be intended to “identify[] those responsible . . . and facilitate[] their prosecution”).

Although the duty to investigate human rights violations inheres to States, it is applicable to the proceedings before the ECCC, irrespective of whether the Tribunal is considered a special internationalized Court, or a part of Cambodia's domestic judiciary.<sup>54</sup> The ECCC has explicitly undertaken an obligation to end impunity for the perpetrators of the massive human rights violations of the Khmer Rouge regime. Moreover, like the international courts discussed above, the ECCC's laws and jurisprudence recognize the importance of an effective investigation to the mandate to end impunity. For this reason, "judicial investigation is compulsory for crimes within the jurisdiction of the ECCC," and broad investigatory powers are granted to the Co-Investigating Judges, who may "take any investigative action conducive to ascertaining the truth."<sup>55</sup>

Moreover, a careful analysis of the governing laws and jurisprudence of the ECCC reveals that the elements of a sufficient investigation in proceedings before the ECCC correlate with the elements of an effective investigation sufficient to discharge the duty to end impunity enumerated at the international level. Each of these elements will now be addressed in turn, both as described in international jurisprudence, and embodied in the procedural rules and jurisprudence of the ECCC.

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<sup>54</sup> Whether the ECCC is more appropriately characterized as domestic or international in nature, and what, if any, bearing the characterization has on cases before the Court, has been raised repeatedly. Most recently, in *Decision on Ieng Sary's Appeal Against the Closing Order*, the PTC reaffirmed its earlier findings that the "ECCC is an internationalized court." *Decision on Ieng Sary's Appeal Against Closing Order*, *supra* note 15 at ¶215. This decision recognizes the Cambodian government's decision to "delegate[] its jurisdiction to hear [the cases relating to the senior leaders of the Democratic Kampuchea]" to the ECCC, in order to draw on the UN's "international expertise," rather than rely on the "pre-existing" domestic regime. *Id.* at ¶213. Moreover, even if the ECCC were to be considered a domestic court, the PTC has found "that the nature of the ECCC as a court has no bearing on the ECCC's jurisdiction over the crimes and modes of liability enumerated in the ECCC Law, because this law grants such jurisdiction to the ECCC." *Id.* at ¶212.

<sup>55</sup>ECCC Internal Rules, *supra* note 16, R. 55(1), (5).

B. Elements of an investigation sufficient to discharge the duty to combat impunity.

1. *An investigation into human rights violation must be designed to facilitate punitive sanctions.*

a. *International investigatory standards demand an investigation capable of identifying and punishing those responsible for human rights abuses.*

To be effective, an investigation must be designed to facilitate punitive sanctions. This requirement ensures that “the truth about . . . the perpetration of heinous crimes”<sup>56</sup> is elucidated and that those responsible for such crimes can be identified, tried and punished. In light of these high purposes, the investigation must entail more than a “mere formality preordained to be ineffective.”<sup>57</sup> Instead, it must be “undertaken in a serious manner” with an “objective,”<sup>58</sup> and capable of “leading to the identification and punishment of those responsible” for human rights abuses.<sup>59</sup>

However, this requirement is an “obligation of means,” not ends.<sup>60</sup> Thus, whether or not the duty has been fulfilled depends, not on whether the investigation ultimately secures the conviction of a violator, but on the intent of the authorities to bring the violator to justice. The duty is therefore discharged when the authorities seek to ascertain the truth of the circumstances surrounding the violation by undertaking “the reasonable steps available to . . . secure the evidence” within the context of the case.<sup>61</sup> In spite of the flexibility inherent to

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<sup>56</sup> Set of Principles, *supra* note 43 at principle 1.

<sup>57</sup> *Chimbivilcas v. Peru*, *supra* note 52.

<sup>58</sup> *Velásquez-Rodríguez v. Honduras*, *supra* note 52.

<sup>59</sup> *Bati v. Turkey*, Application No. 33097/96, (First Section) (Eur. Ct. H. R.) ¶134 (June 3, 2004).

<sup>60</sup> *Finucane v. The United Kingdom*, Application No. 29178/95, (Fourth Section) (Eur.Ct.H.R.) ¶70 (July 1, 2003) (quoting *Hugh Jordan v. The United Kingdom*, *supra* note 51).

<sup>61</sup> *Hugh Jordan v. The United Kingdom*, *supra* note 51 at ¶107.

this standard, “any deficiency in the investigation which undermines its ability” to identify “the person or persons responsible will risk falling foul,”<sup>62</sup> of the duty to investigate effectively, thereby undermining the ability of the State to combat impunity.

The failure to undertake an investigation designed to facilitate punitive sanctions makes it impossible to identify, prosecute and punish those responsible for human rights violations, and effectively shields violators from criminal responsibility. This creates an intolerable “climate of impunity,”<sup>63</sup> in which perpetrators are free to commit serious human rights violations without fear of sanction or reprisal – thereby rendering the State itself “responsible on the international plane”<sup>64</sup> for aiding in the commission of human rights abuses.

