



ព្រះរាជាណាចក្រកម្ពុជា

ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia  
Nation Religion King

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

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

Royaume du Cambodge  
Nation Religion Roi

ការិយាល័យសហចៅក្រមស៊ើបអង្កេត  
Office of the Co-Investigating Judges  
Bureau des co-juges d'instruction

Case File No: 004/2/07-09-2009-ECCC-OCIJ

Before: **The Co-Investigating Judges**  
Date: **16 August 2018**  
Language(s): **English & Khmer [Original in English]**  
Classification: **PUBLIC**

<b>ឯកសារដើម</b>	
ORIGINAL DOCUMENT/DOCUMENT ORIGINAL	
ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/Date de reception):	
.....16...../.....08...../.....2018.....	
ម៉ោង (Time/Heure):.....11:00.....	
មន្ត្រីមម្ពនាបន្តករសំណុំរឿង/Case File Officer/L'agent chargé du dossier:.....SANN RADA.....	

**INTERNATIONAL CO-INVESTIGATING JUDGE'S ORDER ON  
ADMISSIBILITY OF CIVIL PARTY APPLICANTS**

**Distribution:**

**Co-Prosecutors**

CHEA Leang  
Nicholas KOUMJIAN

**Ao An Defence**

MOM Luch  
Richard ROGERS  
Göran SLUITER

**Civil Party Lawyers**

CHET Vanly  
HONG Kimsuon  
KIM Mengkhy  
LOR Chunthy  
SAM Sokong  
SIN Soworn  
TY Srinna  
VEN Pov

Laure DESFORGES  
Isabelle DURAND  
Emmanuel JACOMY  
Martine JACQUIN  
Daniel MCLAUGHLIN  
Lyma NGUYEN  
Nushin SARKARATI



## I. PROCEDURAL HISTORY

1. In what was Case 004 and is now Case 004/2 for the case relating to Ao An, disagreements between the Co-Investigating Judges (“CIJs”) were registered on 22 February 2013, 5 April 2013, 22 January 2015, 21 October 2015, 16 January 2017 and 12 July 2018.
2. Since the opening of the judicial investigation in this case, 1920 people have applied to become Civil Parties.
3. On 29 April 2011, the CIJs declared inadmissible the Civil Party applications of Robert Hamill and Seng Chantheary.<sup>1</sup> The applicants appealed the CIJs’ orders.<sup>2</sup>
4. On 14 and 28 February 2012, the Pre-Trial Chamber (“PTC”) was unable to reach the required majority to decide on the appeals by both applicants.<sup>3</sup>
5. On 15 November 2011, Seng Chantheary withdrew her application from the case file.<sup>4</sup> The Greffier of the Office of the Co-Investigating Judges (“OCIJ”) acknowledged this by letter on 29 May 2014.<sup>5</sup>
6. On 30 December 2011, Robert Hamill requested the CIJs to reconsider their order on his admissibility as a Civil Party.<sup>6</sup> The CIJs did not issue a new order on his admissibility. In this Order, I issue my decision on Robert Hamill’s admissibility as a Civil Party.
7. On 1 May 2012, the Reserve International CIJ granted Civil Party status to 30 applicants.<sup>7</sup> In this Order, I will reassess and, if necessary, reconsider the findings of the Reserve International CIJ in light of the advancement of the investigation.

<sup>1</sup> Case File No. 004/2-D5/1/3, *Order on the Admissibility of the Civil Party applicant SENG Chan Theary*, 29 April 2011; Case File No. 004/2-D5/2/3, *Order on the Admissibility of the Civil Party Applicant Rob Hamill*, 29 April 2011.

<sup>2</sup> Case File No. 004/2-D5/1/4/1, *Appeal against the order on the admissibility of the civil party applicant of SENG Chan Theary*, 18 May 2011; Case File No. 004/2-D5/2/4/2, *Appeal against the order on the admissibility of civil party applicant of Robert Hamill*, 23 May 2011.

<sup>3</sup> Case File No. 004/2-D5/2/4/3, *Considerations of the Pre-Trial Chamber regarding the appeal against order on the admissibility of Civil Party Applicant Robert Hamill*, 14 February 2012; Case File No. 004/2-D5/1/4/2, *Considerations of the Pre-Trial Chamber regarding the appeal against order on the admissibility of Civil Party Applicant SENG Chantheary*, 28 February 2012.

