

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

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**APPEAL AGAINST ORDER ON THE ADMISSIBILITY OF CIVIL PARTY APPLICANT MR.
ROBERT HAMILL (D11/2/3) (CASES 003 AND 004)**

Filed by:

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Ms. Lyma NGUYEN

Pre-Trial Chamber

Judge PRAK Kimsan
Judge NEY Thol
Judge HUOT Vuthy
Judge Catherine MARCHI-UHEL
Judge Rowan DOWNING

Co-Investigating Judges

Judge YOU Bunleng
Judge Siegfried BLUNK

Co-Prosecutors

Ms. CHEA Leang
Mr. Andrew T. CAYLEY

Co-Lawyers for Civil Parties

Mr. HONG Kimsuon
Ms. Silke STUDZINSKY
Mr. CHOUNG Chou-Ngy

I. PROCEDURAL BACKGROUND

1. On 8 April 2011, Mr Robert HAMILL (**Appellant**) submitted an application to become a Civil Party in Cases 003 and 004 to the Victims Support Section (**VSS**). On 12 April 2011, Mr HAMILL's application was issued with VSS registration number 11-VSS-00002.¹
2. On 29 April 2011, the Co-investigating Judges (**CIJs**) announced, in accordance with Internal Rule (**IR**) 66(1), that the investigation in Case 003 was concluded.²
3. On 12 May 2011, Mr HAMILL was notified of the "Order on the Admissibility of the Civil Party Application of Robert Hamill" dated 29 April 2011 (**Admissibility Order**) (D11/2/3).³ The Appellant's lawyers were not notified of the Decision.
4. The last sentence of the Admissibility Order for Case 003 states, "... the Co-Investigating Judges hereby: ... REJECT the application to be a Civil Party in Case File 004 and its related requests⁴ (emphasis added). Although the Case 004 rejection is supposedly contained in document D5/2/3, this document has not been forwarded to the Appellant or his lawyers, despite repeated attempts to obtain it.
5. The Appellant, represented by his legal representatives, national lawyer, Mr SAM Sokong, and international lawyer, Ms Lyma NGUYEN, hereby appeals the rejection of his civil claims. A copy of the Power of Attorney (**POA**), duly submitted to the Victims Support Section (**VSS**) on 20 April 2011 is at **Annex A**.⁵
6. On 1 May 2011, the Appellant's international lawyer requested access to the Case File in Cases 003 and 004⁶. As at 17 May 2011, no substantive response has been received by the Appellants' lawyers concerning requests for access to the relevant

¹ In Case 002, the Appellant was granted civil party status (Application (D22/2073) and in Case 001, gave Civil Party testimony on 17 August 2009 (Day 59) of trial proceedings against Duch (Transcript E1/63.1).

² See <http://www.eccc.gov.kh/en/articles/statement-co-investigating-judges>.

³ OCIJ, "Order on Admissibility of the Civil Party Application of Rob Hamill", dated 29 April 2010 [sic], D11/2/3.

⁴ It is uncertain whether this is a typing error and this Order was meant to refer to a rejection in Case 003. However, to date, no Admissibility Order in Case 004 has been forwarded to the Appellant or his lawyers.

⁵ Internal Rule 23ter(2) (Revision 7) 23ter(2) provides that "when [a] Civil Party is represented by a lawyer, his or her rights are exercised through the lawyer". In this submission, it is assumed that by all standards of fairness, submission of the POA to the VSS is sufficient to give standing to Mr Hamill's legal representatives to act on his behalf generally, and for the purposes of this appeal.

⁶ Email from International Civil Party Lawyer, Ms. Lyma NGUYEN to Greffier of the Office of Co-Investigating Judges, titled "Request for Access to Case File in Cases 003 and 004", dated 1 May 2011. On 4 May, staff of the OCIJ stated that they could not effectively assist with this request. On 4 May 2011, Ms. NGUYEN wrote directly to the Co-Investigating Judges and on 9 May 2011, a follow up communication was made. To date, no response has been received.

Case Files⁷ with the effect that the Appellant's lawyers, at the time of writing this appeal, do not know the scope of investigations in Case 004.⁸

7. On 16 May 2011, a Request to the PTC to suspend the deadline for the Appellant's admissibility appeal pending a grant of access to the case file by the Co-Investigating Judges (**Request**), along with a Notice of Appeal, was filed in Khmer and English.⁹ The request sought, in addition to a suspension of the deadline pending any grant of access to the case file, an additional or alternative request, being grant of leave to file further submissions following any grant of access to the case file, in the interests of procedural fairness and fundamental principles of justice and in accordance with IR 23bis, which states that "[u]nless and until rejected, Civil Party applicants may exercise Civil Party rights".
8. Since a response to the Request may not be received by the time of the filing of this appeal, Civil Party Co-Lawyers hereby seek leave to make further representations relating to this appeal within a reasonable timeframe from the date that access to the Case Files are granted.

II. APPLICABLE LAW AND RULES

9. 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**)¹⁰, Articles 5(2) and 5(3) of the Agreement between the United Nations and the Royal Government of Cambodia (**Agreement**),¹¹ the *Declaration of Basic Principles of Justice for Victims of Crime*

⁷ As at 12 May 2011, the date that the Appellant received the rejection concerning Case 003 via the post in New Zealand, there has been no substantive response to the request for case file access.

⁸ The scope of investigations in Case 003 was made known by the International Prosecutor in Press Release, "Statement by the International Co-Prosecutor Regarding Case File 003", dated 9 May 2011 at <http://www.eccc.gov.kh/en/articles/statement-international-co-prosecutor-regarding-case-file-003>.

⁹ CPLs, "Request for Suspension of Deadline for Appeal against Order on admissibility of Civil Party Application of Robert Hamill Pending Grant of Access to Case File 003 and 004, dated 12 May 2011. As at date of writing, no document number has been provided for the Notice of Appeal or the Request for Suspension of Deadline. Refer also to email to PTC Greffiers from Ms Lyma NGUYEN, titled "Urgent and Important: Electronic Filing System down – cannot file Notice of Appeal concerning Case 003 CP rejection decision", dated 12 May 2011.

¹⁰ Law on the Establishment of the Extraordinary Chambers, dated 27 October 2004 (NS/RKM/1004/006).

¹¹ 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.

*and Abuse of Power (Basic Principles)*¹², Article 14 of the International Covenant On Civil and Political Rights (ICCPR) and Article 3 of the Practice Direction on Victims Participation (*Practice Direction*).¹³

III. STANDARD OF APPEAL

10. IR 77 *bis* is a special rule for appeals against admissibility orders by the OCIJ.¹⁴ The special provision for admissibility appeals exhaustively determines the standard of appeal. The reasons are limited to errors in fact and/or law in determining the decision.