*b. The governing laws and jurisprudence of the ECCC anticipate an investigation designed to facilitate punitive sanctions.*

The requirement that investigations undertaken by the Co-Investigating Judges be designed to facilitate punitive sanctions is inherent in the object and purpose of the ECCC itself. The Court was established “to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions . . . during the period from 17 April 1975 to 6 January 1979.”<sup>65</sup> The creation of the Court recognized the need to address “the legacy of [the] crimes, and the legacy of []

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<sup>62</sup> *Id.*

<sup>63</sup> *Myrna Mock Chang v. Guatemala, Merits, Reparations and Costs, Judgment, Inter.-Amer. Ct. H. R. (ser. C) No. 101, ¶156 (Nov. 25, 2003).*

<sup>64</sup> *Chiumbivichas v. Peru supra* note 52.

<sup>65</sup> ECCC Law, *supra* note 14 at art. 1.



impunity” that “haunt[ed] Cambodia,”<sup>66</sup> and to “respond[] to past serious violations of Cambodian and international law as a means of bringing about national reconciliation, strengthening democracy and addressing the issue of individual accountability”<sup>67</sup> – the same concerns embodied in the right to know, the right to redress and the right to justice.

To ensure an investigation capable of affixing and assigning criminal responsibility, the Co-Investigating Judges are vested with broad powers in order to bring those “most responsible” for the commission of the grievous human rights violations that occurred during the Democratic Kampuchea period to justice. Article 23 new of the ECCC Law provides in part:

All investigations shall be the joint responsibility of two investigating judges . . . hereinafter referred to as Co-Investigating Judges . . . who shall have the power to question suspects and victims, to hear witnesses, and to collect evidence, in accordance with existing procedures in force . . . In carrying out the investigations, the Co-Investigating Judges may seek the assistance of the Royal Government of Cambodia, if such assistance would be useful to the investigation, and such assistance shall be provided.<sup>68</sup>

Similarly, Internal Rule 55(5) entitles the Co-Investigating Judges to “take any investigative action *conducive to ascertain the truth*,” and provides that they “shall conduct their investigation impartially, whether evidence is inculpatory or exculpatory.”<sup>69</sup>

The Pre-Trial Chamber has interpreted Rule 55(5) as granting “broad discretion” to the Co-Investigating Judges, which extends to “discretion to decide on the usefulness or the opportunity to accomplish any investigative action, even

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<sup>66</sup> Group of Experts Report, *supra* note 41 at ¶1.

<sup>67</sup> *Id.* at ¶5. (Quoting Letter from Hun Sen, First Prime Minister of Cambodia, and Norodom Ranariddh, Second Prime Minister of Cambodia (June 21, 1999)).

<sup>68</sup> ECCC Agreement, *supra* note 12 at art. 23 new.

<sup>69</sup> ECCC Internal Rules, *supra* note 16 R. 55(5)(emphasis added).

when it is requested by a party.”<sup>70</sup> However, this discretion is not unlimited. Rather, it is tethered both to the Co-Investigating Judges’ overall obligation to undertake an investigation “conducive to ascertaining the truth,” as well as to their duty to seek both inculpatory and exculpatory evidence, in order to correctly assign and affix criminal liability, and bring the perpetrators of the human rights abuses of the Democratic Kampuchea period to justice.

For example, in the *Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive*, the ECCC’s Pre-Trial Chamber considered an appeal against an order by the Co-Investigating Judges, rejecting the defense’s request to seek potentially exculpatory evidence on the Shared Material Drive, on the basis that sufficient evidence to send the Charged Person to trial had already been collected. Although acknowledging the “discretionary” nature of the decision,<sup>71</sup> the Pre-Trial Chamber nonetheless rejected the CIJ’s articulated “sufficiency” standard, holding that the investigation could not be concluded until “all the acts . . . necessary to ascertaining the truth” had been accomplished.<sup>72</sup> This meant, *inter alia*, that the Co-Investigating Judges had an obligation to review all “documents or other materials” when there was a “*prima facie* reason to believe that they may contain exculpatory evidence,” before determining “whether the charges are sufficient to send the Charged Person to trial” or, instead “whether they shall dismiss the

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<sup>70</sup> Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, *supra* note 27 at ¶22.

<sup>71</sup> *Id.* at ¶25.

<sup>72</sup> *Id.* at ¶36.

case.”<sup>73</sup> In rejecting the “sufficiency standard” in favor of a more comprehensive investigative approach designed to “ascertain the truth” the Pre-Trial Chamber embraced the requirement articulated at international law, that “reasonable steps”<sup>74</sup> be taken to secure relevant evidence concerning the human rights violation.

Likewise, in the *Decision on Reconsideration of the 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 Crime*, the Pre-Trial Chamber once again implied the need for an investigation designed to facilitate punitive sanctions. The PTC considered an appeal against an Order denying the Co-Prosecutor’s request to place dozens of newspaper and magazine articles, allegedly illustrative of the Charged Persons’ knowledge of human rights violations occurring throughout Cambodia, on the Case File.<sup>75</sup> In their Order, the CIJs found that they acted within the bounds of their discretion in limiting their consideration of requests for investigative action to only those requests that related to probative facts.<sup>76</sup> Holding that this standard was erroneous and unduly proscriptive, the

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<sup>73</sup> *Id.* at ¶36. Significantly, the sufficiency standard created by the CIJs in this case marked a departure from their earlier articulation of the scope of the duty to investigate. In their *Order Refusing Further Charges*, the CIJs noted that in the course of the Case 001 investigation they “undertook investigative action concerning all [the] facts” in the introductory submission. Accordingly, “their obligation to investigate all the facts . . . ha[d] been fulfilled.” *Order Refusing Further Charges*, Case File No. 002/19-09-2007-ECCC-OCIJ, ¶15 (Office of the Co-Investigating Judges, Feb. 16, 2010). In so doing, the CIJs implied that their investigative obligation could be fulfilled only when “all the facts” had been investigated, and not when “sufficient” facts had been investigated.

