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THE RIGHT TO AN EFFECTIVE DEFENCE DURING ECCC INVESTIGATIONS

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The Right to an Effective Defence during ECCC Investigations

Göran Sluiter and Marc Tiernan*

Abstract

The present article seeks to explore and discuss to what extent the position of the defence in the course of investigations before the Extraordinary Chambers in the Courts of Cambodia (ECCC) is in conformity with fair trial norms and sufficiently robust to ensure high-quality fact-finding. After recalling the general features and structure of the ECCC proceedings at the pre-trial stage, the authors critically assess how the inquisitorial imprint given to the ECCC investigation phase has ultimately affected the rights of the suspects and accused to an effective defence.

1. Introduction

Investigations are critical to defining the focus and scope of the entire criminal process in domestic systems. The importance of investigations is no less at international courts and tribunals, such as the Extraordinary Chambers in the Courts of Cambodia (ECCC). First and foremost, an investigation will usually determine whether a trial, a burdensome ordeal regardless of the outcome, will be imposed on an individual. Second, should a trial occur, the evidence obtained during an investigation will often decide the parameters of that trial and ultimately affect the final verdict and attribution of criminal liability. In light of their fundamental role in the criminal process, investigations should aim to be efficient, fair, and of high quality in fact-finding. This article will assess how the latter two requirements, fairness and quality of fact-finding, have been treated at the ECCC.¹

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¹ For discussion regarding the efficiency of ECCC investigations, see J.D. Ciociari and A. Heindel, 'Experiments in International Criminal Justice: Lessons from the Khmer Rouge Tribunal', 35 *Michigan Journal of International Law* (2014) 369-442, at 374-379.

While international courts and tribunals have consistently found that the right to a fair trial applies to all stages of proceedings, including the pre-trial investigation stage,² the way in which investigations are conducted and fair trial rights are realised can differ greatly from one jurisdiction to the next. Differences in the investigative process are particularly apparent when comparing the ECCC's procedures to that of other international criminal courts and tribunals. As a hybrid tribunal based on Cambodian law, which is in turn based on French law, the ECCC puts pre-trial investigations at the centre of its proceedings and vests the responsibility for these investigations in the hands of Co-Investigating Judges, with the parties playing a limited role. Given its distinctiveness amongst the international courts and tribunals, the ECCC serves as an experiment in, and example of, applying a civil law style of investigations to international crimes.³ Consequently, the ECCC has raised important questions about the potential of investigating judges in international criminal proceedings and, by extension, about the reduced role of the defence in investigations and how this role may impact fair trial rights and fact-finding.

With the ECCC's last judicial investigation having ended in June 2019 and the unlikelihood that new investigations will be initiated, now is an apt moment to reflect upon the ECCC's novel approach to international criminal investigations.⁴ That said, such a reflection is undoubtedly limited by the fact that it can only be based on investigation experience from the ECCC's few cases. This article examines the investigation process at the ECCC and addresses the question of whether the position of the defence in these proceedings is in conformity with fair trial norms and sufficiently robust to ensure high-quality fact-finding. In order to answer this question, the article first provides an overview of ECCC structures, describing the Court's civil law make-up and its

² Decision on Ieng Thirith's Appeal Against the Co-Investigating Judges' Order Rejecting the Request for Stay of Proceedings on the Basis of Abuse of Process, *Ieng Thirith et al.* (Case 002), D264/2/6, Pre-Trial Chamber (PTC), 10 August 2010 ('Case 002 Decision on Ieng Thirith's Appeal Against the Co-Investigating Judges' Order'), § 13; Decision on the Prosecution's Application for Leave to Appeal the Chamber's Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, *Situation in the Democratic Republic of Congo* (ICC-01/04), PTC I, 31 March 2006, §§ 34-35; See also *Imbrioscia v. Switzerland*, ECtHR (1993), Appl. No. 13972/88, § 36; *Dvorski v. Croatia*, ECtHR (2015), Appl. No. 25703/11, § 76.

³ S. Vasiliev, 'Trial Process at the ECCC: The Rise and Fall of the Inquisitorial Paradigm in International Criminal Law', in S.M. Meisenberg and I. Stegmiller (eds), *The Extraordinary Chambers in the Courts of Cambodia: Assessing their Contribution to International Criminal Law* (T.M.C. Asser Press, 2016) 389-434, at 392-393; Ciociari and Heindel, *supra* note 1, at 370-374.

⁴ The two Co-Investigating Judges issued separate and conflicting closing orders in Cases 003, 004, and 004/2, which were all appealed by the parties. At the time of writing this article, PTC had only issued its considerations on Case 004/2, failing to reach a supermajority decision as to whether the case should proceed to trial. Decisions from the PTC on the appeals in Cases 003 and 004 are expected later in 2020 and will likely include further jurisprudence relevant to the investigation stage of proceedings. See ECCC, *Completion Plan: Revision 23*, 31 December 2019.

primary legal instruments that protect fair trial rights during investigations (Section 2). Following this, the article progresses through each stage of ECCC investigations, analysing the procedure involved with particular focus on the defence's role (Section 3). Finally, the article evaluates whether the ECCC's investigative procedure conforms with fair trial norms and provides for robust fact-finding (Section 4).

2. Structure and Organization

This section examines the structure and organisation of the ECCC as it pertains to investigations, including its foundations in the civil law system and the fair trial protections in its primary legal instruments.

A. *The ECCC's Character and Composition*

Two of the broadest brushstrokes used to describe legal systems are the diametric labels of adversarial and inquisitorial.⁵ Damaška notes that while inquisitorial systems are concerned with finding the truth, adversarial systems tend to place a higher premium on individual rights.⁶ He posits that this difference is a corollary of the notion that, 'concern for individual rights will often set limits to the pursuit of truth and conflict with the desire to establish the facts of the case'.⁷ The underlying philosophical differences in each system can be seen in their contrasting approaches to investigations. Adversarial systems, followed mostly in common law systems, place responsibility for investigations in the hands of two opposing adversaries: the prosecution and defence. These parties engage in contest before a 'passive decision maker' whose primary duty is to ascertain an impartial verdict.⁸ Each party conducts their own investigations, gathers evidence, and builds their respective cases with 'procedurally equal investigative tools'.⁹ By contrast, inquisitorial systems, followed mostly in civil law systems, place responsibility for investigations in the hands of an

⁵ For excellent background to and explanation of the origins and rationales of the adversarial and inquisitorial criminal justice systems, see M. Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (Yale University Press, 1986).

⁶ M. Damaška, 'Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study', 121 *University of Pennsylvania Law Review* (1973) 506-589, at 578-589.

⁷ *Ibid.*, at 589.

⁸ Damaška, *supra* note 5, at 3.

⁹ K. de Meester, *The Investigation Phase in International Criminal Procedure: In Search of Common Rules* (Intersentia, 2015), at 92, 93 (also noting that while in theory under adversarial systems defence and prosecution have procedurally equal investigative tools, in practice, availability of resources and funding, as well as formal investigative powers, usually advantage the prosecution).

objective and non-partisan investigator, acting as an ‘organ of justice’, usually a prosecutor or judge.¹⁰ This investigator conducts a detached and impartial investigation in the belief that such an approach will optimise ‘truth-seeking’.¹¹ In inquisitorial systems, the defence’s role is traditionally limited to overseeing the official’s conduct in the investigation and safeguarding the interests of the suspect or accused.¹² The defence can often request the official carrying out the investigation to conduct a specific investigative act.

International courts and tribunals, including the ad hoc tribunals, Special Court for Sierra Leone, Special Tribunal for Lebanon, and International Criminal Court (ICC), have generally favoured an adversarial model when it comes to investigative proceedings.¹³ It would be wrong to suggest that these institutions are purely adversarial;¹⁴ in many respects they are influenced by civil law procedure, particularly when it comes to victim participation, the law of evidence (which is flexible), and the use of pre-trial chambers. However, this influence has not extended to the fact-finding protocols of these institutions. For the most part, investigations at international criminal courts and tribunals have been and continue to be conducted separately by opposing parties: the defence and prosecution.

The ECCC’s approach to investigations is distinct from its international counterparts.¹⁵ The ECCC is an internationalised court based in the Cambodian legal system,¹⁶ which is influenced by a period of French colonial rule and follows a civil law model.¹⁷ In contrast with most other international criminal tribunals, the ECCC’s procedural rules pertaining to investigations are

¹⁰ *Ibid.*, at 90. It is questionable whether an investigator with the power of initiating prosecution could also be described as an impartial actor. This will be discussed in greater detail below in Section 3.B.

¹¹ *Ibid.*, at 90-92; Damaška, *supra* note 6, at 578-583.

¹² De Meester, *supra* note 9, at 91.

¹³ *Ibid.*, at 82-93.