IV. ADMISSIBILITY OF THE APPEAL

11. According to the IR 77 *bis* (1) and (2), an Order regarding the admissibility of a Civil Party application can be appealed within ten days from notification of the Order. As the Admissibility Order in Case 003 was notified to the Appellant on 12 May 2011, the deadline for appeals of these Orders is **24 May 2011**.¹⁵ This is on application of IR 39(3) to the moving of the deadline to the next working day, given that the actual deadline of 22 May 2011 falls on a Sunday and the 23 May 2011 is a Cambodian national public holiday.
12. In accordance with IR 75, a Notice of Appeal was filed to the Pre-Trial Chamber (PTC) on 16 May 2011.¹⁶
13. On the same day, Civil Party Co-Lawyers lodged the “Request for Suspension of Deadline for Appeal against Order on admissibility of Civil Party Application of Robert Hamill Pending Grant of Access to Case File 003 and 004”.¹⁷

¹² *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, adopted by General Assembly resolution 40/34 of 29 November 1985 (hereinafter referred to as “Basic Principles of Justice for Victims”).

¹³ 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>.

¹⁴ IR 77bis was first adopted on 9 February 2010, and retained in Revision 7 of the IRs. It came into effect on 23 February 2011.

¹⁵ The deadline of 24 May 2011 was confirmed by PTC Greffier in email, titled, “URGENT RESPONSE REQUIRED – Notice of Case 003 Civil Party Admissibility Appeal, dated 16 May 2011.

¹⁶ As at date of writing, no document number has been provided.

¹⁷ As at date of writing, no document number has been provided.

14. In light of indications from the OCIJ Greffier that the Appellant has been rejected as a civil party in both Cases 003 and 004, this appeal pertains to both rejections.
15. Because of a number of public holidays in Cambodia during the period of this appeal, Civil Party Co-Lawyers were notified by the ECCC's Interpretation and Translation Unit (ITU) that it may be able to translate this appeal by the deadline of 24 May 2011, if the appeal were forwarded to ITU on 18 May 2011 for translation. However, a confirmation of this is pending as 16 and 17 May are public holidays where no national staff are working.¹⁸ Civil Party Co-Lawyers will forward this appeal to ITU on 18 May 2011, with a view to submitting both Khmer and English versions on the deadline of 24 May 2011, subject to ITU capacity to translate.
16. The CIJ's Admissibility Order (D11/2/3) contains decisions on the admissibility of Civil Party applications. The appeal against this Order is therefore factually admissible, and is timely submitted.

V. PRELIMINARY REMARKS

17. Prior to the Press Release issued from the Office of the Co-Prosecutors (OCP) on 9 May 2011¹⁹, there have been no indications from any arm of the ECCC as to the identities of the charged persons in Cases 003 and 004. The crimes listed in Case 003, as per the Press Release, include the S-21 security centre and the '[C]apture of foreign nationals off the coast of Cambodia and their unlawful imprisonment, transfer to S-21 or murder' and 'Kampong Chhnang Airport'. There are therefore strong grounds to believe that, of the five individuals under investigation, [REDACTED]
[REDACTED]
[REDACTED] are included.²⁰
18. The Appellant's application was made in accordance with IR 23bis, which provides that a civil party action is admissible where the victim can demonstrate direct

¹⁸ Email from ITU to Civil Party Lawyer, titled "Urgent response required: Advance notice of Case 003 Admissibility Appeal for Translation, dated 16 May 2011.

¹⁹ Press Release, "Statement by the International Co-Prosecutor Regarding Case File 003", 9 May 2011 at <http://www.eccc.gov.kh/en/articles/statement-international-co-prosecutor-regarding-case-file-003>.

²⁰ Julia Wallace, "Tribunal Retracts Announcement of New Defense Lawyer", Cambodia Daily, 1 December 2011, p. 26. See also James O'Toole and Cheang Sokha, "Former Cadres in Complaint", Phnom Penh Post, 4 April 2011, [REDACTED]
[REDACTED]

physical, material or psychological harm from a crime alleged against a charged person. A “charged person” (*personne mise en examen*), according to the IR Glossary is “any person who is subject to prosecution in a particular case, during the period between the Introductory Submission and Indictment or dismissal of the case”.

19. The application also complies with the Practice Direction on Victims Participation (**Victims PD**)²¹ which stipulates in Article 3.3 that “Victims may only apply to be joined as civil parties to a case if the case is under investigation by the Co-Investigating Judges (...)”. Since 7 September 2009, the CIJs have been seized with the Second and the Third Introductory Submissions, which refer to Cases 003 and 004 respectively, rendering these, cases to which victims can apply.
20. The Appellant’s application demonstrated the direct harm caused to the Appellant and his family from criminal acts of which there are reasonable grounds to believe that “charged persons” (those under investigation) are responsible.
21. The Appellant reserves his right to make further representations once access to the case file of cases 003 and 004 is granted to his lawyers.

VI. ARGUMENT

I. FIRST GROUND OF APPEAL

The CIJs violated IR 21(c), to “to ensure legal certainty and transparency” by rejecting the Appellant on the basis that he is an “indirect victim”

22. The Admissibility Order D11/2/3 is, quite literally, incomprehensible. However, from what could be understood of the drafting, it appears that the basis for rejecting the Appellant’s claims is that he is not a “direct” victim, but is, instead, an “indirect” victim. However, the final part of the Admissibility Order would suggest that the CIJs determined that he is not a “victim” at all.
23. Given the indications from the OCP Press Release that “capture of foreign nationals off the coast of Cambodia” and their detention and murder at S-21 is within the scope of investigations, the Admissibility Order focuses on the definition of a

²¹ Practice Direction on Victims Participation (02/2007/Revision 1), 27 October 2008.

“victim” and of harm caused by “intermediate causal links” between the crime of the charged person and the death of the Appellant’s brother.

24. The allegations against persons identified as [REDACTED] do not play a part in the rejection decision. Further submissions may be made in relation to the responsibility of [REDACTED], if these should be required. However, in order to proceed with establishing the CIJs’ errors of statutory interpretation, it is necessary to outline the facts on which the Appellant bases his civil claims, to which the appeal now turns.

a. Facts Pertaining to Appellant’s Brother at S-21

25. The appellant gave testimony in Case 001 against Kaing Guek Eav (alias Duch), Chief of S-21 about the fate his brother, Kerry Hamill, at S-21 where he was detained, interrogated, tortured and executed.²² The facts, outlined in the Appellant’s Victim Information Form (11-VSS-00002) are as follows:
26. On the 13 August 1978, the Appellant’s brother, Kerry George Hamill, skipper and co-owner of a 28-foot yacht, *Foxy Lady*, together with co-owner, Canadian Stuart Glass, and a passenger, Englishman John Dewhirst, were anchored and taking shelter in one of the bays of Koh Tang Island situated 50 km off the coast of south west of Sihanoukville. That evening, without warning, shots were fired upon the *Foxy Lady* and her crew. Stuart Glass, who was on deck, was shot. Kerry, who was also on deck, managed to get Stuart into a lifebuoy. John Dewhirst, who had been below deck at the time of the shots, emerged from below and took refuge with Kerry, climbing overboard into the water.
27. A Khmer Rouge gunboat then picked up the two men. Stuart died and was buried at sea.²³ The men were shackled and blindfolded then taken to a cinema in

²² Refer to victim impact testimony given on 17 August 2009 in Transcript E1/63.1. Refer also to John Dewhirst’s confession at S21.