<sup>74</sup> Hugh Jordan v. The United Kingdom, *supra* note 51 at ¶107.

<sup>75</sup> *Decision on Reconsideration of the 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*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 67) (Pre-Trial Chamber, Sept. 27, 2010), ¶1.

<sup>76</sup> *Id.* at ¶ 19 (Citing *Second Impunged Order*, ¶ 4).

Pre-Trial Chamber explained that the appropriate threshold is “relevance within the scope of the investigation to ascertain the truth.”<sup>77</sup> Moreover, any restrictions that risked “narrow[ing] [this] standard” would be impermissible.<sup>78</sup> This broad standard for admissibility essentially requires in accordance with ECHR jurisprudence that all “reasonable steps available to secure evidence”<sup>79</sup> are taken – and ensures that an unduly proscriptive evidentiary standard does not become an investigative “deficiency,”<sup>80</sup> thereby “undermin[ing] [the CIJs’s] ability to establish . . . the person or persons responsible”<sup>81</sup> for the crimes of the Khmer Rouge.

Accordingly, in conducting the investigation into Case 003, the Co-Investigating Judges must exercise their discretion so as to ascertain the truth within the scope of the introductory submission: to determine whether the facts alleged amount to crimes within the ECCC’s jurisdiction, to identify suspects, and to determine whether evidence against these suspects sufficient to proceed to trial exists. Only in so doing will the CIJs’ investigation enable the Court to fulfill its obligation to bring those responsible for the grievous human rights violations of the Democratic Kampuchea regime to justice, and to finally put to rest the legacy of impunity that has haunted Cambodia for far too long.

*2. An investigation into human rights violations must be transparent.*

*a. International investigatory standards require transparency.*

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<sup>77</sup> *Id.* at ¶61.

<sup>78</sup> *Id.*

<sup>79</sup> Hugh Jordan v. The United Kingdom, *supra* note 51 at ¶107.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

Fundamentally, the transparency requirement demands that an investigation into human rights violations is open to “a sufficient element of public scrutiny” in order to ensure “accountability in practice as well as theory.”<sup>82</sup> The requirement seeks to “maintain[] public confidence in the . . . rule of law,” and ensures that there is no official “collusion in or tolerance of unlawful acts.”<sup>83</sup> While the degree of transparency required to fulfill these goals may vary depending on the exigencies of the case, those most intimately effected by the violations – the victims and their families – must always be kept “involved” and provided with the information “necessary to safeguard [their] legitimate interests.”<sup>84</sup> Thus, the transparency requirement safeguards both the right to know, and the right to redress. On a collective level, it guarantees the right to redress by reaffirming the public faith in government institutions and ensuring “respect for the rule of law.”<sup>85</sup> On an individual level, it protects the victims’ “right to know the truth” by ensuring that “the right of the victims or their next of kin to have the harmful acts and the corresponding responsibilities elucidated by competent State bodies, through . . . investigation and prosecution.”<sup>86</sup>

*b. The governing laws and jurisprudence of the ECCC require transparency to safeguard the interests of the Parties.*

Reflecting the concerns of the transparency requirement at the international level, the Internal Rules explicitly require transparency in all

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<sup>82</sup> Hugh Jordan v. The United Kingdom, *supra* note 51 at ¶109.

<sup>83</sup> *Id* at ¶108.

<sup>84</sup> Finucane v. The United Kingdom, *supra* note 60 at ¶70; Bati v. Turkey, *supra* note 59 at ¶137. (Noting that the transparency requirement is flexible and “may well vary” but, “the complainant must be afforded effective access to the investigatory procedure”).

<sup>85</sup> Set of Principles, *supra* note 43, at principle 35.

<sup>86</sup> Almonacid-Arellano v. Chile. Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H. R., (ser. C) No. 154, ¶148 (Sept. 26, 2006).

proceedings before the ECCC, and implicitly mandate transparency in the investigative phase, in order to ensure that the rights of all the parties to the case, as well as those of the victims, are adequately safeguarded.

*i. The ECCC's transparency requirement safeguards the rights of the Parties.*

Rule 21, which governs the interpretation of the Internal Rules, provides that the rules should be read “so as to always safeguard the interests of the Suspects, Charged Persons, Accused and Victims, and so as to ensure legal certainty and *transparency of the proceedings*.”<sup>87</sup> Thus, transparent proceedings are integral to respecting the rights and interests of all parties to the case, as well as to ensuring legal certainty.

The tacit transparency requirements of Rule 55 and 66 likewise safeguard the interests of the parties.<sup>88</sup> Rule 55 requires that the Co-Investigating Judges “keep a case file, including a written record of the investigation,”<sup>89</sup> which must be “at all times available to the Co-Prosecutors and the lawyers for the other parties . . . to examine;”<sup>90</sup> maintain “a written record of every interview;”<sup>91</sup> and, in the event that a request for investigative action is denied, provide a written explanation of their reasoning, which is “subject to appeal.”<sup>92</sup>

Similarly, Rule 66 provides that the CIJs must publicly “notify all the parties and their lawyers,”<sup>93</sup> of a decision to close their investigation, and grants

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<sup>87</sup> ECCC Rules, *supra* note 14 at R. 21(1) (emphasis added).

