ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ
Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

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

អង្គបុរេជំនុំជម្រះ
Pre-Trial Chamber
Chambre Préliminaire

D411/3/6

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

Case File No: 002/19-09-2007-ECCC/OCIJ (PTC76, PTC112, PTC113, PTC114, PTC115, PTC142, PTC157, PTC164, PTC165 and PTC172)[1]

Before: **Judge PRAK Kimsan, President**
Judge Katinka LAHUIS
Judge NEY Thol
Judge Catherine MARCHI-UHEL
Judge HUOT Vuthy

Greffiers: **SAR Chanrath,**
Entela JOSIFI,
KONG Tarachhath,
Anne-Marie BURNS,

Date: **24 June 2011**

ឯកសារដើម
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PUBLIC

DECISION ON APPEALS AGAINST ORDERS OF THE CO-INVESTIGATING JUDGES ON THE ADMISSIBILITY OF CIVIL PARTY APPLICATIONS

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HONG Kimsuon
Pascal AUBOIN
PICH Ang
CHET Vanly

Accused:
IENG Sary
IENG Thirith
NUON Chea
KHIEU Samphan

Co-Lawyers for the Accused:
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Michael G. KARNAVAS
PHAT Pouv Seang
Diana ELLIS
SON Arun
Michiel PESTMAN

[1] **Each an "Appeal" and collectively "the Appeals."**

VEN Pov
LOR Chhunthy
Olivier BAHOUGNE
KIM Mengkhy
MOCH Sovannary
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Elisabeth RABESANDRATANA
Philippe CANNONE
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Isabelle DURAND
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Laure DESFORGES

Victor KOPPE
SA Sovan
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THE PRE-TRIAL CHAMBER OF THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA ("ECCC") is seised of the Appeals filed by the Co-Lawyers for the Civil Parties ("the Co-Lawyers") against the respective Orders of the Co-Investigating Judges (each, an "Impugned Order" and collectively, "the Impugned Orders") on admissibility of Applications filed by Victims in order to become Civil Party to the proceedings in Case 002.

I. BACKGROUND

1. On 18 July 2007 the Co-Prosecutors filed their Introductory Submission to the Co-Investigating Judges ("Introductory Submission").[2] They identified five suspects,[3] including NUON Chea, IENG Sary, IENG Thirith, KHIEU Samphan and KANG Keck Iev (DUCH), who, they submitted, had taken part in a common criminal plan,[4] the implementation of which constituted a systematic and unlawful denial of basic rights of the *Cambodian population*.[5] The Co-Prosecutors identified twenty-five distinct factual situations of murder,[6] torture,[7] forcible transfer,[8] unlawful detention,[9] forced labor[10] and religious, political and ethnic persecution[11] as evidence of the crimes committed in the execution of this common criminal plan, which they submitted constitute *crimes against humanity, genocide, grave breaches of the Geneva Conventions, homicide, torture and religious persecution*.[12] The Introductory Submission, and subsequent Supplementary Submissions, were filed as strictly confidential and thus not subject to access by the public, the Civil Party Applicants or the Civil Parties, but were accessible to the lawyers for the Civil Parties once they were recognized by the Co-Investigating Judges or a Chamber.

2. On 19 September 2007 the Co-Investigating Judges decided to:

[2] Co-Prosecutors' Introductory Submission, 18 July 2007, D3 ("Introductory Submission").
[3] Introductory Submission, paras. 73 – 113.
[4] Introductory Submission, paras. 5 – 16.
[5] Introductory Submission, paras. 2 – 3.
[6] Introductory Submission paras. 49 – 72.
[7] *Idem.*
[8] Introductory Submission, paras. 37 – 42.
[9] Introductory Submission, paras. 43 – 48.
[10] *Idem.*
[11] Introductory Submission, paras. 69, 70 and 72.
[12] Introductory Submission, paras. 122.

a. Separate the case file of Duch, for "those facts committed inside the framework of S-21" which "section of the case file will be investigated under the Case File Number 001/18-07-2007;"

b. Announce that "other facts specified in the Introductory Submission dated 18 July 2007" and "those facts related to Duch or other persons mentioned in the above Introductory Submission will be investigated under Case File Number 002/19-09-2007."[13]

3. On 26 March 2008 the Co-Prosecutors filed a Supplementary Submission[14] requesting the Co-Investigating Judges to investigate the crimes committed as a result of the operation of the North Zone Security Centre during the period of Democratic Kampuchea, crimes believed to fall within the jurisdiction of the ECCC. The Co-Prosecutors indicated that these new facts have been referred to them by the Co-Investigating Judges who requested advice on whether they should investigate the contents of some Civil Party Applications received.[15] The Co-Prosecutors then clarified[16] that paragraphs 37-39 of the Introductory Submission constitute a request to investigate only the forcible transfer of people from Phnom Penh and that paragraph 39 of the Introductory Submission "describes the origin of the policy that led to the evacuation and simply *notes that the policy was applied to all cities in Cambodia, not just Phnom Penh.*" They classified the new facts as homicide and torture and as the Crimes Against Humanity of murder, extermination, imprisonment, torture, persecutions on political grounds of former officials of the Khmer Republic, and other inhumane acts. Referring to the five suspects, the Co-Prosecutors stated that "these acts were part of the common criminal plan or joint criminal enterprise described in paragraphs 5-16 of the Introductory Submission.

4. On 13 August 2008 the Co-Prosecutors filed a clarification[17] that the judicial investigation is not limited to the facts specified in paragraphs 37 to 72 of the Introductory Submission and paragraphs 5 to 20 of the Supplementary Submission, but extended to all facts, referred to in these two Submissions, provided these facts assist in investigating whether

[13] Separation Order, 19 September 2007, D18.
[14] Co-Prosecutors Supplementary Submission regarding the North Zone security centre, 26 March 2008, D83.
[15] Co-Prosecutors Supplementary Submission regarding the North Zone security centre, 26 March 2008, D83, paras 2 and 3.
[16] Co-Prosecutors Supplementary Submission regarding the North Zone security centre, 26 March 2008, D83, para. 4.
[17] Co-Prosecutors' Response to the Co-Investigating Judges Request to Clarify the Scope of the Judicial Investigation Requested in its Introductory and Supplementary Submission, 13 August 2008, D98/1.

the specified factual situations constitute crimes within the jurisdiction of the ECCC or the modes of liability named in the Introductory Submission.

5. On 30 April 2009 the Co-Prosecutors filed a Supplementary Submission[18] in which they requested and authorised the Co-Investigating Judges to investigate incidences of forced marriage and sexual relations mentioned in four civil party applications which were pending before the Co-Investigating judges at the time. Further, on 5 November 2009, the Co-Prosecutors filed another Supplementary Submission[19] authorizing the Co-Investigating Judges, "where they determine it appropriate, [to] consider and investigate further alleged incidents of forced marriage and sexual relations other than those [already identified in the Supplementary Submission of 30 April 2009]."

6. On 31 July 2009 the Co-Prosecutors filed a Supplementary Submission[20] in which they requested that the genocide of the Cham, homicide, torture and religious persecution of the Cham and murder, extermination, enslavement, imprisonment, torture, rape, persecution on political, racial and religious grounds of the Cham, and other inhumane acts become part of the judicial investigation.[21] Referring to the five suspects, the Co-Prosecutors stated that "these acts were *part of the common criminal plan or joint criminal enterprise* described in paragraphs 5-16 of the Introductory Submission." Throughout this Supplementary Submission the Co-Prosecutors referred to the *whole Cham population as a group.*

7. On the 11 September 2009 the Co-Prosecutors filed a Supplementary Submission[22] clarifying that the scope of factual allegations for which the suspects were being investigated had changed from the original Introductory Submission in relation to five sites and requested that the factual matters and crimes as described in this Supplementary Submission become part of case 002 which was being investigated by the Co-Investigating Judges. They classified these facts as crimes within the jurisdiction of the ECCC, including, but not limited to: homicide and torture, and to crimes against humanity, including murder, extermination, enslavement, imprisonment, torture,

[18] Co-Prosecutors' Response to the Forwarding Order of the Co-Investigating Judges and Supplementary Submission, 30 April 2009, D146/3.
[19] Further Authorisation Pursuant to Co-Prosecutors' 30 April 2009 Response to the Forwarding Order of the Co-Investigating Judges and Supplementary Submission, 5 November 2009, D146/4.
[20] Co-Prosecutors' Supplementary Submission Regarding Genocide of the Cham, 31 July 2009, D196.
[21] Co-Prosecutors' Supplementary Submission Regarding Genocide of the Cham, 31 July 2009, D196, para.24.
[22] Co-Prosecutors' Clarification of Allegations Regarding Five Security Centres and Execution Sites Described in the Introductory Submission, 11 September 2009, D202.

persecutions on political grounds of former officials of the Khmer Republic and other inhumane acts. The Co-Prosecutors stated they have reason to believe that the five suspects committed these criminal acts as *part of the common criminal plan or joint criminal enterprise* described in paragraphs 5-16 of the Introductory Submission.

8. On 5 November 2009, the Co-Investigating Judges released a Statement in which they stated that they intended to complete the investigation in Case 002 by the end of 2009 and that "pursuant to the amended Internal Rules, anyone who wishes to apply to become a Civil Party must submit an application no later than 15 days after the Co-Investigating Judges have issued the notification that they have concluded the investigation."[23] The Co-Investigating Judges "in order to assist any members of the public who wish to apply to become a Civil Party," provided in this statement "information outlining the facts falling within the scope of the ongoing investigation." The Co-Investigating Judges explained that "according to the Internal Rules,[24] a victim is a natural person or legal entity that has suffered direct physical, material or psychological injury as a result of the commission of any crime within the jurisdiction of the ECCC." "If 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.*" The Co-Investigating Judges then enumerate the "material facts [that] form part of the [judicial] investigation," by listing: the "cooperatives and worksites" and the "security centers and execution sites" that are under investigation and the "acts directed against the population and/or groups of persons."

9. On 13 January 2010 the Co-Investigating Judges issued a Notice pursuant to Internal Rule 23 concerning placement on the Case File of Civil Party applications.[25] The Notice reiterated that Victims had fifteen days after their notification by the Co-Investigating Judges of the conclusion of the judicial investigation to submit Civil Party applications. It explained that all civil party applications and supporting documents are filed with the ECCC Victims Unit and then transferred to the Greffier of the Co-Investigating Judges together with a "Victims unit Individual Form" which contains a summary of the alleged

[23] Statement from the Co-Investigating Judges, 5 November 2009, http://www.eccc.gov.kh/english/cabinet/press/138/ECCC_Press_Release_5_Nov_2009_Eng.pdf.
[24] Note that the Internal Rules in force by 5 November 2009 were Internal Rules (Rev. 4) adopted on 11 September 2009.
[25] Notice pursuant to Internal Rule 23 concerning placement on the Case File of Civil Party applications, 13 January 2010, D316.

criminal acts. The Co-Investigating Judges also drew attention to their public statement of 5 November 2009 which reiterated the requirement that:

> "if a victim wishes to become a civil party :
>
> i. his/her alleged prejudice must be direct and personal and
>
> ii. directly *linked to one or more factual situations* that form the basis of the ongoing judicial investigation [...] as set out in CO-prosecutors Introductory and supplementary submissions."

10. On 14 January 2010 the Co-Investigating Judges issued their Notice of Conclusion of Judicial Investigation[26] which specified the investigation as relating to charges of Crimes against Humanity, Grave breaches of the Geneva Conventions dated 12 August 1949, Genocide, Murder, Torture and Religious Persecution.

11. On 27 January 2010 the Co-Investigating Judges issued an Interoffice Memorandum on the filing of Civil Party Applications and complaints.[27] The Memorandum was aimed at providing "the Victims Unit with details necessary to provide information to complainants and civil parties." It confirmed that the Victims had fifteen days after the conclusion of the judicial investigation to submit their applications, which was the 29th of January 2010. The Victims Unit had to file the applications with the Greffiers of the Co-Investigating Judges by the 29th of March 2010. The Victims Unit could also submit any supplementary information provided to complete an initial application, within three months from 29 January 2010.

12. On 9 February 2010 Revision Five of the Internal Rules entered into force. Revision Five of the Internal Rules introduced Rule 23 *bis* (1)(b) which provided:

> "In order for Civil Party application to be admissible, the Civil Party applicant shall:
>
> a) be clearly identified; and
>
> b) Demonstrate as a direct consequence of at least one of the crimes alleged against the Charged Person, that he or she has in fact suffered

[26]Notice of Conclusion of Investigation, 14 January 2010, D317.
[27]Filing of Civil Party Applications and Complaints, 27 January 2010, D337.

physical, material or psychological injury upon which a claim of collective and moral reparation might be based."

13. Rule 23(2) of the Internal Rules under Revision Four provided:

> "The right to take civil action may be exercised by Victims of a crime coming within the jurisdiction of the ECCC, without any distinction based on criteria such as current residence or nationality. In order for Civil Party action to be admissible, the injury must be :
>
> a) Physical, material or psychological ; and
>
> b) The direct consequence of the offence, personal and have actually come into being."

14. On 26 March 2010 the Co-Investigating Judges extended the deadline for the Victims Unit to file the civil party applications from 29 March 2010 until 30 April 2010.[28]

15. On 29 April 2010, the Co-Investigating Judges issued an Interoffice Memorandum in English to the Head of the Victims Unit[29] allowing Civil Party Applicants more time in which to file supplementary information to the Victims Unit in relation to their applications by extending the deadline until 30 June 2010 for those Civil Party Applicants that had already submitted their applications to the Victims Unit by 29 January 2010.

16. On 2 August 2010 the Co-Investigating Judges issued an Order in Khmer and English pursuant to Internal Rule 23 *ter* organizing Civil Party Representation for the 799 remaining unrepresented Civil Parties.[30] The Order was notified in French on 8 September 2010. On 12 August 2010 the Co-Investigating Judges issued a Response to Civil Parties Lawyers' Request for an extension of the period of time for gathering and submitting supplementary information for the 569 civil party applicants who had just been designated a lawyer,[31] rejecting the request due to the advanced stage of the Closing

[28] Deadline to file remaining civil party applications, 26 March 2010, D337/1.
[29] Deadline for Filing Supplementary Information, 29 April 2010, D337/6.
[30] Order on the Organisation of Civil Party Legal Representation under Rule 23 *ter* of the Rules, 2 August 2010, (D337/10).
[31] Response to Civil Parties Lawyers' Request for an extension of period of time for gathering and submitting supplementary information for the recently designated 569 civil party applicants, 12 August 2010, D337/11/1.

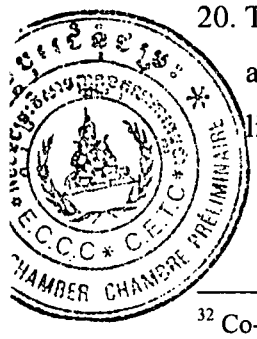
Order, but reminding the Lawyers that they would be entitled to assert any new information received in the interim at the appeals stage.

17. On 16 August 2010, the Co-Prosecutors filed their Rule 66 Final Submission,[32] in which they requested that the Charged Persons be indicted with and sent to trial for crimes of Genocide, Crimes Against Humanity, Grave Breaches of the Geneva Conventions and violations of the 1956 Cambodian Penal Code,[33] as superiors.[34] The Co-Prosecutors submitted that each defendant bears individual criminal responsibility because of committing, planning, instigating, ordering and/or aiding and abetting these crimes.[35] They submitted that each defendant is responsible for committing these crimes through a joint criminal enterprise.[36] The Submission was notified to the Parties on 18 August 2010.

18. On 16 September 2010, the Co-Investigating Judges issued the Closing Order[37] concluding that "as a result of the judicial investigation, there is sufficient evidence that Nuon Chea, Ieng Sary, Khieu Samphan and Ieng Thirith, in Phnom Penh, within the territory of Cambodia, and during the incursions into Vietnam, between 17 April 1975 and 6 January 1979, through their acts or omissions, committed (via joint criminal enterprise), planned, instigated, ordered or aided and abetted, or are responsible by virtue of superior responsibility," for crimes against humanity, genocide, grave breaches of the Geneva Conventions of 12 August 1949, and violations of the 1956 Penal Code.[38] The Closing Order was notified to the Parties on the same day.

19. Between 25 August 2010 and 15 September 2010, the Co-Investigating Judges issued 25 orders on the admissibility of victims who had submitted applications to become Civil Parties in Case 002 pursuant to Rule 23*bis*.