²³ John Dewhirst’s “confession” from S-21 outlines how the capture happened as follows: *On the afternoon of the 13th we thought we could hear a boat engine at intervals throughout the day but we couldn’t be sure. Shortly after dark I went below to make some porridge when suddenly a boat began to close in on us very quickly. I was about to go up on deck when the boat opened fire and sent some shots over our mast so I stayed where I was and turned on the navigation light. The gunboat came in closer and lit us up in its spotlight. Stuart was shot and Kerry helped him out to sea in a lifebuoy....Kerry and I went*

- Sihanoukville where they were held for a day or two before being transferred to the security center S-21 in Phnom Penh.
28. At S-21 both men were subjected to interrogation and torture including electric shock administration. Eventually both men were forced to sign confessions stating that they were CIA agents. These confessions were clearly untrue.
 29. In his fictitious confession Kerry wove his “CIA training” into real facts about his life. Kerry used the Hamill family home telephone number of the time (8708) as his CIA operative number; he stated that Colonel Sanders (of Kentucky Fried Chicken) was one of his superiors, listed several family friends as supposed members of the CIA who helped train him in CIA surveillance; and that “a Mr. S. Tarr” was the public speaking instructor. S. Tarr is, in fact, the phonetic spelling of the Appellant’s mother’s name, Esther.
 30. Kerry’s confession was signed approximately two months after his capture, and it is assumed that he was executed around the time of signing the confession. The exact method of Kerry’s execution is unknown.²⁴

b. The Appellant Suffered Direct and Personal Harm

31. As a direct consequence of the crimes allegedly perpetrated by senior leaders or others “most responsible”, including [REDACTED], the Appellant and his family suffered:
 - (a) fifteen months of anxiety and hope in not knowing Kerry’s whereabouts from 13 August 1978 (date of Kerry Hamill’s capture) to December 1979
 - (b) the unquantifiable grief when the news about Kerry’s capture, torture and murder was made known to the family in December 1979
 - (c) the crippling effect to the grieving process of having no body to bury
 - (d) the belief that perhaps Kerry had been burned to death while conscious

over the side of the boat came for safety and waited until the gunboat came in to pick us up. He told me later the Stuart had died and been buried at sea.

²⁴ In Case 001, there were accounts of two foreigners put into car tyres which were then covered in petrol and set ablaze. It is unknown whether the two individuals were alive at the time. S-21 survivor, Mr CHUM Mey speculated that Him Huy and Comrade Soer played a part in the killings.

- (e) the subsequent depression of the Appellant's brother, John Hamill, and his related aggression and social dysfunctional behavior and his subsequent loss to suicide eight months after hearing the news about Kerry Hamill's demise at the hands of the Khmer Rouge in Democratic Kampuchea
 - (f) the physical ailments that affected the Appellant's mother in the following years including shingles, chronic and debilitating back pain
 - (g) the very real psychological effects inflicted on the Appellant's family
 - (h) the subliminal fear that the family carried, consciously or otherwise, for the last 30 years, which has permeated in the life decisions made, and
 - (i) alcohol abuse during the Appellant's school years compromising his education and social relationships.
32. The appellant holds ██████████²⁵ and others who fall within the category of "those most responsible" for crimes within the jurisdiction of the ECCC²⁶, individually, criminally responsible for the capture, torture and, ultimately, the murder of his brother, Kerry Hamill for **Crimes against Humanity** including forced transfer, imprisonment enslavement, torture, murder and other inhumane acts (including kidnapping and witnessing the murder of a close friend), and **War Crimes**, including unlawful transfer, unlawful confinement, hostage-taking, denial

²⁵ ██████████

██████████ 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, both directly and through their subordinates. CPK Military Division Chairmen ██████████ were directly involved in the arrest and transfer of KR cadres from their Divisions to S-21 for execution. As an official with *de jure* state authority in the CPK, ██████████ had individual criminal responsibility for crimes committed under his responsibility, including crimes against Kerry Hamill, committed on the waters ██████████ ██████████, in his capacity as ██████████ would have, or should have, heard about the capture of the Appellant's brother and his friends in Cambodian waters through his radio communications. He had the capacity to order their capture and / or call for their release, as neither Kerry Hamill, nor John Dewhurst (nor Stuart Glass, who was shot at sea) were CIA agents. This evokes superior responsibility against ██████████ for his failure to take action to prevent war crimes and crimes against humanity from occurring. As a commander who is responsible for the actions of his subordinates, ██████████ clearly falls under the heading "those most responsible" within the jurisdiction of the ECCC as provided in Article 1 of the ECCC Agreement. See Stephen Heder and Brian Tittmore, "Seven Candidates for Prosecution: Accountability for the Crimes of the Khmer Rouge" (2001), pp 49, 52, 58, and 99 – 100.

²⁶ Article 1, 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.

of fair trial rights, inhumane treatment, torture, willful causing of great suffering and willful killing.²⁷

33. [REDACTED] and other persons who fall within the personal jurisdiction of the ECCC, are believed have played a direct role, with individual criminal responsibility for the common purpose and design in the arrests and executions of civilians and foreign nationals specifically in their respective divisions [REDACTED] [REDACTED] captured the Appellant's brother, Kerry Hamill). They also played a role generally for crimes for the whole of Cambodia, connected with *de jure* positions at State officers of the DK. Alternatively, they are believed to be responsible under the doctrine of superior responsibility.²⁸

c. CIJs' Determinations on the Facts and Law

34. The CIJs were of the view that "the applicant did not demonstrate that he suffered the alleged psychological injury as a direct consequence of the death of his brother"²⁹ in Case 003. Further, it appears that they do not consider the Appellant to be a "victim" because, even though the Basic Principles of Justice for Victims of Crime and Abuse of Power (cited by the CIJs as "Basic Principles and Guidelines on the Rights to a Remedy and Reparations for Victims") "do include as victims immediate family members or dependants, but only if they have suffered harm in 'intervening to assist victims' (sic) 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

²⁷ As such, any investigations into the facts raised by the Appellant, against these suspected persons, would also assist to determine jurisdictional elements of crimes against humanity, since Kerry Hamill and John Dewhirst (and Stuart Glass), being foreign nationals, were clearly considered "enemies" of the regime, a civilian population against whom widespread and systematic crimes were committed. In particular, S-21 was known to be an interrogation centre for foreign nationals or those accused of having ties to foreign "agents", including Western nationals and Vietnamese nationals or suspects accused of being such. In relation to war crimes, as civilians, Kerry Hamill, John Dewhirst and Stuart Glass were a protected class of persons under the Geneva Conventions and Protocols, and further investigations into these facts could contribute to the establishment of this jurisdictional element of the war crimes that occurred.

