

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

FILING DETAILS

(PTC07)

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**APPEAL AGAINST ORDER ON THE ADMISSIBILITY OF CIVIL PARTY APPLICANT
[REDACTED] (D11/4/3) (CASE 003)**

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I. PROCEDURAL BACKGROUND

1. On 18 May 2011, [REDACTED] (Appellant) submitted an application to become a Civil Party in Cases 003 and 004 to the Victims Support Section (VSS).¹ On 18 July 2011, the VSS confirmed that [REDACTED] applications were issued with VSS registration number 11-VSS-00186².
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.³
3. On 21 September 2011, [REDACTED] was notified of the "Order on the Admissibility of the Civil Party Application of [REDACTED]" dated 9 September 2011 (Admissibility Order) (D11/4/3).⁴ The Appellant's lawyers were notified of the Decision in an email from the Appellant dated 21 September 2011. Although a Case Notification email was sent to their ECCC email accounts on 14 September 2011, Appellant's lawyers were not effectively notified until 21 September 2011.
4. The Appellant, represented by national lawyer, Mr SAM Sokong, and international lawyer, Ms Lyma NGUYEN, hereby appeals the decision of the CIJs to reject his civil claim in Case 003 by deeming his application inadmissible.⁵
5. On 1 May 2011, the Appellant's international lawyer requested access to the Case File in Cases 003 in respect of other clients for whom legal representation was provided at that time⁶. As at the date of this appeal, (3 October 2011), no substantive response has been received by the Appellants' lawyers concerning requests for access to the relevant Case File.⁷

¹ In Cases 001 and 002, the Appellant was granted civil party status, on the same facts.

² Email from VSS to Lyma Nguyen dated 18 July 2011, titled "Follow up: Civil Party application for [REDACTED] - Case 003".

³ Statement of the CIJs concluding investigations in Case 003, 29 April 2011, at <http://www.eccc.gov.kh/en/articles/statement-co-investigating-judges>.

⁴ OCIJ, "Order on Admissibility of the Civil Party Application of [REDACTED]", dated 9 September 2011, D11/4/3.

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". [REDACTED] Power of Attorney is Document D11/4/2 on the Case File.

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.

⁷ As at 21 September 2011, the date that the Appellant received the rejection concerning Case 003 via the post in [REDACTED], there has been no substantive response to the request for case file access.

II. APPLICABLE LAW AND RULES

6. 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)⁸, Articles 5(2) and 5(3) of the Agreement between the United Nations and the Royal Government of Cambodia (Agreement),⁹ the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Basic Principles)*¹⁰, Article 14 of the International Covenant On Civil and Political Rights (ICCPR) and Article 3 of the Practice Direction on Victims Participation (Practice Direction).¹¹

III. STANDARD OF APPEAL

7. IR 77 *bis* is a specific provision for appeals against admissibility orders by the OCIJ.¹² This provision exhaustively determines the standard of appeal in which grounds of appeal are limited to errors in fact and/or law made by the CIJs in their decision.

IV. ADMISSIBILITY OF THE APPEAL

8. According to the IR 77 *bis* (1) and (2), an Order regarding the admissibility of a Civil Party claim can be appealed within 10 days from the date of its notification. The Admissibility Order was emailed to the Appellant's lawyers on 14 September 2011, and in accordance with the Pre-Trial Chamber (PTC) Memo titled "Judicial recess during Pchum Ben period"¹³, the deadline for filing the appeal is 3 October 2011.¹⁴

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

⁹ Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea, 6 June 2003.

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

¹¹ 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>.

¹² IR 77bis was first adopted on 9 February 2010, and retained in subsequent revisions of the IRs. It came into effect on 23 February 2010.

¹³ PTC Memo, "Judicial recess during Pchum Ben period", ERN 00743666, 23 September 2011.

¹⁴ Through the PTC Memo, all parties or applicants in Cases 003 and 004 were informed that time limits for filing documents will run during the judicial recess for Pchum Ben between 26 – 30 September. In this memo, parties were notified that the Court Management section will not accept any document for filing to the PTC in Cases 003 and 004 during this period, with any deadlines for filing

9. In accordance with IR 75, a Notice of Appeal will be filed to the PTC the same day.¹⁵
10. On 23 September 2011, Civil Party Co-Lawyers were notified by the ECCC's Interpretation and Translation Unit (ITU) that it does not have capacity to produce a Khmer translation of the appeal to be filed on 3 October 2011.¹⁶ Consequently, Civil Party Co-Lawyers will submit the English version of this appeal on 3 October 2011, with the Khmer version to be submitted at the time that the ITU translation is completed.
11. The CIJ's Admissibility Order (D11/4/3) contains a decision on the admissibility of a Civil Party application. The appeal against this Order is therefore factually admissible, and is timely submitted.

V. PRELIMINARY REMARKS

12. The Appellant notes that the CIJs' Admissibility Order pertains only to his Case 003 application, and does not mention his Case 004 application. Further, the Admissibility Order appears to be a "copy and paste" from the CIJs' Order concerning the Admissibility of [REDACTED], containing the same "reasons" for rejecting the respective civil claims.¹⁷ The cases are factually similar in that both [REDACTED] and [REDACTED] lost a close family member as a result of the "capture of [REDACTED] and their unlawful imprisonment, transfer to S-21 or murder", a crime under the scope of investigations in Case 003.¹⁸
13. To date, there has been no indication or accountability from any arm of the ECCC as to the identities of the charged persons in Cases 003. There are, however,

during the recess moved over to Monday 3 October 2011. If 14 September 2011 is taken as the date of receipt of the Admissibility Order, 10 days for appealing, in accordance with IR 77 bis, expires on 24 September. In accordance with IR 39(2), as the deadline falls on a weekend, the date for filing is moved to the next working day, Monday 26 September 2011. In accordance with the Pre-Trial Chambers Memo on Judicial recess during Pchum Benh, filings will not be accepted until Monday 3 October 2011.

