

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

Case No.: 003/07-09-2009-ECCC-OCI7 (PTC 01)

Party Filing: Civil Party Applicant SENG Chan Theory

Filed to: Pre-Trial Chamber

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Appeal Against Order on the Admissibility of Civil Party Application of SENG Chan Theory

Filed by:

Civil Party Applicant

SENG Chan Theory

Applicant's National Lawyer

CHOUNG Chou-Ngy

(pending his official recognition by the ECCC)

Filed to:

Pre-Trial Chamber

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I. INTRODUCTION AND PETITION

1. On 3 April 2011, I, SENG Chan Theory (hereinafter “Appellant”), submitted a public application entitled “*Civil Party Application to Case No. 003/004*” naming [REDACTED] [REDACTED] (“Application”) with the Victims Support Section (“VSS”) of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”), which was filed with the Co-Investigating Judges (“CIJs”) 19 days later on 22 April, as verbally confirmed to her that same evening by the (recently deceased) then-ECCC Public Affairs chief Reach Sambath when they were guests on a Radio Free Asia call-in show. To this day, Appellant never received a formal documentary receipt of her [REDACTED] Application.
2. On late Friday afternoon, 29 April 2011, the CIJs publicly announced the closing of investigation of Case 003 in one sentence.
3. On late Tuesday, 3 May 2011, following a long holiday weekend, Appellant’s national lawyer Mr. CHOUNG Chou-Ngy¹ signed for the receipt of two separate documents (dated the same day as the closing of investigation announcement) with the decisions of the CIJs entitled “Order on the Admissibility of the Civil Party Application of SENG Chan Theory” rejecting Appellant’s [REDACTED] Application to become a civil party in both cases 003 and 004 (“Rejection Orders”), both documents identical in content except for the case file numbering and both classified “Confidential”, even though the names of the five charged persons and scope of investigations are not mentioned.
4. On 5 May 2011, Appellant sent out a press release stating her intention to appeal these Rejection Orders and, in light of new information, to lodge another application against [REDACTED] [REDACTED] and [REDACTED] in Case 004.

¹ Member of the Bar Association of the Kingdom of Cambodia but the ECCC has yet to respond to Appellant’s Power of Attorney to Mr. CHOUNG Chou-Ngy, dated 28 March 2011, lodged with the Civil Party Application on 3 April 2011. If in this situation and in light of Internal Rule 23ter (1), Appellant is an Unrepresented Civil Party Applicant, pending ECCC’s recognition of Mr. Chou-Ngy, she then relies on the principle enshrined in the Pre-Trial Chamber’s decision of 29 August 2008 entitled “Directions on Unrepresented Civil Parties’ Right to Address the Pre-Trial Chamber in Person” which states “(1) Legitimately unrepresented Civil Parties may be granted leave to address the Pre-Trial Chamber in person when their interests are different from those of the Prosecution.” Rule 23ter (1) states “From the issuance of the Closing Order onwards, in order to participate in proceedings, Civil Parties shall at all times be represented by a Civil Party lawyer.”

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5. On 9 May 2011, the UN Co-Prosecutor Andrew Cayley released a public statement identifying crime sites and criminal episodes within the scope of investigation in Case 003.
6. Appellant understands she has ten days after the acknowledged receipt of the Rejection Orders to appeal. In light of all the intervening official holidays and weekends, Appellant has until 18 May 2011, 4 p.m. to lodge her appeal. As she is an unrepresented Civil Party applicant, pending the ECCC's recognition of her only lawyer, Khmer national Mr. CHOUNG Chou-Ngy, Appellant is without access to case files and other relevant court documents. Appellant is submitting her appeal in the English language on 18 May 2011 to the Pre-Trial Chamber ("PTC") and to the ECCC's Interpretation and Translation Unit ("ITU") and the VSS requesting translation to the Khmer language.
7. The Appellant requests that the PTC overturn the CIJs' orders declaring her [REDACTED] Application inadmissible, on the basis that (i) the Appellant was not afforded the fundamental principle of procedural fairness of timely and sufficient information of the scope of investigations for Case 003 and Case 004; (ii) the CIJs failed to conduct field investigations of the crime sites and criminal episodes of Case 003 and Case 004 especially as it relates to Appellant, namely, Phnom Penh and the East Zone, and relatedly, the CIJs failed to maintain judicial independence, (iii) the CIJs misapplied and misinterpreted the facts and law, e.g. "Joint Criminal Enterprise" and the "Common Design and Purpose" principles; and (iv) the CIJs failed to provide reasoned decisions for the inadmissibility of Appellant's [REDACTED] Application to become a civil party.
8. The Appellant is making this appeal a public document because she is responding to content (i) that are already in the public sphere and not harmful nor material to the investigation, and (ii) that has a **very high public interest**, especially as it relates to the quality of the administration of justice and the work of reconciliation and building a more positive legacy for future generations.