¹⁴ The stark divide between adversarial and inquisitorial procedure is an over-simplification, which exists only in theory. Domestic and international systems, the latter especially, are often mixed in nature due to the effects of globalization and the spread of human rights law. See Vasiliev, *supra* note 3, at 397.

¹⁵ De Meester, *supra* note 9, at 91-92, 192-194. The Extraordinary African Chambers and the Special Panels for Serious Crimes in East Timor also use(d) inquisitorial models of investigative proceedings.

¹⁶ Art. 2 (new) Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, 10 August 2001, with inclusion of amendments as promulgated on 27 October 2004 (‘ECCC Law’); Art. 12(1) 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, signed 6 June 2003 (entered into force 29 April 2005) (‘Agreement’) (‘The procedure shall be in accordance with Cambodian law’).

¹⁷ This is, of course, an over-simplification considering Cambodia’s turbulent history, in which a number of successive periods each triggered their own body of applicable law, creating a complex patchwork of norms, new legislation, and international sources with both inquisitorial and adversarial influences.

primarily civil law-based.¹⁸ Consequently, the ECCC prioritises the pursuit of truth by impartial Co-Investigating Judges who are charged with conducting in-depth judicial investigations.¹⁹ The prosecution, defence, and civil parties play a limited role when it comes to investigations at the ECCC, although the Co-Prosecutors may conduct a preliminary investigation for the purpose of initiating prosecution through so-called introductory submissions.²⁰ Once a judicial investigation begins, parties are not permitted to conduct their own investigations.²¹ Instead, they are limited to making requests to the Co-Investigating Judges for investigative action,²² and must rely on the Co-Investigating Judges' duty to investigate both inculpatory and exculpatory evidence.²³

The ECCC's distinct structure requires co-operation among the Court's national and international co-actors (namely the Co-Prosecutors and Co-Investigating Judges) throughout proceedings, including investigations. In Cases 001 and 002, such co-operation existed for the most part between both sides. However, in the more recent Cases 003, 004, 004/1, and 004/2,²⁴ there was, and continues to be, fundamental disagreement between the international and national sides over the desirability and legality of conducting investigations into these suspects.²⁵ The extent to which co-operation is required and the impact of non-cooperation during investigations

¹⁸ While certain aspects of the ECCC's procedure have also been influenced by adversarial models of procedure, e.g. the trial phase, the investigation phase largely follows a traditional inquisitorial model. See Vasiliev, *supra* note 3, at 397-401.

¹⁹ Rule 55 of the Internal Rules of the Extraordinary Chambers in the Courts of Cambodia, Rev. 9 ('Internal Rules'), as revised on 16 January 2015; Art. 23 (new) ECCC Law.

²⁰ Internal Rule 50.

²¹ Inter Office Memorandum Issued by the Co-Investigating Judges on 10 January 2008, referred to in Order Issuing Warnings Under Rule 38, *Nuon Chea et al.* (Case 002), D367, Office of the Co-Investigating Judges (OCIJ), 25 February 2010, § 8.

²² Internal Rule 55(10).

²³ Internal Rule 55(5).

²⁴ Case 004 was initially a joint case with three suspects; however, the case was subsequently severed into separate cases for each suspect: Cases 004, 004/1 and 004/2. References to only Case 004 in the main text should be understood as encompassing the three cases unless accompanied by additional references identifying the cases separately. Order for Severance of AO An From Case 004, *Ao An et al.* (Case 004), D334/1, OCIJ, 16 December 2016; Order for Severance of Im Chaem From Case 004, *Ao An et al.* (Case 004), D286/7, OCIJ, 5 February 2016.

²⁵ The Co-Prosecutors disagreed over the filing of the Third Introductory Submission which opened investigations into what would become Cases 003 and 004. ECCC Press Release, 'Statement of the Co-Prosecutors', 8 December 2008 available online at https://www.eccc.gov.kh/sites/default/files/media/Statement_of_Co_Prosecutors.pdf (visited 16 January 2020). In Cases 003 and 004, the Co-Investigating Judges disagreed with one another on the issue of whether the accused fell within the personal jurisdiction of the ECCC. As a result, investigations into each of these cases were carried out separately. Ultimately, this led to the issuance of two separate and conflicting closing orders in Cases 003, 004 and 004/2. See e.g. Closing Order (Indictment), *Ao An* (Case 004/2), D360, International Co-Investigating Judge (ICIJ), 16 August 2018 ('Case 004/2 Closing Order (Indictment)'); Order Dismissing the Case against Ao An, *Ao An* (Case 004/2), D359, National Co-Investigating Judge (NCIJ), 16 August 2018 ('Case 004/2 Dismissal Order'). In Case 004/1, the Co-Investigating Judges issued a joint closing order dismissing the case. Closing Order (Reasons), *Im Chaem* (Case 004/1), D308/3, OCIJ, 10 July 2017.

has been the subject of much debate at the Court, with important questions in this regard being left largely unresolved to date.²⁶

In sum, as an internationalized hybrid court situated within the civil law-based legal system of Cambodia, the ECCC treats investigations very differently to most other international criminal courts and tribunals.

B. ECCC Law Protecting Fair Trial Rights during Investigations

At the ECCC, and in accordance with international human rights law, fair trial rights must be upheld during the investigation stage of proceedings. The main written laws which govern the ECCC include the Agreement, the ECCC Law, the Internal Rules, and the 1993 Constitution of Cambodia. These texts contain multiple provisions concerning fair trial rights.

For example, Article 13 of the Agreement incorporates by reference the rights of the accused enshrined in Articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR). In the ECCC Law, Article 24 (new) provides the right to counsel and right to interpretation specifically during investigations, while Article 35 (new) requires the presumption of innocence is upheld until the Court has given its ‘definitive judgment’ and further lists a number of ‘minimum [fair trial] guarantees, in accordance with Article 14 of the [ICCPR]’.²⁷ Internal Rule 21 stipulates that ‘[t]he 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 so as to ensure legal certainty and transparency of proceedings, in light of the inherent specificity of the ECCC’.²⁸ Additionally, bearing in mind that the ECCC is a Cambodian court, Article 31 of the Constitution of Cambodia applies and provides that ‘[t]he Kingdom of Cambodia shall recognise and respect human rights as stipulated in the United Nations

²⁶ See *infra* Section 3.C. The Pre-Trial Chamber condemned the issuance of two conflicting closing orders in Case 004/2 and heavily criticized the Co-Investigating Judges for their failure to co-operate during the investigation; however, the Chamber also failed to reach a supermajority decision, with judges split along national and international divides, as to what happens next in the case. Considerations on Appeals Against Closing Orders, *Ao An* (Case 004/2), D359/24, PTC, 19 December 2019, §§ 88-124, 169 (‘Case 004/2 Considerations on Appeal of Closing Orders’).

²⁷ Relevant to suspects and charged persons during investigations, the ‘minimum guarantees’ listed in Art. 35 (new) include the right to be informed of charges; to adequate time and facilities to prepare one’s defence; to be tried without delay; to be defended by counsel of choice and to access legal aid; to examine evidence; to interpretation; to not incriminate oneself.

²⁸ Relevant to suspects and charged persons during investigations, Internal Rule 21 ensures the right to fair and adversarial proceedings; to equality before the law; to be informed of charges; to be defended by counsel of choice; to remain silent; to not incriminate oneself; to be have proceedings conclude in a reasonable time, and moreover the Rule sets out the presumption of innocence and the principle of equality of arms.

Charter, the Universal Declaration of Human Rights, the covenants and conventions related to human rights, women's and children's rights.'

Further, the ECCC Law, the Agreement, and Internal Rules all provide specific directions as to how investigations should be conducted at the ECCC.²⁹ The content of these provisions indicate that investigations must be carried out in a fair and impartial manner. The case law of the ECCC confirms that fair trial rights are applicable during the investigation stage of proceedings³⁰ and what constitutes fairness should be guided by international legal standards.³¹

3. Procedure

This section describes the ECCC's pre-trial investigation procedure by examining preliminary investigations, judicial investigations, Pre-Trial Chamber proceedings and the role of the defence in investigations. Examining all fair trial issues that have emerged during the pre-trial stage at the ECCC is beyond the scope of this article. The discussion is confined to certain issues that have arisen, for the most part, because of the ECCC's procedural set-up affecting the position of the defence and the quality of fact-finding.

A. Preliminary Investigations

Prosecution at the ECCC 'may be initiated *only* by the Co-Prosecutors, whether at their own discretion or on the basis of a complaint'.³² To this end, '[t]he Co-Prosecutors may conduct preliminary investigations to determine whether evidence indicates that crimes within the jurisdiction of the ECCC have been committed and to identify Suspects and potential witnesses'.³³ The Co-Prosecutors' power to conduct preliminary investigations stands apart from the otherwise limited role that the parties play in ECCC investigations, representing a procedural advantage over the defence which may be at odds with the equality of arms principle.

