



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia
Chambres extraordinaires au sein des tribunaux cambodgiens

ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

អង្គបុរេជំនុំជម្រះ
Pre-Trial Chamber
Chambre Preliminaire

D362/6

In the name of the Cambodian people and the United Nations and pursuant to the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea

Case File No. 004/2/07-09-2009-ECCC/OCIJ (PTC58)

THE PRE-TRIAL CHAMBER

Before: Judge PRAK Kimsan, President
Judge Olivier BEAUVALLET
Judge NEY Thol
Judge Kang Jin BAIK
Judge HUOT Vuthy

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CONSIDERATIONS ON APPEAL AGAINST ORDER ON THE ADMISSIBILITY OF CIVIL PARTY APPLICANTS

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TABLE OF ACRONYMS

Term	Abbreviation / Acronym
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	ECCC Agreement
Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia	ECCC Law
The Extraordinary Chambers in the Courts of Cambodia	ECCC
International Criminal Court	ICC
Joint Criminal Enterprise	JCE
Democratic Kampuchea	DK
Communist Party of Kampuchea	CPK
Victim Support Section	VSS



THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) is seised of the “Appeal Against Order on the Admissibility of Civil Party Applicants”, filed on 29 November 2018 (“Appeal”).¹

I. PROCEDURAL HISTORY

1. On 20 November 2008, the International Co-Prosecutor brought a disagreement pursuant to Internal Rule 71(2) before the Pre-Trial Chamber, reporting that the National Co-Prosecutor disagreed with prosecuting new crimes identified in additional submissions.² On 18 August 2009, the Pre-Trial Chamber issued its Considerations on this disagreement.³

2. On 7 September 2009, the Acting International Co-Prosecutor filed the Third Introductory Submission, requesting the Co-Investigating Judges to initiate the judicial investigation against AO An as part of Case 004, in relation to a number of allegations of crimes against humanity, genocide and violations of the Penal Code of the Kingdom of Cambodia of 1956 (“1956 Penal Code”).⁴ The International Co-Prosecutor subsequently filed six Supplementary Submissions to broaden the scope of the investigation in Case 004 pursuant to Internal Rule 55(3).⁵

3. Since the beginning of the investigation, 1920 persons have filed applications to become Civil Parties.⁶

¹ Case 004/2/07-09-2009-ECCC/OCIJ (“Case 004/2”), Appeal Against Order on the Admissibility of Civil Party Applicants, 29 November 2018, notified in Khmer on 5 December 2018, D362/5 (“Civil Party Appeal (D362/5)”).

² Disagreement 001/18-11-2008-ECCC/PTC, International Co-Prosecutor’s Written Statement of Facts and Reasons for Disagreement pursuant to Rule 71(2), 20 November 2008, Doc. No. 1.

³ Disagreement 001/18-11-2008-ECCC/PTC, Considerations of the Pre-Trial Chamber regarding the Disagreement between the Co-Prosecutors pursuant to Internal Rule 71, 18 August 2009, D1/1.3.

⁴ Case 004/20-11-2008-ECCC/OCIJ (“Case 004”), Co-Prosecutors’ Third Introductory Submission, 20 November 2008, D1 (“Third Introductory Submission (D1)”).

⁵ Case 004, Co-Prosecutors’ Supplementary Submission regarding Sector 1 Crime Sites and Persecution of Khmer Krom, 15 June 2011, D27; Case 004, Co-Prosecutors’ Supplementary Submission regarding Sector 1 Crime Sites and Persecution of Khmer Krom, 18 July 2011, D65 (“First Supplementary Submission (D65)”; Case 004, Co-Prosecutors’ Supplementary Submission regarding Forced Marriage and Sexual or Gender-Based Violence, 24 April 2014, D191; Case 004, Response to Forwarding Order D237, 4 February 2015, D237/1; Case 004, Response to Forwarding Order and Supplementary Submission regarding Wat Ta Meak, 4 August 2015, D254/1; Case 004, Response to Forwarding Order Dated 5 November 2015 and Supplementary Submission regarding the Scope of Investigation into Forced Marriage in Sectors 1 and 4, 20 November 2015, D272/1. *See also* Case 004, Decision on Co-Prosecutors’ Supplementary Submission regarding Sector 1 Crime Sites and Persecution of Khmer Krom, 30 June 2011, D27/3.

⁶ *See* Case 004/2, International Co-Investigating Judge’s Order on Admissibility of Civil Party Applicants, 16 August 2018, D362 (“Order on Civil Parties (International) (D362)”), para. 2.



4. In the course of the investigations into Case 004/2, the Office of the Co-Investigating Judges was informed that 47 applicants to Case 004/2 were deceased.⁷ The successor of one deceased applicant expressed the wish to continue the action on behalf of the deceased.⁸ Three applicants have withdrawn their applications.⁹

5. On 29 April 2011, the Co-Investigating Judges declared the Civil Party applications of Robert HAMILL and SENG Chantheary inadmissible.¹⁰ These two applicants appealed against the inadmissibility orders.¹¹ On 14 and 28 February 2012, the Pre-Trial Chamber issued its Considerations regarding the appeals from the two applicants, declaring that the Chamber was unable to reach the required majority to render a decision on the appeals.¹² On 15 November 2011, SENG Chantheary withdrew her application, which was acknowledged by the Greffier of the Office of the Co-Investigating Judges by letter on 29 May 2014.¹³ On 30 December 2011, Robert HAMILL requested the Co-Investigating Judges to reconsider their order.¹⁴ The Co-Investigating Judges did not issue a new order on his admissibility as a Civil Party at this time.

6. On 8 August 2011, the Co-Investigating Judges issued a press release, informing the public and potential Civil Party applicants of the crime sites included in the Third Introductory Submission in Case 004.¹⁵

⁷ See Order on Civil Parties (International) (D362), para. 8.

⁸ See Order on Civil Parties (International) (D362), para. 8.

⁹ See Order on Civil Parties (International) (D362), para. 8.

¹⁰ Case 004, Order on the Admissibility of the Civil Party Application of SENG Chan Theary, 29 April 2011, D5/1/3; Case 004, Order on the Admissibility of the Civil Party Application of Rob HAMILL, 29 April 2011, D5/2/3.

¹¹ Case 004, Appeal against Order on the Admissibility of Civil Party Application of SENG Chan Theary, 18 May 2011, D5/1/4/1; Case 003/07-09/2009-ECCC/OCIJ ("Case 003"), Appeal against Order on the Admissibility of Civil Party Applicant Mr. Robert HAMILL (D11/2/3) (Cases 003 and 004), 23 May 2011, D5/2/4/2.

¹² Case 004, Considerations of the Pre-Trial Chamber regarding the Appeal against Order on the Admissibility of Civil Party Applicant Robert HAMILL, 14 February 2012, D5/2/4/3; Case 004, Considerations of the Pre-Trial Chamber regarding the Appeal against Order on the Admissibility of Civil Party Applicant SENG Chan Theary, 28 February 2012, D5/1/4/2.

¹³ Email from Mr SAM Sokong and Mr Emmanuel JACOMY, Co-Lawyers for Civil Parties to Victims Support Section, 3 March 2014, D5/1/5. See also Order on Civil Parties (International) (D362), para. 5.

¹⁴ Case 004, Request for Co-Investigating Judges to Reconsider Decision on Admissibility of Civil Party Applicant Mr. Robert HAMILL (D11/2/3) (Cases 003 and 004), 30 December 2011, D5/2/5.

¹⁵ ECCC Press Release, "Press Release by the Co-Investigating Judge regarding Civil Parties in Case 004 (004/07-09-2009-ECCC/OCIJ)", 8 August 2011, available at: <https://www.eccc.gov.kh/en/document/public-affair/press-release-co-investigating-judges-regarding-civil-parties-case-004>.



7. On 1 May 2012, the Reserve International Co-Investigating Judge admitted 30 applicants as Civil Parties.¹⁶
8. On 19 December 2012, the International Co-Investigating Judge, being seised of a Supplementary Submission in relation to additional investigations in Case 004, released a statement, notifying the public of 14 additional crime sites under investigation in Case 004.¹⁷
9. AO An's case was subject to a series of confidential disagreements between the Co-Investigating Judges (registered on 22 February 2013, 5 April 2013, 22 January 2015, 16 January 2017 and 12 July 2018, respectively).¹⁸ None of these disagreements were brought before the Pre-Trial Chamber.
10. On 24 April 2014, concurrent with the filing of his Supplementary Submission of the same date,¹⁹ the International Co-Prosecutor announced that he had requested the investigation of sexual or gender-based violence and forced marriage as part of Case 004.²⁰
11. On 27 March 2015, the International Co-Investigating Judge charged AO An with crimes against humanity and violations of Articles 501 and 506 of the 1956 Penal Code (premeditated homicide).²¹ A press release regarding these charges was issued by the International Co-Investigating Judge on the same day.²²
12. On 14 March 2016, the International Co-Investigating Judge decided to charge AO An with additional crimes including genocide and additional crimes against humanity.²³ The

¹⁶ See Order on Civil Parties (International) (D362), para. 7 and footnote 7.

¹⁷ ECCC Press Release, "Statement by the International Co-Investigating Judge regarding Additional Crime Sites in Case File 004", 19 December 2012, available at: <https://www.eccc.gov.kh/en/document/public-affair/statement-international-co-investigating-judge-regarding-additional-crime-sit>.

¹⁸ See Case 004/2, International Co-Investigating Judge's Closing Order (Indictment), 16 August 2018, D360 ("Closing Order (Indictment) (D360)"), para. 1; Case 004/2, National Co-Investigating Judge's Closing Order (Dismissal), 16 August 2018, D359 ("Closing Order (Dismissal) (D359)"), paras 22, 49.

¹⁹ Case 004, Co-Prosecutors' Supplementary Submission regarding Forced Marriage and Sexual or Gender-Based Violence, 24 April 2014, D191.

²⁰ ECCC Press Release, "Statement by the International Co-Prosecutor Nicholas Koumjian regarding Case File 004", 24 April 2014, available at: <https://www.eccc.gov.kh/en/node/30196>.

²¹ Case 004, Written Record of Initial Appearance of AO An, 27 March 2015, D242.

²² ECCC Press Release, "Statement of the International Co-Investigating Judge regarding Case 004", 27 March 2015, available at: <https://www.eccc.gov.kh/en/node/32148>.

²³ Case 004, Written Record of Further Appearance of AO An, 14 March 2016, D303.



International Co-Investigating Judge issued a public statement announcing these new charges on the same day.²⁴

13. On 19 April 2016, the International Co-Investigating Judge informed the parties that he was inclined to exclude certain facts from the investigation and requested the parties' views on the matter.²⁵ On 9 November 2016, after receiving comments from AO An and the International Co-Prosecutor, the International Co-Investigating Judge formally notified the parties of his intention to exclude certain of the alleged facts.²⁶

14. On 30 November 2016 and 31 January 2017, the International Co-Investigating Judge ordered legal representation for all Civil Party applicants.²⁷

15. On 16 December 2016, the Co-Investigating Judges notified the parties of the conclusion of AO An's investigation.²⁸ On the same day, the Co-Investigating Judges also issued an order, severing AO An's investigation from Case 004, thereby creating a new Case File 004/2.²⁹ In addition, the International Co-Investigating Judge issued his decision to exclude alleged facts, as previously notified, pursuant to Internal Rule 66*bis* from the investigation.³⁰ This decision was not appealed by any of the parties.

16. On 29 March 2017, the Co-Investigating Judges issued a Second Notice of Conclusion of Judicial Investigation against AO An.³¹

²⁴ ECCC Press Release, "Statement of the International Co-Investigating Judge regarding Case 004", 14 March 2016, available at: <https://www.eccc.gov.kh/en/document/public-affair/additional-charges-announced-against-ao>.

²⁵ Case 004, Request for Comments regarding Alleged Facts Not To Be Investigated Further, 19 April 2016, D307 ("Case 004, Request for Comments (D307)").

²⁶ Case 004, Notification Pursuant to Internal Rule 66 *bis* (2), 9 November 2016, D307/4.

²⁷ Case 004/2, Order on the Assignment of Lawyers for all Civil Party Applicants, 30 November 2016, D330 (*see*, for example, D330, para. 3, where the International Co-Investigating Judge assigned "lawyers to unrepresented applicants and to applicants with invalid, expired, contradictory or incomplete [Powers of Attorney]" and reaffirmed "the legal representation of applicants with valid" Powers of Attorney); Case 004/2, Order on the Recognition of Lawyer and Assignment of Lawyers to Civil Party Applicants, 31 January 2017, D346.

²⁸ Case 004, Notice of Conclusion of Judicial Investigation against AO An, 16 December 2016, D334 ("First Rule 66(1) Notification (D334)").

²⁹ Case 004, Order for Severance of AO An from Case 004, 16 December 2016, D334/1 ("Case 004, AO An Severance Order (D334/1)").

³⁰ Case 004/2, Decision to Reduce the Scope of Judicial Investigation pursuant to Internal Rule 66 *bis*, 16 December 2016, D337.

³¹ Case 004/2, Second Notice of Conclusion of Judicial Investigation against AO An, 29 March 2017, D334/2 ("Second Rule 66(1) Notification (D334/2)").



17. On 28 April 2017, the International Co-Investigating Judge rejected all requests for protective measures made by Civil Party applicants to Case 004/2.³²

18. On 19 May 2017, the Co-Investigating Judges forwarded the Case File to the Co-Prosecutors pursuant to Internal Rule 66(4), inviting them to file their final submissions within three months.³³

19. On 18 August 2017, the National Co-Prosecutor filed a final submission, requesting dismissal of all allegations against AO An;³⁴ the International Co-Prosecutor in his final submission filed on 21 August 2017, on the other hand, requested AO An to be indicted and committed to trial (collectively, “Final Submissions”).³⁵ On 24 October 2017, the Co-Lawyers for AO An filed a response to the Co-Prosecutors’ Final Submissions.³⁶

20. On 16 August 2018, the Co-Investigating Judges issued conflicting Closing Orders. The National Co-Investigating Judge issued the Closing Order (Dismissal), dismissing all charges against AO An on the ground that he is not subject to the ECCC’s personal jurisdiction as a “senior leader” or among those “most responsible”.³⁷ The International Co-Investigating Judge, in contrast, issued a Closing Order (Indictment), sending AO An for trial on counts of genocide, crimes against humanity, and violations of the 1956 Penal Code and finding that AO An falls within the ECCC’s jurisdiction as one of those “most responsible” for Khmer Rouge-era crimes.³⁸ The Closing Orders were filed in only Khmer and English, respectively, with translations to follow.