²⁸ See Stephen Heder and Brian Tittmore, "Seven Candidates for Prosecution: Accountability for the Crimes of the Khmer Rouge" (2001).

²⁹ OCIJ, "Order on Admissibility of the Civil Party Application of Rob Hamill", dated 29 April 2010 [sic], D11/2/3, paras 5 – 9.

- in New Zealand”³⁰. Here the Admissibility Order incorrectly states “2 years”, when in fact, the death of the Appellant’s brother was reported in a New Zealand newspaper 16 months after it occurred.
35. Had this incredible ground of rejection been applied in Case 001 against KAING Guek Eav, 86 out of 90 applicants would have been rejected, since only *four* were considered by the Trial Chamber to be immediate survivors (“direct victims”).
 36. Further, an application of this approach would be absurd, if applied in situations where an immediate victim dies as a result of crime, as this approach renders no family member ever able to become a Civil Party. The CIJs’ rejection on this ground very clearly indicates that there was no proper legal application of rules and principles, but that there *were* political considerations and influences involved.
 37. By rejecting the Appellant’s application the CIJs violated the principle of fairness and in particular the principle of transparency and certainty. *On the very same facts* as those raised in his Case 003 application, the Appellant was admitted as a Civil Party in Case 001³¹ and Case 002³², namely for psychological harm resulting from the loss of his brother, Kerry Hamill. In both cases he was admitted as the brother of the immediate victim.
 38. The CIJs acknowledge that the Appellant had been admitted in 002 as follows:

“The Co-Investigating Judges are aware that they admitted the Applicant as a Civil Party in Case 002, but it is not apparent from that decision (which was taken under the great time pressure of bring Case 002 to trial) that the requirement of directness of the causality link was examined in depth at the time ... Anyway, 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.”³³
 39. They further acknowledge the Appellant’s admission as a civil party in Case 001:

“The Co-Investigating Judges are also aware that the Trial Chamber in the Judgement (sic) of Case 001 admitted the Applicant as a Civil Party, but they

³⁰ OCIJ, “Order on Admissibility of the Civil Party Application of Rob Hamill”, dated 29 April 2010 [sic], D11/2/3, para 9.

³¹ Case against KAING Guek Eav, 001-18-07-2007-ECCC/TC, Judgment, 26 July 2010, E188, para. 650.

³² Case 002-19-09-2007-ECCC/OCIJ, Order on the Admissibility of Civil Party Applicants residing outside the Kingdom of Cambodia, 6 September 2010, D404.

³³ OCIJ, “Order on Admissibility of the Civil Party Application of Rob Hamill”, dated 29 April 2010 [sic], D11/2/3, para 8.

cannot follow the reasoning ... that the applicant has shown that his "harm was a direct consequence of the crimes..."³⁴

40. Civil Party Co-Lawyers note that Judge YOU Bunleng is the same national Co-Investigating Judge in Case 002, where he and Judge Marcel LeMonde (now replaced by Judge Siegfried BLUNK), in the Appellant's Case 002 Admissibility Order³⁵, noted that Article 3.2 of the Practice Direction provides that "*psychological harm may include the death of kin who were the victim of such crimes*" ... to be admissible, the harm suffered by the applicant does not necessarily have to be immediate but it must be personal".³⁶ The Case 002 Order states:

"To establish the existence of personal psychological harm, the Co-Investigating Judges consider that: (a) There is a presumption of psychological harm for the members of the direct family of the immediate Victim". In applying the criteria set out in the present order, the notion of direct family encompasses not only parents and children, but also spouses and siblings of the direct victim. The presumption will be considered as determinant in the following situations:

- (i) When the immediate Victim is deceased or has disappeared as a direct consequence of the facts under investigation³⁷.
- ii) When the immediate Victim has been forcibly moved and separated from the direct family as a direct consequence of facts under investigation. Such separation results in suffering for the direct family members which meets the personal psychological harm threshold.³⁷

41. Whilst the CIJs made a number of legal errors in Admissibility Order D11/2/3, the immediate error is the inconsistency in legal interpretation of the relevant Rules and Practice Directions, constituting a clear violation of IR 21(1)(c), which guarantees the transparency and certainty in the conduct of proceedings.
42. Judge YOU Bunleng was the same CIJ deciding admissibility orders in Case 002. In his case, the Judge has failed to *consistently* apply the same interpretation of the Practice Directions and Internal Rules as he did in previous cases.
43. The principle of legal certainty *sensu stricto* means that every person has the right to expect a predictable judicial outcome and protection from arbitrary

³⁴ Ibid, para 9.

³⁵ Order on the Admissibility of Civil Party Applicants residing outside the Kingdom of Cambodia, 06 September 2010, Doc.no. D404, para 13.

³⁶ See, for e.g., Prosecutor v Lubanga, 8 April 2009 Trial Chamber I (ICC-01104-01106), para. 49; Prosecutor v Lubanga, 11 July 2008, Trial Chamber I (ICC-01/04-01/06-1432 OA9 A010), para. 32.

³⁷ Order on the Admissibility of Civil Party Applicants residing outside the Kingdom of Cambodia, 06 September 2010, Doc.no. D404, para 14.

determinations. The unjustified rejection of the Applicant in the impugned Order violates IR 21 principles of fairness, transparency, accountability and certainty. It further violates a fundamental principle of the rule of law, being that the *same* facts and the *same* law, when consistently applied, must lead in a predictable manner to the *same result*.³⁸

II. SECOND GROUND OF APPEAL

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

a. Personal Harm as a Direct Consequence of the Crime

44. In the Case 003 rejection, the CIJs state that “the applicant did not demonstrate that he suffered the alleged psychological injury as a **direct** consequence of the death of his brother”.³⁹ They go on to say:

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 the English usage “direct” in this context means that the crime alleged caused an injury without any intermediate causal link. However, in this case, the intermediate link that caused the psychological injury of the applicant was the 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”.

45. The CIJs, whilst acknowledging the Appellant’s civil party status in Case 002, express that the Case 002 admissibility decision was incorrect because it “does not explain the requirements of the term “direct” and “the line of thought ... was not concerned with the requirements of causal directness”.⁴⁰ The CIJs continue: “Anyhow, the considerations that led to that decision are non-binding...”⁴¹
46. Concerning the Appellant’s admission in Case 001, the CIJs seem to argue (although it is not quite comprehensible) that references in the Case 001 Judgment to the French Code of Criminal Procedure and the 1964 Cambodian Code of Criminal Procedural, to civil action being open to all those who have “personally

³⁸ United Nations, “What is the Rule of Law”, at http://www.unrol.org/article.aspx?article_id=3.