<sup>4</sup> Case File No. 004/2-D5/1/5, *Request to withdraw from applicant 11-VSS-00001 Seng Chan Theary*, 3 March 2014.

<sup>5</sup> Case File No. 004/2-D5/1/6, *OCIJ’s Greffier Letter to Lawyer CHOUNG Chou-Ngy*, 29 May 2014; Case File No. 004/2-D5/1/7, *OCIJ’s Greffier Letter to Lawyer SAM Sokong*, 29 May 2014; Case File No. 004/2-D5/1/8, *OCIJ’s Greffier Letter to Lawyer Emmanuel Jacomy*, 29 May 2014.

<sup>6</sup> Case File No. 004/2-D5/2/5, *Request for Co-Investigating Judges to reconsider decision on admissibility of Civil Party applicant Mr. ROBERT Hamill (D11/2/3)*, 30 December 2011.

<sup>7</sup> Case File No. 004/2-D5/40/3, *Order on the admissibility of the Civil Party application of CHOENG Py*, 1 May 2012; Case File No. 004/2-D5/45/3, *Order on the admissibility of the Civil Party application of NGET Chat*, 1 May 2012; Case File No. 004/2-D5/55/3, *Order on the admissibility of the Civil Party application of CHHIM Srorn*, 1 May 2012; Case File No. 004/2-D5/60/3, *Order on the admissibility of the Civil Party application of NGET Vuth*, 1 May 2012; Case File No. 004/2-D5/61/3, *Order on the admissibility of the Civil Party application of THOEUK Yoeun*, 1 May 2012; Case File No. 004/2-D5/62/3, *Order on the admissibility of the Civil Party application of VAN Chauk*, 1 May 2012; Case File No. 004/2-D5/66/3, *Order on the admissibility of the Civil Party application of CHECH Sopha*, 1 May 2012; Case File No. 004/2-D5/72/3, *Order on the admissibility of the Civil Party application of KEU Seung*, 1 May 2012; Case File No. 004/2-D5/75/3, *Order on the admissibility of the Civil Party application of KOEM Pheng*, 1 May 2012; Case File No. 004/2-D5/76/3, *Order on the admissibility of the Civil Party application of SAM Sak*, 1 May 2012; Case File



8. In the course of the investigations into Cases 003, 004, 004/1, and 004/2, the OCIJ was informed that 47 applicants to Case 004/2 are deceased.<sup>8</sup> The successor of one deceased applicant has expressed the wish to continue the action on behalf of the deceased.<sup>9</sup> Three applicants have withdrawn their applications.<sup>10</sup>
9. In the course of the investigations into Cases 003, 004, 004/1, and 004/2, the OCIJ has interviewed a number of Case 004/2 applicants and the Trial Chamber has heard Case 004/2 applicants in Cases 002 and 002/01. The records of these OCIJ interviews and transcripts of the Trial Chamber hearings will be referenced in the Annexes to this Order.
10. On 30 November 2016 and 31 January 2017, I ordered legal representation for all Case 004 and 004/2 applicants,<sup>11</sup> and additional powers of attorneys have been placed on the Case File since. As a result, all Civil Party applicants have legal representation.