II. SUMMARY OF RELEVANT FACTS AND LAW

A. FACTS

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9. In the [REDACTED] Application, Appellant publicly named and expressly hold **Khmer Rouge** [REDACTED] directly, personally, individually responsible for the **Crimes against Humanity** (including the legal elements of murder, extermination, enslavement, imprisonment, torture, political persecution) in their roles as [REDACTED] of the [REDACTED] [REDACTED] respectively, and for their material contribution in developing and implementing the **common design and purpose of a joint criminal enterprise** which impacted the whole of Cambodia.
10. [REDACTED] which incorporated the [REDACTED] and [REDACTED] which incorporated the [REDACTED] occupied senior positions within the DK hierarchy, by virtue of which they were able to influence the development and implementation of Communist Party of Kampuchea ("CPK") policies directly and, in most cases, through their subordinates.
11. According to **ECCC Case 002 Closing Order** "*the Revolutionary Army of Kampuchea ("RAK") was a core institution within the CPK governing Democratic Kampuchea. CPK policy relied heavily on the implementation of its goals by forceful means, making the military an important part of its government apparatus*" (para. 113). As part of its responsibility for internal security, RAK carried out purges under the orders of the CPK Center (para. 146). "*The Military Committee acted as an organ of the Party Center and thus ensured control of the RAK by the Party Center. The Central Committee and Military Committee sometimes met in joint session to decide on military matters, effecting a unified strategic command over the armed forces*" (para. 120). (Emphasis added.)
12. Again according to Case 002 Closing Order, the RAK "*established two combined field commands that each exercised command over several divisions. Both were established in the East Zone. The first of these field commands was located on Route 1 in Sector 23... The second field command was located on Route 7, also in the East Zone. It included...Division 175 plus elements of Division 502*" [REDACTED]

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13. Appellant charges that, as a matter of international law, [REDACTED] and [REDACTED] are directly responsible for her legal injuries during the fall and exodus out of **Phnom Penh (Phase I Movement)** when her father, a Lon Nol military commander, "disappeared", among other legal injuries; and the movement of the population of the **East Zone (Phase III Movement)** when the Khmer Rouge imprisoned her and her family first at **Wat Tlork** and then **Boeung Rai Security Centers**, where she experienced and witnessed, *inter alia*, the death of her mother, among the 30,000 (thirty-thousand) lives estimated to have been extinguished at Boeung Rai.
14. The UN co-prosecutor **Andrew Cayley's** public statement of 9 May 2011 names "Phnom Penh" in relation to S-21 and S-22 security centers, "purges of the East" and "incursions into Vietnam" as some of the crime sites and criminal episodes within the scope of investigation for Case 003 which bear a direct nexus to Appellant's physical proximity to the Charged Persons.

B. REJECTION ORDERS

15. The CIJs rejected Appellant's [REDACTED] Application stating that "[n]one of the factual situations listed above relate to the material facts set out in either the Second or Third Introductory Submissions; neither do they relate to circumstances surrounding these material facts or would be likely to assist in the determination of the jurisdictional elements and modes of liability of potential suspects."
16. The CIJs further reasoned in their rejection that Appellant's claim of the injury she suffered as a direct consequence of the alleged offenses perpetrated by [REDACTED] and [REDACTED] "are unfounded, as the names of the suspects in Case 3 [and Case 4] are confidential and the names cited in the application are therefore purely speculative."
17. The CIJs concluded "Therefore, as the injury of the Applicant does not relate to any of the facts under investigation, the Co-Investigating Judges reject the application on that basis."

C. PRINCIPLES AND LAW

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18. The relevant Law and Internal Rules to which this Appeal refers are IRs 14, 21, 23, 23 bis, 23 quinquies, 53, 55, and 77 bis (Revision 7), Article 10 new of the Law on the Establishment of the ECCC (“ECCC Law”)², Articles 5(2) and 5(3) of the Agreement between the United Nations and the Royal Government of Cambodia (“Agreement”),³ the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (“Basic Principles”)⁴, Article 14 of the International Covenant On Civil and Political Rights (“ICCPR”) and Article 3 of the Practice Direction on Victims Participation (“Practice Direction”).⁵

19. More specifically, Appellant highlights:

(i) IR 21 Fundamental Principles 1(c) states:

“The ECCC shall ensure that victims are kept informed and that their rights are respected throughout the proceedings.”