When conducting a preliminary investigation, the Co-Prosecutors have a number of investigative powers at their disposal, including the ability to summon and interview persons,

²⁹ Arts 23-28 ECCC Law; Art. 5 Agreement; Internal Rules 55-70.

³⁰ Case 002 Decision on Ieng Thirith's Appeal Against the Co-Investigating Judges' Order, *supra* note 2, § 13; Decision on Appeal Against Closing Order Indicting Kaing Guek Eav, alias 'Duch', *Duch* (Case 001), D99/3/42, PTC, 5 December 2008, §§ 138-140 ('Case 001 Decision on Appeal Against Closing Order').

³¹ Case 001 Decision on Appeal Against Closing Order, *supra* note 30, §§ 47-50.

³² Internal Rule 49(1) [emphasis added].

³³ Internal Rule 50(1).

conduct limited searches and seizures, and take suspects into custody.³⁴ If the Co-Prosecutors have ‘reason to believe’ that crimes within the Court’s jurisdiction have been committed, they may file an introductory submission thereby triggering a judicial investigation.³⁵ This marks the end of the preliminary investigation stage and the case file must be forwarded to the Co-Investigating Judges. The Co-Investigating Judges may only investigate the facts set out in introductory or supplementary submissions provided by the Co-Prosecutors.³⁶ During the judicial investigation, the Co-Prosecutors (and the defence) do not have primary investigative powers over a case and they must submit investigative requests to the Co-Investigating Judges.³⁷

While logical and acceptable that the Co-Prosecutors conduct some form of investigation to initiate prosecution, the extent of their investigative powers gives them a significant advantage over the defence, particularly given the latter’s restricted investigative role throughout proceedings.³⁸ First, the Co-Prosecutors have the power to shape subsequent and ongoing judicial investigations through introductory and supplementary submissions and the evidence they collect during preliminary investigations. Given that the judicial investigations and later charges cannot exceed the scope delineated during the preliminary investigation, the Co-Prosecutors can essentially determine what facts the Co-Investigating Judges examine.³⁹ Second, the introductory submission and evidence collected by the Co-Prosecutors during a preliminary investigation naturally import a degree of prosecutorial bias, both implicitly and explicitly, as a starting point for judicial investigations. The Co-Investigating Judges have been accused of too heavily relying on information collected by the Co-Prosecutors during preliminary investigations.⁴⁰ Third, this process gives the Co-Prosecutors considerably more time than the defence to become familiar with the case file and evidence. Unlike the Co-Prosecutors who gather evidence during preliminary investigations and gain immediate access to the case file, defence teams can be left without access to the evidence or case file until a suspect is formally charged by the Co-Investigating Judges.⁴¹ Finally, there are no specific guidelines regarding preliminary investigations, and therefore no

³⁴ Internal Rule 50.

³⁵ Internal Rule 53(1).

³⁶ Internal Rules 55(2), 55(3).

³⁷ Internal Rule 55(10). See *infra* Sections 3.B, 3.D.

³⁸ See *infra* Section 3.D.

³⁹ Internal Rules 55(2), 55(3).

⁴⁰ Ciorciari and Heindel, *supra* note 1, at 389-390.

⁴¹ Considerations of the Pre-Trial Chamber on [REDACTED] Appeal Against the Decision Denying His Request to Access the Case File and Take Part in the Judicial Investigation, *Ao An* (Case 004/2), D121/4/1/4, PTC, 15 January 2014, §§ 9, 15, 16 (‘Case 004/2 Considerations on Access to the Case File’).

clear indication how long they should last or how in-depth they should be. Theoretically, the Co-Prosecutors could use this opportunity to explore leads which may otherwise be rejected as investigative requests during the judicial investigation. For these reasons, preliminary investigations provide the prosecution with an advantage over the defence at the ECCC. It is questionable whether the totality of this advantage is in keeping with the equality of arms principle; a central component of the right to a fair trial.⁴² While a neutral judicial investigation with input from all parties could rectify this imbalance caused by the preliminary investigations, as discussed below, the defence's investigative role has also been limited during the later judicial investigation stage.

A final critique of preliminary investigations at the ECCC is that they lead to an inefficient duplication of investigation efforts.⁴³ The ECCC has 'two pairs of investigators'⁴⁴ with a preliminary investigation conducted by the Co-Prosecutors and a subsequent judicial investigation conducted by the Co-Investigating Judges. Some commentators suggest this bifurcation in the investigative process leads to 'inevitable redundancy and gridlock', which has caused delays in the process.⁴⁵

B. Judicial Investigations

Judicial investigations are a central part of the ECCC's procedure as a result of applying Cambodian law. Responsibility for judicial investigations is vested solely with the Co-Investigating Judges and not the parties.⁴⁶ This approach to investigations at the ECCC raises important questions regarding impartiality, quality of fact-finding, the right to cross-examination, and the ability of the Co-Investigating Judges to maintain the overall fairness of proceedings.

Internal Rules 55 to 70 set out the procedure for judicial investigations, beginning with the receipt of the Co-Prosecutors' introductory submissions up to possible appeals against the closing orders which result from the investigations. These provisions grant the Co-Investigating Judges

⁴² General Comment No. 32, Art. 14, Right to equality before courts and tribunals and to a fair trial, Human Rights Committee, CCPR/C/GC/32, 23 August 2007, §§ 7-14; See also *Bulut v. Austria*, ECtHR (1996), Appl. No. 17358/90, § 47; *Öcalan v. Turkey*, ECtHR (2005), Appl. No. 46221/99, § 140. For a thorough study on equality of arms in international criminal law, see M. Fedorova, *The Principle of Equality of Arms in International Criminal Proceedings* (Intersentia, 2012).

⁴³ De Meester, *supra* note 9, at 156.

⁴⁴ Ciorciari and Heindel, *supra* note 1, at 374-375.

⁴⁵ *Ibid.*

⁴⁶ Art. 23 (new) ECCC Law; Order Issuing Warnings Under Rule 38, *supra* note 21, § 8.

several key powers to conduct investigations.⁴⁷ In addition, the Internal Rules provide for, and intend to preserve and regulate, certain core elements of the ECCC's judicial investigations, briefly outlined here. First, a judicial investigation is compulsory.⁴⁸ Second, judicial investigations are confined to the facts set out in the introductory or supplementary submissions.⁴⁹ Third, judicial investigations must be impartial and extend to both incriminating and exonerating evidence.⁵⁰ Fourth, the results of the judicial investigations become part of the case file, to which all parties (prosecution, defence and civil parties) have access, unless exceptions need to be made.⁵¹ Fifth, the Co-Prosecutors, defence, and civil parties may each submit requests for investigative action to the Co-Investigating Judges, and any rejections of said requests are subject to appeal.⁵² Sixth, judicial investigations must be confidential.⁵³ Seventh, upon completion of the judicial investigations, the parties are entitled to make final submissions on what should happen with the case.⁵⁴ Eighth, a closing order should mark the finalization of the investigative stage, either dismissing the case (dismissal order) or sending it to trial (indictment).⁵⁵ Ninth, the closing order, whether a dismissal or indictment, is subject to appeals with the Pre-Trial Chamber.⁵⁶

Certain observations can be made in relation to some of the above features, which raise discussion or concern in relation to either the ECCC or the phenomenon of judicial investigations more generally. To begin, there is the issue of the impartiality of judicial investigations.⁵⁷ A vital justification for judicial investigations is that they are expected to result in better fact-finding

⁴⁷ Internal Rules 55(4) (to charge suspects named in submissions); 55(5)(a) (to summon and question suspects and charged persons, interview victims and witnesses and record their statements, seize exhibits, seek expert opinions and conduct on-site investigations); 55(5)(b) (to take appropriate measures to provide safety and support of potential witnesses and other sources); 55(5)(c) (to seek information and assistance from states, the United Nations and other organisations/sources); 55(5)(d) (to issue orders as may be necessary to conduct investigations, including summonses, arrest warrants, detention orders and arrest and detention orders); 55(9) (to utilise Judicial Police or ECCC Investigators to undertake investigative action).

⁴⁸ Internal Rule 55(1).

⁴⁹ Internal Rule 55(2).

⁵⁰ Internal Rule 55(5).

⁵¹ Internal Rules 55(6) and 55(11).

⁵² Internal Rules 55(10), 73.

⁵³ Internal Rule 56(1).

⁵⁴ Internal Rule 66.

⁵⁵ Internal Rule 67. When seized of an appeal against a closing order, the PTC may remit the closing order back to the Co-Investigating Judges for reconsideration (Internal Rule 76(5)).

⁵⁶ Internal Rules 73, 74, 77(13).