No. 004/2-D5/87/3, *Order on the admissibility of the Civil Party application of MAO Theng*, 1 May 2012; Case File No. 004/2-D5/89/3, *Order on the admissibility of the Civil Party application of PHAN Saray*, 1 May 2012; Case File No. 004/2-D5/97/3, *Order on the admissibility of the Civil Party application of PICH Chhev alias TAING Sev*, 1 May 2012; Case File No. 004/2-D5/98/3, *Order on the admissibility of the Civil Party application of KHIEM Bo*, 1 May 2012; Case File No. 004/2-D5/110/3, *Order on the admissibility of the Civil Party application of VEUN Chen*, 1 May 2012; Case File No. 004/2-D5/113/3, *Order on the admissibility of the Civil Party application of TIT Sophary*, 1 May 2012; Case File No. 004/2-D5/114/3, *Order on the admissibility of the Civil Party application of SUONG Toeur*, 1 May 2012; Case File No. 004/2-D5/119/3, *Order on the admissibility of the Civil Party application of UN Sovannary*, 1 May 2012; Case File No. 004/2-D5/147/3, *Order on the admissibility of the Civil Party application of KIM So*, 1 May 2012; Case File No. 004/2-D5/155/3, *Order on the admissibility of the Civil Party application of MEY Sam*, 1 May 2012; Case File No. 004/2-D5/180/3, *Order on the admissibility of the Civil Party application of MECH Man*, 1 May 2012; Case File No. 004/2-D5/182/3, *Order on the admissibility of the Civil Party application of TEAM Kay*, 1 May 2012; Case File No. 004/2-D5/187/3, *Order on the admissibility of the Civil Party application of HEM Saroeun*, 1 May 2012; Case File No. 004/2-D5/197/4, *Order on the admissibility of the Civil Party application of MEY Saveoun*, 1 May 2012; Case File No. 004/2-D5/203/3, *Order on the Admissibility of the Civil Party application of TOUCH Hy*, 1 May 2012; Case File No. 004/2-D5/205/3, *Order on the admissibility of the Civil Party application of KHIEU Khan*, 1 May 2012; Case File No. 004/2-D5/239/3, *Order on the admissibility of the Civil Party application of CHEA Saruon*, 1 May 2012; Case File No. 004/2-D5/240/3, *Order on the admissibility of the Civil Party application of KEN Thou*, 1 May 2012; Case File No. 004/2-D5/241/3, *Order on the admissibility of the Civil Party application of UM Sophon*, 1 May 2012; Case File No. 004/2-D5/314/3, *Order on the admissibility of the Civil Party application of KHOUY Sarun*, 1 May 2012.

<sup>8</sup> Annex D, *Memo from VSS to OCIJ on Deceased Civil Parties*, 9 January 2018; Annex E, *VSS List of Deceased Civil Parties*; Case File No. 004/2-D348.2, *Annex 2*, 1 May 2017; Case File No. 004-D219/856, *Written Record of Investigation Action*, 31 October 2016; Case File 004/1-D307, *Order on admissibility of civil party application*, 22 February 2017, para. 7.

<sup>9</sup> Case File No. 004/2-D5/641/3, *Letter from Civil Party Lawyer concerning "Request for successor of deceased civil party to continue civil reparation Claim D5/641"*, 16 January 2016.

<sup>10</sup> Case File No. 004/2-D5/1114/3, *Letter to lawyer*, 5 October 2015; Case File No. 004/2-D5/1921/3, *Letter to Lawyer concerning the withdrawal of Mr. DY Dany from case file 003, 004 and 004/2*, 9 January 2018; Case File No. 004/1-D307, *Order on admissibility of civil party application*, 22 February 2017, para. 7.

<sup>11</sup> Case File No. 004/2-D330, *Order on the Assignment of Lawyers for all Civil Party Applicants*, 30 November 2016; Case File No. 004/2-D346, *Order on the Recognition of Lawyer and Assignment of Lawyers to Civil Party Applicants*, 31 January 2017.



11. On 28 April 2017, I rejected all requests for protective measures by Civil Party applicants in Case File 004/2.<sup>12</sup>

## II. DISCUSSION

### A. Introduction

12. In this Order, I outline the legal principles and criteria that I have applied in determining the admissibility of Civil Party applications in Case 004/2. In the annexes to this Order, I set out my conclusions on admissibility in respect of each individual applicant, providing reasons as to why each application is or is not admitted.

### B. Guiding principles

13. In order for a Civil Party application to be admissible, the applicant must be clearly identified and must demonstrate that, as a direct consequence of at least one of the crimes alleged against a charged person, he or she has in fact suffered physical, material or psychological harm upon which a claim of collective and moral reparation might be based.<sup>13</sup> The admissibility of Civil Party applicants is based on an assessment of their personal circumstances in respect of the allegations, accepting those allegations at face value.<sup>14</sup>
14. The Internal Rules and the Practice Direction on Victim Participation set out the basic principles in relation to Civil Party participation and admissibility. In accordance with the ECCC Law,<sup>15</sup> where there is uncertainty regarding the interpretation or application of these basic principles, guidance may be sought in procedural rules concerning victims established in international law, which include, but are not limited to:
- a. Case law from relevant international and regional human rights courts and tribunals; and
  - b. Articles 1, 2, 4, and 18 of the United Nations General Assembly, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.<sup>16</sup>
15. The Supreme Court Chamber (“SCC”) rightly observed that regional human rights courts are focused on “*state responsibility*” as opposed to “*individual criminal responsibility*.” Accordingly, I have taken a careful approach in applying case law from the regional human rights courts to the admissibility decision, in

<sup>12</sup> Case File No. 004/2-D348, *Decision on civil party applications’ requests for protective measures*, 28 April 2017.