20. The Co-Lawyers, in accordance with Rule 77*bis*, filed appeals for those Civil Party applicants who had been found inadmissible. The Appeals were filed within the time limits set by the Internal Rules or in accordance with the specific directions of the Pre-



[32] Co-Prosecutors' Rule 66 Final Submission, 16 August 2010, D390 ("Final Submission").
[33] Final Submission, para. 1645.
[34] Final Submission, paras. 1565, 1590, 1615, 1640, 1646.
[35] Final Submission, paras. 1535, 1536, 1571, 1596, 1622.
[36] Final Submission, paras. 1537ff, 1572ff, 1597ff, 1623ff.
[37] Co-Investigating Judges' Closing Order, 16 September 2010, D427 ("Closing Order").
[38] Closing Order, para. 1613.

Trial Chamber.[39] In the Appeals, the Co-Lawyers request the Pre-Trial Chamber to overturn the Impugned Orders with respect to the Applicants and to admit them as Civil Parties.

21. On 28 September 2010, the Co-Lawyers of the Accused, IENG Sary, filed a Response to the Appeals,[40] applicable to all Appeals, relying on "the discretion of the Pre-Trial Chamber to determine whether the Office of Co-Investigating Judges has applied the correct test when evaluating Civil Party applications correctly pursuant to Rule 23*bis* while encouraging the Pre-Trial Chamber to take a flexible and inclusive approach in its determination of the admissibility of the Civil Party Appeals."

22. On 4 May 2011 the Pre-Trial Chamber issued Directions to the Co-Lawyers for Ieng Sary, Ieng Thirith and Nuon Chea to file responses to those appeals "not available in English" without waiting for their English translation and setting as deadline the 19th of May 2011.[41] On 4 May 2011 the Pre-Trial Chamber also issued Directions to the Co-Lawyers for Khieu Samphan to file responses to the appeals "not available in French" without waiting for their French translation and setting as a deadline the 19th of May 2011.[42] The Co-Lawyers for the Accused were required to "use their internal linguistic resources [...] by using the Khmer" or English or French versions of the Appeals, as applicable.

23. On 5 May 2011 the Co-Lawyers for IENG Sary filed their Responses to the Appeals,[43] indicating again that they would rely on "the discretion of the Pre-Trial Chamber to determine whether the Office of Co-Investigating Judges has applied the correct test when evaluating Civil Party applications pursuant to Rule 23*bis*" and encouraging the Pre-Trial

[39] Certain Co-Lawyers were directed to amend and re-file appeals filed in respect of more than one Impugned Order. In each case, the Co-Lawyers complied with the direction of the Pre-Trial Chamber.

[40] Ieng Sary's Response to the Appeal of Civil Party Applications Rejected by the [Co-Investigating Judges], 28 September 2010, D399/2/2.

[41] Directions to the Co-Lawyers for Ieng Sary, Ieng Thirith and Nuon Chea to File a Response to the Appeals Lodged by the Civil Party Applicants, 4 May 2011, D392/2/2; see also D393/4/2; D394/2/2; D394/4/2; D397/5/2; D401/4/3; D401/5/2; D401/6/2; D399/3/2; D424/4/2; D426/4/2; D419/2/2; D419/7/2; D419/8/2; D404/5/2; D423/6/2; D423/7/2; D406/3/2; D417/4/2.

[42] Directions to the Co-Lawyers for Khieu Samphan to File a Response to the Appeals Lodged by the Civil Party Applicants, 4 May 2011, D417/2/4; see also D404/3/2; D393/3/3; D394/3/2; D395/3/2; D396/3/2; D397/2/2;D397/6/2; D398/2/2; D398/3/3; D401/3/2; D399/2/3; D399/4/2; D424/3/5; D424/2/2; D426/2/2; D426/3/2; D404/6/2; D423/4/2; D423/5/3; D416/5/2; D416/6/2; D403/2/2; D409/2/2; D403/2/2; D409/2/2; D409/2/2D406/2/2; D415/2/2; D415/5/2; D414/3/2; D417/7/2; D416/7/2; D415/7/2; D423/8/2; D410/6/2; D410/5/2; D417/8/2; D418/5/2; D426/6/3; D403/6/2; D406/4/2; D409/5/2; D423/9/2; D410/7/2; D403/7/2; D418/6/2; D415/8/2; D416/8/2; D414/5/2; D411/5/2.

[43] Ieng Sary's Response to the Appeals of Civil Party Applications Rejected by the Co-Investigating Judges, 5 May 2011, D392/2/3; see also D393/4/3; D394/2/3; D394/4/3; D397/5/3; D401/4/4; D401/5/3; D401/6/3; D399/3/3; D424/4/3; D426/4/3; D419/2/3; D404/5/3; D423/6/3; D423/7/3; D417/4/3.

Chamber to take a flexible and inclusive approach in its determination of the admissibility of the Civil Party Appeals."

24. No other responses to the appeals were filed. No replies are permitted pursuant to Internal Rule 77*bis*(2).

II. SUMMARY OF APPEALS

1. Relief sought by the Lawyers of Civil Party Applicants:

25. In the Appeals the Lawyers of Civil Party Applicants request the Pre-Trial Chamber to:

    a. Declare the appeals admissible;

    b. Overturn the respective Co-Investigating Judges' Order, insofar as they relate to the rejected civil party applicants who have appealed;

    c. Grant to the not-admitted civil party applicants mentioned in the appeal the status of civil parties in case 002.

2. Submissions of the Lawyers for Civil Party Applicants on Admissibility of Appeals:

26. The Civil Party Lawyers have generally submitted the following arguments for admissibility of their appeals:

"According to [Internal Rule] (Revision 5) 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 which was 3 September 2010. The deadline expires on 13 September 2010. Therefore, the appeal was filed within the timeframe given. The impugned Order is a decision on the admissibility of Civil Party applications. Therefore, the appeal is admissible both in fact and timeframe."

3. Grounds of Appeals:

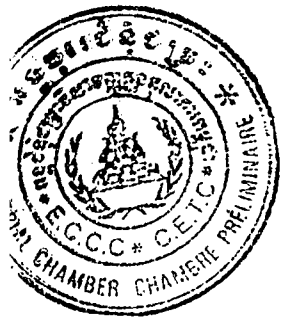
27. The Appeals filed before the Pre-Trial Chamber from the Lawyers of Civil Party Applicants contain a number of grounds of appeal. Before going further on this section, the Pre-Trial Chamber notes that whereas a supermajority of the Pre-Trial Chamber

examines the appeals and impugned orders as in the following paragraphs, Judge Catherine Marchi-Uhel disagrees with the approach adopted by the supermajority and, pursuant to Article 14(2) of the ECCC Law and Internal Rule 77(14), appends separate and partially dissenting opinion which is made available below. The reasons of the supermajority of the Pre-Trial Judges are expressed in paragraphs 28 – 101 below.[44] The term "Pre-Trial Chamber" used in paragraphs 28-101 is to be understood as "the supermajority of the Pre-Trial Chamber."

28. The Pre-Trial Chamber finds that some of the most common and important appeal grounds include complaints that the Co-Investigating Judges erred in law in not providing specific reasons for the rejection of Civil Party applications, that other alleged errors in law by the Co-Investigating Judges before and after issuing their orders on Civil Party Applications brought as a result procedural unfairness, and that by misconstruing the term "injury" the Co-Investigating Judges erred in law and wrongfully rejected Civil Party Applicants.

III. THE ORDERS

29. In all of the impugned Orders on Civil Party applications, the Co-Investigating Judges use the following guiding principles when reaching their inadmissibility decisions:



"A. GUIDING PRINCIPLES

8. Civil action before the ECCC is open to all Victims who are able to demonstrate, in a plausible manner, that they have *de facto* suffered physical, material, or psychological harm as a direct consequence of at least one of the crimes alleged against the Charged Persons, i.e. a material fact of a criminal nature coming within the [Co-Prosecutors] Introductory Submission and Supplementary Submissions.

[44] Pursuant to Internal Rule 77(13) "a decision of the Chamber requires the affirmative vote of at least 4 (four) judges," therefore the decision reached and expressed in the disposition of this decision, is a "decision of the Pre-Trial Chamber."

i) Level of proof and sufficiency of information

[...] The Co-Investigating Judges note that, at the pre-trial stage, they are not in a position to make final determinations concerning the harm suffered by Victims. Such final determinations will only be made, as appropriate by the Trial Chamber in its Judgment, based on all of the evidence submitted in the course of proceedings. Consequently, for a Civil Party [application] to be admissible, the Co-Investigating Judges must assess whether, on the basis of the elements in the Case File, there are *prima facie* credible grounds to suggest that the applicant has indeed suffered harm directly linked to the facts under investigation.

[..]

Moreover, all applicants must clearly prove their identity. The Co-Investigating Judges acknowledge, however, that the nature of the birth and death registration procedures in Cambodia makes it difficult and sometimes impossible for some applicants to provide satisfactory proof of identity. Accordingly, they are of the view that a flexible approach is required.

Furthermore, the Co-Investigating Judges note that most applicants alleging psychological harm will not be in a position to substantiate their relationship with the immediate victim. Therefore, where appropriate, they will apply a presumption of kinship based on the applicant's Victim Information Form and any available supporting documents.

ii) Existence of harm

To have standing, a Victim who wishes to be joined as a Civil Party must make a plausible allegation so that the Co-Investigating Judges are able to admit as possible the existence of personal physical, material or psychological harm, which has actually come into being. With regards to psychological harm, the Co-Investigating Judges note 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*". Therefore, to be admissible, the harm suffered by the applicant does not necessarily have to be immediate but it must be personal.

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.

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.

b. When the immediate Victim has been forcibly married, such circumstances inevitably result to a suffering which meets the personal psychological harm threshold for his or her parents, spouse, and child(ren).

c. The Co-Investigating Judges agree with the Trial Chamber finding that "*direct harm may be more difficult to substantiate in relation to more attenuated familial relationships*" and consider that only a relative presumption exists for extended family members (grand-parents, aunts and uncles, nieces and nephews, cousins, in-laws and other indirect kin). In such cases, the Co-Investigating Judges will assess on a case-by-case basis, whether there are sufficient elements to presume bonds of affection or dependency between the applicant and the immediate Victim. The presumption will be considered as determinant when the immediate Victim is deceased or has disappeared as a direct consequence of facts under investigation.

d. Therefore the personal psychological harm alleged as a consequence of the murder or disappearance of a next of kin will be more easily admissible than in relation to forced marriage or religious persecution. Similar reasoning must *apply a fortiori* to simple witnesses of facts under investigation: psychological harm has a dimension and character distinct from the emotional distress that may be regarded as inevitably caused to witnesses of crimes of

this nature and their application will be rejected unless they have witnessed events of an exceedingly violent and shocking nature.

iii) Causality link between the harm and the crimes alleged against the charged persons

For the Civil Party application to be admissible, the applicant must demonstrate harm as a direct consequence of facts in the Introductory and Supplementary Submissions.

This criterion is specific to Civil Party applications by way of intervention. Under ECCC procedure, contrary to Cambodian Criminal Procedure, an applicant cannot launch a judicial investigation simply by being joined as a Civil Party: being limited to action by way of intervention, he or she may only join ongoing proceedings through the application, and not widen the investigation beyond the factual situations of which the *Co-Investigating Judges are seized by the Co-Prosecutors (in rem seisin).*

The Civil Party application is therefore limited in the sense that it may not allege new facts during the judicial investigation without first receiving a Supplementary Submission from the Co-Prosecutors.

Accordingly, in order for a Civil Party application to be admissible, the applicant is required to demonstrate that his or her alleged harm results only from facts for which the judicial investigation has already been opened."

30. In the paragraphs where they reject Civil Party applications, the Co-Investigating Judges Orders provide reasons which were limited in only providing what is quoted below (*footnotes not omitted for ease of reference*):

"the Co-Investigating Judges find that the necessary *causal link between the alleged harm and the facts under investigation was not established* by [...] applicants,[45] to the extent that the reported facts are in their entirety distinct from those of which the Co-Investigating Judges are currently seized and no circumstances allow them to consider the possibility of a direct link between the alleged injury and the alleged crimes under investigation.

[45] See Annex [..] Inadmissible Civil Parties: Harm is not linked to the facts under investigation.

Moreover, the Co-Investigating Judges note that [...] Civil Party applicants,[46] *did not provide sufficient information in their applications to verify compliance* with Rules 23*bis* (1) and (4).

[...] Civil Party applicant[47] *did not provide sufficient proof of identity.*"

IV. THE APPLICABLE LAW

31. Reference is made to:

a. The Agreement[48] and the ECCC Establishment Law ("ECCC Law");[49]

b. Internal Rules 21, 23, 23*bis* (revisions 3, 4, 5 and 7),[50] 23*ter*, 23quarter, 23 *quinquies*, 80, 91 and 114;

c. Articles 3.2, 3.7 and 3.8 of the Practice Direction on Victim Participation; and

32. Guidance can be sought from the general principles[51] on victims as found in international law, which include:

Articles 1, 2, 4 and 18 of the United Nations General Assembly, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UNGA Res.40/34 of 29 November 1985:

1. "Victims" means persons who, individually or *collectively*, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.

[46] See Annex [...] Inadmissible Civil Parties: Insufficient information to verify compliance with Internal Rule 23*bis* (1) and (4).
[47] See Annex [...] Inadmissible Civil Parties: No proof of identification provided.
[48] 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 ("Agreement").
[49] Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006), ("ECCC Law").
[50] Please note that revisions 5 and 7 of Internal Rule 23*bis* are identical.
[51] *Lubanga* ICC, 11 July 2008, ICC-01/04-01/06 OA9 OA10, para.33: "The Appeals Chamber finds no error in the Trial Chamber's reference to the Basic Principles [...] for the purpose of guidance."

2. A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term "victim" also includes, where appropriate, 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.*

4. Victims should be treated with compassion and respect for their dignity. They are *entitled to access to the mechanisms of justice* and to prompt redress, as provided for by national legislation, for the harm that they have suffered.

18. "Victims" means persons who, individually or *collectively*, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through *acts or omissions that do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights.*

Principles 8 and 9 of the UN General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law : resolution / adopted by the General Assembly, 21 March 2006, A/RES/60/147:

8. For purposes of the present document, 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, through *acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law.* 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.*

9. A person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim.

V. ADMISSIBILITY OF APPEALS

33. Internal Rule 74(4)(b) states that the "civil parties may appeal against [an] order by the Co-Investigating Judges [...] declaring a civil party application inadmissible." Internal Rule 77*bis* provides that "within 10 days of the notification of the decision on admissibility, an Appellant shall file an appeal." The Appeals are brought in pursuance of Internal Rules 74(4)(b) and 77*bis* and in compliance with the directions of the Pre-Trial Chamber and are therefore admissible.

VI. STANDARD OF REVIEW

34. Internal Rule *77bis* permits the Chamber to reverse on appeal orders of the Co-Investigating Judges on admissibility of civil party applicants if it finds that the Co-Investigating Judges committed an error of fact and/or an error of law. The Pre-Trial Chamber has found that "it is well-established in international jurisprudence that, on appeal, alleged errors of law are reviewed *de novo* to determine whether the legal decisions are correct and alleged errors of fact are reviewed under a standard of reasonableness to determine whether no reasonable trier of fact could have reached the finding of fact at issue."[52]

35. Pursuant to Internal Rule 21, the Pre-Trial Chamber has a duty to ensure that proceedings before the ECCC are fair. This, in part, involves people in similar position being treated equally before the court.[53] The fundamental principles of the procedure before the ECCC, enshrined in Internal Rule 21, require that the law shall be interpreted so as to always "*safeguard the interests of all*" the parties involved, that care must be taken to "preserve a *balance* between the rights of the parties" and that "proceedings before the ECCC shall be brought to a conclusion within a *reasonable time.*"[54] Keeping this in mind and considering the unusual number of appeals before it, the Pre-Trial Chamber, after receiving the 95 Civil Party Appeals, having reviewed the related Co-Investigating Judges' orders, has identified a number of fundamental errors which are relevant to all the rejected Civil Party Applicants. The Pre-Trial Chamber finds that a significant injustice would occur to the rejected civil parties who did not raise the errors identified by the Pre-Trial Chamber. The Pre-Trial Chamber has, in the both of the differently composed panels[55] dealing with all these Civil Party Appeals, determined, in the interests of justice, to join all the Appeals filed against the impugned Orders also in order to allow the examination, in its

[52] Decision on Ieng Sary's Appeal against the Closing Order, 11 April 2011, D427/1/30, para. 113.
[53] International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by UN General Assembly resolution 2200A(XXI) of 16 December 1966, entered into force on 23 March 1976 ("ICCPR"), Article 14(1) *first sentence.*
[54] *See also* ICCPR, Article 14(1) and (3)(c).
[55] See also Decisions of the Pre-Trial Chamber on Appeals: PTC73, PTC74, PTC77, PTC78, PTC79, PTC80, PTC81, PTC82, PTC83, PTC84, PTC85, PTC86, PTC87, PTC88, PTC89, PTC90, PTC91, PTC92, PTC93, PTC94, PTC95, PTC96, PTC97, PTC98, PTC99, PTC100, PTC101, PTC102, PTC103, PTC105, PTC106, PTC107, PTC108, PTC109, PTC110, PTC111, PTC116, PTC117, PTC118, PTC119, PTC120, PTC121, PTC122, PTC123, PTC124, PTC125, PTC126, PTC127, PTC128, PTC129, PTC130, PTC131, PTC132, PTC133, PTC134, PTC135, PTC136, PTC137, PTC138, PTC139, PTC140, PTC141, PTC143, PTC144, PTC148, PTC149, PTC150, PTC151, PTC153, PTC154, PTC155, PTC156, PTC158, PTC159, PTC160, PTC161, PTC162, PTC163, PTC166, PTC167, PTC168, PTC169, PTC170, PTC171.

decisions,[56] of the common and fundamental errors identified in all the impugned Orders and after considering the conclusions drawn therefrom, to make a fresh review, on the basis of these findings, in respect of all those Civil Party Applications that were rejected by the Co-Investigating Judges and who have appealed.

