

BEFORE THE PRE-TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

FILING DETAILS

(PTC05)

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APPEAL AGAINST ORDER ON THE ADMISSIBILITY OF CIVIL PARTY
APPLICANT [REDACTED]

Filed by:

Distribution to:

Co-Lawyers for Civil Parties

Pre-Trial Chamber

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Ms. Silke STUDZINSKY

Judge PRAK Kimsan
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I. PROCEDURAL BACKGROUND

1. On 29 April 2011, the Co-Investigating Judges (CIJs) announced that the investigation in Case 003 was concluded.¹
2. On 9 May 2011, [REDACTED] (Appellant) submitted an application to become a Civil Party in Case 003 to the Victims' Support Section (VSS). Attached to the Application form was a Power of Attorney for [REDACTED] legal representatives, national lawyer, Mr. HONG Kimsuon, and international lawyer, Ms Silke STUDZINSKY.² [REDACTED] application was issued with VSS registration number 11-VSS-00003.³
3. On 9 May 2011, the Appellant's lawyers requested access to the Case File 003⁴ and on 10 May they attached the necessary forms to an e-mail.⁵ The Greffier, Mr. LY Chantola, responded that the application was not yet notified to the CIJ's. Despite several subsequent inquiries via e-mail by the Appellant's lawyers *after the application was filed from VSS to CIJs on 3 June 2011*, no further response has been received.
4. On 05 August 2011, only the Appellant was notified of the "Order on the Admissibility of the Civil Party Application of [REDACTED]" dated 27 July 2011 (Order).⁶ The Appellant's lawyers were not notified of the Order although they had explicitly asked for notification of the expected Order.⁷
5. The Appellant, represented by [REDACTED] legal representatives, hereby appeals the rejection of [REDACTED] Civil Party application.

II. APPLICABLE LAW AND RULES

¹ See <http://www.eccc.gov.kh/en/articles/statement-co-investigating-judges>.

² In the absence of access to the case file the respective document number cannot be added.

³ In Cases 001 and 002, the Appellant was granted Civil Party status (Applications D22/0017 and D25/16, respectively) and testified on 20 August 2009 and 24 August 2009 before the Trial Chamber in the proceedings against Duch (ERN 00368453-00368462 and ERN 00370760-00370786).

⁴ In the absence of access to the case file the respective document number cannot be added.

⁵ Email from Civil Party Lawyers, Ms. Silke Studzinsky and Hong Kimsuon, to Greffier of the Office of Co-Investigating Judges, titled "Request for Access to Case File 003", dated 10 May 2011, 3 June 2011, 6 June 2011 and 10 June 2011.

⁶ OCIJ, "Order on Admissibility of the Civil Party Application of [REDACTED]", dated 27 July 2011, CF 003, D11/3.

⁷ See e-mail, dated 10 June 2011.

6. The relevant Law and Internal Rules (IRs) to which this Appeal refers are IRs 14, 21, 23, 23 *bis*, 23 *quinqüies*, 53, 55, and 77 *bis* (Revision 7), Article 10 new of the Law on the Establishment of the ECCC (ECCC Law),⁸ Articles 5(2) and 5(3) of the Agreement between the United Nations and the Royal Government of Cambodia (Agreement),⁹ the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Basic Principles)*,¹⁰ the *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 (Basic Principles and Guidelines)*,¹¹ *UN Principles against Impunity*,¹² Article 14 of the International Covenant On Civil and Political Rights (ICCPR)¹³ and Article 3 of the Practice Direction on Victims Participation (Practice Direction).¹⁴

III. STANDARD OF APPEAL

7. IR 77 *bis* is a special rule for appeals against admissibility orders by the OCIJ.¹⁵ The special provision for admissibility appeals exhaustively determines the standard of appeal. The reasons are limited to errors in fact and/or law in determining the decision.

⁸ Law on the Establishment of the Extraordinary Chambers, dated 27 October 2004 (NS/RKM/1004/006).

⁹ 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, 6 June 2003.

¹⁰ *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, adopted by General Assembly resolution 40/34 of 29 November 1985 (hereinafter referred to as "Basic Principles of Justice for Victims").

¹¹ *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, 16 December 2005, (hereinafter referred to as "Basic Principles and Guidelines"), at <http://www2.ohchr.org/english/law/remedy.htm>.

¹² Impunity, Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher, Addendum - Updated Set of principles for the protection and promotion of human rights through action to combat impunity, UN Doc No. E/CN.4/2005/102/Add.1, 8 February 2005, at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf?OpenElement>

¹³ International Covenant on Civil and Political Rights, General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, at <http://www2.ohchr.org/english/law/ccpr.htm>.

¹⁴ Practice Direction on Victims Participation, at <http://www.eccc.gov.kh/en/documents/legal/practice-direction-victims-participation-revision-1>.

¹⁵ IR 77 *bis* was first adopted on 9 February 2010, and retained in Revision 7 of the IRs. It came into effect on 23 February 2011.

IV. ADMISSIBILITY OF THE APPEAL

8. According to the IR 77 *bis* (1) and (2), an order regarding the admissibility of a Civil Party application can be appealed within ten days from notification of the order. As the Order in Case 003 was notified to the Appellant on 5 August 2011, the deadline for appeals of this Order is 15 August 2011.
9. In accordance with IR 75, Notice of Appeal was filed to the Pre-Trial Chamber (PTC) on 15 August 2011.¹⁶
10. The impugned Order of the CIJs contains a decision on the admissibility of Civil Party applications. The appeal against this Order is therefore factually admissible, and is timely submitted.

V. PRELIMINARY REMARKS

11. Co-Lawyers for Civil Parties submit that it is a matter of great concern that the CIJ's ignored the Appellant's legal representatives, not only by not recognizing them and refusing them access to the case file, but also because the CIJs notified only the Appellant of their rejection of [REDACTED] civil claims. Significantly, the CIJs notified the Appellant *knowing* that [REDACTED] does not live in Phnom Penh, *knowing* the practical difficulties for [REDACTED] to call [REDACTED] lawyers and *knowing* that it would cost someone in [REDACTED] situation extra time and money to send a hard copy of the Order to legal representatives in Phnom Penh in the absence of Internet access and knowledge as to its use. Co-Lawyers for Civil Parties consider this to be a conscious action on the part of the CIJs, carried out with an intent (or recklessness at the very least) to shorten the 10-day deadline for the filing of an appeal, in accordance with the expedited procedures under IR 77*bis*. This, in itself, violates a requirement to respect the rights of the Victim, contrary to IR 21 (1) and 21 (1) (c).
12. This can be considered in light of the CIJs' Decision to "grant" an extension of the deadline for Civil Party applications by three weeks on 7 June 2011, announced one

¹⁶ As at date of writing, no document number has been provided. In the absence of access to the case file the respective document number can not be added.

day before the “extended deadline”, in fact, expired.¹⁷ The extension was thus actually a one-day-extension, published on the homepage of the Court, which is meaningless for the over 90 % of potential Applicants residing in the provinces and regional areas.