¹⁵ As at date of writing, no document number has been provided.

¹⁶ ITU indicated that, if it received the English version of the appeal on 26 September, it may only be able to translate this appeal by 10 October 2011, given that it takes six working days to finish a 30 page translation and its national staff will not be working during the Pchum Ben holiday (26 September - 30 September, inclusive). Email dated 23 September 2011 from ITU to Civil Party Legal Team, titled "RE: URGENT RESPONSE REQUIRED: Capacity to translate from English to Khmer for a civil party admissibility appeal".

¹⁷ OCIJ, "Order on the Admissibility of Civil Party Applicant [REDACTED]", dated 29 April 2010 [sic], Doc No. D11/2/3.

¹⁸ [REDACTED]

strong grounds to believe that, [REDACTED] under investigation, [REDACTED] is included.¹⁹

14. The Appellant's application complies with the Practice Direction on Victims Participation (Victims PD),²⁰ 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 ...". The CIJs have been seized with the Second Introductory Submission, which refers to Case 003, since 7 September 2009, rendering this a case to which victims can apply.
15. The Appellant's application set out 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 This application was made in accordance with IR 23bis, which provides that a civil party action is admissible where the victim can demonstrate direct physical, material or psychological harm from a crime alleged against a charged person.
16. The Appellant requests that his lawyers be granted access to the Case 003 Case File as a matter of due process, and further reserves any right to make further relevant representations about his civil claim at a reasonable time after any such grant is made.

VI. ARGUMENT

1. 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"

17. The Admissibility Order D11/4/3 is, similar to previous Admissibility Orders issued by the CIJs, outrageous in its grounds of rejection and demonstrative of a level of competence and expertise below the standard expected in an internationalized criminal tribunal.

¹⁹ [REDACTED]

²⁰ Practice Direction on Victims Participation (02/2007/Revision 1), 27 October 2008.

²¹ 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".

18. Given the information from [REDACTED] that "capture of [REDACTED]" and their detention and murder at S-21 is within the scope of investigations, the allegations against persons identified as [REDACTED] should have played a part in the rejection decision.
19. The Admissibility Order focuses on the definition of a "victim" and of harm caused by "intermediate causal links" between the crime of the charged person and the death of the Appellant's brother. From what could be understood from the Order, it appears that the basis for rejecting the Appellant's claims is that he is not a "direct" victim of crime, but is, instead, an "indirect" victim. However, there are parts of the Admissibility Order that would suggest that the CIJs considered that the Appellant is not a "victim" at all.
20. 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

21. The facts pertaining to the fate of the Appellant's brother, [REDACTED], at S-21 where he was detained, interrogated, and tortured, and at Boeng Trabek where he was burned to ashes, are outlined in the VSS' Report on Civil Party Application (11-VSS-00186). They are as follows:
22. In December 1978, the Appellant's brother, [REDACTED], and [REDACTED], were sailing [REDACTED] when they were taken captive [REDACTED]. The two men were picked up by a Khmer Rouge naval vessel and then sent to Tuol Sleng Prison (S-21) where they were brutally tortured, possibly on the suspicion that they were CIA agents. The torture continued until the Vietnamese intervention / fall of the Khmer Rouge in January 1979 when the two men were relocated to Boeng Trabek.
23. At Boeng Trabek, possibly one day before the fall of the Khmer Rouge regime, both men were burnt under tyres until their bodies turned to ashes. It has not been

²² VSS, Victim Information Form 11-VSS-00186 of [REDACTED], Case 003 and 004, 18 May 2011.

determined whether they were set on fire while they were alive or after they had been killed.

b. The Appellant Suffered Direct and Personal Harm

24. As a direct consequence of the crimes allegedly perpetrated by senior leaders or others “most responsible”, [REDACTED], the Appellant and his family suffered:

[REDACTED]

25. The Appellant holds [REDACTED] as a person who falls within the category of “those most responsible” for crimes within the jurisdiction of the ECCC²⁴,

²³ [REDACTED]

²⁴ 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.

individually and criminally responsible for the capture, torture and, ultimately, the murder of his brother, [REDACTED], for Crimes against Humanity including imprisonment, enslavement, torture, murder and other inhumane acts, and War Crimes, including unlawful transfer, unlawful confinement, hostage-taking, denial of fair trial rights, inhumane treatment, torture, willful causing of great suffering and willful killing.²⁵

26. [REDACTED] falls within the personal jurisdiction of the ECCC, and is believed to 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. He also played a role involving crimes in respect of the whole of Cambodia, connected with his *de jure* position of authority under the DK. Alternatively, he is believed to be responsible under the doctrine of superior responsibility.²⁶

c. CIJs' Determinations on the Facts and Law

27. The CIJs were of the view that "the Applicant failed to demonstrate that the alleged psychological injury was caused directly by the alleged crime"²⁷ in Case 003.

28. [REDACTED]

29. Further, this approach could never be applied in situations where an immediate victim dies as a result of crime, as it would render 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, turning to an inference that other considerations and influences, such as political factors, were involved.

²⁵ Any investigations into the facts raised by the Appellant, against these suspected persons, would assist to determine jurisdictional elements of crimes against humanity, since [REDACTED], being a [REDACTED], was clearly considered an "enemy" of the regime, under a civilian population against whom widespread and systematic crimes were committed. In particular, S-21 was known to be an interrogation centre for [REDACTED], including [REDACTED] or suspects accused of being such. In relation to war crimes, as a civilian, [REDACTED] was 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.

²⁶

²⁷ OCIJ, "Order on the Admissibility of the Civil Party Application of [REDACTED]", dated 9 September 2011, D11/4/3, paras 5-9.