³⁹ OCIJ, “Order on Admissibility of the Civil Party Application of Rob Hamill”, dated 29 April 2010 [sic], D11/2/3, para 1.

⁴⁰ Ibid, para 8.

⁴¹ Ibid.

- suffered damage directly caused by the offence” are “inconclusive” because it “does not explain the requirements of the term ‘directly’”.⁴²
47. The arguments of the CIJs are flawed, because a lack of a definition of the word “directly” in a legal provision, does not, in any way, render a decision to be made in error. Indeed, it is up to judges to decide on statutory interpretation.
48. IR 23 *bis*(1)(b) stipulates that, in order for Civil Party action to be admissible, the Civil Party applicant shall “demonstrate as a direct consequence of at least one of the crimes alleged against the Charged Person, that he or she has in fact suffered physical, material or psychological injury”. The three main elements required to be demonstrated and established by the Applicant therefore include: (i) existence of injury; (ii) direct consequence of the crime, and (iii) personal harm.
49. There is no doubt that Appellant has demonstrated the personal harm that he suffered as a result of the loss of his brother, Kerry.⁴³ IR 23*bis*(1)(b) purports to require as admissibility criteria for becoming a Civil Party that the harm that the victim has suffered appears as a “**direct consequence of the offence.**” However, this Definition does not reflect the definition for a “victim” in the Glossary of the Internal Rules, which stipulates that a “[a] victim refers to a natural person or legal entity that has suffered harm as a result of the commission of any crime *within the jurisdiction of the ECCC*”⁴⁴ (emphasis added).
50. In defining the prerequisite that the harm has to be a **direct** consequence of the crime/offence, the Trial Chamber established that harm can be suffered by “the immediate victims and the close kin.”⁴⁵ It further established that “[h]arm alleged by members of a victim’s extended family *may in exceptional circumstances amount to a direct and demonstrable consequence of the crime*”⁴⁶ (emphasis added). As a necessary condition, the Trial Chamber requires that “the applicants

⁴² Ibid, para 9.

⁴³ See Victim Information Form 11-VSS-00002 including Case 001 Trial transcriptions E1/63.1 where the Appellant gave evidence of Civil Party impact on 17 August 2009 (Day 59 of trial).

⁴⁴ Glossary of the Internal Rules (Revision 7).

⁴⁵ Case against KAING Guek Eav, 001-18-07-2007-ECCC/TC, Judgment, 26 July 2010, E188, para. 648.

⁴⁶ Ibid, para. 643.

prove both the *alleged kinship* and the *existence of circumstances giving rise to special bond of affection* or dependence of the deceased.”⁴⁷

51. In Case 001, the Appellant was admitted on this narrow interpretation, where the minimum requirement was to establish “harm suffered as direct consequence”.⁴⁸

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

52. The interpretation taken by Civil Party Co-Lawyers is explicitly supported by the Victims PD, which stipulates:

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

- a. The applicant must be a natural person or legal entity that has suffered harm as a result of the commission of any crime within the jurisdiction of the ECCC.
- b. To be considered to have suffered harm, the applicant must show:
 - i. Physical, material or psychological injury; and
 - ii. Such injury to be the direct consequence of the offence, personal and have actually come into being.”

c. Psychological injury may include the death of kin who were the victim of such crimes (emphasis added)

53. The Victims PD explicitly includes the death of kin who were (immediate) victims. By rejecting the Appellant for the reason that he is not an immediate Victim, the CIJs violated and/or erroneously interpreted the applicable Practice Directions.
54. For completeness, Civil Party Co-Lawyers refer to international jurisprudence that provides guidance beyond that given by the ECCC’s Trial Chamber. The ICC Appeal Chamber acknowledges direct and indirect victims and ruled:

“The issue for determination is **whether the harm suffered is personal to the individual. If it is, it can attach to both direct and indirect victims.** Whether or not a person has suffered harm as the result of a crime within the jurisdiction of the Court and is therefore a victim before the Court would have to be determined in light of the particular circumstances.”⁴⁹ (emphasis added).

55. In addition, Rule 85(a) of the Rules of Procedure and Evidence (**RPE**) of the ICC does *not* require that the harm be a ‘**direct**’ consequence⁵⁰. This accords with the definition of the term “victim” in the IR Glossary, identical to the definition of the

⁴⁷ Ibid, para.643.

⁴⁸ This narrow approach in Case 001 was appealed to the Supreme Court Chamber by Civil Parties deemed inadmissible on its application, and a decision is pending.

⁴⁹ Situation in the Democratic Republic of the Congo, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-1432, 11 July 2008, para. 32. Emphasis added.

⁵⁰ Rule 85 (a) of the RPE states: “Victims’ means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court.”

- RPE. Internationally, the harm suffered does not need to be a “**direct** result of the commission of any crime within the jurisdiction,” but must be personal.
56. The Inter-American Court of Human Rights (**IACHR**) has granted reparation to relatives and partners of victims, not only in cases of disappearances,⁵¹ but also for cases of killings,⁵² and other gross human rights violations where the victim did not die or disappear.⁵³ The IACHR considers that it can be presumed that the parents, children, siblings and partners of a direct victim fulfill these requirements and must be considered as indirect victims.⁵⁴
57. Significantly, the Basic Principles, define “victims” under Principle 4(8) as follows:
- “ ... victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights ... Where appropriate, and in accordance with domestic law, the term “**victim**” **also includes the immediate family or dependants of the direct victim** and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.”⁵⁵
58. The CIJs erred in both law and fact, when concluding that the Appellant is not a “victim” because “the Basic Principles and Guidelines on the Rights to a Remedy and Reparations for Victims etc ... do include as victims immediate family members or dependants, but only if they have suffered harm “in intervening to assist victim ... ” (sic).⁵⁶

⁵¹ Case *Velásquez Rodríguez v Honduras (Compensatory damages)*, Judgment of 21 July 1989, Series C No 7, paras 50-52; Case *Garrido and Baigorria v Argentina (Reparations)*, Judgment of 27 August 1998, Series C No 39, paras 62, 63; Case *of Blake v Guatemala*, Judgment of 22 January 1999, para 37; Case *Bámaca Velásquez v Guatemala (Reparations)*, Judgment of 22 February 2002, Series C No 91, paras 33-36.

⁵² Case *Aloboetoe v Suriname (Reparations)*, Judgment of 10 September 1993, Series C No 15, para 71; Case *Panel Blanca v Guatemala (Reparations)*, Judgment of 25 May 2001, Series C No 76, paras 85, 86; Case *of Street Children v Guatemala (Reparations)*, Judgment of 26 May 2001, Series C No 77, para 68; Case *Juan Humberto Sánchez v Honduras, Series C No 9*, Judgment of 7 June 2003, para 152.

⁵³ Case *Loayza Tamayo v Peru (Reparations)*, Judgment of 27 November 1998, Series C No 42, para 92.