13. A further serious matter of concern is the fact that the CIJs, by failing to respond, continuously refuse to recognize the legal representatives in Case 003 and 004 and thereby refuse them access to the case files.
14. By doing this the CIJs have denied victims their right to properly participate in the stage of the investigations and to exercise their rights accordingly, contrary to the fairness provisions under IR 21.

VI. ARGUMENT

I. FIRST GROUND OF APPEAL

The CIJs violated IR 21(c), to “to ensure legal certainty and transparency” by rejecting the Appellant on the basis that [REDACTED] is not a “direct victim”

15. The impugned Order violates basic principles of fairness, such as legal certainty and transparency, as these principles are expressed in IR 21 (c). It appears that the basis for rejecting the Appellant’s application is that [REDACTED] is not a “direct” victim and as such excluded from achieving Civil Party status. According to the Order, a person is a “direct” victim only if a **direct** link between the harm suffered and the offence is established.¹⁸ The Order states that there is not a direct link between the harm suffered by the Appellant (being psychological injury) because the forced labour of [REDACTED] is an “intermediate link”.¹⁹ By rejecting the Appellant’s application on the “reasons” that it has, the CIJs have departed from their previous policy over the past five years, without any change to the legal basis for Civil Party admissibility criteria. They have done this, further, without providing any information to victims or providing comprehensive reasons as to why such a restrictive approach to admissibility is taken in Cases 003 (and 004). The new approach deviates from

¹⁷ Statement from the Co-Investigating Judges Related to Case 003 Requests from the International Co-Prosecutor, 7 June 2011; See in general the Report of the Open Society Justice Initiative, 14 June 2011, at http://www.soros.org/initiatives/justice/articles_publications/publications/cambodia-eccc-20110614.

¹⁸ See Order, paras. 5-7 (a conclusion derived from IR 23bis (1)(b) and the Practice Direction).

¹⁹ See Order, paras 5.

international standards and any other civil law jurisdiction in respect of victims' rights.

16. Had this incredible ground of rejection been applied in Case 001 against Mr. KAING Guek Eav, 86 out of 90 applicants would have been rejected since only *four* were considered by the Trial Chamber to be immediate survivors ("direct victims").²⁰ In Case 002, this argument would have led also to an enormous reduction of admitted Civil Parties who were however admitted by the CIJ.
17. Further, an application of this approach would be absurd, if applied in situations where an immediate victim died, as this approach renders no family member ever able to become a Civil Party. The CIJs' rejection on this ground very clearly indicates that there was no proper legal application of rules and principles, but that political considerations and influences were involved.

CIJs' Determinations on the Facts and Law

18. The CIJs were of the view that "the Applicant failed to demonstrate that the alleged physical [emphasis added] injury was caused **directly** by the alleged crime".²¹ Co-Lawyers for Civil Parties submit that this assertion is incorrect since the Appellant claimed no physical harm, but stated mental harm. The Order obviously lacks the necessary diligence in reviewing the Appellant's factual claims.
19. The CIJs further state that "direct" in this context means "that the crime alleged caused an injury without any intermediate causal link" and that "the intermediate link that caused the alleged psychological injury of the Applicant was the forced labor of [redacted] [the Appellant's] [redacted]".²² The CIJs in their Order continue that "the laws of causality are laws of nature, they leave no room for interpretation or discretion in their application. A cause leading to an effect has either caused that effect directly or through an intermediary".²³
20. The CIJs further attempt to back their argument by rejecting any reference to jurisprudence of the International Criminal Court (ICC) that their Office previously

²⁰ By the time of writing the Trial Chamber's Judgment is still under Appeal before the Supreme Court Chamber.

²¹ OCIJ, "Order on Admissibility of the Civil Party Application of [redacted]", dated 27 July 2011, D11/3, para. 5.

²² Order, para. 5.

²³ Order, para. 5.

made in the series of Admissibility Orders in Case 002 between August and September 2010. They state that reference to the ICC jurisprudence is irrelevant because the definition of "victim" in Rule 85 (a) of the Rules of Procedure and Evidence (RPE) of the ICC expressly includes those who are family members of a direct victim. Indirect harm can qualify an individual as a victim and therefore no reference to the ICC in this regard can be made.

21. An examination of the definition of the term "victim" shows that the CIJ's assertion is erroneous.

22. Rule 85 (a) of the RPE of the ICC defines victims as:

"natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court"

23. The ECCC uses the **same definition** of a victim as,

*"a natural person [...] that has suffered harm as a result of any crime within the jurisdiction of the ECCC"*²⁴

24. The similarity of the definitions, as outlined above, demonstrates the relevance of ICC jurisprudence to an interpretation of the ECCC definition of "victim". The fact that the ICC's definition expressly includes family members of direct victims further tends toward an interpretation of "victim" at the ECCC to similarly include relatives of direct victims. In this way, it is clearly relevant and appropriate to refer to the ICC definition of a victim in support of a proper construction of the term, at the ECCC.

25. Further, in the impugned Order the CIJ erroneously rejects the reference to the ICC that the same Office previously held in all previous Orders on Admissibility. The approach used in all previous Orders was that, to be admissible, the harm suffered by the applicant does not necessarily have to be immediate but it must be personal. Likewise, the CIJ held in the previous Admissibility Orders in 2010 that there is a presumption of psychological harm for the members of the direct family of the immediate victim such as parents, spouses and siblings. The CIJ further held that this presumption will be considered as determined when the immediate victim

²⁴ Glossary of the Internal Rules.

disappeared, died or has been forcibly moved from the direct family as a direct consequence of facts under investigation.²⁵

26. By rejecting the Appellant's application, the CIJs violated the principle of fairness and in particular the principle of transparency and certainty under IR 21. *On the very same facts* as those raised in [REDACTED] Case 003 application, the Appellant was admitted as a Civil Party in Case 002,²⁶ namely for psychological harm as a direct consequence of crimes which are within the scope of investigations and committed against [REDACTED]

27. The CIJs acknowledge that the Appellant had been admitted in Case 002 as follows:

"Although the Co-Investigating Judges admitted the Applicant as a Civil Party in Case 002 for "Kampong Chhnang Airport/Psychological Harm", it is not apparent from that decision that the requirement of directness of the causality link was examined in depth at the time ... In any case, the considerations that led to that decision, furthermore in a different case, are non-binding, and cannot prevent the (present) Co-Investigating Judges from applying Rule 23 bis 1 (b) in the manner considered to be correct."²⁷

28. They further acknowledge the Appellant's admission as a Civil Party in Case 001:

"Although the Trial Chamber in the Judgment of Case 001 admitted the Applicant as a Civil Party, this was only [sic] in respect to the killing of [REDACTED] at S-21, and not in respect to [REDACTED] forced labor as in the current application."²⁸

29. Co-Lawyers for Civil Parties note that Kampong Chhnang Airport was neither under investigation, nor examined before the Trial Chamber in Case 001. It is therefore not surprising that the Appellant was not admitted on the basis of this crime. This fact does not invalidate or weaken [REDACTED] admission in Case 002, in relation to Kampong Chhnang Airport.

30. Whilst the CIJs made a number of legal errors in the impugned Order, the immediate error is the inconsistency in legal interpretation of the relevant Rules and Practice Directions, constituting a clear violation of IR 21(1), which guarantees transparency and certainty in the conduct of proceedings.