30. 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 001²⁸ and Case 002²⁹, namely for psychological harm resulting from the loss of his brother, [REDACTED]. In both cases he was admitted as the brother of the immediate victim.

31. The CIJs acknowledge the Appellant's admission in Case 002 as follows:

"Although the Co-Investigating Judges admitted the Applicant as a Civil Party in Case 002 for "Tuol Sleng (S-21) Security Center/Psychological Harm", it is not apparent from that decision that the requirement of directness of the causality link was examined in depth at the time ... In any case, the considerations that led to the previous CIJs decision are non-binding, and cannot prevent the (present) Co-Investigating Judges from applying Rule 23 *bis*.1(b) in the manner considered to be correct."³⁰

32. They further acknowledge the Appellant's admission as a civil party in Case 001:

"Although the Trial Chamber in the Judgement (sic) of Case 001 admitted the Applicant as a Civil Party, the CIJs cannot follow the reasoning ... that the applicant has shown that his "harm was a direct consequence of the crimes..."³¹

33. 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) 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 become admissible, and the harm suffered by the applicant does not necessarily have to be immediate but it must be personal.³² The Appellant's Case 002 Admissibility 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 investigation.

²⁸ Case against KAING Guek Eav, 001/18-07-2007-ECCC/TC, Judgment, 26 July 2010, E188, para. 650.

²⁹ 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.

³⁰ OCIJ, "Order on the Admissibility of the Civil Party Application of [REDACTED]", dated 9 September 2011, D11/4/3, para 8.

³¹ *Ibid*, para 9.

³² OCIJ, Order on the Admissibility of Civil Party Applicants residing outside the Kingdom of Cambodia, 6 September 2010, D404, para 13.

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.³³

34. Whilst the CIJs made a number of legal errors in Admissibility Order D11/4/3, 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.
35. Judge YOU Bunleng was the same CIJ deciding admissibility orders in Case 002. In this case, Judge YOU Bunleng has failed to *consistently* apply the same interpretation of the Practice Directions and Internal Rules as he did in Case 002.
36. The principle of legal certainty *sensu stricto* means that every person has the right to expect a predictable judicial outcome and protection from arbitrary determinations. The unjustified rejection of the Applicant in the impugned Order violates IR 21 principles of fairness, transparency, accountability and certainty.
37. The CIJs' decision should be overturned on the basis that it violates IR 21, as well as a fundamental principle of the rule of law, that the *same* facts and the *same* law, when consistently applied, must lead, in a predictable manner, to the *same result*.³⁴

³³ *Ibid*, Doc.no. D404, para 14.

³⁴ United Nations, "What is the Rule of Law", at http://www.unrol.org/article.aspx?article_id=3.

2. SECOND GROUND OF APPEAL

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

a. Personal Harm as a Direct Consequence of the Crime

38. In the Case 003 rejection, the CIJs state that “the Applicant failed to demonstrate that the alleged psychological injury was caused directly by the alleged crime”, stating:

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 the current 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 alleged. Therefore, the causal chain in abbreviated form is: Crime alleged - death of brother – psychological injury of Applicant.³⁵

39. The CIJs, whilst acknowledging the Appellant’s civil party status in Case 002, express that the Case 002 admissibility decision was incorrect because it “does not explain or examine the requirements of the term “direct” and “the reasons given ... was [sic] not concerned with the requirement of causal directness”.³⁶ The CIJs continue: “In any case, the considerations that led to the previous CIJs decision are non-binding...”³⁷

40. Concerning the Appellant’s admission in Case 001, the CIJs seem to argue that references in the Case 001 Judgment to the French Code of Criminal Procedure and the 1964 Cambodian Code of Criminal Procedure, to civil action being open to all those who have “personally suffered damage directly caused by the offence”, are “inconclusive” because it “does not explain the requirements of the term ‘directly’”.³⁸

41. The arguments of the CIJs are flawed, because a lack of a definition of the word “directly” in a legal provision, does not, in any way, render a decision to be made in error. Indeed, it is the role of judges to decide on statutory interpretation.

42. IR 23 bis(1)(b) stipulates that, in order for Civil Party action to be admissible, the Civil Party applicant shall “demonstrate as a direct consequence of at least one of the crimes alleged against the Charged Person, that he or she has in fact suffered

³⁵ OCIJ, “Order on the Admissibility of the Civil Party Application of [REDACTED]”, dated 9 September 2011, D11/4/3, para 5.

³⁶ Ibid, para 8.

³⁷ Ibid.

³⁸ Ibid, para 9.

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.

43. There is no doubt that Appellant has demonstrated the personal harm that he suffered as a result of the loss of his brother, [REDACTED].³⁹ IR 23bis(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*”⁴⁰ (emphasis added).
44. 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.”⁴¹ 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*”⁴² (emphasis added). As a necessary condition, the Trial Chamber requires that “the applicants prove both the *alleged kinship* and the *existence of circumstances giving rise to special bond of affection* or dependence of the deceased.”⁴³
45. In Case 001, the Appellant was admitted on this narrow interpretation, where the minimum requirement was to establish “harm suffered as [a] direct consequence”.⁴⁴

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

46. 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.

³⁹ See Victim Information Form 11-VSS-00186.

⁴⁰ Glossary of the Internal Rules (Revision 7).

⁴¹ Case against KAING Guek Eav, 001/18-07-2007-ECCC/TC, Judgment, 26 July 2010, E188, para. 648.

⁴² Ibid, para. 643.

⁴³ Ibid, para.643.

⁴⁴ 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.

- 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)

47. 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.

48. For completeness, Civil Party Co-Lawyers refer to international jurisprudence that provides guidance beyond that given by the ECCC’s Trial Chamber. The Appeal Chamber of the International Criminal Court (ICC) 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.”⁴⁵ (emphasis added).