36. The Pre-Trial Chamber notes that the appeals are not being contested[57] and has also taken in account the effects on the rights of the other parties in case 002.

VII. EXAMINATION OF THE ERRORS IDENTIFIED IN THE ORDERS:

1) Error in law - lack of specific reasons for rejection of Civil Party Applicants:

37. The Pre-Trial Chamber finds that the approach taken by the Co-Investigating Judges, especially in relation to those paragraphs in their orders and the related annexes where they reject Civil Party applications, is not such as to adequately or properly demonstrate an individual consideration of the applications. In this respect, the Pre-Trial Chamber observes that the Co-Investigating Judges, where they reject Civil Party applicants, mention as grounds only that "the necessary causal link between the alleged harm and the facts under investigation was not established" or "the Civil Party applicants did not provide sufficient information in their applications to verify compliance with Rules 23*bis* (1) and (4)." In the respective annexes attached to such sentences in the orders, the Co-Investigating Judges provide a table with information about all the rejected applicants. Each such table consists in three columns, in which the first and second columns indicate the document numbers of the applications and the third column indicates the "reasons" for rejection. The Pre-Trial Chamber observes that, in all such tables, the number of sentences used to describe the reasons for rejection for each applicant is, in maximum, two; the length of each sentence is 5-15 in word-count; and the substance for rejection of each and every applicant under these grounds is identical for all and not specific to each

[56] Note that although the decisions of the Pre-Trial Chamber on these appeals are issued by two differently composed panels, the reasoning of the majority in all these decisions is mainly the same. Please note that, following its reasoning, the Pre-Trial Chamber has also decided to grant a Request for the Reconsideration of one of its previous decisions (*the request was filed with the **Appeal PTC 74** by the Lawyers of a group of Vietnamese Civil Party applicants*).

[57] From all the Accused only the Co-Lawyers for Ieng Sary filed common replies to the Appeals, and they do not explicitly contest the Appeals either.

application. For example, it is simply stated: "harm is not linked to the facts under investigation" or "insufficient information to verify compliance to Rules 23*bis* (1) and (4) of the Internal Rules in relation to the alleged criminal acts." No further explanation is provided in the orders or related annexes.

38. Having made the above observation, the Pre-Trial Chamber notes that it has recognized the requirement for judicial bodies to provide reasoned decisions as an international standard.[58] In its previous Decisions, the Pre-Trial Chamber has found that although the Co-Investigating Judges are not required to 'indicate a view on all the factors' considered in their decision making process,[59] it is important that all parties concerned know the reasons for a decision. The Chamber considered this necessary in order to place 'an aggrieved party in a position to be able to determine whether to appeal, and upon what grounds. Equally a respondent to any appeal has a right to know the reasons of a decision so that a proper and pertinent response may be considered.'[60] An "aggrieved party" will be any person who may have a right of appeal, and may include an accused person as well as a rejected Applicant. Reasons are also necessary for the Pre-Trial Chamber to be able to 'conduct an effective appellate review pursuant to Rule 77(14).'[61] Following an Appeal by the Ieng Thirith Defence team against a rejection of a request for investigative action, the Pre-Trial Chamber considered "how detailed the Co- Investigating Judges' reasons must be under Rule 55(10). The Chamber examined the Rules of the Court[62] and the jurisprudence of both the European Court of Human Rights (ECtHR)[63] and the International Criminal Tribunal for the Former Yugoslavia (ICTY)[64] before providing the following guidance:

> "The Co-Investigating Judges have the discretion – reviewable by the Pre-Trial Chamber upon an admissible appeal - to determine the degree of specific detail that is required by the legal framework of the ECCC. The Co-Investigating Judges must be guided in their

[58] Decision on Nuon Chea's Appeal against Order Refusing Request for Annulment, 26 August 2008, D55/I/8, para. 21.
[59] Decision on Appeal against Provisional Detention Order of Ieng Sary, 17 October 2008, C22/I/73, para. 66.
[60] Decision On Co-Prosecutors' Appeal Against The Co-Investigating Judges Order On Request To Place Additional Evidentiary Material On The Case File Which Assists In Proving The Charged Persons' Knowledge Of The Crimes, 15 June 2010, D365/2/10, para. 24.
[61] Decision on Appeal against Co-Investigating Judges' Order on Requests D153, D172, D173, D174, D178 & D284 (Nuon Chea's Twelfth Request For Investigative Action), 14 July 2010, D300/1/5, para. 41.
[62] Decision on the Ieng Thirith Defence Appeal against 'Order on Requests for Investigative Action by the Defence for IENG Thirith' of 14 June 2010, D353/2/3, para. 23.
[63] *Ibid*, paras. 24 - 26
[64] *Ibid*, para. 27

discretion by the purposes of the requirement in Rule 55(10) to issue a reasoned rejection of a request, as stated above. The Pre-Trial Chamber does not take the position that the Co-Investigating Judges should have exhaustively presented every detail of all the "information already existing on the Case File." Rather, the Pre- Trial Chamber decides that the Co-Investigating Judges should have provided, at a minimum, a representative sample of such information, including, where appropriate, the relevant Document numbers. If a Document number is not available, then the Co-Investigating Judges must provide sufficient details on the source, location, and content of a representative sample of information already on the case file."[65]

39. The Pre Trial Chamber finds that in general, a judicial decision must, implicitly disclose the material which has been taken into account by the judges when making a decision. This will ensure that parties having been unsuccessful in their application can be assured that the facts submitted and their submissions in respect of the law have been properly and fully taken into account. Each applicant to be joined as a Civil Party has a right to have their individual application considered and to a demonstration that this has occurred, even if the decision is provided in a short and tabular form. It is further noted that whilst the appeal procedure provided for under Internal Rule 23 *bis* 2, is by of an "expedited" or summary appeal, the consideration by the Co-Investigating Judges of an application to be joined as a Civil Party is not to be considered in such a manner. While understanding the unusual volume of work before the Co-Investigating Judges and the requirement for consideration of the matters "within a reasonable time," the Pre-Trial Chamber notes that, in the case of the rejected applicants, more detailed reasons than the ones provided in the orders were warranted.

40. Therefore, the Pre-Trial Chamber finds that this is a significant error in law made by the Co-Investigating Judges in all their orders in relation to those parts of the orders where they reject Civil Party Applicants.

[65] *Ibid*, para 30.

2) Error in Law – application of the wrong criteria in its determinations on the causal link:

41. The Pre-Trial Chamber observes that the Co-Investigating Judges have dealt with Civil Party Applications upon the basis of *the facts* as they were set forth in the Introductory and Supplementary Submissions.[66] They did so when they were soon[67] to file the Closing Order and therefore can be presumed to have had knowledge of the actual indictments. The Co-Investigating Judges informed the Victims at a late stage in the investigations by only summarizing the Introductory Submission and the Supplementary Submissions and explaining that "if 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."[68] They also applied in their impugned orders the wrong standard in limiting the admission of victims as civil parties to only those who alleged that harm resulted "*only* from *facts for which the judicial investigation has already been opened*" and defining these facts as limited to the "factual situations of which the Co-Investigating Judges are seized by the Co-Prosecutors (*in rem seisin*)." The Co-Investigating Judges, justify this by referring to jurisprudence from the *French Cour de Cassation* and concluding that "the Civil Party application is therefore limited in the sense that it *may not allege new facts* during the judicial investigation without first receiving a Supplementary Submission from the Co-Prosecutors."

42. While it concurs that the Civil Parties may not, on their own, allege new facts for the purposes of the investigation, the Pre-Trial Chamber considers that the Co-Investigating Judges should have been able to distinguish between two different situations such as: 1) Civil Parties alleging *new facts for the purposes of investigation* and 2) Victims indicating in their Civil Party applications *facts which are likely capable to show that they suffered harm as a direct consequence from 'at least one of the crimes alleged against the Charged Person'*." Internal Rule 23*bis*(1)(b) does not require a causal link between the harm and the facts investigated, it explicitly requires a causal link between the harm and any of *the crimes alleged.* Crimes being the legal characterizations of the facts investigated, the term "crimes" cannot be identified or replaced with the term "facts." The

[66] Note that the Introductory and Supplementary Submissions while asking the Co-Investigating Judges to "open a judicial investigation" against the Accused, they also "propose charges" against them.
[67] The impugned Orders were all issued within two to three weeks before 16 September 2010 when the Closing Order in case 002 was issued.
[68] Co-Investigating Judges' Press statement of 5 November 2009.

Co-Investigating Judges erred in law by setting the wrong criteria for the examination of the existence of a causal link. Consequently, the Pre-Trial Chamber notes, many victims were not accepted as civil parties although their harm is related to the crimes alleged. While the facts investigated are limited to certain areas or crime sites, the legal characterizations of such facts, as it is clear from the way how the Introductory Submission,[69] the Supplementary Submissions and the Closing Order[70] are written, include crimes which represent mass atrocities allegedly committed by the Charged Persons by acting in a joint criminal enterprise together and with others against the population and "*throughout* the country."[71] It is the legal characterization of the investigated factual situations, and not the investigated factual situations themselves, that should have been considered by the Co-Investigating Judges when reviewing Civil Party applications pursuant to Internal Rule 23*bis*(1)(b).

43. Therefore, the Pre-Trial Chamber finds that this is a significant error in law made by the Co-Investigating Judges in all their orders on Civil Party Applications who have been rejected.

3) **Error in law – restrictive application of the term "injury" resulted in wrongful rejection of Civil Party Applicants:**

44. Having reviewed the orders, the Pre-Trial Chamber notes that the Co-Investigating Judges also followed a restrictive approach when applying the term "injury" and especially in respect of the psychological aspect of such. The Co-Investigating Judges failed to fully consider the nature of *victimization* from crimes such as genocide and crimes against humanity which represent mass atrocities and serious violations of international humanitarian law, the nature and extent of such injury and further, the fact that IR23

[69] The Co-Prosecutors in their Introductory Submission identified twenty-five distinct factual situations of murder, torture, forcible transfer, unlawful detention, forced labor and religious, political and ethnic persecution as evidence of the crimes committed in the execution of a *common criminal plan*, which in turn constituted crimes against humanity, genocide, grave breaches of the Geneva Conventions, homicide, torture and religious persecution.

[70] The Closing Order in paragraph 1613 concludes that "as a result of the judicial investigation, there is sufficient evidence that Nuon Chea, Ieng Sary, Khieu Samphan and Ieng Thirith, in Phnom Penh, *within the territory of Cambodia, and during the incursions into Vietnam*, between 17 April 1975 and 6 January 1979, through their acts or omissions, committed (*via joint criminal enterprise*), planned, instigated, ordered or aided and abetted, or are responsible by virtue of superior responsibility," for *crimes against humanity, genocide, grave breaches of the Geneva Conventions of 12 August 1949, and violations of the 1956 Penal Code*."

[71] Closing Order, paras. 1335, 1341, 1349, 1350, 1362, 1363, 1372, 1380, 1390, 1396, 1401, 1407, 1414, 1415, 1431, 1434, 1435, 1440, 1442, 1466, 1467, 1476 - 1478 and 1613.

bis(1)(b) involves considerations of "[..] injury upon which a claim of collective and moral reparations might be based." The Pre-Trial Chamber observes that there was no consideration, in the orders, of the personal harm suffered within a context of the mass atrocities alleged. The Pre-Trial Chamber finds that the nature of victimization from mass atrocities was not adequately or properly considered, with psychological harm being specifically excluded and a number of presumptions being applied for admission, to the exclusion of those to whom such presumptions did not apply. The Pre-Trial Chamber finds that in this way many victims have been erroneously excluded as civil parties.

45. Firstly, the Pre-Trial Chamber notes that the use by the Co-Investigating Judges of a "hierarchy of crimes,"[72] especially in relation to psychological injury as also noted by the Civil Party Lawyers in their appeals, cannot be applied when measuring psychological harm caused by crimes such as the ones alleged in case 002. An isolated event in itself may not cause harm but, when put within the context of the mass atrocities alleged, it assumes other dimensions: the level of fear that may come from witnessing events and/or knowledge of the existence and implementation of the CPK[73] policies is readily understandable. The fact that a person, 30 years after what occurred, still remembers witnessing certain events and recalls emotional distress shows the high intensity of the effect those events had on the person.

46. Secondly, the Pre-Trial Chamber observes that, with regards to psychological harm, the Co-Investigating Judges have applied a presumption of familial kinship using as legal basis Article 3.2 of the Practice Direction that "psychological injury may include the death of kin who were the victim of such crimes." The Pre-Trial Chamber considers that this is an inclusive definition, which was erroneously applied as an exclusive definition by the Co-Investigating Judges. Furthermore, the Pre-Trial Chamber notes that there is no such limitation placed upon the definition of "psychological injury" in the applicable Internal Rules or the ECCC Law. The Pre-Trial Chamber notes that a practice direction, even if it were to place such limitation upon the definition (which it does not) could not be seen as providing a restrictive definition of what is provided in the Internal Rules or the ECCC law.

[72] See paras. 14/c and d in the impugned Orders (*note that the paragraph number may be slightly different in some of the impughed Orders*).
[73] "CPK" stands for: Communist Party of Kampuchea (see Closing Order, Part One, II.A).

47. Thirdly, the Pre-Trial Chamber notes also that there is no explicit provision in the Internal Rules or the ECCC Law that the injury must be personal. The Co-Investigating Judges, referring to jurisprudence from the International Criminal Court (ICC),[74] find in their orders that: "[t]he harm suffered by the applicant does not necessarily have to be immediate but it must be personal." While agreeing with the use of the term personal to qualify injury, the Pre-Trial Chamber considers that were applying the term "personal" for assessment of "psychological harm" the Co-Investigating Judges should have done this within the context of the mass atrocities alleged in case 002. The Pre-Trial Chamber emphasizes that although, as instructed by the provisions of the Agreement and ECCC Law, it can seek guidance on the *principles* of the application of the rules established at international level, caution must be taken when seeking such guidance in relation to their *particular* application in practice of their *specific rules* which are not in all cases applicable to the ECCC Internal Rules. These do not provide the parties the same rights in the proceedings as in ECCC and do not necessarily apply to identical circumstances as those before ECCC.

48. The Pre-Trial Chamber further observes that the Co-Investigating Judges define "personal psychological harm," in their orders, in restrictive terms. The Pre-Trial Chamber considers that where finding that a familial relationship was required, the Co-Investigating Judges applied a limitation without proper basis or consideration.[75] The presumptions in relation to psychological harm are used to the exclusion of other considerations and conclude with the unsupported statement in paragraph 14 d of the orders. This paragraph reads: "Therefore the personal psychological harm alleged as a consequence of the murder or disappearance of a next of kin will be more easily admissible than in relation to forced marriage or religious persecution. Similar reasoning must *apply a fortiori* to simple witnesses of facts under investigation: psychological harm has a dimension and character distinct from emotional distress that may be regarded as inevitably caused to witnesses of crime of this nature and their application will be rejected unless they have witnessed events of an exceedingly violent and shocking nature."