⁵⁷ The right to be tried by an impartial tribunal is guaranteed under ECCC and international law. Art. 12 Agreement (incorporating by reference Arts 14, 15 ICCPR); Art. 14(1) ICCPR. The ECtHR has found that while investigating judges are not considered 'tribunals' in a strict sense under Art. 6(1) of the ECHR, the requirement for a fair trial in a broad sense necessarily implies that an investigating judge is impartial. *Vera Fernández-Huidobro v. Spain*, ECtHR (2010), Appl. No. 74181/01, §§ 108-114.

because the judge, as investigator, is a guarantee of objectivity. In inquisitorial systems like the ECCC, investigations aspire to maintain the principle of objectivity,⁵⁸ and investigating judges must impartially and equally investigate inculpatory and exculpatory evidence.⁵⁹ At the ECCC, suspects rely on the Co-Investigating Judges to provide them with a fair and objective investigation.⁶⁰ However, the assumption that judicial investigations can be impartial is open to challenge. In the ‘home’ of judicial investigations, France, the *Leger* Committee has taken the view that ‘a judge, responsible for a criminal investigation, cannot act with strict neutrality and is not fully a judge’.⁶¹ Even with the best intentions, it is questionable whether a criminal investigation can ever be fully objective and impartial, as there will always be some sort of working hypothesis of guilt.⁶² Moreover, the act of investigating and establishing criminal facts may disrupt or impact, at least to some degree, a judge’s ability to act as neutral arbiter of the case, as concluded by the French *Leger* Committee. The pressure for conviction is even greater in the context of a court established specifically to address a historical situation of mass criminality, putting further strain on investigative impartiality and requiring the balance of a strong defence voice. At the ECCC there has been widespread criticism from defence teams that investigations were biased and focused on incriminating evidence.⁶³ Moreover, the very existence of two separate and conflicting closing orders in each of Cases 003, 004, and 004/2 exemplifies the difficulties with relying on ‘neutral’ investigators to find objective truth. Upon assessing the same evidence in each of the

⁵⁸ K. Ambos, ‘International Criminal Procedure: Adversarial, Inquisitorial, or Mixed?’ 1 *International Criminal Law Review* (2003) 1-37, at 9.

⁵⁹ See e.g. Art. 81(1) Code of Criminal Procedure (France) and Art. 56(1) Code of Criminal Procedure (Belgium).

⁶⁰ Internal Rule 55(5).

⁶¹ The *Leger* Committee was established to examine the need for an investigating judge in French criminal procedure. The majority of the *Leger* Committee’s members recommended abolishing judge-led investigations, and thus the *juge d’instruction*, finding that ‘[this] procedure of investigation — which hardly exists anywhere else in Europe — is no longer suitable to this day and age in that it is neither conducive to efficient investigations nor to the protection of rights of suspects and victims’. This advice was based, in considerable part, on a fundamental view of the Committee’s majority that the roles of investigator and judge cannot be combined. *Rapport du Comité de réflexion sur la justice pénale*, 1 September 2009, at 7 (translations by author).

⁶² Damaška, *supra* note 5, at 120, 121.

⁶³ Many of these claims have been dismissed on appeal by the Pre-Trial Chamber. See e.g. Decision on Ieng Sary’s and on Ieng Thirith Applications under Rule 34 to Disqualify Judge Marcel Lemonde, *Nuon Chea et al.* (Case 002), 8, PTC, 15 June 2010. However, several claims made by the defence relating to prejudice during investigations were not decided on merits due to a failure of the Pre-Trial Chamber to reach a supermajority decision. See e.g. Considerations on Im Chaem’s Application for Annulment of Transcripts and Written Records of Witness Interviews, *Im Chaem* (Case 004/1), D298/2/1/3, PTC, 27 October 2016; Considerations on [REDACTED] Application to Seize the Pre-Trial Chamber with a View to Annulment of Investigation of Toul Beng and Wat Angkuonh Dei and Charges Relating to Toul Beng, *Ao An et al.* (Case 004), D299/3/2, PTC, 14 December 2016. The supermajority rule will be discussed in greater detail in Section 3.C.

respective case files, the International Co-Investigating Judge found that the accused in Cases 003, 004, and 004/2 fell within the Court's jurisdiction as persons most responsible, whereas the National Co-Investigating Judge came to the opposite conclusion.⁶⁴

Once judicial investigations begin, the Co-Investigating Judges have extensive control and discretion over the way in which they are conducted, and the parties can only participate through investigative requests.⁶⁵ As discussed further below, in practice the Co-Investigating Judges have exercised this control rigidly and the parties have been largely excluded from the investigative process.⁶⁶ However, exclusion of the parties in favour of strict 'neutrality' may not actually benefit an investigation. Conceivably, judicial investigations that permit parallel investigations by the parties, at least to some degree, would allow for a deeper exploration of alternative leads and theories, regardless of how tenuous they may be, and could arguably result in better, more thorough, fact-finding. Considering the size of ECCC cases and the overwhelming workload faced by the Co-Investigating Judges, investigations could have benefited if responsibility for them was shared with the parties.

In addition, while the interrogation of witnesses during judicial investigations takes place in the absence of parties, in certain circumstances ECCC proceedings overall could benefit from the parties' participation in this process. Involvement of the defence in witness interrogation at an early stage would ensure better compliance with the accused's right to subject witnesses to cross-examination and would avoid the duplication of work at trial.⁶⁷ The defence's early involvement in cross-examination is especially important considering the advanced age of many witnesses and the deterioration of evidence with each passing year due to fading memories and deaths.

⁶⁴ Case 004/2 Closing Order (Indictment), *supra* note 25; Case 004/2 Dismissal Order, *supra* note 25; Closing Order, *Meas Muth* (Case 003), D267, ICIJ, 28 November 2018; Order Dismissing the Case Against Meas Muth, *Meas Muth* (Case 003), D266, NCIJ, 28 November 2018; Closing Order, *Yim Tith* (Case 004), D382, ICIJ, 28 June 2019; Order Dismissing the Case Against Yim Tith, *Yim Tith* (Case 004), D381, NCIJ, 28 June 2019.

⁶⁵ Internal Rule 55(10).

⁶⁶ Decision on Meas Muth's Request for the Co-Investigating Judges to Clarify whether the Defence May Contact Individuals Including [REDACTED], *Meas Muth* (Case 003), D173/2.3, OCIJ, 4 December 2015, §§ 8-15. See *infra* Section 3.D.

⁶⁷ An accused should be given an adequate and proper opportunity to challenge and question a witness against him or her, either at the time the witness made their statement or at some later stage of the proceedings. Testimonial evidence that the accused has not been able to challenge may still be admitted, provided that the conviction is not solely or to a decisive extent based on that evidence. See *Kostovski v. the Netherlands*, ECtHR (1989), Appl. No. 11454/85, §§ 37-45; *Van Mechelen et al. v. the Netherlands*, ECtHR (1997), Appl. Nos 21363/93, 21364/93, 21427/93 and 22056/93, §§ 46, 56-65; *Al-Khawaja and Tahery v. United Kingdom*, ECtHR (2011), Appl. Nos 26766/05 and 22228/06, §§ 118-167.

Next, there is a notable lack of guidance in ECCC law as to how the Co-Investigating Judges should conduct investigations or what evidentiary standards should be followed. As such, the Co-Investigating Judges have exercised rather wide discretion when it comes to investigations, not always leading to optimal results.⁶⁸ For example, there is no explicit direction in ECCC law as to how long investigations can take or what, if any, are the deadlines for filing closing orders following the conclusion of a judicial investigation.⁶⁹ Even up to the filing of recent closing orders, the Co-Investigating Judges and the Pre-Trial Chamber openly disagreed on the investigative practices and evidentiary considerations that should be employed.⁷⁰ Additionally, personnel changes between International Co-Investigating Judges led to differing approaches to the investigation and inconsistencies in how evidence was collected. For example, while one International Co-Investigating Judge chose not to record witnesses and civil parties, his successor favoured the practice.⁷¹ These problems have only been exacerbated by the fact that ECCC investigations are complex and deal with vast amounts of evidence relating to crimes which date back many years. Clearer and more detailed rules of evidence and procedure could have helped to ensure better and more uniform investigative practices.

Despite the above criticisms, increased judicial involvement in the investigative procedure can afford greater protection to fair trial rights by allowing judicial actors to oversee investigations, to actively address the conduct of parties, and to raise important matters regarding the overall fairness of proceedings. At the ECCC, the Co-Investigating Judges are responsible for ‘the conduct of investigations’, including fair trial issues.⁷² An interesting example of this responsibility in action came about when the Co-Investigating Judges assessed whether a lack of funds or financial

⁶⁸ Ciorciari and Heindel, *supra* note 1, at 390-391.