<sup>88</sup> The Glossary to the Internal Rules defines “Party” as the “Co-Prosecutors, the Charged Person/Accused and Civil Parties.” Thus, the provisions discussed in this section apply equally to the Co-Prosecutors, Charged Person(s) and Civil Parties. *Id.* at Glossary.

<sup>89</sup> *Id.* at R. (55)(6).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 55(7).

<sup>92</sup> *Id.* at 55(10).

<sup>93</sup> *Id.* at 66(1).

“the parties 15 days to request further investigative action.”<sup>94</sup> Moreover, a rejection of such a request must be made available to the parties through “a reasoned order.”<sup>95</sup> By insisting upon an accessible, written record of the investigation, the Rules both acknowledge that transparency is necessary to ensuring judicial accountability, and provide a mechanism through which all of the concerned parties can remain meaningfully involved in the conduct of the investigation.

*i. The transparency requirement safeguards the victims’ right to participate in the investigation.*

The rules and jurisprudence of the ECCC also acknowledge the special interests of victims in proceedings before the Court. As discussed *supra*, Rule 21 expressly mandates “transparency” in order to “safeguard[] the interests of . . . the Victims.” Because victims are not parties to the case, but “natural person[s] . . . that ha[ve] suffered harm as a result of the commission of any crime within the jurisdiction of the ECCC,”<sup>96</sup> this requirement may at first glance appear adverse to Rule 56, which provides that the “judicial investigation shall not be conducted in public,” but must be “confidential.”<sup>97</sup> However, this stipulation is not intended to undermine the general transparency requirement. The Rule itself clarifies that confidentiality is required “in order to preserve the rights and interests of the parties.”<sup>98</sup> Accordingly, it is compulsory only in so far as necessary to preserve these rights. For this reason, Rule 56(2) creates an exception, enabling the Co-Investigating Judges to “issue such information

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<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 66(2).

<sup>96</sup> *Id.* at Glossary.

<sup>97</sup> *Id.* at 56(1).

<sup>98</sup> *Id.*

regarding a case under judicial investigation as they deem essential to keep the public informed of proceedings, or to rectify any false or misleading information.”<sup>99</sup> Far from insisting on a blanket confidentiality requirement, Rule 56(2) anticipates that the public will be “kept informed” and wards against the dissemination of “false or misleading information.”

The Pre-Trial Chamber has emphasized that the IR’s confidentiality provisions must also be tempered by the requirements of Rule 21(1)(c), which stipulates that “victims are kept informed” in order to ensure “that their rights are respected *throughout* the proceedings.”<sup>100</sup> Acknowledging the victims’ dependence on the Co-Investigating Judges for information, as well as for admission to the trial as civil parties, the PTC has noted the “compelling” need to provide “proper and timely information . . . to the victims throughout the pre-trial phase.”<sup>101</sup> This decision implicitly recognizes that victims must have access to information in order to determine whether they may apply for civil party status, and on what grounds. Such information is vital because only by becoming Civil Parties can victims enjoy increased access to and representation in proceedings before the Court, as well as the possibility of receiving reparations.<sup>102</sup>

Thus, the transparency requirements contained in the Internal Rules and the jurisprudence of the ECCC reflect the same concerns articulated on the

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<sup>99</sup> *Id.* at 65(2).

<sup>100</sup> *Id.* at 21(1)(c) (emphasis added).

<sup>101</sup> Decision on Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, Case No. 002/19-09-2007-ECCC/OCIJ (PTC76, 112, 113, 114, 115, 142, 157, 164, 165 and 172) (Pre-Trial Chamber, June 24, 2011), ¶¶ 52, 53.

<sup>102</sup> See ECCC Rules, *supra* note 14 at RR. 23, 23 ter, 23 quinquies(1). (Describing the ways in which victims can participate in proceedings before the ECCC as civil parties, how civil parties may be represented by lawyers in proceedings, and the Civil Parties’ right to “collective and moral reparations”).



international level, ensuring a “sufficient element of public scrutiny”<sup>103</sup> to restore the public’s faith in the judicial system, requiring that the utmost respect is paid to the victims’ right to be kept involved and informed throughout the entirety of the proceedings before the Court, and guaranteeing sufficient access to the investigation to protect the victims’ and the public’s right to know the truth about what happened in Cambodia during the reign of the Khmer Rouge.

*3. An investigation into human rights violations must be independent.*

*a. International procedural norms require an independent investigation.*

The independence requirement recognizes the indispensable role of an investigation in ensuring, enforcing and establishing fundamental rights. Judicial independence therefore requires both that determinations are made “on the basis of facts” – rather than decisions preordained by the improper exertion of “influences, threats or interferences” made “direct[ly] or indirect[ly] from any quarter for any reason,” – and that such decisions are rendered by “individuals of integrity and ability with appropriate training and qualifications.”<sup>104</sup>

Similarly, in the context of investigations, the investigating authorities must be free from any “hierarchical or institutional connection” to anyone implicated in the events, as well as “independent in practice.”<sup>105</sup> An investigation tainted by even the appearance of a lack of judicial independence can tarnish the

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<sup>103</sup> Hugh Jordan v. The United Kingdom, *supra* note 51 at ¶109.