49. Psychological injury should have been considered within the specific context of the Cambodian society in general and especially of its nature and organization during the

[74] *Lubanga* ICC, 8 April 2009, Trial Chamber I (ICC-01/04-01/06) para. 49 and *Lubanga* ICC, 11 July 2008, ICC-01/04-01/06 OA9 OA10, para 32.
[75] See paras. 14/a, b and c in the impugned Orders.

period of the CPK regime. The way in which this society was organized, differs from the way other societies are organized. It could also be said that even within a country the way in which different groups or communities of the society are organized differs from each other. Such differences cannot be ignored. Where "the next of kin" relationship is the only close relationship identified by the Co-Investigating Judges, considering the nature of the crimes alleged, a much broader range of people should have been identified as presumed to have suffered injury as a consequence of crimes committed against a person, or they could have been considered as a matter for independent proof. This is particularly so in respect of the alleged involvement of the Accused in making and implementing policies to the effect of both genocide and crimes against humanity. The Pre-Trial Chamber notes that in the Closing Order the Co-Investigating Judges made positive findings of the widespread and systematic nature of the attacks on the civilian population of Cambodia, as a whole or of targeted groups thereof, and that the intellectual involvement of the Accused in such attacks is the basis of the *mens rea* elements of a number of the indicted crimes of the Accused. Events such as the occurrence of isolated incidents of violence or a disappearance of friends and neighbours, as well as relatives, can make it more than likely that a person has suffered psychological injury once such isolated occurrences are seen within the context of the mass atrocities allegedly having been committed in a widespread and systematic manner, in the whole country as a consequence of the implementation of the CPK policies. Considering such circumstances, it is likely that persons have also suffered injury collectively. Such arises from and is evident in the very nature of the crimes alleged such as genocide and crimes against humanity, which are serious violations of international humanitarian law.[76] Other international courts that try serious violations of international human rights law, to which Principle 8 applies identically as in the case of serious violations of international humanitarian law, although trying crimes specifically directed against the individual, appear "ready to abandon [the] individual centered doctrine in favor of a more encompassing approach, considering that cases frequently reveal a pattern and not a single violation."[77]

[76] UN General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law : resolution / adopted by the General Assembly, 21 March 2006, A/RES/60/147, Principle 8.

[77] Judith Schonsteiner "Dissuasive Measures and the "Society as a Whole": A working Theory of Reparations in the Inter-American Court of Human Rights" at 138 referring to *Goiburu v. Paraguay*, 2006 Inter-American Court of Human Rights (IACtHR) (ser. C) No. 153, 82, which states: "responsibility is increased when the violation is part of a systematic pattern;" and to Dinah Shelton, Remedies In International Human Rights Law,

50. Therefore, the Pre-Trial Chamber finds that these are significant errors in law made by the Co-Investigating Judges in all their orders on Civil Party Applications who have been rejected.

4) Lack of due diligence by the Co-Investigating Judges :

51. The Pre-Trial Chamber takes note of the issue also raised by some of the Civil Party Lawyers in the appeals that the Co-Investigating Judges did not keep the victims informed in a timely fashion.[78] The Pre-Trial Chamber considers that the due diligence[79] displayed in the Co-Investigating Judge's conduct is a relevant factor when considering victims' rights in the proceedings. Therefore, examination of what steps have been taken by the Co-Investigating Judges and to what degree they affect the situation of the victims is necessary. The Internal Rules apply in this regard as follows:

52. While the Pre-Trial Chamber has previously found that "many factors affect the timing of decisions"[80] and it acknowledges that the Co-Investigating Judges were bound by specific provisions of the Internal Rules on confidentiality of investigations and therefore were restricted in respect of information they could make public, it notes that such specific provisions should, at all times, be read in conjunction with the provisions on the fundamental principles of procedure before the ECCC which require that "victims are kept informed and that their rights are respected *throughout* the proceedings."[81] The Pre-Trial Chamber emphasizes that Internal Rule 21(1)(c) does not leave room for interpretation, it does not say "as soon as possible" or "in any event, before the end of the judicial

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Oxford University Press, USA, (2005) at 99 remarking that the "concern for victims not part of the litigation as well as for potential victims, must be among the factors taken into account in affording remedies."

[78] The Co-Investigating Judges issued their first public guideline for addressing Civil Party admissibility on 5 November 2009.

[79] The Pre-Trial Chamber has previously considered that an analysis of Co-Investigating Judges' due diligence is relevant when considering continuation of detention or release issues raised in appeals by the Charged Persons. *See for instance* Decision on Ieng Sary's Appeal against Order on Extension of Provisional Detention, C22/9/14, 30 April 2010, paras. 57-61; Decision on Ieng Thirith's Appeal against Order on Extension of Provisional Detention, C20/9/15, 30 April 2010, paras. 44-50; Decision on Khieu Samphan's Appeal against Order on Extension of Provisional Detention, C26/9/12, 30 April 2010, paras. 40-47; Decision on Appeal against Order on Extension of Provisional Detention of Nuon Chea, C9/4/6, 4 May 2009, paras. 44-49.

[80] Decision on Khieu Samphan's Application to Disqualify Co-Investigating Judge Marcel Lemonde, 14 December 2009, Doc. No. 7, ERN 00414098-00414110, Application PTC 02, para. 33 quoting *Prosecutor v. Bagosora et.al.*, ICTR-98-41-T, "Decision on Motion for Disqualification of Judges" (Bureau), 28 May 2007, para. 15; *Karemera et al.*, ICTR-98-44-T, Decision on Motion by Nzirorera for Disqualification of Trial Judges, 17 May 2004, para 27.

[81] Internal Rule 21(1)(c).

investigation."[82] Specific provision in the Internal Rules of the necessity to keep the Victims informed throughout the proceedings is necessary also because, pursuant to the Internal Rules, unlike the lawyers of the parties to the proceedings, the legal representatives of the Victims do not have an automatic right of access to the case file, therefore they are fully dependent on the information they get from the Co-Investigating Judges.

53. The Pre-Trial Chamber further notes that the Co-Investigating Judges, pursuant to the requirement in Internal Rule 21 to safeguard the interests of all parties, should have taken into consideration also the fact that Internal Rules were amended in respect of the possibility of victims to be admitted as civil parties in the trial phase.[83] Where, in the past, the Trial Chamber, "at the initial hearing," would consider "any applications submitted by Victims to be joined as Civil Parties,"[84] which was done in the light of the Closing Order, the system was redesigned so that the decision on admissibility of a Victims' application to become a Civil Party became solely within the jurisdiction of the Co-Investigating Judges with an appeal to the Pre-Trial Chamber.[85] This fact makes the necessity for proper and timely information to be provided to the victims throughout the pre-trial phase significantly more compelling than before.

54. For these reasons, the Pre-Trial Chamber finds that the conduct of the Co-Investigating Judges does not fulfill the requirement of due diligence and that the fundamental rights of the victims have, as a consequence, not been duly safeguarded.

[82] Internal Rule 55 (10)

[83] Instead, the Co_Investigating Judges, seeking guidance from jurisprudence of other courts, which apply their rules in relation to differing cases and circumstances thereof, such as the French Cour de Cassation, the ICC or even from the ECCC's Trial Judgment in case 001, the Co-Investigating Judges make a finding in all their orders that "at the pre-trial stage, they are not in a position to make final determinations concerning the harm suffered by Victims. Such final determinations will only be made, as appropriate by the Trial Chamber in its Judgment, based on all of the evidence submitted in the course of proceedings."

[84] Internal Rules (Rev. 4 – *as revised on 11 September 2009*), Internal Rule 83; and Practice Direction on Victim Participation 02/2007/Rev.1 - *Amended on 27 October 2008*) Articles 3.7 and 3.8.

[85] Internal Rules (Rev.5 – *as revised on 9 February 2010*), Internal Rule 83 *was repealed* and the new Internal Rule 23*bis* (3) introduced the new Internal Rule 77*bis* which relates only to appeals before the Pre-Trial Chamber and not to those before the Supreme Court Chamber and provides: "The decision of the Pre-Trial Chamber shall be final." Internal Rule 110(5) which was present in Rev. 4 of the Internal Rules was kept also in Rev.5 as it allows the Civil Parties to appeal to the Supreme Court Chamber "only in relation to their civil *interests*."

Conclusion:

55. Considering the totality and significance of the errors identified above, the Pre-Trial Chamber will judge the rejected Civil Party applications before it afresh, taking into account the actual findings in the Closing Order and any supplementary material filed by the Appellants.

VIII. CONSIDERATIONS ON LEGAL REQUIREMENTS APPLICABLE TO CIVIL PARTY APPLICATIONS:

56. The criteria for admissibility of Civil Party applications is provided for in Internal Rule 23*bis*(1),[86] which provides:

> 1. "In order for Civil Party action to be admissible, the Civil Party applicant shall:
>
> a) be clearly identified; and
>
> b) demonstrate as a direct consequence of at least one of the crimes alleged against the Charged Person, that he or she has in fact suffered physical, material or psychological injury upon which a claim of collective and moral reparation might be based.
>
> When considering the admissibility of the Civil Party application, the Co-Investigating Judges shall be satisfied that facts alleged in support of the application are more likely than not to be true."

57. The Pre-Trial Chamber notes that the elements of IR23*bis*(1) include the following:

- The existence of a causal link between the crimes and the injury;
- Injury;
- Proof of identification;
- Level of proof.

58. The Pre-Trial Chamber notes that the Internal Rules do not provide any explanation or criteria on how to apply each of these elements to the civil party applications. Under these

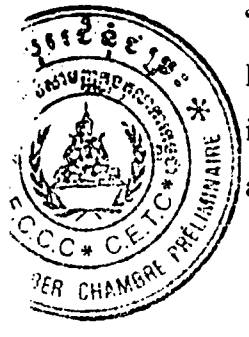
[86] At this time that the Pre-Trial Chamber is reviewing the Civil Party applications, Revision 7 of the Internal Rules, as revised on 23 February 2011, is in force. Pursuant to Internal Rule 114, "Amendments concerning Civil Parties adopted at the 7th, 8th and 9th Plenary Sessions shall be applicable to all cases except Case File No. 001/18-07-2007/ECCC."

circumstances, considering the specific nature of the ECCC, in its application of these elements of the Internal Rules to the Civil Party applications before it the Pre-Trial Chamber shall be guided by the principles established in the Agreement and the ECCC Law.

59. A general principle of the Agreement is found in its Article 2 which provides: "The Vienna Convention on the Law of Treaties, and in particular it's Articles 26 and 27, [apply] to the Agreement." Article 26 of the Vienna Convention provides that every treaty must be performed by its parties in good faith and Article 27 requires that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

60. A more specific principle is enshrined in Article 12(2) of the Agreement and Article 33new of the ECCC Law which provide: "if there is uncertainty regarding the interpretation or application [of the existing procedures], or if there is a question regarding their consistency with international standards, guidance may also be sought in procedural rules established at the international level." The Pre-Trial Chamber observes that the International Criminal Court in its application of the Rules sought guidance from the principles enshrined in the Vienna Convention on the Law of Treaties.[87] It found that "the provisions must be read in context and in accordance with its object and purpose" and that this principle "applies to the Rules." It explained that "the context of a given legislative provision is defined by the particular sub-section of the law read as a whole in conjunction with the section of an enactment in its entirety" and that "its objects may be gathered from the Chapter of the law in which the particular section is included and its purposes from the wider aims of the law as may be gathered from its preamble and general tenor."[88] The Pre-Trial Chamber considers such guidance on the application of the rules appropriate.

61. On a contextual application of IR23*bis* (1), the Pre-Trial Chamber notes that it is titled "Application and admission of Civil Parties" and it is situated in Section III of the Internal Rules: "Procedure," sub-Section A: "General Provisions." The location of IR23*bis* (1) is indicative of a general provision relating to the procedure for admission of civil party applications. It has to, therefore, be read in conjunction with:



[87] *Vienna Convention on the Law of Treaties*, signed on 23 May 1969 and entered into force on 27 January 1980, United Nations, *Treaty Series*, vol. 1155, 18232 ("Vienna Convention").
[88] *Lubanga* ICC, 11 July 2008, Trial Chamber I (ICC-01/04-01/06-1432 OA9 AO10) paras. 54-58.

- IR21 which sets the fundamental principles of procedure before ECCC and provides that "IRs shall be interpreted so as to always safeguard the interests of ....victims and so as to ensure legal certainty and transparency of proceedings, in light of the inherent specificity of the ECCC, set out in the ECCC Law and the Agreement;"
- IR23 which sets the general principles of victims participation as Civil Parties, which is to participate in criminal proceedings against those responsible .... by (only) supporting the prosecution and to seek collective and moral reparations, as provided in IR 23 *quinquies*;
- IRs 23*ter* and 23 quarter which respectively provide for the way in which representation of Civil Parties is arranged in a collective manner and for the possibility for "a group of victims" to organize their Civil Party action together by becoming members of a "Victims Association;
- IR 23*quinquies*(3)(a) which provides that, in case of a conviction, the convicted person shall pay "the costs of the award;"
- IR 80(2) which provides that at trial, the Civil Parties consolidated group has the right to summon witnesses who are not on the list provided by the Co-Prosecutors.

62. The Pre-Trial Chamber considers that the object and purpose of IR23*bis* (1) is not there to restrict or limit the notion of victim or civil party action in the ECCC. It rather is to set criteria for admissibility of civil party applications.

63. The wider aims and general tenor of the Internal Rules, as provided in IR21 can be found in the "inherent specificity of ECCC, set out in the ECCC Law and Agreement."

64. The Agreement provides in its preamble:

> "WHEREAS in the same resolution the General Assembly recognized the legitimate concern of the Government and the people of Cambodia in the *pursuit of justice and national reconciliation*, stability, peace and security;"[89]

65. In this context, it is noted accordingly that the Agreement provides that one of the fundamental principles for the establishment of ECCC is "national reconciliation." This

[89] It is to be recalled that the Pre-Trial Chamber has already determined that "the inclusion of civil parties in proceedings is in recognition of the stated pursuit of national reconciliation," *see* Decision on civil Party Participation in Provisional Detention Appeals, C11/53, 20 March 2008, para. 37.

guides the Judges and Chambers of ECCC to not only seek the truth about what happened in Cambodia, but also to pay special attention and assure a meaningful participation for the victims of the crimes committed as part of its pursuit for national reconciliation.

66. The ECCC Establishment Law provides in its Article 1 that "the purpose of this law is to bring to trial senior leaders of the Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979." The inherent and specific nature of the ECCC is that it has to deal not only with violations of the Cambodian law but also with international crimes and modes of liability. These crimes and modes of liability include: genocide,[90] which is directed towards whole groups and not just individuals; crimes against humanity[91] which are acts committed as part of a "widespread and systematic" attack against the population; the modes of liability of joint criminal enterprise,[92] command responsibility planning, instigating, ordering, aiding and abetting,[93] which if proven, greatly increase the gravity and seriousness of the crimes even more by way of confirming that mass atrocities were committed in an organized manner and may have targeted not only specific groups or specific crime sites but even the whole of the population throughout the country. In addition, the ECCC has a limited jurisdiction for two specific categories, being the senior leaders of the Democratic Kampuchea and those most responsible for the crimes within ECCC's jurisdiction.

67. By way of its specific nature, the Pre-Trial Chamber reads the Internal Rules in a manner that takes into account the nature, the extent, the modes of participation and founding elements of the alleged crimes and the needs of the affected community as expressed in ECCC's foundation instruments.

68. The inherent nature of the ECCC is that although its Internal Rules are modelled after the Cambodian Procedural Code (CPC) which was in turn modelled upon the French Law (FL), unlike the CPC or FL, which deal mainly with ordinary crimes and claims for

[90] ECCC Law, Art 4.
[91] ECCC Law, Art. 5.
[92] Although joint criminal enterprise is not explicitly counted in the ECCC Law, appeals against the applicability of its forms before ECCC have been rejected (*in part*) by the Pre-Trial Chamber: *See* Decision on Appeals against the Co-Investigating Judges Order on Joint Criminal Enterprise, 20 May 2010, D97/14/15; D97/17/6; D97/15/9; and D97/16/10. See also the Introductory Submission, paras. 5 -10 and the Closing Order, para. 1613.
[93] ECCC Law, Art. 29.

individual reparations of a measurable nature, the ECCC, especially in case 002, is dealing not only with allegations about the most serious international crimes known to mankind but also with allegations of particular modes of liability which, when combined, amount to alleged systematic and wide spread mass atrocities. The direct events in respect of such mass atrocities could be argued to have caused collective injury of a nature that cannot be measured in respect of any one individual alone, but only seen in the context of collective damage caused to the whole of a society or directed parts thereof.

69. In addition, the Victims before ECCC, especially in case 002, are in a different position from those before domestic courts and even from those in ECCC's case 001. Civil Parties in a domestic court are usually aware of the allegations and the specific acts upon which they can base their claim. In a domestic court the proximity to the matters alleged is immediate and not complicated by either the passage of time or the inclusion of the consideration of international crimes and the complexity involved in respect of such crimes, including the various special modes of participation. In the ECCC's case 001, the victims knew that the only site they had to relate their claim with was the S21 Security Centre and there was only one accused charged. Kaing Guek Eav, "Duch," was not indicted for committing crimes throughout the country through the different forms of liability, the presence of which distinguishes case 002 from case 001. In case 002 the Accused are indicted for crimes allegedly committed throughout the country.