21. On 16 August 2018, the same day, the National Co-Investigating Judge issued his Order Rejecting Civil Party Applications [*sic*] (“Order on Civil Parties (National)”), rejecting all Appellants’ Civil Party applications in Case 004/2 on the ground that all charges against AO An were dismissed for lack of jurisdiction.³⁹ The National Co-Investigating Judge’s order did not specifically examine the admissibility of each of the Civil Party applications. The International Co-Investigating Judge issued a separate Order on Admissibility of Civil Party

³² Case 004/2, Decision on Civil Party Applicants’ Request for Protective Measures, 28 April 2017, D348.

³³ Case 004/2, Forwarding Order pursuant to Internal Rule 66(4), 19 May 2017, D351.

³⁴ Case 004/2, Final Submission concerning AO An pursuant to Internal Rule 66, 18 August 2017, D351/4.

³⁵ Case 004/2, International Co-Prosecutor’s Rule 66 Final Submission, 21 August 2017, D351/5.

³⁶ Case 004/2, AO An’s Response to the Co-Prosecutors’ Rule 66 Final Submissions, 24 October 2017, D351/6.

³⁷ Closing Order (Dismissal) (D359).

³⁸ Closing Order (Indictment) (D360).

³⁹ Case 004/2, Order Rejecting Civil Party Applications [*sic*], 16 August 2018, D361 (“Order on Civil Parties (National) (D361)”).

Applicants (“Order on Civil Parties (International)”), declaring as admissible the Civil Party applications listed in Annex A to the Order, while rejecting as inadmissible the Civil Party applications listed in Annex B to the Order, including that of Robert HAMILI.⁴⁰ The International Co-Investigating Judge explained that he reassessed and, where necessary, reconsidered the admissibility findings made on 1 May 2012 by the Reserve International Co-Investigating Judge “in light of the advancement of the investigation.”⁴¹

22. On 20 August 2018, a group of Civil Party Co-Lawyers filed a consolidated request for an extension of time and pages for their Internal Rule 77*bis* appeals against Civil Party inadmissibility and permission for a single language filing with translations to follow.⁴² On 21 August 2018, another group of Civil Party Co-Lawyers filed a submission joining and providing additional support for the original extension request.⁴³

23. On 27 August 2018, the Pre-Trial Chamber granted the time and page extension request, extending the filing deadline to 30 days from the notification of the Closing Order (Indictment) in Khmer, increasing the page limit for appeal submissions to 45 pages in English or French or 90 pages in Khmer, and permitting the Civil Party Co-Lawyers to file in a single language, English or Khmer, with translations to follow soon after.⁴⁴

24. The Khmer translation of the Closing Order (Indictment) and the English translation of the Closing Order (Dismissal) were notified on 30 October 2018 and 5 November 2018, respectively.

25. On 29 November 2018, the Civil Party Co-Lawyers filed to the Pre-Trial Chamber the instant Appeal Against Order on the Admissibility of Civil Party Applicants, requesting that the Order on Civil Parties (International) (also, “the Impugned Order”) be overturned. In their Appeal, the Civil Party Co-Lawyers submit that the Impugned Order errs in law and fact and requests, *inter alia*, the Pre-Trial Chamber to reconsider the admissibility of the rejected Civil

⁴⁰ Order on Civil Parties (International) (D362).

⁴¹ Order on Civil Parties (International) (D362), para. 7.

⁴² Case 004/2, Civil Party Co-Lawyers’ Urgent Request for an Extension of Time and Pages to Appeal the Civil Party Admissibility Decisions in Case 004/2, 17 August 2018, D362/1. The request was filed in English on 20 August 2018 and notified in English and Khmer on 23 August 2018.

⁴³ Case 004/2, Submission Joining and Providing Additional Support for “Civil Party Co-Lawyers’ Urgent Request for an Extension of Time and Pages to Appeal the Civil Party Admissibility Decisions in Case 004/2”, 21 August 2018, D362/2. This request was notified in English on 23 August 2018 and in Khmer on 24 August 2018.

⁴⁴ Case 004/2 (PTC58), Decision on Civil Party Requests for Extension of Time and Page Limits, 27 August 2018, D362/4 (“Decision on Extension of Time and Page limits (D362/4”).



Party applications.⁴⁵ None of the Parties submitted responses to the Civil Party Co-Lawyers' Appeal.

26. On 5 October 2018, the Co-Lawyers for AO An filed a notice of appeal against the Closing Order (Indictment).⁴⁶ On 12 November 2018, the International Co-Prosecutor and the National Co-Prosecutor filed notices of appeal against the Closing Order (Dismissal)⁴⁷ and the Closing Order (Indictment),⁴⁸ respectively. The Parties filed submissions on appeal and various responses.⁴⁹ Oral arguments of the Parties on the appeals against the Closing Orders were heard *in camera* on 19, 20 and 21 June 2019.⁵⁰

27. On 19 December 2019, the Pre-Trial Chamber issued its Considerations on Appeals against Closing Orders, concluding *inter alia* that the Co-Investigating Judges' simultaneous issuance of the conflicting Closing Orders was in violation of the ECCC legal framework.⁵¹ The Pre-Trial Chamber was unable to reach a decision between the judges on whether to commit AO An to trial. While the National Judges decided to uphold the Closing Order

⁴⁵ Civil Party Appeal (D362/5) (The Co-Lawyers request that the Pre-Trial Chamber (1) hold that all Civil Party applicants "continue to exercise Civil Party Rights in the absence of a decision by a supra-majority" or, in the alternative, (2) overturn the Impugned Order and reconsider the applications in Annex A, (3) admit any supplementary information submitted by Civil Party Co-Lawyers, (4) grant Appellants the status of Civil Parties and (5), in the alternative, recognise Appellants not granted Civil Party status in Case 004/2 as "Complainants").

⁴⁶ Case 004/2, Notice of Appeal against International Co-Investigating Judges' Closing Order (Indictment), 5 October 2018, D360/5.

⁴⁷ Case 004/2, International Co-Prosecutor's Notice of Appeal against the [National Co-Investigating Judge]'s Order Dismissing the Case against AO An (D359), 12 November 2018, D359/3.

⁴⁸ Case 004/2, National Co-Prosecutor's Notice of Appeal against the [International Co-Investigating Judge]'s Closing Order (Indictment), 12 November 2018, D360/8.

⁴⁹ Case 004/2, National Co-Prosecutor's Appeal against the International Co-Investigating Judge's Closing Order (Indictment) in Case 004/2, 14 December 2018, D360/8/1; Case 004/2, International Co-Prosecutor's Appeal of the Order Dismissing the Case against AO An (D359), 20 December 2018, D359/3/1; Case 004/2, AO An's Appeal against the International Co-Investigating Judge's Closing Order (Indictment), 20 December 2018, D360/5/1; Case 004/2, AO An's Response to the International Co-Prosecutor's Appeal of the Order Dismissing the Case against AO An (D359), 20 February 2019, notified in English on 21 February 2019 and in Khmer on 19 March 2019, D359/3/4; Case 004/2, International Co-Prosecutor's Response to AO An's Appeal of the Case 004/2 Indictment, 22 February 2019, notified in English on 25 February 2019 and in Khmer on 15 March 2019, D360/9; Case 004/2, International Co-Prosecutor's Response to the National Co-Prosecutor's Appeal of the Case 004/2 Indictment, 27 February 2019, notified in English on 28 February 2019 and in Khmer on 15 March 2019, D360/10; Case 004/2, Reply to the International Co-Prosecutor's Response to AO An's Appeal of the Case 004/2 Indictment, 1 April 2019, notified in English on 3 April 2019 and in Khmer on 23 April 2019, D360/11; Case 004/2, International Co-Prosecutor's Reply to AO An's Response to the Appeal of the Order Dismissing the Case against AO An (D359), 3 April 2019, notified in Khmer on 22 April 2019, D359/3/5.

⁵⁰ Case 004/2 Transcript of 19 June 2019 (CS), D359/8.1 & D360/17.1, ERN (EN) 01625081-01625156, pp. 17-92; Case 004/2 Transcript of 20 June 2019 (CS), D359/9.1 & D360/18.1, ERN (EN) 01625260-01625372, pp. 1-113; Case 004/2 Transcript of 21 June 2019 (CS), D359/10.1 & D360/19.1, ERN (EN) 01625493-01625524, pp. 1-32.

⁵¹ Case 004/2 (PTC60), Considerations on Appeals against Closing Orders, 19 December 2019, D359/24 & D360/33 ("Considerations on Appeals against Closing Orders (D359/24 & D360/33)").



(Dismissal) and annul the Closing Order (Indictment) against AO An,⁵² the International Judges considered that Count 1 of the Indictment shall be amended to limit the genocide charges to the Central Zone, approved that AO An be sent for trial on the basis of the Indictment, and found that the Trial Chamber be seised under Internal Rule 77(13)(b).⁵³

II. STANDARD OF REVIEW

28. Internal Rule 77*bis* requires Appellants seeking to overturn an order from the Co-Investigating Judges on the admissibility of Civil Party applicants to demonstrate that the challenged decision was based on an error of law and/or fact.⁵⁴ The Pre-Trial Chamber recalls that on appeal, alleged errors of law are reviewed *de novo* to determine whether the legal decisions are correct, while alleged errors of fact are reviewed under a standard of reasonableness to determine whether no reasonable trier of fact could have reached the finding of fact at issue.⁵⁵

III. ADMISSIBILITY

29. The Co-Lawyers appeal the International Co-Investigating Judge's Order pursuant to Internal Rule 77*bis* and argue that the Appeal is timely and conforms to the page-limit.⁵⁶

30. The Pre-Trial Chamber recalls that pursuant to Internal Rule 74(4)(b), "Civil Parties may appeal against orders by the Co-Investigating Judges [...] declaring a Civil Party application inadmissible".⁵⁷ Internal Rule 77*bis* provides that the appeal shall be filed "[w]ithin

⁵² Considerations on Appeals against Closing Orders (D359/24 & D360/33), para. 302.

⁵³ Considerations on Appeals against Closing Orders (D359/24 & D360/33), paras 684, 694.

⁵⁴ Internal Rule 77*bis*. See also Case 002/19-09-2007-ECCC/OCIJ ("Case 002"), Decision on Appeals against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, 24 June 2011, D404/2/4 ("Case 002, Decision on Civil Party Appeals (D404/2/4)"), para. 34; Case 002, Decision on Appeals against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, 24 June 2011, D411/3/6 ("Case 002, Decision on Civil Party Appeals (D411/3/6)"), para. 34.

⁵⁵ Considerations on Appeals against Closing Orders (D359/24 & D360/33), para. 381 referring to Case 002 (PTC75), Decision on Ieng Sary's Appeal against the Closing Order, 11 April 2011, D427/1/30, para. 113; Case 002, Appeal Judgement, 23 November 2016, F36, paras 89-90; Decision on Civil Party Appeals (D404/2/4), para. 34; Case 002, Decision on Civil Party Appeals (D411/3/6), para. 34.

⁵⁶ Civil Party Appeal (D362/5), paras 6-7.

⁵⁷ Internal Rule 74(4)(b). See also Case 002, Decision on Civil Party Appeals (D404/2/4), para. 33; Case 002, Decision on Civil Party Appeals (D411/3/6), para 33.



10 days of the notification of the decision on admissibility”.⁵⁸ The Chamber considers that the Appeal was submitted in compliance with its instructions, recalling its Decision to exceptionally grant the Co-Lawyers a 30-day extension to file their Appeal.⁵⁹ Accordingly, the Chamber finds that the Appeal is admissible.

IV. LEGAL PRINCIPLES OF CIVIL PARTY ADMISSIBILITY

31. In assessing the Co-Lawyers’ Appeal, the Pre-Trial Chamber considers it appropriate to recall the legal principles governing admissibility of Civil Party applications before the ECCC.

32. Internal Rule 23*bis*(1) sets out the criteria for admitting a Civil Party applicant:

In order for Civil Party action to be admissible, the Civil Party applicant shall:

- a) be clearly identified; and
- b) 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 physical, material or psychological injury upon which a claim of collective and moral reparation might be based.

When considering the admissibility of the Civil Party application, the Co-Investigating Judges shall be satisfied that facts alleged in support of the application are more likely than not to be true.

33. As the Pre-Trial Chamber has previously noted,⁶⁰ the legal elements comprising Internal Rule 23*bis*(1) include the following: (a) the existence of a causal link between the crimes and the injury; (b) injury; and (c) proof of identification. Internal Rule 23*bis*(1) also prescribes the relevant level of proof by which these elements must be established. The Chamber will, in the course of its review of the Appeal, discuss specific legal aspects of these elements and the level of proof as relevant to assessing the Co-Lawyers’ appeal submissions.

⁵⁸ Internal Rule 77*bis*. See also Case 002, Decision on Civil Party Appeals (D404/2/4), para. 33; Case 002, Decision on Civil Party Appeals (D411/3/6), para. 33.

⁵⁹ Decision on Extension of Time and Page limits (D362/4) (The Pre-Trial Chamber extended the deadline for the filing of the present Appeal to 30 days from the notification of the Closing Order (Indictment) in Khmer and increased the page limit for the submissions to 45 pages in English and French and to 90 pages in Khmer. The Khmer translation of the Closing Order (Indictment) was notified on 30 October 2018. The Civil Parties filed their Appeal on 29 November 2018.).

⁶⁰ Case 002, Decision on Civil Party Appeals (D404/2/4), para. 57; Case 002, Decision on Civil Party Appeals (D411/3/6), para. 57.



In this section, the Chamber provides the following general observations.

34. As a preliminary matter, the Pre-Trial Chamber considers that (i) the ECCC Agreement; (ii) ECCC Law; (iii) Internal Rules 21, 23, *23bis*, *23ter*, *23quater*, *23quinquies* and 114; and (iv) the Practice Direction on Victim Participation form part of the applicable context in interpreting the criteria for Civil Party admissibility.⁶¹ Guidance may also be sought from the general principles on victims in international law.⁶²

35. In respect of the existence of a causal link, a Civil Party applicant must demonstrate that the injury was a direct consequence of the crimes alleged against the Charged Person.⁶³ While the injury must be personal to the applicant, the requirement of injury as a direct consequence of the offence does not restrict the admissibility of Civil Parties to direct victims but can also include indirect victims who personally suffered injury as a direct result of the crime committed against the direct victim.⁶⁴ Thus, ECCC jurisprudence recognises both direct victims and indirect victims. A direct victim refers to “the category of persons whose rights were violated or endangered by the crime charged.”⁶⁵ Indirect victims are persons who “personally suffered injury as a direct result of the crime committed against the direct victim.”⁶⁶

36. In terms of injury, Internal Rule *23bis*(1)(b) provides that the injury must be physical, material or psychological.⁶⁷ Physical injury “denotes biological damage, anatomical or functional” and “may be described as a wound, mutilation, disfigurement, disease, loss or dysfunction of organs, or death.”⁶⁸ Material injury “refers to a material object’s loss of value, such as complete or partial destruction of personal property, or loss of income.”⁶⁹ Finally,

⁶¹ Case 002, Decision on Civil Party Appeals (D404/2/4), para. 31; Case 002, Decision on Civil Party Appeals (D411/3/6), para. 31.

