

មជ្ឈមណ្ឌលឯកសារកម្ពុជា

**The Duty to Provide Public Information  
during ECCC Judicial Investigations**

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## I. INTRODUCTION

On April 29, 2011, the Co-Investigating Judges of the Extraordinary Chambers in the Courts of Cambodia (ECCC) publicly announced the close of the judicial investigation into Case 003.<sup>1</sup> This announcement signaled the end of an investigation that began when the Co-Investigating Judges received the Introductory Submission on September 7, 2009,<sup>2</sup> over the course of which the Co-Investigating Judges and their staff appeared to do “little more than review information in their files.”<sup>3</sup> The International Co-Prosecutor stated publicly that he believed that the crimes alleged in the Case 003 Introductory Submission had “not been fully investigated.”<sup>4</sup> Indeed, the Case 003 investigation is reported to have lacked “basic investigative acts” such as interviews with suspects and witnesses and field investigations.<sup>5</sup> Concomitantly, the Co-Investigating Judges did not provide any public information about the scope of the investigation — such as the identities of the suspects or information about alleged crime sites — prior to closing the judicial investigation, thus depriving potential Civil Parties of the information necessary to exercise their rights to participate in the investigation and related proceedings.

The ECCC enables victim participation as Civil Parties to the Court’s proceedings.

The role for victims as parties is provided for by the Internal Rules, and emphasized in the

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<sup>1</sup> Statement from the Co-Investigating Judges, Extraordinary Chambers in the Courts of Cambodia (Apr. 29, 2011), *available at*

[http://www.eccc.gov.kh/sites/default/files/media/ECCC%20OCIJ%20%2029%20Apr%202011 \(Eng\).pdf](http://www.eccc.gov.kh/sites/default/files/media/ECCC%20OCIJ%20%2029%20Apr%202011%20(Eng).pdf).

<sup>2</sup> Order on International Co-Prosecutor’s Public Statement Regarding Case File 003, Case No. 003/07-09-2009-ECCC-OCIJ, ¶ 5 (Office of the Co-Investigating Judges, May 18, 2011), *available at* [http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D14\\_EN.PDF](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D14_EN.PDF).

<sup>3</sup> OPEN SOCIETY JUSTICE INITIATIVE, RECENT DEVELOPMENTS AT THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA: JUNE 2011 UPDATE 7 (2011), *available at* [http://www.soros.org/initiatives/justice/articles\\_publications/publications/cambodia-eccc-20110614/cambodia-eccc-20110614.pdf](http://www.soros.org/initiatives/justice/articles_publications/publications/cambodia-eccc-20110614/cambodia-eccc-20110614.pdf). For more information about the Case 003 judicial investigation and related ECCC and international standards, see Tatiana Sainati, The Scope of the Co-Investigating Judges’ Duty to Investigate (July 2011) (Documentation Center of Cambodia Legal Associate Report), *available at* [http://www.dccam.org/Abouts/Intern/Scope\\_of\\_CIJ\\_s\\_Duty\\_to\\_Investigate--TSainati.pdf](http://www.dccam.org/Abouts/Intern/Scope_of_CIJ_s_Duty_to_Investigate--TSainati.pdf).

<sup>4</sup> Press Release: Statement by the International Co-Prosecutor Regarding Case File 003, Extraordinary Chambers in the Courts of Cambodia (May 9, 2011), at 2, *available at* [http://www.eccc.gov.kh/sites/default/files/media/ECCC%20INT-OCP%209%20May%202011 %20 ENG\\_0.pdf](http://www.eccc.gov.kh/sites/default/files/media/ECCC%20INT-OCP%209%20May%202011%20ENG_0.pdf).

<sup>5</sup> OPEN SOCIETY JUSTICE INITIATIVE, *supra* note 3, at 11.

rhetoric and action of various bodies of the ECCC. Civil Parties are a fundamental element of the French criminal justice system, upon which the Cambodian criminal justice system and the ECCC, in turn, are modeled, and international standards and jurisprudence support the values underlying robust victim participation. This paper will focus on the absence of public information throughout the Case 003 judicial investigation, which prevented victims from participating as Civil Parties.

Today, the Court's duty to provide basic public information is immediately relevant to the ongoing Case 004 investigation. In an attempt to ensure a "reasonable opportunity" for victims to file Civil Party applications in Case 004, the International Co-Prosecutor filed a request on July 28, 2011 asking the Co-Investigating Judges to "issue a public statement by 5 August 2011 describing the crimes and offenses under investigation in Case 004."<sup>6</sup>

Nonetheless, the Co-Investigating Judges have remained silent. The failure to provide necessary information about the ongoing judicial investigation effectively precludes Civil Party participation, violates the participatory rights of victims, factually weakens the judicial investigation, and undermines the Court's commitment to the victims it purports to serve.

## **II. THE CASE 003 JUDICIAL INVESTIGATION**

Throughout the Case 003 judicial investigation, the Co-Investigating Judges have been silent about the scope of the investigation, and have never officially released the names of suspects or information about alleged sites or crimes under investigation. A press release issued by the Office of the Co-Investigating Judges on November 30, 2010, more than one

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<sup>6</sup> Press Release: Statement by the International Co-Prosecutor Regarding Case File 004, Extraordinary Chambers in the Courts of Cambodia (Aug. 5, 2011).

year after the start of the judicial investigation, describes the suspects as “unnamed.”<sup>7</sup> The only additional public statement from the Co-Investigating Judges came in the form of a press release from the Office of the Co-Investigating Judges on February 2, 2011. This “update” said only that the Co-Investigating Judges were reviewing case files — especially files from Cases 001 and 002 — and that no field investigations were being conducted at that time.<sup>8</sup> Even in announcing the close of the investigation, the Co-Investigating Judges provided no information about the scope of the investigation or the deadline for Civil Party applications or for Civil Party requests for additional investigative actions.<sup>9</sup>

It was not until May 9, 2011, when International Co-Prosecutor Andrew Cayley issued a press release naming alleged crime sites under investigation, that the public officially learned any specific information about the Case 003 investigation.<sup>10</sup> Cayley announced that five suspects were under investigation for Cases 003 and 004 — although he did not name them — and listed the alleged crimes for Case 003.<sup>11</sup> He also requested a six-week extension of the deadline for filing Civil Party applications and called for additional investigative actions.<sup>12</sup> Importantly, Cayley reminded victims of the existing deadline for Civil Party

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<sup>7</sup> Press Release: Statement regarding legal counsel, Extraordinary Chambers in the Courts of Cambodia (Nov. 30, 2010), *available at* [http://www.eccc.gov.kh/sites/default/files/media/ECCC\\_30\\_Nov\\_2010\\_\(Eng\).pfd.pdf](http://www.eccc.gov.kh/sites/default/files/media/ECCC_30_Nov_2010_(Eng).pfd.pdf).

<sup>8</sup> Statement from the Co-Investigating Judges, Extraordinary Chambers in the Courts of Cambodia (Feb. 2, 2011), *available at* [http://www.eccc.gov.kh/sites/default/files/media/ECCC\\_OCIJ\\_2\\_Feb\\_2011\(Eng\).pdf](http://www.eccc.gov.kh/sites/default/files/media/ECCC_OCIJ_2_Feb_2011(Eng).pdf).

<sup>9</sup> Notice of Conclusion of Judicial Investigation, Case No. 003/07-09-2009-ECCC-OCIJ (Office of the Co-Investigating Judges, Apr. 29, 2011) (providing only once sentence, stating simply, “The Co-Investigating Judges hereby: Notify the Co-Prosecutors that they consider the investigation has been concluded.”), *available at* [http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D13\\_EN.pdf](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D13_EN.pdf).

<sup>10</sup> *See* Press Release: Statement of the International Co-Prosecutor Regarding Case File 003, *supra* note 4. On April 1, 2011, Theary Seng issued a press release declaring her intention to file a Civil Party Application for Cases 003 and 004, and named suspects Meas Muth and Sou Met publicly for the first time. Press Release, Theary C. Seng, Theary C. SENG Files Civil Party Application in Case 003/004 against Khmer Rouge Military Commanders MEAS Muth and SOU Met at the Extraordinary Chambers (Apr. 1, 2011), *available at* [http://www.cambodiatribunal.org/sites/default/files/reports/civilparty003\\_04\\_pressrelease1april2011.pdf](http://www.cambodiatribunal.org/sites/default/files/reports/civilparty003_04_pressrelease1april2011.pdf). Lars Olsen, the Court’s Legal Communications Officer, described Seng’s actions as “reckless” and stated: “The court will not be bullied into confirming or denying speculations about a confidential investigation.” Douglas Gillison, *Before Charges, Activist Cites Two in a Dormant KR Inquest*, CAMBODIA DAILY, Apr. 4, 2011, at 26.