70. Before the ECCC a civil claimant has no right to individual and material compensatory damages, but rather may make a claim only for collective and moral reparations. Moral reparations mean that a moral obligation may arise in respect of injury caused consequent upon a confirmation of allegations for commission of crimes through the implementation of the CPK policies by the Accused.[94] Collective reparations also stem from collective injury which has an individual effect as well. It would be unrealistic to see the injury caused from alleged mass atrocities only on individual basis because it encompasses individual parameters. Mass atrocities result from a systematic and widespread implementation of policies directed towards the whole of the community as well as particular groups and individuals within the community. Whilst there will be claims for individual injury, the individual applications to be joined as a Civil Party must be seen in the special circumstances of the conflict. The cultural and social background of Cambodia

[94] It is noted that awarding moral reparations *may* involve a financial cost, Internal Rule 23 *quinquies* (3)(a)

must be considered. In addition, it must also be kept in mind that in the period 1975-79 the whole social structure was dramatically changed allegedly as a consequence of the actions of the Accused acting together and with others, as set out in the Closing Order.

A. Causal link:

71. Internal Rule 23*bis*(1)(b) provides that the injury has to be the direct consequence of "crimes alleged against the Charged Person." The Pre-Trial Chamber notes that in case 002 there is only one Closing Order against four Accused together.[95] These Accused are charged with offences allegedly committed by way of their participation together in a joint criminal enterprise (and other forms of liability) throughout Cambodia, including crimes against humanity, genocide, grave breaches of the Geneva Conventions of 12 August 1949 and violations of the 1969 Penal Code.

72. The Pre-Trial Chamber further notes that, unlike in case 001, where the Civil Parties had to show relation to crimes committed only in the S21 Security Centre,[96] in case 002 where there are allegations for the CPK policies being implemented *throughout* Cambodia by way of the Accused allegedly participating in a joint criminal enterprise (or acting together in other forms of liability), the Civil Party Applicants do not necessarily have to relate their injury to only one crime site or even to only those crime sites identified in the part of the Closing Order titled "factual findings," as the crimes and the underlying CPK policies forming the basis of the indictments were allegedly implemented throughout Cambodia. The Closing Order alleges that committing the enumerated crimes by participating in a joint criminal enterprise (and through other forms of liability), the intention of the Accused was not to just commit crimes that happened at specific sites, but rather to implement the CPK policies throughout Cambodia. The Co-Investigating Judges made positive findings of the widespread and systematic nature of the attacks on the civilian population. The intellectual involvement of the Accused in such is the basis of the *mens rea* element for a number of the crimes with which the Accused are indicted. Therefore injury caused to communities or specific groups must also be seen to relate to the Accused acting in concert so as to implement the CPK policies throughout Cambodia.

[95] Closing Order, para. 1613.
[96] ECCC Trial Chamber's Judgment in Case 001, 26 July 2010, E188 ("Judgment in Case 001"), paras. paras 644ff.

Injury caused by the actions of the Accused together to individual victims is part of the collective and immeasurable damage caused to the targeted groups and communities to which the individual victims may belong. In this context, the nature of the responsibility of the Accused in respect of which the injury must to be proven takes on collective parameters. It would be unrealistic, on the basis of the manner in which the Closing Order is formulated, to try to establish individual injury against an individual Accused.

73. The Pre-Trial Chamber observes that all the Civil Parties are admitted in case 002 to claim against all the Accused both as individuals and collectively as a group. The Pre-Trial Chamber notes that this was not done in accordance with the text of Internal Rule 23*bis* (1) (b) where it is prescribed that the causal link should be established with the crimes alleged against "the Charged Person", that is, each individual "Charged Person." The Closing Order alleges responsibility of the Accused acting together in a joint criminal enterprise. The Co-Investigating Judges, being aware of this, may have had no choice but to apply IR23*bis*(1) in the way in which they did, however, they did not explain the rationale behind this in their impugned orders. In this respect, the Pre-Trial Chamber finds that it is bound to follow the same approach as the Co-Investigating Judges to avoid major inconsistency in the position of the Civil Parties admitted by the Co-Investigating Judges and those who may be admitted by the Pre-Trial Chamber.

74. The Closing Order makes the following factual findings on joint criminal enterprise. Paragraphs 156,157, 158 and 159 of the Closing Order state:

> I. "FACTUAL FINDINGS OF JOINT CRIMINAL ENTERPRISE
>
> 156 The common purpose of the CPK leaders was to implement rapid socialist revolution in Cambodia through a "great leap forward" and defend the Party against internal and external enemies, by whatever means necessary.
>
> 157 To achieve this common purpose, the CPK leaders *inter alia* designed and implemented the five following policies:
>
> - The repeated movement of the population from towns and cities to rural areas, as well as from one rural area to another;
> - The establishment and operation of cooperatives and worksites;
> - The reeducation of "bad-elements" and killing of "enemies", both inside and outside the Party ranks;
> - The targeting of specific groups, in particular the Cham, Vietnamese, Buddhists and former officials of the Khmer Republic, including both civil servants and former military personnel and their families; and
> - The regulation of marriage.
>
> 158 The common purpose came into existence on or before 17 April 1975 and continued until at least 6 January 1979. The five policies designed to achieve this common purpose were

implemented within or before these dates. These policies evolved and increased in scale and intensity throughout the regime. One of the consequences of these policies was the collectivisation of all aspects of society. This collectivisation involved the suppression of markets, currency and private property, the prohibition of peoples' freedom of movement, and generally forcing *everyone* to live in communal units according to their categorisation. This resulted in the implementation of a system which Cambodians have subsequently described in the following way: *the entire country had become a "prison without walls".*

159 The persons who shared this common purpose included, but were not limited to: members of the Standing Committee, including **Nuon Chea** and **Ieng Sary**; members of the Central Committee, including **Khieu Samphan**; heads of CPK ministries, including **Ieng Thirith**; zone and autonomous sector secretaries; and heads of the Party Centre military divisions."

75. In the Closing Order the different investigated crime scenes are mentioned and reported upon in respect of how the implementation of these policies occurred. Details are included that allege how the implementation of the policies resulted in actual mass atrocities throughout Cambodia. The Co-Investigating Judges state in the Closing Order that from "approximately 200 security centres and countless execution sites [...] located in every Zone throughout Cambodia and at all levels of the CPK administration structure, including at the Party Centre," they were seised of only eleven such security centres and three execution sites.[97] However their description of how the "two key objectives of security centres and execution sites" were implemented, clearly shows that the eleven security centres and three execution sites serve only as examples in order to demonstrate how all these centres and sites functioned *throughout* Cambodia.[98]

76. These alleged facts specifically related to the initial role of the Accused and are then qualified as being committed by way of participating in a joint criminal enterprise, where the common purpose is achieved through designing and implementing the five above mentioned policies resulting in the indicted crimes. Further modes of liability mentioned are planning, instigating, superior responsibility, ordering, aiding and abetting. The Closing Order further provides:

"Findings of Responsibility under the Joint Criminal Enterprise

1524 The common purpose of the CPK leaders was to implement rapid socialist revolution by in Cambodia through a "great leap forward" and to defend the Party against internal and external enemies, by whatever means necessary. The purpose itself was not entirely criminal in nature but its implementation resulted in and/or involved the commission of crimes within the jurisdiction of the ECCC.

[97] Closing Order, para. 178.
[98] Closing Order, paras. 178ff.

1525 To *achieve this common purpose, the CPK leaders designed and implemented five policies.* Their implementation resulted in and/or involved the commission of the following crimes which were committed by members and non-members of the [joint criminal enterprise]:

(i) Repeated movements of the population from towns and cities to rural areas;

CRIMES AGAINST HUMANITY, punishable under Articles 5, 29 (new) and 39 (new) of the ECCC Law, specifically:

(a) murder
(b) persecution on political grounds
(c) other inhumane acts through "attacks against human dignity" and forced transfer

(ii) Establishment and operation of cooperatives and worksites;

CRIMES AGAINST HUMANITY, punishable under Articles 5, 29 (new) and 39 (new) of the ECCC Law, specifically:

(a) murder
(b) extermination
(c) enslavement
(d) imprisonment
(e) torture
(f) persecution on political grounds
(g) persecution on racial grounds
(h) persecution on religious grounds
(i) other inhumane acts through "attacks against human dignity" and enforced disappearances

(iii) Reeducation of "bad elements" and "enemies", both inside and outside the Party ranks;

CRIMES AGAINST HUMANITY, punishable under Articles 5, 29 (new) and 39 (new) of the ECCC Law, specifically:

(a) murder
(b) extermination
(c) enslavement
(d) imprisonment
(e) torture
(f) persecution on political grounds
(g) persecution on racial grounds
(h) persecution on religious grounds
(i) other inhumane acts through "attacks against human dignity" and enforced disappearances

GRAVE BREACHES OF THE GENEVA CONVENTIONS OF 12 AUGUST 1949, punishable under Articles 6, 29 (new) and 39 (new) of the ECCC Law, specifically:

(a) wilful killing
(b) torture or inhumane treatment
(c) wilfully causing great suffering or serious injury to body or health
(d) wilfully depriving a prisoner of war or civilian the rights of fair and regular trial
(e) unlawful confinement of a civilian
(f) unlawful deportation of a civilian

(iii) The targeting of specific groups, in particular the Cham, Vietnamese, Buddhists and former officials of the Khmer Republic, including both civil servants and former military personnel and their families;

GENOCIDE, by killing, punishable under Articles 4, 29 (new) and 39 (new) of the ECCC Law, specifically:

(a) Cham
(b) Vietnamese

CRIMES AGAINST HUMANITY, punishable under Articles 5, 29 (new) and 39 (new) of the ECCC Law, specifically:

(a) murder
(b) extermination
(c) deportation
(d) imprisonment
(e) torture
(f) persecution on racial grounds
(g) persecution on religious grounds
(h) other inhumane acts through enforced disappearances

GRAVE BREACHES OF THE GENEVA CONVENTIONS OF 12 AUGUST 1949, punishable under Articles 6, 29 (new) and 39 (new) of the ECCC Law, specifically:

(a) wilful killing

(iv) Regulation of marriage

CRIMES AGAINST HUMANITY, punishable under Articles 5, 29 (new) and 39 (new) of the ECCC Law, specifically:

(a) rape
(b) other inhumane acts through forced marriage.

1526 These crimes increased in scale and gravity when, having taken power over the whole territory, the CPK leaders endeavored to carry through the revolutionary project by addressing its presumed failures.

1527 With regard to the policies targeting Chams and Vietnamese, the plan to eliminate these groups may not have existed until April 1977 for the Vietnamese and from 1977 for the Cham. From that moment the members of the [joint criminal enterprise] knew that the implementation of the common purpose expanded to include the commission of genocide of these protected groups. Acceptance of this greater range of criminal means, coupled with persistence in implementation, amounted to an intention of the [joint criminal enterprise] members to pursue the common purpose through genocide.

1528 Co-Investigating Judges find that the common purpose came into existence before 17 April 1975 and continued until at least 6 January 1979. Its five policies were implemented on or before the temporal jurisdiction of the ECCC, which demonstrate the intent of the **Charged Persons** to achieve the common purpose even prior to 1975 and establishes a pattern of conduct that continued throughout the temporal jurisdiction of the ECCC.

1529. The members of the common purpose included, but were not limited to, members of the Standing Committee, including **Nuon Chea** and **Ieng Sary**; members of the Central Committee including **Khieu Samphan**; heads of CPK Ministries, including **Ieng Thirith,** zone and autonomous sector secretaries, and the heads of the Party Centre military divisions, as set out in the sections of this Closing Order regarding CPK structures.

1530. The contribution of the **Charged Persons** to the [joint criminal enterprise] was not limited to setting up the CPK Party and its administration and communication structures. As demonstrated below, *they also actively contributed to the furtherance of the common purpose in many different ways throughout the whole CPK regime.*

1531. With regard to the contribution or participation of the **Charged Persons** to the Joint Criminal Enterprise and their intention to further the common purpose the Co-Investigating Judges make the following legal findings:..."

77. In the Closing Order where the Co-Investigating Judges qualify the facts as crimes, on all occasions, they state that the Accused made and implemented policies for the *whole of Cambodia.* The Pre-Trial Chamber finds that where Civil Party Appellants state that they have suffered from the implementation of policies but in areas other than those chosen to be investigated, they shall be considered for admission as Civil Parties.

78. The Pre-Trial Chamber further observes that in the conclusion[99] of the Closing Order the Co-Investigating Judges qualify the facts as genocide and crimes against humanity, allegedly committed by the Accused through their acts and omissions committed through a joint criminal enterprise and by virtue of their being in command, crimes which are, by definition, ultimately directed against groups or the population.[100] This is because each isolated act against individual members of the group is, by definition, committed "with the [special] intent to destroy, in whole or in part, a [..] group" and is "part of a "widespread or systematic attack directed against any civilian population."[101] The alleged crimes and underlying policies will remain, therefore, to have allegedly been designed to have an effect over whole groups or the whole of the population and an examination of the victimization in such circumstances should take this into account[102] when there have been findings of a nature that demonstrate country wide occurrences. The admission as a civil party in respect of mass atrocity crimes should therefore be seen in the context of dealing with wide spread and systematic actions resulting from the implementation of nation wide policies in respect of which the individual liability alleged against each of the accused also

[99] Closing Order, para. 1613.
[100] Articles 4 and 5 of the ECCC Law. As also pointed out by the Civil Party Lawyers in the Appeal, see also *Prosecutor v. Milosevic,* ICTY Case No IT-02-54-T, Trial Chamber's Decision on Motion for Judgment on Acquittal, 16 June 2004, para 246 states: "the genocidal intent of the Bosnian Serb leadership can be inferred from all the evidence ... the scale and pattern of the attacks, their intensity, the substantial number of Muslims killed... the detention of Muslims, their brutal treatment in detention centres and elsewhere, and the targeting of persons essential to the survival of the Muslims as a group are all factors that point to Genocide."
[101] *See aslo* Antonio Cassese, *International Criminal Law,* Oxford University Press, 2003 ("Cassese 2003"), p. 106: "[genocide and crimes against humanity] do not constitute isolated events but are instead normally part of a larger context, either because they are large-scale and massive infringement of human dignity or because they are linked to a broader practice of misconduct."
[102] UN General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law : resolution / adopted by the General Assembly, 21 March 2006, A/RES/60/147, Principle 8.

takes collective dimensions due to allegations for acting together as part of a joint criminal enterprise.

79. The Pre-Trial Chamber further observes that although the Grave Breaches of the Geneva Conventions, with which the Accused are also indicted in the Closing Order, are, by definition, crimes directed against persons,[103] the way the pertaining facts have been legally characterized in the Closing Order,[104] may lead, where appropriate, to the conclusion that it is likely that such crimes, at times, have also been of a systematic nature and were designed to be directed against "all the detainees," or to have had, at least psychologically, not only an individual but also a collective effect, as is demonstrated by the following findings in the Closing Order: "the conditions [having been designed] to keep *the detainees*[105] in a *permanent climate of fear*."[106] The Pre-Trial Chamber considers this when reviewing the Civil Party applications before it.

80. The Pre-Trial Chamber further notes that in the Closing Order, the Co-Investigating Judges send the Accused to trial also for violations of the 1956 Penal Code[107] (national crimes), which are by definition crimes directed against persons. Despite of laying out the reasons, in the Closing Order,[108] explaining why the Co-Investigating Judges "find themselves in a procedural stalemate" in relation to national crimes, the Pre-Trial Chamber has, unanimously, observed in paragraph 296 of its Decision on Ieng Sary's Appeal against the Closing Order, D427/1/30, dated 11 April 2011, the following:

> *"Reading the Closing Order as a whole, the Pre-Trial Chamber understands that the charges for the national crimes are based on the facts set out in the paragraphs dealing with the corresponding underlying crime as genocide, crimes against humanity or grave breaches of the Geneva Convention.* The same holds true for the modes of liability, save for the modes of liability that the Co-Investigating Judges have said to be international, namely commission via a joint criminal enterprise, superior responsibility and instigation, which shall not apply to the national crimes. Whether the facts stated in the indictment can actually be characterised as murder, torture and religious persecution under the 1956 Penal Code is ultimately a question of legal characterisation that is to be determined by the Trial Chamber and bears no effect, at this stage, on the jurisdiction of the ECCC to send the accused for trial in relation to these crimes."

[103] ECCC Law, Article 6.
[104] Closing Order, paras. 1491-1520.
[105] Emphasis added to the plural version of the word "detainee" used.
[106] Closing Order, para. 1502.
[107] Closing Order, para. 1613.
[108] Closing Order, paras. 1564-1576.