⁶² Case 002, Decision on Civil Party Appeals (D404/2/4), para. 32; Case 002, Decision on Civil Party Appeals (D411/3/6), para. 32 (referring to *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, GA Res. 40/34, 29 November 1985 (“1985 Victims Principles”) and *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, GA Res. 60/147, 21 March 2006, UN Doc. A/RES/60/147 (“2005 Victims Principles”)).

⁶³ Case 002, Decision on Civil Party Appeals (D404/2/4), para. 71; Case 002, Decision on Civil Party Appeals (D411/3/6), para. 71. *See further* Ground 1 *infra*.

⁶⁴ Case 001/18-07-2007-ECCC/SC (“Case 001”), Appeal Judgement, 3 February 2012, F28 (“Case 001 Appeal Judgment (F28)”), para. 418; Case 002, Decision on Civil Party Appeals (D404/2/4), para. 83; Case 002, Decision on Civil Party Appeals (D411/3/6), para. 83.

⁶⁵ Case 001 Appeal Judgment (F28), para. 416.

⁶⁶ Case 001 Appeal Judgment (F28), para. 418.

⁶⁷ Case 002, Decision on Civil Party Appeals (D404/2/4), para. 83; Case 002, Decision on Civil Party Appeals (D411/3/6), para. 83.

⁶⁸ Case 001 Appeal Judgment (F28), para. 415.

⁶⁹ Case 001 Appeal Judgment (F28), para. 415.



psychological injury may “include[] mental disorders or psychiatric trauma, such as post-traumatic stress disorder.”⁷⁰

37. In respect of the requirement for all applicants to clearly prove their identity, the Pre-Trial Chamber has previously endorsed a flexible approach, which includes, for example, accepting as proof of identity statements issued from the village elder or the communal chiefs.⁷¹

38. In terms of the level of proof by which the above elements must be established, pursuant to Internal Rule 23*bis*(1), the Pre-Trial Chamber must, in evaluating the materials submitted as part of a Civil Party application, be “satisfied that facts alleged in support of the application are more likely than not to be true.”⁷²

V. MERITS

39. While the decision of the Pre-Trial Chamber in respect of the admissibility of the Appeals is expressed in the preceding paragraphs, the Chamber, upon deliberation, has not attained the required majority of four affirmative votes to reach a decision based on common reasoning on the merits. Pursuant to Internal Rule 77(14), the Opinions of the various members of the Pre-Trial Chamber are attached to these Considerations.

⁷⁰ Case 002, Decision on Civil Party Appeals (D404/2/4), para. 83; Case 002, Decision on Civil Party Appeals (D411/3/6), para. 83; Case 001 Appeal Judgment (F28), para. 415.

⁷¹ Case 002, Decision on Civil Party Appeals (D404/2/4), para. 95; Case 002, Decision on Civil Party Appeals (D411/3/6), para. 95. *See further* Ground 4 *infra*.

⁷² Case 002, Decision on Civil Party Appeals (D404/2/4), para. 94; Case 002, Decision on Civil Party Appeals (D411/3/6), para. 94. *See further* Ground 4 *infra*.



VI. DISPOSITION**THEREFORE, THE PRE-TRIAL CHAMBER HEREBY:**

- **UNANIMOUSLY DECLARES** that it has not assembled an affirmative vote of at least four judges on a decision on the Appeal.

In accordance with Internal Rule 77(13), the present Decision is not subject to appeal.

Phnom Penh, 30 June 2020

President

Pre-Trial Chamber



PRAK Kimsan

Olivier BEAUVALLET

NEY Thol

Kang Jin BAIK

HUOT Vuthy

Judges PRAK Kimsan, NEY Thol and HUOT Vuthy append their opinion.

Judges Olivier BEAUVALLET and Kang Jin BAIK append their opinion.



VII. OPINION OF JUDGES PRAK KIMSAN, NEY THOL AND HUOT VUTHY

40. Under Internal Rule 23*bis*(1), in order for Civil Party action to be admissible, the Civil Party applicant shall:

- a) be clearly identified; and
- b) 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 physical, material or psychological injury upon which a claim of collective and moral reparation might be based.

41. In Considerations on Appeals against Closing Orders, D359/24 and D360/33, issued by the PTC, the PTC unanimously hereby decides and declares that the issuance of Two Conflicting Closing Orders was illegal, violating the legal framework of the ECCC.⁷³ The National Judges are of the view that the closing order dismissing the case against AO An, which was done in accordance with the Agreement and the ECCC Law, shall be upheld, and the closing order indicting AO An and sending him to trial, which was not done in line with the Agreement and the ECCC Law, shall be annulled. Finally, the National Judges hereby decide to uphold the closing order dismissing the case against AO An, and annul the closing order indicting AO An and sending him to trial.⁷⁴

42. Pursuant to Internal Rule 23*bis* and the Disposition in aforementioned D359/24 and D360/33, the PTC National Judges find that **all** civil party applicants shall be rejected, not only those in the annexes as the International Co-Investigating Judge had decided.

43. Therefore, the PTC National Judges hereby decide to reject all civil party applications in Case 004/2.

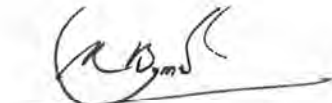
Phnom Penh, 30 June 2020



President PRAK Kimsan



Judge NEY Thol



Judge HUOT Vuthy

⁷³ Considerations on Appeals against Closing Orders (D359/24 & D360/33), p. 89.

⁷⁴ Considerations on Appeals against Closing Orders (D359/24 & D360/33), p. 133.



VIII. OPINION OF JUDGES BAIK AND BEAUVALLET

44. The International Judges will set out below their considerations in respect of the Civil Parties' Appeal.

A. Ground 1: Alleged Error of Law and Fact in Identifying Only Those Crimes Committed in the Central Zone as Relevant to the Nexus Requirement Under Internal Rule 23bis(1)(b)

1. Submissions

45. The Co-Lawyers assert that the International Co-Investigating Judge erred in law and fact by only examining alleged crimes committed in the Central Zone as relevant to Civil Party admissibility.⁷⁵ In doing so, the International Co-Investigating Judge: (a) disregarded AO An's alleged participation in "a national JCE whose goal was the implementation of CPK policies across Cambodia, including through crimes outside the Central [...] Zone";⁷⁶ and (b) failed to take into account "the presumption of collective injury, which extends to members of the same targeted group or community regardless of their location".⁷⁷

46. Under Ground 1(a), the Co-Lawyers submit that the Impugned Order erred by focusing exclusively on crimes committed in the Central Zone,⁷⁸ despite the allegations that AO An participated in a national JCE.⁷⁹ The Co-Lawyers contend that the Pre-Trial Chamber has made clear in Case 002 that Internal Rule 23bis(1)(b) requires Civil Party applicants to show a link between the "physical, material or psychological injury" and "the alleged crimes", which constitute the "legal characterization of the facts investigated" rather than the facts investigated themselves.⁸⁰ Therefore, in cases of mass atrocities committed through a JCE via nationwide policies, Civil Party applicants are not necessarily required to relate their injury to one of the crime sites or factual incidents set out in a closing order.⁸¹

⁷⁵ Civil Party Appeal (D362/5), para. 17.

⁷⁶ Civil Party Appeal (D362/5), heading of Section V(A)(a).

⁷⁷ Civil Party Appeal (D362/5), para. 17.

⁷⁸ Civil Party Appeal (D362/5), para. 18.

⁷⁹ Civil Party Appeal (D362/5), paras 18, 26.

⁸⁰ Civil Party Appeal (D362/5), para. 18 *referring to* Case 002, Decision on Civil Party Appeals (D404/2/4), para. 42.

⁸¹ Civil Party Appeal (D362/5), para. 20 *referring to* Case 002, Decision on Civil Party Appeals (D404/2/4), para. 72.



47. The Co-Lawyers assert that the Pre-Trial Chamber's Case 002 holdings apply equally in the instant case because AO An participated in a national JCE with the purpose of implementing CPK policies throughout Cambodia.⁸² They allege that the Closing Order (Indictment), Third Introductory Submission and the Supplementary Submissions "are replete with allegations of A[O] An's participation in a national JCE that encompasses alleged crimes beyond those solely committed" in the Central Zone⁸³ and assert that the national JCE was implemented through regional enterprises, including by AO An in the Central Zone.⁸⁴ In support of these contentions, the Co-Lawyers refer, *inter alia*, to allegations that arrests and disappearances in the Central Zone were "an organized effort planned by [AO An] and *other leaders of the CPK*" but implemented by AO An and his cadre⁸⁵ and that AO An's participation in the national JCE was coordinated with the highest levels of CPK leadership⁸⁶ since AO An received instructions from POL Pot.⁸⁷ The Co-Lawyers contend that, *inter alia*, the Closing Order (Indictment) highlights AO An's involvement in the perpetration of Central Zone crimes in furtherance of the CPK's nationwide criminal plan as the Closing Order (Indictment) found that AO An made a "significant contribution" to the four nationwide policies,⁸⁸ including the targeting of a broad range of specific groups.⁸⁹

48. Therefore, the Co-Lawyers assert that the International Co-Investigating Judge erred by focusing exclusively on crimes committed in the Central Zone to determine Civil Party admissibility "[d]espite the manifest 'collective dimensions' of A[O] An's liability".⁹⁰ Instead, the International Co-Investigating Judge should have considered crimes committed outside the Central Zone when they formed part of the national JCE to which AO An allegedly belonged.⁹¹ The Co-Lawyers request that the Pre-Trial Chamber admit the Appellants that suffered harm as a direct consequence of the implementation of this national JCE.⁹²

⁸² Civil Party Appeal (D362/5), para. 21.

⁸³ Civil Party Appeal (D362/5), para. 23 *referring to* Closing Order (Indictment) (D360), para. 307; First Supplementary Submission (D65), para. 23.

⁸⁴ Civil Party Appeal (D362/5), para. 21.

⁸⁵ Civil Party Appeal (D362/5), para. 21 *referring to* Third Introductory Submission (D1), para. 90(b).

⁸⁶ Civil Party Appeal (D362/5), para. 21.

⁸⁷ Civil Party Appeal (D362/5), para. 21 *referring to* Closing Order (Indictment) (D360), para. 825.

⁸⁸ Civil Party Appeal (D362/5), para. 22 *referring to* Closing Order (Indictment) (D360), paras 827-829, 831.

⁸⁹ Civil Party Appeal (D362/5), para. 25 *referring to* Closing Order (Indictment) (D360), para. 218.

⁹⁰ Civil Party Appeal (D362/5), para. 26.

⁹¹ Civil Party Appeal (D362/5), para. 26.

⁹² Civil Party Appeal (D362/5), paras 27-28 (The Co-Lawyers refer to rejected Civil Party applicants that have suffered harm as a consequence of the four policies implemented to advance the national JCE, including Chhom Hun (13-VSS-00633), Dân Nat (13-VSS-00316), Kâp Nhen (13-VSS-00477), In Sopheap (13-VSS-00193) and the Appellants identified in Annex E: Civil Parties Harmed as a Result of Persecution of a Targeted Group,



49. Under Ground 1(b), the Co-Lawyers argue that the International Co-Investigating Judge erred by limiting his admissibility analysis to Central Zone crimes considering that victims outside this Zone were members of the same targeted groups and communities.⁹³ The Co-Lawyers assert that the Pre-Trial Chamber recognised a “presumption of collective injury” when mass atrocity crimes are alleged and that this presumption extends to members of the same targeted group or community, rejecting any requirement of physical proximity.⁹⁴ The Co-Lawyers further allege that the ECCC’s endorsement of “collective injury” comports with international practice,⁹⁵ as this notion is recognised by the International Criminal Court (“ICC”),⁹⁶ the 1985 and 2005 United Nations’ Basic Principles⁹⁷ and various human rights bodies, such as the African Commission of Human and Peoples’ Rights and the Inter-American Court of Human Rights.⁹⁸

50. The Co-Lawyers allege that AO An is responsible for targeting specific groups in the Central Zone⁹⁹ and recall the Pre-Trial Chamber’s reasoning that “a presumption of collective injury arising from the harm suffered by direct victims in the Central [...] Zone extends to *all* members of these specifically targeted groups or communities irrespective of their locations”.¹⁰⁰ While the International Co-Investigating Judge purportedly acknowledges the principle of collective injury in the Impugned Order, he nevertheless “erroneously imposes a requirement that those with shared membership in the targeted group or community be physically located in the Central [...] Zone”.¹⁰¹

D362/5.7 (“Annex E (D362/5.7)”) and Annex F: Civil Party Applicants Harmed Pursuant to the Policies of the Joint Criminal Enterprise, D362/5.8 (“Annex F (D362/5.8)”).

⁹³ Civil Party Appeal (D362/5), para. 29.

⁹⁴ Civil Party Appeal (D362/5), para. 30 *referring to* Case 002, Decision on Civil Party Appeals (D404/2/4), paras 83-93.

⁹⁵ Civil Party Appeal (D362/5), para. 31.

⁹⁶ Civil Party Appeal (D362/5), para. 31 *referring to* International Criminal Court (“ICC”), *Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, ICC-01/04-01/06-1432, Judgment on the Appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, 11 July 2008, para. 35.

⁹⁷ Civil Party Appeal (D362/5), para. 31 *quoting* 1985 Victims Principles, Annex A.1; 2005 Victims Principles, preamble.

⁹⁸ Civil Party Appeal (D362/5), para. 31 *referring to* African Commission on Human and Peoples’ Rights, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, No. 276/03, 25 November 2009, para. 248; Committee on Economic, Social and Cultural Rights, *General Comment No. 21: Right of everyone to take part in cultural life*, 43rd session, 21 December 2009, U.N. Doc. E/C. 12/GC/21, para. 37; Inter-American Court of Human Rights, *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*, Judgment (Merits and Reparations), 27 June 2012, Series C, No. 245, paras 231-232, 284.