<sup>104</sup> UN Basic Principles on the Independence of the Judiciary, U.N.H.C.H.R., Endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 (Dec. 13 1985), Principles 2, 10. Available at: <http://www2.ohchr.org/english/law/indjudiciary.htm>

<sup>105</sup> Bati v. Turkey, *supra* note 59 at ¶135.

entirety of the proceedings,<sup>106</sup> potentially rendering any ultimate judgment “fraudulent.”<sup>107</sup> Because “the damage caused by . . . crimes [against humanity] still prevails in the national society and the international community . . . those responsible [must] be investigated and punished”<sup>108</sup> through a process that is above suspicion. Only in this way can the outcome of the investigation – and by extension, the subsequent trial, prosecution and judgment – provide the finality necessary to bring closure to victims, reestablish the public’s faith in the rule of law, and guarantee the right to know and the right to justice.

*b. The requirement of independence is explicit in the rules and jurisprudence of the ECCC.*

The ECCC Agreement, Law and Internal Rules all explicitly stipulate that the Co-Investigating Judges function independently in the conduct of their investigation. Article 25 of the ECCC Law provides, “the Co-Investigating Judges shall be independent in the performance of their functions and shall not accept or seek instructions from any government or any other source.”<sup>109</sup> This provision mirrors precisely the requirement of judicial independence articulated in Article 5(3) of the Agreement.<sup>110</sup> Similarly, Internal Rule 14 stipulates that “[t]he Office of the Co-Investigating Judges shall be established as an independent office

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<sup>106</sup> Findlay v. The United Kingdom, Case No. 110/1995/616/706 (Chamber) (Eur. Ct. H.R.) ¶ 73 (Jan. 21, 1997).

<sup>107</sup> See Almonacid-Arellano v. Chile, *supra* note 86 at ¶154 (explaining that a “judgment rendered” after “proceedings [that] were not conducted independently or impartially . . . or [where] there was no real intent to bring those responsible to justice . . . produces an apparent or fraudulent *res judicata* case,” and noting that the stigma attached to proceedings conducted without independence or impartiality is enough to render *ne bis in idem* inapplicable).

<sup>108</sup> *Id.* at ¶151.

<sup>109</sup> ECCC Law, *supra* note 14 at art. 25.

<sup>110</sup> Article 5(3) of the ECCC Agreement provides in pertinent part that the Co-Investigating Judges “shall be independent in the performance of their function.” ECCC Agreement, *supra* note 12 at art. 5(3).

within the ECCC.”<sup>111</sup> The Pre-Trial Chamber has explicitly linked this judicial independence to the conduct of the investigation, holding that the Co-Investigating Judges are “independent in the way they conduct their investigation.”<sup>112</sup>

At the ECCC, the independence requirement seeks to ensure that the proceedings serve only “the interests of justice” rather than any “specific design,” and that the results of the trial do not reflect “the machinations . . . of the authorities who investigate the facts, bring charges and render judgment.”<sup>113</sup> Accordingly, to guarantee that the CIJs exercise the required judicial independence in discharging their investigatory obligations, both the ECCC Agreement and ECCC Law mandate that the CIJs be “persons of high moral character, impartiality and integrity.”<sup>114</sup> As with the independence requirement at the international level, the ECCC’s independence requirement ultimately serves to safeguard fundamental rights, by guaranteeing that those responsible for the massive human rights violations committed during the Democratic Kampuchea era are investigated and punished through a process untainted by an appearance of bias. Thus, the ECCC’s independence requirement guarantees the right to justice and the right to redress, by ensuring the independent

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<sup>111</sup> ECCC Rules, *supra* note 14 at R. 14(1).

<sup>112</sup> Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, *supra* note 27 at ¶22 (internal quotations and citations omitted).

<sup>113</sup> Decision on Ieng Sary’s Appeal Against the Closing Order, *supra* note 15 at ¶155 (internal quotations and citations omitted). Although related to the issue of *ne bis in idem*, the Pre-Trial Chamber’s emphasis on the entirety of the judicial proceedings – from investigation to judgment – being “impartial and independent” and dedicated to serving the interests of justice logically applies to the principle behind the independence required of the Co-Investigating Judges in fulfilling their investigative duties.

<sup>114</sup> ECCC Agreement, *supra* note 12 at art. 5(2). Similarly, the ECCC Law provides that the CIJs “shall have high moral character, a spirit of impartiality and integrity, and experience.” ECCC Law, *supra* note 14 at art. 25.

investigation essential to addressing the damage caused by the human rights violations of the Khmer Rouge era, and restoring faith in the rule of law.

4. *To discharge the duty to investigate, an investigation must be prompt.*

a. *International law requires a prompt investigation to satisfy the obligation to investigate human rights violations.*

The requirement of “promptness and reasonable expedition” is implicit in the investigating authorities’ overall obligation to take “reasonable steps” to investigate an alleged human rights violation.<sup>115</sup> Generally, promptness requires that “the authorities . . . act as soon as an official complaint has been lodged.”<sup>116</sup> A prompt investigation is indispensable to discharging the obligation to effectively investigate human rights abuses, as “[t]he passage of time . . . inevitably erode[s] the amount and quality of the evidence available”<sup>117</sup> and creates an “appearance of . . . a lack of diligence”<sup>118</sup> on the part of the authorities, thereby “cast[ing] doubt on the good faith of [their] investigative efforts” and “dragging out the ordeal” for victims and their families.<sup>119</sup> Thus, the promptness requirement seeks to “maintain public confidence in the adherence to the rule of law and . . . prevent any appearance of collusion in or tolerance of unlawful acts.”<sup>120</sup>

The promptness requirement also addresses the fundamental due process rights of charged persons, including the right “to be informed promptly”<sup>121</sup> of

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<sup>115</sup> Hugh Jordan v. The United Kingdom, *supra* note 51 at ¶107.

