



ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia
Nation Religion King

Royaume du Cambodge
Nation Religion Roi

អង្គជំនុំជម្រះវិសេសវិសេសនៃតុលាការកម្ពុជា

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

Case File No: 003/07-09-2009-ECCC-OCIJ

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

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du dossier: Uch ARUN	

Before: Judge YOU Bunleng
Judge Siegfried BLUNK

Date: 29 April 2011

Original: English

Classification:

[Redacted]

[Public]

Order on the Admissibility of the Civil Party Application of Rob Hamill

Co-Prosecutors

CHEA Leang
Andrew CAYLEY



We, **YOU Bunleng** (ឃុំ ប៊ុនហ្គេង) and **Siegfried BLUNK** (ស៊ីកហ្វ្រីដ ប្លឺង), Co-Investigating Judges of the Extraordinary Chambers in the Courts of Cambodia (the "ECCC");

Noting the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia, dated 27 October 2004 (the "ECCC Law");

Noting Rules 12, 12 *bis*, 21, 23, 23 *bis*, 23 *ter*, 53 and 55 of the ECCC Rules (Rev.7) (the "Rules");

Noting Articles 1, 3 and 6 of the Practice Direction on Victim Participation (the "Practice Direction");

Noting the Trial Chamber Judgment in **KAING Guek Eav alias Duch** (001/18-07-2007/ECCC/TC);

Noting the judicial investigation being conducted pursuant to the Co-Prosecutors' Second Introductory Submission;

I - PROCEDURAL HISTORY

1. The present order is in relation to the Civil Party Application of Rob HAMILL ("The Applicant") filed on 22 April 2011 with the Co-Investigating Judges (CIJ) by the ECCC Victims Support Section ("VSS") pursuant to Rule 12 *bis*(b).¹
2. The Applicant requests to be party to the proceedings in Case 003 and Case 004 for the injury he suffered as the alleged direct consequence of crimes within the jurisdiction of the ECCC² further to the death of his brother, Kerry HAMILL, arrested in 1978 by the DK navy having inadvertently sailed his yacht, the Foxy Lady, into Cambodian waters and subsequently transferred to S-21 for interrogation and execution.
3. The Applicant also alleges that persons by the name of [Redacted] are responsible for these crimes.³
4. The Applicant requests that the information he submitted for Case 002⁴ and his testimonies given on the day 59 of the trial⁵ of case 001 be incorporated into his Civil Party Application for Case 003.⁶

¹ See Inter-Office Memorandum (Strictly confidential) dated 21 April 2011.

² See Victims Unit report on Civil Party Applications VSS-2011-009-OCIJ dated 22 April 2011, Victim Information Form VU 11-VSS-00002 and Annexe dated 07 April 2011, p.1-4 and 7.

³ See Victims Unit report on Civil Party Applications VSS-2011-009-OCIJ dated 22 April 2011, Victim Information Form VU 11-VSS-00002 and Annexe dated 07 April 2011, p.1-4 and 7.

⁴ Referred to in Case File 002 under D22/2073

⁵ Referred to as in Case File 001 Trial Transcriptions E1/63.1

⁶ See Victims Unit report on Civil Party Applications VSS-2011-009-OCIJ dated 22 April 2011, Victim Information Form VU 11-VSS-00002 and Annexe dated 07 April 2011.



II – REASONS FOR THE DECISION

5. The application has to be rejected because the applicant did not demonstrate that he suffered the alleged psychological injury as a **direct** consequence of the death of his brother.
6. Internal Rule 23bis.1 (b) requires that a Civil Party applicant must demonstrate that he has suffered injury as a direct consequence of the crime alleged against a Charged Person. According to English usage⁷ “direct” in this context means that the crime alleged caused an injury without any intermediate causal link. However, in this case the intermediate link that caused the psychological injury of the applicant was the death of his brother. Without that link his injury could not have been caused by the crime. The causal chain in this case in abbreviated form is: Crime of charged person– death of brother – injury of applicant.
7. This does not conflict with The Practice Direction on victim participation which in Article 3.2.c only states that psychological injury **may** include the death of kin who were the victim of such crimes, but which does not deal with the causality link between the injury and the crime. Anyhow, the Practice Direction is merely a guideline without the quality of a Rule, let alone of Law.
8. The Co-Investigating Judges are aware that they admitted the Applicant as a Civil Party in Case 002⁸, but it is not apparent from that decision (which was taken under the great time pressure of bringing Case 002 to trial) that the requirement of directness of the causality link was examined in depth at the time. The decision’s chapter under the heading “Causality link between the harm and the crimes alleged against the charged persons” states (at para.15) that “the applicant must demonstrate harm as a direct consequence of facts in the Introductory and Supplementary Submissions”, but does not explain the requirements of the term “direct”. The ending of this chapter (at para.18), namely the stated requirement that the “alleged harm results only from facts for which the judicial investigation has already been opened” also seems to indicate that the line of thought – despite the heading – was not concerned with the requirements of causal directness.

Anyhow, the considerations that led to that decision are non-binding, and cannot prevent the (present) Co-Investigating Judges from applying the Rule in the way considered now to be correct.

9. The Co-Investigating Judges are also aware that the Trial Chamber in the Judgement of Case 001 admitted the Applicant as a Civil Party, but they cannot follow the reasoning (at para. 650 of the Judgement) that the applicant has shown that his “harm was a direct consequence of the crimes ...”.

The reference that Judgement makes (in fn. 1075) to Article 2 of the French Code of Criminal Procedure is inconclusive as that Article only states that civil action is open to all those who have “personally suffered damage directly caused by the offence”, but does not explain the requirements of the term “directly”.

The same applies to the quoting of Article 13 of the 1964 Cambodian Code of Criminal Procedure.

⁷ cf. the Oxford Online Dictionary’s definition of the word “direct” as “without intervening factors or intermediaries”

⁸ D404: Order on the Admissibility of Civil Party Applicants residing outside the Kingdom of Cambodia



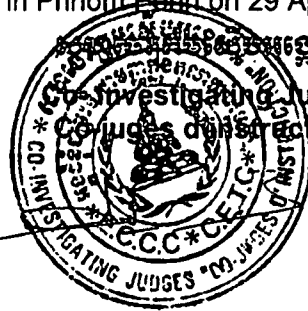
Insofar (in the same footnote) mention is made of the "Basic Principles and Guidelines on the Rights to a Remedy and Reparations for Victims etc." these (in para. 8) do include as victims immediate family members or dependants, but only if they have suffered harm "in intervening to assist victims" which is not the case of the Applicant who 2 years after the death of his brother in Cambodia learned about it from a newspaper in New Zealand.

FOR THESE REASONS, THE CO-INVESTIGATING JUDGES HEREBY:

DECLARE Civil Party application VU 11-VSS-00002 (D11/2) inadmissible and further declare that, given the information it contains concerning the facts which occurred between 17 April 1975 and 6 January 1979, on the territory of Democratic Kampuchea, they will be placed on Case File 003/07-09-2009-ECCC-OCIJ as complaint;

REJECT the application to be a Civil Party in Case File 003 and its related requests.

Done in Phnom Penh on 29 April 2011



ឃុំ ហ៊ុនរៀន

Dr. Siegfried BLUNK