<sup>11</sup> *See* Press Release: Statement of the International Co-Prosecutor Regarding Case File 003, *supra* note 4, at 1.

<sup>12</sup> *Id.* at 1-2.

applications, which he determined under the Rules to be May 18, 2011.<sup>13</sup> In the time between Cayley's press release and the originally stated Civil Party application deadline, 316 individuals submitted Civil Party applications.<sup>14</sup> The Co-Investigating Judges reported that they received a total of 318 Civil Party applications before the May 18 deadline;<sup>15</sup> this suggests that only two Civil Party applications were submitted before the International Co-Prosecutor's public statement, which came *after* the stated conclusion of the judicial investigation.

The Co-Investigating Judges responded to the press release with an official request demanding that Cayley retract his statement,<sup>16</sup> and an order rejecting his requests for further investigative action based on a technicality.<sup>17</sup> The Co-Investigating Judges refused Cayley's request for an extension to the Civil Party application deadline, but acted on their own authority to extend the deadline by three weeks.<sup>18</sup> Their announcement, however, came one day before their newly established deadline. Thus, in effect, the extension gave Civil Party applicants one day to learn about the Co-Investigating Judges' order and apply. There is no

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<sup>13</sup> *Id.* at 2. See also *Case 003 FAQ*, ECCC NEWSLETTER #3, 2011 (Public Affairs Office, Extraordinary Chambers in the Courts of Cambodia), May 2011 (confirming the May 18, 2011, deadline for Case 003 Civil Party Applications), available at <http://www.cambodiatribunal.org/images/CTM/eccc%20newsletter%203%202011%20case%20003%20faq.pdf>.

<sup>14</sup> OPEN SOCIETY JUSTICE INITIATIVE, *supra* note 3, at 15.

<sup>15</sup> Statement from the Co-Investigating Judges, Extraordinary Chambers in the Courts of Cambodia (May 30, 2011), available at <http://www.eccc.gov.kh/sites/default/files/media/ECCC%20OCIJ-30%20May%202011-ENG.pdf>.

<sup>16</sup> Order on International Co-Prosecutor's Public Statement Regarding Case File 003, Case No. 003/07-09-2009-ECCC-OCIJ, ¶ 9 (Office of the Co-Investigating Judges, May 18, 2011), available at [http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D14\\_EN.PDF](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D14_EN.PDF).

<sup>17</sup> See Decision on Time Extension Request and Investigative Requests by the International Co-Prosecutor Regarding Case 003, Case No. 003/07-09-2009-ECCC/OCIJ, (Office of the Co-Investigating Judges, June 7, 2011) (rejecting the International Co-Prosecutor's requests as invalid because he acted alone), available at <http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/5-D20-3-EN-Redacted.pdf>; see also Press Release: Statement from the Co-Investigating Judges Related to Case 003 Requests from the International Co-Prosecutor, Extraordinary Chambers in the Courts of Cambodia (June 7, 2011), available at [http://www.eccc.gov.kh/sites/default/files/media/ECCC%20OCIJ%207%20June%202011\(Eng\).pdf](http://www.eccc.gov.kh/sites/default/files/media/ECCC%20OCIJ%207%20June%202011(Eng).pdf).

<sup>18</sup> Press Release: Statement from the Co-Investigating Judges Related to Case 003 Requests from the International Co-Prosecutor, *supra* note 17.

public information indicating that any additional Civil Party applications were submitted as a result of the extension.<sup>19</sup>

### III. VICTIMS' ROLE AS CIVIL PARTIES DURING JUDICIAL INVESTIGATIONS

Victims have the right to participate as Civil Parties at the ECCC.<sup>20</sup> Civil Party participation is the primary and fundamental means by which victims are intended to meaningfully engage with the Tribunal's proceedings. The Preamble to the 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 describes the Court's "pursuit of justice and national reconciliation."<sup>21</sup> The Pre-Trial Chamber has emphasized that this core principle guides the Court to "pay special attention and assure a meaningful participation for the victims of the crimes committed as part of its pursuit for national reconciliation."<sup>22</sup> Civil Party action before the ECCC has two primary purposes:<sup>23</sup> first, participation as Civil Parties enables victims to seek collective and moral reparations;<sup>24</sup> additionally, Civil Parties are able to participate in criminal proceedings by supporting the prosecution.<sup>25</sup>

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<sup>19</sup> The author could not find any public information about Civil Party applications submitted between June 7, 2011, the date of the announcement of the application deadline's extension, and June 8, 2011, the extended deadline.

<sup>20</sup> See ECCC Internal Rule 23 (describing the general principles of victim participation as civil parties before the ECCC); ECCC Internal Rules 23bis(1) and (2) (outlining the process by which victims who meet the necessary criteria are able to join the proceedings as Civil Parties).

<sup>21</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 pmb. ¶ 2, June 6, 2003 [hereinafter Agreement], available at <http://www.unhcr.org/refworld/docid/4ba8e2ea9dc.html>.

<sup>22</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, ¶ 65 (Pre-Trial Chamber, June 24, 2011), available at [http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D411\\_3\\_6\\_EN.PDF](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D411_3_6_EN.PDF).

<sup>23</sup> See *id.* ¶ 96.

<sup>24</sup> ECCC Internal Rule 23(1)(b).

<sup>25</sup> ECCC Internal Rule 23(1)(a).

## **A. Civil Parties Participate in Judicial Investigations to Seek Reparations**

In October, 2009, the ECCC Trial Chamber affirmed that in pursuit of reparation claims, “Civil Parties have the right to participate in proceedings against those responsible for crimes within the jurisdiction of the ECCC...”<sup>26</sup> Victims can exercise their right to Civil Party participation from the earliest stages of judicial proceedings, as affirmed by the Pre-Trial Chamber in 2008, which stated that the Internal Rules “ make it clear that Civil Parties have active rights to participate starting from the investigative phase of the procedure.”<sup>27</sup>

The process for Civil Party participation at the ECCC, detailed in the Court’s Internal Rules, requires victims to apply to become Civil Parties within fifteen days after notification of the conclusion of the judicial investigation,<sup>28</sup> and a successful Civil Party application demands the inclusion of certain information about the ongoing investigations to which victims can connect the specifics of their individual circumstances.<sup>29</sup> Furthermore, the Internal Rules envision and provide for Civil Party participation at the pre-trial stage,<sup>30</sup> granting Civil Parties the right to request investigative acts<sup>31</sup> and appeal certain pre-trial decisions.<sup>32</sup>

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<sup>26</sup> Decision On Co-Lawyers’ Joint Request for a Ruling on the Standing of Civil Party Lawyers to Make Submissions on Sentencing and Directions Concerning the Questioning of the Accused, Experts and Witnesses Testifying on Character, Case No. 001/18-07-2007/ECCC/TC, ¶ 11 (Trial Chamber, Oct. 9 2009), *available at* [http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E72\\_3\\_EN.pdf](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E72_3_EN.pdf).

<sup>27</sup> Decision On Civil Party Participation in Provisional Detention Appeals, Case No. 002/19-09-2007/ECCC/OCIJ (PTC01), ¶ 36 (Pre-Trial Chamber, Mar. 20, 2008), *available at* [http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/PTC\\_decision\\_civil\\_party\\_nuon\\_chea\\_C11\\_53\\_EN.pdf](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/PTC_decision_civil_party_nuon_chea_C11_53_EN.pdf).

<sup>28</sup> ECCC Internal Rule 23*bis*(2) (stating that victims must apply to become Civil Parties no later than fifteen days after the Co-Investigating Judges notify the parties of the conclusion of the judicial investigation).

<sup>29</sup> ECCC Internal Rule 23*bis*(1)(b). *See also* discussion *infra* Parts IV.A.2, IV.B.1.

<sup>30</sup> *See* ECCC Internal Rule 23(3) (“At the pre-trial stage, Civil Parties participate individually.”).

<sup>31</sup> ECCC Internal Rule 59(5). *See also* discussion *infra* Parts III.B, IV.A.3-4.

<sup>32</sup> ECCC Internal Rule 74(4).

Moreover, French criminal procedure — upon which Cambodian criminal procedure and that of the ECCC are modeled<sup>33</sup> — provides for robust Civil Party participation during judicial investigations. Victims in French criminal proceedings enjoy the same rights to participate in investigations as the suspects themselves, and recent reforms have strengthened their role.<sup>34</sup> Participation in judicial investigations is a fundamental aspect of a victim’s ability to seek reparations through the judicial process.

