



## អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

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

ព្រះរាជាណាចក្រកម្ពុជា  
ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia  
Nation Religion King

Royaume du Cambodge  
Nation Religion Roi

### អង្គបុរេជំនុំជម្រះ

Pre-Trial Chamber  
Chambre Préliminaire

D384/7

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

Case File No. 004/07-09-2009-ECCC/OCIJ (PTC62)

### THE PRE-TRIAL CHAMBER

Before:

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

Date:

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

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<b>Term</b>	<b>Abbreviation / Acronym</b>
The Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea	ECCC Agreement
Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia	ECCC Law
Internal Rules of the Extraordinary Chambers in the Courts of Cambodia (as revised)	Internal Rules
International Criminal Court	ICC
Joint Criminal Enterprise	JCE
Democratic Kampuchea	DK
Communist Party of Kampuchea	CPK
Victim Support Section	VSS
Victim Information Form	VIF
Supplementary Information Form	SIF



**THE PRE-TRIAL CHAMBER** of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) is seised of the “Appeal against Order on the Admissibility of Civil Party Applicants”, filed by the Co-Lawyers for Civil Parties (“Co-Lawyers”) on 13 September 2019 (“Appeal” or “Civil Party Appeal”).<sup>1</sup>

## I. PROCEDURAL HISTORY

1. On 20 November 2008, the International Co-Prosecutor brought a disagreement pursuant to Internal Rule 71(2) before the Pre-Trial Chamber, reporting that the National Co-Prosecutor disagreed with prosecuting new crimes identified in additional submissions.<sup>2</sup> On the same day, the International Co-Prosecutor issued the Third Introductory Submission, seeking to open a judicial investigation against YIM Tith as part of Case 004, involving allegations of crimes against humanity and violations of the Penal Code of the Kingdom of Cambodia of 1956 (“1956 Penal Code”).<sup>3</sup>

2. On 18 August 2009, unable to reach a supermajority of votes on the Decision concerning the Disagreement, the Pre-Trial Chamber directed the International Co-Prosecutor to forward the New Introductory Submissions to the Co-Investigating Judges pursuant to Internal Rule 53(1).<sup>4</sup>

3. On 7 September 2009, the Acting International Co-Prosecutor filed the Third Introductory Submission, requesting the Co-Investigating Judges to initiate the judicial investigation against YIM Tith as part of Case 004.<sup>5</sup> The International Co-Prosecutor subsequently filed four Supplementary Submissions in relation to YIM Tith to broaden the scope of the investigation pursuant to Internal Rule 55(3).<sup>6</sup>

<sup>1</sup> Case 004/07-09-2009-ECCC/OCIJ (“Case 004”), Appeal against Order on the Admissibility of Civil Party Applicants, 13 September 2019, notified in Khmer on 8 April 2020, D384/5 (“Civil Party Appeal (D384/5)”).

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

<sup>3</sup> Case 004/20-11-2008-ECCC/OCIJ, Co-Prosecutors’ Third Introductory Submission, 20 November 2008, D1.

<sup>4</sup> Disagreement 001/18-11-2008-ECCC/PTC, Considerations of the Pre-Trial Chamber regarding the Disagreement between the Co-Prosecutors pursuant to Internal Rule 71, 18 August 2009, D1/1.3, para. 45.

<sup>5</sup> Case 004, Acting International Co-Prosecutor’s Notice of Filing of the Third Introductory Submission, 7 September 2009, D1/1.

<sup>6</sup> Case 004, Co-Prosecutors’ Supplementary Submission regarding Sector 1 Crime Sites and Persecution of Khmer Krom, 18 July 2011, D65 (“First Supplementary Submission (D65)”); Case 004, Co-Prosecutors’ Supplementary Submission regarding Forced Marriage and Sexual or Gender-Based Violence, 24 April 2014, D191 (“Second Supplementary Submission (D191)”); Case 004, Response to Forwarding Order and Supplementary Submission regarding Wat Ta Meak, 4 August 2015, D254/1; Case 004, Response to Forwarding Order Dated 5 November



4. Since the beginning of the investigation, 2,014 persons have filed applications to become Civil Parties in Case 004.<sup>7</sup>

5. In the course of the investigations into Case 004, the Office of the Co-Investigating Judges was informed that 47 applicants to Case 004 were 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>

6. On 29 April 2011, the Co-Investigating Judges declared the Civil Party applications of Robert HAMILL and SENG Chan Theory inadmissible.<sup>11</sup> These applicants appealed against the inadmissibility Orders.<sup>12</sup> On 14 and 28 February 2012, the Pre-Trial Chamber issued its Considerations regarding the Appeals from the two applicants, declaring that the Chamber was unable to reach the required majority to render a decision on the Appeals.<sup>13</sup> On 15 November 2011, SENG Chan Theory withdrew her application from Case 004, which was acknowledged by the Greffier of the Office of the Co-Investigating Judges by letter on 29 May 2014.<sup>14</sup> On 30 December 2011, Robert HAMILL requested the Co-Investigating Judges to reconsider their

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2015 and Supplementary Submission regarding the Scope of Investigation into Forced Marriage in Sectors 1 and 4, 20 November 2015, D272/1 ("Fourth Supplementary Submission (D272/1)").

<sup>7</sup> Case 004, Order on Admissibility of Civil Party Applications, 28 June 2019, D384 ("Order on Civil Parties (International) (D384)"), para. 2.

<sup>8</sup> Order on Civil Parties (International) (D384), para. 8.

<sup>9</sup> Order on Civil Parties (International) (D384), para. 8 *referring to* Case 004, Letter from Civil Party Lawyer concerning "Request for Successor of Deceased Civil Party to Continue Civil Reparation Claim D5/641", 16 January 2016, D5/641/3.

<sup>10</sup> Order on Civil Parties (International) (D384), para. 8 *referring to* Case 004, Letter to Lawyer, 5 October 2015, D5/1114/3; Case 004, Letter to Lawyer concerning the Withdrawal of Mr. DY Dany from Case File 003, 004 and 004/2, 9 January 2018, D5/1921/3; Case 004/1/07-09-2009-ECCC/OCIJ ("Case 004/1"), Order on Admissibility of Civil Party Application, 22 February 2017, D307, para. 7.

<sup>11</sup> Case 004, Order on the Admissibility of the Civil Party Application of Robert HAMILL, 29 April 2011, D5/2/3; Case 004, Order on the Admissibility of the Civil Party Application of SENG Chan Theory, 29 April 2011, D5/1/3.

<sup>12</sup> Case 004, Appeal against Order on the Admissibility of Civil Party Application of SENG Chan Theory, 18 May 2011, D5/1/4/1; Case 003/07-09-2009-ECCC/OCIJ ("Case 003"), Appeal against Order on the Admissibility of Civil Party Applicant Mr. Robert Hamill (D11/2/3) (Cases 003 and 004), 23 May 2011, D5/2/4/2.

<sup>13</sup> Case 004 (PTC02), Considerations of the Pre-Trial Chamber regarding the Appeal against Order on the Admissibility of Civil Party Applicant Robert Hamill, 14 February 2012, D5/2/4/3 ("Considerations on Appeal of Robert HAMILL (D5/2/4/3)"); Case 004 (PTC01), Considerations of the Pre-Trial Chamber regarding the Appeal against Order on the Admissibility of Civil Party Applicant SENG Chan Theory, 28 February 2012, D5/1/4/2 ("Considerations on Appeal of SENG Chan Theory (D5/1/4/2)").

<sup>14</sup> Case 004, Request to Withdraw from Applicant 11-VSS-00001 SENG Chan Theory, 3 March 2014, D5/1/5; Case 004, OCIJ's Greffier Letter to Lawyer CHOUNG Chou-Ngy, 29 May 2014, D5/1/6; Case 004, OCIJ's Greffier Letter to Lawyer SAM Sokong, 29 May 2014, D5/1/7; Case 004, OCIJ's Greffier Letter to Lawyer Emmanuel Jacomy, 29 May 2014, D5/1/8. *See also* Order on Civil Parties (International) (D384), para. 5.



Order.<sup>15</sup> The Co-Investigating Judges did not issue a new order on his admissibility as a Civil Party at that time.<sup>16</sup>

7. On 8 August 2011, the Co-Investigating Judges issued a press release, informing the public and potential Civil Party applicants of the crime sites included in the Third Introductory Submission in Case 004.<sup>17</sup>

8. On 1 May 2012, the Reserve International Co-Investigating Judge admitted 30 applicants as Civil Parties.<sup>18</sup>

9. On 19 December 2012, the International Co-Investigating Judge, being seised of a Supplementary Submission in relation to additional investigations in Case 004, released a statement, notifying the public of 14 additional crime sites under investigation in Case 004.<sup>19</sup>

10. YIM Tith's Case was subject to a series of confidential disagreements between the Co-Investigating Judges (registered on 22 February 2013, 5 April 2013, 21 October 2015, 16 January 2017 and 21 January 2019).<sup>20</sup> None of these disagreements were brought before the Pre-Trial Chamber.

11. On 24 April 2014, concurrent with the filing of his Supplementary Submission of the same date,<sup>21</sup> the International Co-Prosecutor announced that he had requested the investigation of sexual or gender-based violence and forced marriage as part of Case 004.<sup>22</sup> On 9 December 2015, the International Co-Investigating Judge charged YIM Tith with violations of Articles 501 and 506 (premeditated homicide) of the 1956 Penal Code, genocide, crimes against humanity and grave breaches of the Geneva Conventions of 1949.<sup>23</sup> A press release regarding

<sup>15</sup> Case 004, Request for Co-Investigating Judges to Reconsider Decision on Admissibility of Civil Party Applicant Mr. Robert HAMILL (D11/2/3) (Cases 003 and 004), 30 December 2011, D5/2/5.

<sup>16</sup> Order on Civil Parties (International) (D384), para. 6.

<sup>17</sup> ECCC Press Release, "Press Release by the Co-Investigating Judge regarding Civil Parties in Case 004 (004/07-09-2009-ECCC/OCIJ)", 8 August 2011, available at: <https://www.eccc.gov.kh/en/document/public-affair/press-release-co-investigating-judges-regarding-civil-parties-case-004>.

<sup>18</sup> See Order on Civil Parties (International) (D384), para. 7.

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

<sup>20</sup> See Case 004, Closing Order, 28 June 2019, D382 ("Indictment (D382)"), paras 3, 7, 21; Case 004, Order Dismissing the Case against YIM Tith, 28 June 2019, D381 ("Dismissal (D381)"), para. 13.

<sup>21</sup> Second Supplementary Submission (D191).

<sup>22</sup> ECCC Press Release, "Statement by the International Co-Prosecutor Nicholas KOUMJIAN regarding Case File 004", 24 April 2014, available at: <https://www.eccc.gov.kh/en/node/30196>.

<sup>23</sup> Case 004, Written Record of Initial Appearance of YIM Tith, 9 December 2015, D281 ("Initial Appearance of YIM Tith (D281)").



these charges was issued by the International Co-Investigating Judge on the same day.<sup>24</sup> Neither YIM Tith nor his Co-Lawyers elected to make a statement during the Initial Appearance.<sup>25</sup>

12. On 4 March 2016, by his Request for Comments regarding Alleged Facts Not To Be Investigated Further, the International Co-Investigating Judge informed the parties that he was inclined to exclude certain facts from the investigation and requested the parties' views on the matter.<sup>26</sup> On 25 August 2016, after receiving comments from the Co-Lawyers for YIM Tith and the International Co-Prosecutor,<sup>27</sup> the International Co-Investigating Judge notified the parties that certain alleged facts *prima facie* appeared to be subject to Internal Rule 66*bis* and certain other alleged facts appeared to be subject to a dismissal pursuant to Internal Rule 67.<sup>28</sup> The International Co-Investigating Judge provisionally discontinued the investigation into these facts and informed the parties that a final decision on partial dismissal, pursuant to Internal Rule 67 or application of Internal Rule 66*bis*, would be taken at the conclusion of the investigation.<sup>29</sup>

13. On 30 November 2016, 31 January 2017 and 7 April 2017, the International Co-Investigating Judge ordered legal representation for all Case 004 Civil Party applicants.<sup>30</sup>

14. On 20 January 2017, 17 March 2017 and 4 May 2017, the International Co-Investigating Judge issued further notices of Provisional Discontinuance and informed the parties of his intention to discontinue the investigation into additional facts that *prima facie* appeared to be subject to Internal Rule 66*bis*.<sup>31</sup>

15. On 29 March 2017, the International Co-Investigating Judge, by judicial order, amended the charges against YIM Tith and added modes of liability in relation to the crimes

<sup>24</sup> ECCC Press Release, "Statement of the International Co-Investigating Judge regarding Case 004", 9 December 2015, available at: <https://www.eccc.gov.kh/en/node/35023>.

<sup>25</sup> Initial Appearance of YIM Tith (D281).

<sup>26</sup> Case 004, Request for Comments regarding Alleged Facts not to be Investigated Further, 4 March 2016, D302 ("Request for Comments (D302)").

<sup>27</sup> Case 004, YIM Tith's Submissions on Alleged Facts not to be Investigated Further, 8 April 2016, D302/1; Case 004, International Co-Prosecutor's Response to the International Co-Investigating Judge's Request for Comments regarding Alleged Facts not to be Investigated Further, 11 April 2016, D302/2.

<sup>28</sup> Case 004, Notice of Provisional Discontinuance regarding Individual Allegations, 25 August 2016, D302/3 ("Notice of Provisional Discontinuance (D302/3)"), paras 8-16.

<sup>29</sup> Notice of Provisional Discontinuance (D302/3), paras 34-36.

<sup>30</sup> Order on Civil Parties (International) (D384), para. 10.

<sup>31</sup> Case 004, Notice of Intention to Add Modes of Liability by Way of Judicial Order and of Provisional Discontinuance, 20 January 2017, D342 ("Notice of Intention and Provisional Discontinuance (D342)"); Case 004, Notice of Provisional Discontinuance regarding Facts Relating to Six Crime Sites, 17 March 2017, D349 ("Notice of Provisional Discontinuance (Six Crime Sites) (D349)"); Case 004, Notification pursuant to Internal Rule 66 *bis* (2), 4 May 2017, D354 ("Internal Rule 66*bis* (2) Notification (D354)").



previously charged on 9 December 2015.<sup>32</sup>

16. On 28 April 2017, the International Co-Investigating Judge rejected all requests for protective measures by Civil Party applicants in Case 004.<sup>33</sup> On 11 May 2017, one Civil Party applicant filed an application requesting protective measures.<sup>34</sup> The International Co-Investigating Judge did not issue a decision on the Request at that time.<sup>35</sup>

17. On 13 June 2017, the Co-Investigating Judges notified the parties of the conclusion of the judicial investigation against YIM Tith pursuant to Internal Rule 66(1).<sup>36</sup> On the same day, the International Co-Investigating Judge reduced the scope of the investigation by excluding certain alleged facts pursuant to Internal Rule 66*bis*.<sup>37</sup>

18. On 5 September 2017, the Co-Investigating Judges issued a Second Notice of Conclusion of the Judicial Investigation against YIM Tith.<sup>38</sup>

19. On 1 March 2018, the Co-Investigating Judges forwarded the Case File to the Co-Prosecutors pursuant to Internal Rule 66(4), inviting them to file their final submissions within three months.<sup>39</sup>

20. On 31 May 2018, the National Co-Prosecutor filed a final submission, requesting dismissal of all allegations against YIM Tith;<sup>40</sup> the International Co-Prosecutor in his Final Submissions of 4 June 2018, on the other hand, requested for YIM Tith to be indicted and committed to trial (collectively, "Final Submissions").<sup>41</sup> On 26 November 2018, the Co-Lawyers for YIM Tith filed a Response to the Co-Prosecutors' Final Submissions requesting a

<sup>32</sup> Case 004, Order Amending the Charges Against Yim Tith, 29 March 2017, D350; Case 004, Annex: Notification of Amended Charges against YIM Tith, 29 March 2017, D350.1. *See also* Notice of Intention and Provisional Discontinuance (D342).

<sup>33</sup> Case 004, Decision on Civil Party Applications' Requests for Protective Measures, 28 April 2017, D353.

<sup>34</sup> Case 004, Civil Party Application of SUN Chhivhong, 15 February 2017 (filed on 11 May 2017), D5/2008.

<sup>35</sup> Order on Civil Parties (International) (D384), para. 11.

<sup>36</sup> Case 004, Notice of Conclusion of Judicial Investigation against YIM Tith, 13 June 2017, D358 ("First Rule 66(1) Notification (D358)").

<sup>37</sup> Case 004, Decision to Reduce the Scope of the Judicial Investigation pursuant to Internal Rule 66 *bis*, 13 June 2017, D359 ("Internal Rule 66*bis* Decision (D359)"). *See also* Notice of Provisional Discontinuance (D302/3); Notice of Intention and Provisional Discontinuance (D342); Notice of Provisional Discontinuance (Six Crime Sites) (D349); Internal Rule 66*bis* (2) Notification (D354).

<sup>38</sup> Case 004, Second Notice of Conclusion of Judicial Investigation against YIM Tith, 5 September 2017, D368 ("Second Rule 66(1) Notification (D368)").

<sup>39</sup> Case 004, Forwarding Order Pursuant to Internal Rule 66(4), 1 March 2018, D378.

<sup>40</sup> Case 004, Final Submission concerning YIM Tith pursuant to Internal Rule 66, 31 May 2018, D378/1.

<sup>41</sup> Case 004, International Co-Prosecutor's Rule 66 Final Submission against YIM Tith, 4 June 2018, D378/2.





dismissal of the Case against YIM Tith.<sup>42</sup>

21. On 28 June 2019, the Co-Investigating Judges issued two conflicting Closing Orders. The National Co-Investigating Judge issued the Order Dismissing the Case Against YIM Tith (“Dismissal”), dismissing all charges against YIM Tith on the ground that he is not subject to the ECCC’s personal jurisdiction as a “senior leader” or among those “most responsible”.<sup>43</sup> In contrast, the International Co-Investigating Judge issued a Closing Order (“Indictment”), indicting YIM Tith and sending him for trial on counts of genocide, crimes against humanity, war crimes and violations of the 1956 Penal Code while finding that YIM Tith falls under the ECCC’s jurisdiction as one of those “most responsible” for Khmer Rouge-era crimes.<sup>44</sup>

22. On 28 June 2019, the same day, the National Co-Investigating Judge issued his Order Rejecting Civil Party Applications [*sic*] (“Order on Civil Parties (National)”), rejecting all Civil Party applications in Case 004 on the ground that all charges against YIM Tith were dismissed for lack of jurisdiction.<sup>45</sup> The Order on Civil Parties (National) did not specifically examine the admissibility of each of the Civil Party applications.<sup>46</sup> The International Co-Investigating Judge issued a separate Order on Admissibility of Civil Party Applications (“Order on Civil Parties (International)”), declaring as admissible the Civil Party applications listed in his Annex A to the Order, while rejecting as inadmissible the Civil Party applications listed in his Annex B to the Order, including that of Robert HAMILL.<sup>47</sup> The International Co-Investigating Judge further rejected the Request for protective measures made by one Civil Party applicant.<sup>48</sup>

23. On 26 July 2019 and 2 August 2019, the Co-Lawyers filed two separate Requests for an extension of time and pages for their Internal Rule 77*bis* appeals against Civil Party inadmissibility and permission for a single language filing with translations to follow.<sup>49</sup>

<sup>42</sup> Case 004, YIM Tith’s Combined Response to the National and International Co-Prosecutors’ Final Submissions, 26 November 2018, D378/5.