<sup>116</sup> Bati v. Turkey, *supra* note 59 at ¶133.

<sup>117</sup> Paul and Audrey Edwards v. The United Kingdom, Application No. 46477/99 (Third Section) (E.Ct.H.R.) ¶86 (March 14, 2002).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at ¶108.

<sup>121</sup> International Covenant on Civil and Political Rights [hereinafter ICCPR], art. 14(3)(a), Dec. 16, 1966, 999 U.N.T.S. 171.

charges filed, as well as the right “to be tried without undue delay”<sup>122</sup> which are “minimum [fair trial] guarantees”<sup>123</sup> enshrined in Article 14 of the International Covenant on Civil and Political Rights (ICCPR). Although Article 14 deals with fair trial rights, rather than investigations into human rights abuses, the emphasis on “promptness” from the initial filing of charges through to the trial itself confirms the centrality of promptness to the state’s duty to investigate.

Thus, the promptness requirement addresses both individual and collective concerns. On a collective level, the requirement seeks both to ensure diligent investigations of human rights violations, and to confirm public faith in the “rule of law” and the efficacy of the judicial system. On an individual level, the requirement addresses the particular interests of victims and their families, attempting to spare them the additional material and emotional hardships inherent in a drawn-out investigation.

*b. The Rules and jurisprudence of the ECCC anticipate a prompt judicial investigation.*

The governing laws, procedural rules and jurisprudence of the ECCC imply a promptness requirement in the conduct of the Co-Investigating Judges’ investigation. Rule 21(4) provides that “[p]roceedings before the ECCC shall be brought to a conclusion within a reasonable time.”<sup>124</sup> In *Decision on Reconsideration of 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 Crime*, the Pre-Trial Chamber explicitly linked the requirement of IR 21(4) both to “the Charged

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<sup>122</sup> *Id.* at art. 14(3)(c)

<sup>123</sup> *Id.* at art. 14(3)

<sup>124</sup> ECCC Internal Rules, *supra* note 16, R. 21(4).

Person’s right to be tried within a reasonable time, enshrined in Article 14 of the ICCPR,” and to IR 55, which governs the conduct of judicial investigations.<sup>125</sup> In this decision, the Pre-Trial Chamber addressed IR 55(10), which provides that “at any time during an investigation, the Co-Prosecutors, a Charged Person or a Civil Party may request the Co-Investigating Judges to make such orders or undertake such investigative action as they consider useful for the conduct of the investigation.”<sup>126</sup> The PTC clarified that IR 55(10) requests for investigative action must meet the standards of precision and relevance in order to prevent time-consuming judicial fishing expeditions, and to ensure that the Co-Investigating Judges do not waste precious time attempting to deduce why material requested is being sought.<sup>127</sup> By logical extension, these concerns apply equally to the CIJs, and require that they undertake a prompt investigation.

The Pre-Trial Chamber has also implicitly recognized the importance of a prompt investigation to preventing the “appearance of a lack of diligence” so lethal to reestablishing faith in the judicial system. Considering the rights of victims to meaningful participation in the course of proceedings before the Court in *Decision on Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications*, the PTC emphasized that the obligation to keep victims informed “throughout the proceedings,” together with the victims’ dependence on the CIJs for information, necessitates the release of “timely

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<sup>125</sup> Decision on Reconsideration of 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 Crime, *supra* note 75 at ¶47.

<sup>126</sup> ECCC Internal Rules, *supra* note 16, R. 55(10).

<sup>127</sup> Decision on Reconsideration of 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 Crime, *supra* note 75 at ¶48.

information . . . to the victims throughout the pre-trial phase.”<sup>128</sup> Significantly, the PTC found that the CIJs’ failure to release information to the victims in a timely manner was an abrogation of their “due diligence” obligation.<sup>129</sup> In so doing, the PTC effectively inferred a promptness requirement into the conduct of judicial investigations in proceedings before the ECCC as a safeguard preventing a “lack of diligence” on the part of the CIJs, and preserving the interests of victims and parties to the case – the same concerns addressed by the promptness requirement at the international level.

#### **IV. The Duty to Investigate and Case 003**

The Co-Investigating Judges’ investigation into Case 003 almost certainly falls short of the obligation to effectively investigate crimes within the jurisdiction of the ECCC, as articulated at the international level and anticipated by the governing laws and jurisprudence of the Court itself. By all accounts, the CIJs allowed Case 003 to languish for twenty months, without visiting alleged crime sites, interviewing potential witnesses, releasing information to victims and possible civil party applicants, or even informing the suspects that they were under judicial investigation, before closing their investigation in the wake of the Cambodian government’s vocal opposition to any further trials at the ECCC.<sup>130</sup> In response to the CIJs’ decision to close the investigation – and their subsequent rejection of the International Co-

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<sup>128</sup> Decision on Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, *supra* note 101 at ¶53.

<sup>129</sup> *Id.* at ¶51.