⁹⁹ Civil Party Appeal (D362/5), para. 32 *referring to* Closing Order (Indictment) (D360), para. 218; Third Introductory Submission (D1), paras 7, 16-17; First Supplementary Submission (D65), para. 21.

¹⁰⁰ Civil Party Appeal (D362/5), para. 32.

¹⁰¹ Civil Party Appeal (D362/5), para. 33.



51. The Co-Lawyers request that the Pre-Trial Chamber overturn the Impugned Order and admit as Civil Parties the Appellants who have provided sufficient information to show their membership in one or more of the specifically targeted groups or communities identified in the Closing Order (Indictment).¹⁰²

2. Discussion

52. The International Judges find that the International Co-Investigating Judge did not err by identifying only those crimes allegedly committed in the Central Zone as relevant to the causal link requirement under Internal Rule 23bis(1)(b). First, the International Judges observe that the Impugned Order appropriately limits the examination of potentially admissible Civil Party applicants to the Central Zone.¹⁰³ Second, the Impugned Order correctly interprets and applies the notion of collective injury in relation to indirect victims who suffered injury as a result of an alleged crime committed against a direct victim in the Central Zone.¹⁰⁴

a. Applicable Law

53. Stating the purpose of Civil Party action, Internal Rule 23(1) provides:

The purpose of Civil Party action before the ECCC is to:

- a) Participate in criminal proceedings against those responsible for crimes within the jurisdiction of the ECCC by supporting the prosecution; and
- b) Seek collective and moral reparations, as provided in Rule 23quinquies.

54. Dealing with applications and admission of Civil Parties, Internal Rule 23bis(1) provides:

In order for Civil Party action to be admissible, the Civil Party applicant shall:

- a) be clearly identified; and

¹⁰² Civil Party Appeal (D362/5), paras 34-35 (The Co-Lawyers refer to rejected Civil Party applicants that have suffered harm as a consequence of being a member of a targeted group or community, including Ven Vân (11-VSS-00276), Chin Sokhom (13-VSS-00647), El Meu (13-VSS-00403), Man Sles (16-VSS-00015), Kheav Ny (13-VSS-00610), Son Em (14-VSS-00170), Tan Sok (11-VSS-00120), Has Da (11-VSS-00224), Bun Sarin (15-VSS-00063), Svay Neth (14-VSS-00196), Sao Seang Kim (16-VSS-00077), So Kelvin Leng (11-VSS-00319), Long Phan (11-VSS-00182), Hoeung Sovanna (13-VSS-00389), Chhay Yan (15-VSS-00022) and the Appellants identified in Annex E (D362/5.7).

¹⁰³ Closing Order (Indictment), para. 824; Order on Civil Parties (International) (D362), para. 37.

¹⁰⁴ Order on Civil Parties (International) (D362), paras 32-34.



- b) 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 physical, material or psychological injury upon which a claim of collective and moral reparation might be based.

When considering the admissibility of the Civil Party application, the Co-Investigating Judges shall be satisfied that facts alleged in support of the application are more likely than not to be true.

b. Ground 1(a)

55. The Impugned Order did not err in limiting the territorial scope to the Central Zone and the International Judges consider that extending Civil Party action against the Accused beyond the alleged crimes in the Central Zone would be improper and unfair, derogating from the nexus requirement under Internal Rule 23*bis* essential to admitting any Civil Party application.

56. Internal Rule 23*bis*(1)(b) concerns the admission of Civil Party applications and provides that a Civil Party applicant must “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 physical, material or psychological injury”.¹⁰⁵ The International Judges observe that this Internal Rule requires a causal link between the “alleged crimes” and the “injury” suffered by the applicant.¹⁰⁶ The Pre-Trial Chamber has previously found that while “Internal Rule 23*bis*(1)(b) does not require a causal link between the harm and the facts investigated, it explicitly requires a causal link between the harm and any of *the crimes alleged*.”¹⁰⁷ Consequently, the harm suffered by a Civil Party applicant must be connected to crimes charged in the Closing Order (Indictment) in order to be considered for admissibility at this stage of the proceedings.

57. The meaning of Internal Rule 23*bis*(1)(b) has been further clarified by the Pre-Trial Chamber. While noting the robust partial dissent in Case 002,¹⁰⁸ the International Judges observe that: “[t]he Pre-Trial Chamber considers 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 rather is to set criteria for admissibility of civil party applications”.¹⁰⁹ In the context of Case 002, where

¹⁰⁵ Internal Rule 23*bis*(1)(b).

¹⁰⁶ Internal Rule 23*bis*(1)(b). *See also* Case 002, Decision on Civil Party Appeals (D404/2/4), para. 42; Case 002, Decision on Civil Party Appeals (D411/3/6), para. 42.

¹⁰⁷ Case 002, Decision on Civil Party Appeals (D404/2/4), paras 42, 71; Case 002, Decision on Civil Party Appeals (D411/3/6), paras 42, 71.

¹⁰⁸ Case 002, Decision on Civil Party Appeals (D404/2/4), [Dissenting] Opinion of Judge Catherine MARCHI-UHEL, paras 3-5.

¹⁰⁹ Case 002, Decision on Civil Party Appeals (D404/2/4), para. 62; Case 002, Decision on Civil Party Appeals (D411/3/6), para. 62.



multiple Accused were implicated, the Chamber observed that while “the facts investigated are limited to certain areas or crime sites, the legal characterizations of such facts, [...] include crimes [...] committed by the Charged Persons by acting in a joint criminal enterprise together and with others against the population and ‘*throughout* the country’”.¹¹⁰ As noted, “the Victims before ECCC, especially in case 002, are in a different position from those before domestic courts and even from those in ECCC’s case 001”.¹¹¹ Consequently, in Case 002, the Chamber held that Civil Party applicants did not have to relate their injury to only those crime sites identified in the Closing Order “as the crimes and the underlying CPK policies forming the basis of the indictments were allegedly implemented throughout Cambodia”¹¹² with those offenses “including crimes against humanity, genocide, grave breaches of the Geneva Conventions of 12 August 1949 and violations of the 1969 Penal Code”.¹¹³

58. In this case, while the Co-Lawyers refer extensively to the Chamber’s prior holdings in Case 002,¹¹⁴ the International Judges find that those arguments fail. The International Judges are not convinced that the circumstances identified by the Pre-Trial Chamber in Case 002 are prevalent in the instant case. The International Judges observe that the multiple Accused in Case 002 were indicted for crimes committed *throughout* Cambodia.¹¹⁵ In contrast with Case 002, AO An is indicted for crimes committed in the *Central Zone* only,¹¹⁶ with the Closing Order (Indictment) clearly defining and limiting the geographical scope as follows: “beginning in late 1976 or early 1977 and lasting until at least 6 January 1979, K[E] Pauk, A[O] An and other CPK cadres shared the common purpose of implementing four CPK policies *in the Central Zone of DK*”.¹¹⁷

59. In addition, the Co-Lawyers argue that Civil Parties across Cambodia should have been admitted and make repeated reference to allegations made in the Third Introductory

¹¹⁰ Case 002, Decision on Civil Party Appeals (D404/2/4), para. 42; Case 002, Decision on Civil Party Appeals (D411/3/6), para. 42.

¹¹¹ Case 002, Decision on Civil Party Appeals (D404/2/4), para. 69; Case 002, Decision on Civil Party Appeals (D411/3/6), para. 69.

¹¹² Case 002, Decision on Civil Party Appeals (D404/2/4), para. 72; Case 002, Decision on Civil Party Appeals (D411/3/6), para. 72.

¹¹³ Case 002, Decision on Civil Party Appeals (D404/2/4), para. 71; Case 002, Decision on Civil Party Appeals (D411/3/6), para. 71.

¹¹⁴ Civil Party Appeal (D362/5), paras 19-20.

¹¹⁵ See, e.g., Case 002, Decision on Civil Party Appeals (D404/2/4), paras 74-75; Case 002, Decision on Civil Party Appeals (D411/3/6), paras 74-75.

¹¹⁶ Closing Order (Indictment) (D360), paras 720-851.

¹¹⁷ Closing Order (Indictment) (D360), para. 824 (emphasis added).



Submission and Supplementary Submissions in support of this contention.¹¹⁸ The International Judges consider that, at this stage of the proceedings where the Closing Order has already been issued, the authoritative document is the Closing Order (Indictment)—not any prior submissions from the Office of the Co-Prosecutors.¹¹⁹ In that sense, the International Judges consider that the causal link that must be made by the Civil Party applicants is to a crime alleged and not to “(i) the broader scope of the investigation, (ii) facts for which the judicial investigation has already been opened, or (iii) facts under investigation.”¹²⁰ The International Judges observe that the Closing Order (Indictment) charges AO An for various crimes limited in geographical scope to the Central Zone.¹²¹ In addition, the International Co-Investigating Judge explained that he did not consider himself directly seized of the criminal scenarios alleged in the First Supplementary Submission in respect of AO An,¹²² with which the International Co-Prosecutor agreed.¹²³

60. It is reasonably concluded, at this stage of the proceedings, that to be admissible a Civil Party applicant must demonstrate, as a direct consequence of at least one of the crimes charged, 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.¹²⁴

61. The International Judges observe that the Impugned Order appropriately limits the

¹¹⁸ Civil Party Appeal (D362/5), paras 21-25.

¹¹⁹ See, e.g., Internal Rule 67(1) (“The Co-Investigating Judges shall conclude the investigation by issuing a Closing Order, either indicting a Charged Person and sending him or her to trial, or dismissing the case. The Co-Investigating Judges are not bound by the Co-Prosecutors’ submissions.”).

¹²⁰ Cf. Decision on Civil Party Appeals (D404/2/4), [Dissenting] Opinion of Judge Catherine MARCHI-UHEL, para. 34.

¹²¹ Closing Order (Indictment) (D360).

¹²² Case 004, Request for Comments (D307), para. 3, fact 8 (“A[O] An’s responsibility for all crime scenarios alleged in the [First Supplementary Submission] – I do not consider myself directly seized of Fact 8 [...], for several reasons: The allegations in the [First Supplementary Submission] are geographically limited to the Northwest and Southwest Zones. The crimes alleged by the [Office of the Co-Prosecutors] are described in paragraphs 5 to 20 of the [First Supplementary Submission]. In this narrative, there is no mention of any role that A[O] An may have played in the commission of the alleged crimes. A[O] An is only mentioned in paragraph 23, where he is alleged to have committed, *inter alia*, the crimes described in the [First Supplementary Submission] through his participation in the joint criminal enterprise described in paragraph 21 of the [First Supplementary Submission] and paragraph 16 of the [Third Introductory Submission] [...] As for paragraph 21 of the [First Supplementary Submission], it describes a nation-wide JCE. However, the allegations of A[O] An’s membership thereof are very general, and other allegations made by the [Office of the Co-Prosecutors] in the Submissions do not shed further light on A[O] An’s alleged membership in this nation-wide JCE. There are no offence-specific allegations of fact regarding A[O] An, either.”).

¹²³ Case 004, International Co-Prosecutor’s Response to the International Co-Investigating Judge’s Request for Comments regarding Alleged Facts not to be Investigated Further, 3 June 2016, D307/2, paras 3(4), 24 (“The [International Co-Prosecutor] agrees that the [International Co-Investigating Judge] should not consider himself directly seized of Fact 8 in regard to A[O] An.”).

¹²⁴ Internal Rule 23bis(1)(b).



scope of potentially admissible Civil Party applicants to those “who have suffered harm in the *Central Zone* from approximately late 1976 to 6 January 1979”, in accordance with the Closing Order (Indictment).¹²⁵ Contrary to the Co-Lawyers’ allegations,¹²⁶ Civil Party applicants that have suffered injury, which is not derived from crimes alleged in the Central Zone, do not meet the causal link requirement under Internal Rule 23bis(1)(b).

62. Finally, the International Judges consider that the majority of inadmissible Civil Party applicants highlighted in the Co-Lawyers’ submissions and those listed in Annex E (targeted groups)¹²⁷ and Annex F (as victims across Cambodia)¹²⁸ may have suffered from the mass atrocities, which transpired during the Khmer Rouge regime. However, the International Judges find that the events described do not amount to alleged crimes in Case 004/2, as defined in the Closing Order (Indictment). Consequently, the International Co-Investigating Judge did not err in law by considering only victims of Central Zone crimes or by rejecting the applicants listed in Annexes E and F that are not linked to alleged crimes in this Zone.¹²⁹ Accordingly, Ground 1(a) is dismissed.

c. Ground 1(b)

63. Under Internal Rule 23bis(1)(b), a Civil Party applicant must further “demonstrate [...] that he or she has in fact suffered physical, material or psychological injury.”¹³⁰ In Case 002, the Pre-Trial Chamber considered the nature and extent of psychological injury suffered in the context of mass atrocities committed throughout Cambodia¹³¹ and extended the presumption of psychological injury to indirect victims who did not have a familial relationship with the direct victim but who were part of the same targeted group.¹³² The Pre-Trial Chamber observed that:

[T]he mere knowledge of the fate of another human who is a direct victim of crimes committed resulting from the implementation of policies to that effect must be more than not likely to be psychologically disturbing to any person of ordinary sensibility.

¹²⁵ Order on Civil Parties (International) (D362), para. 37 (emphasis added).

¹²⁶ Civil Party Appeal (D362/5), paras 17-21, 26.

¹²⁷ Annex E (D362/5.7).

¹²⁸ Annex F (D362/5.8).

¹²⁹ The International Judges note that they will assess the alleged factual errors in respect of certain Civil Party applicants, *inter alia*, Dân Nat (13-VSS-00316) in Ground 2 and/or Ground 4 *infra*.

¹³⁰ Internal Rule 23bis(1)(b).

¹³¹ Case 002, Decision on Civil Party Appeals (D404/2/4), para. 86; Case 002, Decision on Civil Party Appeals (D411/3/6), para. 86.

¹³² Case 002, Decision on Civil Party Appeals (D404/2/4), paras 83-93; Case 002, Decision on Civil Party Appeals (D411/3/6), paras 83-93.