<sup>43</sup> Dismissal (D381).

<sup>44</sup> Indictment (D382) (In addition to the Indictment, the International Co-Investigating Judge formally terminated the judicial investigation into the facts excluded in the Rule 66*bis* Decision and issued a Partial Dismissal Order, dismissing certain charges against YIM Tith).

<sup>45</sup> Case 004, Order Rejecting Civil Party Applications [*sic*], 28 June 2019, D383 (“Order on Civil Parties (National) (D383)”), paras 12-13.

<sup>46</sup> Order on Civil Parties (National) (D383).

<sup>47</sup> Order on Civil Parties (International) (D384), paras 50-51. *See also* Case 004, Annex B: List of Civil Party Applications Inadmissible, Annex to Order on Civil Parties (International), 28 June 2019, D384.2 (“Annex B to Order on Civil Parties (D384.2)”).

<sup>48</sup> Order on Civil Parties (International) (D384), paras 49, 53.

<sup>49</sup> Case 004, Civil Party Lawyer’s Urgent Request for an Extension of Time and Pages to Appeal the Civil Party Admissibility Decisions in Case 004, 26 July 2019, D384/1; Case 004, Civil Party Co-Lawyers’ Urgent Request



24. On 22 August 2019, the Pre-Trial Chamber granted the time and page extension Request, extending the filing deadline to 30 days from the notification of the Indictment in Khmer, increasing the page limit for Appeal submissions to 45 pages in English or French or 90 pages in Khmer, and permitting the Co-Lawyers to file in a single language, English or Khmer, with translations to follow soon after.<sup>50</sup>

25. The Khmer translation of the Indictment and the English translation of the Dismissal were notified on 15 August 2019 and 5 September 2019, respectively.

26. On 13 September 2019, the Co-Lawyers filed the Civil Party Appeal before the Pre-Trial Chamber.<sup>51</sup> In the Appeal, the Co-Lawyers submit that the International Co-Investigating Judge erred in law and fact in rejecting Civil Party applicants and request, *inter alia*, that the Impugned Order be overturned, and that the Pre-Trial Chamber reconsider the admissibility of the rejected Civil Party applications.<sup>52</sup> None of the Parties filed responses to the Appeal.

27. On 23 August 2019, the National Co-Prosecutor filed a Notice of Appeal against the Indictment.<sup>53</sup> On 10 September 2019 and 19 September 2019, the International Co-Prosecutor and the Co-Lawyers, respectively, filed Notices of Appeal against the Dismissal.<sup>54</sup> On 17 September 2019, the Co-Lawyers for YIM Tith filed a Notice of Appeal against both Closing Orders.<sup>55</sup> The Parties filed submissions on appeal and various responses.<sup>56</sup> On 18 March 2021,

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for an Extension of Time and Pages to Appeal the Civil Party Admissibility Decisions in Case 004, 19 August 2019, D384/3.

<sup>50</sup> Case 004 (PTC62), Decision on Civil Party Co-Lawyers' Urgent Requests for an Extension of Time and Pages to Appeal the Civil Party Admissibility Decisions in Case 004, 22 August 2019, D384/4 ("Decision on Co-Lawyers' Requests (D384/4)").

<sup>51</sup> Civil Party Appeal (D384/5).

<sup>52</sup> Civil Party Appeal (D384/5), paras 64-65.

<sup>53</sup> Case 004, National Co-Prosecutor's Notice of Appeal against the International Co-Investigating Judge's Closing Order (Indictment), 23 August 2019, D382/4.

<sup>54</sup> Case 004, International Co-Prosecutor's Notice of Appeal against the Order Dismissing the Case against YIM Tith (D381), 10 September 2019, D381/4; Case 004, Civil Party Notice of Appeal against the Order Dismissing the Case against YIM Tith (D381), 19 September 2019, D381/11.

<sup>55</sup> Case 004, YIM Tith's Notice of Appeal against the Closing Orders, 17 September 2019, D381/7 & D382/9.

<sup>56</sup> Case 004, National Co-Prosecutor's Appeal against the International Co-Investigating Judge's Closing Order (Indictment) in Case 004, 13 September 2019, D382/4/1; Case 004, YIM Tith's Appeal of the Issuance of Two Closing Orders in Case 004, 2 December 2019, D381/18 & D382/21; Case 004, YIM Tith's Appeal of the International Co-Investigating Judge's Closing Order in Case 004, 2 December 2019, D382/22 (filed on 4 December 2019); Case 004, International Co-Prosecutor's Appeal of the Order Dismissing the Case against YIM Tith (D381), 2 December 2019, D381/19 (filed on 5 December 2019); Case 004, Civil Party Co-Lawyers' Appeal against the National Co-Investigating Judge's Closing Order in Case 004, 1 December 2019, D381/20 (filed on 6 December 2019); Case 004, International Co-Prosecutor's Response to YIM Tith's Appeal of the Case 004 Indictment, 14 February 2020, D382/27 (notified in English and Khmer on 17 February 2020); Case 004, International Co-Prosecutor's Response to YIM Tith's Appeal against the Issuance of Two Closing Orders in Case 004, 17 February 2020, D381/25 & D382/28 (notified in English and Khmer on 18 February 2020); Case 004, YIM Tith's Response to the International Co-Prosecutor's Appeal of the National Co-Investigating Judge's



the Pre-Trial Chamber, pursuant to Internal Rule 77(3)(b), decided to determine the Appeals against the Closing Orders in Case 004 on the basis of the written submissions only and to proceed without an oral hearing.<sup>57</sup>

28. On 17 September 2021, the Pre-Trial Chamber issued its Considerations on Appeals against Closing Orders, concluding *inter alia* that the Co-Investigating Judges' issuance of the two conflicting Closing Orders was illegal, violating the legal framework of the ECCC,<sup>58</sup> and that it had not assembled the required majority to decide based on common reasoning on the merits of the Appeals on the Closing Orders.<sup>59</sup> The National Judges of the Pre-Trial Chamber found that the issuance of the two conflicting Closing Orders was illegal, YIM Tith did not fall within the personal jurisdiction of the Court, and the Case File against YIM Tith should be sent to the ECCC archives.<sup>60</sup> The International Judges found that the National Co-Investigating Judge's Dismissal Order was null and void and issued *ultra vires*, that the International Co-Investigating Judge's Indictment conformed to the ECCC legal framework and was valid, and that YIM Tith should be sent for trial before the Trial Chamber according to the principle of continuation of judicial investigation and prosecution.<sup>61</sup>

## II. STANDARD OF REVIEW

29. Internal Rule 77*bis* requires Appellants seeking to overturn an order from the Co-Investigating Judges on the admissibility of Civil Party applicants to demonstrate that the challenged decision was based on an error of law and/or fact.<sup>62</sup> The Pre-Trial Chamber recalls

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Closing Order, 20 February 2020, D381/26; Case 004, YIM Tith's Reply to the International Co-Prosecutor's Response to YIM Tith's Appeal of International Co-Investigating Judge's Closing Order in Case 004, 13 March 2020, D382/29; Case 004, YIM Tith's Reply to the International Co-Prosecutor's Response to YIM Tith's Appeal of the Issuance of Two Closing Orders in Case 004, 16 March 2019, D381/27 & D382/30; Case 004, International Co-Prosecutor's Reply to YIM Tith's Response to Her Appeal of the Order Dismissing the Case against YIM Tith (D381), 25 March 2020, D381/28.

<sup>57</sup> Case 004, Decision on Oral Hearing in Case 004, 18 March 2021, D381/41 & D382/40.

<sup>58</sup> Case 004 (PTC61), Considerations on Appeals against Closing Orders, 17 September 2021, D381/45 & D382/43 ("Case 004 Considerations on Closing Orders Appeals (D381/45 & D382/43)"), paras 84-115.

<sup>59</sup> Case 004 Considerations on Closing Orders Appeals (D381/45 & D382/43), para. 116.

<sup>60</sup> Case 004 Considerations on Closing Orders Appeals (D381/45 & D382/43), Opinion of Judges PRAK, NEY and HUOT, para. 131.

<sup>61</sup> Case 004 Considerations on Closing Orders Appeals (D381/45 & D382/43), Opinion of Judges BAIK and BEAUVALLET, paras 168-177, 522-523.

<sup>62</sup> Internal Rule 77*bis*. See also Case 003 (PTC36), Considerations on Appeal against Order on the Admissibility of Civil Party Applicants, 10 June 2021, D269/4 ("Case 003 Considerations on Civil Party Appeal (D269/4)"), para. 31; See also Case 004/2/07-09-2009-ECCC/OCIJ ("Case 004/2") (PTC58), Considerations on Appeal against Order on the Admissibility of Civil Party Applicants, 30 June 2020, D362/6 (Case 004/2 Considerations on Civil Party Appeal (D362/6)"), para. 28; Case 002/19-09-2007-ECCC/OCIJ ("Case 002"), Decision on Appeals against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, 24 June



that on appeal, alleged errors of law are reviewed *de novo* to determine whether the legal decisions are correct, while alleged errors of fact are reviewed under a standard of reasonableness to determine whether no reasonable trier of fact could have reached the finding of fact at issue.<sup>63</sup>

### III. ADMISSIBILITY

30. The Co-Lawyers appeal the International Co-Investigating Judge's Order pursuant to Internal Rule 77*bis* and argue that the Appeal is timely and conforms to the page-limit.<sup>64</sup>

31. The Pre-Trial Chamber recalls that pursuant to Internal Rule 74(4)(b), "Civil Parties may appeal against [...] orders by the Co-Investigating Judges [...] declaring a Civil Party application inadmissible".<sup>65</sup> Internal Rule 77*bis* provides that the appeal shall be filed "[w]ithin 10 days of the notification of the decision on admissibility".<sup>66</sup> The Chamber considers that the Appeal was submitted in compliance with its instructions, recalling its Decision to exceptionally grant the Co-Lawyers a 30-day extension to file their Appeal.<sup>67</sup> Accordingly, the Chamber finds that the Appeal is admissible.

### IV. LEGAL PRINCIPLES OF CIVIL PARTY ADMISSIBILITY

32. In assessing the Co-Lawyers' Appeal, the Pre-Trial Chamber considers it appropriate

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2011, D404/2/4 ("Case 002 Decision on Civil Party Appeals (D404/2/4)"), para. 34; Case 002, Decision on Appeals against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, 24 June 2011, D411/3/6 ("Case 002 Decision on Civil Party Appeals (D411/3/6)"), para. 34.

<sup>63</sup> Case 003 Considerations on Civil Party Appeal (D269/4), para. 31; Case 004/2 Considerations on Civil Party Appeal (D362/6), para. 28; Case 004/2 (PTC60), Considerations on Appeals against Closing Orders, 19 December 2019, D359/24 & D360/33, ("Case 004/2 Considerations on Appeals against Closing Orders (D259/24 & D360/33)"), Opinion of Judges BAIK and BEAUVALLET, para. 381 *referring to* Case 002 (PTC75), Decision on IENG Sary's Appeal against the Closing Order, 11 April 2011, D427/1/30, para. 113; Case 002/1, Appeal Judgement, 23 November 2016, F36, paras 89-90; Case 002 Decision on Civil Party Appeals (D404/2/4), para. 34; Case 002 Decision on Civil Party Appeals (D411/3/6), para. 34.

<sup>64</sup> Civil Party Appeal (D384/5), paras 6-7.

<sup>65</sup> Internal Rule 74(4)(b). *See also* Case 004/2 Considerations on Civil Party Appeal (D362/6), para. 30; Case 003 Considerations on Civil Party Appeal (D269/4), para. 33; Case 002 Decision on Civil Party Appeals (D404/2/4), para. 33; Case 002 Decision on Civil Party Appeals (D411/3/6), para. 33.

<sup>66</sup> Internal Rule 77*bis*. *See also* Case 004/2 Considerations on Civil Party Appeal (D362/6), para. 30; Case 003 Considerations on Civil Party Appeal (D269/4), para. 33; Case 002 Decision on Civil Party Appeals (D404/2/4), para. 33; Case 002 Decision on Civil Party Appeals (D411/3/6), para. 33.

<sup>67</sup> Decision on Co-Lawyers' Requests (D384/4) (The Pre-Trial Chamber granted the Co-Lawyers' request to extend the filing deadline for the present Appeal to 30 days from the notification of the Indictment (D382) in Khmer and increased the page-limit to 45 pages in English or French, or 90 pages in Khmer. The Khmer translation of Indictment (D382) was notified on 15 August 2019. The Civil Parties filed their Appeal on 13 September 2019.).



to recall the legal principles governing admissibility of Civil Party applications before the ECCC.

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

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

- a) be clearly identified; and
- b) demonstrate as a direct consequence of at least one of the crimes alleged against the Charged Person, that he or she has in fact suffered physical, material or psychological injury upon which a claim of collective and moral reparation might be based.

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

34. As the Pre-Trial Chamber has previously noted,<sup>68</sup> the legal elements comprising Internal Rule 23*bis*(1) include the following: (a) the existence of a causal link between the crimes and the injury; (b) injury; and (c) proof of identification. Internal Rule 23*bis*(1) also prescribes the relevant level of proof by which these elements must be established. The Chamber will, in the course of its review of the Appeal, discuss specific legal aspects of these elements and the level of proof as relevant to assessing the Co-Lawyers' Appeal submissions. In this section, the Chamber provides the following general observations.

35. As a preliminary matter, the Pre-Trial Chamber considers that (i) the ECCC Agreement; (ii) the ECCC Law; (iii) Internal Rules 21, 23, 23*bis*, 23*ter*, 23*quater*, 23*quinqies* and 114; and (iv) the Practice Direction on Victim Participation form part of the applicable context in interpreting the criteria for Civil Party admissibility.<sup>69</sup> Guidance may also be sought from the general principles on victims in international law.<sup>70</sup>

<sup>68</sup> Case 004/2 Considerations on Civil Party Appeal (D362/6), para. 33; Case 003 Considerations on Civil Party Appeal (D269/4), para. 36; Case 002 Decision on Civil Party Appeals (D404/2/4), para. 57; Case 002 Decision on Civil Party Appeals (D411/3/6), para. 57.

<sup>69</sup> Case 004/2 Considerations on Civil Party Appeal (D362/6), para. 34; Case 003 Considerations on Civil Party Appeal (D269/4), para. 37; Case 002 Decision on Civil Party Appeals (D404/2/4), para. 31; Case 002 Decision on Civil Party Appeals (D411/3/6), para. 31.

<sup>70</sup> Case 004/2 Considerations on Civil Party Appeal (D362/6), para. 34; Case 003 Considerations on Civil Party Appeal (D269/4), para. 37; Case 002 Decision on Civil Party Appeals (D404/2/4), para. 32; Case 002 Decision on Civil Party Appeals (D411/3/6), para. 32 (all referring to *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, GA Res. 40/34, 29 November 1985 ("1985 Victims Principles") and *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, GA Res. 60/147, 21 March 2006, UN Doc. A/RES/60/147 ("2005 Victims Principles")).



36. With respect to the existence of a causal link, a Civil Party applicant must demonstrate that the injury was a direct consequence of the crimes alleged against the Charged Person.<sup>71</sup> While the injury must be personal to the applicant, the requirement of injury as a direct consequence of the offence does not restrict the admissibility of Civil Parties to direct victims but can also include indirect victims who personally suffered injury as a direct result of the crime committed against the direct victim.<sup>72</sup> Thus, ECCC jurisprudence recognises both direct victims and indirect victims. A direct victim refers to “the category of persons whose rights were violated or endangered by the crime charged.”<sup>73</sup> Indirect victims are persons who “personally suffered injury as a direct result of the crime committed against the direct victim.”<sup>74</sup>

37. In terms of injury, Internal Rule 23bis(1)(b) provides that the injury must be physical, material or psychological.<sup>75</sup> Physical injury “denotes biological damage, anatomical or functional” and “may be described as a wound, mutilation, disfiguration, disease, loss or dysfunction of organs, or death.”<sup>76</sup> Material injury “refers to a material object’s loss of value, such as complete or partial destruction of personal property, or loss of income.”<sup>77</sup> Finally, psychological injury may “[include] mental disorders or psychiatric trauma, such as post-traumatic stress disorder.”<sup>78</sup>

38. Regarding the requirement for all applicants to clearly prove their identity, the Pre-Trial Chamber has previously endorsed a flexible approach,<sup>79</sup> which includes, for example,

<sup>71</sup> Case 004/2 Considerations on Civil Party Appeal (D362/6), para. 35; Case 003 Considerations on Civil Party Appeal (D269/4), para. 38; Case 002 Decision on Civil Party Appeals (D404/2/4), para. 71; Case 002 Decision on Civil Party Appeals (D411/3/6), para. 71.

<sup>72</sup> Case 004/2 Considerations on Civil Party Appeal (D362/6), para. 35; Case 003 Considerations on Civil Party Appeal (D269/4), para. 38; Case 001/18-07-2007-ECCC/SC (“Case 001”), Appeal Judgement, 3 February 2012, F28 (“Case 001 Appeal Judgment (F28)”), para. 418; Case 002 Decision on Civil Party Appeals (D404/2/4), para. 83; Case 002 Decision on Civil Party Appeals (D411/3/6), para. 83.

<sup>73</sup> Case 004/2 Considerations on Civil Party Appeal (D362/6), para. 35; Case 003 Considerations on Civil Party Appeal (D269/4), para. 38; Case 001 Appeal Judgment (F28), para. 416.

<sup>74</sup> Case 004/2 Considerations on Civil Party Appeal (D362/6), para. 35; Case 003 Considerations on Civil Party Appeal (D269/4), para. 38; Case 001 Appeal Judgment (F28), para. 418.

<sup>75</sup> Case 004/2 Considerations on Civil Party Appeal (D362/6), para. 36; Case 003 Considerations on Civil Party Appeal (D269/4), para. 39; Case 002 Decision on Civil Party Appeals (D404/2/4), para. 83; Case 002 Decision on Civil Party Appeals (D411/3/6), para. 83.

<sup>76</sup> Case 004/2 Considerations on Civil Party Appeal (D362/6), para. 36; Case 003 Considerations on Civil Party Appeal (D269/4), para. 39; Case 001 Appeal Judgment (F28), para. 415.

<sup>77</sup> Case 004/2 Considerations on Civil Party Appeal (D362/6), para. 36; Case 003 Considerations on Civil Party Appeal (D269/4), para. 39; Case 001 Appeal Judgment (F28), para. 415.

<sup>78</sup> Case 004/2 Considerations on Civil Party Appeal (D362/6), para. 36; Case 003 Considerations on Civil Party Appeal (D269/4), para. 39; Case 002 Decision on Civil Party Appeals (D404/2/4), para. 83; Case 002 Decision on Civil Party Appeals (D411/3/6), para. 83; Case 001 Appeal Judgment (F28), para. 415.

<sup>79</sup> Case 004/2 Considerations on Civil Party Appeal (D362/6), para. 37; Case 003 Considerations on Civil Party Appeal (D269/4), para. 40.



accepting as proof of identity statements issued from the village elder or the communal Chiefs.<sup>80</sup>

39. Concerning the level of proof by which the above elements must be established, pursuant to Internal Rule 23*bis*(1), the Pre-Trial Chamber must, in evaluating the materials submitted as part of a Civil Party application, be “satisfied that facts alleged in support of the application are more likely than not to be true.”<sup>81</sup>

## V. MERITS

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

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<sup>80</sup> Case 002 Decision on Civil Party Appeals (D404/2/4), para. 95; Case 002 Decision on Civil Party Appeals (D411/3/6), para. 95.