²⁵ See for example, Order on the Admissibility of Civil Party Applicants from Current Residents of Banteay Meanchey Province, 13 September 2010, D416, paras.13-14.

²⁶ Case 002-19-09-2007-ECCC/OCIJ, Order on the Admissibility of Civil Party Applicants from Current Residents of Prey Veng Province, 9 September 2010, D410.

²⁷ Impugned Order, dated 27 July 2011, D11/3, para 7.

²⁸ Ibid., para. 8. Since Kampong Chhnang Airport was not under investigation and before the Trial Chamber in Case 001 it is not surprising that the Appellant was not admitted on the basis of this crime.

31. Judge YOU Bunleng was the same CIJ deciding admissibility orders in Case 002. In the Appellant's case, the Judge has failed to *consistently* apply the same interpretation of the Practice Directions and Internal Rules as he did in previous cases. In spite of this, Co-Lawyers for Civil Parties highlight that legal certainty and consistency is not related to a respective Judge, but rather to the Office of the Co-Investigating Judges, as an organ of the ECCC. For this reason, the departure of International CIJ, Judge Marcel Lemonde, and his replacement by a new international CIJ does not allow deviations from the former principles of the Office, in particular when the new policy or approach is not backed internationally or nationally and lacks any legal basis.
32. The principle of legal certainty *sensu stricto* means that every person has the right to expect a predictable judicial outcome and protection from arbitrary determinations. The unjustified rejection of the Applicant in the impugned Order violates IR 21(1), principles of fairness, transparency, accountability and certainty. It further violates a fundamental principle of the rule of law, being that the *same* facts and the *same* law, when consistently applied, must lead in a predictable manner to the *same result*.²⁹
33. The assertion of the CIJs that the former admission of the Appellant in Case 002, "furthermore in a different case, [is] non-binding" is therefore erroneous.
34. The fact that the case file is different – or that different defendants are involved in relation to a crime site investigated in a previous case file - does not affect the prerequisites for becoming a Civil Party. To the contrary, any facts established by the Appellant in Case 002 which are the same as those established in a Case 003 application, where a relevant crime site is under investigation, must be treated equally.
35. To conclude, the rejection of the Appellant violated the general principal of fairness and, in particular, the right to legal certainty and transparency pursuant to IR 21 (1) and (1) (c).

²⁹ United Nations, "What is the Rule of Law", at http://www.unrol.org/article.aspx?article_id=3.

2. SECOND GROUND OF APPEAL

The CIJs violated IR 23 bis (1) (b) and Article 3.2 (c) of the Practice Direction On Victims Participation

a. Personal Harm as a Direct Consequence of the Crime

36. As outlined above³⁰ the CIJs state that “the applicant failed to demonstrate that the alleged physical [sic] injury was caused directly by the alleged crime”.³¹ They go on to say:

“According to the English usage “direct” in this context means that the crime alleged caused an injury without any intermediate causal link. However, in this case, the intermediate link that caused the psychological injury of the applicant was the forced labor of [REDACTED]. Without that link [REDACTED] injury could not have been caused by the crime alleged. Therefore, the causal chain in abbreviated form is: Crime alleged- forced labor of [REDACTED] – alleged psychological injury of applicant.”³²

37. The CIJs, whilst acknowledging the Appellant’s Civil Party status in Case 002, express that the Case 002 admissibility decision was incorrect because it “does not explain or examine the requirements of the term “direct”” and the line of thoughts “... were not concerned with the requirements of causal directness”.³³ The CIJs continue: “In any case, the considerations that led to that decision, furthermore in a different case are non-binding...”³⁴

38. The CIJs even find that their interpretation:

“is not inconsistent with Paragraph 8 of the Basic Principles and Guidelines on the Rights to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law which provides “where appropriate, and in accordance with domestic law, the term “victim” also includes the immediate family or dependants of the direct victim...” because it would obviously be inappropriate to have the requirement of direct causality stipulated by Rule 23bis 1 (b) abrogated by a UN guideline, apart from the fact that domestic law i.e. Article 13 of the 1964 Cambodian Code of Criminal Procedure also requires direct causality.”³⁵

³⁰ See para. 18 of this Appeal.

³¹ OCIJ, “Order on Admissibility of the Civil Party Application of [REDACTED]”, dated 27 July 2011, D11/3, para. 5.

³² Impugned Order, para. 5.

³³ Ibid, para 7.

³⁴ Ibid.

³⁵ Ibid, para 6.

39. Co-Lawyers for Civil Parties note that the current “Code of Criminal Procedure of the Kingdom of Cambodia” (CPC) was adopted by the National Assembly in June 2007, during the first plenary of the ECCC, and is in force since August 2007. The CPC states in its Article 611:

“The following provisions shall be abrogated:

- *All provisions governing criminal procedures before 1992*
- *(...)”*

Further, Article 612 of the CPC stipulates:

“This Code [the CPC] shall immediately be applicable to all criminal proceedings which are conducted after the entry into force of this Code.”

40. Consequently the Code from 1964 to which the CIJs refer, has been, at least since 2007, no longer in force.
41. The arguments of the CIJs are flawed, because a lack of a definition of the word “directly” in a legal provision, does not, in any way, render a decision to be made in error. Indeed, it is up to judges to decide on statutory interpretation.
42. IR 23 *bis*(1)(b) stipulates that, in order for Civil Party action to be admissible, the Civil Party applicant shall “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”. The three main elements that must be demonstrated and established by the Applicant are: (i) existence of injury; (ii) direct consequence of the crime, and (iii) personal harm.
43. In accordance with these three elements, the Appellant has established the existence of injury in the form of psychological harm. This injury has occurred as a direct consequence of crimes committed against [REDACTED]. There is no doubt that the Appellant has demonstrated that [REDACTED] has suffered personal harm in the form of psychological harm.³⁶
44. IR 23*bis* (1) (b) purports to require as admissibility criteria for becoming a Civil Party that the harm that the victim has suffered appears as a “**direct consequence of the offence.**” However, this definition does not reflect the definition for a “victim” in the Glossary of the Internal Rules, which stipulates that “[a] victim refers to a natural

³⁶ See Victim Information Form. .

person or legal entity that has suffered harm as a result of the commission of any crime within the jurisdiction of the ECCC".³⁷

45. In defining the prerequisite that the harm has to be a *direct* consequence of the crime/offence, the Trial Chamber established that harm can be suffered by "the immediate victims and the close kin."³⁸
46. This (still narrow) interpretation by the Trial Chamber of the ECCC is at least in so far in accordance with the UN Basic Principles and Guidelines³⁹ as the definition of "victim" is not limited to those persons who are the immediate victims. Although the authority given by this is limited to that of a Guideline, it is one general source of International Criminal Law (ICL) and is reflected in all national civil law jurisdictions⁴⁰ which rarely deal with mass crimes and therefore do not reflect the harm suffered in the case of mass crimes where crimes are committed against entire communities, or the whole population.⁴¹

b. Article 3.2. (c) Practice Direction on Victim Participation.