## **B. Civil Parties Support the Prosecution during Judicial Investigations**

Civil Party participation at the ECCC, as at other civil law-based courts, is predicated on the ability of Civil Parties to contribute to judicial investigations. Because Civil Party applications must “specify the alleged crime” or “show the guilt of the alleged perpetrator,”<sup>35</sup> they by their very nature support the prosecution as provided for in Rule 23(1)(a). In addition to providing potentially pertinent information in Civil Party applications, Civil Parties may also support the ongoing investigations through interviews or by requesting investigative acts that reveal information about the alleged crimes.<sup>36</sup> As the Trial Chamber noted, Civil Parties can help establish the truth, which is the overall goal of Cambodian criminal procedure.<sup>37</sup> Civil Parties might be uniquely positioned to offer certain information pertinent to ongoing investigations,<sup>38</sup> and their participation can bring to the Court “first-hand knowledge” about

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<sup>33</sup> See Decision On Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, *supra* note 22, ¶ 68 (noting that the ECCC Internal Rules are modeled after the Cambodian Procedural Code which was in turn modeled after French law); see also Agreement, *supra* note 21 art. 12(1) (“The procedure shall be in accordance with Cambodian law.”).

<sup>34</sup> Jacqueline Hodgson, *Suspects, Defendants and Victims in the French Criminal Process: The Context of Recent Reform*, 51 Int’l & Comp. L.Q. 781, 792 (2002); JACQUELINE HODGSON, FRENCH CRIMINAL JUSTICE: A COMPARATIVE ACCOUNT OF THE INVESTIGATION AND PROSECUTION OF CRIME IN FRANCE 31 (2005).

<sup>35</sup> ECCC Internal Rule 23bis(4).

<sup>36</sup> See ECCC Internal Rule 59 (providing for interviews of Civil Parties and describing the investigative acts that Civil Parts may request the Co-Investigating Judges to perform, including questioning witnesses, visiting sites, ordering expertise, or collecting other evidence).

<sup>37</sup> Decision On Co-Lawyers’ Joint Request for a Ruling on the Standing of Civil Party Lawyers to Make Submissions on Sentencing and Directions Concerning the Questioning of the Accused, *supra* note 26, ¶ 34.

<sup>38</sup> See Dissenting Opinions of Judge Lavergne, Decision On Co-Lawyers’ Joint Request for a Ruling on the Standing of Civil Party Lawyers to Make Submissions on Sentencing and Directions Concerning the

events and inform the Court about issues that are “directly relevant to the pre-trial proceedings.”<sup>39</sup> During the Case 002 judicial investigation, for example, Civil Parties provided the necessary information to add the crime of forced marriage to the Closing Order,<sup>40</sup> and assisted in adding an additional crime site to the investigation.<sup>41</sup>

Similarly, the French criminal justice system relies on Civil Parties to strengthen judicial investigations by pushing judges into the “vigorous investigation” of a case and “conquering the inertia of the prosecutor.”<sup>42</sup> For this reason, Civil Parties are often involved from the early stages of an investigation.<sup>43</sup> “The theory is that the investigating judge will be encouraged to do his duty in uncovering incriminating evidence by the civil party on the one hand, and exculpatory evidence by the defense on the other.”<sup>44</sup> French *parties civiles* have the same opportunities as the prosecutor to participate in the investigative stage of proceedings,<sup>45</sup> can request that investigative judges carry out investigative acts that they believe will assist in the discovery of the truth,<sup>46</sup> and may initiate investigative proceedings directly.<sup>47</sup> Thus, Civil

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Questioning of the Accused, *supra* note 26, ¶ 16 (stating that in some instances, Civil Parties might be best placed to describe the personality, character, or conduct of the accused given their personal knowledge.)

<sup>39</sup> Co-Prosecutor’s Response to an Application for Reconsideration of the Pre-Trial Chamber’s Decision Regarding a Civil Party’s Right Of Audience, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 03), ¶ 17 (Office of the Co-Prosecutors, July 17 2008), *available at* [http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/C22\\_I\\_61\\_EN.pdf](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/C22_I_61_EN.pdf).

<sup>40</sup> *See* Closing Order, Case No. 002/19-09-2007-ECCC-OCIJ, ¶ 861 (Office of the Co-Investigating Judges, Sept. 15, 2010), *available at* <http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D427Eng.pdf>; Decision On Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, *supra* note 22, ¶ 5.

<sup>41</sup> *See* Statement of the Co-Prosecutors, Extraordinary Chambers in the Courts of Cambodia (Mar. 28, 2008) (describing a Supplementary Submission based on information and input from victims and civil society regarding allegations of crimes committed at a Government of Democratic Kampuchea Security Center), *available at*

[http://www.eccc.gov.kh/sites/default/files/media/Supplementary\\_Submission\\_Press\\_Release\\_28\\_March\\_08\\_EN\\_G.pdf](http://www.eccc.gov.kh/sites/default/files/media/Supplementary_Submission_Press_Release_28_March_08_EN_G.pdf); *see also* Decision On Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, *supra* note 22, ¶ 3 (referencing a Supplementary Submission based on the contents of Civil Party applications received by the Co-Investigating Judges).

<sup>42</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, 820.

<sup>43</sup> *Id.*

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

<sup>45</sup> HODGSON, *supra* note 34, at 43.

<sup>46</sup> *Id.* at 125.

<sup>47</sup> *Id.* at 31.

Party participation in judicial investigations under the French system is fundamental to the success of an investigation, and Civil Parties complement and supplement the role of the prosecutors.

### **C. Information is Essential for Civil Party Participation in Judicial Investigations**

Victims must receive certain information during ongoing judicial investigations in order to seek reparations and support the prosecution through Civil Party participation in the proceedings. Without basic information about the ongoing judicial investigation, victims will be unable to connect their personal circumstances to the alleged crimes, as required by Rule 23 *bis* (1)(b), thus preventing their participation as Civil Parties, nor will they be able to contribute to the investigation through relevant Civil Party applications or by requesting certain investigative acts.

Although Internal Rule 56(1) provides that judicial investigations shall not be conducted in public and that confidentiality shall be maintained,<sup>48</sup> the Co-Investigating Judges are not precluded from providing certain information to the public. Rule 56(2) enables the Co-Investigating Judges to issue information regarding ongoing investigations that they “deem essential to keep the public informed of the proceedings, or to rectify any false or misleading information”<sup>49</sup> and to “jointly grant limited access to judicial investigation to the media or other non-parties in exceptional circumstances.”<sup>50</sup> These provisions, introduced with “the Co-Investigating Judges *may*,”<sup>51</sup> might seem to suggest that the Co-Investigating Judges have full discretion regarding whether or not to provide information to the public. The Pre-Trial Chamber, however, recently asserted the importance of reading all

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<sup>48</sup> ECCC Internal Rule 56(1).

<sup>49</sup> ECCC Internal Rule 56(2)(a).

<sup>50</sup> ECCC Internal Rule 56(2)(b).

<sup>51</sup> ECCC Internal Rule 56(2) (emphasis added).

Rules, including Rule 56, in the context of “the fundamental principles of procedure,”<sup>52</sup> specifically Rule 21(1)(c), which states that the Court “shall ensure that victims are kept informed and that their rights are respected throughout the proceedings.”<sup>53</sup> French criminal procedure supports interpreting Rule 21(1)(c) to grant victims the right to information during the investigative stage of ECCC proceedings. Recognizing that information is necessary to facilitate victim participation, the French Code of Criminal Procedure states that the investigating judge *must* inform victims of the offense to be investigated, their right to serve as Civil Parties, and the manner in which they can exercise that right.<sup>54</sup>

If victims and potential Civil Parties do not have sufficient or meaningful information during the investigative phase, they are precluded from exercising fundamental participatory rights provided for in the ECCC’s Internal Rules. The failure to provide information to victims, precluding their participation as Civil Parties, thus legally harms the judicial investigation by violating the process provided for in the Court’s Internal Rules, factually harms the investigation by preventing Civil Parties from fully contributing, and suggests that the Court’s stated commitment to victims and belief in their value to the proceedings is disingenuous.

#### **D. The Duty to Provide Information Recognized but Not Fulfilled during the Case 003 Investigation**

Throughout Case 003, various actors at the ECCC have acted in seeming recognition of the duty to provide public information about the ongoing judicial investigation. For example, on February 2, 2011, the Co-Investigating Judges released a statement regarding Cases 003 and 004, referencing their ability under Rule 56(2) to update the public about an ongoing

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<sup>52</sup> Decision On Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, *supra* note 22, ¶ 52.