Such disturbance flows not just from seeing such crimes being committed but also from the implied and constant threat generated by such occurrences that can reasonably be expected to instill fear on the others that this could also be their fate due to them belonging to the same targeted group or community as the direct victim of a crime committed as part of the implementation of the CPK policies.¹³³

Following this observation, the Chamber held that “for those applicants alleging psychological injury who are not in a position to substantiate a close relationship with the immediate victim, [it] shall, where appropriate, apply a presumption of collective injury” in its assessment of Civil Party applications.¹³⁴

64. In the present case, the International Judges affirm that an indirect victim may claim psychological injury even in the absence of a familial relationship with the direct victim through his or her membership within the same targeted group or community. The International Judges observe that the International Co-Investigating Judge has, in fact, adopted this approach, as the relevant section of the Impugned Order concludes:

[P]sychological harm encompasses harm suffered by a direct victim as a direct result of a crime, or by an indirect victim as a result of the crimes committed against, or the harm suffered by, a direct victim. *Indirect victims may suffer such harm regardless of the absence of a familial relationship with the direct victim where they were both members of the same targeted group or the same community, or where the indirect victim was otherwise affected by the harm suffered by the direct victim.*¹³⁵

65. On this basis, the Co-Lawyers allege that “a presumption of collective injury arising from the harm suffered by direct victims in the Central [...] Zone extends to *all* members of these specifically targeted groups or communities irrespective of their locations”.¹³⁶ However, the International Judges recall that Internal Rule 23*bis*(1)(b) requires a nexus between the *injury* and the *alleged crimes*,¹³⁷ including in relation to indirect victims.

66. In contrast with Case 002, the crimes alleged against AO An are limited in geographical scope to the Central Zone.¹³⁸ As noted, it follows that the injury described by a Civil Party applicant must be connected to the Central Zone. In particular, the Closing Order (Indictment) describes the targeting of specific groups as follows:

¹³³ Case 002, Decision on Civil Party Appeals (D404/2/4), para. 86; Case 002, Decision on Civil Party Appeals (D411/3/6), para. 86.

¹³⁴ Case 002, Decision on Civil Party Appeals (D404/2/4), para. 93; Case 002, Decision on Civil Party Appeals (D411/3/6), para. 93.

¹³⁵ Order on Civil Parties (International) (D362), para. 34 (emphasis added).

¹³⁶ Civil Party Appeal (D362/5), para. 32.

¹³⁷ Internal Rule 23*bis*(1)(b).

¹³⁸ Closing Order (Indictment) (D360), para. 824.



[B]eginning in late 1976 or early 1977 and lasting until at least 6 January 1979, Ke Pauk, Ao An and other CPK cadres shared the common purpose of implementing four CPK policies in the Central Zone of DK.

[...]

iii. The targeting of specific groups, including Central Zone CPK cadres, former officials of the Khmer Republic, “17 April people”, people from the East Zone, the Cham, and their families was implemented through genocide of the Cham population of Kampong Cham Province, by killing, causing serious bodily or mental harm; and through the crimes against humanity of imprisonment, murder, extermination, torture, other inhumane acts (enforced disappearances, forced labour, physical abuse of prisoners, and inhumane conditions of detention), persecution on political grounds, and persecution on religious grounds.¹³⁹

67. In contrast, the Co-Lawyers argue that *all* Civil Party applicants alleging injury as members of a specifically targeted group are admissible, even when the injury did not result from the targeting of a member of a specific group in the Central Zone.¹⁴⁰ For example, the Co-Lawyers describe Civil Party applicant EL Meu, an ethnic Cham, who was forcibly relocated with her family from their home in Kampot to locations in DK outside the Central Zone and was forced to eat pork against her religious beliefs.¹⁴¹ While the International Judges agree that this may have caused suffering and may be related to policies implemented throughout Cambodia during the Khmer Rouge regime, the injury alleged did not result from the targeting of Cham in the Central Zone and is not imputable to AO An.

68. The International Judges therefore conclude that the nexus requirement in Internal Rule 23bis(1)(b) dictates that the presumption of collective injury, in the present case, extends to those Civil Party applicants who can relate their injury to the alleged crimes committed against direct victims in the Central Zone. Mere membership of the same targeted group elsewhere, without any connection to the Central Zone, does not suffice. While the International Judges observe that the majority of the inadmissible Civil Party applicants highlighted in the Co-Lawyers’ submissions and those listed in Annex E¹⁴² may have suffered psychological injury as a result of their (perceived) membership of a specifically targeted group, their injury does not relate to the “alleged crimes” in this case and, consequently, the International Co-

¹³⁹ Closing Order (Indictment) (D360), para. 824.

¹⁴⁰ Civil Party Appeal (D362/5), paras 33-35 (stating that the “Appellants listed in Annex E have all provided information sufficient to show their membership in one or more of the specifically targeted groups or communities identified in the Submissions” and “[o]n this basis, the [Pre-Trial Chamber] should overturn the Impugned Order and admit these Appellants as Civil Parties”) (emphasis added).

¹⁴¹ Civil Party Appeal (D362/5), para. 34(3).

¹⁴² Annex E (D362/5.7).



Investigating Judge did not err in law when rejecting these applicants.¹⁴³ Accordingly, Ground 1(b) is dismissed.

B. Ground 2: Alleged Error in that the Severance of Case 004/2 from Case 004 Should not be Determinative of Civil Party Admissibility

1. Submissions

69. The Co-Lawyers submit that the International Co-Investigating Judge misconstrued the Case 004/2 Severance Order¹⁴⁴ as limiting his ability to consider alleged crimes in the broader Case 004 pre-severance case file and, thus, prejudiced the Appellants.¹⁴⁵ The International Co-Investigating Judge reduced the temporal and geographic scope to applicants who suffered harm “in the Central Zone from approximately late 1976 to 6 January 1979”¹⁴⁶, effectively barring previously qualified Civil Party applicants from participating.¹⁴⁷ The Co-Lawyers submit that the International Co-Investigating Judge’s interpretation of the Severance Order “runs counter to the rights of the victims” which are guaranteed by the fundamental principles of the ECCC, particularly in light of the tribunal’s goal of national reconciliation and the need to assure meaningful victim participation.¹⁴⁸

70. The Co-Lawyers allege that the Co-Investigating Judges provided no prior indication that the Severance Order would negatively impact the rights of Civil Party applicants.¹⁴⁹ The Co-Investigating Judges “failed to consult the Civil Parties or their lawyers in advance of the Severance Order, despite Internal Rule 66 *bis*, which requires that parties be granted an opportunity to make submissions on the matter.”¹⁵⁰ Moreover, the Co-Investigating Judges failed to provide a reasoned decision on the Severance Order’s potential impact on Civil Parties

¹⁴³ The International Judges note that it will assess the alleged factual errors in respect of certain Civil Party applicants, *inter alia*, So Kelvin Leng (11-VSS-00319) and Man Sles (16-VSS-00015) in Ground 2 and 4 *infra* respectively.

¹⁴⁴ Civil Party Appeal (D362/5), paras 36-38 *referring to* Case 004, AO An Severance Order (D334/1).

¹⁴⁵ Civil Party Appeal (D362/5), para. 36 *quoting* Order on Civil Parties (International) (D362), para. 37.

¹⁴⁶ Civil Party Appeal (D362/5), para. 37.

¹⁴⁷ Civil Party Appeal (D362/5), para. 37.

¹⁴⁸ Civil Party Appeal (D362/5), para. 38 *referring to* Case 002, Decision on Appeals on Admissibility of Civil Party Applications (D404/2/4), para. 61.

¹⁴⁹ Civil Party Appeal (D362/5), para. 39.

¹⁵⁰ Civil Party Appeal (D362/5), para. 39 *referring to* Internal Rule 66*bis*(2) (“Before reducing the scope of the judicial investigation, the Co-Investigating Judges shall notify the details of the intended reduction to the Co-Prosecutors and the lawyers for the other parties. The parties shall have 15 days to file submissions.”).



and the scope of Cases 004, 004/1 and 004/2.¹⁵¹

71. Referring to the Severance Order, the Co-Lawyers submit that a routine act, intended to expedite the proceedings should not deprive victims of their right to meaningfully participate.¹⁵² Despite the Severance Order's pronouncement that its issuance would cause no prejudice to the parties, this Order became determinative of the admissibility of "large swaths" of Civil Party applicants, as the International Co-Investigating Judge disregarded the wider scope of Case 004, which included crimes in the Northwest and Southwest Zones.¹⁵³

72. Therefore, the Co-Lawyers request that the Pre-Trial Chamber "find that the Severance Order impermissibly prejudiced the rights of Appellants" and overturn the International Co-Investigating Judge's Impugned Order¹⁵⁴ for each Appellant that "suffered an injury that is the direct consequence of an alleged crime that was otherwise in the scope of Case 004 pre-severance".¹⁵⁵ In support of their contentions, the Co-Lawyers submit lists of applicants under Annex B (Southwest Zone), Annex C (Northwest Zone) and Annex D (Central Zone), alleging that they were erroneously rejected.¹⁵⁶

2. Discussion

73. The International Co-Investigating Judge's interpretation of the Severance Order did not erroneously limit his own examination nor improperly disregard the broader allegations in the original Case 004.

74. First, the International Judges find that the International Co-Investigating Judge did not reduce the scope of the investigation nor deprive victims of their right to meaningfully participate by the Severance Order. The Severance Order only "duplicated and collected" the same factual allegations from Case 004 to form the new Case 004/2, including the charged

¹⁵¹ Civil Party Appeal (D362/5), para. 39 *referring to* Internal Rule 66bis(3) ("The Co-Investigating Judges shall determine the effect of the decision made pursuant to sub-rule (1) on the status of the Civil Parties and on the right of Civil Party applicants to participate in the judicial investigation").

¹⁵² Civil Party Appeal (D362/5), para. 40 *referring to* Case 004, AO An Severance Order (D334/1).

¹⁵³ Civil Party Appeal (D362/5), para. 40.

¹⁵⁴ Civil Party Appeal (D362/5), para. 41.

¹⁵⁵ Civil Party Appeal (D362/5), para. 41 *referring to* Annex B: Civil Party Applicants Harmed in the Southwest Zone Between 1975 and 1979 (Kampot, Kandal and Takeo Provinces), D362/5.4 ("Annex B (D362/5.4)"); Annex C: Civil Party Applicants Harmed in the Northwest Zone Between 1976 and 1979 (Banteay Meanchey, Battambang and Pursat Provinces), D362/5.5 ("Annex C (D362/5.5)"); Annex D: Civil Party Applicants Harmed in the Central Zone Between 1976 and 1979 (Kampong Cham, Kampong Thom and Kratie Provinces), D362/5.6 ("Annex D (D362/5.6)").

¹⁵⁶ Annex B (D362/5.4); Annex C (D362/5.5); Annex D (D362/5.6).



crimes against AO An.¹⁵⁷ The Civil Party applicants demonstrating a causal link to the crimes alleged may be admitted in AO An's case under Internal Rule 23*bis*(1)(b).¹⁵⁸ Given the duplication of all charges and that the identical factual allegations are "remaining in the original case",¹⁵⁹ the Civil Party applicants retain their status regarding the same crimes against other Charged Persons or Suspects in Case 004.

75. Turning to the Co-Lawyers' contention that the International Co-Investigating Judge violated Internal Rule 66*bis* by failing to consult the Civil Parties "in advance of the severance order" or that the Severance Order did not "include any reasoned decision" on the potential impact on the Civil Parties,¹⁶⁰ these arguments must fail as this provision is irrelevant. The Internal Rule 66*bis*(1)(2) and (3)¹⁶¹ state in relevant part as follows:

1. In order to ensure a fair, meaningful and expeditious judicial process, in consideration of the specific requirements of the proceedings before the ECCC, the Co-Investigating Judges may, at the time of notification of conclusion of investigation, decide to reduce the scope of judicial investigation by excluding certain facts set out in an Introductory Submission or any Supplementary Submission(s). The Co-Investigating Judges shall ensure that the remaining facts are representative of the scope of the Introductory Submission and any Supplementary Submission(s).
2. Before reducing the scope of the judicial investigation, the Co-Investigating Judges shall notify the details of the intended reduction to the Co-Prosecutors and the lawyers for the other parties. The parties shall have 15 days to file submissions.
3. The Co-Investigating Judges shall determine the effect of the decision made pursuant to sub-rule (1) on the status of the Civil Parties and on the right of Civil Party applicants to participate in the judicial investigation.

¹⁵⁷ See Case 004/1/07-09-2009-ECCC-OCIJ ("Case 004/1"), Considerations on the International Co-Prosecutor's Appeal of Closing Order (Reasons), 28 June 2018, D308/3/1/20 ("Case 004/1, Considerations on the Appeal of Closing Order (Reasons) (D308/3/1/20)"), paras. 38-40 (where the Pre-Trial Chamber previously held, concerning the severance of Case 004/1 (IM Chaem) from the wider Case 004, that "the Co-Investigating Judges implicitly severed all criminal allegations brought against IM Chaem, but did not sever the person, in order to establish Case 004/1." Further, the Chamber explicitly found that all criminal allegations against IM Chaem "have been duplicated and collected in Case 004/1, with no allegations against her remaining in Case 004." Importantly, "*all criminal allegations in the Introductory and Supplementary Submissions, including those duplicated in Case 004/1 against IM Chaem, also remain in Case 004, against other known or unknown persons*". (emphasis added)).

¹⁵⁸ See also, Ground 1(a) (discussing admissibility of Civil Party applicants including, *inter alia*, the nexus required between the injury suffered by the Civil Party applicant and the crime alleged under Internal Rule 23*bis*).

¹⁵⁹ Case 004/1, Considerations on the Appeal of Closing Order (Reasons) (D308/3/1/20), para. 38.

¹⁶⁰ Civil Party Appeal (D362/5), para. 39.

¹⁶¹ Civil Party Appeal (D362/5), para. 39, footnotes 93 and 94.



The plain language of this provision applies to the reduction of the scope of the judicial investigation—a legal mechanism wholly dissimilar from severance. The International Judges thus find that Internal Rule 66*bis*(1), (2) and (3) are not applicable to severance orders.

76. Second, turning to the Co-Lawyers' contention that by the Severance Order, the International Co-Investigating Judge deprived the victim of their right to meaningfully participate and that he should have considered the Northwest or Southwest Zones,¹⁶² the International Judges find that this argument fails on its face. The Severance Order occasioned no prejudicial reduction or exclusion, as rejected for the reasons above. Further, as the International Judges address under Ground 1, the International Co-Investigating Judge did not err in confining the scope of admissibility to, *inter alia*, injury which is the direct consequence of at least one of the crimes alleged against AO An, which transpired in the *Central Zone* from approximately late 1976 to 6 January 1979.¹⁶³ Accordingly, the International Judges find that Annex B (listing applicants harmed in the Southwest Zone) and Annex C (listing applicants harmed in the Northwest Zone) fall outside of the scope of Case 004/2.