<sup>130</sup> See OPEN SOCIETY JUSTICE INITIATIVE, RECENT DEVELOPMENTS AT THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA, JUNE 2011 UPDATE [hereinafter OSJI Report], 11 -12, Open Society Foundations, (2011) (noting that the “Case 003 investigation stagnated for 20 months amid Cambodian government interference and lack of national cooperation within the court,” citing a “general dysfunction in the office” of the CIJs, and that “no genuine investigation was pursued.” Moreover, “suspects were never officially informed that they were under investigation” nor were they “questioned or assigned individual legal representatives.” The rights of civil parties to “join the proceedings” have similarly been neglected).

Prosecutor's requests for additional investigative actions – several staffers resigned their positions with the OCIJ, citing “discontent over [the] handling” of the investigation, and concerns that “the judges . . . may have ignored their legal obligations.”<sup>131</sup> Victims and victims' rights groups likewise expressed displeasure with the conduct of the investigation, describing Case 003 as “a farce.”<sup>132</sup> Such an investigation almost certainly lacks the elements of design to facilitate punitive sanctions, transparency, independence and promptness necessary to an effective investigation.

- A. The investigation into Case 003 was almost certainly not designed to facilitate punitive sanctions.

The CIJs investigation was incapable of affixing and assigning criminal responsibility in order to prosecute, try and punish those who perpetrated the massive human rights violations in Democratic Kampuchea. Far from exercising their broad investigative powers to conduct “all the acts . . . necessary to ascertaining the truth,”<sup>133</sup> and taking the “reasonable steps available to secure”<sup>134</sup> relevant evidence, the CIJs ostensibly failed to question a single witness, inform the unnamed suspects that they were under investigation, or visit any of the named crime sites.

Overall, the Case 003 investigation resembles “a mere formality preordained to be ineffective,”<sup>135</sup> undertaken to put an end to the proceedings before the ECCC,

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<sup>131</sup> O'Toole, *Disorder in the Court*, *supra* note 8; Carmichael, *Cambodian Khmer Rouge Tribunal Monitor Calls for UN Investigation into Judges*, *supra* note 8.

<sup>132</sup> O'Toole, *Alarm Sounded on KRT*, *supra* note 4, (quoting Cambodian Center for Human Rights President, Ou Virak).

<sup>133</sup> Decision on the Appeal from the Order on Request to Seek Exculpatory Evidence in the Shared Materials Drive, *supra* note 70 at ¶22.

<sup>134</sup> *Hugh Jordan v. The United Kingdom*, *supra* note 51 at ¶107.

<sup>135</sup> *Chiumbivilcas v. Peru*, *supra* note 52.



rather than a “serious”<sup>136</sup> investigation designed to identify those responsible for the massive human rights violation of the Khmer Rouge era, and finally end impunity for the perpetrators.

B. The investigation into Case 003 almost certainly fails to meet the transparency requirement.

The CIJs’ investigation into Case 003 has almost certainly failed to meet the transparency requirement. Instead of undertaking an investigation designed to ensure both practical and theoretical accountability and secure “public confidence in the[] adherence to the rule of law,”<sup>137</sup> the whole conduct of the investigation has exposed the Court to allegations of collusion, bias and ineptitude, seriously undermining the court’s legacy.

More concretely, the CIJ’s have neglected to keep victims, including potential civil parties, apprised of their activities during the course of their investigation, flouting the Pre-Trial Chamber’s requirement that “victims are kept informed and that their rights are respected *throughout* the proceeding.”<sup>138</sup> Additionally, the CIJs have failed to formally notify the unnamed suspects in the introductory submission that they are under investigation. As noted by the ECCC’s Defense Support Section (DSS), this puts the “Unnamed Suspects in Cases 003 and 004 . . . at risk of being substantially affected.”<sup>139</sup>

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<sup>136</sup> Velásquez-Rodríguez v. Honduras, *supra* note 52 at ¶177.

<sup>137</sup> Hugh Jordan v. The United Kingdom, *supra* note 49 at ¶¶108-9.

<sup>138</sup> Decision on Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, *supra* note 101 at ¶53.

<sup>139</sup> Press Release, Defence Support Section, *Upholding international standards: Defence Support Section appoints counsel to represent the interests of the suspects in cases 003 and 004*, (Nov. 30, 2010). The Unnamed Suspects in Cases 003 and 004 are Charged Persons under the Internal Rules, and according to the Court’s jurisprudence. In interpreting the definition of “Charged Person” provided in the glossary to the IRs, The CIJs have held that a person who “is not named in the Introductory Submission . . . acquires the status of a ‘Charged Person,’ which is the case for

Thus, instead of restoring public faith in the judicial system, and safeguarding the rights of the victims and parties, the conduct of the Case 003 investigation to date has exposed the Court to the very allegations of judicial inertia, complicity with outside interests, and indifference to the rights of victims and charged persons, which the transparency requirement seeks to protect, and has endangered the ability of the ECCC to establish the truth about the crimes perpetrated by the Khmer Rouge, and to provide closure and redress to the Cambodian people.