<sup>53</sup> ECCC Internal Rule 21(1)(c).

<sup>54</sup> C. PR. PÉN. art. 80-3.

judicial investigation and their desire to “avoid any misunderstanding and misinterpretation” of their work.<sup>55</sup> While the Co-Investigating Judges did provide basic information about the ongoing investigations — stating that they had established joint working groups and were examining documents available in the case files — their statement failed to provide any information specific enough to support a Civil Party application because it did not reveal any of the alleged crimes or persons under investigation.<sup>56</sup> Tellingly, the Co-Investigating Judges ended their statement with a reminder that their current works “would remain confidential.”<sup>57</sup>

Although after public outcry regarding victims’ exclusion from the process the Office of the Co-Investigating Judges recognized that Civil Parties could apply to join Case 003,<sup>58</sup> they still did not provide the information necessary to encourage or facilitate successful applications. Revealingly, when asked about whether he thought that the Office of the Co-Investigating Judges had provided potential Case 003 Civil Parties with sufficient information, International Co-Investigating Judge Siegfried Blunk responded that potential Civil Parties had “‘ample opportunities’ to find out what was going on through the tribunal’s Victims’ Support unit.”<sup>59</sup> This statement recognizes that victims depend on information about ongoing investigations to submit Civil Party applications, yet it ascribes responsibility for providing the necessary information to the Victims Support Section (VSS). Because VSS

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<sup>55</sup> Statement from the Co-Investigating Judges, *supra* note 8, ¶ 3. The Co-Investigating Judges appeared to address media speculation regarding the scope of their ongoing investigation.

<sup>56</sup> *Id.* See also ECCC Internal Rule 23bis(1)(b) (requiring that a Civil Party “demonstrate as a direct consequence of at least one of the crimes alleged against the Charged Person that he or she has in fact suffered...”).

<sup>57</sup> Statement from the Co-Investigating Judges, *supra* note 8, ¶ 3.

<sup>58</sup> For example, the May 30, 2011, Statement from the Co-Investigating Judges regarding Civil Party Applications in Case 003, *supra* note 15, outlined the process for Civil Party applications, stating: “All Civil Party Applications will be processed by VSS pursuant to the Practice Direction on Victim Participation, before being forwarded to the Office of the Co-Investigating Judges...[to] decide on the admissibility.” However, this statement came after the then-deadline for Civil Party applications for Case 003.

<sup>59</sup> Robert Carmichael, *Tribunal’s Credibility Under Threat as Controversial Cases Head for Closure* (Radio Australia: Connect Asia May 11, 2011), available at [http://www.robertcarmichael.net/Robert\\_Carmichael/Cambodia\\_Radio\\_News/Entries/2011/5/11\\_Tribunals\\_credibility\\_under\\_threat\\_as\\_controversial\\_cases\\_head\\_for\\_closure.html](http://www.robertcarmichael.net/Robert_Carmichael/Cambodia_Radio_News/Entries/2011/5/11_Tribunals_credibility_under_threat_as_controversial_cases_head_for_closure.html).

is not itself considered a Party,<sup>60</sup> however, the Internal Rules do not provide VSS with access to otherwise confidential information about ongoing judicial investigations except through the Rule 56(2) provision for public information. As confirmed by the Public Affairs Office, “By law, it is only the Co-Investigating Judges who can release information about the investigation to the public, including the name of defendants.”<sup>61</sup> VSS, like the victims themselves, therefore depends on information from the Co-Investigating Judges to fulfill its responsibility to assist with the Civil Party application process.<sup>62</sup>

Shortly after the Co-Investigating Judges announced the close of the judicial investigation into Case 003, the Court’s Public Affairs Section released a ‘Case 003 FAQ.’ Implicitly recognizing that the Court had not “actively invited” Civil Party participation in Case 003, the Public Affairs Section remarked: “Since the scope of investigation in Case 003 at this point has not been made public, it would be a risk that most Civil Party Applications filed would fall outside of the scope of the investigation.”<sup>63</sup> The FAQ thus recognizes that Civil Party applicants depend on public information to submit successful applications.

In sum, various Court actors have recognized the right to Civil Party participation and alluded to the necessity of information to facilitate this participation during the Case 003 judicial investigation. However, the Co-Investigating Judges have prevented victims from realizing their right to participate in the proceedings by failing to provide the information necessary for successful Civil Party applications and victim participation.

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<sup>60</sup> See the definition of “Party” in the Glossary to the ECCC Internal Rules, defining “Party” to include the Co-Prosecutors, the Charged Person/Accused and Civil Parties.

<sup>61</sup> *Case 003 FAQ*, *supra* note 13, at 3.

<sup>62</sup> See ECCC Internal Rule 12bis(1)(b) (stating that the Victims Support Section shall, *under the supervision of the Co-Investigating Judges*, assist victims in submitting Civil Party applications).

<sup>63</sup> *Case 003 FAQ*, *supra* note 13, at 3.

#### **IV. THE DUTY TO PROVIDE TIMELY AND MEANINGFUL PUBLIC INFORMATION**

Recognizing that a duty to provide certain information to victims exists, it must be determined at what stage in the judicial investigation this information is necessary and how much information is required to facilitate Civil Party participation.

##### **A. Victims Should Receive Timely Information to Enable Meaningful Participation in and Contribution to the Judicial Investigation**

At a minimum, public information during the judicial investigation is required early enough to enable victims to meet the Civil Party application deadline. In addition, Civil Parties have pre-trial participation rights that they are prevented from exercising if they are unable to complete their Civil Party applications sufficiently early in the investigation. Victims are most likely to be able to contribute meaningfully to a judicial investigation — both as Civil Party applicants and Civil Parties requesting investigative acts — during the early, active stages of the investigation, as opposed to shortly before or after receiving notification of the investigation’s closure. ECCC jurisprudence emphasizes that information should be provided in a timely manner, and that Civil Party participation is possible before formal charges have been issued.

##### **1. Civil Party Participation Is Possible Before Formal Charges Have Been Filed**

Civil Party participation may begin before formal charges have been filed against the persons under investigation. Rule 23 *bis* (1)(b) states that a Civil Party applicant, in order to be admitted, shall: “[D]emonstrate as a direct consequence of at least one of the crimes alleged against the Charged Person, that he or she has in fact suffered...”<sup>64</sup> Recent news articles and perhaps even the Court’s Public Affairs Office have recently suggested that Rule

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<sup>64</sup> ECCC Internal Rule 23*bis*(1)(2) (emphasis added).

23 *bis* precludes Civil Party participation until the Co-Investigating Judges have filed formal charges, and that there are no Charged Persons in Case 003.<sup>65</sup> ECCC jurisprudence and recent practice, however, suggest that any persons named in the prosecutor’s initial submissions are automatically Charged Persons under Rule 23 *bis* (1)(b).

According to the ECCC Internal Rules’ Glossary, ‘Charged Person’ “refers to any person who is subject to prosecution in a particular case, during the period between the Introductory Submission and Indictment or dismissal of the case.”<sup>66</sup> Indeed, an order by the Office of the Co-Investigating Judges affirmed that any person named in the Introductory Submission is a Charged Person, stating: “If the person is not named in the Introductory Submission, he or she acquires the status of a ‘Charged Person’, *which is the case for all persons named in the Introductory Submission.*”<sup>67</sup> Similarly, Co-Investigating Judges have noted that: “Any person named in the introductory submission is referred to as ‘the charged person,’” in accordance with French Criminal procedure.<sup>68</sup> The Pre-Trial Chamber espoused a similar interpretation in their recent Decision on Appeals against Orders of the Co-Investigating Judges on the Admission of Civil Party Applications. There, the Pre-Trial Chamber referenced the Guiding Principles that the Co-Investigating Judges use to determine Civil Party admissibility, specifically Guiding Principle 8, which declares:

Civil action before the ECCC is open to all Victims who are able to demonstrate, in a plausible manner, that they have de facto suffered physical, material, or psychological harm as a direct consequence of at least one of the crimes alleged against the Charged

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<sup>65</sup> For example, Reach Sambach reacted to Theary Seng’s filing of a Civil Party application in Case 003 before the suspects had been charged with a crime by stating: “Theary Seng, if she claims she is a lawyer, she should also read the Internal Rules of the court, and then she will know what she can do and what she cannot do.” Julia Wallace, *Activist Tries to File Civil Party Application in Case 003*, CAMBODIA DAILY, Apr. 5, 2011, at 26. See also Douglas Gillison, *supra* note 10, (“Tribunal Rules say reparations can only be sought once a suspect has been charged with a crime.”).

<sup>66</sup> ECCC Internal Rules Glossary.