47. The interpretation taken by Co-Lawyers for Civil Parties is explicitly supported by the Victims PD, which stipulates:

"In order to be considered as a victim for the purposes of the ECCC:

a. The applicant must be a natural person or legal entity that has suffered harm as a result of the commission of any crime within the jurisdiction of the ECCC.

b. To be considered to have suffered harm, the applicant must show:

i. Physical, material or psychological injury; and

³⁷ Glossary of the Internal Rules (Revision 7). By the time of writing the new Internal Rules were not made public yet.

³⁸ Case against KAING Guek Eav, 001-18-07-2007-ECCC/TC, Judgment, 26 July 2010, E188, para. 648. This narrow approach in Case 001 was appealed to the Supreme Court Chamber by Civil Parties deemed inadmissible and a decision is outstanding.

³⁹ The Basic Principles and Guidelines were unanimously adopted by all UN member States, including The Royal Government of the Kingdom of Cambodia.

⁴⁰ As an example, Co-Lawyers for Civil Parties refer only to the German Criminal Procedure Code which provides in §395 (2):

⁴¹ Die gleiche Befugnis steht Personen zu,

1. deren Kinder, Eltern, Geschwister, Ehegatten oder Lebenspartner durch eine rechtswidrige Tat getötet wurden (...).⁴¹ (Free translation: "The same right [to become a Civil Party] is provided to those persons whose children, parents, siblings, spouses or partners were killed through an unlawful act").

⁴¹ See: CF002, Decision on Appeals Against Orders Of The Co-Investigating Judges On The Admissibility Of Civil Party Applications, 24 June 2011, D411/3/6, paras. 44-50 and 71-93. The PTC has a broad understanding of the affects of mass crimes and the injury inflicted on the population and which can and must be causally linked to the Accused.

ii. Such injury to be the direct consequence of the offence, personal and have actually come into being.

c. Psychological injury may include the death of kin who were the victim of such crimes.”

48. By rejecting the Appellant for the reason that [REDACTED] is not an immediate victim, the CIJs violated and/or erroneously interpreted the applicable Practice Directions.
49. For completeness, Co-Lawyers for Civil Parties refer to international jurisprudence that provides guidance beyond that given by the ECCC’s Trial Chamber. The ICC Appeal Chamber acknowledges direct and indirect victims and ruled:

*“The issue for determination is whether the harm suffered is personal to the individual. If it is, it can attach to both direct and indirect victims. Whether or not a person has suffered harm as the result of a crime within the jurisdiction of the Court and is therefore a victim before the Court would have to be determined in light of the particular circumstances.”*⁴² (emphasis added)

50. In addition, Rule 85(a) of the RPE of the ICC does *not* require that the harm be a ‘direct’ consequence.⁴³ This accords with the definition of the term “victim” in the IR Glossary, identical to the definition of the RPE. Internationally, the harm suffered does not need to be a “direct result of the commission of any crime within the jurisdiction,” but must be personal.
51. The Inter-American Court of Human Rights (IACHR) has granted reparation to relatives and partners of victims, not only in cases of disappearances,⁴⁴ but also for cases of killings,⁴⁵ and other gross human rights violations where the victim did not die or disappear.⁴⁶ The IACHR considers that it can be presumed that the parents,

⁴² Situation in the Democratic Republic of the Congo, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-1432, 11 July 2008, para. 32.

⁴³ Rule 85 (a) of the RPE states: “Victims’ means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court.”

⁴⁴ Case *Velásquez Rodríguez v. Honduras (Compensatory damages)*, Judgment of 21 July 1989, Series C No 7, paras. 50-52; Case *Garrido and Baigorria v. Argentina (Reparations)*, Judgment of 27 August 1998, Series C No 39, paras. 62, 63; Case of *Blak e v. Guatemala*, Judgment of 22 January 1999, para. 37; Case *Bámaca Velásquez v. Guatemala (Reparations)*, Judgment of 22 February 2002, Series C No 91, paras. 33-36.

⁴⁵ Case *Aloeboetoe v. Suriname (Reparations)*, Judgment of 10 September 1993, Series C No 15, para. 71; Case *Panel Blanca v. Guatemala (Reparations)*, Judgment of 25 May 2001, Series C No 76, para. 85, 86; Case of *Street Children v. Guatemala (Reparations)*, Judgment of 26 May 2001, Series C No 77, para. 68; Case *Juan Humberto Sánchez v. Honduras, Series C No 9*, Judgment of 7 June 2003, para. 152.

⁴⁶ Case *Loayza Tamayo v. Peru (Reparations)*, Judgment of 27 November 1998, Series C No 42, para. 92.

children, siblings and partners of a direct victim fulfill these requirements and must be considered as indirect victims.⁴⁷

52. Significantly, the Basic Principles and Guidelines, define “victims” under Principle 4(8) as follows:

*“... victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights ... Where appropriate, and in accordance with domestic law, the term “victim” also includes the immediate family or dependants of the direct victim ...”*⁴⁸

53. The CIJs erred in both law and fact, when concluding that the Appellant is not a “victim”. To conclude, there is neither any legal basis under the ECCC laws and Rules, or support in international practice or jurisprudence, for the rejection of the Appellant, because ■■■ has clearly demonstrated and established that ■■■ suffered harm as a direct consequence of a crime under investigation. The impugned Order of the CIJs appears to be motivated by factors other than proper legal interpretation and proper application of the law and rules, and clearly violates Internal Rule 23 bis(1)(b), Article 3.2(c) of the Victims PD, and Principle 4 (8) of the Basic Principles and Guidelines. For this reason, it should be struck out, set aside, and the Appellant should be granted Civil Party status on the proper application of the relevant Rules and Regulations.

3. THIRD GROUND OF APPEAL

The CIJs violated Rule 21 (1), 21 (1) (c), 23bis (1), the UN Basic Principles and Guidelines and exceeded their power by rejecting the application on an alternative basis as not meeting the standard of proof

54. The CIJs deemed the application as alternatively inadmissible on the basis that the claims of the Appellant relevant to the harm ■■■ suffered did not meet an adequate

⁴⁷ Case *Blake v Guatemala (Reparations)*, Judgment of 22 January 1999, para. 37 [parents and brothers and sisters of disappeared person, without differentiation in proof]; Case *Loayza Tama o v. Peru (Reparations)*, Judgment of 27 November 1998, Series C No 42, para. 92 [all persons with a close-family link, i.e. children, parents and brothers and sisters]; Case *Juan Humberto Sánchez v Honduras*, Judgment of 7 June 2003, Series C No 99, para. 152 [family members for victim and in their own right; siblings; non biological father; wife and other partner]; Case of *19 Merchants v. Colombia*, Judgment of 5 July 2004, Series C No 109, para. 249 [children, partner, parents and siblings].

⁴⁸ Principle 4(8), Basic Principles and Guidelines (see footnote 12). The Basic Principles (see footnote 11) have the same definition under A (2).

standard of proof. They referred to the standard of proof of IR 23bis (1), which states:

"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".⁴⁹

55. The CIJs further declared the alternative ground for rejecting the Appellant's application as follows:

"However the allegation by the applicant, that the pain and pity [redacted] felt 34 years ago for the suffering and poor health of [redacted] (to whom [redacted] had been forcibly married) after [redacted] 3 months of forced labor, is still present in [redacted] mind, although it is noted as such, cannot be considered "more likely than not to be true", especially as such pain and pity would have been overshadowed by [redacted] later disappearance and killing at S-21, and therefore been relegated to the back of [redacted] consciousness.