(ii) IR 23bis Application and Admission of Civil Parties and the Practice Direction for Victim Participation (Appendix A: Victim Information Form) state:

“In order for Civil Party action to be admissible, the Civil Party applicant shall...demonstrate as a direct consequence of at least one of the crimes alleged against the Charged Person, that he or she has in fact suffered physical, material or psychological injury...” (Emphasis added.)

(iii) IR 55 (1) General Provisions Concerning Investigations states:

“A judicial investigation is compulsory for crimes within the jurisdiction of the ECCC.” (Emphasis added.)

(iv) IR 56 (1) and (2) Public Information by the Co-Investigating Judges state:

“In order to preserve the rights and interests of the parties, judicial investigations shall not be conducted in public... However, the Co-Investigating Judges,

² Law on the Establishment of the Extraordinary Chambers, dated 27 October 2004 (NS/RKM/1004/006).

³ Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea, 6 June 2003.

⁴ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by General Assembly resolution 40/34 of 29 November 1985.

⁵ Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49, at <http://www2.ohchr.org/english/law/ccpr.htm>.

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may...issue such information regard a case under investigation as they deem essential to keep the public informed of the proceedings; and...jointly grant limited access to the judicial investigation to the media or other non-parties in exceptional circumstances..." (Emphasis added.)

20. The Appendix (Individual Criminal Responsibility) in *Seven Candidates for Prosecution: Accountability for the Crimes of the Khmer Rouge* by Professor Stephen Heder and international lawyer Brian D. Tittmore and the Michigan Law Review article *Liberal Legal Norms Meet Collective Criminality* by Professor John D. Ciorciari neatly sum up international legal precedents establishing individual responsibility, which states that it is most straightforward when a defendant actually committed the criminal act in question. However, individual responsibility can also be established through other forms of criminal participation, such as ordering the criminal conduct, participating in a **common design or purpose** to commit the crimes (**joint criminal enterprise**), or otherwise **aiding and abetting the crimes**.

D. ARGUMENTS

First Argument:

The CIJs violated IR 56, IR 21, the Basic Principles of Victims Rights, and fundamental principle of procedural fairness to provide public information about Cases 003 and 004

21. ~~The Appellant was not afforded the fundamental principle of procedural fairness of~~ timely and sufficient information of the scope of investigations for Case 003 and Case 004.
22. During a period of one year and a half, since the receipt of the Second and Third Introductory Submissions forming Cases 003 and 004, the CIJs kept the Appellant in the dark in failing to provide sufficient information about the scope of investigation in order for her and other interested victims to file civil party applications. Appellant's application resulted not from information from the CIJs but from her personal research.
23. Procedural fairness includes timely information, equity and a transparent and clear procedure, where one's rights and obligations are properly provided, expressed and

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explained. It enshrines the expectation that a matter will be dealt with, in a predictable, proper and defined manner. Here, the Appellant encountered the contrary of these principles of unreasonable secrecy, intimidation and harassment upon the lodging of her application.

24. Under IR 56(a), the CIJs may, *"jointly through the Public Affairs Section, issue such information regarding a case under judicial investigation as they deem essential to keep the public informed of the proceedings, or to rectify any false or misleading information"*, and under IR 56(b), *"jointly grant limited access to the judicial investigation to the media or other non-parties"*.
25. The ECCC has seen that there is much public interest in the cases it investigates and prosecutes, including cases 003 and 004. Even though investigations are by their very nature confidential, there should be some efforts to at least inform and advise victims as to what they should expect in those case files, as occurred in Case 002 when the CIJs publicly announced the scope of judicial investigations, *prior* to the conclusion of those investigations⁶ and a detailed summary of the investigation was made public and victims were properly informed.⁷ The CIJs' Press Release of 5 November 2009, although belated, offered the first public guideline addressing Civil Party applicants. Victims were further given an extended deadline to submit supplementary information supporting their claims, following the press release.
26. In January 2010, when the ECCC judges concluded their investigations in Case 002, more than 2,000 victims of the Khmer Rouge regime had already applied to participate in the trial and seek reparations. In both Cases 003 and 004, potential victims, estimated many more than 100,000⁸, are systematically prevented from participating because no

⁶OCIJ, "Press Release", 5 November 2009, at http://www.eccc.gov.kh/english/cabinet/press/138/ECCC_Press_Release_5_Nov_2009_Eng.pdf. . In Case 002, the OCIJ provided a belated but useful Press Release, dated 5 November 2009, informing the public about various acts against population groups and crime sites under the "scope of investigations" and stating, "[i]f a victim wishes to become a civil party, his/her alleged prejudice must be personal and directly linked to one or more factual situations that form the basis of the ongoing judicial investigation."