<sup>67</sup> Order Refusing Request for Further Charging, Case No. 002/19-09-2007-ECCC-OCIJ, ¶ 13 (Office of the Co-Investigating Judges, Feb. 16, 2010), available at [http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D298\\_2\\_EN.pdf](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D298_2_EN.pdf).

<sup>68</sup> *Id.* at 6 n.6.

Persons, i.e. a material fact of a criminal nature coming within the [Co-Prosecutor's] Introductory Submission and Supplementary Submission.<sup>69</sup>

Guiding Principle 8 suggests that being a victim of crimes falling within the scope of the Co-Prosecutor's submissions is a sufficient basis for Civil Party participation.

Throughout the Case 003 investigation, the Co-Investigating Judges relied on different excuses for their failure to provide public information, but never argued that Civil Party Applications could not be accepted because there were no Charged Persons. Notably, the Rejection of Rob Hamill's Civil Party application does not rely on the argument that the suspects have not been formally charged, but instead focuses exclusively on whether or not the applicant qualified as a "victim" of the alleged crimes.<sup>70</sup> Likewise, the Co-Investigating Judges did not argue that there were no Charged Persons when they rejected the International Co-Prosecutor's request for an extension to the deadline for Civil Party applications.<sup>71</sup>

Although the May 2011 Case 003 Public Affairs FAQ - which "explained" the reason for the lack of public information in Case 003 - referenced that no one had been formally charged with crimes or arrested in Case 003, it did not claim that Civil Party applications were thus impermissible. Instead, the FAQ stated that the lack of formal charges made it more difficult to provide information about the scope of the investigation "without incurring the risk of compromising the future legal process in this case."<sup>72</sup> The FAQ thus suggests that providing information to Civil Party applicants might be more difficult, but is not impossible, when there are no formal charges. Therefore, although formal charges have not been filed for Case 003 — and it appears, based on the pending close of the judicial investigation, that there may

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<sup>69</sup> Decision On Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, *supra* note 22, ¶ 29 (quoting Guiding Principle 8).

<sup>70</sup> See Appeal Against Order on the Admissibility of Civil Party Applicant Mr. Robert Hamill (D11/2/3) (Cases 003 and 004), Case No. 003/07-09-2009-ECCC/OI, ¶ 22 (Co-Lawyers for Civil Parties, May 23, 2011), available at [http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D11\\_2\\_4\\_2\\_EN.PDF](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D11_2_4_2_EN.PDF).

<sup>71</sup> See Decision on Time Extension Request and Investigative Requests by the International Co-Prosecutor Regarding Case 003, *supra* note 17 (rejecting as invalid the ICP's requests because he acted alone).

<sup>72</sup> Case 003 FAQ, *supra* note 13, at 3.

never be formal charges in Case 003 — neither ECCC Rules nor recent jurisprudence and practice preclude Civil Party participation as a result.

2. Information, at a Minimum, Must Be Provided in Sufficient Time to Meet Civil Party Application Deadlines

Public information during the judicial investigation is necessary for the Civil Party application process to function as envisioned by the Court’s Internal Rules. Under the new reforms to the Court’s Internal Rules, Civil Party applications must be submitted during the judicial investigation phase. Specifically, Rule 23 *bis* (2) requires that victims submit Civil Party applications “in writing no later than fifteen (15) days after the Co-Investigating Judges notify the parties of the conclusion of the judicial investigation.”<sup>73</sup> This necessitates that certain information be available to Civil Parties sufficiently in advance of this deadline to enable them to build an application that demonstrates “as a direct consequence of at least one of the crimes alleged against the Charged Person, that he or she has in fact suffered physical, material, or psychological injury upon which a claim of collective and moral reparation might be based.”<sup>74</sup> International Co-Prosecutor Andrew Cayley referenced the need for this information to facilitate Civil Party participation, stating that because information about the Case 003 crime sites under investigation had not been made public until his announcement on May 9, 2011, he would request an extension of the Civil Party application deadline “to allow reasonable time for civil party applications.”<sup>75</sup> Cayley’s statement indicates his belief that nine days, the time between his announcement and the then-deadline for Civil Party applications, would not be a sufficient amount of time to facilitate Civil Party participation.

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<sup>73</sup> ECCC Internal Rules 23*bis*(2).

<sup>74</sup> ECCC Internal Rule 23*bis*(1)(b).

<sup>75</sup> Press Release: Statement of the International Co-Prosecutor Regarding Case File 003, *supra* note 4, at 2.

Aspects of basic Civil Party participation also suggest that information must be provided to enable Civil Party applications well in advance of the closure of the judicial investigation. The Co-Investigating Judges are charged with supervising the transfer of information from VSS to Civil Parties regarding their legal representation.<sup>76</sup> The Rules thus appear to assume that Civil Party representation will be facilitated prior to the close of the judicial investigation, which would require Civil Party applications to be processed in sufficient time to organize representation, at least by the time of the Closing Order.<sup>77</sup> Additionally, the Co-Investigating Judges must decide on the admissibility of Civil Party applications by or at the time they issue the Closing Order.<sup>78</sup> If potential Civil Parties do not receive necessary information to submit Civil Party applications prior to the close of a judicial investigation, it might delay the issuance of the Closing Order if the Co-Investigating Judges have to process many applications in the final moments of the investigation. For example, during the period of time between the public notification of the end of the Case 002 investigation on January 14, 2010, and the issuance of the Case 002 Closing Order on September 15, 2010, the Co-Investigating Judges had to extend by one month the deadline for the victim's unit to submit Civil Party applications to the Co-Investigating Judges,<sup>79</sup> in addition to extending by two months the deadline for Civil Parties to submit supplementary information.<sup>80</sup> In early August 2010, the Co-Investigating Judges were still in the process of assigning lawyers to 799 unrepresented Case 002 Civil Parties.<sup>81</sup> That same month, the Civil Party lawyers requested an additional extension for the submission of supplemental

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<sup>76</sup> ECCC Internal Rule 12*bis*(1)(f).

<sup>77</sup> ECCC Internal Rule 23*ter*(1).

<sup>78</sup> See ECCC Internal Rule 23*bis*(2); ECCC Internal Rule 23*bis*(3).

<sup>79</sup> See Decision On Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, *supra* note 22, ¶¶ 11, 14.

<sup>80</sup> See, *id.* ¶¶ 11, 15.

<sup>81</sup> *Id.* ¶ 16.

information for those Civil Parties who had only recently been designated a lawyer.<sup>82</sup> Thus, even with nine months' notice, it could be difficult for all Civil Party requirements in the Rules to be met.

3. Information Must be Provided Early Enough for Civil Parties to Realize their Right to Pre-Trial Participation

In addition to the Civil Party application process — which necessarily takes place within fifteen days of the notification of the conclusion of the judicial investigation<sup>83</sup> — Civil Parties have pre-trial participation rights that victims are precluded from exercising if they do not have sufficient information to join the proceedings during the judicial investigation stage. Civil Parties may, *at any time during an investigation*,<sup>84</sup> 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>85</sup> or “to interview him or her, question witnesses, go to a site, order expertise, or collect other evidence on his or her behalf.”<sup>86</sup> Victims who do not have the necessary information to become Civil Parties during the judicial investigation would thus be unable to initiate these investigative acts. The Co-Investigating Judges are not required to grant each Civil Party's requests.<sup>87</sup> Nonetheless, the Rules are predicated on the idea that Civil Parties can contribute to an investigation, in part, by encouraging such investigative acts,<sup>88</sup> thus effectively depriving victims of their ability to participate in the pre-trial proceedings is a violation of the Rules.

Civil Parties also have Pre-Trial Appeal rights that they cannot exercise unless they have been joined as Civil Parties prior to the deadline for these appeals. For example, Rule

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<sup>82</sup> *Id.*

<sup>83</sup> ECCC Internal Rule 23*bis*(2)

<sup>84</sup> *See, e.g.*, ECCC Internal Rules 55(10), 59(5).

<sup>85</sup> ECCC Rule 55(10).

<sup>86</sup> ECCC Internal Rule 59(5).

<sup>87</sup> *Id.*

<sup>88</sup> *See, e.g.*, ECCC Internal Rule 23(1)(a); ECCC Internal Rule 59(5); *supra* pp. 5-7.

74 creates the opportunity for Civil Parties - per Rule 23 *bis*, either already accepted or not yet rejected<sup>89</sup> - to appeal certain orders by the Co-Investigating Judges, including: refusing requests for investigative action; declaring a Civil Party application inadmissible; and dismissing the case if the Co-Prosecutors have also appealed.<sup>90</sup> Appeals must be filed within ten days from the date of notice of that decision order, unless otherwise provided for.<sup>91</sup> If victims have not yet completed the Civil Party application process within ten days of the appealable decisions, they lose their ability to exercise their appeal rights.