Although this allegation is even considered highly unlikely to be true, the possibility cannot be excluded that it was based on unsound advice by third person."⁵⁰

a. Violation of IR 23bis (1)

56. Although the standard of proof as reflected in IR 23bis (1) is subject to interpretation, any statutory interpretation requires an objective standard that can be subject to an appellate review by the Pre-Trial Chamber. The CIJs failed to provide objective reasons for finding that the allegations of the Appellant are "even considered highly unlikely to be true".⁵¹
57. The CIJs' finding appears to be mere speculation, without any reference to any facts which gave rise to their finding of the Appellant's purported failure to meet the standard of proof, without knowing the Appellant, and without being in an appropriate position to assess individual types and degrees of suffering, such as possessing a sound knowledge of psychology or psychiatry. The conclusion made by the CIJs that the level of proof has not been met and that the allegations on the suffering and harm are "highly unlikely to be true" is erroneous.
58. No psychologist, psychiatrist or trauma expert would come to such a broad and sweeping conclusion without relevant details about the particular suffering and symptoms of the individual or insight into the harm suffered.

⁴⁹ Order, para 9.

⁵⁰ Order, para 9.

⁵¹ Order, para 9.

59. The CIJs erroneously interpreted IR 23*bis* (1) when they assumed that the suffering “would have been overshadowed ...and therefore been relegated to the back of [redacted] consciousness”. This conclusion is based on an incorrect, unprofessional and unsound view on trauma without any basis in scientific or factual findings. The CIJs clearly exceeded their power and competence as Judges, who are neither psychologists, psychiatrists nor trauma experts, and whose roles are to apply law to facts.
60. Co-Lawyers for Civil Parties note that trauma, and how and to what extent it is memorialized, is highly individual and seems to be different between males and females.⁵² Experts consider that “there is also a growing recognition that factors others than the severity of the event itself may have the greatest impact on memory quality (for example, how often the event is thought about).⁵³ Traumatic experiences in situations of mass crimes are different from trauma experiences in “normal” non-mass crimes situations. Experts described the experience of ongoing human rights violations as sequential trauma or continuing of stress.⁵⁴ The respective coping with these extreme situations can only be assessed by experienced experts after examining the whole background and individual situation of the survivor.
61. Moreover, by holding the allegations of the Appellant as “highly likely to be untrue” CIJs indirectly charge the victim and survivor with having submitted lies. Perhaps to discharge this **incredible and untenable assertion**, the CIJs continue with their speculations that the assertion of the Appellant might be based on “unsound advice by a third person”. This is undoubtedly directed against the legal representatives of the Appellant who submitted [redacted] Victims Information Form on [redacted] behalf.
62. Co-Lawyers for Civil Parties unreservedly object to the speculations made by the CIJs and assert that there has been no violation of the lawyers’ duties and obligations to their client.

⁵² Stephen Porter and Angela R. Birt, *Is Traumatic Memory Special? A Comparison of Traumatic Memory Characteristics with Memory for other Life experiences*, in *Applied Cognitive Psychology*, 15: S101-117(2001). See also, Silove, D. (1999): *The Psychosocial Effects of Torture, Mass Human Rights Violations, and Refugee Trauma: Toward an Integrated Conceptual Framework*. In: *The Journal of Nervous and Mental Disease* 187(4): 200-207.

⁵³ See *supra*, first authority, at p. S102.

⁵⁴ Silove, footnote 52 and Hans Keilson (1979) “Sequentielle Traumatisierung bei Kindern”; a fundamental research on Holocaust victims.

63. Co-Lawyers for Civil Parties further hold that the CIJs *ultra vires* assessment of the mental affects on the Appellant of crime(s) committed against [REDACTED] does not serve as a sound alternative basis for rejecting [REDACTED] civil claims and therefore must be rejected.
64. To conclude, the CIJs interpreted IR 23*bis* (1) erroneously by speculating on matters beyond their knowledge and without providing proper and comprehensive reasons as to how they arrived at their conclusion.

b. Violation of IR 21 (1) and 21 (1) (c) and the Basic Principles and Guidelines

65. Internal Rules 21 (1) and 21 (1) (c) mirror fairness principles and oblige the ECCC to interpret the Rules always as to safeguard the interests (*inter alia*) of the Victims and to respect their rights.
66. The finding that the suffering of the Appellant because of the forced labor of [REDACTED] is "highly unlikely to be true" is an affront to victims who have suffered serious harm from crimes against next of kin. The CIJs' assertion that they do not believe the claims made by the Appellant about the fact or degree of [REDACTED] personal suffering, without any further basis, constitutes an expression of their belief that [REDACTED] is probably lying. These findings result in a defamation of the Appellant, which is a violation of the principle of respecting and safeguarding the rights of victims, as it is expressed in the Internal Rules⁵⁵.
67. If the CIJs take a similar approach for all "indirect" victims of crime (immediate family members of direct victims), the result would be an indirect discrimination against victims who suffered personal and direct harm as a result of crimes committed against next of kin. This has been the case so far, with Civil Party applicants, Mr Rob Hamill and now, [REDACTED].
68. Further, Principle VI (10) of the Basic Principles and Guidelines stipulates:

"Victims should be treated with humanity and respect for their dignity and human rights, and appropriate measures should be taken to ensure their safety, physical and psychological well-being and privacy, as well as those of their families. The State should ensure that its domestic laws, to the extent possible, provide that a victim who has suffered violence or trauma should benefit from special

⁵⁵ See Internal Rule 21 (1) and (1) (c).

consideration and care to avoid his or her re-traumatization in the course of legal and administrative procedures designed to provide justice and reparation.”

69. It is acknowledged among victimology experts⁵⁶ that the recognition of being a victim who had suffered a specific harm is an important component of the judicial process.
70. If one thing is clear, it is that victims of crimes – whether direct or indirect victims – wish to be believed. Part of the reason behind maintaining a deafening silence – for victims who do not speak about their injuries – is a fear of not being believed. In applying to become a Civil Party in Case 003, ██████████ courageously recounted ██████ story once again. By holding that the Appellants claim to be “even considered highly unlikely to be true” without any factual or other basis, the CIJs’ express a disregard for the principle of recognition for the Appellant – and by extension – all victims in ██████ situation.
71. By adding that this suffering was related to ██████ “forcibly married ██████████” the CIJs express an additional false preconception and demonstrate a lack of any professional background on forced marriages. In addition, the CIJs demonstrate a deep lack of empathy and show ignorance towards victims’ suffering.
72. Not only are their doubts, without being backed by objective criteria, simply unprofessional and demonstrate the CIJs’ lack of knowledge on trauma, the comments made by the CIJs violate the Basic Principles and Guidelines on how victims should be treated, which is *inter alia*, treating them with “respect for their dignity, and their physical and psychological well-being, to avoid re-traumatization.”
73. Co-Lawyers for Civil Parties conclude that the reasoning in the first alternative is a serious violation of IR 21 (1) (19 (c) and the Basic Principles and Guidelines and forms an error in law.