77. Third, concerning Annex D (listing applicants harmed in the Central Zone), as Annexes B and C, the International Judges reject the argument that the Severance Order impermissibly prejudiced applicants. Notwithstanding the Co-Lawyers' failure to properly raise the errors, under Internal Rule 21, the International Judges find that it safeguards the interests of victims to exceptionally consider Annex D as the Central Zone falls squarely within the territorial scope of this case making it *prima facie* relevant and erroneous exclusions may have occurred.

78. Upon reviewing Annex D, the International Judges find that the International Co-Investigating Judge erred in his decision on admissibility of seven Civil Party applicants and consider that, as reasoned in Annex 1 appended to these Considerations, the following seven Civil Party applications should have been admitted: 13-VSS-00316, 12-VSS-00518, 11-VSS-00059, 12-VSS-00672, 13-VSS-00697, 16-VSS-00020 and 11-VSS-00032.¹⁶⁴

¹⁶² Civil Party Appeal (D362/5), para. 40. *See also*, Annex B (D362/5.4); Annex C (D362/5.5) (with Annex B referencing applicants harmed within the Southwest Zone and Annex C listing applicants harmed in the Northwest Zone).

¹⁶³ *See* Considerations on Appeals against Closing Orders, (D359/24 & D360/33), para. 632 (where the International Judges with regards to amending the Closing Order (Indictment), considered that "Count 1 of the Indictment to provide that AO An is indicted and committed to trial for the crime of genocide against the Cham of Kampong Cham Province in the *Central Zone*.").

¹⁶⁴ The International Judges remark that three of these seven applicants (12-VSS-00672, 16-VSS-00020 and 11-VSS-00032) are also submitted and considered under Ground 4, where the International Judges find that they should have been admitted similarly therein, as *infra*.



79. In conclusion, as regards the lists of applicants under Annex B (Southwest Zone), Annex C (Northwest Zone) and Annex D (Central Zone) except for the above seven Civil Party applicants who should have been admitted, the International Judges find no legal basis to conclude that the International Co-Investigating Judge erred in his examination of admissibility in Case 004/2 following severance nor that this “impermissibly prejudiced” the Civil Party applicants. Ground 2 is affirmed in part and dismissed in part.

C. Ground 3: Alleged Failure to Provide Reasoned Decisions for the Rejections of Civil Party Applications

1. Submissions

80. The Co-Lawyers allege that the International Co-Investigating Judge erred in law by failing to provide a reasoned opinion for the rejections of Civil Party applications. They argue that the Impugned Order fails to meet the minimum standards required to respect the principles of legality, including transparency and legal certainty as set out by the Pre-Trial Chamber.¹⁶⁵ At a minimum, the Co-Investigating Judges must “implicitly disclose the material which has been taken into account by the judges when making a decision”.¹⁶⁶ Without the Civil Parties being informed of the reasoning, the right to appellate review provided by the Internal Rules is rendered meaningless.¹⁶⁷

81. The Co-Lawyers argue that the Pre-Trial Chamber previously set out the minimum standards for a reasoned decision concerning Civil Party application rejections in Case 002 and contend that the Impugned Order “fails to meet” those standards.¹⁶⁸ The Co-Lawyers submit that the International Co-Investigating Judge rejected “an overwhelming proportion” of Civil Party applications “*en masse* without proper individual consideration.”¹⁶⁹ The Co-Lawyers allege that the Impugned Order, as in Case 002, uses reasoning, or lack thereof, which are “limited to a few short, recycled statements.”¹⁷⁰ The Impugned Order rejects “nearly three-

¹⁶⁵ Civil Party Appeal (D362/5), paras 42, 44 and footnote 98 *referring to, inter alia*, Case 002, Decision on Civil Party Appeals (D411/3/6), paras 37-38.

¹⁶⁶ Civil Party Appeal (D362/5), para. 42 *quoting* Case 002, Decision on Civil Party Appeals (D411/3/6), para. 39.

¹⁶⁷ Civil Party Appeal (D362/5), para. 42.

¹⁶⁸ Civil Party Appeal (D362/5), paras 43-44 *referring to* Case 002, Decision on Civil Party Appeals (D411/3/6); Case 002, Decision on Civil Party Appeals (D404/2/4).

¹⁶⁹ Civil Party Appeal (D362/5), para. 44

¹⁷⁰ Civil Party Appeal (D362/5), para. 44.



quarters of the Appellants on [...] generic grounds”, including falling outside of the scope of the case file or that it was not more likely than not that the applicant suffered harm from a charged crime.¹⁷¹ This lack of specificity does not allow Civil Party applicants to meaningfully exercise their appellate rights.¹⁷²

82. The Co-Lawyers request that the Pre-Trial Chamber overturn the Impugned Order where the application fell “‘outside the scope of the case file’ [...] or where it was purportedly ‘not shown that it is more likely than not to be true that the victim suffered as a consequence of the crimes charged’” because the basis of those rejections were not issued by reasoned order.¹⁷³

2. Discussion

83. The International Judges find that the Impugned Order and related Annex B (outlining the analysis of inadmissible applications) provide sufficient reasoning in support of the inadmissibility findings to constitute a reasoned decision. The Order and related Annex B disclose the material taken into consideration. These documents demonstrate that the International Co-Investigating Judge individually considered each Civil Party applicant and allow Appellants to effectively exercise their right to appeal.

84. The International Judges recall that “the requirement for judicial bodies to provide reasoned decisions [...] [is] an international standard”.¹⁷⁴ First, the International Judges consider that a reasoned decision is required for the parties to effectively exercise their right to appeal under Internal Rule 74.¹⁷⁵ In its previous decisions, the Chamber found that while “the Co-Investigating Judges are not required to ‘indicate a view on all the factors’ considered in their decision making process, it is important that all parties concerned know the reasons for a

¹⁷¹ Civil Party Appeal (D362/5), para. 44.

¹⁷² Civil Party Appeal (D362/5), para. 44.

¹⁷³ Civil Party Appeal (D362/5), para. 45. *See also* Civil Party Appeal (D362/5), Annex G: Civil Party Applicants Found Inadmissible on Inadequate Grounds (D362/5.9).

¹⁷⁴ Case 002, Decision on Civil Party Appeals (D404/2/4), para. 38; Case 002, Decision on Civil Party Appeals (D411/3/6), para. 38 *referring to* Case 002 (PTC06), Decision on Nuon Chea’s Appeal against Order Refusing Request for Annulment, 26 August 2008, D55/1/8, para. 21.

¹⁷⁵ Internal Rule 74 concerns Grounds for Pre-Trial Appeals. Particularly relevant is Internal Rule 74(4) concerning Civil Party Appeals reading: “Civil Parties may appeal against the following orders by the Co-Investigating Judges [...]” and listing the specific grounds for Civil Party appeals, including appeal against orders “declaring a Civil Party application inadmissible).



decision.”¹⁷⁶ This allows the parties to make an informed decision on whether to appeal or not and on what grounds.¹⁷⁷

85. In Case 002, the Pre-Trial Chamber considered the level of detail required in the Co-Investigating Judges’ reasoning when admitting or rejecting Civil Party applications, finding that:

[I]n general, a judicial decision must, implicitly disclose the material which has been taken into account by the judges when making a decision. This will ensure that parties having been unsuccessful in their application can be assured that the facts submitted and their submissions in respect of the law have been properly and fully taken into account. Each applicant to be joined as a Civil Party has a right to have their individual application considered and to a demonstration that this has occurred, even if the decision is provided in a short and tabular form.¹⁷⁸

In that case, the Chamber considered that more detailed reasoning was required in respect of the rejected Civil Party applicants because the Co-Investigating Judges’ reasons were limited to short statements (5-15 words), contained a “maximum” of two sentences per rejection and were not specific to each application.¹⁷⁹ The Chamber concluded that the Co-Investigating Judges committed a “significant error in law” in insufficiently addressing the basis of rejection concerning Civil Party applicants.¹⁸⁰

86. In the present case, the International Judges observe that the Impugned Order sets out the legal principles and criteria the International Co-Investigating Judge applied when determining the admissibility of Civil Party applications.¹⁸¹ These principles include the type of victim and harm relevant to admissible Civil Party applications, the causal link required between the harm suffered and crimes alleged against the charged person, the standard of proof

¹⁷⁶ Case 002, Decision on Civil Party Appeals (D404/2/4), para. 38; Case 002, Decision on Civil Party Appeals (D411/3/6), para. 38 referring to Case 002 (PTC03), Decision on Appeal against Provisional Detention Order of Ieng Sary, 17 October 2008, C22/1/73, para. 66; Case 002 (PTC67), Decision on Co-Prosecutors Appeal against the Co-Investigating Judges Order on Request to Place Additional Evidentiary Material on the Case File which Assists in Providing the Charged Persons’ Knowledge of the Crimes, 15 June 2010, D365/2/10, para. 24. See also Case 002 (PTC62), Decision on the Ieng Thirith Defence Appeal against ‘Order on Requests for Investigative Action by the Defence for Ieng Thirith’ of 15 March 2010, 14 June 2010, D353/2/3, para. 23.

¹⁷⁷ Case 002, Decision on Civil Party Appeals (D404/2/4), para. 38; Case 002, Decision on Civil Party Appeals (D411/3/6), para. 38; Case 002 (PTC 46), Decision on Appeal against OCIJ Order on Requests D153, D172, D173, D174, D178 & D284 (NUON Chea’s Twelfth Request for Investigative Action), 14 July 2010, D300/1/5 (“Case 002, Decision on Appeal OCIJ Order (D300/1/5)”, para. 41.

¹⁷⁸ Case 002, Decision on Civil Party Appeals (D404/2/4), para. 39; Case 002, Decision on Civil Party Appeals (D411/3/6), para. 39.

¹⁷⁹ Case 002, Decision on Civil Party Appeals (D404/2/4), paras 37, 39; Case 002, Decision on Civil Party Appeals (D411/3/6), paras 37, 39.

¹⁸⁰ Case 002, Decision on Civil Party Appeals (D404/2/4), paras 39-40; Case 002, Decision on Civil Party Appeals (D411/3/6), paras 39-40.

¹⁸¹ Order on Civil Parties (International) (D362).



and sufficiency of information.¹⁸² In addition, the International Co-Investigating Judge defines the scope of admissible applications based on the Closing Order (Indictment) against AO An, explaining that the “applicants who have suffered harm in the Central Zone from approximately late 1976 to 6 January 1979 satisfy the causal link requirement in the presence of two conditions”.¹⁸³ The related Annexes provide additional information with respect to the admissibility of each individual Civil Party applicant.¹⁸⁴ The International Judges consider that the Impugned Order and Annexes shall be read in conjunction.

87. While the Co-Lawyers allege that the International Co-Investigating Judge “rejected an overwhelming proportion of [Civil Party applications] *en masse* without proper individual consideration”,¹⁸⁵ the International Judges find that Annex B,¹⁸⁶ in fact, demonstrates that the International Co-Investigating Judge individually considered each application. The International Judges observe that the table includes, *inter alia*, the relevant document numbers and sufficient reasoning for the inadmissibility findings.

88. As opposed to merely stating that “the necessary causal link between the alleged harm and the facts under investigation was not established” or “the Civil Party applicants did not provide sufficient information in their applications to verify compliance with Rules 23*bis* (1) and (4)” as was done in Case 002,¹⁸⁷ in Annex B under the column “Reasons for the Inadmissibility Finding”,¹⁸⁸ the International Co-Investigating Judge demonstrates the basis of his conclusion. For instance, after articulating the specific information primarily considered, he concluded that “facts described fall outside the scope of the case file” or that “it was not shown that it is more likely than not to be true that the applicant suffered as a consequence of one of the crimes charges” on the facts described in respect of each individual applicant; this

¹⁸² Order on Civil Parties (International) (D362).

¹⁸³ Order on Civil Parties (International) (D362), paras 37-38 (The International Co-Investigating Judge further explains that the two further conditions applicants must satisfy are that: (i) “the harm suffered by the applicant derives from the alleged implementation” of the CPK policies described in the Closing Order (Indictment) at any location within the Central Zone; (ii) “there is evidence that the implementation of these policies may have amounted to either genocide, or to one or more of the crimes against humanity listed in Article 5 of the ECCC Law”).

¹⁸⁴ Annex A: Civil Party Applications Declared Admissible, D362.1; Annex B: Civil Party Applications Declared Inadmissible, D362.2.

¹⁸⁵ Civil Party Appeal (D362/5), para. 44.

¹⁸⁶ Annex B: Civil Party Applications Declared Inadmissible, D362.2.

¹⁸⁷ Case 002, Decision on Civil Party Appeals (D404/2/4), para. 37; Case 002, Decision on Civil Party Appeals (D411/3/6), para. 37.

¹⁸⁸ Annex B: Civil Party Applications Declared Inadmissible, D362.2.



included the crimes alleged in the application, the location and timeframe.¹⁸⁹

89. In respect of KIEV Him,¹⁹⁰ a specific complaint made by the Co-Lawyers of a failure to provide reasoning, the International Judges consider that the International Co-Investigating Judge's reasoning was sufficient as he described the relevant facts relating to crimes alleged in 1975 in Kampong Speu Province and, as such, these “do not relate to any matter which would permit his admission to be joined as a civil party”.¹⁹¹

90. In conclusion, the International Co-Investigating Judge's explanations were specific and, importantly, included reference to the details of the application rejected. The International Judges therefore consider that Annex B, read in conjunction with the Impugned Order, disclosed the material taken into account by the International Co-Investigating Judge when making his decision and that this demonstrates that each individual application had been “properly and fully taken into account”.¹⁹² The International Judges find that the Impugned Order and related Annex B are sufficiently reasoned, allowing each applicant to file an appeal of the rejection of his or her application. Accordingly, Ground 3 is dismissed.