<sup>13</sup> Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev. 9) (“Internal Rules”), Rule 23 *bis* (1); Extraordinary Chambers in the Courts of Cambodia, Practice Direction on Victim Participation (Revision 1), 27 October 2008 (“Practice Direction on Victim Participation”), Article 3.2.

<sup>14</sup> *See supra*.

<sup>15</sup> Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NC/RKM/1004/006) (“ECCC Law”), Article 33 new.

<sup>16</sup> *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, General Assembly Resolution 40/34, 29 November 1985 (A/RES/40/34).



recognition of the fact that these courts are necessarily “*animated by different policies than the ECCC.*”<sup>17</sup>

16. Given that Internal Rule 23 *bis* (1) and Article 3.2 of the Practice Direction on Victim Participation echo Article 13 of the 2007 Cambodian Code of Criminal Procedure, which itself is inspired by and closely resembles Article 2 of the French Code of Criminal Procedure, it may also be useful to look at the general principles on victims found in French law.

### C. Type of victims and their admissibility as Civil Parties

#### i. Direct victim

17. A direct victim (sometimes referred to as an “*immediate*” or “*primary*” victim)<sup>18</sup> refers to the “*category of persons whose rights were violated or endangered by the crime charged.*”<sup>19</sup>
18. In case of death of a direct victim, a civil action may be pursued on behalf of deceased applicants by their successors.<sup>20</sup> The Cambodian Code of Criminal Procedure provides that a civil action may be started or continued by the victim’s successor.<sup>21</sup> While the Trial Chamber ruled that successors could only act on behalf of the deceased if the deceased had already filed an Application,<sup>22</sup> this runs contrary to the Cambodian Code of Criminal Procedure and the SCC deemed this limitation without basis in the applicable law.<sup>23</sup>
19. Thus, when a direct victim dies, the successors have two ways to participate: either on behalf of the deceased; or in their own name, as indirect victims, for the harm they suffered as a consequence of the direct victim’s injury.<sup>24</sup> Either way, the applicant must expressly state whether he or she applies as a successor on behalf of a direct victim or as an indirect victim.

<sup>17</sup> Case File No. 001-F28, *Appeal Judgement of Case 001*, 3 February 2012 (“Case 001 Appeal Judgement”), para. 431.

<sup>18</sup> Case File No. 001-E188, *Judgement*, 26 July 2010 (“Case 001 Trial Judgement”), paras 643-644, 648-650, 667; *Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen*, Judgment on the Appeals of the Defence against the Decisions Entitled “Decision on Victims’ Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06” of Pre-Trial Chamber II, International Criminal Court (“ICC”) Appeals Chamber (ICC-02/04-179), 23 February 2009 (“*Kony Decision*”), para. 29.

<sup>19</sup> Case 001 Appeal Judgement, para. 416.

<sup>20</sup> Case 001 Appeal Judgement, para. 421; Case 001 Trial Judgement, para. 641; Case File No. 001-E2/5/3, *Decision on Motion regarding Deceased Civil Party* (“Decision regarding Deceased Civil Party”), 13 March 2009, paras 10-12; *see also*: UNHRC, *Guerra and Wallen v. Trinidad and Tobago*, nos. 576/94 and 576/94, 4 April 1995, para. 6.2.

<sup>21</sup> Cambodian Code of Criminal Procedure, Article 16.

<sup>22</sup> Decision regarding Deceased Civil Party, paras 11-12.