81. The Pre-Trial Chamber similarly examines crimes within the context of the Closing Order.

82. The Pre-Trial Chamber shall examine whether injury alleged by Civil Party applicants relates to any of the crimes alleged against the Accused as charged in the Closing Order.

B. Injury:

83. Internal Rule 23*bis*(1)(b) provides that the injury must be physical, material or psychological. The Pre-Trial Chamber, as also noted by the Co-Investigating Judges in their Orders, adopts the finding of ICC's Appeal Chamber that injury must be personal and that it does not necessarily have to be direct.[109] The Pre-Trial Chamber further adopts the finding of the ECCC's Trial Chamber that psychological injury includes mental disorders or psychiatric trauma, such as post-traumatic stress disorder.[110] In relation to psychological injury, the Pre-Trial Chamber finds it essential to place the considerations of victimization also within the social and cultural context relevant at the time when the alleged crimes occurred in Cambodia. Particular care needs to be taken with this to ensure that the position of civil party applicants is considered within the correct context. Such context will be country and culture specific.[111]

84. As noted above, the Pre-Trial Chamber observes that expert opinion on the nature of extended family in Cambodia was provided before the Trial Chamber of the ECCC in case 001 by Mr. CHHIM Sotheara, a psychiatrist and university professor who lives and works in Phnom Penh and who was qualified by the Trial Chamber as an expert. On 25 August 2009 when he appeared before the Trial Chamber, while replying to questions directed from Civil Party Lawyers, Mr. Sotheara stated the following:[112]

[109] *Lubanga* ICC,11 July 2008, ICC-01/04-01/06 OA9 OA10, Disposition para.1(i).
[110] Judgment in Case 001, para. 641.
[111] The Pre-Trial Chamber notes that other international courts have applied the same *culturally sensitive* approach. For instance see: *Aloeboetoe et al.* Case, Reparations Judgment of September 10, 1993,Inter-American Court of Human Rights, paras. 54 – 63 (Emphasiz added to para. 55); *Case of Saramaka People v. Suriname,* Inter-American Court of Human Rights, Preliminary Objections, Merits, Reparations, and Costs, Judgment of November 28, 2007, paras. 188-189; See also Nowak, Manfred, *U.N. Covenant on Civil and Political Rights CCPR Commentary*, N.P.Engel, ("ICCPR Commentary"), p. 405: which, referring to the practice of ECtHR and of the Human Rights Committee notes that "the term family is to be interpreted broadly in the sense of the respective cultural understandings of the States Parties."
[112] Transcript of Trial Proceedings, KAING GUEK EAV, "DUCH," D288/4.68.1, 25 August 2009.

"Question: Thank you. Regarding S-21, or the Tuol Sleng genocidal museum, as it is known now, most of the victims are the relatives of those executed at S-21. What are the main reasons for the victims wanting to know the exact location of the death of their relatives? What are the connections between the place of the death and their psychological experience?

Answer: Thank you for the question, Counsel. I would like to say that first let me talk about the family and the social environment in Cambodia. The social and family situation in Cambodia is that we live in family [closely together,][113] so the impact of the relationship is tense and the closeness between each family member, who might be the dead victims or the victims who are survivors now -- and those people who died could be the ones who assisted them, who had gratitude over them. So the death of such dear people or relatives are exactly the same type of suffering they would experience. And the secondary traumatization experienced by them is the post-traumatic stress disorder or the trauma. Even if they are not the direct victims of the mistreatment or torture but due to the closeness of relationship between them and the dead people leads to the secondary traumatization, the hearing of the torture or the mistreatment or other events related to their death would cause the secondary traumatization in a similar fashion experienced by those people who died. This is my response, Counsel."[114]

85. The expert evidence continued as follows:

"Question: My last question: some of our clients not only lost their mother or their brother or their sisters or their fathers at S-21, but also their cousins or their grandfathers or even their brother-in-law; people who would be considered in other cultures as more distant family members, but however what we observed in the proceedings that our clients pain is just as acute so how can you explain that people who might have lost their brother-in-law or their grandfather or more distant relatives might feel pain in such an acute way?

Answer: It depends on the attachment, the linkages between the person to that persons. In Cambodian society and family, the Cambodian society has a tradition of showing homage, gratitude, respect to the senior members of the family so the younger children or members of the family must have had established some kind of connection with the dead people. Those people who died could have been the role model, the mentors for them. So this establishes a kind of bond -- the very close bond for the people who live and who have to pay the gratitude to dead people. So they have to find all means to return their gratitude to them; so only by way of finding justice for them would be the best remedy. That's why they have joined as the civil parties in these proceedings."[115]

[113] The transcript in English refers here to "separately". The Pre-Trial Chamber has examined the Khmer version of the transcript which is the original statement of the expert and notices that, if translated correctly from the Khmer original, the word "separately" should actually be "closely together."

[114] Transcript of Trial Proceedings, KAING GUEK EAV, "DUCH," D288/4.68.1, 25 August 2009, (English version), at pages 36 – 37, from line 14 (questioning by Civil Party Counsel Mr Hong Kimsuon).

[115] Transcript of Trial Proceedings, KAING GUEK EAV, "DUCH," D288/4.68.1, 25 August 2009, (English version) at page 47, from line 25 (questioning by International Civil Party Counsel Mr Alain Werner).

86. The Pre-Trial Chamber also notes that the very nature of the *societal and cultural context at the time when the alleged crimes occurred* requires another and wider consideration of the matter of victimization. This is particularly so in respect of the alleged involvement of the Accused in implementing policies that affected whole groups and communities, even the whole Cambodian society. Under such circumstances, relationships of dependency are relevant, as are relationships of people within close knit village communities, where people know each other well and placed reliance upon each other in many ways in order to live and survive. The Pre-trial Chamber considers that the mere knowledge of the fate of another human who is a direct victim of crimes committed resulting from the implementation of policies to that effect must be more than not likely to be psychologically disturbing to any person of ordinary sensibility. Such disturbance flows not just from seeing such crimes being committed but also from the implied and constant threat generated by such occurrences that can reasonably be expected to instill fear on the others that this could also be their fate due to them belonging to the same targeted group or community as the direct victim of a crime committed as part of the implementation of the CPK policies.

87. The Pre-Trial Chamber notes that the implementation of the CPK policies, allegedly by the Accused acting in a joint criminal enterprise (and through other forms of liability) together and with others, brought as a consequence the restructuring of the whole social structure in Cambodia at the time,[116] the creation of the "new people," which was allegedly achieved by: repeatedly moving the population from towns and cities to rural areas; by "re-educating the "bad elements" and "enemies," both inside and outside the Party ranks," or by establishing the new cooperatives and worksites. All of these social restructuring brought people, who were suddenly separated from their families, to new environments and amongst other people, whom they had even never met or seen in their lives before but, most importantly, with whom they had to share the same fate in circumstances of great difficulty and oppression. It would be just to consider that other bonds from the ordinary familial ones evolved as a consequence, these being similar to such bonds as the ones created between prisoners thrown together in the same cell.[117] These people, just because of being part of the same targeted group or community, apart

[116] Closing Order paras. 158, 161, 169, 207.
[117] Closing order, para. 158: "*the entire country had become a "prison without walls.*"

from the usual traditions and values, appear to have had to share everything, including their fears and sorrows, with people they never met before, in the same way or at even deeper levels than they would, under normal circumstances, with their family members. The Pre-Trial Chamber considers that such bonds cannot be ignored and applying only a presumption of familial kinship, under the circumstances, would be too limited. To a large extent, it is reasonable to presume that, due to the implementation of the CPK Policies throughout Cambodia, people with no previous relationship of any kind, but who were part of the same targeted group or community, had to rely upon each other for their very survival.

88. The Pre-Trial Chamber considers that in case 002, for the reasons mentioned above, the degree of relationship between a Civil Party applicant with the immediate victim is not dependent only on a presumption of familial kinship but may also extend to the fact of an applicant belonging to the same persecuted group or community as the immediate victim. When the indirect victim is a member of a group or community targeted by the implementation of CPK policies, no distinction between what happened to the individual and the collective can be made.

89. In this context, the Pre-Trial Chamber notes that the Closing Order[118] alleges that the CPK leaders and their followers in the implementation of their policies made sure that fear of violence or death was instilled to all the members of the targeted group or community, thus passing a message to everyone, which circumstance shows that not only the direct victim of a crime but also those who witnessed the crime were affected because of shock and very direct fear of being subject of the same treatment just because of belonging to that same group or community. Under the circumstances where the alleged crimes were committed in a widespread and systematic manner, it is more likely than not that even being a witness of a crime committed against another member of the same group or community would cause psychological suffering and injury.

90. The Closing Order makes allegations about the treatment of targeted *groups* and that "this measure adversely affected many *groups* of people [...] directly or indirectly."[119] It also states that "the Co-Investigating Judges are seized of facts [of forced marriage][120] and of

[118] Closing Order, paras. 210-212, 219, 220, 231-232.
[119] Closing Order, para. 205.
[120] Closing Order, para. 216.

[establishment and operation of cooperatives and worksites][121] occurring *throughout* Cambodia" and that "one of the objectives of the population movements was to fulfill the labor requirements of the cooperatives and worksites"[122] which were established *throughout* Cambodia.[123] It is more likely than not that the implementation of the alleged policies had an impact not only on individuals but also on groups of the population or on whole communities *throughout* Cambodia.

91. The Closing Order further alleges that the policies were implemented by doing "*whatever must be done*" to reach the objective and that this included, from directions for the *killing of all members* that belonged to a certain community,[124] to killing or threatening to kill those who did not do what they were directed to do.[125] It is alleged in the Closing Order and it is more likely than not that people throughout Cambodia were not able to assert their opposition for *fear of violence or death*. Such fear, combined with the surrounding circumstances at the time, as described in the Closing Order, make it more likely than not that in many cases even people who witnessed[126] or had knowledge of the crimes could suffer emotional distress and psychological injury not only from harm caused to other individuals but also from a *perception of direct and actual threat* of the same happening to them if they belonged to the same targeted group or community.

92. It is more likely than not and conforms with human sensibility that those who witnessed what happened to anyone who objected (the latter not necessary being a family member), feared they could suffer the same, which combined with the fact that they had to also, against their will, put up with being separated from their homes and loved ones (at times these included hospitalized family members or wives/mothers/daughters who had just given birth)[127] and thus ended up feeling alone, lost and hopeless at a time when they needed to be strong, would have experienced psychological injury.

93. Therefore, the Pre-Trial Chamber, for those applicants alleging psychological injury who are not in a position to substantiate a close relationship with the immediate victim, shall,

[121] Closing Order, para. 168.
[122] Closing Order, para. 161.
[123] Closing Order, para. 168.
[124] Closing order, para. 214.
[125] Closing Order, paras. 210, 211, 219,
[126] The Pre-Trial Chamber in its decision on Civil Party admissibility in appeals PTC 47&48 has previously accepted as Civil Parties victims alleging harm suffered from witnessing a crime: Decision on Appeals against Co-Investigating Judges Combined Order D250/3/3 dated 13 January 2010 and Order D250/3/2 dated 13 January 2010 on Admissibility of Civil Party Applications, 27 April 2010, D250/3/2/1/5, para 38.
[127] Closing Order, para. 225.

where appropriate, apply a presumption of collective injury in its assessment of civil party applications in case 002. The presumption of collective injury derives from the very nature of the source of such injury, these being crimes like genocide or crimes against humanity which, as mentioned above, are, by definition, crimes directed against groups or the population.[128] The Pre-Trial Chamber understands that the only way to make collective injury tangible is by means of individual examples which are capable of showing the nature and depth of the damage caused to the collective.[129] By presumption of collective injury, the Pre-Trial Chamber means that as long as a civil party applicant submits that he/she was a *member of the same targeted group or community* as the direct victim and such is more likely than not to be true, psychological harm suffered by the indirect victim arises out of the harm suffered by the direct victim, brought about by the commission of crimes which represent grave violations of international humanitarian law as alleged in the Closing Order.

C. Level of proof:

94. Pursuant to Internal Rule 23(1), when considering the admissibility of the Civil Party application, the Pre-Trial Chamber shall be satisfied that facts alleged in support of the application are *more likely than not to be true.*

D. Proof of identity:

95. The Pre-Trial Chamber shall apply a flexible approach in relation to the requirement pursuant to IR23*bis*(1)(a) for all applicants to clearly prove their identity. In this respect,

[128] See also Cassese 2003, pp. 89-90 referring to the *Chambre d'accusation* of the Paris Court of Appeal, judgment of 13 April 1992 in *Touvier* (at 352): "Jews and members of the Resistance persecuted in a systematic manner in the name of a State practicing a policy of ideological supremacy, the **former *by reason of their membership of a racial or religious community***, the later ***by reason of their opposition to that policy***, can equally be the victims of crimes against humanity"

[129] The Pre-Trial Chamber notes that the Inter-American Court of Human Rights (IACtHR) has also made similar applications: *Case of the Plan de Sánchez Massacre v. Guatemala*, Judgment of November 19, 2004, Reparations, Inter-American Court of Human Rights, para. 93: "Reparations are not exhausted by compensation for pecuniary and non pecuniary damage (supra paras. 72 to 76 and 80 to 89); other forms of reparation must be added. In this section, the Court will begin to determine measures of satisfaction seeking to repair the non-pecuniary damage, which are not of a pecuniary nature, but rather have public repercussions. These measures have particular relevance in this case, owing to the extreme gravity of the facts and *the collective nature of the damage produced.*"

the Pre-Trial Chamber shall also follow the common practice applied in Cambodian courts and accept as proof of identity also statements issued in a form or the other from the village elder or the communal chiefs.

E. Whether the application of a broader Civil Party admissibility criteria affects the balance that has to be maintained with the rights of the other parties involved in the proceedings:

96. The Pre-Trial Chamber notes that the purpose of Civil Party action before ECCC is: a) to participate in criminal proceedings against those responsible for crimes within the jurisdiction of the ECCC by supporting the prosecution; and b) to seek collective and moral reparations, as provided in Internal Rule 23 *quinquies*.[130]

Participation in proceedings:

97. The Pre-Trial Chamber notes that in ECCC the role of the Civil Parties at trial is limited to the following: as members of a consolidated group, they may summon witnesses who are not on the list provided by the Co-Prosecutors,[131] they may be heard through the Civil Party Co-Lead Lawyers by the Trial Chamber,[132] and may be allowed to ask questions or to object to the continued hearing of the testimony of any witnesses, if they consider that such testimony is not conducive to ascertaining the truth. As far as the rights of the Civil Parties in proceedings go in ECCC, they do not have a direct effect on decisions that would directly and adversely affect the position of the Accused, such as whether to prosecute or not, they do not explicitly have a say in possible amendments to the charges or in relation to decisions on joint or separate trials or on guilt. The Pre-Trial Chamber considers that the moral and collective nature of representation before the Trial Chamber and simplified purpose of civil party action at trial before ECCC do not support any concerns that a possible admission of a larger number of people as Civil Parties may have an adverse effect on the rights of the accused.

[130] Internal Rule 23.
[131] Internal Rule 80(2).
[132] Internal Rule 91.

Reparations in the case of possible convictions:

98. Internal Rule 23 *quinquies* provides:

> "Civil Party Claim
>
> 1. If an Accused is convicted, the Chambers may award *only collective and moral reparations* to Civil Parties. Collective and moral reparations for the purpose of these Rules are measures that:
>
> a) acknowledge the harm suffered by Civil Parties as a result of the commission of the crimes for which an Accused is convicted and
> b) provide benefits to the Civil Parties which address this harm.
>
> These benefits shall not take the form of monetary payments to Civil Parties.
>
> 2. Reparations shall be requested in a single submission, which may seek a limited number of awards. This submission shall provide:
>
> a) a description of the awards sought;
> b) reasoned argument as to how they addresses the harm suffered and specify, where applicable, the Civil Party group within the consolidated group to which they pertains; and
> c) in relation to each award, the single, specific mode of implementation described in Rule 23*quinquies*(3)(a)-(b) sought.
>
> 3. In deciding the modes of implementation of the awards, the Chamber may, in respect of each award, either:
>
> a) order that the *costs of the award* shall be borne by the convicted person; or
> b) recognize that a specific project appropriately gives effect to the award sought by the Lead Co-Lawyers and may be implemented. Such project shall have been designed or identified in cooperation with the Victims Support Section and have secured sufficient external funding."

99. The Pre-Trial Chamber observes that the only right the Civil Parties have in the case of convictions, which may directly affect the rights of the Accused, is that to seek in a "single submission" "in relation to each award, the single specific mode of implementation" of the award which *may* include an "order that the costs of the award shall be borne by the convicted person." The issue is not one in relation to the cost of the award, but rather the fact that a Civil Party has a right, as a member of a collective "class" to request moral reparations. This is a right which flows from the fact of joinder in the proceedings and is not an issue to be balanced against the position of the accused.