¹⁸⁹ Annex B: Civil Party Applications Declared Inadmissible, D362.2; *see, for example, inter alia*, one rejection from the International Co-Investigating Judge stating that: MAY Vannak described “enslavement and [other inhumane acts] in Mean Chey Commune, Chhuk District, Kampot Province throughout the DK period; murder of Applicant's relatives in Prey Kduoch Tram Kak District, Takeo Province in unspecified time during the DK period” and that while it is “recognised that these are traumatising events, they do not relate to any matter which would permit the admission of the applicant to be joined as a civil party, as they fall outside the scope of the Case File” (Annex B: Civil Party Applications Declared Inadmissible, D362.2, page 170); *see also*, for example, the International Co-Investigating Judge examining the individual application of TES Bopha, who described “[other inhumane acts]: death of [...] children in 1975; [other inhuman acts]: disappearance of her brother, her brother-in-law, her children and her husband and [other inhumane acts] (incl. ill-treatment), enslavement and [other inhumane acts] (incl. inhumane living conditions) of Applicant in Bakan District, throughout DK; [other inhumane acts]: death of her mother and siblings” and the International Co-Investigating Judge concluding that these “facts described fall outside the scope of the case file.” (Annex B: Civil Party Applications Declared Inadmissible, D362.2, page 66); *see also*, for example, the International Co-Investigating Judge examination of PHLEU Ly's application in which he described, *inter alia*, “disappearance of Applicant's parents, her husband and her brothers, former Lon Nol Soldiers in Sector 13 in 1976” and CHHAY Sok's application who described, *inter alia*, “forcible transfer [...] to Kampong Speu Province, Battambang Province (1975) and Kandal Province”. The International Co-Investigating Judge found with respect to both applicants that they did “not establish that it is more likely or not to be true that [they] suffered as a consequence of one of the crimes charged” (Annex B: Civil Party Applications Declared Inadmissible, D362.2, pages 131, 137). The International Co-Investigating Judge's description of relevant facts and his related reasoning for the rejections—that they fall outside of the scope of the case file or that the applicant does not establish that he/she suffered as a consequence of one of the crimes charged—were commonly formulated like the examples of MAY Vannak, TES Bopha, PHLEU Ly and CHHAY So and, thus, sufficiently articulate the rejections in Annex B.

¹⁹⁰ Civil Party Appeal (D362/5), para. 44 (The Co-Lawyers allege that “the Impugned Order recapitulates facts but does not state the reason the International Co-Investigating Judge rejected the Civil Party's Application”).

¹⁹¹ Annex B: Civil Party Applications Declared Inadmissible, D362.2, page 208.

¹⁹² Case 002, Decision on Civil Party Appeals (D404/2/4), para. 39; Case 002, Decision on Civil Party Appeals (D411/3/6), para. 39.



D. Ground 4: Alleged Failure to Provide Sufficient Information

1. Submissions

91. The Co-Lawyers submit that the Co-Investigating Judges erred in fact by rejecting Civil Party applicants for failing “to provide sufficient information as required under Internal Rule 23*bis*(1) and (4)”.¹⁹³ They allege that “[i]nformation is deemed sufficient when it allows the [Co-Investigating Judges] to be satisfied that the facts alleged are more likely than not to be true.”¹⁹⁴

92. In the Co-Lawyers’ view, the object and purpose of Internal Rule 23*bis* is not to restrict or limit the concept of Civil Party action at the ECCC¹⁹⁵ and this Rule must be read in conjunction with Internal Rule 21, which sets out the fundamental duty to safeguard the interests of the victims.¹⁹⁶ The Co-Investigating Judges “must determine whether there are *prima facie* credible grounds indicating that the applicant suffered harm related to the facts under investigation on the basis of the elements in the case file”¹⁹⁷ and, while doing so, take into consideration the gravity of the crimes addressed at the ECCC in light of “the special circumstances of the conflict.”¹⁹⁸ The Co-Lawyers refer to the International Co-Investigating Judge’s acknowledgment that certain factors mitigate the required proof of harm for Civil Party applicants (such as the passage of time) and to his flexible approach to proving identity.¹⁹⁹

93. In light of the above, the Co-Lawyers request the Pre-Trial Chamber to overturn the International Co-Investigating Judge’s findings of inadmissibility for victims rejected under grounds related to the sufficiency and quality of information and, consequently, grant these victims Civil Party status.²⁰⁰

¹⁹³ Civil Party Appeal (D362/5), para. 46.

¹⁹⁴ Civil Party Appeal (D362/5), para. 46 referring to Case 002, Decision on Civil Party Appeals (D404/2/4), para. 94.

¹⁹⁵ Civil Party Appeal (D362/5), para. 47 referring to Case 002, Decision on Civil Party Appeals (D404/2/4), para. 62.

¹⁹⁶ Civil Party Appeal (D362/5), para. 47 referring to Case 002, Decision on Civil Party Appeals (D404/2/4), para. 61.

¹⁹⁷ Civil Party Appeal (D362/5), para. 48.

¹⁹⁸ Civil Party Appeal (D362/5), para. 48 quoting Case 002, Decision on Civil Party Appeals (D404/2/4), para. 70.

¹⁹⁹ Civil Party Appeal (D362/5), paras 49-50 referring to Order on Civil Parties (International) (D362), paras 40, 48.

²⁰⁰ Civil Party Appeal (D362/5), paras 51-52 (This concerns victims identified by the Co-Lawyers in Annexes H(1) and H(2) of their Appeal. See Annex H(1): Admissibility Arguments for Civil Party Applicants Found Inadmissible for Insufficiency of the Evidence or Related Grounds (Applicants Represented by Foreign-National



2. Discussion

94. Pursuant to Internal Rule 23*bis*(4), all Civil Party applications must contain sufficient information to allow verification of their compliance with the Internal Rules.²⁰¹ In particular, “the application must provide details of the status as a Victim, specify the alleged crime and attach any evidence of the injury suffered, or tending to show the guilt of the alleged perpetrator.”²⁰² Considering that the object and purpose of these rules is not to “restrict or limit the notion of victim or civil party action in the ECCC” but to set baseline criteria for admissibility,²⁰³ the Pre-Trial Chamber has endorsed a “flexible approach” in relation to the requirement for all applicants to clearly prove their identity.²⁰⁴

95. In accordance with Internal Rule 23*bis*(1), when considering the admissibility of Civil Party applications, “the Co-Investigating Judges shall be satisfied that facts alleged in support of the application are more likely than not to be true.”²⁰⁵ The International Judges observe that, in the Impugned Order, the International Co-Investigating Judge found certain circumstantial factors mitigated the required degree of proof of harm,²⁰⁶ including: (a) the passage of time; (b) the capacity to identify and record psychological health impact; and (c) the capacity to provide proof of ownership and of income due to forced movement of the population.²⁰⁷ The International Judges consider that this flexible approach to documentary evidence and proving identity is appropriate considering the particular cultural and social background of Cambodia and the practical extent of available evidence in the wake of the mass atrocities alleged in this case.²⁰⁸

96. The International Judges have duly reviewed the Co-Lawyers’ arguments submitted in the Appeal’s Annexes H(1) and H(2) for overturning the International Co-Investigating Judge’s

Lawyer Teams), D362/5.10; Annex H(2): Admissibility Arguments for Civil Party Applicants Found Inadmissible for Insufficiency of the Evidence, etc. (National Legal Team), D362/5.11).

²⁰¹ Internal Rule 23*bis*(4). See also *Practice Direction on Victim Participation*, 02/2007/Rev.1, as amended 27 October 2008, Articles 3.2, 3.5, 3.6.

²⁰² Internal Rule 23*bis*(4).

²⁰³ Case 002, Decision on Civil Party Appeals (D404/2/4), para. 62; Case 002, Decision on Civil Party Appeals (D411/3/6), para. 62.

²⁰⁴ Case 002, Decision on Civil Party Appeals (D404/2/4), para. 95; Case 002, Decision on Civil Party Appeals (D411/3/6), para. 95.

²⁰⁵ Internal Rule 23*bis*(1). See also Case 002, Decision on Civil Party Appeals (D404/2/4), para. 94; Case 002, Decision on Civil Party Appeals (D411/3/6), para. 94.

²⁰⁶ Order on Civil Parties (International) (D362), para. 42.

²⁰⁷ Order on Civil Parties (International) (D362), para. 41.

²⁰⁸ See Case 002, Decision on Civil Party Appeals (D404/2/4), paras 83, 95; Case 002, Decision on Civil Party Appeals (D411/3/6), paras 83, 95.



findings of inadmissibility. To this end, the International Judges have carefully examined the information provided by Civil Party applicants²⁰⁹ to assess if the International Co-Investigating Judge erred in his assessment of whether it is “more likely than not to be true” that the applicant suffered harm from crimes committed in the Central Zone from late 1976 to 6 January 1979, within the temporal or territorial scope of the case file.²¹⁰ Appended as Annex 2, contains the International Judges’ considerations in respect of each of these submissions. Upon reviewing the applications within Annex 2, the International Judges find that the International Co-Investigating Judge erred in his decision on admissibility of eight Civil Party applicants and consider that the following eight Civil Party applications should have been admitted as reasoned in Annex 2: 16-VSS-00048; 15-VSS-00038; 16-VSS-00042; 16-VSS-00015; 16-VSS-00020; 11-VSS-00032; 11-VSS-00058; and 12-VSS-00672.²¹¹

E. Ground 5: Alleged Violation of Victims’ Rights to be Informed

1. Submissions

97. Under Ground 5, the Co-Lawyers submit that the Co-Investigating Judges breached victims’ rights to be properly and timely informed throughout the proceedings in violation of Internal Rule 21(1)(c).

98. First, the Co-Lawyers recall the Pre-Trial Chamber’s holding concerning the set of victims’ rights enshrined in Internal Rule 21(1)(c),²¹² emphasising that the Internal Rules must be read in a manner that protects the interests of the victims.²¹³ While the Co-Lawyers recognise that the Co-Investigating Judges are bound by Internal Rules on confidentiality of investigations, they allege that these provisions should be read in conjunction with the fundamental principles of procedure before the ECCC which require that “victims are kept informed” and that “their rights are respected *throughout* the proceedings”,²¹⁴ which leaves no

²⁰⁹ In examining the Civil Party applications, the International Judges reviewed victim information forms and any attachments, and where available, supplementary information, summary reports, written records of interview and transcripts of in-court testimony given by the applicant before the ECCC.

²¹⁰ Internal Rule 23*bis*; Order on Civil Parties (International) (D362), paras 37-39.

²¹¹ The International Judges remark that three of these eight applicants (16-VSS-00020, 11-VSS-00032 and 12-VSS-00672) are also submitted and considered under Ground 2, where the International Judges find that they should have been admitted similarly therein, as *supra*.

²¹² Civil Party Appeal (D362/5), para. 53 *referring to* Internal Rule 21(1)(c).

²¹³ Civil Party Appeal (D362/5), para. 53 *referring to* Case 002, Decision on Civil Party Appeals (D404/2/4), para. 61.

²¹⁴ Civil Party Appeal (D362/5), para. 54 *referring to* Case 002, Decision on Civil Party Appeals (D404/2/4), para. 52.



room for interpretation.²¹⁵

99. Furthermore, the Co-Lawyers assert that proper and timely access to information is particularly key for victims seeking to become Civil Parties, as they do not have access to the case file and rely on information released by the Co-Investigating Judges.²¹⁶ The Co-Investigating Judges failed to keep victims informed because they only disclosed the relevant crime sites to the victims three years after the filing of the Third Introductory Submission on 20 November 2008.²¹⁷ Moreover, in their first disclosure on the Case 004 crime sites, the Co-Investigating Judges sowed confusion and undercut victims' faith in the outcome of the investigation by noting "their 'serious doubts' about whether Case 004 would go forward".²¹⁸

100. The Co-Lawyers submit that the Co-Investigating Judges' failure to disclose information in a timely manner "prevented them from properly analyzing relevant evidence, and ultimately limited their ability to provide details concerning relevant harm".²¹⁹ They urge the Pre-Trial Chamber to take this "into consideration when reviewing the Impugned Order's rejection" of Civil Party applications.²²⁰

2. Discussion

101. The International Judges will first discuss the law applicable to assessing the Co-Investigating Judges' obligations under Internal Rule 21(1)(c). The International Judges will then assess whether the Co-Investigating Judges breached these obligations in the light of the procedural history of Case 004 (as relevant to AO An) and Case 004/2, and the relief due, if any.

102. Internal Rule 21(1)(c) stipulates that "[t]he ECCC shall ensure that victims are kept informed and that their rights are respected *throughout* the proceedings."²²¹ Accordingly, in performing their obligations to properly and timely keep victims informed, the Co-

²¹⁵ Civil Party Appeal (D362/5), para. 54 referring to Case 002, Decision on Civil Party Appeals (D404/2/4), para. 52.

²¹⁶ Civil Party Appeal (D362/5), para. 55.

²¹⁷ Civil Party Appeal (D362/5), para. 55.

²¹⁸ Civil Party Appeal (D362/5), para. 55 quoting ECCC Press Release, "Press Release by the Co-Investigating Judges regarding Civil Parties in Case 004 (004/07-09-2009-ECCC/OCIJ)", 8 August 2011, available at: <https://www.eccc.gov.kh/en/document/public-affair/press-release-co-investigating-judges-regarding-civil-parties-case-004>.

²¹⁹ Civil Party Appeal (D362/5), paras 56-57.

²²⁰ Civil Party Appeal (D362/5), para. 57.

²²¹ Internal Rule 21(1)(c) (emphasis added).



Investigating Judges must exercise due diligence in safeguarding the interests and rights of victims, *throughout* the entirety of the investigative phase.²²²

103. Although certain provisions of the Internal Rules governing the confidentiality of investigations serve to restrict the information that the Co-Investigating Judges can publicly disclose,²²³ these provisions “should, at all times, be read in conjunction with the provisions on the fundamental principles of procedure before the ECCC” of which Rule 21(1)(c) forms an integral part.²²⁴ As the Pre-Trial Chamber has recognised, victims are fully dependent on the information released by the Co-Investigating Judges to guide their participation in ECCC proceedings at the pre-trial stage, as they do not have an automatic right of access to the case file.²²⁵ The International Judges will thus proceed to evaluate the due diligence displayed by the Co-Investigating Judges in keeping victims apprised during the course of the pre-trial proceedings.

104. The Co-Lawyers specifically challenge the lack of disclosure by the Co-Investigating Judges in the period between 20 November 2008 and their first press release disclosing information about the investigation in Case 004 dated 8 August 2011 (“August 2011 Press Release”).²²⁶ The International Judges turn to evaluate this submission.

105. In respect of the period between 7 September 2009 (the forwarding of the Third Introductory Submission to the Office of the Co-Investigating Judges)²²⁷ to the issuance of the August 2011 Press Release, the International Judges find that the Co-Investigating Judges failed to timely disclose information about the investigation against AO An to victims, in

²²² Case 002, Decision on Civil Party Appeals (D404/2/4), paras 51-52; Case 002, Decision on Civil Party Appeals (D411/3/6), paras 51-52. *See also* Case 004 (PTC01), Considerations of the Pre-Trial Chamber regarding the Appeal against Order on the Admissibility of Civil Party Applicant SENG Chan Theary, 28 February 2012, D5/1/4/2 (Opinion of Judges DOWNING and LAHUIS), para. 6.