⁷ See Public Information of the Co-investigating Judges at <http://www.eccc.gov.kh/en/articles/conclusion-judicial-investigation-case-002>, dated 14 January 2010.

⁸ Closure of Cases may Reflect Official View of KR', *The Cambodia Daily*, 2 May 2011 front page, by Douglas Gillison.

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information has been made available about the suspects' names, the crimes and crime sites with which the CIJ's are seized. After the close of a 20-month investigation in Case 003, on 29 April 2011, when the conclusion of investigations was announced, the number of civil party applicants remains at four.

27. Answers to "Frequently Asked Questions ("FAQ") about Case 003" were placed on the ECCC website on 10 May 2011.⁹ This came after the OCP's Press Release of 9 May 2011, where the international prosecutor informed the public about the scope of investigations in Case 003, and the deadline for potential civil parties to apply. Considering that the FAQs were placed on the internet *after* the Office of Co-Prosecutors' Press Release, and the fact the CIJs have already rejected the first two civil party applications, the issuance of this information can be interpreted as being official non-encouragement for victims to apply.
28. In contrast with Case 002, the level of respect given to victims of crimes in Case 003 has been non-existent, demonstrated by the lack of outreach to inform victims about relevant information about the case file. Apart from the UN co-prosecutor's Press Release, the conduct of investigations in Cases 003 and 004 have so far, revealed that respect for the dignity of victims is not a priority for the court, as victims have effectively been denied the opportunity to apply as civil parties, given that the deadline for applications is 18 May 2011 in accordance with Internal Rule 23 *bis* (2) with no extension of time has been given.
29. The UN co-prosecutor's Press Release of 9 May 2011, under the discretion provided in IR 54, does not exonerate the CIJs from their responsibility to properly inform the public, victims and potential civil parties about the identities of the charged persons and the scope of investigations in Cases 003 and 004.
30. Not only have the CIJs failed in their duty to inform the public under IR 56, they have persecuted the UN co-prosecutor for fulfilling his role, in "*provid[ing] the public with an objective summary of the information contained in [the Introductory] Submission, taking into account the rights of the defense and the interests of Victims, witnesses and other*

⁹ "Frequently Asked Questions about Case 003" at <http://www.eccc.gov.kh/en/articles/frequently-asked-questions-about-case-003>.

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persons mentioned therein, and the requirements of the investigation”, in accordance with IR 54, by making “contempt of court” allegations against him.¹⁰

31. To date, the CIJs have continued to fail to meet their duties under IR 56 to inform the public.
32. This is a breach of the Basic Principles, which states, *“Victims should be treated with compassion and respect for their dignity. They are entitled to access to mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered”¹¹* and *“[v]ictims should be informed of their rights in seeking redress through such mechanisms”¹²*. In particular, Principle 6 states:

The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:

- a. Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information;*
- b. Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system;*
- c. Providing proper assistance to victims throughout the legal process;*
- d. Taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation;*
- e. Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims (emphasis added).*

33. By failing in its duty to inform the public under IR 56, the CIJs have also breached not only the Principle 6 of the Basic Principles, but also IR 21 in their management of civil party admissibility, and in their conduct of the investigations. They have, in particular, breached IR21(c), to keep victims informed¹³ and more broadly, breached fundamental

¹⁰ James O’Toole, “Cayley in the crosshairs”, Phnom Penh Post, 13 May 2011, p. 1.

¹¹ Principle 4 of the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*.

¹² Principle 5, *Ibid*.

¹³ IR 21 states that “The applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims, and so as to ensure legal certainty and transparency of proceedings ... In this respect:... (c) The ECCC shall ensure that victims are kept informed and that their rights are respected throughout the proceedings...”

principles of fairness under international law.¹⁴

Second Argument:

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

34. The rejection of the Appellant's civil claims is based on the failure of the CIJs to properly and *independently* investigate the facts in the Second Introductory Submission as referred to them by the Office of Co-Prosecutors. In particular, they failed to consider the facts submitted by the Applicant/Appellant.
35. The CIJs failed to conduct field investigations of the crime sites and criminal episodes of Case 003 and Case 004 especially as it relates to Appellant, namely, Phnom Penh and the East Zone. This failure adversely affected specifically the ability of Appellant to put together an even stronger application, and generally the goals of justice and reconciliation.
36. Since 7 September 2009, when the CIJs were first seized with the Second and Third Introductory Submissions¹⁵, more than 20 months has passed with no proper investigations having been conducted. On 2 February 2011, after nearly 17 months of being seized with the investigation of the Second and Third Introductory Submissions, the CIJs informed the public that no field investigations are conducted and "*the work at present is focused on examining and analyzing the documents available on the Case Files, particularly the existing documents in the previous Cases Files 001 and 002*".¹⁶ Shortly after this announcement, the closure of the investigations was made public. It can be inferred from the short timeframe between the 2 February 2011 announcement and the 29 April 2011 announcement of the close of investigations (less than three months) that no field investigations have taken place at all.