<sup>23</sup> Case 001 Appeal Judgement, para. 421. The SCC’s position is supported by French law: France, Cour de cassation, Assemblée plénière, 9 May 2008, nos. 06-85.751 and 05-87.379: « *Le droit à réparation du préjudice éprouvé par la victime avant son décès, étant né dans son patrimoine, se transmet à ses héritiers.* »

<sup>24</sup> Case 001 Appeal Judgement, para. 419.



ii. Indirect victim

20. In addition to direct victims, persons who “*personally suffered injury as a direct result of the crime committed against the direct victim*” may also apply to be Civil Parties as indirect victims.<sup>25</sup> The SCC found that “[t]he exercise of the rights of indirect victims is autonomous of the rights of the direct victims”.<sup>26</sup> Indirect victims may therefore be granted Civil Party status even if the direct victim does not apply for Civil Party status.<sup>27</sup>

iii. Perpetrator-victim dichotomy

21. Civil Party applications of persons who have contributed to the perpetration of the offence they claim to be victims of will be declared inadmissible. While it is recognised that perpetrators may suffer trauma as a result of their own participation to international offences,<sup>28</sup> they cannot be admitted to file a Civil Party application against other alleged perpetrators of the same offences.<sup>29</sup> This is the case in particular where the circumstances were not “*beyond [the victim-perpetrator’s] control*”.<sup>30</sup>

**D. Type of harm**

22. In order to have standing, an applicant must have suffered actual harm.<sup>31</sup>

23. Internal Rule 23 *bis* (1)(b) provides that, in order for an application to be admissible, the injury must be physical (i), material (ii), or psychological (iii).

i. Physical harm

24. According to the SCC, physical harm “*denotes biological damage, anatomical or functional. It may be described as a wound, mutilation, disfiguration, disease, loss or dysfunction of organs, or death.*”<sup>32</sup>

25. The Pre-Trial Judge of the Special Tribunal for Lebanon considered physical harm “*involv[es] the body*” and “*ordinarily requir[es] a degree of medical treatment for the victim.*”<sup>33</sup> The SCC further elaborated that physical harm may be

<sup>25</sup> Case 001 Appeal Judgement, para. 418.

<sup>26</sup> Case 001 Appeal Judgement, para. 418.

<sup>27</sup> Case 001 Appeal Judgement, para. 418.

<sup>28</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Decision on Sentence pursuant to Article 76 of the Statute, ICC Trial Chamber (ICC-01/04-01/06-2901), 10 July 2012, para. 39ff, in the specific context of child soldiers.

<sup>29</sup> France, Cour de cassation, Chambre criminelle, 28 October 1997, no. 96-85.880; 7 February 2001, no. 00-83.023.

<sup>30</sup> *Prosecutor v. Dominic Ongwen*, Decision on the confirmation of charges against Dominic Ongwen, ICC Pre-Trial Chamber (ICC-02/04-01/15-422-Red), 23 March 2016, para. 154.

<sup>31</sup> Internal Rule 23 *bis* (1)(b); Practice Direction on Victim Participation on Victim Participation, Article 3.2 (b) (ii). The terms “*harm*” and “*injury*” are considered interchangeable and not legally distinct in this context. The French version of the Internal Rules uses one word throughout the document, and the Khmer version features two different words, which are also used interchangeably (“ព្រហ្មទណ្ឌកម្ម” and “ខូចខាត”): Case File No. 002-D404/2/4, *Decision on Appeals against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications*, 24 June 2011 (“Case 002 Decision on Appeals”), paras 44-49; Case 001 Appeal Judgement, para. 415.

<sup>32</sup> Case 001 Appeal Judgement, para. 415.

<sup>33</sup> *Prosecutor v. Salim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi & Assad Hassan Sabra*, Decision on Victims’ Participation in the Proceedings, Special Tribunal for Lebanon Pre-Trial Chamber (STL-11-01/PT/PTJ), 8 May 2012, paras 64, 66.



suffered by “*the vulnerable, such as infants, children and the old and sick, whose caregivers were taken away from them.*”<sup>34</sup> It may also result from prolonged psychological injury that causes various ailments.<sup>35</sup>

ii. Material harm

26. The SCC considered that material harm “*refers to a material object’s loss of value, such as complete or partial destruction of personal property, or loss of income.*”<sup>36</sup> While material harm is defined as a material loss, the SCC and PTC also took into account the impact of Communist Party of the Kampuchea (“CPK”) policy on the family unit, as well as the way in which elderly and vulnerable family and community members were provided and cared for.<sup>37</sup>
27. In particular, the SCC held that such injury may be constituted where the “*direct victim was providing [for the indirect victim] at the time [...], or would have, in all probability, provided for [them] in the future.*”<sup>38</sup> This is for instance the case in a relationship between parents and children.<sup>39</sup> Thus, material harm can be suffered by both direct and indirect victims.