<sup>81</sup> Case 004/2 Considerations on Civil Party Appeal (D362/6), para. 38; Case 003 Considerations on Civil Party Appeal (D269/4), para. 41; Case 002 Decision on Civil Party Appeals (D404/2/4), para. 94; Case 002 Decision on Civil Party Appeals (D411/3/6), para. 94.



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

- **DECLARES** that it has not assembled an affirmative vote of at least four judges for a decision based on common reasoning on the merits.

In accordance with Internal Rule 77*bis*, the present Decision is not subject to appeal.

In accordance with Internal Rule 77(14), this Decision shall be notified to the Co-Investigating Judges, the Co-Prosecutors and other Parties, by the Greffier of the Pre-Trial Chamber.

**Phnom Penh, 29 September 2021****Pre-Trial Chamber**

**PRAK Kimsan   Olivier BEAUVALLET   NEY Thol   Kang Jin BAIK   HUOT Vuthy**

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

Judges Kang Jin BAIK and Olivier BEAUVALLET append their Opinion.





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

41. Regarding Civil Party applications, the National Judges of the Pre-Trial Chamber would like to express their further Opinion as follows.

42. The National Judges of the Pre-Trial Chamber are of the view that the Decision made by the National Co-Investigating Judge that the ECCC has no personal jurisdiction over YIM Tith and that the charges against him are dismissed is justified. The National Judges of the Pre-Trial Chamber concluded Case 004 against the Charged Person YIM Tith and sent the Case File to be held at the ECCC archives.

43. Pursuant to Internal Rule 23*bis*, the National Judges of the Pre-Trial Chamber find that **all** Civil Party applicants shall be rejected.

44. Therefore, the National Judges of the Pre-Trial Chamber decide to reject all Civil Party applications in Case 004.

**Phnom Penh, 29 September 2021**



**President PRAK Kimsan**



**Judge NEY Thol**



**Judge HUOT Vuthy**



### VIII. OPINION OF JUDGES KANG JIN BAIK AND OLIVIER BEAUVALLET

45. The International Judges will set out below their considerations in respect of the Civil Party Appeal.

#### A. Ground 1: Alleged Error in Law and Fact by Finding that the Nexus Requirements for JCE A (Four CPK Policies) under Internal Rule 23*bis*(1)(b) are Met Only by Victims of Crimes Committed in the Northwest Zone

##### 1. Submissions

46. Under Ground 1, the Co-Lawyers submit that the International Co-Investigating Judge erred in law and fact by failing to find that victims of nationwide CPK policies outside the Northwest Zone also suffered direct injury as a result of the crimes alleged against YIM Tith. Consistent with the Pre-Trial Chamber's jurisprudence that the causal link requirement under Internal Rule 23*bis*(1)(b) should be interpreted "broadly", the International Co-Investigating Judge should have admitted (i) victims of crimes committed pursuant to nationwide CPK policies that were implemented under the JCE;<sup>82</sup> (ii) victims of same targeted groups who suffered from a collective injury regardless of their location;<sup>83</sup> and (iii) victims who suffered harm from policies and crimes carried out *within* the crime sites and zones alleged in the Indictment.<sup>84</sup>

47. Under Ground 1(1), the Co-Lawyers submit that the International Co-Investigating Judge erred by focusing only on CPK policy-related crimes committed in the Northwest Zone, despite the allegations in the Indictment, the Third Introductory Submission and the Supplementary Submissions that YIM Tith participated in and implemented policies under a national JCE.<sup>85</sup> The Co-Lawyers contend that the Pre-Trial Chamber has made clear in Case 002 that Internal Rule 23*bis*(1)(b) requires Civil Party applicants to demonstrate a link between the "physical, material or psychological injury" and "the alleged crimes", which constitute the

<sup>82</sup> Civil Party Appeal (D384/5), paras 18-19.

<sup>83</sup> Civil Party Appeal (D384/5), para. 19.

<sup>84</sup> Civil Party Appeal (D384/5), para. 19.

<sup>85</sup> Civil Party Appeal (D384/5), para. 20.



“legal characterization of the facts investigated” rather than the facts investigated themselves.<sup>86</sup> Therefore, in cases of mass atrocities committed through a JCE *via* nationwide policies, Civil Party applicants are not necessarily required to relate their injury to one of the crime sites or factual incidents set out in a closing order.<sup>87</sup>

48. The Co-Lawyers assert that the Pre-Trial Chamber’s Case 002 findings apply equally in the instant proceedings because YIM Tith participated in a national JCE with the goal of implementing CPK policies throughout Cambodia, beyond the Northwest Zone.<sup>88</sup> They allege that the Indictment, the Third Introductory Submission and the Supplementary Submissions name YIM Tith as “one of the primary persons responsible for implementing CPK policy in his areas of responsibility” and assert that the national JCE was implemented through regional enterprises, including by YIM Tith in the areas under his command.<sup>89</sup> In support of these contentions, the Co-Lawyers refer, *inter alia*, to allegations that YIM Tith regularly chaired meetings, monitored worksites, visited security centres and held authority over military units, personnel matters, security and economic policy in his areas of responsibility.<sup>90</sup> The Co-Lawyers note the International Co-Investigating Judge’s conclusion that YIM Tith’s role and actions “easily compare with” and “even exceed [...] significantly” those of AO An, MEAS Muth or Kaing Guek Eav *alias* Duch.<sup>91</sup>

49. The Co-Lawyers highlight that the Indictment found that YIM Tith implemented and made a “significant contribution” to the four nationwide policies at the regional level (collectively, JCE A),<sup>92</sup> as well as to the two additional JCEs of (i) eliminating in whole or in part the Khmer Krom (JCE B) and (ii) furthering a system of ill-treatment at Wat

<sup>86</sup> Civil Party Appeal (D384/5), paras 20-21 *referring to* Internal Rule 23bis(l)(b); Case 002 Decision on Civil Party Appeals (D404/2/4), paras 42, 49, 66, 68-69, 72, 77; Special Tribunal for Lebanon, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/PTJ, Fourth Decision on Victims’ Participation in the Proceedings, 2 May 2013, para. 15.

<sup>87</sup> Civil Party Appeal (D384/5), para. 22 *referring to* Case 002 Decision on Civil Party Appeals (D404/2/4), paras 72, 78; Special Court for Sierra Leone, *Prosecutor v. Sesay et al.*, SCSL-04-15-T, Judgement, 2 March 2009, para. 262.

<sup>88</sup> Civil Party Appeal (D384/5), para. 23 *referring to* Indictment (D382), para. 1016; Second Supplementary Submission (D191), para. 14.

<sup>89</sup> Civil Party Appeal (D384/5), paras 23-24 *referring to* Indictment (D382), para. 1020.

<sup>90</sup> Civil Party Appeal (D384/5), para. 24 *referring to* Indictment (D382), paras 364-367, 374.

<sup>91</sup> Civil Party Appeal (D384/5), para. 24 *referring to* Indictment (D382), para. 999.

<sup>92</sup> Civil Party Appeal (D384/5), para. 25 *referring to* Indictment (D382), paras 1016, 1021-1024 (describing the four nationwide policies as: “the establishment and operation of cooperatives and worksites; the regulation of marriage implemented through *inter alia* the forced marriage of the population; the re-education of so-called ‘bad elements’ and the killing of ‘enemies’ and ‘bad elements’ both inside and outside the CPK ranks; and the targeting of specific groups”).



Pratheat Security Centre (JCE C).<sup>93</sup>

50. Therefore, the Co-Lawyers contend that the International Co-Investigating Judge erred by focusing exclusively on crimes committed in the Northwest Zone to determine Civil Party admissibility for victims of JCE A, “[d]espite the manifest ‘collective dimensions’ of Y[IM] Tith’s liability”.<sup>94</sup> Instead, the International Co-Investigating Judge should have considered crimes committed outside the Northwest Zone where they formed part of the national JCE to which YIM Tith allegedly belonged.<sup>95</sup> The Co-Lawyers request that the Pre-Trial Chamber admit the Appellants in Annexes B and C who suffered harm as a direct consequence of the implementation of this national JCE A.<sup>96</sup>

51. Under Ground 1(2), the Co-Lawyers submit that the International Co-Investigating Judge erred by limiting the geographic scope of Civil Party admissibility to victims living in areas over which YIM Tith had administrative control because members of specific targeted communities and groups outside these areas also suffered harm from a collective injury.<sup>97</sup> The Pre-Trial Chamber recognised a “presumption of collective injury” that extends to members of the same targeted group or community when mass atrocity crimes are alleged, rejecting any requirement of physical proximity between members of the same targeted groups or communities.<sup>98</sup> The Co-Lawyers further allege that the ECCC’s endorsement of “collective injury” comports with international practice,<sup>99</sup> as this notion is recognised by the ICC,<sup>100</sup> the 1985 and 2005 United Nations’ Basic Principles<sup>101</sup> and various human rights bodies, such as the African Commission of Human and Peoples’ Rights and the Inter-American Court of

<sup>93</sup> Civil Party Appeal (D384/5), para. 25 *referring to* Indictment (D382), paras 1016(ii), (iii).

<sup>94</sup> Civil Party Appeal (D384/5), para. 26.

<sup>95</sup> Civil Party Appeal (D384/5), para. 26.

<sup>96</sup> Civil Party Appeal (D384/5), paras 27-28. The Co-Lawyers refer to their Annexes B (Case 004, Annex B: Harm to Civil Party Applicants Resulting from Selected Policies of JCE A, Annex to Civil Party Appeal, 13 September 2019, D384/5.2.2 (“Annex B to Civil Party Appeal (D384/5.2.2)”) and C (Case 004, Annex C: Harm to Civil Party Applicants Resulting from the Targeting Policy of JCE A, Annex to Civil Party Appeal, 13 September 2019, D384/5.2.3 (“Annex C to Civil Party Appeal (D384/5.2.3)”) which identify the rejected Civil Party applicants that have suffered harm as a consequence of the four policies implemented to advance the common criminal plan of JCE A, including ON Daravuth (17-VSS-00043), SEV Heam (13-VSS-00282) and PEN Hoeurn (11-VSS-00094).

<sup>97</sup> Civil Party Appeal (D384/5), para. 29.

<sup>98</sup> Civil Party Appeal (D384/5), para. 30 *referring to* Case 002 Decision on Civil Party Appeals (D404/2/4), paras 83-93.

<sup>99</sup> Civil Party Appeal (D384/5), para. 31.

<sup>100</sup> Civil Party Appeal (D384/5), para. 31 *referring to* International Criminal Court, *Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, ICC-01/04-01/06-1432, Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, 11 July 2008, para. 35.

<sup>101</sup> Civil Party Appeal (D384/5), para. 31 *quoting* 1985 Victims Principles, Annex A.1; 2005 Victims Principles, Preamble.



Human Rights.<sup>102</sup>

52. The Co-Lawyers submit that YIM Tith is responsible for targeting specific groups or communities in the Northwest Zone and six crime sites in the Southwest Zone<sup>103</sup> and, allege that, as per the Pre-Trial Chamber's reasoning, a presumption of collective injury arising from the harm suffered by direct victims in the Northwest Zone and Southwest Zone extends to *all* members of these specifically targeted groups or communities, irrespective of their locations.<sup>104</sup>

53. While the International Co-Investigating Judge purportedly acknowledged the principle of collective injury in his findings and further recognised that the victims of the JCE to eliminate Khmer Krom (JCE B) "need not be geographically restricted to the specific locations identified in the [Impugned Order]",<sup>105</sup> he nevertheless "erroneously impose[d] a requirement that those with a shared membership in these targeted groups or communities [...] be physically located in the Northwest Zone or the six specified locations in the Southwest Zone".<sup>106</sup>

54. The Co-Lawyers request that the Pre-Trial Chamber overturn the Impugned Order and admit, as Civil Parties, the Appellants who have provided sufficient information to show their membership in one or more of the specifically targeted groups or communities, as identified in the Indictment or submissions.<sup>107</sup>

<sup>102</sup> Civil Party Appeal (D384/5), para. 31 *referring to* African Commission on Human and Peoples' Rights, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, No. 276/03, 25 November 2009, para. 248; UN Committee on Economic, Social and Cultural Rights, General Comment No. 21: Art. 15(1)(a) (*Right of Everyone to Take Part in Cultural Life*), 43<sup>rd</sup> session, 21 December 2009, U.N. Doc. E/C. 12/GC/21, para. 37; Inter-American Court of Human Rights, *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*, Judgment (Merits and Reparations), 27 June 2012, Series C, No. 245, paras 231- 232, 284.

<sup>103</sup> Civil Party Appeal (D384/5), para. 32 *referring to* Indictment (D382), paras 196-275, 308, 310, 311, 312-316, 1022; Third Introductory Submission (D1), paras 17, 59, 98; First Supplementary Submission (D65), paras 11-20.

<sup>104</sup> Civil Party Appeal (D384/5), para. 32.

<sup>105</sup> Civil Party Appeal (D384/5), para. 33 *referring to* Order on Civil Parties (International) (D384), para. 28; Indictment (D382), paras 289, 1016(ii).

<sup>106</sup> Civil Party Appeal (D384/5), para. 33.

<sup>107</sup> Civil Party Appeal (D384/5), paras 34-35. The Co-Lawyers refer to their Annex C (D384/5.2.3) which identify the rejected Civil Party applicants that have suffered harm as a consequence of being a member of a targeted group or community, including eight such applicants: NUT Sarun (11-VSS-00152), TER Koem Seang (11-VSS-00015), SIENG Chanty (13-VSS-00396), SEANG Ry (12-VSS-00669), PIN Dân (11-VSS-00027), CHEA Choeung (12-VSS-00503), LIM Seang Keang (11-VSS-00020), TEP Chanra (11-VSS-00226) as well as two additional applicants: PHAT Horn (12-VSS-00805) and CHEA Soeun (14-VSS-00061) from the Co-Lawyers' Annex B (D384/5.2.2).



55. Under Ground 1(3), the Co-Lawyers submit that the International Co-Investigating Judge deemed several Civil Party applicants inadmissible, although they suffered harm from policies and crimes for which YIM Tith was responsible within the Northwest Zone and six crime sites in the Southwest Zone.<sup>108</sup> Referring to their Annex D, the Co-Lawyers allege that 66 Appellants meet the Impugned Order's "narrow" and "erroneous" admissibility criteria.<sup>109</sup> Further, the Co-Lawyers assert that 268 Applicants—who have suffered harm in areas throughout the Southwest Zone where YIM Tith had authority, but not in one of the Southwest Zone's six sites identified in the Indictment—should have been admitted as Civil Parties.<sup>110</sup> In this regard, the Co-Lawyers refer to the International Co-Investigating Judge's and the International Co-Prosecutor's allegations that YIM Tith was Deputy Secretary and, later, became Secretary of the Kirivong District Committee during the DK regime and led the Sector 13 Committee and that he also held broad *de facto* authority for the wider Southwest Zone from 1976 until 6 January 1979.<sup>111</sup>

56. The Co-Lawyers conclude that while Appellants who suffered harm as a direct consequence of JCE A as well as victims of specific targeted groups or communities that suffered collective injury should be admitted as Civil Parties, as *supra*,<sup>112</sup> the location of the harm suffered by Appellants within the crime sites and zones identified in the Indictment constitutes an "additional linkage between their harms and Y[IM] Tith's criminal activities".<sup>113</sup>

## 2. Discussion

57. The International Judges find that the International Co-Investigating Judge did not err by identifying only those crimes allegedly committed in the Northwest Zone and six crime sites in the Southwest Zone as relevant to the causal link requirement under Internal Rule 23bis(1)(b). First, the International Judges observe that the Impugned Order appropriately limits the examination of potentially admissible Civil Party applicants to the Northwest Zone in relation to JCE A. Second, the Impugned Order correctly interprets and applies the notion

<sup>108</sup> Civil Party Appeal (D384/5), para. 36.

<sup>109</sup> Civil Party Appeal (D384/5), para. 36. The International Judges observe that the number of Appellants listed under counts 1-7 in the Co-Lawyers' Annex D is 67, not 66 as alleged in their submissions. *See* Case 004, Annex D: Civil Party Applicants Harmed by Conduct at Zones and Crime Sites within the Scope of Case 004, Annex to Civil Party Appeal, 13 September 2019, D384/5.2.4 ("Annex D to Civil Party Appeal (D384/5.2.4)").

<sup>110</sup> Civil Party Appeal (D384/5), para. 37 *referring to* Order on Civil Parties (International) (D384), para. 36 [*sic*].

<sup>111</sup> Civil Party Appeal (D384/5), para. 38 *referring to* Indictment (D382), paras 327-332, 334-335, 348-350.

<sup>112</sup> Civil Party Appeal (D384/5), para. 38.

<sup>113</sup> Civil Party Appeal (D384/5), para. 38.



of collective injury in relation to indirect victims who suffered injury as a result of an alleged crime committed against a direct victim in the Northwest Zone and six crime sites in the Southwest Zone. Third, the International Co-Investigating Judge did not err by excluding Civil Party applicants linked to crimes outside of the crime sites identified in the Indictment.

a. Applicable Law

58. Internal Rule 23(1)—defining the purpose of Civil Party action—provides:

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

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

59. Internal Rule 23*bis*(1)—addressing the requirements for the admissibility of Civil Party applications—prescribes:

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

- a) be clearly identified; and
- b) demonstrate as a direct consequence of at least one of the crimes alleged against the Charged Person, that he or she has in fact suffered physical, material or psychological injury upon which a claim of collective and moral reparation might be based.

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

b. Ground 1(1)

60. Internal Rule 23*bis*(1)(b) concerns the admission of Civil Party applications and provides that a Civil Party applicant must “demonstrate as a direct consequence of at least one of the crimes alleged against the Charged Person, that he or she has in fact suffered physical, material or psychological injury”.<sup>114</sup> The International Judges observe that this Internal Rule requires a causal link between the “injury” and “any of the crimes alleged”.<sup>115</sup> Consequently,

<sup>114</sup> Internal Rule 23*bis*(1)(b).

<sup>115</sup> Internal Rule 23*bis*(1)(b). *See also* Case 002 Decision on Civil Party Appeals (D404/2/4), para. 42; Case 002 Decision on Civil Party Appeals (D411/3/6), para. 42.



the harm suffered by a Civil Party applicant must be connected to crimes charged in the Indictment in order to be considered for admissibility at this stage of the proceedings.<sup>116</sup>

61. The International Judges recall the Pre-Trial Chamber's previous clarification of the meaning of Internal Rule 23bis(1)(b).<sup>117</sup> Specifically, the Chamber stated that "the object and purpose of [Internal Rule] 23bis(1) is not there to restrict or limit the notion of victim or civil party action in the ECCC. It rather is to set criteria for admissibility of civil party applications".<sup>118</sup> The International Judges recall that in Case 002, which concerned multiple Accused, the Pre-Trial Chamber observed that while "the facts investigated are limited to certain areas or crime sites, the legal characteri[s]ations of such facts, [...] include crimes [...] committed by the Charged Persons by acting in a joint criminal enterprise together and with others against the population and 'throughout the country'".<sup>119</sup> As noted by the Chamber, "the Victims before ECCC, especially in [C]ase 002, are in a different position from those before domestic courts and even from those in ECCC's [C]ase 001".<sup>120</sup> Accordingly, in Case 002, the Pre-Trial Chamber held that Civil Party applicants did not have to relate their injury to only those crime sites identified in the Closing Order "as the crimes and the underlying CPK policies forming the basis of the indictments were allegedly implemented throughout Cambodia"<sup>121</sup> with those offences "including crimes against humanity, genocide, grave breaches of the Geneva Conventions of 12 August 1949 and violations of the [1956] Penal Code".<sup>122</sup>

62. Nevertheless, the International Judges consider that the Co-Lawyers' reference to the Chamber's prior holdings in Case 002 is not convincing<sup>123</sup> and that the circumstances in Case 002 differ from the present Case. Specifically, the International Judges note that in Case 002

<sup>116</sup> Case 004/2 Considerations on Civil Party Appeal (D362/6), Opinion of Judges BAIK and BEAUVALLET, para. 56; Case 003 Considerations on Civil Party Appeal (D269/4), Opinion of Judges BEAUVALLET and BAIK, para. 58.