49. 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’ consequence⁴⁶. This accords with the definition of the term “victim” in the IR Glossary, identical to the definition of the RPE. Internationally, the harm suffered does not need to be a “direct result of the commission of any crime within the jurisdiction,” but must be personal.

50. The Inter-American Court of Human Rights (IACHR) has granted reparation to relatives and partners of victims, not only in cases of disappearances,⁴⁷ but also for cases of killings,⁴⁸ and other gross human rights violations where the victim

⁴⁵ 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.

⁴⁶ 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.”

⁴⁷ Case *Velásquez Rodríguez v Honduras (Compensatory damages)*, Judgment of 21 July 1989, Series C No7, 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.

⁴⁸ Case *Aloeboetoe v Suriname (Reparations)*, Judgment of 10 September 1993, Series C No 15, para. 71;

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

did not die or disappear.⁴⁹ 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.⁵⁰

51. 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.”⁵¹

52. 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 ... do include as victims immediate family members or dependants, but only if they have suffered harm “in intervening to assist victim ...”⁵²

53. The CIJs 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, the CIJs 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, but does not need to be both.

54. 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

⁴⁹ Case *Loayza Tamayo v Peru (Reparations)*, Judgment of 27 November 1998, Series C No 42, para. 92.

⁵⁰ Case *Blake v Guatemala (Reparations)*, Judgment of 22 January 1999, para. 37 [parent s and brothers

and sisters of disappeared person, without differentiation in proof]; Case *Loayza Tamao 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].

⁵¹ Principle 4(8), Basic Principles of Justice for Victims (see footnote 10).

⁵² 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.

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 sound legal interpretation and proper application of the law, and 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 and the Appellant should be granted civil party status on the proper application of the law.

3. 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 Case 003

Lack of Public Information about the Conduct of Case 003

55. 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”.
56. There is much public interest in the cases that the Tribunal investigates and prosecutes, including Case 003. 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, as occurred in Case 002 when the CIJs publicly announced the scope of judicial investigations, *prior* to the conclusion of those investigations⁵³ In Case 002, a detailed summary of the investigation was made public and Victims were properly informed.⁵⁴ 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

⁵³ 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.”

⁵⁴ 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.

- supplementary information supporting their claims, following the press release.⁵⁵
57. In January 2010, when judges at the Tribunal concluded their investigations in Case 002, around 4000 victims of the Khmer Rouge regime had already applied to participate in the trial and seek reparations. On 24 June 2011, 98% of applicants had been granted Civil Party status, with approximately 2000 successful appeals.⁵⁶
58. In both Cases 003 and 004, potential victims, estimated many more than 100 000⁵⁷, are systematically prevented from participating because no information has been made available about the suspects' names. When the conclusion of a 20-month investigation in Case 003 was announced on 29 April 2011, the number of civil party applicants totalled four. By the extended deadline of 8 June 2011, there were only 318 civil party applicants.
59. Answers to "Frequently Asked Questions (FAQs) about Case 003" were placed on the ECCC website on 10 May 2011⁵⁸ following 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 that the CIJs have already rejected the first two civil party applications, a reasonable inference could be made that the issuance of this information was an official warning for victims not to apply.
60. In Case 002, the Appellant was asked by the Victims Unit (now VSS) whether he wished to transfer his Case 001 application to Case 002 (in effect, to apply as a Civil Party in Case 002). In contrast, 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 Case 003 has so far revealed that respect for the dignity of victims is not a priority for the

⁵⁵ The extension of the initial deadline of 18 May 2011 by three weeks was announced on 7 June 2011. The extension was effectively one day (8 June 2011). See OCIJ Press Release, "Statement from the Co-Investigating Judges Related to Case 003 Requests from the International Co-Prosecutor", dated 7 June 2011, at <http://www.eccc.gov.kh/sites/default/files/media/ECCC%20OCIJ%207%20June%202011%28Eng%29.pdf>

⁵⁶ PTC, Decision on Appeals Against Orders of the Co-Investigating Judges of the Admissibility of Civil Party Applications, 24 June 2011, Doc no. D404/2/4.

⁵⁷ "Closure of Cases may Reflect Official View of KR", *The Cambodia Daily*, 2 May 2011 front page, by Douglas Gillison.

⁵⁸ "Frequently Asked Questions about Case 003" at <http://www.eccc.gov.kh/en/articles/frequently-asked-questions-about-case-003>.

Court, as victims have been effectively denied the opportunity to apply as civil parties, given that the deadline for applications was 18 May 2011 (in accordance with IR 23 *bis* (2)) and the extended deadline was announced on 7 June 2011, only one day before the extension actually expired.

61. 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.⁵⁹
62. 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 suspected persons and the scope of investigations in Case 003.
63. The conduct of the CIJs in Case 003 violates 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”⁶⁰ and “[v]ictims should be informed of their rights in seeking redress through such mechanisms”.⁶¹
64. In relation to their treatment of victims who have demonstrated courage of a high standing, sufficient to face the unspeakable horrors of the past, the type of “reasoning” the CIJs offer on the definition of a victim have done nothing to demonstrate that any hope placed on the judicial process of the ECCC is not misguided hope. In particular, the CIJs have breached Principle 6 of the Basic Principles, which 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,**

⁵⁹ James O’Toole, “Cayley in the crosshairs”, Phnom Penh Post, 13 May 2011, p. 1.

⁶⁰ Principle 4 of the Basic Principles of Justice for Victims (see footnote 12).

⁶¹ *Ibid.*, Principle 5.

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).

65. More broadly, by failing in its duty to inform the public under IR 56, the CIJs have breached not only 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 IR 21(c), to keep victims informed⁶² and more broadly, breached fundamental principles of fairness under international law.⁶³
66. The CIJ's have further denied Civil Party Lawyers' requests for access to the Case File without any legal basis⁶⁴, thereby hindering the ability of Civil-Party Lawyers to identify proper legal and factual grounds which may exist on the case file, in support of their clients' claims.