⁶⁹ In Case 004/1, the Pre-Trial Chamber acknowledged this issue and criticised the Co-Investigating Judges for taking too long to issue their Closing Order. Considerations on the International Co-Prosecutor’s Appeal of Closing Order (Reasons), *Im Chaem* (Case 004/1), D308/3/1/20, PTC, 28 June 2018, §§ 28-31 (‘Case 004/1 Considerations on Appeal of Closing Order’). In Case 004/2, the Pre-Trial Chamber similarly found that the Co-Investigating Judges had generated excessive delays in issuing their conflicting Closing Orders. Case 004/2 Considerations on Appeal of Closing Orders, *supra* note 26, §§ 60-72.

⁷⁰ Case 004/1 Considerations on Appeal of Closing Order, *supra* note 69, §§ 41-63; Case 004/2 Closing Order (Indictment), *supra* note 25, §§ 35-37; Case 004/2 Considerations on Appeal of Closing Orders, *supra* note 26, §§ 36, 73-87.

⁷¹ Memorandum from ICIJ to all OCIJ investigators concerning ‘Instructions on the recording of witness and civil party interviews’, D154, ICIJ, 22 September 2015. The ECCC Trial Chamber found that audio recording witness and civil party interviews was not necessary under ECCC law. Decision on Nuon Chea’s Request for a Rule 35 Investigation Regarding Inconsistencies in the Audio and Written Records of OCIJ Witness Interviews, *Nuon Chea et al.* (Case 002), E142/3, Trial Chamber (TC), 13 March 2012, § 6.

⁷² Art. 5(1) Agreement; Art. 23 (new) ECCC Law.

uncertainty at the Court threatened judicial independence, fairness, and the integrity of proceedings.⁷³ The Co-Investigating Judges noted their power, and indeed their obligation, to stop investigations where there was a fundamental breach of fair trial rights.⁷⁴ While the Co-Investigating Judges decided not to order a stay of proceedings in this instance,⁷⁵ their actions demonstrated a willingness to assume broad authority over protecting the right to a fair trial during the judicial investigation stage.

C. Pre-Trial Chamber Proceedings

The Pre-Trial Chamber serves two primary functions: first, it acts as a special chamber to settle disagreements between the Co-Prosecutors or Co-Investigating Judges;⁷⁶ second, it plays the role of the Cambodian Investigation Chamber in ECCC proceedings, albeit with some limitations, and has power of review over investigations.⁷⁷ Additionally, the Pre-Trial Chamber has found that it has inherent jurisdiction, as the appellate body at the pre-trial stage, to rule on issues in the interests of justice and fairness.⁷⁸

The supermajority rule is of particular importance when assessing the ability of the Pre-Trial Chamber to uphold fair trial rights.⁷⁹ As with the ECCC's other chambers, the Pre-Trial Chamber must adhere to a supermajority voting rule, meaning that four of its five judges must agree in order to reach a decision.⁸⁰ A lack of supermajority results in a non-decision. Unique to the Pre-Trial Chamber, if the judges fail to reach the required supermajority, there is presumption of continuity.⁸¹ This means that appealed actions and decisions pertaining to the investigation will

⁷³ Combined Decision on the Impact of the Budgetary Situation on Cases 003, 004, and 004/2 and Related Submissions by the Defence for Yim Tith, (Cases 003, 004 and 004/2), D349/6, OCIJ, 11 August 2017.

⁷⁴ *Ibid.*, § 17.

⁷⁵ *Ibid.*, §§ 69-73.

⁷⁶ Internal Rules 71, 72.

⁷⁷ Internal Rules 73, 74.

⁷⁸ Decision on Ao An's Urgent Request for Redaction and Interim Measures, *Ao An* (Case 004/2), D360/3, PTC, 5 September 2018, § 6.

⁷⁹ It is outside the scope of this article to discuss the origins and rationale of the supermajority rule. For further discussion on this topic, see Ciorciari and Heindel, *supra* note 1, at 403-406. For a qualitative and quantitative analysis of the performance and purported dysfunctions of the ECCC Pre-Trial Chamber see, in this Symposium, N. Naidu and S. Williams, 'The Function and Dysfunction of the Pre-Trial Chamber at the Extraordinary Chambers in the Courts of Cambodia'.

⁸⁰ Art. 7(4) Agreement; Arts 20 (new) and 23 (new) ECCC Law; Rule 77(13) Internal Rules.

⁸¹ *Ibid.* However, there is uncertainty as to what this presumption of continuity means after investigations have ended. Thus, in a situation of two conflicting Closing Orders, one dismissing the case and the other sending it to trial, the question is no longer about continuing investigations, as they have been closed. See Rule 67(1) Internal Rules. The Pre-Trial Chamber failed to reach a binding decision on this issue in Case 004/2 (see Case 004/2 Considerations on Appeal of Closing Orders, *supra* note 26, § 169).

stand despite opposition from a simple majority of Pre-Trial Chamber judges (three out of five).⁸² This is problematic for three main reasons: first, it creates a higher barrier for case dismissal than the continuance of proceedings, arguably undermining the presumption of innocence; second, it resolves doubt (a failure of the judges to reach a binding decision) in a manner contrary to the suspect's interests, arguably undermining the principles of legal certainty and *in dubio pro reo*;⁸³ and third, as discussed below, it undermines the ability of the Pre-Trial Chamber to effectively resolve disagreements submitted by the Co-Prosecutors and Co-Investigating Judges because a non-decision can lack clear direction and allow investigations to proceed with issues that impact later proceedings. Furthermore, the supermajority rule fails to adequately protect fair trial rights during the investigation stage. For example, if a suspect appeals an order of the Co-Investigating Judges and a simple majority of Pre-Trial Chamber judges believe that the order should be overturned or amended due to its impact on that suspect's fair trial rights, the simple majority will be unable to enforce their decision and the potential infringement will continue. Therefore, the supermajority rule has weakened the ability of the Pre-Trial Chamber to fulfil its role of upholding fair trial rights during the investigation.

One of the Chamber's primary functions is to serve as a mechanism for the settlement of internal disputes between the two Co-Prosecutors or the Co-Investigating Judges. Considering the binary nature of the ECCC, with equally authoritative international and national actors, disagreements were to be expected. Detailed procedures for bringing such disagreements before the Pre-Trial Chamber are found in Internal Rules 71 and 72. However, the disagreement procedure is not explicitly set out as mandatory in the Internal Rules, and certain disputes amongst the Co-Investigating Judges have not been brought before the Pre-Trial Chamber.⁸⁴ Despite appearing non-mandatory in the Internal Rules, the Pre-Trial Chamber has strongly criticised the Co-Investigating Judges for not availing themselves of the procedure.⁸⁵

As discussed above, the disagreement procedure also includes the failsafe that the Pre-Trial Chamber's inability to reach a supermajority results in the action or decision of one Co-Prosecutor or one Co-Investigating Judge at the heart of the disagreement being executed.⁸⁶ Jørgensen

⁸² Art. 7(4) Agreement; Arts 20 (new) and 23 (new) ECCC Law; Internal Rule 77(13).

⁸³ Even in situations where a simple majority of judges have made a decision, and doubt would not exist in an ordinary court setting, the opposite action may be taken due to a failure to reach a supermajority.

⁸⁴ Note the use of the word 'may' in the provisions related to the disagreement procedure. See Internal Rules 71, 72.

⁸⁵ Case 004/2 Considerations on Appeal of Closing Orders, *supra* note 26, §§ 120, 123.

⁸⁶ Internal Rules 71(4), 72(4).

describes the foresight of this in-built continuity as ‘crafty in one sense’ but notes that ‘the system is also designed so that genuine deadlock between national and international actors simply endures with potentially serious consequences for the legitimacy of the institution.’⁸⁷

The failure of the disagreement procedure and supermajority rule to address deadlock was especially apparent throughout Cases 003 and 004. To begin, the Co-Prosecutors filed a statement of disagreement concerning the appropriateness of opening new judicial investigations into what would become Cases 003 and 004.⁸⁸ After the Co-Prosecutors referred their disagreement to the Pre-Trial Chamber, the judges failed to reach a supermajority vote as to whether the introductory submission should be filed.⁸⁹ A majority of judges (three of five) disagreed with the filing of the second and third introductory submissions; however, failing to meet the supermajority necessary to halt proceedings, the submissions were filed and judicial investigations began into what would become Cases 003 and 004, despite support from only a minority of judges.⁹⁰ Subsequently, the Co-Investigating Judges disagreed over whether the Court had jurisdiction over the suspects in Cases 003 and 004 but they chose not to refer their disagreement to the Pre-Trial Chamber.⁹¹ The Co-Investigating Judges ultimately issued separate and conflicting Closing Orders in Cases 003, 004, and 004/2, despite the International Co-Investigating Judge acknowledging that ‘procedural uncertainty’ would arise if the Pre-Trial Chamber failed to reach a supermajority.⁹² To date, the Pre-Trial Chamber has issued considerations in relation to Case 004/2 only. All five pre-trial judges found that ‘the Co-Investigating Judges’ issuance of the two conflicting closing orders was illegal, violating the legal framework of the ECCC’.⁹³ The Pre-Trial Chamber was also highly critical of the Co-Investigating Judges’ decision to bypass the disagreement procedure.⁹⁴ However, the Pre-Trial Chamber judges were also unable to reach a supermajority decision as to whether the case should proceed to trial. Consequently, despite a majority of the Pre-Trial Chamber judges

⁸⁷ N. Jørgensen, *The Elgar Companion to the Extraordinary Chambers in the Courts of Cambodia* (Elgar Publishing Ltd, 2018), at 173.