<sup>117</sup> Case 002 Decision on Civil Party Appeals (D404/2/4), para. 62; Case 002 Decision on Civil Party Appeals (D411/3/6), para. 62.

<sup>118</sup> Case 002 Decision on Civil Party Appeals (D404/2/4), para. 62; Case 002 Decision on Civil Party Appeals (D411/3/6), para. 62.

<sup>119</sup> Case 002 Decision on Civil Party Appeals (D404/2/4), para. 42; Case 002 Decision on Civil Party Appeals (D411/3/6), para. 42.

<sup>120</sup> Case 002 Decision on Civil Party Appeals (D404/2/4), para. 69; Case 002 Decision on Civil Party Appeals (D411/3/6), para. 69.

<sup>121</sup> Case 002 Decision on Civil Party Appeals (D404/2/4), para. 72; Case 002 Decision on Civil Party Appeals (D411/3/6), para. 72.

<sup>122</sup> Case 002 Decision on Civil Party Appeals (D404/2/4), para. 71; Case 002 Decision on Civil Party Appeals (D411/3/6), para. 71.

<sup>123</sup> Civil Party Appeal (D384/5), para. 23.





multiple Accused were indicted for crimes committed throughout Cambodia.<sup>124</sup> In contrast, in the instant Case, YIM Tith is indicted for crimes committed in the Northwest Zone and the six crime sites in the Southwest Zone only.<sup>125</sup> The Indictment clearly defined and limited the geographical and material scope of the Case as follows: “Y[IM] Tith was one of the primary persons responsible for implementing CPK polic[ies] in his areas of responsibility”,<sup>126</sup> as a part of three distinct JCEs with other CPK cadres who shared the common purpose of implementing the said policies.<sup>127</sup>

63. The International Judges thus consider that the circumstances identified by the Pre-Trial Chamber in Case 002 are not prevalent in the instant Case and find the Co-Lawyers’ arguments related to Case 002 findings irrelevant.

64. Moreover, the Co-Lawyers assert that Civil Parties across Cambodia should have been admitted and repeatedly refer to allegations made in the Third Introductory Submission and the Supplementary Submissions in support of this contention.<sup>128</sup> The International Judges recall that at the closing order stage of proceedings, the authoritative document is the Indictment and not any prior submissions from the Office of the Co-Prosecutors.<sup>129</sup> The International Judges further note that the causal link that must be demonstrated by the Civil Party applicants is to a crime alleged and not to “(i) the broader scope of the investigation, (ii) facts for which the judicial investigation has already been opened, or (iii) facts under investigation.”<sup>130</sup>

65. The International Judges reaffirm that, at this stage of the proceedings, to be admissible a Civil Party applicant must show that as a direct consequence of at least one of the crimes charged, he or she has in fact suffered physical, material or psychological injury upon which a claim of collective and moral reparation might be based.<sup>131</sup>

<sup>124</sup> Case 002 Decision on Civil Party Appeals (D404/2/4), paras 74-75; Case 002 Decision on Civil Party Appeals (D411/3/6), paras 74-75.

<sup>125</sup> Indictment (D382), pp. 475-487.

<sup>126</sup> Indictment (D382), para. 1019.

<sup>127</sup> Indictment (D382), paras 1016-1018.

<sup>128</sup> Civil Party Appeal (D384/5), paras 23-25.

<sup>129</sup> See, e.g., Internal Rule 67(1) (“The Co-Investigating Judges shall conclude the investigation by issuing a Closing Order, either indicting a Charged Person and sending him or her to trial, or dismissing the case. The Co-Investigating Judges are not bound by the Co-Prosecutors’ submissions”).

<sup>130</sup> Cf. Case 002 Decision on Civil Party Appeals (D404/2/4), [Dissenting] Opinion of Judge Catherine MARCHI-UHEL, para. 34.

<sup>131</sup> Internal Rule 23bis(1)(b); Case 004/2 Considerations on Civil Party Appeal (D362/6), Opinion of Judges BAIK and BEAUVALLET, para. 60; Case 003 Considerations on Civil Party Appeal (D269/4), Opinion of Judges BEAUVALLET and BAIK, para. 62.



66. The International Judges observe that the Indictment charged YIM Tith for various crimes committed in limited geographical areas.<sup>132</sup> In accordance with these specific charges, the Impugned Order appropriately limits the scope of potentially admissible Civil Party applicants to those: (i) “who have suffered harm in the Northwest Zone from early 1977 until at least 6 January 1979”; (ii) “who have suffered harm as a consequence of the charged nation-wide common plan, alleged from at least 1976 until 6 January 1979, to eliminate Khmer Krom, in whole or in part”; (iii) “who have suffered harm as a consequence of any of the [...] crimes alleged at Wat Pratheat Security Centre between at least September-October 1975 until 6 January 1979”; and (iv) “who have suffered harm as a consequence of any of the [...] crimes alleged at Wat Pratheat Security Centre, Kraing Ta Chan Security Centre, Preil Village Execution Site, Wat Angkun Execution Site, Slaeng Village Forest Execution Site, or Prey Sokhon and Wat Ang Serei Muny Execution Site”.<sup>133</sup>

67. Contrary to the Co-Lawyers’ allegations,<sup>134</sup> Civil Party applicants that have suffered injury, which is not derived from crimes charged in the Indictment, do not meet the causal link requirement under Internal Rule 23*bis*(1)(b).

68. Finally, the International Judges consider that the majority of inadmissible Civil Party applicants highlighted in the Co-Lawyers’ submissions and those listed in Annex B<sup>135</sup> and Annex C<sup>136</sup> may have suffered from the mass atrocities, which occurred during the Khmer Rouge regime. However, the International Judges find that the described events, which occurred outside of the Northwest Zone, do not amount to alleged crimes committed under JCE A, which covers the crime sites in the Northwest Zone only.<sup>137</sup> Accordingly, the International Co-Investigating Judge did not err in law by considering only victims of crimes alleged in the Northwest Zone or by rejecting the applicants listed in the Co-Lawyers’ Annexes B and C that are not linked to purported crimes in this Zone. Ground 1(1) is thus dismissed.

c. Ground 1(2)

<sup>132</sup> See Indictment (D382), pp. 475-487.

<sup>133</sup> Order on Civil Parties (International) (D384), paras 37-38.

<sup>134</sup> Civil Party Appeal (D384/5), para. 26.

<sup>135</sup> Annex B to Civil Party Appeal (D384/5.2.2).

<sup>136</sup> Annex C to Civil Party Appeal (D384/5.2.3).

<sup>137</sup> Indictment (D382), para. 1016(i), pp. 475-487.



69. Pursuant to Internal Rule 23bis(1)(b), a Civil Party applicant must “demonstrate [...] that he or she has in fact suffered physical, material or psychological injury.”<sup>138</sup> In Case 002, the Pre-Trial Chamber considered the nature and extent of psychological injury suffered in the context of mass atrocities committed throughout Cambodia<sup>139</sup> and extended the presumption of psychological injury to indirect victims who did not have a familial relationship with the direct victim but who were part of the same targeted group.<sup>140</sup> The Chamber observed that:

[T]he mere knowledge of the fate of another human who is a direct victim of crimes committed resulting from the implementation of policies to that effect must be more than not likely to be psychologically disturbing to any person of ordinary sensibility. Such disturbance flows not just from seeing such crimes being committed but also from the implied and constant threat generated by such occurrences that can reasonably be expected to instill fear on the others that this could also be their fate due to them belonging to the same targeted group or community as the direct victim of a crime committed as part of the implementation of the CPK policies.<sup>141</sup>

70. Following this observation, the Chamber held that “for those applicants alleging psychological injury who are not in a position to substantiate a close relationship with the immediate victim, [it] shall, where appropriate, apply a presumption of collective injury” in its assessment of Civil Party applications.<sup>142</sup>

71. In the present Case, the International Judges reaffirm that an indirect victim may claim psychological injury, even in the absence of a familial relationship with the direct victim, through his or her membership within the same targeted group or community.<sup>143</sup> The International Judges note that the International Co-Investigating Judge has, in fact, adopted this approach, as the relevant section of the Impugned Order concludes:

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

<sup>138</sup> Internal Rule 23bis(1)(b).

<sup>139</sup> Case 002 Decision on Civil Party Appeals (D404/2/4), para. 86; Case 002 Decision on Civil Party Appeals (D411/3/6), para. 86.

<sup>140</sup> Case 002 Decision on Civil Party Appeals (D404/2/4), paras 83-93; Case 002 Decision on Civil Party Appeals (D411/3/6), paras 83-93.

<sup>141</sup> Case 002 Decision on Civil Party Appeals (D404/2/4), para. 86; Case 002 Decision on Civil Party Appeals (D411/3/6), para. 86.

<sup>142</sup> Case 002 Decision on Civil Party Appeals (D404/2/4), para. 93; Case 002 Decision on Civil Party Appeals (D411/3/6), para. 93.

<sup>143</sup> Case 004/2 Considerations on Civil Party Appeal (D362/6), Opinion of Judges BAIK and BEAUVALLET, para. 64; Case 003 Considerations on Civil Party Appeal (D269/4), Opinion of Judges BEAUVALLET and BAIK, para. 68.



the indirect victim was otherwise affected by the harm suffered by the direct victim.<sup>144</sup>

72. On this basis, the Co-Lawyers allege that “a presumption of collective injury arising from the harm suffered by direct victims in the Northwest Zone and Southwest Zone extends to *all* members of these specifically targeted groups or communities irrespective of their locations”.<sup>145</sup> However, the International Judges recall that Internal Rule 23*bis*(1)(b) requires a nexus between the injury and the alleged crimes, including in relation to indirect victims.<sup>146</sup>

73. In contrast with Case 002, the crimes alleged against YIM Tith are limited in geographical scope to the Northwest Zone and the six crime sites in the Southwest Zone.<sup>147</sup> Specifically, the Indictment describes the targeting of specific groups as follows:

[b]y at least early 1977 until at least 6 January 1979, Y[IM] Tith, Ta Mok, and other trusted Southwest Zone cadres carried out an operation in the Northwest Zone of DK to implement the CPK’s policies on [...] the targeting of specific groups. The participants [...] intended to and implemented these policies through the commission of the crimes against humanity of imprisonment, murder, extermination, enslavement, other inhumane acts, and persecution.

[...]

From at least 1976 until 6 January 1979, Y[IM] Tith, Ta Mok and other Southwest Zone cadres shared the common objective to implement in specific areas of DK a nationwide plan for the elimination in whole or in part of the Khmer Krom. The participants [...] intended to and implemented the plan through the commission of the crime of genocide by killing members of the group, the crimes against humanity of murder, extermination, enslavement, deportation, imprisonment, torture, persecution, and other inhumane acts and, grave breaches of the Geneva Conventions.

[...]

Y[IM] Tith made a significant contribution to the CPK policies on killing enemies, eliminating the Khmer Krom, and targeting other specific groups, including Northwest Zone CPK cadres, former officials of the Khmer Republic, ‘17 April People’, East Zone Evacuees, and their families [...].<sup>148</sup>

<sup>144</sup> Order on Civil Parties (International) (D384), para. 34.

<sup>145</sup> Civil Party Appeal (D384/5), para. 32.

<sup>146</sup> Internal Rule 23*bis*(1)(b).

<sup>147</sup> Indictment (D382), para. 1016, pp. 475-487.

<sup>148</sup> Indictment (D382), paras 1016 (i), (ii), 1022 (emphasis omitted).



74. As previously noted, the injury described by a Civil Party applicant must be connected to the abovementioned crimes provided in the Indictment.<sup>149</sup> In contrast, the Co-Lawyers assert that all Civil Party applicants alleging injury as members of a specifically targeted group are admissible, even when the injury did not result from the targeting of a member of a specific group in the Northwest Zone and the six crime sites in the Southwest Zone.<sup>150</sup> For instance, the Co-Lawyers describe Civil Party applicant PIN Dân (11-VSS-00027), a monk who was designated as a “new person”, defrocked and then forcibly relocated with his family from Phnom Penh to Kampong Cham Province where he was forced to build dams and subjected to forced marriage.<sup>151</sup> He also lost several family members who were accused of being LON Nol soldiers in Kampong Cham Province.<sup>152</sup> While the International Judges agree that this may have caused suffering and may be related to policies implemented throughout Cambodia during the Khmer Rouge regime, the injury alleged did not result from the targeting of “new people” and former military personnel in the Northwest Zone or the six crime sites in the Southwest Zone and, as such, is not imputable to YIM Tith.

75. Therefore, the International Judges conclude that the causal link requirement in Internal Rule 23bis(1)(b) provides that the presumption of collective injury, in the present Case, extends to those Civil Party applicants who can relate their injury to the alleged crimes committed against direct victims in the Northwest Zone and the six crime sites in the Southwest Zone, as defined in the Indictment.<sup>153</sup> The International Judges reaffirm that the mere membership in the same targeted group elsewhere, without any connection to the Northwest Zone or the six crime sites in the Southwest Zone, does not suffice.<sup>154</sup> While the International Judges note that the majority of the inadmissible Civil Party applicants highlighted in the Co-Lawyers’ submissions and those listed in Annex C may have suffered psychological injury as a result of their (perceived) membership of a specifically targeted group, their injury does not relate to the

<sup>149</sup> Case 004/2 Considerations on Civil Party Appeal (D362/6), Opinion of Judges BAIK and BEAUVALLET, para. 56; Case 003 Considerations on Civil Party Appeal (D269/4), Opinion of Judges BEAUVALLET and BAIK, para. 58.

<sup>150</sup> Civil Party Appeal (D384/5), paras 32-33.

<sup>151</sup> Civil Party Appeal (D384/5), para. 34(6).

<sup>152</sup> Civil Party Appeal (D384/5), para. 34(6).

<sup>153</sup> See also Case 004/2 Considerations on Civil Party Appeal (D362/6), Opinion of Judges BAIK and BEAUVALLET, para. 68; Case 003 Considerations on Civil Party Appeal (D269/4), Opinion of Judges BEAUVALLET and BAIK, para. 72.

<sup>154</sup> See Case 004/2 Considerations on Civil Party Appeal (D362/6), Opinion of Judges BAIK and BEAUVALLET, para. 68; Case 003 Considerations on Civil Party Appeal (D269/4), Opinion of Judges BEAUVALLET and BAIK, para. 72.



“alleged crimes” in this Case. Accordingly, the International Judges find that the International Co-Investigating Judge did not err by rejecting these applicants and dismiss Ground 1(2).

d. Ground 1(3)

76. As noted earlier, under Internal Rule 23*bis*(1)(b), for the application to be admissible, a Civil Party applicant must “demonstrate as a direct consequence of at least one of the crimes alleged against the Charged Person, that he or she has in fact suffered physical, material or psychological injury”.<sup>155</sup> The Pre-Trial Chamber has found that “the harm suffered by a civil party applicant must be connected to crimes charged in the Indictment in order to be considered for admissibility at this stage of the proceedings.”<sup>156</sup>

77. YIM Tith was indicted for genocide of the Khmer Krom, crimes against humanity, grave breaches of the Geneva Conventions of 12 August 1949 and violations of the 1956 Penal Code limited in geographical scope to the Northwest Zone and the six crime sites in the Southwest Zone.<sup>157</sup> The International Judges note that, in accordance with the Indictment,<sup>158</sup> the Impugned Order limits the scope of potentially admissible Civil Party applicants to those (i) “who have suffered harm in the Northwest Zone from early 1977 until at least 6 January 1979”; (ii) “who have suffered harm as a consequence of the charged nation-wide common plan, alleged from at least 1976 until 6 January 1979, to eliminate Khmer Krom, in whole or in part”; (iii) “who have suffered harm as a consequence of any of the [...] crimes alleged at Wat Pratheat Security Centre between at least September-October 1975 until 6 January 1979”; and (iv) “who have suffered harm as a consequence of any of the [...] crimes alleged at Wat Pratheat Security Centre, Kraing Ta Chan Security Centre, Preil Village Execution Site, Wat Angkun Execution Site, Slaeng Village Forest Execution Site, or Prey Sokhon and Wat Ang Serei Muny Execution Site”.<sup>159</sup>

78. Regarding the 268 inadmissible Civil Party applicants identified by the Co-Lawyers in Annex D, the International Judges note that these Appellants allegedly suffered harm in

<sup>155</sup> See *supra* paras 33-34, 36, 60.

<sup>156</sup> See *supra* paras 33-34, 36, 60.

<sup>157</sup> Indictment (D382), pp. 475-487.

<sup>158</sup> Indictment (D382), pp. 475-487. See also Indictment (D382), paras 1012-1017, 1026-1039.

<sup>159</sup> Order on Civil Parties (International) (D384), paras 37-38 (which further delineates that “any such crime or crimes may be imputable to [YIM] Tith” (emphasis omitted)).



Kirivong District and Sector 13 in the Southwest Zone (count 8) and other locations in the Southwest Zone (count 9),<sup>160</sup> where YIM Tith held “broad *de facto* authority”.<sup>161</sup>

79. In this regard, the International Judges observe that none of the three JCEs, of which YIM Tith was purportedly a member, covers the entire Kirivong District and Sector 13 or other locations throughout the Southwest Zone.<sup>162</sup> Apart from JCE, the International Co-Investigating Judge charged YIM Tith with direct commission, planning, ordering, superior responsibility and instigating of international crimes “in the areas of his responsibility under his *official* functions and during the time he exercised them”<sup>163</sup> and co-perpetration, planning and ordering of domestic crimes “in his areas of responsibility, based on his *official* authority over a wide area during the periods that he exercised them”.<sup>164</sup> The International Judges observe that the Indictment did not charge YIM Tith for crimes alleged in the areas of his *de facto* authority, “beyond that formally given to him through his official appointments”.<sup>165</sup> Accordingly, if the harm suffered by applicants derived from the crimes not charged in the Indictment, such appellants do not satisfy the causal link requirement under Internal Rule 23bis(1)(b). The International Judges note that although the 268 inadmissible Civil Party applicants listed under counts 8 and 9 in Annex D may have suffered from atrocities during the DK period, their injury is not derived from crimes alleged in the Northwest Zone and the six crime sites in Sector 13 of the Southwest Zone, as defined in the Indictment. Consequently, the International Co-Investigating Judge did not err by excluding the applicants who allegedly suffered harm in Kirivong District and Sector 13 in the Southwest Zone and other locations in the Southwest Zone.<sup>166</sup> The International Judges reject the Co-Lawyers for Civil Parties’ argument<sup>167</sup> that 268 applicants who have suffered harm throughout the Southwest Zone—where YIM Tith “held broad *de facto* authority”<sup>168</sup>—should have been admitted as civil parties.