⁵⁶ See for further details, Intervict, The international Victimology Institute, Tilburg University, at <http://www.tilburguniversity.edu/research/institutes-and-research-groups/intervict/>.

4. FOURTH GROUND OF APPEAL

The CIJs violated IR 21 (1), IR 21 (1) (c), 23 (1), the fundamental principal of an effective remedy for victims and the right to a reasoned decision by rejecting the application in the alternative because of the necessity of an expeditious trial and the satisfaction of being a Civil Party in Cases 001 and 002

74. The CIJs rejected the Application in the second and third alternative because the
- “(i) “admission would not be in the interest of the expeditiousness of proceedings”, pursuant to IR 21 (4) because the criminal acts committed at Kampong Chhnang airport are part of the Closing Order in Case 002, and (ii) the Applicant is enjoying [redacted] rights as a civil party in that case, and has furthermore already enjoyed [redacted] rights as a civil party in regard to S-21 during the trial of Case 001.”⁵⁷*
75. The third alternative ground of rejection amounts to a general ground to be applied to any Applicant who is already a Civil Party in either one of the other cases before the ECCC. To the knowledge of the Co-Lawyers for Civil Parties, only Civil Parties who have been admitted into Cases 001 and/or 002 have also applied for Cases 003 (and 004).⁵⁸ Consequently, this rejection reason amounts to a general reason to reject all current applicants from being admitted as Civil Parties in Case 003 (and 004). In other words, the proceedings in Cases 003 and 004 will be *Civil Party-free investigations* and, if any proceedings were to ever reach the trial stage, also *Civil Party-free trials*.
76. This procedure is a serious and grave violation of the substance and intention of the Internal Rules, the Cambodian CPC and international norms. To exclude applicants simply because of (i) the cause of expeditious proceedings (without balancing this objective with the rights of victims) and (ii) their current participation in other cases, has no legal bases and amounts to the illegal introduction of new criteria for becoming a Civil Party.⁵⁹ The CIJs consciously breached the applicable law and the

⁵⁷ Impugned Order, para 10.

⁵⁸ This is inferred from the fact that it is unlikely that any NGO has been able to afford any outreach activities in Cases 003 and 004 to inform the population — and neither does the Court. Therefore, only existing Civil Parties submitted applications in Case 003 and 004. In addition, since no information has been made available about the case file, there is very little that NGOs could inform victims about. Contrary to this, the Court as a whole contributes to make it more difficult for Victims to apply since it had the Victims Application forms deleted from its homepage at the time when the deadline for application was running. Co-Lawyers for Civil Parties complained in this regard towards Public Affairs and the VSS.

⁵⁹ Judges shall interpret the laws but are not allowed to add constitutive elements.

Internal Rules by rejecting the Appellant in the alternative on this basis. The non-recognition of legitimate Civil Party applicants who meet legal admissibility criteria by the CIJs demonstrates, once again, that the CIJs are moving in a direction of dismissing Cases 003 (and 004).

77. This unsubstantiated approach further constitutes a violation of the principle of legal certainty where all Civil Parties previously admitted from Case 001 were asked and even invited by CIJ to participate in Case 002, after having already participated in Case 001.
78. With this alternative ground of rejection (which could, in the view of the CIJs, stand on its own, if the other grounds were not be accepted by the PTC), the CIJs have not properly applied the Internal Rules, which outline clearly the criteria to become a Civil Party. Participating in Case 002 where the same crime site will be examined, or having already participated in Case 001, where another crime site is included, does not invalidate their participation in Cases 003 and/or 004. The point made by the CIJs is not a valid argument or existing legal criteria for the admissibility decision.
79. The reasoning in this alternative is an "add-on" to an already outrageous ruling, and constitutes a serious violation of basic fundamental rights of a victim, (i) to be heard, (ii) to have access to truth, (iii) to have access to an effective remedy, including reparation. The CIJs have fully deprived the Appellant from exercising these rights in Case 003, which can never be remedied by participating in another trial with (a) different Accused and/or different criminal subject matters.
80. In addition, this 'reasoning' is so absurd that any rejection on this ground amounts to an erroneous decision on the basis of a failure to provide (proper and adequate) reasons, itself a breach of the Internal Rules and CPC, both of which require a reasoned decision.⁶⁰

⁶⁰ See for example CF002, Appeal against Order on the Admissibility of Civil Party Applicants from Current Residents of Kep, 6 September 2010, D392/3/1, paras. 50-63.

5. FIFTH GROUND OF APPEAL

The CIJs violated IR 14 (1), 55 (5), Article 10 new ECCC Law, Article 5 (2) and (3) of the Agreement and the UN Principles against Impunity by failing to properly and independently investigate Case 003

81. The rejection of the Appellant's civil claims is based on the failure of the CIJs to properly and independently investigate the facts in the Second Introductory Submission as referred to them by the Co-Prosecutors.
82. According to Article 5 (2) and (3) of the Agreement, Article 10 of the ECCC Law, and IRs 14(1) and 55(5), the (Co-Investigating) Judges "shall be independent, and shall not accept or seek any instructions from any government or any other source" and "they shall conduct the investigations impartially and independently".
83. In September 2004, then-UN Secretary-General Kofi Annan appointed an independent expert to update the UN's principles on protecting and promoting human rights through combating impunity.⁶¹ The expert issued a report and a set of updated principles (Impunity Principles) at the end of her one-year mandate.⁶² These principles clarify a number of rights guaranteed to victims of atrocity crimes:
- (i) the right to truth,
 - (ii) the right to justice, and
 - (iii) the right to reparation, with guarantees of non-recurrence.⁶³
84. The CIJs violated these provisions – and more so breached their specific duties – since they are seized with Cases 003 (and 004) and have continued to fail to properly investigate the facts in case 003 that directly concern the Appellant. The reluctance of the CIJs to investigate beyond Case 002 has a long history and is allegedly driven

⁶¹ See United Nations Press Release, "Secretary-General Appoints Independent Expert to Update Set of Principles to Combat Impunity," September 14, 2004, at <http://www.unhcr.ch/hurricane/hurricane.nsf/0/F851F48DECAB6A26C1256F0E005714AF?opendocument>.

⁶² UN Doc. No. E/CN.4/2005/102, Promotion and Protection of Human Rights: Impunity, Report of the independent expert to update the Set of Principles to combat impunity, Diane Orentlicher, 8 February 2005, at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05111/03/PDF/G0511103.pdf?OpenElement> and Addendum – Updated set of Principles for the protection and promotion of human rights through action to combat impunity.

⁶³ Quoted from the OSJI Report, 14 June 2011, at p. 8, see footnote 16.