4. FOURTH GROUND OF APPEAL

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

67. The CIJs rejected the Application in the second and third alternative because the
- “admission would not be in the interest of the expeditiousness of proceedings pursuant to Rule 21 (4) because the alleged criminal acts committed at S-21 Security Center are part of the Closing Order in Case 002, and the Applicant is enjoying his rights as a civil party in that case, and has furthermore already enjoyed his rights as civil party in regard to S-21 during the trial of Case 001.”⁶⁵
68. This alternative ground of rejection amounts to a general ground to be applied to any Applicant who is already a Civil Party in either one of the other cases before

⁶² 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...”

⁶³ Principles 4 and 6 of the Basic Principles of Justice for Victims (see footnote 12).

⁶⁴ To date, there has been silence from the OCIJ in response to Civil Party Lawyers' requests for access to the Case File in 003.

⁶⁵ OCIJ, “Order on the Admissibility of the Civil Party Application of [REDACTED]”, dated 9 September 2011, D11/4/3, para 10.

the ECCC. To the knowledge of the Co-Lawyers for Civil Parties, only Civil Parties who have been admitted into Cases 001 and/or 002 have also applied for Case 003.⁶⁶ Consequently, it can be inferred from this ground for refusing admissibility that the CIJs intend that *all* current applicants in Case 003 should be rejected. In other words, the proceedings in Case 003 exclude civil party participation.

69. This determination is a serious and grave violation of the substance and intention of the Internal Rules, the Cambodian Criminal Procedural Code and international norms. To exclude applicants simply because of (i) the cause of expeditious proceedings (without balancing this objective with the rights of victims) and (ii) their current participation in other cases, has no legal basis and amounts to a stealthy introduction of additional criteria for becoming a Civil Party.⁶⁷ The CIJs consciously breached the applicable law and the Internal Rules by rejecting the Appellant in the alternative on this basis. The non-recognition of legitimate Civil Party applicants who meet legal admissibility criteria by the CIJs demonstrates, once again, that the CIJs are moving in a direction of dismissing Case 003.
70. This unsubstantiated approach further constitutes a violation of the principal of legal certainty where all Civil Parties previously admitted from Case 001 were asked and even *invited* by the VSS to participate in Case 002, after having already participated in Case 001.
71. With this alternative ground of rejection (which could, in the view of the CIJs, stand on its own, if the other grounds were not be accepted by the PTC), the CIJs have not properly applied the Internal Rules, which outline clearly the criteria to become a Civil Party. Participating in Case 002 where the same crime site will be examined, or having already participated in Case 001, does not invalidate an individual's participation in Case 003. The different case files demonstrate that there are different defendants, who carried out distinct roles and responsibilities

⁶⁶ This is inferred from the fact that it is unlikely that any NGO has been able to afford any outreach activities in Cases 003 to inform the population – and neither does the Court. Therefore, only existing Civil Parties submitted applications in Case 003. In addition, since no information has been made available about the case file, there is very little that NGOs could inform victims about. Contrary to this, the Court as a whole contributes to make it more difficult for Victims to apply since it had the Victims Application forms deleted from its homepage at the time when the deadline for application was still running. Co-Lawyers for Civil Parties complained in this regard towards Public Affairs and the VSS.

⁶⁷ Judges shall interpret the laws but are not allowed to add constitutive elements.

for the same crime sites. The point made by the CIJs is not a valid argument or existing legal criteria for decisions concerning civil party admissibility.

72. The reasoning in this alternative is an “add-on” to an already outrageous ruling, and constitutes a serious violation of basic fundamental rights of a victim, (i) to be heard, (ii) to have access to truth, and (iii) to have access to an effective remedy, including reparation. The CIJs have fully deprived the Appellant from exercising these rights in Case 003, which can never be remedied by participating in another trial with [a] different Accused.
73. In addition, this ‘reasoning’ is so absurd that any rejection on this ground amounts to an erroneous decision on the basis of a failure to provide (proper and adequate) reasons, itself a breach of the Internal Rules and CPC, both of which require a reasoned decision. Civil Party Lawyers incorporate by reference legal argument on the requirement of a reasoned decision, based on paragraphs 50 – 63 of the Appeal against the Order on Admissibility of Civil Party Applicants from Current Residents of Kep.⁶⁸
74. Fundamental principles of justice require that a victim be informed of proper (and comprehensible) reasons for which the crimes they experienced and the harm they suffered were rejected by the Court as not admissible to support their claim. On a related ground, Civil Party Co-Lawyers submit that judges of the PTC should also overturn the CIJ’s order in relation to [REDACTED] on the basis that rejected Civil Party applications must be issued by a properly reasoned decision, which is comprehensible and legally and factually sound.

5. FIFTH GROUND OF APPEAL

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

75. The appeal turns to a submission by Civil Party Co-Lawyers that the CIJs failed to properly and independently investigate Case 003 in that they
- a) failed to investigate facts referred to them in the Office of the Co-Prosecutor’s Second Introductory Submission
 - b) allowed political considerations to interfere with their legal determinations

⁶⁸ Refer to Case File 002, Appeal against Order on the Admissibility of Civil Party Applicants from Current Residents of Kep, 6 September 2010, D392/3/1, paras. 50-63.