²²³ *See, e.g.*, Internal Rule 56(1). *See generally* Case 002, Decision on Civil Party Appeals (D404/2/4), para. 52; Case 002, Decision on Civil Party Appeals (D411/3/6), para. 52.

²²⁴ Case 002, Decision on Civil Party Appeals (D404/2/4), para. 52; Case 002, Decision on Civil Party Appeals (D411/3/6), para. 52.

²²⁵ Case 002, Decision on Civil Party Appeals (D404/2/4), para. 52; Case 002, Decision on Civil Party Appeals (D411/3/6), para. 52. *See also* 1985 Victims Principles, Art. 6 (“The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by: (a) Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information”).

²²⁶ *See* Civil Party Appeal (D362/5), para. 55.

²²⁷ While it is true that the Third Introductory Submission was dated on 20 November 2008, the International Judges recall that this submission was subject to a disagreement between the two Co-Prosecutors. It was not until 7 September 2009, after the Pre-Trial Chamber had issued its considerations on this disagreement, that the Third Introductory Submission was forwarded to the Office of the Co-Investigating Judges to open a judicial investigation against AO An. Thus, the International Judges will take this as the proper starting point to assess the Co-Investigating Judges’ compliance with their duties under Internal Rule 21(1)(c).



violation of Internal Rule 21(1)(c).

106. The reason given by the Co-Investigating Judges to delay disclosure—until 8 August 2011—of the crime sites and criminal episodes under investigation was due to their “doubts” about the jurisdictional reach of the Court. In particular:

So far, the Office of the Co-investigating Judges did not notify the public of the crime sites in Case 004, because, unlike in Case 002, there are serious doubts whether the suspects are “most responsible” according to the jurisdictional requirement of Article 2 ECCC Law. If the Court had no jurisdiction, it would be inappropriate to encourage civil party applications further to the 200 already received in this case, as this could raise expectations which might not be met later on. However, since there is an increasing amount of speculative and wrong information being published in the media and on a certain website, the following information is released without prejudice to legal issues to be addressed in the Closing Order [...].²²⁸

107. The International Judges do not consider that the above constitutes a valid reason to leave victims in the dark about the matters under investigation in light of the Co-Investigating Judges’ mandatory duty to keep victims informed under Internal Rule 21(1)(c). The International Judges recall that victims may bring forward information relevant to assessing the personal jurisdiction of the Court, in particular, the role that suspects may have played in relation to the alleged crimes.²²⁹ In the two-year period between the opening of AO An’s judicial investigation and the August 2011 Press Release, it was incumbent on the Co-Investigating Judges to disclose information so that interested victims may begin to adequately prepare Civil Party applications.²³⁰ Indeed, the International Co-Investigating Judge later made a disclosure “[p]ursuant to Internal Rule 21(1)(c)” to inform victims of additional crime sites under investigation in Case 004 in December 2012.²³¹

108. Furthermore, the International Judges recall that, previously in Case 002, the Pre-Trial Chamber found that the Co-Investigating Judges had failed to provide information to victims in a timely manner—where their first public disclosure about the investigation was issued on 5

²²⁸ ECCC Press Release, “Press Release by the Co-Investigating Judges regarding Civil Parties in Case 004 (004/07-09-2009-ECCC/OCIJ)”, 8 August 2011, available at: <https://www.eccc.gov.kh/en/document/public-affair/press-release-co-investigating-judges-regarding-civil-parties-case-004>

²²⁹ See Case 004/1, Considerations on the Appeal of Closing Order (Reasons) (D308/3/1/20), para. 55; Considerations on Appeals against Closing Orders (D359/24 & D360/33), para. 81.

²³⁰ See Case 004 (PTC02), Considerations of the Pre-Trial Chamber regarding the Appeal against Order on the Admissibility of Civil Party Applicant Robert Hamill, 14 February 2012, D5/2/4/3 (Opinion of Judges DOWNING and LAHUIS), para. 6.

²³¹ ECCC Press Release, “Statement by the International Co-Investigating Judge regarding Additional Crime Sites in Case File 004”, 19 December 2012, available at: <https://www.eccc.gov.kh/en/document/public-affair/statement-international-co-investigating-judge-regarding-additional-crime-sit>.



November 2009, approximately two years after Case File 002 was created on 19 September 2007.²³² The similar two-year delay in this case likewise gives rise to a violation of Internal Rule 21(1)(c), especially in the absence of valid justification for the delay.

109. Notwithstanding this violation, in evaluating the relief due, the International Judges observe that any prejudice to victims from the delayed provision of information would appear to be minimal in the circumstances. In particular, many years transpired after relevant information about the investigation came into the public domain²³³ until the deadline for submitting Civil Party applications, as discussed below.

110. In this regard, under Internal Rule 23bis(2), “[a] Victim who wishes to be joined as a Civil Party shall submit such application in writing no later than fifteen (15) days after the Co-Investigating Judges notify the parties of the conclusion of the judicial investigation pursuant to IR 66(1).” The Co-Investigating Judges notified the closure of the investigation against AO An twice, on 16 December 2016 and 29 March 2017, respectively.²³⁴ The International Judges recall the Chamber’s previous finding that the Co-Investigating Judges committed a procedural error in failing to grant the parties fifteen days from the date of the Second Notice of Conclusion to request further investigative actions.²³⁵ The International Judges consider that this holding applies equally to Civil Parties and, consequently, victims had the right to apply as Civil Parties fifteen days from the Second Notice of Conclusion.²³⁶

111. In sum, although the International Judges find that the Co-Investigating Judges breached their obligations to timely keep victims informed, the prejudice which can be said to result therefrom would appear to be minimal.²³⁷ The multi-year period of time that transpired for victims to prepare Civil Party applications would appear to mitigate, if not eliminate as a

²³² See Case 002, Decision on Civil Party Appeals (D404/2/4), paras 51-54; Case 002, Decision on Civil Party Appeals (D411/3/6), paras 51-54.

²³³ See ECCC Press Release, “Press Release by the Co-Investigating Judges regarding Civil Parties in Case 004 (004/07-09-2009-ECCC/OCIJ)”, 8 August 2011, available at: <https://www.eccc.gov.kh/en/document/public-affair/press-release-co-investigating-judges-regarding-civil-parties-case-004>.

²³⁴ First Rule 66(1) Notification (D334); Second Rule 66(1) Notification (D334/2).

²³⁵ Considerations on Appeals against Closing Orders (D359/24 & D360/33), para. 65.

²³⁶ Second Rule 66(1) Notification (D334/2). Thus, the deadline for Civil Party applications in this proceeding was 13 April 2017.

²³⁷ The International Judges express no view on whether the Co-Investigating Judges provided timely and proper information in relation to Cases 003 (MEAS Muth) and 004 (YIM Tith). The factual circumstances of those cases, and the degree to which victims’ and Civil Party applicants’ rights were affected therein, will be examined in the context of those proceedings.



practical matter,²³⁸ any prejudice that may have been caused by the Co-Investigating Judges' delay in disclosing investigative information.

112. The Co-Lawyers have not given specific examples of Civil Party applicants (or potential applicants) who were prejudiced by the Co-Investigating Judges' untimely disclosure of information about the investigation against AO An. No specific instance has been brought to the attention of the Pre-Trial Chamber where, for example, the alleged delay caused an interested applicant to uncover information relevant to their application too late for submission, or that an eligible victim would have submitted an application if the Co-Investigating Judges had published the information in a timely manner. In these circumstances, the International Judges consider that the Co-Lawyers' arguments are speculative.

113. Finally, the International Judges note that the Co-Lawyers request the Pre-Trial Chamber to take the alleged breach of Internal Rule 21(1)(c) "into consideration" when reviewing the rejected Civil Party applications.²³⁹ To the extent the Co-Lawyers argue that the Pre-Trial Chamber should ignore, or materially loosen, the procedural requirements and law applicable to considering Civil Party admissibility, the International Judges reject this submission. The International Judges likewise note the Co-Lawyers' third request for relief, requesting the Chamber to "[a]dmit any supplementary information submitted by Civil Party Co-Lawyers".²⁴⁰ In view of the violation found above, the International Judges would have been prepared to consider supplementary information submitted by Civil Party applicants to support their application that was discovered late as a direct result of the Co-Investigating Judges' failure to keep the victims timely informed. However, the Co-Lawyers have not identified any such supplementary information and the International Judges similarly have not found such material during the review of Civil Party applications under the preceding grounds of appeal. In light of these circumstances, the International Judges must deny this request for relief. Ground 5 is affirmed in part and dismissed in part.

²³⁸ From the August 2011 Press Release onwards, eligible victims knew about almost all of the crime sites and criminal episodes under investigation in the Central Zone and had over five years to prepare and supplement their Civil Party applications. In respect of forced marriage and rape allegations, the International Co-Prosecutor's statement about the allegations in question, as well as the public statement released by the International Co-Investigating Judge accompanying his second charging of AO An, would go towards minimizing the prejudice occasioned on a practical level. *See* ECCC Press Release, "Statement by the International Co-Prosecutor Nicholas Koumjian regarding Case File 004", 24 April 2014, available at: <https://www.eccc.gov.kh/en/node/30196>; ECCC Press Release, "Statement of the International Co-Investigating Judge regarding Case 004", 14 March 2016, available at: <https://www.eccc.gov.kh/en/document/public-affair/additional-charges-announced-against-ao>.

²³⁹ *See* Civil Party Appeal (D362/5), para. 57.

²⁴⁰ *See* Civil Party Appeal (D362/5), para. 59(3).



CONCLUSION

114. The National Co-Investigating Judge's Order on Civil Parties (National)²⁴¹ does not preclude the future participation of Civil Parties who have been found admissible in future proceedings against AO An. In rejecting all Civil Party applications in Case 004/2, the National Co-Investigating Judge gave as his sole and exclusive reason the dismissal of all charges against AO An.²⁴² The International Judges recall, however, that the National Co-Investigating Judge's Closing Order (Dismissal) is *ultra vires*, void and without legal effect,²⁴³ and further that the Closing Order (Indictment) stands and has been legally forwarded to the Trial Chamber by virtue of Internal Rule 77(13)(b).²⁴⁴

115. The validity of the Order on Civil Parties (National), which is expressly founded on the reasoning of the Closing Order (Dismissal), is inherently and inextricably tied to the legal validity of the Closing Order (Dismissal) itself. Given that the National Co-Investigating Judge's issuance of his Closing Order (Dismissal) has no legal basis in the ECCC's fundamental framework and is void *ab initio*,²⁴⁵ the International Judges find that the Order on Civil Parties (National) is also void and cannot be ascribed legal effect. Accordingly, the Order on Civil Parties (International) endures as the remaining operative Order on the admissibility of Civil Parties in Case 004/2.

116. Turning to the Civil Parties' Requests in the conclusion of their Appeal,²⁴⁶ the International Judges recall that "[u]nless and until rejected, Civil Party applicants may exercise Civil Party rights"²⁴⁷ and consider that these interrelated Requests have been addressed within the reasoning and the findings of these Considerations.

117. Therefore, for the foregoing reasons, the International Judges of the Pre-Trial Chamber hereby decide that the Civil Party Appeal is admissible and dismiss Grounds 1(a), 1(b) and 3. The International Judges uphold in part and dismiss in part Grounds 2, 4 and 5. The

²⁴¹ Order on Civil Parties (National) (D361).

²⁴² Order on Civil Parties (National) (D361), para. 13 ("Today, we dismissed all charges in Case 004/2 against AO An because [*sic*] AO An, the only Charged Person [*sic*] in this case, does not fall under the ECCC's jurisdiction.").

²⁴³ Considerations on Appeals against Closing Orders, (D359/24 and D360/33), paras 326, 683.

²⁴⁴ Considerations on Appeals against Closing Orders (D359/24 & D360/33), paras 685-687.

²⁴⁵ Considerations on Appeals against Closing Orders (D359/24 & D360/33), paras 315-329.

²⁴⁶ Civil Party Appeal (D362/5), para. 59.

²⁴⁷ Internal Rule 23bis(2).

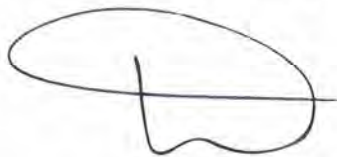


International Judges find that the International Co-Investigating Judge erred in his decision on admissibility under Ground 2 in that seven Civil Party applications and related documents should have been admitted (as reasoned in Annex 1)²⁴⁸ and, also, under Ground 4, in that eight Civil Party applications and related documents should have been admitted (as reasoned in Annex 2).²⁴⁹ The following twelve Civil Party applicants should have been admitted as Civil Parties to Case 004/2: 13-VSS-00316, 12-VSS-00518, 11-VSS-00059, 12-VSS-00672, 13-VSS-00697, 16-VSS-00020, 11-VSS-00032; 16-VSS-00048; 15-VSS-00038; 16-VSS-00042; 16-VSS-00015; and 11-VSS-00058.²⁵⁰

Internal Rule 77 (13) (a)

118. Internal Rule 77(13)(a) provides that where the required majority is not attained, the default decision of the Chamber, as regards an appeal against an order, shall be that such order shall stand. Consequently, the International Judges hereby find that the International Co-Investigating Judge's Order on Admissibility of Civil Party Applicants stands.²⁵¹ Accordingly, the International Judges hold that all Civil Parties who have been found admissible by the International Co-Investigating Judge have the right to participate in future proceedings against AO An.²⁵²

Phnom Penh, 30 June 2020



Judge Olivier BEAUVALLET



Judge Kang Jin BAIK

²⁴⁸ See Ground 2, *supra*, with regard to Civil Party applicants under 13-VSS-00316, 12-VSS-00518, 11-VSS-00059, 12-VSS-00672, 13-VSS-00697, 16-VSS-00020 and 11-VSS-00032.

²⁴⁹ See Ground 4, *supra*, with regard to Civil Party applicants under 16-VSS-00048; 15-VSS-00038; 16-VSS-00042; 16-VSS-00015; 16-VSS-00020; 11-VSS-00032; 11-VSS-00058; and 12-VSS-00672.

²⁵⁰ The International Judges recall that three Civil Party applicants (12-VSS-00672, 16-VSS-00020, 11-VSS-00032) who should have been admitted by the International Co-Investigating Judge were submitted under Grounds 2 and 4 of the Appeal and approved respectively under each Ground.

²⁵¹ Order on Civil Parties (International) (D362).

²⁵² Order on Civil Parties (International) (D362).