During the Case 002 proceedings, the Pre-Trial Chamber determined that Civil Parties were able to participate in appeals of provisional detention orders before the Pre-Trial Chamber, finding that the text of Internal Rule 23(1)(a) made clear that Civil Parties could participate in all criminal proceedings, including during the investigative phase.<sup>92</sup> Participation in these pre-trial proceedings, the Pre-Trial Chamber declared, is consistent with international guidelines concerning Civil Party participation at international tribunals.<sup>93</sup> Indeed, international standards support providing information about ongoing investigations to facilitate victim participation from the early phases of an investigation. At the International Criminal Court, the obligation to inform victims under the Rules of Procedure and Evidence arises “from the earliest stage of the investigation on.”<sup>94</sup> Similarly, the United Nations General Assembly Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power declares that Courts should facilitate access to justice and fair treatment of victims by “informing victims of their role and the scope, timing and progress of the proceedings and

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<sup>89</sup> ECCC Internal Rule 23*bis* (2) (“Unless and until rejected, Civil Party applicants may exercise Civil Party rights.”).

<sup>90</sup> ECCC Internal Rule 74(4).

<sup>91</sup> ECCC Internal Rule 75(1).

<sup>92</sup> Decision on Civil Party Participation in Provisional Detention Appeals, *supra* note 27, ¶ 36.

<sup>93</sup> *Id.* ¶ 40.

<sup>94</sup> Cristoph Safferling, Amicus Curiae Concerning Criminal Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 01), §II(1) (Feb. 20, 2008), available at [http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/Amicus\\_Christoph\\_Safferling\\_C11\\_39\\_EN.pdf](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/Amicus_Christoph_Safferling_C11_39_EN.pdf).

of the disposition of their cases,”<sup>95</sup> “allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected,”<sup>96</sup> and “providing proper assistance to victims throughout the legal process.”<sup>97</sup> Thus, ECCC Rules and jurisprudence, supported by international standards, require that Civil Parties are able to effectively exercise their pre-trial participation rights by receiving timely information to realize those rights.

4. Civil Parties Must Receive Information in Time to Meaningfully Contribute to the Investigation Itself

The Internal Rules depend on Civil Party participation to “support the prosecution”<sup>98</sup> and contribute to ongoing investigations, and Civil Parties must be sufficiently informed about the ongoing investigations to contribute in a timely and meaningful manner.

The order to include the forced marriage charge in Case 002, which was based on information gleaned from Civil Party applications, offers guidance on the time required to facilitate such Civil Party contributions. On March 17, 2009, based on information received from Civil Party applications, the Office of the Co-Investigating Judges forwarded the case file of the investigation to the Office of the Co-Prosecutors.<sup>99</sup> On April 20, 2009, the Office of the Co-Prosecutors filed a response, requesting and authorizing the Co-Investigating Judges to investigate charges of forced marriage based on incidences of forced marriage and sexual relations mentioned in four Civil Party applications.<sup>100</sup> Several months later, on November 5, 2009, the Office of the Co-Investigating Judges stated publicly that the Case

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<sup>95</sup> Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, Annex, art. (A)(6)(1), G.A. Res. Annex, U.N. Doc A/RES/40/34/Annex (Nov. 29. 1985), *available at* <http://www.un.org/documents/ga/res/40/a40r034.htm>.

<sup>96</sup> *Id.* art (A)(6)(2).

<sup>97</sup> *Id.* art. (A)(6)(3).

<sup>98</sup> ECCC Internal Rule 23.

<sup>99</sup> Second Request for Investigative Actions Concerning Forced Marriages and Forced Sexual Relations, Case No. 002 19-09-2007-ECCC/OClI, ¶ 3 (Co-Lawyers for Civil Parties, July 15, 2009), *available at* [http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D188\\_Redacted\\_EN.pdf](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D188_Redacted_EN.pdf).

<sup>100</sup> Decision on Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, *supra* note 22, ¶ 5.

002 investigation now included charges of forced marriage.<sup>101</sup> Civil Parties continued to encourage this investigation, filing at least two requests for investigative actions regarding allegations of forced marriage, on July 15 and December 4, 2009.<sup>102</sup> Ultimately, the crime of forced marriage was included in the Case 002 Closing Order, with much of the evidence cited in the Closing Order coming directly from Civil Party applications and interviews.<sup>103</sup> The Case 002 example demonstrates that investigations based on information from Civil Parties will take several months. Public information coming at or after the conclusion of the judicial investigation would preclude Civil Parties from meaningfully contributing.

5. Public Information During Case 003 Does Not Meet the Standard for Timely Information Created by Case 002 and Related Jurisprudence

In contrast to Case 003, victims received basic information about the ongoing investigation throughout the Case 002 judicial investigation. Nevertheless, a recent Pre-Trial Chamber decision found that “the Co-Investigating Judges did not keep the victims informed in a timely fashion”<sup>104</sup> and “that the fundamental rights of victims have, as a consequence, not been duly safeguarded.”<sup>105</sup> Thus the Case 002 judicial investigation, despite providing public information earlier and more regularly than that of Case 003, offers an example of public information released too late and/or too infrequently to meet ECCC requirements.

The Case 002 judicial investigation opened on July 18, 2007, when the Co-Prosecutors filed their introductory submission and the investigation transferred to the Office

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<sup>101</sup> Statement from the Co-Investigating Judges Judicial Investigation of Case 002/19-09-2007-ECCC-OCIJ and Civil Party Applications, Extraordinary Chambers in the Courts of Cambodia (Nov. 5, 2009), at 5, *available at* [http://www.eccc.gov.kh/sites/default/files/media/ECCC\\_Press\\_Release\\_5\\_Nov\\_2009\\_Eng\\_0.pdf](http://www.eccc.gov.kh/sites/default/files/media/ECCC_Press_Release_5_Nov_2009_Eng_0.pdf).

<sup>102</sup> See Second Request for Investigative Actions Concerning Forced Marriages and Forced Sexual Relations, *supra* note 99; Co-Lawyers for the Civil Parties’ Fourth Investigative Request Concerning Forced Marriages and Sexually Related Crimes, Case No. 002/19-09-2007-ECCC/OCIJ, (Co-Lawyers for Civil Parties, Dec. 4, 2009), *available at* [http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D268\\_Redacted\\_EN.pdf](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D268_Redacted_EN.pdf).

<sup>103</sup> See Closing Order, *supra* note 40, ¶¶ 843-861.

<sup>104</sup> Decision On Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, *supra* note 22, ¶ 51.

<sup>105</sup> *Id.* ¶ 54.

of the Co-Investigation Judges.<sup>106</sup> Between the introductory submission and the issuance of the Closing Order, on September 15, 2010,<sup>107</sup> the Co-Investigating Judges provided information to the public regarding the ongoing investigations - at least some of it specifically intended to facilitate Civil Party applications. The public arrests and provisional detention orders for the four Case 002 defendants provided the identities of those under investigation,<sup>108</sup> but public information was not limited to notification about the identity of the Charged Persons. For example, an update from the Co-Investigating Judges on November 1, 2007, described three broad categories of crimes and other alleged abuses under investigation, and reminded potential Civil Parties about the resources available to them.<sup>109</sup> Within three months, on January 31, 2008, the Office of the Co-Investigating Judges admitted victims as Civil Parties in the case against Nuon Chea,<sup>110</sup> and Civil Parties participated in a public hearing on February 4, 2008.<sup>111</sup> Certain hearings were made public throughout the judicial investigation, including a hearing as early as March 20, 2008, to deliver decisions on

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<sup>106</sup> *Id.* ¶ 1.

<sup>107</sup> Closing Order, *supra* note 40.

<sup>108</sup> See Provisional Detention Order: Nuon Chea, Case No. 002/19-09-2007 (Office of the Co-Investigating Judges, Sept. 19, 2007), available at [http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/Provisional\\_Detention\\_Order\\_Nuon\\_Chea\\_19092007\\_ENG.pdf](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/Provisional_Detention_Order_Nuon_Chea_19092007_ENG.pdf); Provisional Detention Order: Ieng Sary, Case No. 002/19-09-2007-ECCC/OCIJ (Office of the Co-Investigating Judges, Nov. 14, 2007), available at [http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/Provisional\\_detention\\_order\\_IENG\\_Sary\\_ENG\\_0.pdf](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/Provisional_detention_order_IENG_Sary_ENG_0.pdf); Provisional Detention Order: Ieng Thirith, Case No. 002/19-09-2007-ECCC/OCIJ (Office of the Co-Investigating Judges, Nov. 14, 2007), available at [http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/Provisional\\_detention\\_order\\_IENG\\_Thirith\\_ENG.pdf](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/Provisional_detention_order_IENG_Thirith_ENG.pdf); Provisional Detention Order: Khieu Samphan, Case No. 002/19-09-2007-ECCC/OCIJ (Office of the Co-Investigating Judges, Nov. 19, 2007), available at [http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/Provisional\\_detention\\_order\\_KHIEU\\_Samphan\\_ENG\\_0.pdf](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/Provisional_detention_order_KHIEU_Samphan_ENG_0.pdf).