⁸⁸ ECCC Press Release, ‘Statement of the Co-Prosecutors’, *supra* note 25.

⁸⁹ Three judges disagreed with the filing of the introductory submission, whereas two found that it should be filed. Considerations of the Pre-Trial Chamber Regarding the Disagreement between the Co-Prosecutors Pursuant to Internal Rule 71, (Cases 003 and 004), PTC, 18 August 2009, § 45, declaration at 20.

⁹⁰ *Ibid.*

⁹¹ For an in-depth discussion regarding the Co-Investigating Judge’s failure to refer their confidential disagreements to the Pre-Trial Chamber, see Case 004/2 Considerations on Appeal of Closing Orders, *supra* note 26, §§ 96-119.

⁹² Case 004/2 Closing Order (Indictment), *supra* note 25, § 854.

⁹³ Case 004/2 Considerations on Appeal of Closing Orders, *supra* note 26, §§ 88-124, declaration at 61.

⁹⁴ *Ibid.*, § 123.

voting to dismiss the case in order to preserve the principles of legality and certainty,⁹⁵ the status of the case remains unclear.

In sum, the disagreement procedure, coupled with the supermajority voting rule, has meant that disagreements between the Court's actors over fundamental matters, such as jurisdiction, can be left unresolved. The ineffectiveness of the disagreement procedure is also potentially unfair to suspects and victims because it allows the slow march of onerous and expensive proceedings despite the existence of entrenched disagreements that have led to confusion and uncertainty. This arguably impacts the right to be tried without undue delay. A fairer alternative would be a mandatory disagreement procedure with a simple majority voting requirement to ensure that disputes are resolved with certainty and in a timely manner.

Next, the Pre-Trial Chamber has assumed many characteristics of a *Chambre d'Instruction* (Investigation Chamber) under the civil law procedure of Cambodia, with the notable exception of investigative powers.⁹⁶ In Cambodian domestic proceedings, the Code of Criminal Procedure grants the investigation chamber jurisdiction to 'order additional investigative action which it deems useful' when seized of an appeal.⁹⁷ The Pre-Trial Chamber justified a departure from such power because of the unique nature of ECCC, which involves 'large scale investigations and extremely voluminous cases', and because the Pre-Trial Chamber 'has not been established and is not equipped to conduct investigations'.⁹⁸ Instead, the Pre-Trial Chamber has consistently recognised the Co-Investigating Judges' overall responsibility for investigations and limited its own role to one of judicial oversight.⁹⁹

According to the Internal Rules, the Pre-Trial Chamber has jurisdiction over, *inter alia*, appeals against orders of the Co-Investigating Judges (Internal Rule 74) and applications to annul investigative action (Internal Rule 76(2)).¹⁰⁰ The grounds for appeal provided for in Internal Rule 74 differ for each of the parties, with the Co-Prosecutors explicitly retaining much broader powers of appeal than the defence or civil parties.¹⁰¹ Addressing this procedural difference between the

⁹⁵ *Ibid.*, Opinion of Judges Prak Kimsan, NeyThol and Huot Vuthy, §§ 295-302.

⁹⁶ *Ibid.*, §§ 31-37; Case 001 Decision on Appeal Against Closing Order, *supra* note 30, §§ 41-42.

⁹⁷ Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Material Drive, *Nuon Chea et al.* (Case 002), D164/4/13, PTC, 18 November 2009, § 24.

⁹⁸ *Ibid.*, § 25.

⁹⁹ *Ibid.*

¹⁰⁰ See also Internal Rule 73.

¹⁰¹ The Co-Prosecutors can appeal all orders of the Co-Investigating Judges, whereas the defence and civil parties are limited to appealing a list of orders and decisions specifically enumerated in the Internal Rules (Internal Rule 74).

parties, the Pre-Trial Chamber noted that such differences are not a violation of the principle of equality of arms *per se*; Internal Rule 21 exists to safeguard the rights of all parties; and it was ‘clearly the intent of drafters to provide differing procedural rights to appeal to the parties under Internal Rule 74’.¹⁰² However, in practice, these broader appeal capabilities represent *another* distinct procedural advantage for the Co-Prosecutors over the defence.¹⁰³ For example, when appealing closing orders, the Co-Prosecutors have been able to appeal issues related to the contours of crimes,¹⁰⁴ whereas the defence have not.¹⁰⁵

Common to all parties is the power to appeal Co-Investigating Judges’ orders that refuse requests for investigative action.¹⁰⁶ However, the Pre-Trial Chamber has been largely deferential to the discretion of the Co-Investigating Judges when it comes to investigative action, finding that ‘the Co-Investigating Judges are in a best position to assess the opportunity of conducting a requested investigative action in light of their overall duties and their familiarity with the case files’.¹⁰⁷ Also, while not strictly provided for in the Internal Rules, the Pre-Trial Chamber has recognised that it has inherent powers to review issues of procedural fairness.¹⁰⁸

Significantly, the Pre-Trial Chamber has the power to review closing orders on appeal. In such circumstances, the Pre-Trial Chamber has found that it may ‘investigate the case by itself’ and ‘Internal Rule 79(1) suggests that the Pre-Trial Chamber has the power to issue a new or revised Closing Order that will serve as basis for the trial’.¹⁰⁹ Essentially, when seized of appeals against closing orders, be they either dismissal orders or indictments, the Pre-Trial Chamber has the final word on the outcome of investigations with the power to reverse the findings of the Co-Investigating Judges on whether an accused should be sent to trial or to amend the charges against

¹⁰² Case 004/2 Considerations on Appeal of Closing Orders, *supra* note 26, § 143.

¹⁰³ In addition to the power to conduct preliminary investigations, see *supra* Section 3.A.

¹⁰⁴ Case 004/1 Considerations on Appeal of Closing Order, *supra* note 69, §§ 26, 255-263, 270-274.

¹⁰⁵ Case 004/2 Considerations on Appeal of Closing Orders, *supra* note 26, §§ 143-147, 157-161; Decision on Ieng Sary’s Appeal Against the Closing Order, *Nuon Chea et al.* (Case 002), D427/1/30, PTC, 11 April 2011, §§ 44-46. The Pre-Trial Chamber found that the defence may not challenge the contours of crimes and modes of liability in pre-trial appeals because these are matters to be addressed at trial. It is unclear why this rationale should not apply equally to appeals from both the Co-Prosecutors and defence.

¹⁰⁶ Internal Rules 73, 74.

¹⁰⁷ Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Material Drive, *supra* note 97, § 25.

¹⁰⁸ Decision on Ao An’s Urgent Request for Redaction and Interim Measures, *supra* note 78, § 6; Decision on Appeals by Nuon Chea and Ieng Thirith Against the Closing Order, *Nuon Chea et al.* (Case 002), D427/2/15, PTC, 15 February 2011, § 71.

¹⁰⁹ Case 004/1 Considerations on Appeal of Closing Order, *supra* note 69, § 22; Case 001 Decision on Appeal Against Closing Order, *supra* note 30, §§ 40-42.

the accused. This is interesting in light of the Pre-Trial Chamber's otherwise deferential posture towards the Co-Investigating Judges' authority over the investigation and its position that it has no investigative powers, which one might consider necessary to 'investigate the case by itself'.¹¹⁰

On the face of it, the judicial oversight of investigations provided by the Pre-Trial Chamber seems positive for the protection of fair trial rights because it strengthens impartiality and allows a panel of judges to ensure that investigative activities are carried out correctly. However, the Pre-Trial Chamber's supermajority rule and the presumption of continuity unfortunately undermine its ability to take action against fair trial violations and, in fact, are in tension with fair trial principles.

D. The Role of the Defence in Investigations

The right to effective representation is a fundamental fair trial right enshrined in both international¹¹¹ and ECCC law.¹¹² It applies throughout all stages of criminal proceedings, from the beginning of the investigation up to and including the final appeal.¹¹³ Corollaries of this right include the right to adequate time and facilities to prepare one's defence and the equality of arms principle.¹¹⁴ The right to representation is especially important during the pre-trial stage when 'an accused often finds himself in a particularly vulnerable position' and '[i]n most cases, this particular vulnerability can only be properly compensated for by the assistance of a lawyer'.¹¹⁵ Effective representation requires the ability to actually participate in proceedings. At the ECCC, the defence encountered two main issues regarding participation during the investigation stage: the question of when they could gain access to the case file and their limited role in investigations.