¹⁴ Principles 4 and 6 of the *Declaration on Principles of Justice for Victims of Crime and Abuse of Power*.

¹⁵ See Public Information at <http://www.eccc.gov.kh/en/articles/acting-international-co-prosecutor-requests-investigation-additional-suspects>, dated 8 September 2009.

¹⁶ See Public Statement at <http://www.eccc.gov.kh/en/articles/statement-co-investigating-judges-regarding-case-files-003-and-004>, dated 2 February 2011.

37. To press the point, the “investigations” of the CIJs were compromised early on, by the “un-signing” of rogatory letters in Case 003 and 004 by the national Judge YOU Bunleng.¹⁷ After the International Investigating Judge set a deadline to his national counter-part on 4 June 2010 for the signing of these rogatory letters, on 7 June 2010, according to UN legal affairs spokesman Lars Olsen “the first investigative acts in Cases 003 and 004 [had been] taken [on] Friday [4 June 2010] in form of confidential rogatory letters [...] which were signed by *both* [CIJs]”¹⁸.
38. The response followed immediately: “[RGC] Interior Ministry spokesman Lieutenant General Khieu Sopheak repeated the [Government’s] opposition to the new investigations [...]”, citing Mr. HUN Sen’s warnings of unrest. “*Just only the five top leaders [are] to be tried. Not six. Just five.* The court must secure stability and the peace of the nation. The conflict and internal instability we do not want.”¹⁹
39. On 8 June 2010, having struck out his signature, Judge YOU Bunleng informed his international counterpart that he could not longer endorse the mission. “[U]pon more attentive and deeper consideration of the question, I think that it is not yet *opportune* to take action in Cases 003 and 004”²⁰.
40. In June 2010, the Open Society Justice Initiative (OSJI), a reputable court monitor, published its report, which assessed the ‘un-signing’ as follows:

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

¹⁷ OCIJ Internal Memorandum, from You Bunleng to Marcel Lemonde, 8 June 2010, “Dossiers 003 et 004” (unofficial translation from French into English).

¹⁸ Douglas Gillison, ‘KRT Begins Investigation of Five New Regime Suspects’, *The Cambodia Daily*, 8 June 2010, p. 26 (emphasis added). Reach Sambath, the tribunal’s spokesman issued a statement announcing Judge Bunleng’s dissociation from the rogatory letters, and saying that a [media] report on the signing of the documents, which was based on information provided by UN spokesman Mr. Olsen, was ‘non-basis information.’

¹⁹ *Ibid.*

²⁰ OCIJ Internal Memorandum, from You Bunleng to Marcel Lemonde, 8 June 2010, “Dossiers 003 et 004” (unofficial translation from French into English).

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When added to the history of governmental objections to allowing Cases 003/004 to move forward independently, it supports the conclusion that political interference is improperly affecting decisions about the cases²¹ (emphasis added).

41. On 9 June 2010, the International CIJ stated a disagreement between the Co-Investigating Judges *"related to the timing of the investigations" and that "until the end of this year the International Judge will proceed pursuant to Rule 72 IR"*.²²
42. Observers found that *"[t]he disagreement is consistent with an apparent pattern of government reluctance to prosecute any former regime leaders beyond those five already [in custody]"*²³ and *"Judge Marcel Lemonde is now to proceed without the support of his Cambodian colleague in the politically charged investigation that government officials have already said should not move forward."*²⁴
43. Even after the indictment in Case 002 was issued on 15 September 2010, proper investigations, such as on-site investigations, interviews of witnesses, victims and suspects were not conducted.
44. The CIJs have failed to meet their legal role, functions and duties in accordance with the ECCC Law, which states:

"All investigations shall be the joint responsibility of two investigating judges... hereinafter referred to as Co-Investigating Judges, and shall follow existing procedures in force... The Co-Investigating Judges shall have the power to question suspects and victims, to hear witnesses, and to collect evidence, in accordance with existing procedures in force²⁵ ..."

The CIJs did not conduct new investigations in Case 003, and only referred to the existing materials available in Cases 001 and 002. Cases 001 and 002 concerned five entirely different suspects and the CIJs' approach to investigations is unreasonable and does not

²¹ OSJI, 'Political Interference at the Extraordinary Chambers in the Courts of Cambodia', July 2010, available at: http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/political-interference-report-20100706, page 21, emphasis added.