⁵⁴ Case *Blake v Guatemala (Reparations)*, Judgment of 22 January 1999, para 37 [parents and brothers and sisters of disappeared person, without differentiation in proof]; Case *Loayza Tamayo v Peru (Reparations)*, Judgment of 27 November 1998, Series C No 42, para 92 [all persons with a close family link, i.e. children, parents and brothers and sisters]; Case *Juan Humberto Sánchez v Honduras*, Judgment of 7 June 2003, Series C No 99, para 152 [family members for victim and in their own right; siblings; non biological father; wife and other partner]; Case *of 19 Merchants v Colombia*, Judgment of 5 July 2004, Series C No 109, para 249 [children, partner, parents and siblings].

⁵⁵ Principle 4(8), Basic Principles of Justice for Victims (see footnote 12).

⁵⁶ The definition of “victim” under the Basic Principles and Guidelines on the Rights to a Remedy and Reparations for Victims is similarly worded to the definition in the Basic Principles of Justice for Victims of Crime and Abuse of Power.

59. The CIJs erred in fact, because the applicant found out 16 months (not “2 years”) after the fact, about the death of his brother. They also erred in finding that the “non-intervention” of the Appellant to “assist” his brother is material to his claims as a victim of crime. For this, they seriously erred in basic statutory interpretation, as the definition does not require a victim to be *both* an “immediate family member or dependent” *and* “persons who have suffered harm in intervening to assist a victim”. The definition explicitly uses the word, “or”, meaning that a victim could be a family member **OR** someone who suffered harm when intervening to assist.
60. To conclude, there is neither any legal basis under the ECCC laws, nor support in international practice or jurisprudence, for the rejection of the Appellant, because he has clearly demonstrated that he suffered harm as a direct consequence of a crime under investigation. The impugned Order of the CIJs appears to be motivated by factors other than proper legal interpretation and proper application of the law, and clearly violates Internal Rule 21(1)(c), 23 *bis*(1)(b), Article 3.2(c) of the Victims PD, and Principle 4 of the Basic Principles. For this reason, it should be struck out, set aside, and the Appellant should be granted civil party status on the proper application of the relevant law.

III. THIRD GROUND OF APPEAL

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

1. Lack of Public Information about the Conduct of Case 003

61. 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”.
62. The Tribunal 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 investigations⁵⁷ and a detailed summary of the investigation was made public and Victims were properly informed.⁵⁸ 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.

63. In January 2010, when judges at the tribunal 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 000⁵⁹, are systematically prevented from participating because no 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.
64. Answers to "Frequently Asked Questions (FAQs) about Case 003" were placed on the ECCC website on 10 May 2011.⁶⁰ 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 OCP's 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.

⁵⁷ OCIJ, "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."

⁵⁸ 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.

⁵⁹ "Closure of Cases may Reflect Official View of KR", *The Cambodia Daily*, 2 May 2011 front page, by Douglas Gillison.

⁶⁰ "Frequently Asked Questions about Case 003" at <http://www.eccc.gov.kh/en/articles/frequently-asked-questions-about-case-003>.

65. 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 International 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 IR 23 *bis* (2) with no extension of time has been given.
66. In Case 002, the Appellant was shown respect when he was approached by the Victims Unit (now VSS) and asked whether he wanted to have his Case 001 application transferred to Case 002 (in effect, to apply as a Civil Party in Case 002). In Case 003, the Appellant's Civil Party application was initiated on information he had gathered on his own, in light of the gaps in information at the court.
67. The CIJ's have further denied Civil Party Lawyers' requests for access to the Case File without any legal basis.⁶¹ This denial hinders the ability of Civil-Party Lawyers, who legitimately represent civil party applicants' claims, to identify proper legal and factual grounds in support of their clients' claims.
68. The International 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.
69. Not only have the CIJs failed in their duty to inform the public under IR 56, they have persecuted the International 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 defence and the interests of Victims, witnesses and other persons mentioned therein, and the requirements of the investigation", in accordance with IR 54, by making "contempt of court" allegations against him.⁶²

⁶¹ To date, there has been silence from the OCIJ in response to Civil Party Lawyers' requests for access to the Case Files in 003 and 004.

⁶² James O'Toole, "Cayley in the crosshairs", Phnom Penh Post, 13 May 2011, p. 1.

70. To date, the CIJs have continued to fail to meet their duties under IR 56 to inform the public.
71. 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”⁶³ and “[v]ictims should be informed of their rights in seeking redress through such mechanisms”.⁶⁴ 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).
72. 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 informed⁶⁵ and more broadly, breached fundamental principles of fairness under international law.⁶⁶

IV. FOURTH GROUND OF APPEAL

⁶³ Principle 4 of the Basic Principles of Justice for Victims (see footnote 12).

⁶⁴ Principle 5, Ibid.

⁶⁵ 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...”

⁶⁶ Principles 4 and 6 of the Basic Principles of Justice for Victims (see footnote 12).

In failing to give proper reasons in relation to the Appellant's Civil Party Application in Case 004, the CIJs have violated IR 21 concerning the fundamental principle of procedural fairness to provide reasons for a decision

1. Right to a Reasoned Decision as a Fundamental Principle of Law

73. In relation to the rejection of the Appellant's claims in Case 004, as at the time of writing this appeal, neither the Appellant nor his lawyers have received the Case 004 Admissibility Order, purportedly document number D5/2/3, despite numerous attempts to obtain it.⁶⁷
74. The Case 003 Admissibility Order D11/2/3, in the last sentence, states that the CIJs "REJECT the application to be a Civil Party in Case File 004 and its related requests". It is uncertain whether this reference to Case 004 is a mistake, as the Admissibility Order D11/2/3 pertains to Case 003. However, for the purposes of this appeal, it is assumed that the Case 004 rejection, referred to in D11/2/3, is given entirely without reason.
75. The obligation to issue a *reasoned* order is an implied duty of any judicial body. As the current Internal Rules are silent on this requirement, the ECCC Law allows the PTC to seek guidance in international procedural rules.⁶⁸
76. The right to a fair determination of a matter is protected under Article 14.1 of the ICCPR.⁶⁹ The CIJ's failure to give a properly reasoned decision is a clear denial of the right to a fair determination, specifically, the right to know exactly why one has been deemed inadmissible, and by extension, since Civil Parties cannot respond to a rejection without knowing the reasons, the right to be properly heard.
77. Civil Party Co-Lawyers refer to, and incorporate by reference, paragraphs 51 – 57

⁶⁷ See footnote 6.

⁶⁸ Civil Party Co-Lawyers note that IR 23 (3) and (4) (Rev. 3 and previous Revisions), state that Civil Parties have the right to a reasoned decision in relation to orders on admissibility. IR 23(3) (previous) states: "...[T]he Co-Investigating Judges may decide by reasoned order that the Civil Party application is inadmissible. (...)." IR 23(4) states: "...[T]he Trial Chamber may, by written reasoned decision, declare the Civil Party application inadmissible." This demonstrates that the previous versions of the IRs therefore expressly conferred substantive rights to civil party applicants. This right remains as a fundamental principle of procedural fairness.