- c) failed to perform their legal role, functions and duties in accordance with ECCC Law, and
- d) determined civil party admissibility based on a premature finding that suspected persons in Case 003 are not within the personal jurisdiction of the tribunal

These points, separately and collectively, establish that the CIJs erred in fact and in law about the proper role and function they had to play within the tribunal, and in doing so, violated the IRs, ECCC Law and ECCC Agreement.

a) Failure to investigate facts in the Second Introductory Submission

76. According to Article 5 (2) and (3) of the ECCC 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”.
77. The rejection of the Appellant’s application is based on the failure of the CIJs to *independently* investigate the facts in the Second Introductory Submission as referred to the CIJs by the Co-Prosecutors. The facts under investigation, comprising “capture of [REDACTED] and their unlawful imprisonment, transfer to S-21 or murder”, as enunciated by [REDACTED], clearly place the alleged suspect, [REDACTED] within the personal jurisdiction of the tribunal.
78. Since 7 September 2009, when the CIJs were first seized with the Second Introductory Submission⁶⁹ (Case 003), more than 20 months have 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 Introductory Submission, the CIJs informed the public that no field investigations were being 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

⁶⁹ See Public Information at <http://www.eccc.gov.kh/en/articles/acting-international-co-prosecutor-requests-investigation-additional-suspects>, dated 8 September 2009.

previous Cases Files 001 and 002”.⁷⁰ Shortly after this announcement, the closure of the investigations was made public.

79. OSJI’s June 2011 *Report on Recent Developments at the ECCC* noted that while Judge Marcel Lemonde was still in office, the ECCC’s Public Affairs Unit’s monthly publication *The Court Report* cited some field investigations in Case 003; however, the field investigations were reportedly conducted by international staff only.⁷¹ Issues of *The Court Report* published between the date on which Judge Blunk took office (December 2010) and the 29 April closing of the Case 003 investigation cited “no field investigations.” Generally, the cited “progress” in the investigation was the review of documents already in OCIJ’s possession, and the preparation of “memoranda on complex legal issues.”⁷²
80. In response to the CIJs’ 29 April 2011 announcement of the close of investigations for Case 003, the International Co-Prosecutor conducted a review of Case File 003 in accordance with his obligations under Rule 66(5).⁷³ The International Co-Prosecutor concluded that the investigation was incomplete and filed a Request for an Extension of Time for the Filing of Civil Party Applications⁷⁴ and three Investigative Requests.⁷⁵ On 7 June 2011, the CIJs issued an Impugned Order rejecting the Requests as invalid without assessing them on the merits, on the basis that the formal requirements had not been met.⁷⁶ The International Prosecutor has since lodged an appeal requesting the Pre-Trial Chamber to overturn the CIJs’ decision, and cites as one of the grounds, the CIJs’

⁷⁰ 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.

⁷¹ “The Court Report,” ECCC Publication, January 2011, p. 7, cites: “...one Case 003 related field mission in Phnom Penh on 1 December.” This is the most recent reported field mission and was conducted on the day Judge Blunk officially took office. See also “The Court Report,” ECCC Publication, November 2010 at page 8; see also Justice Initiative December Update, p.11; see also Justice Initiative Political Interference Report at page 21.

⁷² See “The Court Report,” ECCC Publication, February 2011, p. 7: “No field investigation was conducted during the reporting period” and “The Court Report,” ECCC Publication, March 2011, p. 6: “No field investigations were conducted in February.” See also “The Court Report,” ECCC Publication, April 2011, p. 6, which makes no mention at all of field investigation activity. All editions between February and April cite desk-based review of materials, mainly from the Case 002 file.

⁷³ International Co-Prosecutor’s appeal against the “Decision on time extension request and investigative requests by the International Co-Prosecutor regarding Case 003”, paras 4-7, available at: <http://www.eccc.gov.kh/en/document/court/international-co-prosecutors-appeal-against-decision-time-extension-request-and-inves>.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

contravention of their “legal obligation to conduct a complete and impartial investigation”.⁷⁷

81. In failing to properly and fully investigate the facts that the Appellant describes in his application, and more importantly, in failing to consider these *in relation to* the scope of investigations, the CIJs have violated the ECCC Agreement, ECCC Law and IRs.

b) Apparent Political Interference in Legal Determinations

82. The reluctance of the CIJs to investigate beyond Case 002 has a long history and is allegedly driven by the political interference of the Royal Government of Cambodia.⁷⁸ That only international staff of the OCIJ have participated in field investigations in Case 003 and/or 004 demonstrates that national/international divisions between the co-prosecutors and between the co-investigating judges are longstanding. Coupled with the premature closure of investigations for Case 003 in April, this has raised questions as to “whether the desk-based investigations have been tailored to provide legal cover for the politically-determined dismissal of politically-opposed cases.”⁷⁹
83. The “investigations” of the CIJs were compromised early on, by the “un-signing” of rogatory letters in Cases 003 and 004 by the national Judge YOU Bunleng.⁸⁰ The International Investigating Judge set a deadline for his national counterpart on 4 June 2010 for the signing of these rogatory letters by 7 June 2010. However, the first investigative acts in Cases 003 and 004 had reportedly already been taken on 4 June 2010 in the form of confidential rogatory letters, which were signed by *both* CIJs.⁸¹

⁷⁷ Press Release by the International Co-Prosecutor Against the Rejection of Requests in Case File 003, 19 August 2011, available at:

<http://www.cambodiatribunal.org/sites/default/files/eccc%20ocp%2019%20aug%202011%20eng.pdf>

⁷⁸ “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.

⁷⁹ OSJI Report, “Recent Developments at the Extraordinary Chambers in the Courts of Cambodia” June 2011. Available at http://www.soros.org/initiatives/justice/articles_publications/publications/cambodia-eccc-20110614/cambodia-eccc-20110614.pdf.

⁸⁰ OCIJ Internal Memorandum, from You Bunleng to Marcel Lemonde, 8 June 2010, “Dossiers 003 et 004” (unofficial translation from French into English).

⁸¹ 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

84. An immediate response was given: “[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.*”⁸²
85. On 8 June 2010, having struck out his signature, Judge YOU Bunleng informed his international counterpart that ‘it is not yet *opportune* to take action in Cases 003 and 004’⁸³. 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.⁸⁴

86. On 9 June 2010, the International CIJ stated that there was a disagreement between the CIJs “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”.⁸⁵ 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]”⁸⁶ and “Judge Marcel Lemonde is now to proceed without the

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.