<sup>160</sup> Case 004, Annex D(1): Key to Zone and Crimes Site Codes within the Scope of Case 004, Annex to Civil Party Appeal, 13 September 2019, D384/5.2.4.1 (“Annex D(1) to Civil Party Appeal (D384/5.2.4.1)”).

<sup>161</sup> Civil Party Appeal (D384/5), para. 38 *referring to* Indictment (D382), paras 348-350.

<sup>162</sup> Indictment (D382), para. 1016(i), (ii), (iii).

<sup>163</sup> Indictment (D382), paras 1026-1033 [emphasis added].

<sup>164</sup> Indictment (D382), paras 1036-1038 [emphasis added].

<sup>165</sup> Indictment (D382), para. 1020. *See also* Indictment (D382), paras 1017, 1030, 1034, 1039.

<sup>166</sup> Order on Civil Parties (International) (D384), paras 37-38 *referring to* Initial Appearance of YIM Tith (D281), at ERN (EN) 01205491-01205492 [emphasis added].

<sup>167</sup> Order on Civil Parties (International) (D384), para. 38.

<sup>168</sup> Order on Civil Parties (International) (D384), para. 38 *referring to* Indictment (D382), paras 332, 334-335, 348-350, 352.



80. Nevertheless, the International Judges observe that 67 Appellants, identified by the Co-Lawyers in Annex D, purportedly suffered harm at Wat Pratheat Security Centre, Kraing Ta Chan Security Centre, Wat Ang Serei Muny and Prey Sokhon Execution Site in the Southwest Zone (counts 1-3); Thipakdei Cooperative in Sector 1 of the Northwest Zone (count 4); Tuol Seh Nhauv Execution Site in Sector 2 of the Northwest Zone (count 5); Wat Kirirum Security Centre in Sector 3 of the Northwest Zone (count 6) and in other locations throughout the Northwest Zone (count 7).<sup>169</sup> Noting that these applications relate to geographic locations and crime sites in the Northwest Zone and three crime sites in the Southwest Zone, as alleged in the Indictment,<sup>170</sup> the International Judges consider that it is in the interest of the victims to review the 67 Civil Party applications listed in the Co-Lawyers' Annex D under counts 1-7.

81. Upon examination of 67 Appellants identified in the Co-Lawyers' Annex D as well as the International Co-Investigating Judge's reasoning for rejecting them, the International Judges observe that contrary to the Co-Lawyers' allegations,<sup>171</sup> most of these applications were found inadmissible because the events alleged in the applications occurred outside of the temporal or territorial scope of the Case File.<sup>172</sup>

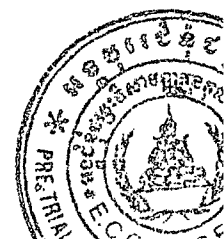
82. Nonetheless, the International Judges find that the International Co-Investigating Judge erred in his decision on admissibility with respect to ten Civil Party applicants under Ground 1(3) and consider that the following Civil Party applications should have been admitted, as reasoned in Annex 1: CHAN Yun (11-VSS-00081); CHEN Savey (13-VSS-00073); HANG Sokhady (13-VSS-00645); KHUTH Touch (17-VSS-00016); MEN Samoeurn (13-VSS-00680); NUON Saman (15-VSS-00141); ORM Chhailang (13-VSS-00358); PRAK Sinan (13-VSS-00374); SO Saroeun (15-VSS-00073); and TUON Pronh (11-VSS-00337). In conclusion, the International Judges find that Ground 1(3) is partially upheld for these ten applications and dismissed for the remaining appellants.

<sup>169</sup> Annex D(1) to Civil Party Appeal (D384/5.2.4.1). The International Judges note that the number of Appellants listed under counts 1-7 in the Co-Lawyers' Annex D is 67, not 66 as alleged in their submissions. *See* Annex D to Civil Party Appeal (D384/5.2.4).

<sup>170</sup> Indictment (D382), para. 1016, pp. 475-487.

<sup>171</sup> Civil Party Appeal (D384/5), para. 36 *referring to* Annex D to Civil Party Appeal (D384/5.2.4).

<sup>172</sup> *See, e.g.*, Civil Party Applicants: TOCH Sim At (12-VSS-00625); SVAY Sarom (12-VSS-00617); CHOUN Nary (13-VSS-00315); EAN Ret (16-VSS-00004).





**B. Ground 2: Alleged Failure to Consider Facts Excluded pursuant to Internal Rule  
66bis in Determining Civil Party Admissibility**

1. Submissions

83. The Co-Lawyers submit that the International Co-Investigating Judge erred by limiting the geographic scope of Civil Party admissibility and excluding victims who would have been admissible prior to the Decision to Reduce the Scope of Judicial Investigation pursuant to Internal Rule 66bis (“Internal Rule 66bis Decision”).<sup>173</sup> His refusal to consider crimes alleged outside of the Northwest Zone or six specified sites in the Southwest Zone caused severe prejudice to the Appellants.<sup>174</sup>

84. In issuing the Internal Rule 66bis Decision,<sup>175</sup> the International Co-Investigating Judge excluded certain factual allegations from the investigation,<sup>176</sup> while explicitly stating that the exclusion of these facts would not impact the admissibility of Civil Party applicants.<sup>177</sup> Despite these repeated statements, the Impugned Order limited the geographic scope of Civil Party admissibility, effectively barring previously qualified applicants from participating in the proceedings.<sup>178</sup> For example, ten applications were found inadmissible even though the applicants suffered harm at Trapeang Thma Dam Worksite, a relevant crime site identified in the Third Introductory Submission.<sup>179</sup>

85. The Co-Lawyers aver that the International Co-Investigating Judge only examined allegations within the more restricted purview of Case 004 and argue that a routine procedural

<sup>173</sup> Civil Party Appeal (D384/5), para. 39.

<sup>174</sup> Civil Party Appeal (D384/5), para. 39.

<sup>175</sup> Civil Party Appeal (D384/5), para. 40 *referring to* Internal Rule 66bis Decision (D359). The Co-Lawyers further point to an earlier “Request for Comments” in which the International Co-Investigating Judge “highlight[ed] thirteen facts [...] that the judges did not intend to further investigate”. See Request for Comments (D302).

<sup>176</sup> Civil Party Appeal (D384/5), para. 40 *referring to* the following factual allegations that were excluded from the investigation pursuant to Internal Rule 66bis: Damnak Reang Execution Site, forced marriage near Kang Hort Dam, sites in Sector 5 of the Northwest Zone, Anlong Vil Breng and Related Execution Site, Phnom Tra Chek Chet Worksite, Banteay O Ta Krey Execution Site, Wat Kandal Security Centre, Wat Banteay Neang Security Centre and Wat Thoamayutt Security Centre.

<sup>177</sup> Civil Party Appeal (D384/5), paras 39-40 *referring to* Internal Rule 66bis Decision (D359), para. 14; Order on Civil Parties (International) (D384), para. 39.

<sup>178</sup> Civil Party Appeal (D384/5), para. 41 *referring to* Order on Civil Parties (International) (D384), paras 37-38 (a)(b)(c).

<sup>179</sup> Civil Party Appeal (D384/5), para. 42 *referring to* Case 004, Annex E: Civil Party Applicants Found Inadmissible Due to the Reduction of the Scope of Trial, Annex to Civil Party Appeal, 13 September 2019, D384/5.2.5 (“Annex E to Civil Party Appeal (D384/5.2.5)”).



act, intended to expedite the proceedings, should not deprive victims of their right to meaningfully participate.<sup>180</sup> The International Co-Investigating Judge's interpretation of the impact of the scope reduction "runs counter to the rights of the victims," which require the ECCC to take a broad view of Civil Party admissibility and for the Judges to pay special attention to assure meaningful participation of the victims.<sup>181</sup>

86. Finally, the Co-Lawyers request the Pre-Trial Chamber to find that the International Co-Investigating Judge erroneously rejected Civil Party applicants identified in their Annex E<sup>182</sup> who suffered harm as consequence of the crimes alleged at various sites in the Third Introductory Submission and the First and Third Supplementary Submissions,<sup>183</sup> and that were later excluded under Internal Rule 66bis.<sup>184</sup>

## 2. Discussion

87. Pursuant to Internal Rule 66bis(1), "the Co-Investigating Judges may, at the time of notification of conclusion of investigation, decide to reduce the scope of judicial investigation by excluding certain facts set out in an Introductory Submission or any Supplementary Submission(s)."<sup>185</sup> In accordance with Internal Rule 66bis(3), the Co-Investigating Judges shall determine the effect of such a decision "on the status of the Civil Parties and on the right of Civil Party applicants to participate in the judicial investigation."<sup>186</sup>

88. The International Judges observe that, following the conclusion of the judicial investigation against YIM Tith,<sup>187</sup> the International Co-Investigating Judge reduced the scope of the investigating by excluding certain facts from the investigation ("Rule 66bis facts"),<sup>188</sup> indicating that the remaining facts "are representative of the scope of the [International Co-Prosecutor]'s Introductory and Supplementary Submissions geographically, temporally and

<sup>180</sup> Civil Party Appeal (D384/5), para. 43.

<sup>181</sup> Civil Party Appeal (D384/5), para. 44 *referring to* Case 002 Decision on Civil Party Appeals (D404/2/4), paras 61, 65.

<sup>182</sup> Civil Party Appeal (D384/5), para. 45 *referring to* Annex E to Civil Party Appeal (D384/5.2.5).

<sup>183</sup> Damnak Reang Execution Site, Kang Hort Dam Worksite, Phnom Trayoung Security Centre and Worksite, Trapeang Thma Dam Worksite and Anlong Vil Breng and Related Execution Site.

<sup>184</sup> Annex B to Order on Civil Parties (D384.2).

<sup>185</sup> Internal Rule 66bis(1).

<sup>186</sup> Internal Rule 66bis(3).

<sup>187</sup> First Rule 66(1) Notification (D358).

<sup>188</sup> Internal Rule 66bis Decision (D359). *See further* Request for Comments (D302); Notice of Provisional Discontinuance (D302/3); Notice of Intention and Provisional Discontinuance (D342); Notice of Provisional Discontinuance (Six Crime Sites) (D349); Internal Rule 66bis (2) Notification (D354).



substantively, in terms of the nature and scale of crimes and the categories of victims”<sup>189</sup>, and that the exclusion of these facts “will not affect the status of Civil Parties or the right of Civil Party applicants to participate in the judicial investigation.”<sup>190</sup> Additionally, the Impugned Order reads that “[f]acts excluded on the basis of Internal Rule 66*bis* [...] may still form the basis of a decision of admissibility”.<sup>191</sup>

89. Turning to the Co-Lawyers’ allegation that the Internal Rule 66*bis* Decision limited the geographic scope of Civil Party admissibility,<sup>192</sup> the International Judges observe that all of the Rule 66*bis* facts relate to geographic locations and crime sites in the Northwest Zone, notably:

- (a) all allegations relating to Damnak Reang Execution Site (Sector 1, Northwest Zone);<sup>193</sup>
- (b) all allegations of forced marriage near Kang [Hort] Dam (Sector 1, Northwest Zone);<sup>194</sup>
- (c) allegations in relation to sites in Sector 5, Northwest Zone;<sup>195</sup>
- (d) Anlong Vil Breng and related Execution Site (Sector 1, Northwest Zone);<sup>196</sup>
- (e) Phnom Tra Chek Chet Worksite (Sector 1, Northwest Zone);<sup>197</sup>
- (f) Banteay O Ta Krey Execution Site (Sector 1, Northwest Zone);<sup>198</sup>
- (g) Wat Kandal Security Centre (Sector 3, Northwest Zone);<sup>199</sup>
- (h) Wat Banteay Neang Security Centre (Sector 3, Northwest Zone);<sup>200</sup>
- (i) Wat Thoamayutt Security Centre (Sector 4, Northwest Zone).<sup>201</sup>

Therefore, the Co-Lawyers’ allegations concerning the International Co-Investigating Judge’s failure to consider crimes “outside of the Northwest Zone or six specified sites in the Southwest

<sup>189</sup> Internal Rule 66*bis* Decision (D359), para. 12. *See also* Internal Rule 66*bis* (2) Notification (D354), para. 10.

<sup>190</sup> Internal Rule 66*bis* Decision (D359), para. 14. *See also* Internal Rule 66*bis* (2) Notification (D354), para. 12.

<sup>191</sup> Order on Civil Parties (International) (D384), para. 39.

<sup>192</sup> Civil Party Appeal (D384/5), paras 39-41.

<sup>193</sup> Internal Rule 66*bis* Decision (D359), para. 4 *referring to* First Supplementary Submission (D65), para. 9.

<sup>194</sup> Internal Rule 66*bis* Decision (D359), para. 4 *referring to* Fourth Supplementary Submission (D272/1), para. 6.

<sup>195</sup> Internal Rule 66*bis* Decision (D359), para. 4 *referring to* Third Introductory Submission (D1), paras 71 (Wat Chamkar Khol Execution Site), 74-75 (Phnom Trayoung Security Centre and Worksite), 76 (Phum Chakrey Security Centre and Execution Site; Prey Taruth Execution Site), 77 (Wat Preah Net Preah and related Detention and Execution Sites), 78 (Trapeang Thma Dam Worksite), 79 (Spean Spreng and Prey Roneam Dam Worksites).

<sup>196</sup> Internal Rule 66*bis* Decision (D359), para. 4 *referring to* First Supplementary Submission (D65), para. 7.

<sup>197</sup> Internal Rule 66*bis* Decision (D359), para. 4 *referring to* First Supplementary Submission (D65), para. 7.

<sup>198</sup> Internal Rule 66*bis* Decision (D359), para. 4 *referring to* Third Introductory Submission (D1), para. 61.

<sup>199</sup> Internal Rule 66*bis* Decision (D359), para. 4 *referring to* Third Introductory Submission (D1), paras 65-66.

<sup>200</sup> Internal Rule 66*bis* Decision (D359), para. 4 *referring to* Third Introductory Submission (D1), para. 69.

<sup>201</sup> Internal Rule 66*bis* Decision (D359), para. 4 *referring to* Third Introductory Submission (D1), paras 63-64.



Zone”<sup>202</sup> under this Ground are inapposite. Those crimes were never subject to exclusion under Internal Rule 66bis.<sup>203</sup> The International Judges further observe that the Impugned Order considered for admissibility, *inter alia*, “applicants who have suffered harm in the **Northwest Zone** from early 1977 until at least 6 January 1979”<sup>204</sup> and that applicants with a nexus to the Rule 66bis facts were in fact admitted where the remaining conditions were fulfilled.<sup>205</sup>

90. Moreover, upon examination of the International Co-Investigating Judge’s reasoning for rejecting the Civil Party applicants identified in the Co-Lawyers’ Annex E,<sup>206</sup> the International Judges observe that none of the applicants listed in this Annex were rejected because of the Internal Rule 66bis reduction.<sup>207</sup>

91. Rather, those applications were found inadmissible because the International Co-Investigating Judge was not satisfied that the facts alleged in support of the applications were “more likely than not to be true”<sup>208</sup> or because the events occurred outside of the temporal scope of the Case File. For example, four applications were found inadmissible because the factual accounts provided by the applicants were “word for word the same”, which made it “hard to be satisfied [...] that it is more likely than not to be true that they suffered harm as a result of one of the crimes charged”.<sup>209</sup> Other applicants were rejected because of contradictory

<sup>202</sup> Civil Party Appeal (D384/5), para. 39.

<sup>203</sup> The International Judges observe that the Co-Lawyers also appear to refer to the “full scope of the crimes” in the Case 004 Case File, pre-severance of Cases 004/1 and 004/2. This issue will be discussed under Ground 5.

<sup>204</sup> Order on Civil Parties (International) (D384), para. 37 (stating further that the causal link requirement is met, *inter alia*, when “the harm suffered by the applicant derives from the alleged implementation” of certain policies “at any location within the Northwest Zone”) (emphasis added).

<sup>205</sup> The International Co-Investigating Judge admitted Civil Party applicants who suffered harm linked to the Rule 66bis facts where those applications met the other relevant criteria described in the Impugned Order (temporal scope, standard of proof etc.). For example, PRAK Kav (13-VSS-00129), CHUM Chim (13-VSS-00130) and THORN Sakhort (13-VSS-00171) suffered injury from crimes alleged at Phnum Trayoung Security Centre (Sector 5, Northwest Zone); UM Samoet (15-VSS-00047) suffered injury from crimes alleged at Phnom Tra Chek Chet (Sector 1); PREUNG Saroem (13-VSS-00531), PIK Saret (13-VSS-00560) and TOR Chanty (13-VSS-00561) suffered injury from crimes alleged at Wat Kandal Security Centre (Sector 3); CHIN Thorn (13-VSS-00140), NIT Luon (13-VSS-00174), THON Thy (13-VSS-00247) and PE Chon (13-VSS-00266) suffered injury from crimes alleged at Trapeang Thma Dam (Sector 5). See Case 004, Annex A: List of Civil Party Applications Admissible, Annex to Order on Civil Parties (International), 28 June 2019, D384.1 (“Annex A to Order on Civil Parties (D384.1)”), at ERN (EN) 01620182, rows 1, 4, 7-8, 11-12, at ERN (EN) 01620189, row 3, at ERN (EN) 01620217, rows 6-7, at ERN (EN) 01620230, row 10.

<sup>206</sup> Civil Party Appeal (D384/5), paras 42, 45; Annex E to Civil Party Appeal (D384/5.2.5).

<sup>207</sup> Annex B to Order on Civil Parties (D384.2).

<sup>208</sup> Internal Rule 23bis(1) (“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.”); Order on Civil Parties (International) (D384), para. 40.

<sup>209</sup> Civil Party Applicants: CHHIM Sampoeung (13-VSS-00542), MLIS Kimchhat (13-VSS-00545), KHVEK Pach (13-VSS-00548), PIK Oeup (13-VSS-00543). Annex B to Order on Civil Parties (D384.2), at ERN (EN) 01620233, rows 5-7, 9.



information and inconsistencies in their accounts,<sup>210</sup> because they provided insufficient information about certain events or failed to specify the time frame.<sup>211</sup> Finally, several applications were found inadmissible because the applicants' age at the time of the events, as recorded in their identifying information, could not be reconciled with the accounts provided in their applications (*e.g.* having to carry out hard labour while born after DK).<sup>212</sup>

92. In conclusion, the International Judges find that the International Co-Investigating Judge did not impermissibly limit the geographic scope of Civil Party admissibility or cause prejudice to the Appellants. Nevertheless, the International Judges find that it is in the interest of the victims to exceptionally review the applicants listed in the Co-Lawyers' Annex E, as these applications allegedly fall within the territorial scope of this Case.

93. Upon reviewing the Co-Lawyers' Annex E, the International Judges find that the International Co-Investigating Judge erred in his decision on admissibility of four Civil Party applicants and consider that the following Civil Party applications should have been admitted, as reasoned in Annex 2 of these Considerations: CHEN Savey (13-VSS-00073); CHROUK Phors (13-VSS-00335); KHUT Khonh (13-VSS-00085); and ORM Chhailang (13-VSS-00358).