IX. INDIVIDUAL ASSESSMENT OF CIVIL PARTY APPLICATIONS:

100. The Pre-Trial Chamber makes a fresh review of each Civil Party application brought before it by the Appeals. The full reasons for the rejection or admission of each Civil Party applicant shall be filed separately as attachments to this decision.

101. Given the important information they contain concerning the facts which occurred between 17 April 1975 and 6 January 1979, within the territory of Democratic Kampuchea, the applications of those Civil Party applicants who are found inadmissible, shall remain, as also indicated by the Co-Investigating Judges in their orders, on Case File 002 as complaints.

X. DISPOSITION

THEREFORE THE PRE-TRIAL CHAMBER DECIDES AS FOLLOWS:

a. To, unanimously, declare all the appeals admissible;

b. To, unanimously, overturn the Co-Investigating Judges' impugned Orders, insofar as they relate to the rejection of the civil party applications listed in the table below; to admit their respective application and to grant them the status of civil parties in case 002;

Appeals against Impugned Order D411 (Kampong Speu Province)[133]		
PTC 76[134]		
08-VU-01222 (D22/1401)	08-VU-01227 (D22/1411)	08-VU-01306 (D22/1013)
09-VU-02516 (D22/2288)	09-VU-02517 (D22/2289)	09-VU-02521 (D22/2293)
09-VU-03309 (D22/2318)	09-VU-3310 (D22/2319)	09-VU-03311 (D22/2320)
09-VU-03314 (D22/2323)	09-VU-03318 (D22/2327)	09-VU-3323 (D22/2331)
09-VU-03331 (D22/2337)	09-VU-03349 (D22/2353)	09-VU-03350 (D22/2354)
09-VU-03358 (D22/2362)	09-VU-03393 (D22/2395)	09-VU-03395 (D22/2397)
09-VU-03429 (D22/2424)	09-VU-03455 (D22/3164)	09-VU-03461 (D22/3170)
09-VU-04172 (D22/2463)	09-VU-04178 (D22/2469)	09-VU-04187 (D22/2473)
09-VU-04189 (D22/3583)	10-VU-00026 (D22/2505)	10-VU-00404 (D22/3822)
08-VU-01483 (D22/1752)	09-VU-01052 (D22/1545)	09-VU-01502 (D22/0785)
09-VU-04191 (D22/3585)	09-VU-03312 (D22/2321)	
PTC 172[135]		
08-VU-01347 (D22/383)	09-VU-01417 (D22/0843)	08-VU-01460 (D22/1723)
09-VU-01422 (D22/1860)	08-VU-01303 (D22/364)	
Appeals against Impugned Order D419 (Kampot Province)[136]		
PTC 112[137]		
09-VU-03389 (D22/2392)	09-VU-01186 (D22/1490)	08-VU-01858 (D22/1946)
09-VU-04181 (D22/3577)		
PTC 113[138]		
09-VU-01336 (D22/0647)	09-VU-01317 (D22/0636)	
PTC 114[139]		

[133] Order on the Admissibility of Civil Party Applicants from Current Residents of Kampong Speu Province, 9 September 2010, D411 ("Impugned Order D411").
[134] Appeal against Order on the Inadmissibility of Civil Party Applicants from Current Residents of Kampong Speu Province (D411), 20 September 2010, D411/3/3 ("PTC 76").
[135] Appeal Against Orders on the Admissibility of Civil Party Applicants from Current Residents of Kampong Speu, 2 November 2010, D411/5/1 ("Appeal PTC 172").
[136] Order on the Admissibility of Civil Party Applicants from Current Residents of Kampot Province, 14 September 2010, D419 ("Impugned Order D419").
[137] *Appel des Co-avocats de parties civiles, Groupe Avocats Sans Frontières France, de l'ordonnance D419 sur la recevabilité des constitutions de parties civiles résidant dans la province de Kampot*, 27 September 2010, D419/2/1 ("Appeal PTC 112").
[138] Appeal Against Order on the Admissibility of Civil Party Applicants from Current Residents of Kampot Province, filed on 24 September 2010, D419/5/1 ("Appeal PTC 113").

08-VU-00820 (D22/448)	08-VU-01553 (D22/385)	08-VU-01775 (D22/1500)
08-VU-01776 (D22/388)	08-VU-01783 (D22/919)	08-VU-01787 (D22/1501)
08-VU-01789 (D22/923)	08-VU-01833 (D22/225)	09-VU-00576 (D22/1982)
09-VU-03790 (D22/3441)	09-VU-03870 (D22/3521)	09-VU-03874 (D22/3525)
09-VU-03876 (D22/3527)	09-VU-03880 (D22/3530)	09-VU-03882 (D22/3532)
09-VU-03896 (D22/3546)	09-VU-04254 (D22/3640)	09-VU-04257 (D22/3643)
09-VU-03793 (D22/3444)	08-VU-01785 (D22/921)	08-VU -01844 (D22/224)
08-VU-02184 (D22/478)	08-VU-02370 (D22/1147)	09-VU-00059 (D22/1720)
09-VU-00060 (D22/1719)	09-VU-00572 (D22/2080)	09-VU-00573 (D22/1979)
09-VU-00575 (D22/221)	09-VU-00619 (D22/l978)	09-VU-00621 (D22/900)
09-VU-00723 (D22/830)	09-VU-03773 (D22/3424)	09-VU-03783 (D22/3434)
09-VU-03796 (D22/3447)	09-VU-03794 (D22/3445)	09-VU-03864 (D22/3515)
09-VU-03871 (D22/3522)	09-VU-03875 (D22/3526)	09-VU-03878 (D22/3528)
09-VU-03883 (D22/3533)	09-VU-03885 (D22/3535)	09-VU-03890 (D22/3540)
09-VU-03892 (D22/3542)	09-VU-04240 (D22/3626)	09-VU-04244 (D22/3630)
09-VU-04253 (D22/3639)	09-VU-04262 (D22/3648)	08-VU-01778 (D22/945)
09-VU-00055 (D22/531)	09-VU-00622 (D22/1502)	
PTC 115[140]		
09-VU-03797 (D22/3448)	09-VU-00261 (D22/1970)	09-VU-00262 (D22/1459)
09-VU-03761 (D22/3412)	08-VU-01832 (D22/1943)	09-VU-03863 (D22/3514)
09-VU-00062 (D22/1673)	09-VU-01426 (D22/1915)	09-VU-02063 (D22/3024)
08-VU-01828 (D22/1200)	09-VU-01427 (D22/1916)	09-VU-00703 (D22/1605)
PTC157[141]		
08-VU-02160 (D22/0098)	08-VU-02163 (D22/0215)	09-VU-00329 (D22/1815)
PTC 164[142]		
09-VU-01756 (D22/2169)		
PTC 165[143]		
09-VU-00926 (D22/1253)	09-VU-03359 (D22/2363)	09-VU-2104 (D22/2200)

c. To, by majority of four judges, Judge Marchi-Uhel dissenting, overturn the Co-Investigating Judges' impugned Orders, insofar as they relate to the rejection of the civil party applicants listed in the table below; to admit their respective application and to grant them the status of civil parties in case 002;

Appeals against Impugned Order D411 (Kampong Speu Province)		
PTC 76		
09-VU-03394 (D22/2396)	09-VU-02519 (D22/2291)	09-VU-02520 (D22/2292)
09-VU-03397 (D22/3146)	08-VU-01533 (D22/0408)	09-VU-03462 (D22/3171)

[139] *Requête d'appel d'ordonnance sur la recevabilité des constitutions de parties civiles résidant dans la province de Kampot (52 requérants) Table des sources*, 27 September 2010, D419/7/1. Despite the reference to the table of authorities in the title of this document, it contains the appeal; the table of authorities is in the document entitled *Requête d'appel d'ordonnance sur la recevabilité des constitutions de parties civiles résidant dans la province de Kampot (52 requérants)*, dated 27 September 2010, D419/7/1.1 («Appeal PTC 114 »).

[140] Appeal against the Order on the Admissibility of Civil Party Applicants from Current Residents of Kampot Province (23 Applicants), 27 September 2010, D419/8/1 ("Appeal PTC 115").

[141] Appeal against Orders on the Inadmissibility of Civil Party Applicants from current Residents of Kampot Province (D419), 27 October 2010, D419/10/1 ("Appeal PTC 157").

[142] Appeal against Orders on the Admissibility of Civil Party Applicants from Current residents of Kampot Province (D419), 2 November 2010, D419/11/1 ("Appeal PTC 164").

[143] Appeal against Orders on the Admissibility of Civil Party Applicants from Current residents of Kampot Province, 2 November 2010, D419/12/1 ("Appeal PTC 165").

09-VU-03430 (D22/2425)	08-VU-02024 (D22/0372)	09-VU-04176 (D22/2467)
09-VU-03431 (D22/2426)	08-VU-02026 (D22/1025)	09-VU-04184 (D22/3579)
09-VU-03433 (D22/2427)	08-VU-02037 (D22/0361)	08-VU-00227 (D22/1298)
09-VU-03453 (D22/3162)	08-VU-02335 (D22/0474)	08-VU-00248 (D22/1375)
09-VU-03454 (D22/3163)	08-VU-02340 (D22/386)	08-VU-00666 (D22/363)
09-VU-03457 (D22/3166)	08-VU-02341 (D22/0407)	08-VU-01178 (D22/387)
09-VU-03458 (D22/3167)	08-VU-02345 (D22/1141)	08-VU-01295 (D22/373)
09-VU-03826 (D22/3477)	08-VU-02347 (D22/0413)	08-VU-01298 (D22/1012)
09-VU-04153 (D22/3560)	08-VU-02348 (D22/1142)	08-VU-01303 (D22/0428)
09-VU-04174 (D22/2465)	09-VU-00014 (D22/0473)	08-VU-01342 (D22/0914)
09-VU-04183 (D22/3578)	09-VU-00016 (D22/1176)	08-VU-01457 (D22/1768)
09-VU-04186 (D22/3581)	09-VU-00017 (D22/0499)	08-VU-01485 (D22/1731)
09-VU-00348 (D22/3773)	09-VU-00162 (D22/0617)	08-VU-01486 (D22/1730)
09-VU-00469 (D22/3827)	09-VU-01048 (D22/1688)	08-VU-01514 (D22/0768)
09-VU-01059 (D22/2087)	09-VU-01051 (D22/1547)	09-VU-03326 (D22/2334)
09-VU-01060 (D22/1430)	09-VU-01054 (D22/1548)	09-VU-03328 (D22/2335)
09-VU-01411 (D22/1849)	09-VU-01055 (D22/1550)	09-VU-03330 (D22/3140)
09-VU-01413 (D22/1848)	09-VU-01057 (D22/1551)	09-VU-03339 (D22/2343)
09-VU-01910 (D22/2897)	09-VU-02431 (D22/2210)	09-VU-03341 (D22/D2345)
09-VU-01911 (D22/2898)	09-VU-02432 (D22/2211)	09-VU-03344 (D22/2348)
09-VU-01912 (D22/2899)	09-VU-02433 (D22/2212)	09-VU-03345 (D22/2349)
09-VU-01915 (D22/2902)	09-VU-02434 (D22/2213)	09-VU-03347 (D22/2351)
09-VU-01916 (D22/2903)	09-VU-02435 (D22/2214)	09-VU-03348 (D22/2352)
09-VU-01917 (D22/2904)	09-VU-02514 (D22/2286)	09-VU-03351 (D22/2355)
09-VU-01918 (D22/2905)	09-VU-02518 (D22/2290)	09-VU-03352 (D22/2356)
09-VU-01919 (D22/2906)	09-VU-02428 (D22/2208)	09-VU-03353 (D22/2357)
09-VU-02427 (D22/2207)	09-VU-03316 (D22/2325)	09-VU-03354 (D22/2358)
09-VU-02430 (D22/2209)	09-VU-03319 (D22/2328)	09-VU-03356 (D22/2360)
09-VU-03321 (D22/2329)	09-VU-03324 (D22/2332)	
PTC 142[144]		
08-VU-01230 (D22/2046)	08-VU-01443 (D22/1798)	08-VU-01228 (D22/1400)
08-VU-01293 (D22/0437)	08-VU-01550 (D22/1045)	08-VU-01229 (D22/1409)
08-VU-01300 (D22/1658)	08-VU-02052 (D22/0946)	08-VU-01231 (D22/1404)
Appeals against Impugned Order D419 (Kampot)		
PTC 112		
09-VU-00777 (D22/0552)	09-VU-03380 (D22/2383)	08-VU-02364 (D22/0466)
09-VU-03391 (D22/2394)	09-VU-00774 (D22/1114)	09-VU-00505 (D22/0960)
09-VU-03771 (D22/3422)	09-VU-00775 (D22/1101)	09-VU-01460 (D22/2713)
09-VU-03788 (D22/3439)	09-VU-00776 (D22/0553)	09-VU-01750 (D22/2164)
09-VU-03865 (D22/3516)	09-VU-00780 (D22/0807)	09-VU-00772 (D22/0555)
09-VU-03879 (D22/3529)	09-VU-00781 (D22/0806)	
09-VU-04127 (D22/3551)	09-VU-00782 (D22/0805)	09-VU-03305 (D22/2314)
09-VU-04129 (D22/2445)	09-VU-00787 (D22/1627)	09-VU-03308 (D22/2317)
09-VU-04130 (D22/3552)	09-VU-00790 (D22/1592)	09-VU-03298 (D22/2307)
09-VU-04131 (D22/2446)	09-VU-00801 (D22/1449)	09-VU-03300 (D22/2309)
09-VU-04133 (D22/2447)	09-VU-00803 (D22/1447)	09-VU-03301 (D22/2310)
09-VU-04135 (D22/3555)	09-VU-00806 (D22/1523)	09-VU-03304 (D22/2313)
09-VU-04136 (D22/2448)	09-VU-00808 (D22/1516)	09-VU-03306 (D22/2315)
09-VU-04137 (D22/3556)	09-VU-00905 (D22/1117)	09-VU-03360 (D22/2364)
09-VU-04139 (D22/3557)	09-VU-00907 (D22/1096)	09-VU-03361 (D22/2365)

[144] Appeal Brief against the Order on the Admissibility of Civil Party Applicant from current Residents of Kampong Speu Province (D411), 19 September 2010, D411/4/1 ("Appeal PTC 139").