iii. Psychological harm

28. A significant number of Civil Party applicants in Case 004/2 claim to have suffered psychological harm, both as direct and indirect victims.
29. Psychological harm is constituted by distress, mental disorders, psychological or psychiatric trauma including, but not limited to, post-traumatic stress disorder.<sup>40</sup> It can also result from the mere witnessing of shocking or violent events,<sup>41</sup> or even the emotional distress from recalling such events, even if they occurred thirty years before.<sup>42</sup>
30. For an indirect victim, psychological harm can result from the death of kin, the uncertainty or fear about a direct victim’s fate, the knowledge of their suffering, or the loss of the sense of safety and moral integrity.<sup>43</sup>
31. In this respect, the criterion of “*special bond of affection or dependence*” to the direct victim is of relevance in determining the existence of psychological harm,<sup>44</sup> and psychological harm may be constituted as a result of harm suffered by distant relatives, or even simply friends.<sup>45</sup>

<sup>34</sup> Case 001 Appeal Judgement, para. 417.

<sup>35</sup> Case 001 Appeal Judgement, para. 417.

<sup>36</sup> Case 001 Appeal Judgement, para. 415.

<sup>37</sup> Case 002 Decision on Appeals, para. 86; Case 001 Appeal Judgement, para. 417.

<sup>38</sup> Case 001 Appeal Judgement, para. 417.

<sup>39</sup> Case 001 Appeal Judgement, para. 417.

<sup>40</sup> Case 001 Appeal Judgement, para. 415.

<sup>41</sup> Situation in Uganda, *Decision on the Participation of Victims in the Appeal* (“Uganda Decision on Participation”), ICC Appeals Chamber, (ICC-02/04-164), 27 October 2008, para. 10.

<sup>42</sup> Case 002 Decision on Appeals, para. 45.

<sup>43</sup> Practice Direction on Victim Participation, Article 3.2 (c); Case 001 Appeal Judgement, paras 417.

<sup>44</sup> Case 001 Appeal Judgement, paras 446, 447.

<sup>45</sup> Case 001 Appeal Judgement, para. 418.



32. The PTC even found that psychological harm may stem from events involving people from the same community, who relied on each other to survive.<sup>46</sup> It found that an injury should be measured in the context of collective damage caused to the whole society, or directed parts of society, rather than in respect of individuals alone.<sup>47</sup>
33. Hence, mass crimes perpetrated against groups or large portions of the population in a widespread manner may also affect other nationals of the same country, whether present or absent. Such crimes may even affect people born *after* the facts, for instance through accounts told by direct or indirect victims.<sup>48</sup>
34. Therefore, psychological 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.

#### **E. Existence of a causal link**

35. Internal Rule 23 *bis* (1)(b) requires, consistently with international standards,<sup>49</sup> the existence of a causal link between the harm suffered and at least one of the crimes alleged against the charged person.
36. The PTC, taking into account the nature of the crimes and modes of liability within the jurisdiction of the ECCC, interpreted the causal link requirement broadly, and allowed for the admission of applicants whose alleged harm did not necessarily stem from crimes committed specifically in the locations identified in the OCP submissions, or in the Closing Order. In particular, it took into account the broad nature of the alleged crimes against humanity and genocide allegations, as well as the scope of the Joint Criminal Enterprise (“JCE”) in Case 002.<sup>50</sup>

#### **F. Admissibility of Civil Party applicants**

37. Based on the Closing Order against Ao An, 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. Firstly, the harm

<sup>46</sup> Case 002 Decision on Appeals, paras 86, 88, 91. This finding is in line with international and regional case law. *See for instance:* Human Rights Committee, *Toonen v. Australia*, no. 488/92, 31 March 1994, para. 5.1; ECtHR, *Norris v. Ireland*, no. 10581/83, 26 October 1988, paras 29, 32-34; IACHR, *Suarez Rosero v. Ecuador*, 12 November 1997, para. 98.

<sup>47</sup> Case 002 Decision on Appeals, para. 68.

<sup>48</sup> *See recently Prosecutor v. Katanga*, Décision relative à la question renvoyée par la Chambre d’appel dans son arrêt du 8 mars 2018 concernant le préjudice transgénérationnel allégué par certains demandeurs en réparation, 19 July 2018, ICC Trial Chamber II, (ICC-01/04-01/07), para. 10. [Only available in French at the time of writing] I note that due to the different framework of victim participation before the ECCC, especially at the investigation stage, there is no need to make such a strict determination of causality yet. The proper avenue for the Civil Party Applicants to plead this particular issue in more detail is at the trial stage.