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

#### **1. Submissions**

94. The Co-Lawyers allege that the International Co-Investigating Judge erred in law by failing to provide reasoned decisions for the rejections of Civil Party applications. They argue that the Impugned Order fails to meet the minimum standards required to respect the principles of legality, including transparency and legal certainty as set out by the Pre-Trial Chamber.<sup>213</sup>

<sup>210</sup> Civil Party Applicants NHOEK Yun (13-VSS-00147), ORM Chhailang (13-VSS-00358), CHROUK Phors (13-VSS-00335), PAL Rattanak (13-VSS-00431). Annex B to Order on Civil Parties (D384.2), at ERN (EN) 01620233, row 3; 01620268, rows 10, 12; 01620269, row 6.

<sup>211</sup> Civil Party Applicants KHUT Khonh (13-VSS-00085), VINH SaMinh (13-VSS-00026). Annex B to Order on Civil Parties (D384.2), at ERN (EN) 01620233, rows 8, 10.

<sup>212</sup> Civil Party Applicants CHROUK Phors (13-VSS-00335), CHEN Savey (13-VSS-00073), KHUT Khonh (13-VSS-00085), MOUK Samay (13-VSS-00057). Annex B to Order on Civil Parties (D384.2), at ERN (EN) 01620268, row 12, 01620233, rows 2, 8, 11.

<sup>213</sup> Civil Party Appeal (D384/5), paras 46, 48 and footnote 122 *referring to, inter alia*, Case 002 Decision on Civil Party Appeals (D411/3/6), paras 37-38.



At a minimum, the Co-Investigating Judges must “implicitly disclose the material which has been taken into account by the judges when making a decision.”<sup>214</sup> Without the Civil Parties being informed of the reasoning, the right to appellate review provided by the Internal Rules is rendered meaningless.<sup>215</sup>

95. The Co-Lawyers argue that the Pre-Trial Chamber previously set out the minimum standards for a reasoned decision concerning Civil Party application rejections in Case 002 and contend that the Impugned Order “fails to meet” those standards.<sup>216</sup> The Co-Lawyers submit that the International Co-Investigating Judge rejected “a vast number” of Civil Party applications “*en masse* without proper individual consideration.”<sup>217</sup> The Co-Lawyers allege that the Impugned Order, as in Case 002, uses reasoning, or lack thereof, which is “limited to a few short, recycled statements.”<sup>218</sup> The Impugned Order rejects “nearly two-thirds of the Appellants on [...] generic grounds”,<sup>219</sup> and in three instances merely restates the facts without providing reasons for rejection.<sup>220</sup> This lack of specificity does not allow Civil Party applicants to meaningfully exercise their appellate rights.<sup>221</sup>

96. Finally, the Co-Lawyers request that the Pre-Trial Chamber overturn the Impugned Order where the application was found inadmissible for being “outside the scope of the case file”, where it was allegedly “not shown that it is more likely than not to be true that the victim suffered as a consequence of the crimes charged”, or where the International Co-Investigating Judge “failed to provide any reasoning” as these rejections were not issued by a reasoned order.<sup>222</sup>

## 2. Discussion

<sup>214</sup> Civil Party Appeal (D384/5), para. 46 *quoting* Case 002 Decision on Civil Party Appeals (D411/3/6), para. 39.

<sup>215</sup> Civil Party Appeal (D384/5), para. 46.

<sup>216</sup> Civil Party Appeal (D384/5), paras 46-48 and footnote 122 *referring to, inter alia*, Case 002 Decision on Civil Party Appeals (D411/3/6), paras 37-38.

<sup>217</sup> Civil Party Appeal (D384/5), para. 48.

<sup>218</sup> Civil Party Appeal (D384/5), para. 48.

<sup>219</sup> Civil Party Appeal (D384/5), para. 48.

<sup>220</sup> Civil Party Appeal (D384/5), para. 48 *referring to* Civil Party applicants CHHUN Samân (12-VSS-00582), NHIM Kol (12-VSS-00672) and Y Moy (13-VSS-00707).

<sup>221</sup> Civil Party Appeal (D384/5), para. 48.

<sup>222</sup> Civil Party Appeal (D384/5), para. 49 *referring to* Case 004, Annex F: Grounds for Inadmissibility of Civil Party Applicants, Annex to Civil Party Appeal, 13 September 2019, D384/5.2.6 (“Annex F to Civil Party Appeal (D384/5.2.6)”).



97. The International Judges recall that “the requirement for judicial bodies to provide reasoned decisions [...] [is] an international standard”.<sup>223</sup> First, the International Judges consider that a reasoned decision is required for the parties to effectively exercise their right to appeal under Internal Rule 74.<sup>224</sup> In its previous decisions, the Chamber found that while “the Co-Investigating Judges are not required to ‘indicate a view on all the factors’ considered in their decision making process, it is important that all parties concerned know the reasons for a decision.”<sup>225</sup> This allows the parties to make an informed decision on whether to appeal or not and on what grounds.<sup>226</sup>

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

[I]n general, a judicial decision must, implicitly disclose the material which has been taken into account by the judges when making a decision. This will ensure that parties having been unsuccessful in their application can be assured that the facts submitted and their submissions in respect of the law have been properly and fully taken into account. Each applicant to be joined as a Civil Party has a right to have their individual application considered and to a demonstration that this has occurred, even if the decision is provided in a short and tabular form.<sup>227</sup>

<sup>223</sup> Case 003 Considerations on Civil Party Appeal (D269/4), Opinion of Judges BEAUVALLET and BAIK, para. 92; Case 004/2 Considerations on Civil Party Appeal (D362/6), Opinion of Judges BAIK and BEAUVALLET, para. 84; Case 002 Decision on Civil Party Appeals (D404/2/4), para. 38; Case 002 Decision on Civil Party Appeals (D411/3/6), para. 38 *referring to* Case 002 (PTC06), Decision on Nuon Chea’s Appeal against Order Refusing Request for Annulment, 26 August 2008, D55/1/8, para. 21.

<sup>224</sup> Case 003 Considerations on Civil Party Appeal (D269/4), Opinion of Judges BEAUVALLET and BAIK, para. 92; Case 004/2 Considerations on Civil Party Appeal (D362/6), Opinion of Judges BAIK and BEAUVALLET, para. 84. *See also* Internal Rule 74 (“Grounds for Pre-Trial Appeals”). (In particular, Internal Rule 74(4) reads: “Civil Parties may appeal against” the Co-Investigating Judges’ orders “declaring a Civil Party application inadmissible”).

<sup>225</sup> Case 003 Considerations on Civil Party Appeal (D269/4), Opinion of Judges BEAUVALLET and BAIK, para. 92; Case 004/2 Considerations on Civil Party Appeal (D362/6), Opinion of Judges BAIK and BEAUVALLET, para. 84; Case 002 Decision on Civil Party Appeals (D404/2/4), para. 38; Case 002 Decision on Civil Party Appeals (D411/3/6), para. 38 *referring to* Case 002 (PTC03), Decision on Appeal against Provisional Detention Order of IENG Sary, 17 October 2008, C22/1/73, para. 66; Case 002 (PTC67), Decision on Co-Prosecutors’ Appeal against the Co-Investigating Judges Order on Request to Place Additional Evidentiary Material on the Case File which Assists in Providing the Charged Persons’ Knowledge of the Crimes, 15 June 2010, D365/2/10, para. 24. *See also* Case 002 (PTC62), Decision on the Ieng Thirith Defence Appeal against ‘Order on Requests for Investigative Action by the Defence for Ieng Thirith’ of 15 March 2010, 14 June 2010, D353/2/3, para. 23.

<sup>226</sup> Case 003 Considerations on Civil Party Appeal (D269/4), Opinion of Judges BEAUVALLET and BAIK, para. 92; Case 004/2 Considerations on Civil Party Appeal (D362/6), Opinion of Judges BAIK and BEAUVALLET, para. 84; Case 002 Decision on Civil Party Appeals (D404/2/4), para. 38; Case 002 Decision on Civil Party Appeals (D411/3/6), para. 38; Case 002 (PTC 46), Decision on Appeal against OCIJ Order on Requests D153, D172, D173, D174, D178 & D284 (NUON Chea’s Twelfth Request for Investigative Action), 14 July 2010, D300/1/5, para. 41.

<sup>227</sup> Case 002 Decision on Civil Party Appeals (D404/2/4), para. 39; Case 002 Decision on Civil Party Appeals (D411/3/6), para. 39. *See further* Case 003 Considerations on Civil Party Appeal (D269/4), Opinion of Judges



In that Case, the Chamber considered that more detailed reasoning was required in respect of the rejected Civil Party applications because the Co-Investigating Judges' reasons were limited to a "maximum" of two sentences, containing five to fifteen words each and were not specific to each application.<sup>228</sup> The Chamber concluded that the Co-Investigating Judges committed a "significant error in law" in insufficiently addressing the basis of rejection of the Civil Party applicants.<sup>229</sup>

99. In the present Case, the International Judges observe that the International Co-Investigating Judge, in the Impugned Order, set out the legal principles and criteria that he applied in determining the admissibility of Civil Party applications.<sup>230</sup> These principles included the type of victim and harm relevant to admissible Civil Party applications, the causal link required between the harm suffered and the crimes alleged against the Charged Person, the standard of proof and sufficiency of information.<sup>231</sup> In addition, he defined the scope of admissible applications based on the Indictment against YIM Tith, explaining that, *inter alia*, "applicants who have suffered harm in the Northwest Zone from early 1977 until at least 6 January 1979 satisfy the causal link requirement in the presence of two conditions",<sup>232</sup> along with a further three categories of applicants.<sup>233</sup> Moreover, the related Annexes to the Impugned

BEAUVALLLET and BAIK, para. 93; Case 004/2 Considerations on Civil Party Appeal (D362/6), Opinion of Judges BAIK and BEAUVALLLET, para. 85.

<sup>228</sup> Case 002 Decision on Civil Party Appeals (D404/2/4), paras 37, 39; Case 002 Decision on Civil Party Appeals (D411/3/6), paras 37, 39. *See further* Case 003 Considerations on Civil Party Appeal (D269/4), Opinion of Judges BEAUVALLLET and BAIK, para. 94; Case 004/2 Considerations on Civil Party Appeal (D362/6), Opinion of Judges BAIK and BEAUVALLLET, para. 85.

<sup>229</sup> Case 002 Decision on Civil Party Appeals (D404/2/4), paras 39-40; Case 002 Decision on Civil Party Appeals (D411/3/6), paras 39-40. *See further* Case 003 Considerations on Civil Party Appeal (D269/4), Opinion of Judges BEAUVALLLET and BAIK, para. 94; Case 004/2 Considerations on Civil Party Appeal (D362/6), Opinion of Judges BAIK and BEAUVALLLET, para. 85.

<sup>230</sup> Order on Civil Parties (International) (D384).

<sup>231</sup> Order on Civil Parties (International) (D384), paras 13-36, 40-48.

<sup>232</sup> Order on Civil Parties (International) (D384), para. 37. (The two conditions are that: (1) the harm suffered must have derived from the alleged implementation of certain CPK policies described in the Indictment at any location within the Northwest Zone, and (2) that the alleged implementation of these policies may have amounted to either genocide listed in Article 4 of the ECCC Law, one or more of the crimes against humanity listed in Article 5 of the ECCC Law, or one of the domestic crimes listed in Article 3 new of the ECCC Law, and that any such crime or crimes may be imputable to YIM Tith.).

<sup>233</sup> Order on Civil Parties (International) (D384), para. 38. (The additional three categories of applicants are: (1) those who suffered harm as a consequence of "the charged nation-wide common plan, alleged from at least 1976 until 6 January 1979, to eliminate the Khmer Krom, in whole or in part"; (2) applicants who suffered harm as a consequence of certain crimes "alleged at Wat Pratheat Security Centre between at least September-October 1975 until 6 January 1979"; (3) any applicant who suffered harm as a consequence of certain crimes alleged at Wat Pratheat Security Centre, Kraing Ta Chan Security Centre, Preil Village Execution Site, Wat Angkun Execution Site, Slaeng Village Forest Execution Site or Prey Sokhon and Wat Ang Serei Muny Execution Site" subject to further conditions, such as that the evidence must indicate that they have been a victim of genocide as listed in Article 4 of the ECCC Law; one or more of the crimes against humanity listed in Article 5 of the ECCC Law; one or more of the grave breaches of Geneva Conventions listed in Article 6 of the ECCC Law; one of the domestic





Order provide additional reasoning with respect to the admissibility of each individual Civil Party applicant.<sup>234</sup> The International Judges consider that the Impugned Order and its Annexes shall be read in conjunction.

100. While the Co-Lawyers allege that the International Co-Investigating Judge “rejected a vast number of [Civil Party applications] *en masse* without proper individual consideration”,<sup>235</sup> the International Judges find that Annex B to the Impugned Order,<sup>236</sup> in fact, clearly indicates that the International Co-Investigating Judge individually considered each application. As opposed to merely stating that “the necessary causal link between the alleged harm and the facts under investigation was not established” as in Case 002,<sup>237</sup> the International Co-Investigating Judge, in Annex B to the Impugned Order, demonstrated the basis of his conclusion. More specifically, he articulated the information primarily considered and provided his conclusion that the “facts described fall outside the scope of the case file” or that “it was more likely than not to be true that the applicant suffered as a consequence of one of the crimes charged” on the basis of his examination of the facts recounted in each individual application, including the alleged crimes as well as their location and time frame.<sup>238</sup>

101. In respect of three applications that the International Co-Investigating Judge allegedly found inadmissible by merely restating the facts and without any reasoning,<sup>239</sup> the International Judges observe that the International Co-Investigating Judge omitted a conclusory finding, such as that “the facts described are outside of the scope of the Case File”. Despite this, the

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crimes listed in Article 3 new of the ECCC Law, and that any such crime or crimes may be imputable to YIM Tith.).

<sup>234</sup> Annex A to Order on Civil Parties (D384.1); Annex B to Order on Civil Parties (D384.2).

<sup>235</sup> Civil Party Appeal (D384/5), para. 48.

<sup>236</sup> Annex B to Order on Civil Parties (D384.2).

<sup>237</sup> Case 002 Decision on Civil Party Appeals (D404/2/4), para. 37; Case 002 Decision on Civil Party Appeals (D411/3/6), para. 37.

<sup>238</sup> See, e.g., *inter alia*, Annex B to Order on Civil Parties (D384.2), p. 18, at ERN (EN) 01620250, row 1 [CHEY Phean (11-VSS-00026)]. (The International Co-Investigating Judge’s consideration of CHEY Phean’s application, referring to the facts specific to his application: that the Applicant described “enslavement and [other inhumane acts] in Kampong Siem and Chamkar Leu districts, Kampong Cham Province throughout DK; [other inhumane acts]; disappearance of Applicant’s cousin in Chamkar Leu District” that form the basis of his conclusion that “the facts described fall outside of the scope of the Case File”). See also, e.g., Annex B to Order on Civil Parties (D384.2), p. 26, at ERN (EN) 01620258, row 12 [KIM Seng (11-VSS-00129)]. (The International Co-Investigating Judge’s consideration of KIM Seng’s application, referring to the facts specific to his application: that the Applicant described events in Kampong Speu Province and “[w]hile the Applicant describes being forced to carry out labour in Kampong Speu Province in 1975-76, he also claims to have been transferred to Pursat and Battambang provinces in 1975. The circumstances are thus unclear [...]” that form the basis of his conclusion: “the Applicant does not establish that it is more likely than not to be true that he suffered as a consequence of one of the crimes charged.”).

<sup>239</sup> Civil Party Appeal (D384/5), paras 48-49 and footnote 126 referring to CHHUN Samân (12-VSS-00582); NHIM Kol (12-VSS-00672); Y Moy (13-VSS-00707).



International Judges consider that the reasons behind the rejection of two of the three applications are clear from the stated facts in Annex B (under the column: “Reasons for Inadmissibility Finding”) and the scope of admissibility, as defined in the Impugned Order.

102. First, with regard to Y Moy (13-VSS-00707), the International Co-Investigating Judge describes “[i]nhumane living conditions, imprisonment and [other inhumane acts] (incl. ill-treatment) of Applicant in Kirivong District, Takeo Province in 1976”,<sup>240</sup> unrelated to one of the six charged crime sites in the Southwest Zone.<sup>241</sup> Second, with regard to NHIM Kol (12-VSS-00672), the facts described in Annex B relate to events in S-21 (Phnom Penh) and Kampong Siem District in Kampong Cham Province (Central Zone),<sup>242</sup> that are clearly outside of the territorial scope of the Case File, as described in the Impugned Order.<sup>243</sup>

103. Finally, regarding CHHUN Samân (12-VSS-00582),<sup>244</sup> the International Judges observe that the International Co-Investigating Judge described the following facts without stating why the application was rejected:

[t]he Applicant described being arrested and beaten in Sectors 23 and 24, Svay Rieng and Prey Veng Province. He also described the disappearance of his brother-in-law in 1976 from Kampong Ror District, Svay Rieng Province; *and the disappearance of his brother in 1977 after he was sent to Banteay Meanchey Province [...]*.<sup>245</sup>

While the events that occurred in Svay Rieng and Prey Veng Province are clearly outside of the territorial scope of the Case,<sup>246</sup> the disappearance and/or killing of the applicant’s brother

<sup>240</sup> Annex B to Order on Civil Parties (D384.2), p. 42, at ERN (EN) 01620274, row 3 [Y Moy].

<sup>241</sup> The International Judges have nevertheless reviewed the application and hold that the International Co-Investigating Judge did not err in finding the application inadmissible. In the VIF, the applicant stated that she was imprisoned in Wat Pratheath in 1978. However, she later clarified in a supplementary document that she was not imprisoned in Wat Pratheath (but rather in Wat Phnom Phlet) and that the events that led to her detention occurred in 1976. Accordingly, there is no nexus between the events described and the charged crimes at the six specified sites in the Southwest Zone and the application is inadmissible. *See* Civil Party Application of Y MOY, 16 September 2013, D5/1580, at ERN (EN) 01168203-01168204; Supplementary Information of Y Moy, 22 June 2016, D5/1580/3, at ERN (EN) 01337571-01337574.

<sup>242</sup> Annex B to Order on Civil Parties (D384.2), p. 6, at ERN (EN) 01620238, row 15 [NHIM Kol].

<sup>243</sup> The International Judges have nevertheless reviewed the application and hold that the International Co-Investigating Judge did not err in finding the application inadmissible because the facts described in the application are outside of the territorial scope of the Case File. *See further* evaluation under Ground 4, Annex 3 of the instant Considerations.

<sup>244</sup> The International Judges note that, while the Civil Party applicant CHHUN Samân (12-VSS-00582) is deceased, his interests continue to be represented by Counsel. *See* Case 002 Decision on Succession Request to Continue Civil Party Action, 14 June 2021, F57/1.

<sup>245</sup> Annex B to Order on Civil Parties (D384.2), p. 58, at ERN (EN) 01620290, row 2 [CHHUN Samân] (emphasis added).

<sup>246</sup> Civil Party Application of CHHUN Samân, 27 January 2012, D5/387; Case 002/2, Transcript of 28 June 2011 (CS), D5/387/4.1; Case 002/2, Transcript of 29 June 2011 (CS), D5/387/4.1.



at Phnom Yat in (now) Banteay Meanchey Province (Northwest Zone) in 1977 falls within the territorial and temporal scope of the Case File.<sup>247</sup> In respect of this application, the International Judges find that the International Co-Investigating Judge provided insufficient explanation as to why the application was rejected and erred in finding the application inadmissible. The Civil Party application of CHHUN Samân (12-VSS-00582) should have been admitted.