⁶⁹ Article 14.1 ICCPR states: "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law".

of the Appeal Against Order on the Admissibility of Civil Party Applicants from Current Residents of Kep Province.⁷⁰

78. A failure to issue a properly reasoned decision is a violation of Principle 4 of the Basic Principles, which provides that victims should be treated with compassion and respect for their dignity.⁷¹ 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 victimising these persons yet again, this time by an internationalised judicial institution.

2. The Extent of the Reasoning

79. In failing to provide sufficiently detailed reasons, the CIJs have failed to fulfill their obligations under IR 21 “to ensure legal certainty and transparency”. They further violate IR 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.
80. International Jurisprudence acknowledges two principal reasons underlying the right to a reasoned decision. Firstly, the concerned person must be able to identify the reasons for a rejection against which s/he wants to appeal; secondly, the Appeal Chamber cannot conduct a fair and comprehensive appellate review of a decision if no reasons are given.
81. International Courts have abstained from defining the exact extent of reasoning required, deciding instead that the scope of reasons must be considered on a case-by-case basis. The ICC stated in *Prosecutor v Lubanga*⁷²:

“Decisions of a Pre-Trial Chamber authorizing the non-disclosure to the defence of the identity of a witness of the Prosecutor must be supported by sufficient reasoning. The extent of the reasoning will depend on the circumstances of the case, but it is essential that it indicates with sufficient clarity the basis of the decision. Such reasoning will not necessarily require reciting each and every factor that was before the Pre-Trial Chamber to be individually set out, but it

⁷⁰ Appeal against Order on Admissibility of Civil Party Applicants From Current Residents of Kep Province, 6 September 2011, D392/3/1.

⁷¹ Principle 4, Basic Principles of Justice for Victims (see footnote 12).

⁷² The Pre-Trial Chamber of the ECCC referenced the jurisprudence of the Appeals Chambers of the International Criminal Tribunal for the Former Yugoslavia and analyzed the jurisprudence of the European Court of Human Rights and concluded that the principle of having the right to a reasoned decision “applies with similar force to the case at hand”, at para. 29 of the 14 December 2006 Decision, para. 30.

must identify which facts it found to be relevant in coming to its conclusion.⁷³

82. According to the Lubanga case, a properly reasoned decision would have, at the very least, referred to the main facts stated in each application and discussed these facts in application of the Internal Rules, in order to clearly articulate the relevant facts which lead to the given conclusion. ⁷⁴
83. Fundamental principles of justice require that a victim be informed of the reasons for which the crimes they experienced and the harm they suffered were rejected by the Court as not admissible. Civil Party Co-Lawyers request that PTC overturn the CIJ's order in relation to Rob Hamill on the basis that rejected Civil Party applications must be issued by reasoned order.

V. FIFTH GROUND OF APPEAL

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

84. The rejection of the Appellant's civil claims is based on the failure of the CIJs to properly and *independently* investigate the facts in the Second Introductory Submission as referred to them by the Co-Prosecutors. In particular, they failed to consider the facts submitted by the Applicant.
85. These facts indicate that persons under investigation clearly fall under the responsibility of "charged persons" in Case 003, [REDACTED] the "capture of foreign nationals off the coast of Cambodia and their unlawful imprisonment, transfer to S-21 or murder", as enunciated by the International Prosecutor's Press Release of 9 May 2011.

⁷³ *Prosecutor vs. Thomas Lubanga Dyilo*, Judgment, 14 December 2006, para 30. Situation in the Democratic Republic of the Congo, *Prosecutor vs. Thomas Lubanga Dyilo*, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81", ICC-01/04-01/06-779, 14 December 2006, para.30. The ICC Statute and the ICC Rules of Procedure and Evidence stress in various places the importance of sufficient reasoning, for example in the context of evidentiary matters rule 64 (2) of the Rules of Procedure and Evidence, which requires a Chamber to "give reasons for any rulings it makes".

⁷⁴ In the jurisprudence of the ICC, each decision on admissibility of an applicant is discussed in detail with reasoned explanations for each applicant as to whether or not victim status is granted, including clear reasons for each decision.

86. According to Article 5 (2) and (3) of the Agreement, Article 10 of the ECCC Law, and IRs 14(1) and 55(5), the (Co-Investigating) Judges “shall be independent, and shall not accept or seek any instructions from any government or any other source” and “they shall conduct the investigations impartially and independently”.
87. The CIJs violated these provisions since they are seized with Cases 003 and 004 and have continued to fail to properly investigate the facts that the Appellant describes in his application. The reluctance of the CIJ’s to investigate beyond Case 002 has a long history and is allegedly driven by political interference of the Royal Government of Cambodia.⁷⁵
88. Since 7 September 2009, when the CIJs were first seized with the Second and Third Introductory Submissions⁷⁶, 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”.⁷⁷ 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.
89. 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.⁷⁸ 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

⁷⁵ “This was consistent with a reported plan by the judges to do away with both of the court’s pending cases, which together reportedly concern many more than 100,000 victims. No arrests have been made, no charges announced.”, in ‘Closure of Cases may Reflect Official View of KR’, *The Cambodia Daily*, 2 May 2011 front page, by Douglas Gillison.

⁷⁶ See Public Information at <http://www.eccc.gov.kh/en/articles/acting-international-co-prosecutor-requests-investigation-additional-suspects>, dated 8 September 2009.

⁷⁷ 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.

⁷⁸ OCIJ Internal Memorandum, from You Bunleng to Marcel Lemonde, 8 June 2010, “Dossiers 003 et 004” (unofficial translation from French into English).

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]”⁷⁹.

90. 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.*”⁸⁰
91. 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”⁸¹.
92. In June 2010, the Open Society Justice Initiative (OSJI), a reputable court monitor, published its report, which assessed the ‘un-signing’ as follows:

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

When added to the history of governmental objections to allowing Cases 003/004 to move forward independently, it supports the conclusion that political interference is improperly affecting decisions about the cases.⁸²

⁷⁹ 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.

⁸⁰ *Ibid.*

⁸¹ OCIJ Internal Memorandum, from You Bunleng to Marcel Lemonde, 8 June 2010, “Dossiers 003 et 004” (unofficial translation from French into English).

⁸² 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.

93. 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”.⁸³
94. 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]”⁸⁴ 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.”⁸⁵
95. 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.
96. 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 force⁸⁶...”

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

97. 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

⁸³ Statement of the Co-Investigating Judges, at <http://old.eccc.gov.kh/english/cabinet/press/156/PROCIJ%28JUne2010.pdf>.

⁸⁴ Sebastian Strangio, ‘KRT judges divided on next cases’, *The Phnom Penh Post*, 10 June 2010, p.1.

⁸⁵ Douglas Gillison, ‘More Questions than Answers’, *The Cambodia Daily*, 11 June 2010.