⁸² *Ibid.*

⁸³ OCIJ Internal Memorandum, from You Bunleng to Marcel Lemonde, 8 June 2010, “Dossiers 003 et 004” (unofficial translation from French into English).

⁸⁴ 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.

⁸⁵ Statement of the Co-Investigating Judges, at

<http://old.eccc.gov.kh/english/cabinet/press/156/PROCIJ%28JUne2010.pdf>

⁸⁶ Sebastian Strangio, ‘KRT judges divided on next cases’, *The Phnom Penh Post*, 10 June 2010, p.1.

support of his Cambodian colleague in the politically charged investigation that government officials have already said should not move forward.”⁸⁷

87. The resulting failure to fully or properly investigate appears to be directly linked to Prime Minister Hun Sen’s repeated public statements.⁸⁸ Foreign Minister HOR Namhong told reporters after the UN Secretary General met with the premier, “we have to think about peace in Cambodia”.⁸⁹ OSJI assessed this recent statement as follows:

Such blatant political inference in the court’s work is of course contrary to basic fair trial standards⁹⁰, 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 state⁹¹.

88. The actual or perceived guidance that the CIJs have taken from political influences amounts to a violation of the relevant provisions of the ECCC Agreement, the ECCC Law, and the IRs which spell out the role that the judges have to play at the court and the manner in which they are to carry out these roles.

c) Failure to perform legal role, functions and duties in accordance with ECCC

Law

89. The CIJs have failed to meet their legal role, functions and duties in accordance with the ECCC Law, which states:

⁸⁷ Douglas Gillison, ‘More Questions than Answers’, *The Cambodia Daily*, 11 June 2010.

⁸⁸ Including a comment 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”.

⁸⁹ 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.

⁹⁰ 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/cambodia-report-20101207/cambodia-khmer-rouge-report-20101207.pdf.110](http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/khmer-rouge-tribunal-20101 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.110).

⁹¹ 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.

“All investigations shall be the joint responsibility of two 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 force⁹²...”

90. The CIJs failed to carry out their legal responsibility as they did not follow the “existing procedures in force”; they did not question suspects and victims, hear witnesses, or collect evidence. They did not conduct any new investigations in Case 003, and only referred to the existing materials available in Cases 001 and 002.
91. Given that Cases 001 and 002 concern five entirely different suspects, with different roles and functions within the DK, the CIJs’ approach to investigations is unprofessional, and unreasonable. The approach demonstrates no initiative, will or drive to exercise their functions fully, properly and independently.
92. One example of recent direct interference by the government in Court matters in Case 002 was 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 Defense⁹³ 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 Judge⁹⁴”.
93. One of the ECCC’s Cambodian Judges told James Goldston, Executive Director of OSJI, in early February 2010, “How can we say that the court is a model of independent justice if the government does not let us do our job?”⁹⁵
94. Additionally, in a Press Release dated 20 September 2011, the OSJI expressed its deep concern with regard to the rejection of a similar civil party applicant and other developments that have further contributed to an already sizeable body of

⁹² Law on the Establishment of the Extraordinary Chambers, dated 27 October 2004 (NS/RKM/1004/006, Article 23, page 9).

⁹³ 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.

⁹⁴ *Ibid.*

⁹⁵ James Goldston, ‘Cambodia’s Court at a Crossroads’, *Wall Street Journal*, 1 March 2010.

evidence raising serious questions as to the independence, competence, and professionalism of the court's two co-investigating judges. The United Nations was once again called, as it was in June 2011, "[to] conduct an independent investigation into serious allegations that the co-investigating judges at the ECCC are deliberately styming investigations".⁹⁶

d) Premature Findings on Personal Jurisdiction Prejudiced Civil Party Determinations

95. The CIJs in their press release dated 8 August 2011 stated that they had "serious doubts" about whether the suspects in Case 004 (and effectively the alleged suspects in Case 003) would be considered as "most responsible persons" according to the jurisdictional requirements of the court.⁹⁷ It follows that on 9 September 2011, the CIJs handed down their decision in respect of the Appellant's admissibility.⁹⁸
96. The date of the CIJs' decision is significant in light of the timing of their press statement because they indicate that the basis for the rejection, rather than being a proper consideration of the Appellant's claims against legal admissibility criteria, was a pre-determined position about the personal jurisdiction of the Court. This also appears to have impacted significantly on the approach the CIJs have taken to exercising their duty to investigate.⁹⁹
97. Civil Party Co-Lawyers submit that this determination was made prematurely, and inappropriately interferes with the proper determination of civil party admissibility in Case 003. In Case 001, KAING Guek Eav was found by the *Trial Chamber* to be within the category of "those who were most responsible", and thus, under the tribunal's personal jurisdiction.¹⁰⁰ If it were left to the Trial Chamber to determine this legal point, and the criteria used by the Trial Chamber in Case 001 were again applied, the result would be a finding that [REDACTED]

⁹⁶ OSJI Press Release "Cambodia's Khmer Rouge Court Excludes Victims' Voices" at <http://www.soros.org/initiatives/justice/news/cambodia-victims-20110916>

⁹⁷ Press release by the Co-Investigating Judges regarding Civil Parties in Case 004, 8 August 2011, at: <http://www.cambodiatribunal.org/sites/default/files/ECCC%20PR%20OCIJ%208%20Aug%202011%20%28Eng%29.pdf>

⁹⁸ OCIJ, "Order on Admissibility of the Civil Party Application of [REDACTED]", 9 September 2011, D11/4/3.

⁹⁹ Tatiana Sainati, 'The Scope of the Co-Investigating Judges' Duty to Investigate', *DC-CAM*, pages 34-37.