- by political interference of the Royal Government of Cambodia⁶⁴ and by unknown reasons with regard to the non-investigation by the present International CIJ.
85. Since 7 September 2009, when the CIJs were first seized with the Second and Third Introductory Submissions,⁶⁵ more than 20 months have passed with no proper investigations having been conducted. On 2 February 2011, the CIJs informed the public that no field investigations had been conducted and “the work at present is focused on examining and analyzing the documents available on the Case Files, particularly the existing documents in the previous Cases Files 001 and 002”.⁶⁶ Shortly after this announcement, the closure of the investigations was made public. It can be inferred from the short timeframe between the 2 February 2011 announcement and the 29 April 2011 announcement of the close of investigations (less than three months) that no field investigations have taken place at all.
86. To press the point, the “investigations” of the CIJs were compromised early on, by the “un-signing” of rogatory letters in Case 003 and 004 by the national Judge YOU Bunleng.⁶⁷ After the International CIJ set a deadline to his national counter part on 4 June 2010 for the signing of these rogatory letters. On 7 June 2010, according to UN legal affairs spokesman Lars Olsen, “the first investigative acts in Cases 003 and 004 [had been] taken [on] Friday [4 June 2010] in form of confidential rogatory letters [...] which were signed by *both* [CIJs]”⁶⁸.
87. The response followed immediately: “[RGC] Interior Ministry spokesman Lieutenant General Khieu Sopheak repeated the [Government’s] opposition to the new investigations [...]”, citing Mr. HUN Sen’s warnings of unrest. “*Just only the five top*

⁶⁴ “This was consistent with a reported plan by the judges to do away with both of the court’s pending cases, which together reportedly concern many more than 100,000 victims. No arrests have been made, no charges announced.”, in ‘Closure of Cases may Reflect Official View of KR’, *The Cambodia Daily*, 2 May 2011, front page, by Douglas Gillison.

⁶⁵ See Public Information at <http://www.eccc.gov.kh/en/articles/acting-international-co-prosecutor-requests-investigation-additional-suspects>, dated 8 September 2009.

⁶⁶ See Public Statement at <http://www.eccc.gov.kh/en/articles/statement-co-investigating-judges-regarding-case-files-003-and-004>, dated 2 February 2011.

⁶⁷ OCIJ Internal Memorandum, from You Bunleng to Marcel Lemonde, 8 June 2010, “Dossiers 003 et 004” (unofficial translation from French into English).

⁶⁸ Douglas Gillison, ‘KRT Begins Investigation of Five New Regime Suspects’, *The Cambodia Daily*, 8 June 2010, p. 26 (emphasis added). Reach Sambath, the tribunal’s spokesman issued a statement announcing Judge Bunleng’s dissociation from the rogatory letters, and saying that a [media] report on the signing of the documents, which was based on information provided by UN spokesman Mr. Olsen, was ‘non-basis information’.

leaders [are] to be tried. Not six. Just five. The court must secure stability and the peace of the nation. The conflict and internal instability we do not want."⁶⁹

88. On 8 June 2010, having struck out his signature, Judge YOU Bunleng informed his international counterpart that he could not longer endorse the mission. "[U]pon more attentive and deeper consideration of the question, I think that it is not yet *opportune* to take action in Cases 003 and 004".⁷⁰
89. In June 2010, the Open Society Justice Initiative (OSJI), a reputable court monitor, published its report, which assessed the 'un-signing' as follows:

"Judge You Bunleng initially signed the authorization for such investigation, but withdrew his agreement shortly after the order became public and a spokesperson from the Interior Ministry publicly reiterated that 'only the five top leaders [are] to be tried'. Judge You Bunleng cited the 'current state of Cambodian society' as the reason for refusing to agree to any investigation of the cases. He also indicated that any investigation in the cases could be considered again only after an indictment in [Case 002] was issued. This is an inherently political rationale.

When added to the history of governmental objections to allowing Cases 003/004 to move forward independently, it supports the conclusion that political interference is improperly affecting decisions about the cases."⁷¹

90. On 9 June 2010, the International CIJ stated a disagreement between the Co-Investigating Judges "related to the timing of the investigations" and that "until the end of this year the International Judge will proceed pursuant to Rule 72 IR".⁷²
91. Observers found that "[t]he disagreement is consistent with an apparent pattern of government reluctance to prosecute any former regime leaders beyond those five already [in custody]"⁷³ and "Judge Marcel Lemonde is now to proceed without the support of his Cambodian colleague in the politically charged investigation that government officials have already said should not move forward."⁷⁴

⁶⁹ *Ibid.*

⁷⁰ OCIJ Internal Memorandum, from You Bunleng to Marcel Lemonde, 8 June 2010, "Dossiers 003 et 004" (unofficial translation from French into English).

⁷¹ OSJI, 'Political Interference at the Extraordinary Chambers in the Courts of Cambodia', July 2010, available at:

http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/political-interference-report-20100706, page 21, emphasis added.

⁷² Statement of the Co-Investigating Judges, at <http://old.eccc.gov.kh/english/cabinet/press/156/PROCIJ%28JUne2010.pdf>.

⁷³ Sebastian Strangio, 'KRT judges divided on next cases', *The Phnom Penh Post*, 10 June 2010, p.1.

⁷⁴ Douglas Gillison, 'More Questions than Answers', *The Cambodia Daily*, 11 June 2010.

92. Even after the indictment in Case 002 was issued on 15 September 2010, proper investigations, such as on-site investigations, interviews of witnesses, victims and suspects were not conducted.
93. The CIJs have failed to meet their legal rôle, functions and duties in accordance with the ECCC Law, which states:

*"All investigations shall be the joint responsibility of two investigating judges... hereinafter referred to as Co-Investigating Judges, and shall follow existing procedures in force... The Co-Investigating Judges shall have the power to question suspects and victims, to hear witnesses, and to collect evidence, in accordance with existing procedures in force..."*⁷⁵

The CIJs did not conduct new investigations in Case 003, and only referred to the existing materials available in Cases 001 and 002. Cases 001 and 002 concerned five entirely different suspects and the CIJs' approach to investigations is unreasonable and does not demonstrate any will or drive to exercise their functions fully, properly and independently. The CIJs did not follow the "existing procedures in force," which include questioning suspects and victims, hearing witnesses, and collecting evidence. They did not properly conduct these investigations, and have thereby failed in carrying out their legal responsibility as CIJs.

94. This failure to investigate fully or properly appears to be directly linked to the Prime Minister Hun Sen's repeated public statements, including to the visiting UN Secretary General Ban Ki-moon in October 2010, that "a second Khmer Rouge war crimes trial due to start early next year would be the last. Hun Sen clearly affirmed that case three is not allowed". Foreign Minister HOR Namhong told reporters after the UN Secretary General met with the premier, "we have to think about peace in Cambodia".⁷⁶ OSJI assessed this recent statement as follows:

*"Such blatant political inference in the court's work is of course contrary to basic fair trial standards"*⁷⁷

⁷⁵ Law on the Establishment of the Extraordinary Chambers, dated 27 October 2004 (NS/RKM/1004/006, Article 23, p. 9)

⁷⁶ AFP Report, 'Cambodian PM says No Third Khmer Rouge Trial', 27 October 2010. OSJI Report 'Salvaging Justice', at http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/khmer-rouge-tribunal-20101110

⁷⁷ OSJI Report 'Salvaging Judicial Independence: The need for a Principled Completion Plan for the Extraordinary Chambers in the Courts of Cambodia', at http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/khmer-rouge-tribunal-20101110.

and

"As a practical matter, Cambodian court officials are not free to proceed independently with prosecutions that the [Prime Minister] has openly and categorically opposed. Cambodian court officials are understandably fearful of acting in apparent defiance of a public command by the head of state."⁷⁸