As to the first matter, in Cases 003 and 004 there has been litigation on the issue of when the defence should gain access to the case file.¹¹⁶ Upon being appointed, defence lawyers in these cases requested access to the case file with a view to effectively representing their clients' interests in the ongoing investigations. However, the International Co-Investigating Judge denied this access until the suspects were formally charged, arguing that a difference existed in the Internal

¹¹⁰ *Ibid.*

¹¹¹ Art. 14(3)(d) ICCPR; General Comment No. 32, *supra* note 42, §§ 10, 37-38.

¹¹² Internal Rule 21; Art. 13 Agreement.

¹¹³ UN Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 27 August-7 September 1990, §1.

¹¹⁴ Art. 14 (1), (3)(b) ICCPR; General Comment No. 32, *supra* note 42, §§ 7-14.

¹¹⁵ *Salduz v. Turkey*, ECtHR (2008), Appl. No. 36391/02, § 54.

¹¹⁶ See e.g. Case 004/2 Considerations on Access to the Case File, *supra* note 41; Decision on [REDACTED] Appeal Against the Co-Investigating Judges' Constructive Denial of [REDACTED] Request to Access the Case File and to Participate in the Judicial Investigation, *Meas Muth and Sou Met* (Case 003), D87/2/3, PTC, 9 September 2014.

Rules between ‘suspects’ and ‘charged persons’, with suspects not yet being a party to the proceedings.¹¹⁷ On appeal, the Pre-Trial Chamber’s two international judges found that the International Co-Investigating Judge committed an error of law in finding the defendants were not charged persons within the definition of the Internal Rules.¹¹⁸ This minority of judges noted that ‘affording [the defendant] the opportunity to participate in the investigation and to have access to the case file, subject to possible limitations, is necessary, at this stage, to protect his fundamental right to a fair trial’.¹¹⁹ However, the international judges also noted the possibility of restricting access to the case file so long as such restrictions served a legitimate interest and the defendant was not deprived of a fair hearing in light of the entirety of proceedings. On this basis they stated that they would have remitted the matter back to the Co-Investigating Judges, for them decide in accordance with the law.¹²⁰ The Pre-Trial Chamber’s three national judges agreed with the International Co-Investigating Judge that the suspects were not yet formally charged.¹²¹

The defence teams in Cases 003 and 004 did not have access to the case file for up to six years of the judicial investigations from the filing of the introductory submissions until formal charging. Upon gaining access to the case files, defence teams at the ECCC discovered that parts of the investigation they wished to engage with had already begun or ended, without their input and oversight.¹²² Arguably, even if no fair trial rights were manifestly violated, the overall legitimacy and quality of the investigation process could have been strengthened if defence teams had been given earlier access to the case file, in advance of charging. Such access would have afforded the defence greater participation in the Co-Investigating Judges’ investigations, allowing them to contribute to the investigation and ensure that investigative activities adhered to fair trial rights standards. Moreover, given that the Co-Prosecutors maintained access to the case file following their preliminary investigation, the defence’s extended denial of access arguably violated the equality of arms principle.¹²³

¹¹⁷ Decision on the [REDACTED] Defence Requests to Access the Case File and Take Part in the Judicial Investigation, *Ao An et al.* (Case 004), D121/4, International Co-Investigating Judge, 31 July 2013, §§ 36-44, 61-62.

¹¹⁸ Case 004/2 Considerations on Access to the Case File, *supra* note 41, Opinion of Judges Chang-Ho Chung and Rowan Downing, §§ 17, 25-29.

¹¹⁹ *Ibid.*, § 25.

¹²⁰ *Ibid.*, § 29.

¹²¹ *Ibid.*, Opinion of Judges Prak Kimsan, Ney Thol and Huot Vuthy, §§ 8, 16.

¹²² See e.g. Considerations on Appeal Against Decision on [REDACTED] Fifth Request for Investigative Action, *Ao An et al.* (Case 004), D260/1/1/3, 16 June 2016, Opinions of Judges Beauvallet and Baik, §§ 39, 40.

¹²³ See *Matyjek v. Poland*, ECtHR (2007), Appl. No. 38184/03, §§ 55-65; *Moiseyev v. Russia*, ECtHR (2008), Appl. No. 62936/00, §§ 213-218

Second, the defence at the ECCC plays a limited role during the investigation stage. This is characteristic of an inquisitorial system, and in this regard the ECCC reflects a conventional version of such a system following the legal tradition of Cambodia. As such, '[t]he ECCC's procedural framework does not envisage full-fledged party-driven investigations such as those common to adversarial systems'.¹²⁴ The defence may oversee and engage with the Co-Investigating Judges' investigations but may not conduct their own investigations or interview witnesses. According to the Co-Investigating Judges:

'[b]efore this Court, the power to conduct judicial investigations is assigned solely to the two independent Co-Investigating Judges and not to the parties. There is no provision which authorises the parties to accomplish investigative action in place of the Co-Investigating Judges, as may be the case in other procedural systems.'¹²⁵

Consequently, the Supreme Court Chamber made the interesting, but somewhat superficial, finding that it 'sees no statutory basis or compelling practical reasons for prohibiting the Defence from undertaking actions aimed at discovering relevant evidence, as long as such conduct does not lead to witness tampering or any other distortion of evidence',¹²⁶ suggesting that defence teams could play a more active role in investigations. However, this statement was tempered with an ensuing reference to 'limited action' to satisfy investigative requests (the *status quo* position of the Co-Investigating Judges) and was made just months before the final judicial investigations ended.¹²⁷ As such, it is unclear what practical benefit, if any, this finding afforded to defence teams wishing to have a greater investigative role.

As discussed above, ECCC law highlights several ways in which the defence can engage with the investigation.¹²⁸ In practice, the principal means by which the defence has attempted to interact with investigations is through requests for investigative action (Internal Rules 55(10) and 58(6)),

¹²⁴ Appeal Judgement, *Nuon Chea and Khieu Samphan* (Case 002/1), F36, Supreme Court Chamber, 23 November 2016, § 248 (Case 002/1 Appeal Judgment).

¹²⁵ Order Issuing Warnings Under Rule 38, *supra* note 21, § 8.

¹²⁶ Case 002/1 Appeal Judgment, *supra* note 124, § 249.

¹²⁷ *Ibid.* The appellate functions of the ECCC Supreme Court Chamber and its contribution to appeal case law are discussed, in this Symposium, in S. Vasiliev, 'ECCC Appeals: Appraising the Supreme Court Chamber's Interventions'.

¹²⁸ See *supra* Section 3.B.

which the Co-Investigating Judges have discretion to accept or reject.¹²⁹ The Pre-Trial Chamber has found that it is implicit from the text of Internal Rule 55(10), when read in conjunction with Internal Rule 58(6), that a party who files a request for investigative action ‘shall identify specifically the investigative action requested and explain the reasons why he or she considers the said action to be necessary for the conduct of the investigation’.¹³⁰ This necessitates that cumulative requirements of specificity and *prima facie* relevance need to be met, and the Co-Investigating Judges may ‘reject a request that satisfies only one of the conditions’.¹³¹ To this end, the defence can make ‘preliminary inquiries as are strictly necessary for the effective exercise of their right to request investigative action’.¹³² In ECCC jurisprudence, preliminary inquiries have included a review of public sources, contacting states to inquire as to the existence of relevant materials and seeking copies of such materials, and contacting individuals to inquire whether they are in possession of documents.¹³³ Conversely, the defence has been prohibited from conducting inquiries of non-public sources, questioning witnesses (*inter alia* about crime sites or previous witness statements), conducting site visits with witnesses as guides and approaching persons who have not been previously contacted by the Co-Investigating Judges.¹³⁴

Defence teams have argued that the cumulative requirements for requests for investigative action coupled with the inability of parties to conduct investigations beyond ‘preliminary inquiries’ have prevented them from effectively participating in the investigation, in contradiction of ECCC law.¹³⁵ Limited to preliminary inquiries only, it can be difficult for the defence to sufficiently satisfy the cumulative requirements of specificity and relevance, which in turn enables the Co-Investigating Judges to easily reject requests for investigative action. Indeed, it would seem paradoxical that defence teams are required to submit requests for investigative action *in lieu* of being able to conduct their own investigations, only to find that the strict interpretation of the

¹²⁹ Decision on the Appeal Against the ‘Order on the Request to Place on the Case [File] the Documents Relating to Mr. Khieu Samphan’s Real Activity’, *Nuon Chea et al.* (Case 002), D370/2/11, PTC, 7 July 2010, § 13, recalling that ‘an order by the Co-Investigating Judges on a request for investigative action is discretionary’.