²² Statement of the Co-Investigating Judges, at <http://old.eccc.gov.kh/english/cabinet/press/156/PROCIJ%28June2010.pdf>.

²³ Sebastian Strangio, 'KRT judges divided on next cases', *The Phnom Penh Post*, 10 June 2010, p.1.

²⁴ Douglas Gillison, 'More Questions than Answers', *The Cambodia Daily*, 11 June 2010.

²⁵ Law on the Establishment of the Extraordinary Chambers, dated 27 October 2004 (NS/RKM/1004/006, Article 23, pg. 9

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demonstrate any will or drive to exercise their functions fully, properly and independently. The CIJs did not follow the “existing procedures in force,” which include questioning suspects and victims, hearing witnesses, and collecting evidence. They did not conduct any of these actions, and have thereby failed in carrying out their legal responsibility as CIJs.

45. This failure to investigate fully or properly appears to be directly linked to the Prime Minister Hun Sen’s repeated public statements, including to the visiting UN Secretary General Ban Ki-moon in October 2010, that “a second Khmer Rouge war crimes trial due to start early next year would be the last. Hun Sen clearly affirmed that case three is not allowed”. Foreign Minister HOR Namhong told reporters after the UN Secretary General met with the premier, “we have to think about peace in Cambodia”.²⁶ OSJI assessed this recent statement as follows:

Such blatant political inference in the court’s work is of course contrary to basic fair trial standards²⁷, and

As a practical matter, Cambodian court officials are not free to proceed independently with prosecutions that the [Prime Minister] has openly and categorically opposed. Cambodian court officials are understandably fearful of acting in apparent defiance of a public command by the head of state²⁸.

46. One of the ECCC’s Cambodian Judges told James Goldston, Executive Director of OSJI, in early February 2010, what is at stake: *“How can we say that the court is a model of independent justice if the government does not let us do our job?”²⁹*

²⁶ AFP Report, ‘Cambodian PM says No Third Khmer Rouge Trial’, 27 October 2010. OSJI Report ‘Salvaging Justice’, at http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/khmer-rouge-tribunal-20101110

²⁷ OSJI Report ‘Salvaging Judicial Independence: The need for a Principled Completion Plan for the Extraordinary Chambers in the Courts of Cambodia’, at http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/khmer-rouge-tribunal-20101110.

²⁸ OSJI Report ‘Recent Developments at the Extraordinary Chambers in the Courts of Cambodia’, December 2010 available at http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/cambodia-report-20101207/cambodia-khmer-rouge-report-20101207.pdf.

²⁹ James Goldston, ‘Cambodia’s Court at a Crossroads’, *Wall Street Journal*, 1 March 2010.

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47. A relevant example of recent direct interference by the government in Court matters in Case 002 is when the OCIJ failed to interview important witnesses who were allegedly instructed not to comply with the Court's summons. Upon the Appeal of the Defense³⁰ the International Judges of the PTC stated that 'although the OCIJ is the natural investigative body within the ECCC, they have repeatedly refused to investigate this matter [allegations of interference]'. The International Judges found that "[t]he comment by Khieu Kanharith satisfies us that there is a reason to believe he or those he speaks on behalf of, may have knowingly and willfully attempted to threaten or intimidate the Six Officials, or otherwise interfere with the decision of the Six Officials related to the invitation to be interviewed by the International Co-Investigating Judge"³¹.
48. Further, since the closing of the investigator's office is looming and UN investigators have already been told that their contracts will not be extended beyond the end of this year³², it is highly likely that, regardless what further investigations the Office of Co-Prosecutors request, they will all be rejected, without even a prospect of an appeal because the closure of the Office of the CIJs has already been decided.
49. To conclude, by failing to investigate independently, thoroughly and free from the Prime Minister's prohibition to investigate cases 003 and 004, the application of the Appellant was rejected without being investigated. Therefore, the rejection order is flawed, and in violation Rules 14 (1), 55 (5) of the IR, Article 10 new of the ECCC Law and Article 5 (29 and (3) of the Agreement.

Third Argument:

The CIJs misapplied and misinterpreted the facts and law, in particular the principles of Joint Criminal Enterprise and Common Design/Purpose

50. The CIJs misapplied and misinterpreted the facts and law, e.g. "Joint Criminal Enterprise" and the "Common Design and Purpose" principles.

³⁰ Second Decision on Nuon Chea's and Ieng Sary's Appeal Against OCIJ Order on request to Summons Witnesses, 9 September 2010, D314/1/12, page 21.