¹⁰⁰ Case against KAING Guek Eav, 001-18-07-2007-ECCC/TC, Judgment, 26 July 2010.

██████████ is an individual who falls under the personal jurisdiction of the Court. According to the Office of the Co-Prosecutors, ██████████ was an influential figure in the DK and ██████████. As such, it is arguable that ██████████ role would be of an even higher order than that of KAING Guek Eav, ██████████.

98. The statement of “serious doubts” made by the CIJs exposes their unwillingness to properly investigate Case 003, and indicates that they will decide to dismiss the case when they issue the Closing Order, which ultimately taints and is prejudicial to decisions on Civil Party admissibility¹⁰³.
99. To conclude, the failure to investigate independently, thoroughly and free from the Prime Minister’s prohibition to investigate Case 003 has meant that the Appellant’s application was rejected without being investigated. It is our submission that the rejection order contains legal error, and violates Rules 14 (1), 55 (5) of the IR, Article 10 new of the ECCC Law and Article 5 (29 and (3) of the Agreement, and the UN Principles against Impunity. For these reasons, the Appellant seeks to have the decision of the CIJs deeming his civil claims inadmissible overturned.

6. SIXTH GROUND OF APPEAL

In rejecting the Appellant’s civil claims, the CIJs have impeded a serious judicial process at the ECCC by allowing impunity to prevail and in doing so, have acted contrary to the primary purposes of the ECCC as set out in the Law on Establishment of the ECCC.

100. The vision for the ECCC, which is supposed to be a “special new court” “independent” of both the government and the UN is set out as:

“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.”¹⁰⁴

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¹⁰³ Tatiana Sainati, ‘The Scope of the Co-Investigating Judges’ Duty to Investigate’, *DC-CAM*, page 27.

¹⁰⁴ See ECCC official website at <http://www.eccc.gov.kh/en/about-eccc/introduction>, accessed on 11 May 2011. Emphasis added.

However, Civil Party Co-Lawyers argue that the standard set by the CIJs in Case 003 has been a lack of investigation, conducting their roles with apparent or actual influences of a political nature, lack of transparency, mistreatment of victims, and denial of civil party participation, all of which impede the ECCC's process of justice, promotes impunity and violates international standards of due process and victims rights.

101. The CIJs' denial of the Appellant's 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 the CIJs have searched for *any* reason to reject the Appellant's very strong and compelling civil claims in Case 003, due to political interference.
102. The statements made by the CIJs that [REDACTED] is not someone who is covered under the Tribunal's personal jurisdiction is a public indication that the rejection of civil party claims is likely to be followed by a dismissal of Case 003 by the CIJs. This proposition is supported by the unfortunate event in early 2011 when UN investigators were advised that their contracts would not be extended beyond the end of this year.¹⁰⁵
103. Further, by failing to give any public information about the scope and nature of Case 003, 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.
104. The effect and impact of political interference at this Court is clear. The Office of Public Affairs section of the ECCC has attempted to explain the inaction of the CIJs as a necessary precaution to avoid
"the creation of unrealistic expectations for victims who might want to file an application to become a Civil Party", as the "experience from Case 002" showed that there "would be a risk that most Civil Party Applications filed [in Case 003] would fall outside of the scope of the investigation".¹⁰⁶
105. This explanation ignores an obvious solution, whereby the CIJs could release *some* information about the scope of investigation. Rather, the explanation given

¹⁰⁵ Julia Wallace, 'Case 003 investigation reaches conclusion', *The Cambodia Daily* 20 April-1 May 2011, p. 2.

¹⁰⁶ See ECCC official website at <http://www.eccc.gov.kh/en/articles/frequently-asked-questions-about-case-003>, accessed on 11 May 2011.

on the ECCC website condones the CIJs' efforts to block civil party participation in Case 003.

106. The rejection of the Appellant's application and any subsequent inaction in relation to Requests for Further Investigations from the International Prosecutor¹⁰⁷, demonstrate that the CIJs are working *against* the mission of the ECCC and sets an internationally dangerous precedent of impunity for those most responsible for mass crimes.

107. James A. Goldston of OSJI stated in the 20 September 2011 press release:

Continuing to ignore these allegations only serve to further risk the ECCC's legacy for justice in Cambodia, as well as to compromise the UN's own contribution to the development of international criminal law.¹⁰⁸

If Case 003 is dismissed because of political interference and without transparency or review, significant damage will be done to the court's overall legitimacy and the ongoing fight against impunity.

108. In conclusion, the CIJs are blocking the ECCC's process of justice and championing impunity, and the Admissibility Order dismissing [REDACTED] application in Case 003 is yet another example of the extent that political interference has played out at this Court.

109. 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, [REDACTED] must be admitted as a Civil Party in Case 003.

110. The Appellant expects that the same due process will also take place in relation to his application in Case 004.

VII. CONCLUSION AND RELIEF REQUESTED

111. 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

¹⁰⁷ 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".

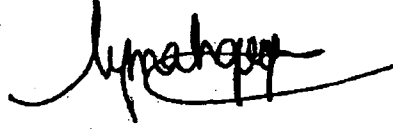
¹⁰⁸ OSJI Press Release "Cambodia's Khmer Rouge Court Excludes Victims' Voices" at <http://www.soros.org/initiatives/justice/news/cambodia-victims-20110916>

- (iii) Consider all representations and legal submissions made, and
- (iv) Grant the Appellant Civil Party status in Case 003, and
- (v) Grant his lawyers access to the Case File in Case 003.

Respectfully submitted by:



Mr. SAM Sokong
National Civil Party Lawyer



Ms. Lyma NGUYEN
International Civil Party Lawyer

Signed in Phnom Penh, Kingdom of Cambodia, and Darwin, Australia (respectively),
on this 3rd day of October 2011.