<sup>49</sup> *See: Prosecutor v. Lubanga*, Decision on the requests of the Prosecutor and the Defence for Suspensive Effect of the Appeals against Trial Chamber I’s Decision on Victim’s Participation of 18 January 2008, ICC Appeals Chamber (ICC-01/04-01/06-1347), para. 18; *Kony* Decision, paras 36, 38.

<sup>50</sup> Case 002 Decision on Appeals, paras 49, 66, 68, 69-72, 77.





suffered by the applicant derives from the alleged implementation of the following policies, at any location within the Central Zone:

- i. The establishment and operation of cooperatives and worksites;
- ii. The re-education of “bad elements” and killing of “enemies” both inside and outside the CPK ranks;
- iii. The targeting of specific groups, including Central Zone CPK cadres, former officials of the Khmer Republic, Cham ethnics, and their families; and
- iv. The regulation of marriage through, *inter alia*, the forced marriage of the inhabitants of the Central Zone.

38. Secondly, 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, namely imprisonment, murder, extermination, enslavement, torture, other inhumane acts, or persecution, and that such crime or crimes may be imputable to Ao An.

39. Facts excluded on the basis of Internal Rule 66 *bis*<sup>51</sup> alleged by Civil Party applicants may still form the basis of a decision of admissibility, should they fulfil the above and below conditions.

#### **G. Standard of proof and sufficiency of information**

40. Civil Party applications must contain sufficient information to allow verification of their compliance with the Internal Rules.<sup>52</sup> The CIJs must be satisfied that facts alleged in support of the application are more likely than not to be true.<sup>53</sup> In particular, the Victim Information Forms (“VIFs”) and statements made by the applicants must contain the necessary degree of particularity and authenticity to make them credible in the circumstances of the case.<sup>54</sup> The VIFs and related documents must be complete and generally consistent.<sup>55</sup> I therefore apply a probability standard in assessing the claims of Civil Party applicants. In assessing the statements made by Civil Party applicants in support of their claims, I lend increased credibility to such statements given the lack of individual financial interest on the part of victims pursuing their civil actions.<sup>56</sup>

41. Owing to the unique nature of Civil Party participation before the ECCC and the circumstances of the case, the extent of available evidence that Civil Party applicants may rely on will be diminished, due to various factors, including:

<sup>51</sup> Case File No. 004/02-D337, *Decision to reduce the scope of judicial investigation pursuant to internal rule 66 bis*, 16 December 2016.

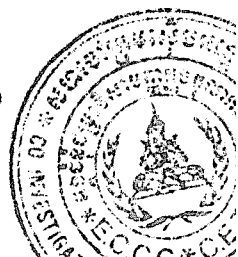
<sup>52</sup> Internal Rules, Rule 23 *bis* (4); Practice Direction on Victim Participation, Article 3.5.

<sup>53</sup> Internal Rules, Rule 23 *bis* (1).

<sup>54</sup> Case 001 Appeal Judgement, para. 536; *Kony* Decision, paras 35-36, 38.

<sup>55</sup> Case 001 Appeal Judgement, para. 536.

<sup>56</sup> Case 001 Appeal Judgement, para. 536.



- a. The passage of time, and the effect that this may have on an applicant's ability to provide documentary evidence in regards to harm suffered, including medical records where physical harm is alleged;<sup>57</sup>
- b. The capacity, following the DK period, to extensively and accurately identify, respond, or record the impact that the conditions of the DK period had on the psychological health of the population;
- c. The evacuation, movement, and resettlement of the population in different regions, and the effect that this had on an applicant's ability to provide proof of ownership where loss of property is alleged, and the ability to provide proof of income where loss of income is alleged.

42. These factors mitigate the required degree of proof of harm.

i. Proof of pecuniary damage

43. While the regional human rights courts set high standards for the proof of pecuniary damage,<sup>58</sup> they provide alternative modes of assessment of such damage when the alleged victim is unable to substantiate their pecuniary claims.<sup>59</sup> These courts apply stronger standards because they provide for individual monetary compensation, whereas the ECCC does not.