¹³⁰ Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Material Drive, *supra* note 97, § 44.

¹³¹ Decision on the Appeal Against the ‘Order on the Request to Place on the Case [File] the Documents Relating to Mr. Khieu Samphan’s Real Activity’, *supra* note 129, § 22.

¹³² Order issuing Warnings Under Rule 38, *supra* note 21, § 8.

¹³³ Decision on Meas Muth’s Request for the Co-Investigating Judges to Clarify whether the Defence May Contact Individuals Including [REDACTED], *supra* note 66, §§ 11, 12.

¹³⁴ *Ibid.*

¹³⁵ Decision on Appeal Against Decision on [REDACTED] Seventh Request for Investigative Action, *Ao An* (Case 004/2), D277/1/1/4, 3 April 2017, §§ 13, 22-23.

requirements for submitting said requests often necessitate the very investigative acts which the defence teams are prohibited to undertake. This has led to some frustration for defence teams at the ECCC, who attest that, in practice, the treatment of requests for investigative action has led to the exclusion of the defence from the investigation.¹³⁶ Despite the frustrations voiced by defence teams, the Pre-Trial Chamber has consistently held that the Co-Investigating Judges are solely in charge of pre-trial investigations and have a wide margin of discretion when it comes to determining how such investigations are conducted.¹³⁷

In sum, the defence has thus far played a limited role in ECCC investigations. Arguably, the practice of excluding the defence from participating in the investigation renders the participatory rights afforded in the Internal Rules illusory and may be at odds with international human rights law, including the right to effective representation and adequate time and facilities to prepare one's defence. The above must also be understood in the context of the Co-Prosecutors' abilities to conduct pre-trial investigations and appeal the Co-Investigating Judges' orders and decisions on a broader range of grounds than the defence, calling into question the equality of arms principle.

4. Conclusion

This article aims to answer the question of whether the position of the defence in ECCC investigations is in conformity with fair trial norms and sufficiently robust to ensure high-quality fact-finding. To date, the position of the defence in ECCC investigations has not received significant attention in either the literature or available case law. Although this assessment may be somewhat premature given that matters relating to the fairness of investigations are likely to be addressed in future Pre-Trial Chamber decisions on the closing orders or relitigated at trial in Cases 003 and 004, should there ever be trials, areas of concern can already be identified.

To begin this assessment, criticism of the ECCC's investigations should not be taken as a complete condemnation of the inquisitorial process or even of the ECCC's performance to date. There is no universal template for investigations in inquisitorial systems. Moreover, there is indeed some merit in having judges more involved in the pre-trial stage of international criminal

¹³⁶ *Ibid.*; Defence Appeal Against the Closing Order, *Nuon Chea et al.* (Case 002), D427/4/3, Khieu Samphan Defence, 18 October 2010, § 101; Ciorciari and Heindel, *supra* note 1, at 388-391.

¹³⁷ Decision on Appeal Against Decision on [REDACTED] Seventh Request for Investigative Action, *supra* note 135, §§ 10-14; Decision on the Appeal Against the 'Order on the Request to Place on the Case [File] the Documents Relating to Mr. Khieu Samphan's Real Activity', *supra* note 129, § 13.

proceedings.¹³⁸ The ECCC's mixed record of inquisitorial investigations does indicate that there are certain benefits arising from stronger judicial involvement in and oversight of investigations. Although other international courts and tribunals have been primarily adversarial at the investigation stage, at the ICC, judges have been gaining a more prominent role during the pre-trial phase. The ICC pre-trial chamber can, for example, exercise authority and oversight over investigations.¹³⁹ While far from being judicially-led investigations, the ICC's legal framework allows its pre-trial chamber to play an active role in the collection of evidence, and recently Article 56 of the Rome Statute was used by the chamber to hear witnesses prior to trial.¹⁴⁰ An even stronger judicial role in investigations at the ICC could improve oversight of arrest warrants and help to rectify the witness tampering which has plagued that court.

Nevertheless, despite these benefits, the research question of this article must be answered in the negative. To date, the practice of the ECCC has shown that not enough consideration is being given to the position and role of the defence in these investigations. The matter is further exacerbated by the judicial stalemate in Cases 003 and 004, in which appeals by the defence on issues of fairness cannot be properly considered because of the effects of the supermajority rule. From a defence perspective, the main problem in the law and practice of judicial investigations at the ECCC is that defence involvement is too late and too little.

As to the timing of their involvement, the defence has been denied access to the case file, often to their detriment, until after charging (when the Co-Prosecutors' preliminary investigations have ended, and the Co-Investigating Judges' investigations have advanced significantly). The ability of the defence to participate effectively in investigations comes 'too late'. It has proven very difficult, if not impossible, for the defence to meaningfully oversee and engage with investigations when they are *faits accomplis*. In the context of the ECCC, there is no reason why the defence

¹³⁸ G. Sluiter, 'Key Reforms for the Next Decade of the ICC - Towards a Stronger Judicial Role in the Investigations and a More Robust System of Enforcing State Cooperation', in *Anniversary Question: In the Rome Statute's third decade, what key reforms could make the international criminal justice project stronger, more efficient, and more effective?*, ICC Forum May 2019, available online at <https://iccforum.com/anniversary#Sluiter> (last accessed 24 September 2019).

¹³⁹ Art. 57(3) ICCSt.

¹⁴⁰ Decision on the 'Second Prosecution application to the Pre-Trial Chamber to preserve evidence and take measures under article 56 of the Rome Statute', *Ongwen* (ICC-02/04-01/15-316-Red), PTC II, 23 March 2016, §§ 10-16; Decision on Request to Admit Evidence Preserved Under Article 56 of the Statute, *Ongwen* (ICC-02/04-01/15-520), TC IX, 10 August 2016, §§ 1, 15, confirming that the use of such power by ICC pre-trial chambers is not in violation of internationally recognised human rights. See also G. Sluiter, 'Should We Give the Investigating Judge a Chance in International Criminal Proceedings', *Amsterdam Law School Legal Studies Research Paper No. 2019-29* (6 December 2018), at 13.

could not have been given access to the case file immediately upon initiation of the judicial investigations.

In addition, the defence's role in the investigations has been 'too little'. Contrary to what is common practice at other international criminal tribunals, the defence has no investigative rights or budget. This handicap has not been compensated for by any significant flexibility from the Co-Investigating Judges in entertaining and granting defence requests for investigative action. On the contrary, a rigid standard of specificity and relevance has been applied, which the defence teams can hardly ever meet without being in a position to conduct their own investigations.

Moreover, the defence's 'too little' involvement has repercussions on efficiency and the position of victims in the proceedings. It is hard to grasp that in modern day investigations the defence would not be invited to participate in some witness interrogations during judicial investigations; this would satisfy the right to cross-examination early on in the proceedings and would avoid the necessary duplication of work at trial, while also sparing certain witnesses the ordeal of being interrogated again on the same facts at trial.

Hanging as a shadow over the 'too late, too little' critique is the comparison between the role of the defence in ECCC investigations and that of the Co-Prosecutors. Generally, the prosecution has a marked advantage over defence teams, at both the ECCC and other international criminal tribunals, in that it has greater resources and can develop an institutional memory and experience from its involvement throughout all cases. What is problematic from an equality of arms perspective are the marked *procedural* advantages that the prosecution has over the defence throughout the investigations. Procedural advantages that the prosecution has at the ECCC include: (i) important preliminary investigative powers that can significantly shape the investigations, while the defence has none; (ii) continuing access to the case file, thus being in a permanent position of developing the prosecution's case, while the defence has only been given access to the case file after charging; and (iii) considerably broader appeal rights in respect of the Co-Investigating Judges' orders.

In and of themselves, these concerns are serious given their impact on the right to a fair trial, but there are also detrimental effects on the quality of fact-finding. Stronger involvement of the defence in the judicial investigations would compel all actors, especially the judges, to seriously consider unexplored facts and alternate narratives in cases that often involve vast amounts of evidence and pressure to prosecute. While this may trigger additional work, the benefits are

tangible, especially given that the ideal of objective and impartial investigations is a fallacy.¹⁴¹ However, there has been little support for an increased role of the defence in ECCC investigations.

International criminal cases come laden with immense pressure to prosecute and extensive evidence related to the alleged crimes, and thus a strong voice for the accused is vital to maintaining fairness in proceedings, starting with the investigative phase. This is not to say that judicially-led investigations should have no place in international criminal law, but they should be organised in such a way that allows for an effective and meaningful participation of the defence.

¹⁴¹ Rapport du Comité de réflexion sur la justice pénale, *supra* note 61, at 7.