95. One of the ECCC's Cambodian Judges told James Goldston, Executive Director of OSJI, in early February 2010, what is at stake: "How can we say that the court is a model of independent justice if the government does not let us do our job?"⁷⁹
96. A relevant example of recent direct interference by the government in Court matters in Case 002 is when the OCIJ failed to interview important witnesses who were allegedly instructed not to comply with the Court's summons. Upon the Appeal of the Defense⁸⁰ the International Judges of the PTC stated that "although the OCIJ is the natural investigative body within the ECCC, they have repeatedly refused to investigate this matter [allegations of interference]". The International Judges found that "[t]he comment by Khieu Kanharith satisfies us that there is a reason to believe he or those he speaks on behalf of, may have knowingly and willfully attempted to threaten or intimidate the Six Officials, or otherwise interfere with the decision of the Six Officials related to the invitation to be interviewed by the International Co-Investigating Judge."⁸¹
97. Further, since the closing of the investigator's office is looming and UN investigators have already been told that their contracts will not be extended beyond the end of this year,⁸² six UN Legal Officers and Investigators left OCIJ between April and June 2011⁸³ because they simply wanted to do their job properly or to leave an apparently

⁷⁸ OSJI Report 'Recent Developments at the Extraordinary Chambers in the Courts of Cambodia', December 2010 available at

http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/cambodia-report-20101207/cambodia-khmer-rouge-report-20101207.pdf.

⁷⁹ James Goldston, 'Cambodia's Court at a Crossroads', *Wall Street Journal*, 1 March 2010.

⁸⁰ Second Decision on Nuon Chea's and Ieng Sary's Appeal Against OCIJ Order on request to Summons Witnesses, 9 September 2010, D314/1/12, page 21.

⁸¹ *Ibid.*

⁸² Julia Wallace, 'Case 003 investigation reaches conclusion', *The Cambodia Daily*, 30 April-1 May 2011, p. 2.

⁸³ Douglas Gillison, '6th UN Official resigns from KR Judges' office', *The Cambodia Daily*, 22 June 2011, p.24.

dysfunctional working environment.⁸⁴ Since the new International CIJ took office on 1 December 2010, the investigations in Case 003 and 004 did not progress, in contrary the present International CIJ obviously joined his national counter part for unknown motives and reasons. It is highly likely that Case 003 (and 004) will be unanimously dismissed.

98. On 9 May 2011, the International Co-Prosecutor issued a press release in response to the closure of the Case 003 investigation, indicating his intention to seek further investigative acts.⁸⁵ The International Co-Prosecutor said in his statement that the crimes had “not been fully investigated” and added later to medias that “a significant amount” of investigation was still to be carried out.⁸⁶
99. The CIJs rejected three investigative requests from the International Co-Prosecutor. On 3 August 2011, the International Co-Prosecutor appealed the rejection order.⁸⁷ However, Co-Lawyers for Civil Parties observe that even if the Pre-Trial Chamber were to grant the requests and order the OCIJ to properly investigate these matters, it appears as though the closure of the Office is already pre-determined.
100. Co-Lawyers for Civil Parties have demonstrated that the CIJs are working *against* the mission of the ECCC, which sets a dangerous precedent of impunity for those most responsible for mass crimes. The actions of the CIJs demonstrate contempt and disdain for due process and for the rights of victims, in violation of international standards for due process and victims rights. This goes against the vision for the ECCC which is summarized on the ECCC’s official website as:

*“This special new court was created by the government and the UN but it will be independent of them. It is a Cambodian court with international participation that will apply international standards. It will provide a new role model for court operations in Cambodia.”*⁸⁸

⁸⁴ Douglas Gillison, ‘UN Legal Team Walk out on Stymied KR Cases,’ *The Cambodia Daily*, 13 June 2011, front page and p. 26.

⁸⁵ Press Release: Statement by the International Co-Prosecutor Regarding Case File 003; May 9, 2011, at <http://www.eccc.gov.kh/en/articles/statement-international-co-prosecutor-regarding-case-file-003>.

⁸⁶ Rob Carmichael, “Tribunal’s Credibility Under Threat as Controversial Cases Head for Closure;” May 11, 2011, at http://www.robertcarmichael.net/Robert_Carmichael/Cambodia_Radio_News/Entries/2011/5/11_Tribunals_credibility_under_threat_as_controversial_cases_head_for_closure.html.

⁸⁷ Notice of appeal, 3 August 2011, D26/1, at http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D26_1_EN.PDF.

⁸⁸ See ECCC official website at <http://www.eccc.gov.kh/en/about-eccc/introduction>, accessed on 11 May 2011. Emphasis added.

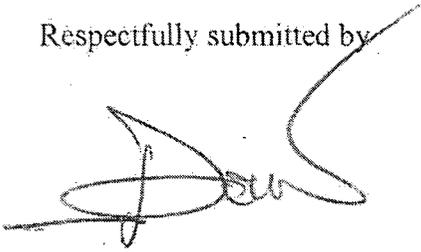
101. Furthermore, if the ECCC will be a new role model for court operations in Cambodia, the CIJs' actions in Case 003 have made that model one of reckless impunity, setting a dangerous precedent on an international level for victims rights. The standard set by the CIJs in Case 003 has been a lack of investigation, succumbing to political influence, lack of transparency, mistreatment of victims, and denial of Civil Party participation.
102. The CIJs are blocking the ECCC's process of justice and championing impunity, and the Order dismissing the Appellant's application in Cases 003 is yet another example of the extent that political interference has played out at this Court.
103. For all the legal reasons cited in this appeal, on a correct construction of the law/Internal Rules and proper application of law/Internal Rules to the facts pertaining to the Appellant's Civil Party application, the Appellant must be admitted as a Civil Party in Case 003.
104. To conclude, by failing to investigate independently, thoroughly and freely from political interference and, free from any other discernable motives on the part of either and/or both CIJs, the Appellant's application was rejected without any sound basis. Co-Lawyers for Civil Parties submit that the rejection order is flawed, and violates Internal Rules 14 (1), 55 (5), Article 10 new of the ECCC Law; Article 5, (2) and (3) of the Agreement, and the UN Principles against Impunity.

VII. CONCLUSION AND RELIEF REQUESTED

105. Co-Lawyers for Civil Parties respectfully request that the Judges of the Pre-Trial Chamber:
 - (i) Declare this Appeal admissible, and
 - (ii) Set aside the decision of the CIJs' Order, deeming the Appellant's civil party application inadmissible, and
 - (iii) Grant the Appellant Civil Party status in Case 003, and
 - (iv) Order the CIJs to grant legal representatives of the Appellant access to the Case File, and

- (v) Grant leave for the Appellant's lawyers to make further submissions in support of this appeal after a reasonable time from which access to the case file in Case 003 has been granted (at least 30 days).

Respectfully submitted by



Mr. HONG Kimsoun
Co-Lawyer for Civil Parties



Ms. Silke STUDZINSKY
Co-Lawyer for Civil Parties

Signed in Phnom Penh, Kingdom of Cambodia, on this 15th day of August 2011.