<sup>109</sup> Update by the Co-Investigating Judges, Extraordinary Chambers in the Courts of Cambodia, § 3 (Nov. 1, 2007), available at [http://www.eccc.gov.kh/sites/default/files/media/OCIJ\\_Media\\_Update\\_EN\\_01\\_11\\_2007.pdf](http://www.eccc.gov.kh/sites/default/files/media/OCIJ_Media_Update_EN_01_11_2007.pdf).

<sup>110</sup> Joint Response to the Submissions of the Defence, the Co-Prosecutors and amici curiae relating to the participation of Civil Parties in appeals against provisional detention orders, Case No. 002/09-19-2007-ECCC/PTC, ¶ 1 (Co-Lawyers for Civil Parties, Mar. 6, 2008), available at [http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/Response\\_by\\_Lawyers\\_of\\_the\\_Civil\\_Parties\\_C11\\_48\\_EN.pdf](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/Response_by_Lawyers_of_the_Civil_Parties_C11_48_EN.pdf).

<sup>111</sup> See Statement by the Victims Unit, Extraordinary Chambers in the Courts of Cambodia (Feb. 4, 2008), available at [http://www.eccc.gov.kh/sites/default/files/media/Victim\\_Unit\\_Press\\_Release.pdf](http://www.eccc.gov.kh/sites/default/files/media/Victim_Unit_Press_Release.pdf).

Civil Party participation for Case 002.<sup>112</sup> On November 5, 2009, almost two months prior to the judicial investigation's end, the Co-Investigating Judges released an additional statement containing information about Civil Party applications, outlining the basic facts of the investigation, and providing a tentative timeline for the end of the investigation.<sup>113</sup> Victims received further information about new sites and crimes under investigation, as well as information about the Civil Party application process, through updates from the Co-Investigating Judges, Co-Prosecutors, and Victims Unit.<sup>114</sup> Thus, the Co-Investigating Judges released information about the ongoing judicial investigation multiple times before notifying the public of the close of the Case 002 investigation on January 14, 2010.<sup>115</sup> If the public information provided during Case 002 was not timely enough to meet the Court's due diligence standards, then the lack of information provided during Case 003 clearly falls woefully short.

### **B. Sufficient Information Must Be Provided to Enable Successful Civil Party Participation and Relevant Contributions to the Ongoing Investigation**

Victims must have sufficient information about ongoing judicial investigations to enable them to meet the requirements of the Civil Party application process and to substantially participate in and contribute to the ongoing judicial investigation. Targeted victim and Civil Party participation preserves Tribunal resources and promotes efficiency.

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<sup>112</sup> See Invitation to Attend the ECCC Pre-Trial Chamber Session 20 March 2008, Extraordinary Chambers in the Courts of Cambodia (17 March 2008), *available at* [http://www.eccc.gov.kh/sites/default/files/media/20\\_Mar-08\\_-Nuon\\_Chea-\\_Invitation\\_guildeline\\_en.pdf](http://www.eccc.gov.kh/sites/default/files/media/20_Mar-08_-Nuon_Chea-_Invitation_guildeline_en.pdf).

<sup>113</sup> Decision On Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, *supra* note 22, ¶ 8.

<sup>114</sup> See, e.g., Statement of the Co-Prosecutors, *supra* note 41 (describing a new detention center crime site under investigation); Media Alert: Public Notice of OCIJ On-Site Investigation, Extraordinary Chambers in the Courts of Cambodia, (Feb. 22, 2008) (notifying the public about upcoming on-site investigations), *available at* [http://www.eccc.gov.kh/sites/default/files/media/Public\\_Notice\\_of\\_OCIJ\\_On-Site\\_Investigation.pdf](http://www.eccc.gov.kh/sites/default/files/media/Public_Notice_of_OCIJ_On-Site_Investigation.pdf); Statement of the Victims Unit, Extraordinary Chambers in the Courts of Cambodia, (Jan. 21, 2009) (providing detailed information about Civil Party Application requirements), *available at* [http://www.eccc.gov.kh/sites/default/files/media/Statement\\_of\\_VU.pdf](http://www.eccc.gov.kh/sites/default/files/media/Statement_of_VU.pdf).

<sup>115</sup> Office of the Co-Investigating Judges: Conclusion of Judicial Investigation in Case 002/19-09-2007-ECCC-OCIJ, Extraordinary Chambers in the Courts of Cambodia, (Jan. 14, 2010), *available at* [http://www.eccc.gov.kh/sites/default/files/media/ECCC\\_OCIJ\\_PR14Jan2010-Eng.pdf](http://www.eccc.gov.kh/sites/default/files/media/ECCC_OCIJ_PR14Jan2010-Eng.pdf).

To be sure, the rights of all parties must be considered during the judicial investigation. Providing basic information during judicial investigations, however, is consistent with the rights of victims and Civil Parties and is not unduly harmful to the other parties to the investigation.

1. Victims Must Have Enough Information to Exercise their Right to Serve as Civil Parties

Successful Civil Party applications depend on information about the ongoing investigation in order to connect each applicant's unique situation to the suspects and alleged crimes under investigation, as required by the Internal Rules.<sup>116</sup> Rule 23 *bis* (4) requires that Civil Party applications: provide details regarding their status as a victim; specify the alleged crime; offer evidence of the injury suffered; and “tend to show the guilt of the alleged perpetrator.”<sup>117</sup> A successful Civil Party application necessitates that the applicant demonstrate that as a direct consequence of at least one of the crimes alleged against the Charged Person, he or she has in fact suffered injury upon which a claim for reparations might be based.<sup>118</sup> In their Case 001 Judgment, the Trial Chamber elaborated, declaring that Civil Parties must “show the existence of wrongdoing attributable to the Accused which has a direct causal connection to a demonstrable injury personally suffered by the Civil Party.”<sup>119</sup> Thus, prospective Civil Parties depend on specific information about the persons and crimes under investigation.

The Pre-Trial Chamber recently emphasized that the “object and purpose of IR23*bis* (1) is not there to restrict or limit the notion of victim or civil party action in the ECCC. It is

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<sup>116</sup> See ECCC Internal Rule 23*bis*(1)(b); ECCC Internal Rule 23*bis*(4).

<sup>117</sup> ECCC Internal Rule 23*bis*(4).

<sup>118</sup> ECCC Internal Rule 23*bis*(1)(b).

<sup>119</sup> Judgement in Case 001, Case No. 001/18-07-2007/ECCC/TC, ¶ 639 (Trial Chamber, July 26, 2010), available at [http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/20100726\\_Judgement\\_Case\\_001\\_ENG\\_PUBLI\\_C.pdf](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/20100726_Judgement_Case_001_ENG_PUBLI_C.pdf).

rather to set criteria for admissibility of civil party applications.”<sup>120</sup> Without the necessary information about crimes and/or persons under investigation, however, the Rule *would* serve to limit victim participation because Civil Party applicants would be unable to make the necessary connections between their applications and the ongoing investigations to successfully become Civil Parties to the proceedings.

Cases 003 and 004 illustrate the impossibility created for prospective Civil Parties who do not receive information about the scope of ongoing investigations. For example, Rob Hamill — already a Civil Party for Cases 001 and 002 — had to rely on newspaper articles to discern the scope of the Case 003/004 investigation:

Even though the ECCC has not yet disclosed the names of persons under investigation, the basis of my application in Case 003/004 is the disclosure of the names of suspects by the Cambodia Daily in an article published on 1 December 2010, on page 26. Furthermore, a number of articles (for example, from the Cambodia Daily, including one dated 4 April 2011 Page 26) refer to the two being named by prosecutors in 2009.<sup>121</sup>

## 2. Victims Must Have Sufficient Information to Enable Meaningful and Relevant Contributions to the Judicial Investigation

In Case 002, many Civil Party applications filed before details of the investigation had been made public fell outside the scope of the investigation and were ultimately rejected.<sup>122</sup> The rejection of Case 002 Civil Party applications illustrates another problem that arises when victims lack sufficient information about ongoing investigations: their applications are less likely to be pertinent to the ongoing investigation. Applications submitted without

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<sup>120</sup> Decision On Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, *supra* note 22, ¶ 62.