44. For the reasons set out above and because the ECCC provides only for collective and moral reparations,<sup>60</sup> it is appropriate to adopt a relaxed approach when considering pecuniary damage allegedly suffered by an applicant, for the purpose of the admissibility finding.

ii. Proof of non-pecuniary damage

45. The SCC upheld the presumption found by the Trial Chamber that bonds of affection and dependence exist between the direct victim and immediate family members.<sup>61</sup> In the Cambodian context, due to the specific context of proximity and co-dependence with extended family members,<sup>62</sup> the social restructuring of the DK period<sup>63</sup> and the practical difficulties to obtain proof of kinship, this presumption needs to be extended to non-immediate family members in order to adopt a flexible approach to proof of kinship.

<sup>57</sup> While the majority did not address these questions, I find the separate opinion of Judge Marchi-Uhel on this point relevant and helpful: Case 002 Decision on Appeals, *Separate and Partially Dissenting Opinion of Judge Catherine Marchi-Uhel*, para. 66.

<sup>58</sup> For example: ECtHR, Practice direction issued by the President of the Court in accordance with Rule 32 of the Rules of Court on 28 March 2007, Article 11: "*It is for the applicant to show that pecuniary damage has resulted from the violation or violations alleged. The applicant should submit relevant documents to prove, as far as possible, not only the existence but also the amount or value of the damage.*"

<sup>59</sup> ECtHR, *Ipek v. Turkey*, no. 25760/94, 17 February 2004, para. 227; see also: *Akdivar and others v. Turkey*, no. 99/1995/605/693, 1 April 1998, paras 16-19; IACHR, *Caracazo v. Venezuela*, 29 August 2002 (Reparations and Costs), para. 50 (b), (d); Case File No. 001-F13.1.37, *Authority 37: REDRESS, "Collective Reparations: Concepts and Principles"*, filed 2 November 2010, p. 6.

<sup>60</sup> Internal Rule 23 *quinquies*.

<sup>61</sup> Case 001 Appeal Judgement, para. 448.

<sup>62</sup> Case 001 Trial Judgement, para. 643; Case File No. 001-E1/68.1, *Transcript of Proceedings – "Duch" Trial*, 25 August 2009 ("Expert Testimony"), p. 36, ll. 23-25, p. 37, ll. 1-3, p. 48, ll. 10-19. Note that, according to the French and Khmer versions, page 36, line 24 should read "together", as opposed to "separated."

<sup>63</sup> Case 002 Decision on Appeals, paras 70, 90.



46. I have decided to adopt a broad approach to non-pecuniary damage. In the present case, the nature, width, and gravity of the crimes alleged and charged is such that their psychological impact on victims can only be presumed to have been heavy. This is in line with the case law of regional human rights courts.<sup>64</sup>

iii. Proof of identity

47. All Civil Party applications must contain details allowing verification of the applicant’s status as a Victim.<sup>65</sup> To this extent, the OCIJ has reviewed thumbprints and identifying documents contained in each VIF and the documents attached or appended to it.

48. However, I accept the PTC’s finding that “statements issued in a form or other from the village elder or the communal chief”<sup>66</sup> are enough to establish the applicants’ identities. I also accept that where the copy of the identity card or the thumbprint is missing, it is sufficient if the applicant can be identified *via* the data contained in the VIF.

**FOR THE FOREGOING REASONS, I:**

49. **DECLARE** all Civil Party applications listed in Annex A admissible;

50. **DECLARE** the Civil Party applications in Annex B inadmissible; and

51. **DECLARE** that the Civil Party applications and related documents listed in Annex C are to be considered as complaints.

Dated 16 August 2018, Phnom Penh



Judge Michael Böhlender

សហចៅក្រមស៊ើបអង្កេតអន្តរជាតិ  
International Co-Investigating Judge  
Co-juge d’instruction international

<sup>64</sup> ECtHR, *Peck v. United Kingdom*, no. 44647/98, 28 January 2013, para. 118; IACHR, *Ituango Massacres v. Colombia*, 1 July 2006, para. 384; *Caracazo v. Venezuela*, 29 August 2002, para. 50 (e).

<sup>65</sup> Practice Direction on Victim Participation, Article 3.5 (a).

<sup>66</sup> Case 002 Decision on Appeals, para. 95.