³¹ *Ibid.*

³² Julia Wallace, 'Case 003 investigation reaches conclusion', *The Cambodia Daily* 20 April-1 May 2011, p. 2.
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51. Appellant argues that [REDACTED] and [REDACTED] bear "individual criminal responsibility" in two capacities: (i) in that they knowingly, directly and substantially contributed to the crimes under investigation of which she is a victim and a witness (bearing "individual responsibility"), and (ii) in that they knew and failed to prevent crimes committed against her (bearing "superiority responsibility").
52. As such, Appellant argues that, as a matter of international law, [REDACTED] [REDACTED] are directly responsible for her legal injuries during the fall and exodus out of Phnom Penh (Phase I Movement) when her father, a Lon Nol military commander, "disappeared", among other legal injuries; and the movement of the population of the East Zone (Phase III Movement) when the Khmer Rouge imprisoned her and her family first at Wat Tlork and then Boeung Rai Security Centers, where she experienced and witnessed, *inter alia*, the death of her mother, among the 30,000 (thirty-thousand) lives estimated to have been extinguished at Boeung Rai.
53. Here, the legal nexus is the CRIMES, not the geographically districts and zones the Charged Persons physically commandeered, *vis-à-vis* the Appellant.
54. Furthermore, admissibility requires the Appellant to demonstrate a link to *only one* crime ("at least one of the crimes", Rule 23bis) which she suffered under [REDACTED] [REDACTED] for admissibility. As such, it is incomprehensible to believe that [REDACTED] [REDACTED] respectively, had no material contribution to the fall and exodus of Phnom Penh (Phase I Movement) when Appellant lost her father, *inter alia*, or that they did not materially contribute to Appellant's imprisonment in Wat Tlork and Boeung Rai Security Centers during the period of East Zone purges and incursions into Vietnam.

Fourth Argument:

In failing to give proper reasons in relation to the Appellant's [REDACTED] Application, the CIJs have violated IR 21 concerning the fundamental principal of procedural fairness to provide reasons for a decision

55. The CIJs failed to provide reasoned decisions for the inadmissibility of Appellant's [REDACTED] Application to become a civil party. Moreover, they intentionally erred in

assist in the determination of the jurisdictional elements and modes of liability of potential suspects."

60. This deficiency of proper and detailed reasons constitutes an error of law and renders the rejection orders invalid. The CIJs' inadequate and insufficient reasoning violates the fundamental principle of law that proper reasons be given for a judicial decision. Furthermore, it renders the Appellant's right to appeal meaningless under Internal Rules 74(4) and 77bis on the basis that there is insufficient information upon which the Appellant could determine the grounds on which to base an appeal to the PTC. Similarly, inadequate and/or insufficient reasoning does not provide PTC the requisite threshold of information upon which to conduct a proper and effective appellate review of the rejection.
61. Article 45 § 1 of the European Convention on Human Rights ("ECHR Convention") states that "*[r]easons shall be given for judgments as well as for decisions declaring applications admissible or inadmissible.*" This article enshrines one of the fundamental principles of law. Referring to Article 6 § 1 of the Convention, the European Court of Human Rights ("ECHR") has also held in several decisions that "**according to its settled case-law, judgments of courts and tribunals should adequately state the reasons on which they are based.**"³⁵ This is because "*[s]uch reasoning is essential to the very quality of justice and provides a safeguard against arbitrariness.*"³⁶ Other International Tribunals, including the ECCC, have upheld this fundamental requirement.³⁷

³⁵ *Taxquet v. Belgium*, Application no. 926/05, Chamber decision of 13 January 2009, para 40.

³⁶ *Ibid.* at para. 43.

³⁷ See Decision on the Ieng Thirith Defense Appeal at para. 27, quoting an Appeals Judgment of the ICTY but without further information as to which Judgment is referred to. Similarly, the Appeals Chamber of the ICTY has held that the right to a reasoned decision is an element of the right to a fair trial and that only on the basis of a reasoned decision will proper appellate review be possible (see Prosecutor v. Momir Nikolic, Judgment on Sentencing Appeal, 8 March 2006, Case No. IT-02-60/1-A, para. 96; Prosecutor v. Dragoljub Kunarac et al, Judgment, 12 June 2002, Case No. IT-96-23&23/1-A, para. 41). In paragraph 11 of its "Decision on Interlocutory Appeal from Trial Chamber Decision Granting Nebojsa Pavkovic's Provisional Release" of 1 November 2005 in the case of Prosecutor v. Milutinovic et al. (Case No. IT-05-87-AR65.1), the Appeals Chamber of the ICTY held that "as a minimum, the Trial Chamber must provide reasoning to support its findings regarding the substantive considerations relevant to its decision". See also: Prosecutor v. Lubanga. ICC-01/04-01/06-774 OA6, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Second Decision on Appeal Against Order on Civil Party Application Admissibility