<sup>121</sup> Robert Miles Hamill, Civil Party Application to Case # 003/004, at 1 (April 2011), *available at* <http://www.scribd.com/doc/52637419/Olympian-rower-Rob-Hamill-s-Civil-Party-applicatio%E2%80%8Bn-to-ECCC-Case-003-004>. Hamill’s application was ultimately rejected by the Office of the Co-Investigating Judges in a “confidential” decision. *See* Press Release, Rob Hamill, Rob Hamill’s Civil Party Application to the Extraordinary Chambers in the Courts of Cambodia (ECCC) in Cases 003 and 004 Rejected by Co-Investigating Judges Siegfried BLUNK and YOU Bunleng (May 16, 2011), *available at* <http://www.cam111.com/photoneews/2011/05/17/96757.html>.

<sup>122</sup> *Case 003 FAQ*, *supra* note 13, at 3.

knowledge of the ongoing investigations are unlikely to provide information targeted to the specific allegations under investigation. There are several problems associated with receiving “blind” Civil Party applications. First, sorting through applications that are not relevant to the scope of the investigation is a waste of time and resources for VSS and the Co-Investigating Judges. Additionally, victims might have unrealistic expectations about their ability to participate as Civil Parties that will not be fulfilled without sufficient information to build a successful application.<sup>123</sup> Finally, the investigation itself will be factually harmed when victims are not given the opportunity to provide information relevant to the ongoing judicial investigations. Precluding victim participation in this way is counter to the Court’s Rules and the values underlying them, which provide that Civil Parties should contribute to ongoing investigations.<sup>124</sup>

Assessing the amount of information provided to the public during Case 002, the Pre-Trial Chamber noted that because recent amendments to the Rules make the Co-Investigating Judges the exclusive entity responsible for the admissibility of victims’ Civil Party applications, the need for “information to be provided to victims throughout the pre-trial phase is significantly more compelling.”<sup>125</sup> Without access to the case files, victims are fully dependent on information from the Co-Investigating Judges during the pre-trial phase.<sup>126</sup> This need for information is augmented by the differences between ECCC proceedings and criminal trials in Cambodian domestic court, where Civil Parties are more likely to be aware of the alleged crimes upon which they can base their claims. Instead, at the ECCC, because

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<sup>123</sup> *See id.* (referencing unrealistic expectations created for victims if Civil Party applications are encouraged despite providing little or no public information about the ongoing investigation).

<sup>124</sup> *See, e.g.*, ECCC Internal Rule 23(1)(a) (stating that Civil Party action should support the prosecution); ECCC Internal Rule 55(10) (providing that Civil Parties have the right to undertake investigative action that they consider useful to investigation).

<sup>125</sup> Decision On Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, *supra* note 22, ¶ 53.

<sup>126</sup> *Id.* ¶ 52.

of the scale of the crimes under investigation and the amount of time elapsed, victims are less likely to be able to infer the scope and scale of the judicial investigations.<sup>127</sup> Thus, the Pre-Trial Chamber has confirmed that it is particularly important that the Co-Investigating Judges provide meaningful information to victims during the ongoing judicial investigation.

Meaningful victim participation appears especially likely when victims feel officially encouraged to apply to become Civil Parties. Public information during the Case 002 judicial investigation likely catalyzed the immense Civil Party participation in Case 002. Over the course of the investigation, VSS submitted 4,128 Civil Party,<sup>128</sup> more than 2,000 of which the Co-Investigating Judges received by the time they notified the public of the close of the Case 002 judicial investigation on January 14, 2010.<sup>129</sup> By comparison, the Co-Investigating Judges only received 318 Civil Party applications for Case 003,<sup>130</sup> whereas they provided almost no information about the ongoing investigation. At least 314 of these Civil Party applications were filed only after Andrew Cayley provided minimal information about the ongoing investigation and invited Civil Party applications,<sup>131</sup> which suggests that minimal information with official encouragement is necessary to facilitate Civil Party participation.

3. The Rights of Victims and Civil Parties, Which Depend on Certain Public Information, Are Not Incompatible with the Rights of Other Parties

The ECCC's Internal Rules recognize the need to balance the rights of all involved in the judicial investigation, including and without diminishing the rights of victims and Civil Parties. Rule 21, describing the Court's fundamental principles, reminds that all ECCC Law, Rules, Directions, and Regulations "shall be interpreted so as to always safeguard the

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<sup>127</sup> *Id.* ¶ 69.

<sup>128</sup> Closing Order, *supra* note 40, ¶ 10.

<sup>129</sup> Office of the Co-Investigating Judges: Conclusion of Judicial Investigation in Case 002/19-09-2007-ECCC-OCIJ, *supra* note 115, ¶ 3.

<sup>130</sup> Statement from the Co-Investigating Judges, *supra* note 15, ¶ 1.

<sup>131</sup> OPEN SOCIETY JUSTICE INITIATIVE, *supra* note 3, at 16.

interests of Suspects, Charged Persons, Accused and Victims and so as to ensure legal certainty and transparency of proceedings.”<sup>132</sup> Furthermore, the Court must “preserve a balance between the rights of the parties” in all proceedings.<sup>133</sup> This balance is essential to the determination about which information to make public during a judicial investigation and is emphasized in the Court’s Rules regarding public information during ongoing proceedings.

Rule 56 guides the Co-Investigating Judges to preserve “the rights and interests of the parties” by maintaining confidentiality during judicial investigations,<sup>134</sup> but the Internal Rules and ECCC jurisprudence make clear that the rights of victims to information and Civil Party participation cannot be ignored. The Co-Investigating Judges have emphasized that the confidential nature of the investigative stage is “indispensable to the quality of the judicial process, particularly to guarantee the protection of privacy of those persons mentioned in the case file and the presumption of innocence, as well as to promote efficiency in investigations.”<sup>135</sup> Rule 54, which provides similar guidance to the Co-Prosecutors on the balance between confidentiality and “the need to ensure that the public is duly informed of ongoing ECCC proceedings,”<sup>136</sup> specifically emphasizes the importance of including the interests of victims in the rights-balancing process.<sup>137</sup> Indeed, International Co-Prosecutor Cayley referenced this balancing in his public statement from May 9, 2011, stating: “In providing this information the interests of victims and witnesses, the rights of suspects, and the requirements of the investigation have been taken into account, as required under the

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<sup>132</sup> ECCC Internal Rule 21(1).

<sup>133</sup> ECCC Internal Rule 21(1)(a).

<sup>134</sup> ECCC Internal Rule 56.

<sup>135</sup> Press Statement of the Co-Investigating Judges, Extraordinary Chambers in the Courts of Cambodia, ¶ 5 (3 March 2009), *available at* [http://www.eccc.gov.kh/sites/default/files/media/OCIJ\\_press\\_statement\\_EN.pdf](http://www.eccc.gov.kh/sites/default/files/media/OCIJ_press_statement_EN.pdf).

<sup>136</sup> ECCC Internal Rule 54.

<sup>137</sup> *Id.* (“...the Co-Prosecutors may provide the public with an objective summary of the information contained in such submissions, taking into account the rights of the defence and the interests of Victims, witnesses, and any other persons mentioned therein, and the requirements of the investigation.”)

Rules.”<sup>138</sup> Because the rights of victims and Civil Parties cannot be overshadowed by the rights of other parties, it is therefore necessary to provide sufficient public information for those rights to be realized.

## V. CONCLUSION

During the Case 003 judicial investigation, the Co-Investigating Judges failed to fulfill their duty to provide victims with timely and meaningful information. Their failure to provide sufficient information effectively precluded Civil Party participation, which violated the right of victims to participate as Civil Parties to seek reparations and support the prosecution. Furthermore, the lack of public information factually harmed the investigation by preventing potentially relevant victim and Civil Party contributions. The Co-Investigating Judges must provide a meaningful amount of information in sufficient time to enable victims to participate as Civil Parties and contribute to the ongoing judicial investigation. With the ongoing judicial investigation into Case 004 likely coming to an end soon, the Co-Investigating Judges have a pressing obligation to provide the necessary information to enable victims to participate as Civil Parties to the proceedings. Otherwise, the Civil Party participation process envisioned in the Internal Rules breaks down, and the Court’s stated commitment to victims and belief in the value of their participation appears insincere.

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<sup>138</sup> Press Release: Statement of the International Co-Prosecutor Regarding Case File 003, *supra* note 4, at 1.