104. Regarding, the other rejected applications listed in Annex F to the Appeal, the International Co-Investigating Judge provided sufficient explanation with references to the details of the applications concerned.<sup>248</sup> Annex B, read in conjunction with the Impugned Order, sufficiently disclosed the material taken into account by the International Co-Investigating Judge in making his admissibility determinations and established that the individual applications were “properly and fully taken into account”.<sup>249</sup> Therefore, the International Judges find that the Impugned Order and related Annex B are sufficiently reasoned, allowing each applicant to file an appeal against the rejection of his or her application. Ground 3 is partially upheld as to Civil Party CHHUN Samân (12-VSS-00582) and dismissed for the remaining appellants.

#### **D. Ground 4: Alleged Error in Law and Fact by Rejecting Appellants for Failure to Provide Sufficient Information**

##### **1. Submissions**

105. The Co-Lawyers submit that the Co-Investigating Judges erred in law and fact by rejecting Civil Party applicants for failing to provide sufficient information.<sup>250</sup> They allege that the standard of proof and sufficiency of information as required by Internal Rules 23bis(1) and (4) and Article 3.2 of the Practice Direction were met.<sup>251</sup> In short, “[i]nformation is deemed sufficient when it allows the [Co-Investigating Judges] to be satisfied that the facts alleged are

<sup>247</sup> Supplementary Information of CHHUN Samân, 12 December 2013, D5/387/3, at ERN (EN) 01300160-01300161. *See also* evaluation under Ground 4, Annex 3 of the instant Considerations.

<sup>248</sup> Annex F to Civil Party Appeal (D384/5.2.6).

<sup>249</sup> Case 002 Decision on Civil Party Appeals (D404/2/4), para. 39; Case 002 Decision on Civil Party Appeals (D411/3/6), para. 39.

<sup>250</sup> Civil Party Appeal (D384/5), para. 50.

<sup>251</sup> Civil Party Appeal (D384/5), paras 50-51 *referring to* Case 004, Annex G(1): Admissibility Arguments for Civil Party Applicants Found Inadmissible for Insufficiency of the Evidence or Related Grounds (Foreign-National Legal Teams), Annex to Civil Party Appeal, 13 September 2019, D384/5.2.7; Case 004, Annex G(2): Admissibility Arguments for Civil Party Applicants Found Inadmissible for Insufficiency of the Evidence or Related Grounds (National Legal Team), Annex to Civil Party Appeal, 13 September 2019, D384/5.2.7.1.



more likely than not to be true.”<sup>252</sup>

106. In the Co-Lawyers’ view, the object and purpose of Internal Rule 23*bis* is not to restrict or limit the concept of Civil Party action at the ECCC<sup>253</sup> and this Rule must be read in conjunction with Internal Rule 21, which sets out the fundamental duty to safeguard the interests of the victims.<sup>254</sup> The Co-Investigating Judges “must determine whether there are *prima facie* credible grounds indicating that the applicant suffered harm related to the facts under investigation on the basis of the elements in the case file”<sup>255</sup> and, while doing so, take into consideration the gravity of the crimes addressed at the ECCC in light of “the special circumstances of the conflict.”<sup>256</sup> The Co-Lawyers refer to the International Co-Investigating Judge’s acknowledgment that certain factors mitigate the required proof of harm for Civil Party applicants (such as the passage of time).<sup>257</sup>

107. The Co-Lawyers further submit that the Co-Investigating Judges violated Internal Rule 21(1)(c) by failing to keep victims informed throughout the proceedings.<sup>258</sup> They assert that proper and timely access to information is particularly key for victims seeking to become Civil Parties, as they do not have access to the Case File and rely on information released by the Co-Investigating Judges.<sup>259</sup> The Co-Investigating Judges failed to keep victims informed because they only disclosed the relevant crime sites to the victims three years after the filing of the Third Introductory Submission on 20 November 2008, and did not specify the crime sites related to YIM Tith until 9 December 2015.<sup>260</sup> Moreover, in their first disclosure on the Case 004 crime sites, the Co-Investigating Judges sowed confusion and undercut victims’ faith in the outcome of the investigation by noting “their ‘serious doubts’ about whether Case 004 would go forward”.<sup>261</sup> In the Co-Lawyers’ submission, the Chamber should take this breach of

<sup>252</sup> Civil Party Appeal (D384/5), para. 51 *referring to* Case 002 Decision on Civil Party Appeals (D404/2/4), para. 94.

<sup>253</sup> Civil Party Appeal (D384/5), para. 52 *referring to* Case 002 Decision on Civil Party Appeals (D404/2/4), para. 62.

<sup>254</sup> Civil Party Appeal (D384/5), para. 52 *referring to* Case 002 Decision on Civil Party Appeals (D404/2/4), para. 61.

<sup>255</sup> Civil Party Appeal (D384/5), para. 53.

<sup>256</sup> Civil Party Appeal (D384/5), para. 53 *quoting* Case 002 Decision on Civil Party Appeals (D404/2/4), para. 70.

<sup>257</sup> Civil Party Appeal (D384/5), para. 54 *referring to* Order on Civil Parties (International) (D384), para. 41.

<sup>258</sup> Civil Party Appeal (D384/5), para. 55 *referring to* Internal Rule 21(1)(c); Case 002 Decision on Civil Party Appeals (D404/2/4), para. 52.

<sup>259</sup> Civil Party Appeal (D384/5), para. 55.

<sup>260</sup> Civil Party Appeal (D384/5), para. 55.

<sup>261</sup> Civil Party Appeal (D384/5), para. 55 *quoting* ECCC Press Release, “Press Release by the Co-Investigating Judges Regarding Civil Parties in Case 004 (004/07-09-2009-ECCC/OCIJ)”, 8 August 2011, available at: <https://www.eccc.gov.kh/en/document/public-affair/press-release-co-investigating-judges-regarding-civil-parties-case-004>.



victims' rights into consideration since the Co-Investigating Judges' failure to disclose information in a timely manner hindered the Civil Parties' ability to conduct timely investigations, properly analyse relevant evidence and provide details concerning relevant harm.<sup>262</sup> This serves "as an additional factor mitigating the required proof of harm."<sup>263</sup>

108. In light of the above, the Co-Lawyers request the Pre-Trial Chamber to overturn the International Co-Investigating Judge's findings of inadmissibility for victims rejected under grounds related to the sufficiency and quality of information<sup>264</sup> and, consequently, grant these victims Civil Party status.<sup>265</sup>

## 2. Discussion

109. Pursuant to Internal Rule 23bis(4), all Civil Party applications must contain sufficient information to allow verification of their compliance with the Internal Rules.<sup>266</sup> In particular, "the application must provide details of the status as a Victim, specify the alleged crime and attach any evidence of the injury suffered, or tending to show the guilt of the alleged perpetrator."<sup>267</sup> Considering that the object and purpose of these rules is not to "restrict or limit the notion of victim or civil party action in the ECCC" but to set baseline criteria for admissibility,<sup>268</sup> the Pre-Trial Chamber has endorsed a "flexible approach" in relation to the requirement for all applicants to clearly prove their identity.<sup>269</sup>

110. In accordance with Internal Rule 23bis(1), when considering the admissibility of Civil Party applications, "the Co-Investigating Judges shall be satisfied that facts alleged in support of the application are more likely than not to be true."<sup>270</sup> The International Judges observe that, in the Impugned Order, the International Co-Investigating Judge found certain circumstantial

<sup>262</sup> Civil Party Appeal (D384/5), para. 55.

<sup>263</sup> Civil Party Appeal (D384/5), para. 55.

<sup>264</sup> Civil Party Appeal (D384/5), para. 56 and footnotes 139-141.

<sup>265</sup> Civil Party Appeal (D384/5), para. 57 (This concerns victims identified by the Co-Lawyers in Annexes G(1) and G(2) of their Appeal).

<sup>266</sup> Internal Rule 23bis(4). *See also Practice Direction on Victim Participation*, 02/2007/Rev.1, as amended 27 October 2008 ("Practice Direction on Victim Participation"), Articles 3.2, 3.5, 3.6.

<sup>267</sup> Internal Rule 23bis(4).

<sup>268</sup> Case 002 Decision on Civil Party Appeals (D404/2/4), para. 62; Case 002 Decision on Civil Party Appeals (D411/3/6), para. 62.

<sup>269</sup> Case 002 Decision on Civil Party Appeals (D404/2/4), para. 95; Case 002 Decision on Civil Party Appeals (D411/3/6), para. 95. *See also* Case 004/2 Considerations on Civil Party Appeal (D362/6), Opinion of Judges BAIK and BEAUVALLET, para. 94; Case 003 Considerations on Civil Party Appeal (D269/4), Opinion of Judges BEAUVALLET and BAIK, para. 105.

<sup>270</sup> Internal Rule 23bis(1). *See also* Case 002 Decision on Civil Party Appeals (D404/2/4), para. 94; Case 002 Decision on Civil Party Appeals (D411/3/6), para. 94.



factors mitigated the required degree of proof of harm,<sup>271</sup> including: (a) the passage of time; (b) the capacity to identify and record psychological health impact; and (c) the capacity to provide proof of ownership and of income due to forced movement of the population.<sup>272</sup> The International Judges consider that this flexible approach to documentary evidence and proving identity is appropriate considering the particular cultural and social background of Cambodia and the practical extent of available evidence in the wake of the mass atrocities alleged in this Case.<sup>273</sup>

111. The International Judges note that the Co-Lawyers request the Pre-Trial Chamber to take the alleged breach of Internal Rule 21(1)(c) “into consideration” when reviewing the rejected Civil Party applications.<sup>274</sup> As the International Judges have previously held, “in performing their obligations to properly and timely keep victims informed, the Co-Investigating Judges must exercise due diligence in safeguarding the interests and rights of victims, *throughout* the entirety of the investigative phase.”<sup>275</sup> Here, in respect of the period between 7 September 2009 (the forwarding of the Third Introductory Submission to the Office of the Co-Investigating Judges)<sup>276</sup> to the issuance of the August 2011 Press Release, the International Judges find that the Co-Investigating Judges failed to timely disclose information about the investigation against YIM Tith to victims, in violation of Internal Rule 21(1)(c).<sup>277</sup> The International Judges further note that it would not be until 9 December 2015 that the crime sites related to YIM Tith would be disclosed publicly.<sup>278</sup>

112. The reason given by the Co-Investigating Judges to delay disclosure—until 8 August

<sup>271</sup> Order on Civil Parties (International) (D384), para. 42.

<sup>272</sup> Order on Civil Parties (International) (D384), para. 41.

<sup>273</sup> Case 004/2 Considerations on Civil Party Appeal (D362/6), Opinion of Judges BAIK and BEAUVALLET, para. 95; Case 003 Considerations on Civil Party Appeal (D269/4), Opinion of Judges BEAUVALLET and BAIK, para. 106. *See also* Case 002 Decision on Civil Party Appeals (D404/2/4), paras 83, 95; Case 002 Decision on Civil Party Appeals (D411/3/6), paras 83, 95.

<sup>274</sup> *See* Civil Party Appeal (D384/5), para. 55.

<sup>275</sup> Case 004/2 Considerations on Civil Party Appeal (D362/6), Opinion of Judges BAIK and BEAUVALLET, para. 102. *See also* Case 002 Decision on Civil Party Appeals (D404/2/4), paras 51-52; Case 002 Decision on Civil Party Appeals (D411/3/6), paras 51-52; Considerations on Appeal of SENG Chan Theary (D5/1/4/2), Opinion of Judges DOWNING and LAHUIS, para. 6.

<sup>276</sup> While it is true that the Third Introductory Submission was dated on 20 November 2008, the International Judges recall that this submission was subject to a disagreement between the two Co-Prosecutors. It was not until 7 September 2009, after the Pre-Trial Chamber had issued its considerations on this disagreement, that the Third Introductory Submission was forwarded to the Office of the Co-Investigating Judges to open a judicial investigation against YIM Tith. Thus, the International Judges will take this as the proper starting point to assess the Co-Investigating Judges’ compliance with their duties under Internal Rule 21(1)(c).

<sup>277</sup> *See* Case 004/2 Considerations on Civil Party Appeal (D362/6), Opinion of Judges BAIK and BEAUVALLET, para. 105.

<sup>278</sup> *See* ECCC Press Release, “Statement of the International Co-Investigating Judge regarding Case 004”, 9 December 2015, available at: <https://www.eccc.gov.kh/en/node/35023>.



2011—of the crime sites and criminal episodes under investigation was due to their “doubts” about the jurisdictional reach of the Court.<sup>279</sup> As in Case 004/2,<sup>280</sup> the International Judges do not consider that this constitutes a valid reason to leave victims in the dark about the matters under investigation in light of the Co-Investigating Judges’ mandatory duty to keep victims informed under Internal Rule 21(1)(c). In the two-year period between the opening of the judicial investigation concerning YIM Tith and the August 2011 Press Release, it was incumbent on the Co-Investigating Judges to disclose information so that interested victims may begin to adequately prepare Civil Party applications.<sup>281</sup>

113. Notwithstanding this violation, in evaluating the relief due, the International Judges observe that any prejudice to victims from the delayed provision of information would appear to be minimal in the circumstances.<sup>282</sup> In particular, many years transpired after relevant information about the investigation came into the public domain<sup>283</sup> until the deadline for submitting Civil Party applications, as discussed below.

114. In this regard, under Internal Rule 23*bis*(2), “[a] Victim who wishes to be joined as a Civil Party shall submit such application in writing no later than fifteen (15) days after the Co-Investigating Judges notify the parties of the conclusion of the judicial investigation pursuant to I[n]ternal R[ule] 66(1).” The Co-Investigating Judges notified the closure of the investigation against YIM Tith twice, on 13 June 2017 and 5 September 2017, respectively.<sup>284</sup> The International Judges recall the Chamber’s previous finding that the Co-Investigating Judges committed a procedural error in failing to grant the parties 15 days from the date of the Second Notice of Conclusion to request further investigative actions.<sup>285</sup> The International Judges consider that this holding applies equally to Civil Parties and, consequently, victims

<sup>279</sup> ECCC Press Release, “Press Release by the Co-Investigating Judges Regarding Civil Parties in Case 004 (004/07-09-2009-ECCC/OCIJ)”, 8 August 2011, available at: <https://www.eccc.gov.kh/en/document/public-affair/press-release-co-investigating-judges-regarding-civil-parties-case-004>.

<sup>280</sup> Case 004/2 Considerations on Civil Party Appeal (D362/6), Opinion of Judges BAIK and BEAUVALLET, para. 107.

<sup>281</sup> Case 004/2 Considerations on Civil Party Appeal (D362/6), Opinion of Judges BAIK and BEAUVALLET, para. 107. *See also* Considerations on Appeal of Robert HAMILL (D5/2/4/3), Opinion of Judges DOWNING and LAHUIS, para. 6.

<sup>282</sup> *See* Case 004/2 Considerations on Civil Party Appeal (D362/6), Opinion of Judges BAIK and BEAUVALLET, para. 109.

<sup>283</sup> *See* ECCC Press Release, “Press Release by the Co-Investigating Judges Regarding Civil Parties in Case 004 (004/07-09-2009-ECCC/OCIJ)”, 8 August 2011, available at: <https://www.eccc.gov.kh/en/document/public-affair/press-release-co-investigating-judges-regarding-civil-parties-case-004>.

<sup>284</sup> First Rule 66(1) Notification (D358); Second Rule 66(1) Notification (D368).

<sup>285</sup> *See* Case 004/2 Considerations on Appeals against Closing Orders (D359/24 & D360/33), para. 65; Case 003 (PTC35), Considerations on Appeals against Closing Orders, 7 April 2021, D266/27 & D267/35, Opinion of Judges BEAUVALLET and BAIK, para. 142.



had the right to apply as Civil Parties 15 days from the Second Notice of Conclusion.<sup>286</sup>

115. In sum, although the International Judges find that the Co-Investigating Judges breached their obligations to timely keep victims informed, the prejudice which can be said to result therefrom would appear to be minimal.<sup>287</sup> The multi-year period of time that transpired for victims to prepare Civil Party applications would appear to mitigate, if not eliminate as a practical matter,<sup>288</sup> any prejudice that may have been caused by the Co-Investigating Judges' delay in disclosing investigative information.

116. The Co-Lawyers have not given specific examples of Civil Party applicants (or potential applicants) who were prejudiced by the Co-Investigating Judges' untimely disclosure of information about the investigation against YIM Tith. No specific instance has been brought to the attention of the Pre-Trial Chamber where, for example, the alleged delay caused an interested applicant to uncover information relevant to their application too late for submission, or that an eligible victim would have submitted an application if the Co-Investigating Judges had published the information in a timely manner. In these circumstances, the International Judges consider that the Co-Lawyers' arguments are speculative.<sup>289</sup>

117. To the extent the Co-Lawyers argue that the Pre-Trial Chamber should ignore, or materially loosen, the procedural requirements and law applicable to considering Civil Party admissibility, the International Judges reject this submission.<sup>290</sup> The International Judges likewise note the Co-Lawyers' third request for relief, requesting the Chamber to "[a]dmit any

<sup>286</sup> Case 004/2 Considerations on Civil Party Appeal (D362/6), Opinion of Judges BAIK and BEAUVALLET, para. 110; Second Rule 66(1) Notification (D368). Thus, the deadline for Civil Party applications in this proceeding was 20 September 2017.

<sup>287</sup> Case 004/2 Considerations on Civil Party Appeal (D362/6), Opinion of Judges BAIK and BEAUVALLET, para. 111.

<sup>288</sup> From the August 2011 Press Release onwards, eligible victims knew about almost all of the crime sites and criminal episodes under investigation in the Northwest Zone and had over six years to prepare and supplement their Civil Party applications. In respect of forced marriage and rape allegations, the International Co-Prosecutor's statement about the allegations in question, as well as the public statement released by the International Co-Investigating Judge accompanying his charging of YIM Tith, would go towards minimizing the prejudice occasioned on a practical level. See ECCC Press Release, "Statement by the International Co-Prosecutor Nicholas KOUMJIAN Regarding Case File 004", 24 April 2014, available at: <https://www.eccc.gov.kh/en/node/30196>; ECCC Press Release, "Statement of the International Co-Investigating Judge regarding Case 004", 9 December 2015, available at: <https://www.eccc.gov.kh/en/node/35023>. Moreover, the December 2015 public statement, detailing the crimes sites in the Southwest and Northwest Zones, was released almost two years before the applicable deadline for Civil Party applications in Case 004.

<sup>289</sup> See Case 004/2 Considerations on Civil Party Appeal (D362/6), Opinion of Judges BAIK and BEAUVALLET, para. 112.