⁸⁶ Law on the Establishment of the Extraordinary Chambers, dated 27 October 2004 (NS/RKM/1004/006, Article 23, pg. 9

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”.⁸⁷ OSJI assessed this recent statement as follows:

Such blatant political inference in the court’s work is of course contrary to basic fair trial standards⁸⁸, 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 state⁸⁹.

98. 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?”⁹⁰
99. 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 Defense⁹¹ 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

⁸⁷ 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

⁸⁸ 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.

⁸⁹ 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.

⁹⁰ James Goldston, ‘Cambodia’s Court at a Crossroads’, *Wall Street Journal*, 1 March 2010.

⁹¹ 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.

with the decision of the Six Officials related to the invitation to be interviewed by the International Co-Investigating Judge⁹²

100. 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 year⁹³, it is highly likely that, regardless what further investigations the Co-Prosecutors request, they will all be rejected, without even a prospect of an appeal because the closure of the Office of the Co-Investigating Judges has already been decided.
101. To conclude, by failing to investigate independently, thoroughly and free from the Prime Minister's prohibition to investigate case 003/004, 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.

VI. SIXTH GROUND OF APPEAL

"In rejecting the Appellant's civil claims, the CIJs have blocked the ECCC's process of justice, in which victims and the international community, alike, have placed their hopes, and in doing so, have fostered a message that impunity prevails, in violation of the primary purposes of the ECCC as set out in the Law on Establishment of the ECCC

102. The rejection of the Appellant's very strong claims for Case 003, using every reason possible, and denying the Appellant his right to participate as a civil party in a case where he is a "victim" under a proper construction of the Practice Directions and Internal Rules, leads to a strong suspicion that these rejections are to be followed by a dismissal of the case files in Cases 003 and 004.
103. By failing to give any public information about the scope and nature of Cases 003 and 004, and by condemning the International Prosecutor for fulfilling his function under IR 54 in issuing this information to the public, the CIJs, are effectively blocking a process of justice in which they are supposed to play a significant and meaningful role.

⁹² *Ibid.*

⁹³ Julia Wallace, 'Case 003 investigation reaches conclusion', *The Cambodia Daily* 20 April-1 May 2011, p. 2.

104. The effect and impact of political interference at this Tribunal is now clear. The Office of Public Affairs section of the ECCC attempts to explain the inaction of the CIJs on their website:

“Since the scope of investigation in Case 003 at this point has not been made public, it would be a risk that most Civil Party Applications filed would fall outside of the scope of the investigation. To encourage the filing of Civil Party Applications in a situation as such, could potentially lead to the creation of unrealistic expectations for victims who might want to file an application to become a Civil Party⁹⁴.”

This explanation ignores an obvious solution, whereby the CIJs could release *some* information about the scope of investigation. Rather, the explanation given on the ECCC website condones the CIJs’ efforts to block civil party participation in Cases 003 and 004.

105. The rejection of the Appellant’s application and any subsequent inaction in relation to any Requests for Further Investigations from the International Prosecutor⁹⁵, would demonstrate that the CIJs are working *against* the mission of the ECCC and sets a dangerous precedent of impunity for those most responsible for mass crimes. The actions of the CIJs demonstrate contempt and disdain for due process and for the rights of victims, in violation of international standards for due process and victims rights. This goes against the vision for the ECCC is summarized on the ECCC’s official website as:

“This special new court was created by the government and the UN but it will be independent of them. It is a Cambodian court with international participation that will apply international standards. **It will provide a new role model for court operations in Cambodia.**⁹⁶”

⁹⁴See ECCC official website at <http://www.eccc.gov.kh/en/articles/frequently-asked-questions-about-case-003>, accessed on 11 May 2011.

⁹⁵ Following from the National Prosecutor’s Press Release, “Statement by the National Co-Prosecutor Regarding Case File 003”, dated 10 May 2011, it is clear that any Requests for Further Investigations will come from the International Prosecutor only. In this Press Release, the National Prosecutor, CHEA Leang, “maintains that the named suspects in Case File 003 do not fall within the jurisdiction of the ECCC to be brought to trial and that the Tribunal’s mandate can be adequately fulfilled through the prosecution of the Accused persons in the ECCC Detention Facility”.

⁹⁶ See ECCC official website at <http://www.eccc.gov.kh/en/about-eccc/introduction>, accessed on 11 May 2011. Emphasis added.

Furthermore, if the ECCC will be a new role model for court operations in Cambodia, the CIJs' actions in Case 003 have made that model one of reckless impunity, setting a dangerous precedent on an international level for victims rights. The standard set by the CIJs in Case 003 has been a lack of investigation, succumbing to political influence, lack of transparency, mistreatment of victims, and denial of civil party participation.

106. In conclusion, the CIJs are blocking the ECCC's process of justice and championing impunity, and the Admissibility Order dismissing Rob Hamill's application in Cases 003 and 004 is yet another example of the extent that political interference has played out at this Tribunal.
107. For all the legal reasons cited in this appeal, on a correct construction of the law and proper application of law to the facts pertaining to the Appellant's civil claims, Rob Hamill must be admitted as a Civil Party in Case 003.
108. Civil Party Co-Lawyers request that Judges of the PTC determine Mr Hamill's civil party status in Case 004 in accordance with the law, and on a construction of the law that accords with IR 21 and the *Basic Principles of Justice for Victims of Crime and Abuse of Power*.

VIII. CONCLUSION AND RELIEF REQUESTED

109. Civil Party Co-Lawyers respectfully request that the PTC:
 - (i) Declare this Appeal admissible, and
 - (ii) Set aside the decision of the CIJs' Order, deeming the Appellant inadmissible, and
 - (iii) Grant leave for the Appellant's lawyers to make further submissions / representations in support of this appeal after a reasonable time from which access to the case files in Cases 003 and 004 has been granted (30 days)⁹⁷, and
 - (iv) Consider all representations and legal submissions made, and
 - (v) Grant the Appellant Civil Party status in Case 003, and

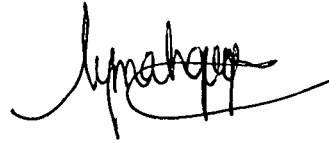
⁹⁷ In the "Request for Suspension of Deadline for Filing Appeal against Order on Admissibility of Civil Party Application, Robert HAMILL, Pending Grant of Access to Case File", dated 12 May 2011, Civil Party Co-Lawyers sought a suspension of the deadline and/or leave to submit further legal and factual arguments, at a reasonable time following any grant of access to the Case File.

- (vi) Determine the Civil Party Status of the Appellant in Case 004 in accordance with the applicable laws.

Respectfully submitted by:



Mr. SAM Sokong
Co-Lawyers for Civil Parties



Ms. Lyma NGUYEN

Signed in Phnom Penh, Kingdom of Cambodia, and Canberra, Australia (respectively), on this 23rd day of May 2011.