C. The investigation into Case 003 almost certainly lacks the independence necessary to an effective investigation.

Similarly, the conduct of the CIJs almost certainly lacks the independence necessary to an effective investigation. The CIJs' decision to close the investigation, despite a manifest lack of investigative action, came in the wake of the Cambodian government's vehement and long-standing opposition to Case 003. Prime Minister Hun Sen expressly stated that the Tribunal's hearings would end with Case 002, and that further prosecutions would "not [be] allowed."<sup>140</sup> Similarly, the government's spokesperson, Khieu Kanharith bluntly asserted, "[i]f [the foreign staff] want to go into Case 003 or 004, they should just pack their bags and return home."<sup>141</sup>

The resulting public perception that "the judges might be submitting to the will of the Cambodian government,"<sup>142</sup> and "yielding to government pressure,"<sup>143</sup> has

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all persons named in the Introductory Submission." Order Refusing Further Changes, *supra* note 73 at ¶13.

<sup>140</sup> Strangio, *Limited liability for Khmer Rouge tribunal*, *supra* note 5.

<sup>141</sup> *Id.*

<sup>142</sup> Robert Carmichael, *US Group Condemns UN Tribunal in Cambodia*, Voice of America, May 26, 2011. Available at: <http://www.voanews.com/english/news/asia/southeast/US-Group-Condemns-UN-Tribunal-in-Cambodia-122651214.html>.

<sup>143</sup> Strangio, *supra* note 5.

resulted in the widespread belief that “influences, threats or interferences”<sup>144</sup> from outside parties, rather than determinations based on facts, underlie the CIJs decision. Accordingly the “appearance of independence”<sup>145</sup> necessary to an effective investigation into human rights violations is lacking in the Case 003 investigation, potentially tainting the entirety of the proceedings before the ECCC, and undermining the Court’s ability to provide truth, justice and redress to the people of Cambodia.

D. The investigation into Case 003 falls short of the promptness required of an effective investigation.

The investigation into Case 003 almost certainly falls short of the promptness requirement. Instead of “act[ing] as soon as an official complaint has been lodged,”<sup>146</sup> the CIJs apparently allowed the investigation to idle for twenty months, during which time, no substantive investigative activity was undertaken.<sup>147</sup> Moreover, the CIJs failed to inform the suspects of their placement under judicial investigation,<sup>148</sup> violating the “minimum [fair trial] guarantees” of the ICCPR, which safeguard the right “to be informed promptly”<sup>149</sup> of charges filed, the ECCC’s internal requirement that “proceedings . . . be brought to a conclusion within a reasonable time,”<sup>150</sup> and the PTC’s tacit requirement that the CIJs prevent “undue delays”<sup>151</sup> in proceedings before the court.

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<sup>144</sup> UN Basic Principles on the Independence of the Judiciary, *supra* note 104, at Principle 2.

<sup>145</sup> Findlay v. The United Kingdom, *supra* note 106 at ¶73.

<sup>146</sup> Bati v. Turkey, *supra* note 59 at ¶133

<sup>147</sup> OSJI Report, *supra* note 130 at 11.

<sup>148</sup> *Id.* at 11 – 12.

<sup>149</sup> ICCPR, *supra* note 121 at art. 14(3)(a).

<sup>150</sup> ECCC Internal Rules, *supra* note 16, R. 21(4).

<sup>151</sup> ICCPR, *supra* note 121 at art. 14(3)(c).

Moreover, the failure to provide victims with “timely,”<sup>152</sup> or indeed any, information, coupled with the widespread allegations that the CIJs have deliberately undermined the case and neglected their judicial duties, has exposed the investigation – and by extension, the ECCC itself – to the “appearance of [a] lack of diligence” that the promptness requirement seeks to prevent.<sup>153</sup>

#### **IV. Conclusion**

Ultimately, Case 003 may need to be brought to a close, for any number of practical or legal reasons. However, its closure must not be premised on a sham investigative process. The Cambodian people deserve to have their fundamental rights to know, to justice, and to redress restored – and an effective investigation into Case 003 is indispensable to securing these rights. Moreover, by failing to articulate and enforce standards for an effective investigation, the ECCC – and by extension, the United Nations, which has lent its expertise, support and credibility to the Tribunal from the start – risks shielding the perpetrators of some of the most heinous human rights violations the world has ever seen from punishment, thereby perpetuating rather than combatting impunity.

Both the ECCC’s mandate to end impunity for the perpetrators of the heinous human rights violations endured by millions of Cambodians between 1975 and 1979, and the Court’s governing laws and jurisprudence demand an investigation that adheres to the standards for investigation into human rights abuses enumerated at the international level. Although, as discussed above, the Pre-Trial Chamber has begun to formulate such a standard in addressing appeals

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<sup>152</sup> Decision on Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, *supra* note 101 at ¶53

<sup>153</sup> Paul and Audrey Edwards v. The United Kingdom, *supra* note 117 at ¶86.

arising out of requests for investigative action, to date, they have done so on a case-by-case basis, rather than articulating a consistent and clear test that can be applied to all controversies regarding the scope of the CIJ's investigative duty.

This *ad hoc* approach does little to stem the public tide of discontent and suspicion that have recently put the legitimacy of the Court in jeopardy.

Alternatively, by applying the test articulated at the international level, the Pre-Trial Chamber can consolidate the standards it has begun to articulate in its prior opinions and ensure greater consistency in the assessment of the investigation. Most importantly, by demanding that the Co-Investigating Judges embody the standards of impartiality, integrity and high moral character articulated in the Court's founding documents, and by insisting upon an effective investigation, the Pre-Trial Chamber can salvage the Court's legacy, and enable the ECCC to fulfill the promise of justice and national reconciliation that it was intended to provide to the people of Cambodia.