<sup>290</sup> See Case 004/2 Considerations on Civil Party Appeal (D362/6), Opinion of Judges BAIK and BEAUVALLET, para. 113.





supplementary information submitted by Civil Party Co-Lawyers”.<sup>291</sup> In view of the violation found above, the International Judges would have been prepared to consider supplementary information submitted by Civil Party applicants to support their application that was discovered late as a direct result of the Co-Investigating Judges’ failure to keep the victims timely informed. However, the Co-Lawyers have not identified any such supplementary information and the International Judges similarly have not found such material during the review of Civil Party applications.<sup>292</sup>

118. The International Judges have duly reviewed the Co-Lawyers’ arguments submitted in the Appeal’s Annexes G(1) and G(2) for overturning the International Co-Investigating Judge’s findings of inadmissibility. To this end, the International Judges have carefully examined the information provided by Civil Party applicants<sup>293</sup> to assess if the International Co-Investigating Judge erred in his assessment of whether it is “more likely than not to be true” that the applicant suffered harm from crimes committed within the temporal or territorial scope of the Case File: namely, at least one of the crimes charged against YIM Tith committed (a) in the Northwest Zone from early 1977 to 6 January 1979; (b) as part of the nation-wide common plan to eliminate the Khmer Krom, from 1976 to 6 January 1979; (c) at Wat Pratheath Security Centre from September 1975 to 6 January 1979; and (d) at Wat Pratheath Security Centre, Kraing Ta Chan Security Centre, Preil Village Execution Site, Wat Angkun Execution Site, Slaeng Village Forest Execution Site, or Prey Sokhon and Wat Ang Serei Muny Execution Site.<sup>294</sup> Appended as Annex 3, contains the International Judges’ considerations in respect of each of these submissions. Upon reviewing the applications within Annex 3, the International Judges find that the International Co-Investigating Judge erred in his decision on admissibility of four Civil Party applicants and consider that the following Civil Party applications should have been admitted as reasoned in Annex 3: TUON Pronh (11-VSS-00337); CHHUN Samân (12-VSS-00582); CHEN Savey (13-VSS-00073); and SDEUNG Mach (13-VSS-00429).

<sup>291</sup> See Civil Party Appeal (D384/5), para. 65(3).

<sup>292</sup> In these Considerations, the International Judges assessed supplemental information provided in the Appeal after the issuance of the Impugned Order, including the corrected date of birth of CHEN Savey (13-VSS-00073). While this was not submitted in alleged connection to the International Co-Investigating Judge’s untimely disclosure of the investigation into YIM Tith, the International Judges considered the material and concluded that this Civil Party application should have been admitted. See appended Annexes 1-3.

<sup>293</sup> In examining the Civil Party applications, the International Judges reviewed VIFs and any attachments and, where available, supplementary information, summary reports, written records of interview and transcripts of in-court testimony given by the applicant before the ECCC.

<sup>294</sup> Internal Rule 23bis; Order on Civil Parties (International) (D384), paras 37-38.



**E. Ground 5: Alleged Error in that the Severance of Cases 004/2 and 004/1 from Case 004 Limited Civil Party Admissibility**

**1. Submissions**

119. The Co-Lawyers submit that the International Co-Investigating Judge “misconstrued” the Cases 004/2 and 004/1 Severance Orders<sup>295</sup> (collectively, “the Severance Orders”), as limiting his consideration of alleged crimes in the broader Case 004 pre-severance file, thereby causing prejudice.<sup>296</sup>

120. The Co-Lawyers assert that while the Co-Investigating Judges articulated in the Severance Orders that severance would not prejudice any rights<sup>297</sup> and that it was in the interest of all parties,<sup>298</sup> the Impugned Order greatly reduced the temporal and geographic scope of Civil Party admissibility originally covered by the alleged crimes in Case 004. This effectively barred many otherwise qualified Civil Party applicants from participating, confining examination solely to applicants who suffered harm in the Northwest Zone from early 1977 until at least 6 January 1979 and/or in connection with the nationwide policy to eliminate the Khmer Krom, crimes at Wat Pratheat Security Centre and the six crime sites in the Southwest Zone.<sup>299</sup>

121. The Co-Lawyers submit that the International Co-Investigating Judge’s interpretation of the impact of the Severance Orders on the scope of alleged crimes “runs counter to the rights of victims”.<sup>300</sup> The Pre-Trial Chamber has made clear that the Internal Rules shall always be interpreted so as to safeguard the interests and rights of the victims and that meaningful participation of victims must be assured in light of the ECCC’s objective of national reconciliation.<sup>301</sup> The Impugned Order does the opposite by severely limiting the scope of Civil Party admissibility in Case 004.<sup>302</sup>

<sup>295</sup> Case 004, Order for Severance of AO An from Case 004, 16 December 2016, D334/1 (“Order for Severance for AO An (D334/1)”); Case 004, Order for Severance of IM Chaem from Case 004, 05 February 2016, D286/7 (“Order for Severance of IM Chaem (D286/7)”).

<sup>296</sup> Civil Party Appeal (D384/5), para. 58.

<sup>297</sup> Order for Severance for AO An (D334/1), para. 4.

<sup>298</sup> Order for Severance of IM Chaem (D286/7), para. 4.

<sup>299</sup> Civil Party Appeal (D384/5), para. 59 *citing* Order on Civil Parties (International) (D384), para. 37.

<sup>300</sup> Civil Party Appeal (D384/5), para. 60.

<sup>301</sup> Civil Party Appeal (D384/5), para. 60 *citing* Case 002 Decision on Civil Party Appeals (D404/2/4), para. 61.

<sup>302</sup> Civil Party Appeal (D384/5), para. 60.



122. Moreover, the Co-Investigating Judges erred by failing to consult the Civil Parties before issuing the Severance Orders, despite Internal Rule 66*bis*(2), which requires that parties be granted an opportunity to make submissions.<sup>303</sup> The Co-Investigating Judges further failed to provide a reasoned decision on the impact of the Severance Orders on Civil Parties nor any information regarding the Co-Investigating Judges' position on the scopes of Cases 004, 004/1 and 004/2, elements required by Internal Rule 66*bis*(3).<sup>304</sup> Further, the Severance Orders caused procedural inequities among Civil Party applicants: while VSS continued to log all Civil Party applicants as Case 004 without distinguishing for severance,<sup>305</sup> the Severance Orders triggered different deadlines for Civil Party participation in three distinct Case 004 proceedings.<sup>306</sup>

123. The Co-Lawyers contend that the Impugned Order's "*en masse* rejection" of applicants who, but for the Severance Orders, would have qualified as Civil Parties in Case 004 contradicts the pronouncement that severance would cause no prejudice to the rights or interest of the parties.<sup>307</sup> Instead, the Severance Orders "became determinative of Civil Party admissibility for large swaths of applicants".<sup>308</sup> The International Co-Investigating Judge erred by disregarding the broader allegations in the original Case 004, including crimes in the Central, Northwest and Southwest Zones, and erroneously examined only allegations within the newly restricted Case 004.<sup>309</sup> This routine procedural severance, intended to expedite the case matters, should not deprive victims of their right to meaningfully participate in proceedings addressing crimes and policies under which they suffered tremendous harm.<sup>310</sup>

124. Therefore, the Co-Lawyers request that the Pre-Trial Chamber find that the International Co-Investigating Judge's interpretation of the Severance Orders impermissibly prejudiced the rights of the Appellants and overturn the Impugned Order for the Appellants listed in the Appeal's Annexes B, C and E, who suffered an injury as a direct consequence of an alleged crime otherwise within the scope of Case 004 pre-severance.<sup>311</sup>

<sup>303</sup> Civil Party Appeal (D384/5), para. 61.

<sup>304</sup> Civil Party Appeal (D384/5), para. 61.

<sup>305</sup> Civil Party Appeal (D384/5), para. 61.

<sup>306</sup> Civil Party Appeal (D384/5), para. 61 and footnote 150.

<sup>307</sup> Civil Party Appeal (D384/5), para. 62.

<sup>308</sup> Civil Party Appeal (D384/5), para. 62.

<sup>309</sup> Civil Party Appeal (D384/5), para. 62.

<sup>310</sup> Civil Party Appeal (D384/5), para. 62.

<sup>311</sup> Civil Party Appeal (D384/5), para. 63.



## 2. Discussion

125. The International Co-Investigating Judge did not misconstrue the Severance Orders nor improperly limit consideration of alleged crimes in the broader Case 004 pre-severance file, depriving victims of the right to meaningfully participate.

126. First, the International Judges note that the International Co-Investigating Judge made no reference to the Severance Orders in the Impugned Order.<sup>312</sup> The guiding legal principles he applied in determining the admissibility of Civil Party applications were Internal Rule 23bis(1) and Article 3.2 of the Practice Direction on Victim Participation.<sup>313</sup> Accordingly, the Civil Party applicants demonstrating a causal link to the crimes alleged against YIM Tith were admitted in Case 004 under Internal Rule 23bis(1)(b).<sup>314</sup> Indeed, the severances of Case 004/2 and Case 004/1 have no bearing on this determination and the International Co-Investigating Judge did not take into consideration nor “interpret” the Severance Orders when he assessed the admissibility of Civil Party applications.

127. Moreover, the International Judges recall that the Severance Orders only “duplicated and collected” the same factual allegations from Case 004 to form the new Case 004/2 or Case 004/1, leaving all the original criminal allegations in Case 004.<sup>315</sup> While the Severance Orders severed all criminal allegations brought against IM Chaem and AO An, the identical factual allegations are “remaining in the original case” and the Civil Party applicants retain their status in Case 004.<sup>316</sup> The limitation on the Civil Party admissibility was due to the requirement of a

<sup>312</sup> Order on Civil Parties (International) (D384), paras 12-16.

<sup>313</sup> Practice Direction on Victim Participation, Art. 3.2.

<sup>314</sup> See *supra* Legal Principles of Civil Party Admissibility (discussing the admissibility of Civil Party applicants including, *inter alia*, the causal link required between the injury suffered by the Civil Party applicant and the crime alleged under Internal Rule 23bis).

<sup>315</sup> See Case 004/1, Considerations on the International Co-Prosecutor’s Appeal of Closing Order (Reasons), 28 June 2018, D308/3/1/20 (“Case 004/1 Considerations on Appeal of Closing Order (Reasons) (D308/3/1/20)”), paras 38-40 (where the Pre-Trial Chamber previously held, concerning the severance of Case 004/1 (IM Chaem) from the wider Case 004, that “the Co-Investigating Judges implicitly severed all criminal allegations brought against IM Chaem, but did not sever the person, in order to establish Case 004/1.” Further, the Chamber explicitly found that all criminal allegations against IM Chaem “have been duplicated and collected in Case 004/1, with no allegations against her remaining in Case 004.” Importantly, “*all criminal allegations in the Introductory and Supplementary Submissions, including those duplicated in Case 004/1 against IM Chaem, also remain in Case 004, against other known or unknown persons*” (emphasis added)); see also Order for Severance for AO An (D334/1); Order for Severance of IM Chaem (D286/7); Case 004/2 Considerations on Civil Party Appeal (D362/6), Opinion of Judges BAIK and BEAUVALLET, para. 74.

<sup>316</sup> Case 004/1, Considerations on Appeal of Closing Order (Reasons) (D308/3/1/20), para. 38.



causal link under Internal Rule 23*bis*(1)(b), as applied by the International Co-Investigating Judge. The Co-Lawyers' argument regarding the Severance Orders is inapposite.

128. Second, turning to the Co-Lawyers' contention that the International Co-Investigating Judge violated Internal Rule 66*bis* by failing to consult the Civil Parties "in advance of the Severance Orders" or that the Severance Orders did not "include any reasoned decision" on the potential impact on the Civil Parties,<sup>317</sup> these arguments must fail as this provision is irrelevant. The Internal Rule 66*bis*(1)(2) and (3)<sup>318</sup> state in pertinent part as follows:

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

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

130. Third, as to the alleged administrative inequities occasioned by the Severance Orders, the International Judges find that the arguments, concerning VSS's continued logging of Case 004 applicants without distinguishing for severance or the differing deadlines for Civil Party applications in three distinct cases,<sup>319</sup> fail to demonstrate any discernible error in the Impugned Order.

<sup>317</sup> Civil Party Appeal (D384/5), para. 61.

<sup>318</sup> Civil Party Appeal (D384/5), para. 61, footnotes 148 and 149.

<sup>319</sup> Civil Party Appeal (D384/5), para. 61 and footnote 150.



131. Fourth, concerning the assertion that the Severance Orders “became determinative” of Civil Party admissibility for large swaths of applicants and that the International Co-Investigating Judge disregarded broader allegations in the original Case, including crimes in Central, Northwest and Southwest Zones,<sup>320</sup> the International Judges find this allegation to be baseless and that the Severance Orders occasioned no prejudicial reduction nor exclusion, as rejected for the reasons above. Moreover, the International Co-Investigating Judge did not err in confining the scope of admissibility to, *inter alia*, injury which is the direct consequence of at least one of the crimes charged against YIM Tith, as enshrined within Internal Rule 23*bis*.<sup>321</sup>

132. In light of the foregoing findings, the International Judges conclude that the Co-Lawyers’ submission of Annexes B, C, and E<sup>322</sup> herein merits no consideration and, accordingly, dismiss Ground 5.<sup>323</sup>

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<sup>320</sup> Civil Party Appeal (D384/5), para. 62.

<sup>321</sup> See Internal Rule 23*bis*; see also *supra* Legal Principles of Civil Party Admissibility.

<sup>322</sup> Civil Party Appeal (D384/5), para. 63.

<sup>323</sup> The International Judges remark that Annex E, which the Co-Lawyers likewise submitted under Ground 2 in the Civil Party Appeal (D384/5), is considered there as those listed Civil Party applications fell within the territorial scope of this Case (*see supra* Ground 2 and accompanying Annex 2).



## CONCLUSION

133. The National Co-Investigating Judge's Order on Civil Parties (National)<sup>324</sup> does not preclude the future participation of Civil Parties who have been found admissible from future proceedings against YIM Tith. In rejecting all Civil Party applications in Case 004, the National Co-Investigating Judge gave as his sole and exclusive reason the dismissal of all charges against YIM Tith.<sup>325</sup> The International Judges recall, however, that the National Co-Investigating Judge's Dismissal is *ultra vires*, void and without legal effect,<sup>326</sup> and further that the Indictment stands and should be forwarded to the Trial Chamber by virtue of Internal Rule 77(13)(b).<sup>327</sup>

134. The validity of the Order on Civil Parties (National), which is expressly founded on the reasoning of the Dismissal, is inherently and inextricably tied to the legal validity of the Dismissal itself. Given that the National Co-Investigating Judge's issuance of his Dismissal has no legal basis in the ECCC's fundamental framework and is void *ab initio*,<sup>328</sup> the International Judges find that the Order on Civil Parties (National) is also void and cannot be ascribed legal effect. Accordingly, the Order on Civil Parties (International) endures as the remaining operative Order on the Admissibility of Civil Parties in Case 004.

135. Turning to the Civil Parties' Requests in the conclusion of their Appeal,<sup>329</sup> the International Judges recall that "[u]nless and until rejected, Civil Party applicants may exercise Civil Party rights"<sup>330</sup> and consider that these interrelated Requests have been addressed within the reasoning and the findings of these Considerations.

136. Therefore, for the foregoing reasons, the International Judges of the Pre-Trial Chamber hereby decide that the Civil Party Appeal is admissible and dismiss Grounds 1(1), 1(2) and 5. The International Judges uphold in part and dismiss in part Grounds 1(3), 2, 3 and 4. The International Judges find that the International Co-Investigating Judge erred in his decision on

<sup>324</sup> Order on Civil Parties (National) (D383).

<sup>325</sup> Order on Civil Parties (National) (D383), para. 12 ("Today, we dismissed all charges in Case 004 against YIM Tith because YIM Tith, the only Charged Person in this case, does not fall under the ECCC's jurisdiction.").

<sup>326</sup> Case 004 Considerations on Closing Orders Appeals (D381/45 & D382/43), Opinion of Judges BAIK and BEAUVALLET, paras 175-176.

<sup>327</sup> Case 004 Considerations on Closing Orders Appeals (D381/45 & D382/43), Opinion of Judges BAIK and BEAUVALLET, paras 175-176, 522-533.

<sup>328</sup> Case 004 Considerations on Closing Orders Appeals (D381/45 & D382/43), Opinion of Judges BAIK and BEAUVALLET, paras 175-176, p. 225.

<sup>329</sup> Civil Party Appeal (D384/5), para. 65.

<sup>330</sup> Internal Rule 23bis(2).



admissibility under (i) Ground 1(3) because ten Civil Party applications and related documents should have been admitted (as reasoned in Annex 1);<sup>331</sup> (ii) Ground 2 because four Civil Party applications and related documents should have been admitted (as reasoned in Annex 2);<sup>332</sup> (iii) Ground 3 because one Civil Party application and related documents should have been admitted;<sup>333</sup> and (iv) Ground 4 because four Civil Party applications and related documents should have been admitted (as reasoned in Annex 3).<sup>334</sup> The following fourteen Civil Party applicants should have been admitted as Civil Parties to Case 004: CHAN Yun (11-VSS-00081); CHEN Savey (13-VSS-00073); HANG Sokhady (13-VSS-00645); KHUTH Touch (17-VSS-00016); MEN Samoeurn (13-VSS-00680); NUON Saman (15-VSS-00141); PRAK Sinan (13-VSS-00374); SO Saroeun (15-VSS-00073); TUON Pronh (11-VSS-00337); ORM Chhailang (13-VSS-00358); CHROUK Phors (13-VSS-00335); KHUT Khonh (13-VSS-00085); CHHUN Samân (12-VSS-00582); and SDEUNG Mach (13-VSS-00429).<sup>335</sup>

#### **Internal Rule 77(13)(a)**

137. Internal Rule 77(13)(a) provides that where the required majority is not attained, the default decision of the Chamber, as regards an appeal against an order, shall be that such order shall stand. Consequently, the International Judges hereby find that the International Co-Investigating Judge's Order on Admissibility of Civil Party Applications stands.<sup>336</sup> Accordingly, the International Judges hold that all Civil Parties who have been found admissible by the International Co-Investigating Judge have the right to participate in future proceedings against YIM Tith.<sup>337</sup>

<sup>331</sup> See Ground 1(3) *supra*, with regard to Civil Party applicants CHAN Yun (11-VSS-00081); CHEN Savey (13-VSS-00073); HANG Sokhady (13-VSS-00645); KHUTH Touch (17-VSS-00016); MEN Samoeurn (13-VSS-00680); NUON Saman (15-VSS-00141); PRAK Sinan (13-VSS-00374); SO Saroeun (15-VSS-00073); TUON Pronh (11-VSS-00337); and ORM Chhailang (13-VSS-00358).

<sup>332</sup> See Ground 2 *supra*, with regard to Civil Party applicants CHEN Savey (13-VSS-00073); CHROUK Phors (13-VSS-00335); KHUT Khonh (13-VSS-00085); and ORM Chhailang (13-VSS-00358).

<sup>333</sup> See Ground 3 *supra*, with regard to Civil Party applicant CHHUN Samân (12-VSS-00582).

<sup>334</sup> See Ground 4 *supra*, with regard to Civil Party applicants TUON Pronh (11-VSS-00337); CHHUN Samân (12-VSS-00582); CHEN Savey (13-VSS-00073); and SDEUNG Mach (13-VSS-00429).

<sup>335</sup> The International Judges recall that four Civil Party applicants (13-VSS-00073; 11-VSS-00337; 12-VSS-00582; and 13-VSS-00358) who should have been admitted by the International Co-Investigating Judge were submitted under multiple Grounds of the Appeal and approved respectively under each Ground.


<sup>336</sup> Order on Civil Parties (International) (D384).

<sup>337</sup> Order on Civil Parties (International) (D384).





**Phnom Penh, 29 September 2021**

A blue ink signature consisting of a large, stylized loop followed by a horizontal line.

**Judge Olivier BEAUVALLET**

A blue ink signature in a cursive style, appearing to read 'Kang Jin Baik'.

**Judge Kang Jin BAIK**