62. The ECCC's PTC has adopted this requirement from the ECHR and should continue to apply it in this case.³⁸ In a unanimous decision, the PTC held that although the above ECHR case-law dealt with final verdicts on guilt, "*their import is relevant to the pre-trial context at the ECCC.*"³⁹ The appellant in that matter successfully appealed a decision of the CIJs rejecting a request for investigative action on the grounds that the CIJs did not issue a reasoned decision in its rejection order.⁴⁰
63. As the right to a reasoned decision is a fundamental general principle of law, decisions on Civil Party admissibility likewise warrant a reasoned decision. Failure to provide detailed reasons in rejecting a Civil Party application is an infringement of this fundamental right.
64. By granting the right to appeal a rejection order, the ECCC acknowledges the importance of this procedural right. A rejected Civil Party applicant cannot, in practice, submit a revised application because the Internal Rules set a deadline for applications 15 days after the announcement of the closing of the investigations.⁴¹ The only recourse left, for Civil Party applicants, then, is to appeal. Thus the order should be sufficiently detailed to make this last recourse possible, and moreover, meaningful.
65. For these reasons, a failure to issue a properly reasoned decision is a violation of Principle 4 of the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, which provides that victims should be treated with compassion and respect for their dignity.⁴² A rejection without a properly reasoned basis is not only a deprivation of a fundamental procedural right, it is also an affront to the dignity of victims and has the effect of victimizing these persons yet again, this time by an internationalized judicial institution.

the Prosecution Requests and Amended Requests for Redactions under Rule 81", 14 December 2006, para. 30: "[T]he right to a reasoned decision is an element of the right to a fair trial and that only on the basis of a reasoned decision will proper appellate review be possible".

³⁸ *Ibid.* at para. 28.

³⁹ *Ibid.*

⁴⁰ *Ibid.* at para. 30 (cf. para. 31, PTC noted that the CIJ's error of law would have required PTC to overturn the CIJ's order, but there were other valid reasons to uphold it).

⁴¹ Internal Rule 23 *bis* (2).

⁴² Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by UN General Assembly resolution 40/34, 29 November 1985, principle 4.

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66. In failing to provide sufficiently detailed reasons, the CIJs have failed to fulfill their obligations under Internal Rule 21 “to ensure legal certainty and transparency”. They further violate Internal Rule 21(c) by failing to keep victims properly informed of the basis for decisions adverse to the victims’ interests, and thereby failing to respect victims’ rights throughout the proceedings.

Therefore...

67. Therefore, in light of the above failures of the CIJs, the Rejection Orders against Appellant [REDACTED] Application should be overruled, and Appellant’s request for Civil Party status to Case 003 against [REDACTED] should be granted.

III. CONCLUSION AND RELIEF REQUESTED

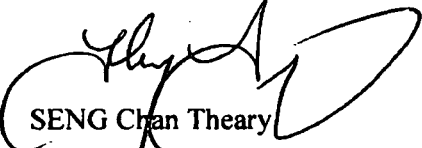
68. In sum, the legal injury of Appellant *does* relate to the facts under investigation, whereby a direct link exists between the factual situations suffered by Appellant to the crimes committed by the [REDACTED], even if the CIJs failed in investigating and providing information. In addition to their misapplication and misinterpretation of both facts and law, the CIJs are disingenuous in calling Appellant’s naming of [REDACTED] “unfounded” and “speculative”; they must really believe they can hide securely and perpetually behind the veil of unquestioned, unchallenged “confidentiality”.

69. Appellant respectfully requests that the PTC:

- (i) Declare this Appeal admissible, and
- (ii) Set aside the decision of the CIJs’ Order, deeming the Appellant inadmissible, on the basis that:
 - a. the Appellant was not afforded the fundamental principle of procedural fairness of timely and sufficient information of the scope of investigations for Case 003 and Case 004;
 - b. the CIJs failed to conduct field investigations of the crime sites and criminal episodes of Case 003 and Case 004 especially as it relates to Appellant,

- namely, Phnom Penh and the East Zone, and related, the CIJs failed to maintain judicial independence; and
- c. the CIJs misapplied and misinterpreted the facts and law, e.g. “Joint Criminal Enterprise” and the “Common Design and Purpose” principles; and
 - d. the CIJs failed to provide reasoned decisions for the inadmissibility of Appellant’ [REDACTED] Application to become a civil party; and
- (iii) Consider all representations and legal submissions made, and
 - (iv) Grant the Appellant the status of Civil Party.

Respectfully submitted,



SENG Chan Theory

18 May 2011

Civil Party Applicant/Appellant