09-VU-04140 (D22/2450)	09-VU-01175 (D22/1493)	09-VU-03363 (D22/2367)
09-VU-04143 (D22/2453)	09-VU-01176 (D22/1492)	09-VU-03364 (D22/2368)
09-VU-04144 (D22/2454)	09-VU-01177 (D22/2698)	09-VU-03365 (D22/2369)
09-VU-04147 (D22/2457)	09-VU-01179 (D22/1532)	09-VU-03366 (D22/2370)
09-VU-04149 (D22/2458)	09-VU-01180 (D22/2699)	09-VU-03368 (D22/2372)
09-VU-04245 (D22/3631)	09-VU-01181 (D22/1714)	09-VU-03369 (D22/2373)
09-VU-00770 (D22/1594)	09-VU-01182 (D22/2700)	09-VU-03371 (D22/2375)
09-VU-00771 (D22/0556)	09-VU-01184 (D22/1533)	09-VU-03375 (D22/2379)
09-VU-00772 (D22/0555)	09-VU-01188 (D22/2701)	09-VU-03376 (D22/3143)
09-VU-00773 (D22/0554)	09-VU-01189 (D22/2702)	09-VU-03377 (D22/2380)
09-VU-01327 (D22/0645)	09-VU-01190 (D22/2703)	09-VU-03378 (D22/2381)
09-VU-01331 (D22/1887)	09-VU-01191 (D22/2704)	09-VU-03379 (D22/2382)
09-VU-01332 (D22/1886)	09-VU-01192 (D22/1489)	09-VU-03381 (D22/2384)
09-VU-01335 (D22/0646)	09-VU-01307 (D22/0663)	09-VU-03383 (D22/2386)
09-VU-01338 (D22/1596)	09-VU-01310 (D22/0660)	09-VU-03385 (D22/2388)
09-VU-01340 (D22/1881)	09-VU-01311 (D22/0630)	09-VU-03386 (D22/2389)
09-VU-01424 (D22/0708)	09-VU-01312 (D22/0631)	09-VU-03387 (D22/2390)
09-VU-01425 (D22/0709)	09-VU-01313 (D22/0632)	09-VU-01322 (D22/0641)
09-VU-01319 (D22/0638)	09-VU-01314 (D22/0633)	09-VU-01323 (D22/0642)
09-VU-01320 (D22/0639)	09-VU-01318 (D22/0637)	09-VU-01326 (D22/1889)
09-VU-01433 (D22/0659)	09-VU-01459 (D22/2128)	09-VU-02107 (D22/2202)
09-VU-01434 (D22/0658)	09-VU-01461 (D22/2129)	09-VU-02108 (D22/3062)
09-VU-01435 (D22/1847)	09-VU-01462 (D22/2130)	09-VU-02109 (D22/3063)
09-VU-01436 (D22/1846)	09-VU-01465 (D22/2714)	09-VU-02110 (D22/3064)
09-VU-01438 (D22/1844)	09-VU-01467 (D22/2716)	09-VU-02111 (D22/2203)
09-VU-01440 (D22/1843)	09-VU-01468 (D22/2717)	09-VU-02112 (D22/3065)
09-VU-01442 (D22/1842)	09-VU- 01752 (D22/2165)	09-VU-02132 (D22/3066)
09-VU-01445 (D22/1831)	09-VU-01753 (D22/2166)	09-VU-02237 (D22/3118)
09-VU-01447 (D22/1830)	09-VU-01754 (D22/2167)	09-VU-02502 (D22/2278)
09-VU-01448 (D22/1829)	09-VU-01757 (D22/2170)	09-VU-03285 (D22/2294)
09-VU-01449 (D22/1828)	09-VU-01761 (D22/2762)	09-VU-03286 (D22/2295)
09-VU-01452 (D22/2121)	09-VU-01762 (D22/2763)	09-VU-03287 (D22/2296)
09-VU-01453 (D22/2122)	09-VU-01763 (D22/2764)	09-VU-03289 (D22/2298)
09-VU-01454 (D22/2123)	09-VU-01767 (D22/2766)	09-VU-03293 (D22/2302)
09-VU-01455 (D22/2124)	09-VU-01769 (D22/2768)	09-VU-03294 (D22/2303)
09-VU-01456 (D22/2125)	09-VU-01772 (D22/2771)	09-VU-03296 (D33/2305)
09-VU-01457 (D22/2126)	09-VU-02105 (D22/3061)	08-VU-01554 (D22/384)
08-VU-01869 (D22/0731)	09-VU-00065 (D22/1669)	08-VU-01559 (D22/1007)
08-VU-01870 (D22/2650)	09-VU-00066 (D22/1664)	08-VU-01846 (D22/2649)
08-VU-01895 (D22/0467)	09-VU-00070 (D22/1538)	08-VU-01855 (D22/0733)
08-VU-01927 (D22/0767)	09-VU-00071 (D22/0955)	09-VU-00769 (D22/0557)
08-VU-01929 (D22/0950)	09-VU-00072 (D22/1610)	09-VU-00546 (D22/1106)
08-VU-01931 (D22/0951)	09-VU-00076 (D22/1035)	09-VU-00548 (D22/1237)
08-VU-02150 (D22/1765)	09-VU-00249 (D22/1462)	09-VU-00717 (D22/0835)
09-VU-02154 (D22/1782)	09-VU-00250 (D22/1037)	09-VU-00719 (D22/0834)
08-VU-02190 (D22/1948)	09-VU-00252 (D22/1461)	09-VU-00720 (D22/0833)
08-VU-02191 (D22/1211)	09-VU-00253 (D22/1038)	09-VU-00724 (D22/0829)
08-VU-02201 (D22/1054)	09-VU-00255 (D22/1460)	09-VU-00742 (D22/1115)
08-VU-02204 (D22/1153)	09-VU-00256 (D22/1040)	09-VU-00744 (D22/1075)
08-VU-02209 (D22/1727)	09-VU-00257 (D22/1041)	09-VU-00768 (D22/1546)
08-VU-02361 (D22/1138)	09-VU-00258 (D22/1042)	09-VU-00348 (D22/1822)
08-VU-02363 (D22/0464)	09-VU-00259 (D22/1043)	09-VU-00545 (D22/1076)
08-VU-02366 (D22/0492)	09-VU-00260 (D22/1044)	09-VU-00064 (D22/1668)

08-VU-02367 (D22/1144)		
PTC 113		
08-VU-01561 (D22/1064)	09-VU-01308 (D22/0662)	08-VU-01790 (D22/1143)
09-VU-00069 (D22/2671)	09-VU-01316 (D22/0635)	08-VU-01556 (D22/1006)
09-VU-00254 (D22/1039)	09-VU-0174 (D22/2172)	09-VU-00788 (D22/1584)
09-VU-00547 (D22/1133)	09-VU-01337 (D22/1883)	09-VU-00789 (D22/1593)
09-VU-00549 (D22/1223)	08-VU-02203 (D22/0420)	08-VU-02368 (D22/0470)
09-VU-00721 (D22/0832)	10-VU-00833 (D22/3851)	09-VU-01521 (D22/0791)
09-VU-00802 (D22/1448)	09-VU-01432 (D22/0760)	08-VU-02365 (D22/465)
09-VU-00805 (D22/2085)	09-VU-01333 (D22/1885)	09-VU-00216 (D22/1262)
09-VU-01185 (D22/2093)	09-VU-01309 (D22/0661)	09-VU-01451 (D22/2120)
09-VU-00758 (D22/1488)		
PTC 114		
09-VU-04252 (D22/3638)	09-VU-00620 (D22/901)	
PTC 115		
08-VU-0827 (D22/1027)	09-VU-03795 (D22/3446)	09-VU-03792 (D22/3443)
09-VU-00626 (D22/1443)	08-VU-02199 (D22/1131)	09-VU-01428 (D22/1917)
09-VU-04251 (D22/3637)	08-VU-00830 (D22/993)	09-VU-01429 (D22/1918)
09-VU-03869 (D22/3520)	08-VU-01829 (D22/393)	
PTC 157		
08-VU-02155 (D22/1799)	09-VU-00347 (D22/1797)	09-VU-00328 (D22/1814)
09-VU-00322 (D22/1795)		

d. To dismiss, unanimously, the Appeals, insofar as they relate to the rejection of the civil party application listed below, which has been found inadmissible.

Appeal against Impugned Order D411 (Kampong Speu Province)		
PTC 76		
08-VU-02051 (D22/0360)		

Phnom Penh, 24 June 2011

Pre-Trial Chamber

Presiding:

Katinka LAHUIS **NEY Thol** **Catherine MARCHI-UHEL** **HUOT Vuthy** **PRAK Kimsan**

Greffiers:

SAR Chanrath **Enkela JOSIFI**

KONG Tarachhath **Anne-Marie BURNS**

Judge Catherine Marchi Uhel appends separate and partial dissenting opinion.

002/19-09-2007-ECCC/OCIJ (PTC 76, 112, 113, 114, 115, 142, 157, 164, 165 and 172)

SEPARATE AND PARTIALLY DISSENTING OPINION OF JUDGE CATHERINE MARCHI-UHEL

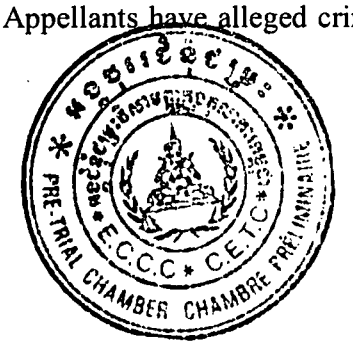
INTRODUCTION

1. I have read the Decision of the majority of judges (the "Majority") in the appeals against the orders on admissibility (each, an "Impugned Order" and collectively, "the Impugned Orders") issued by the Office of the Co-Investigating Judges (the "Co-Investigating Judges") in respect of those victims whose applications to be a civil party to the proceedings in Case 002 were found inadmissible and who have appealed such finding to the Pre-Trial Chamber ("the Applicants" or "the Appellants").

2. I concur with the Majority that all of the appeals are admissible. While, as detailed below, I consider that the Co-Investigating Judges have committed errors of facts and mixed errors of law and facts, I am of the view that the *de novo* review on appeal undertaken by the Majority is not warranted.

3. On the substance, these appeals are raising two major issues related to the admissibility of civil party applications. The first issue concerns the interpretation of the Internal Rules as to the link to be established between the injury suffered by the applicant and at least one of the crimes alleged against the accused. In this respect, the Majority has in my view not properly taken into account the necessary relationship between the scope of the Indictment and final determinations on civil party admissibility. Under the Internal Rules[1], a "victim" is a natural person who has suffered harm as a result of the commission of any crime within the jurisdiction of the ECCC. Any victim may file a complaint with the Co-Prosecutors pursuant to Rule 49(2). A "civil party" is a victim whose application to become a civil party has been declared admissible by the Co-Investigating Judges or the Pre-Trial Chamber. I agree with the Co-Investigating Judges and the Majority that most Applicants whose application was declared inadmissible in the Impugned Orders have demonstrated that it is plausible that they suffered harm as a direct consequence of at least one crime within the jurisdiction of the ECCC. These applicants may be considered as victims, in the sense of the Internal Rules. Not all of them, however, meet the requirements to consider their respective civil party application admissible. This is particularly so when the crime(s) they alleged to have caused their respective harm is not a crime for which the accused are indicted and I cannot agree with the import of the Majority decision in this respect. I consider that most Appellants have alleged crimes which

[1] ECCC Internal Rules (Rev. 6), as revised on 17 September 2010.



may have been committed in furtherance of one or more of the policies which according to the Indictment form part of the common purpose allegedly shared by the accused. Indeed, according to the Indictment the common purpose of the Communist Party of Kampuchea (the "CPK") leaders was to implement rapid socialist revolution in Cambodia through a "great leap forward' and defend the Party against internal and external enemies, by whatever means necessary.[2] In order to achieve this common purpose, the CPK leaders *inter alia* designed and implemented the following five policies: (1) the repeated movement of the population from towns and cities to rural areas, as well as from one rural area to another; (2) the establishment and operation of cooperatives and worksites; (3) the reeducation of "bad-elements" and killing of "enemies", both inside and outside the Party ranks; (4) the targeting of specific groups, in particular the Cham, Vietnamese, Buddhists and former officials of the Khmer Republic, including both civil servants and former military personnel and their families; and (5) the regulation of marriage.[3] Further, among the phenomenon alleged to have occurred increasingly in parallel with the evolution of these policies, the Indictment describes a large phenomenon of internal purges.[4] Importantly however, the accused are not indicted for each and every crime allegedly committed by the Khmer Rouge during the CPK regime, even as part of the above mentioned policies and/or against members of the targeted groups. In particular, for most of the crimes for which the accused are indicted, the scope of the Indictment is limited to crimes committed during three specific phases of forced movements of population and at a listed number of worksites, cooperatives, security centres and execution sites.[5] I believe that the Majority is aware of the scope of the Indictment. However, its interpretation of the Internal Rules relevant to the admissibility of civil party applications is in my view contrary to both the spirit and the letter of the rules in question and amounts to admitting civil party applicants who are not even alleging that they suffered harm as a result of at least one of the crimes for which the accused are indicted. Because of my divergence of view with the Majority on this point, I do not agree that the Impugned Order should have been reversed in respect of the admissibility of a number of Applicants. I am appending to this Opinion an Annex giving specific reasons dealing with the individual facts of each of the Applicants in question.

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[2] Indictment, para. 156.
[3] Indictment, para. 157.
[4] Indictment, para. 192 and following.
[5] For an exception to this approach, see below discussion under Ground 8, related to persecution on religious grounds and Grounds 10 and 11, related to other inhumane acts through forced marriage.

4. Admitting civil parties who do not allege suffering harm from at least one crime for which the accused are indicted in Case 002 is in my view not only against the spirit and the letter of the Internal Rules but it also brings with it a number of risks, i.e. 1) undermining the role of the consolidated group of civil parties in the trial, whose legitimacy is directly resulting from the fact that they are suffering from at least one of the crimes for which the accused are indicted and whose participation aims at supporting the prosecution of these crimes and seeking collective and moral reparation for the harm caused by these; 2) delaying the process as the Co-Lead Lawyers will have to identify the interest of a group whose members are not all alleging crimes for which the accused are indicted, and this situation raises potential for unnecessary challenges by the parties before the Trial Chamber; 3) frustrating the civil parties who met the requirements of admissibility and will see these challenges delaying the trial; and 4) also frustrating the civil party wrongly admitted due to the fact that the crimes they were directly victims of would not be discussed at trial and not result in a conviction.

5. I am satisfied that there are other avenues in the Internal Rules to address the interest of victims who do not meet the requirements of admissibility as civil parties. First of all, the Co-Investigating Judges have and the Pre-Trial Chamber recognized that it is plausible that they suffered harm as a direct consequence of at least one crime within the jurisdiction of the ECCC. Second, in respect of the Applicants which I find could not be admitted as civil parties, I have endeavored in the Annex to this Opinion to address each of the crimes alleged by these Applicants which where argued in the appeal. This is not only with a view to provide a reasoned opinion, but also to give recognition to the suffering reported by these Applicants. Finally, unlike reparations which may be granted by the Trial Chamber in Case 002 to the consolidated group of civil parties, in the event that the trial leads to a conviction of one or more accused, measures envisaged by Internal Rule 12*bis*(3) aim at addressing the broader interest of 'victims' and are not limited to civil parties. Indeed, this rule entrusts the Victim Support Section to develop and implement programs and measures other than those of a legal nature addressing the broader interest of victims, including where appropriate in collaboration with governmental and non-governmental entities external to the ECCC. When adopting Revision 5 of the Internal Rules, the Plenary of Judges carefully reviewed the use of the term 'victims' and 'civil parties' in the respective rules and I have no doubt that the non judicial measures in question may have a broader scope and benefit to the victims in parallel to the judicial process, including to those who do not qualify as civil parties. I am convinced that the avenue offered by Internal Rule 12*bis*(3)

is, in respect of victims who do not even allege having suffered harm as a direct consequence of at least one crime for which the accused are indicted, one appropriate avenue for addressing the suffering(s) of this class of victims. The avenue chosen by the Majority is in my view not an appropriate one.

6. The second important issue raised by these appeals goes to the way a civil party applicant can satisfy this Chamber that he/she suffered psychological harm as a result of the alleged crime(s). In this respect, while I must admit that I do not fully understand what the Majority means by the notion of victimization it relies upon and how it actually applies to individual Applicants, I do agree that the Co-Investigating Judges have been too restrictive in their approach. I explain below why I consider that a broader class of applicants than that retained by the Co-Investigating Judges shall benefit from a presumption of psychological harm before the ECCC. Moreover, like the Majority, I consider that the circumstances which prevailed at the ECCC for Case 002 demand that the Pre-Trial Chamber accepts further statements or particulars from civil party applicants in the course of the appeals before it.

I. THE COMMON GROUNDS AND PRELIMINARY REMARKS RELATED THERETO

7. The ninety four appeals received by the Pre-Trial Chamber contain various and sundry grounds of appeal. Most grounds of appeals alleging errors of facts, errors of law or mixed errors of law and facts have been raised in several appeals, although the formulation may vary from one appeal to another ("common grounds"). Not every Applicant has raised every ground contained in this Opinion. However, given (i) the common interests of many of the Applicants, (ii) the fact that the admissibility regime as contained in the Internal Rules and further interpreted by the Co-Investigating Judges applies equally to all applications, and (iii) especially in light of the practice of the Co-Lawyers who chose to incorporate by reference the appellate arguments made in other appeals, often by other Co-Lawyers, I concur with the Majority that it is appropriate to issue one Opinion dealing with these common grounds and to issue in the form of annexes further reasons pertaining to the specific case of each Applicant, in order to ensure that the legal and factual considerations of each application and/or appeal are adequately addressed. Many of the grounds of appeal that are found in more than one appeal by the Co-Lawyers are discussed in this Opinion. In

those instances in which the Co-Lawyers have made slightly different submissions related to the same ground of appeal, I have included those submissions, as appropriate, in my discussion of the individual grounds and the submissions made in respect of that ground. As the Pre-Trial Chamber is under no obligation to consider those arguments that are plainly without merit or that are not properly pleaded by the Co-Lawyers, I have not addressed those in this Opinion. To ensure equality of treatment to all applicants who have appealed their rejection to become a civil party and a coherent approach in the management of the admissibility regime for civil parties, I have reviewed all individual applications in the light of my conclusions on the common grounds. This means that even if, in some instances, the Co-Lawyers have not raised a specific error, or have qualified it differently, I have applied my findings to the individual applicants and admitted some on the basis of grounds that were not specifically raised by their Lawyers.

8. I am of the view that there are more common grounds alleged in the appeals than the few selected by the Majority. I will therefore consider each common ground that I have identified in turn rather than following the structure adopted by the Majority in order to ensure coherence in the way my reasoning and approach to these appeals are exposed.

9. The following alleged errors of law are summarized herein for ease of reference.

(1) Ground 1: failure by the Co-Investigating Judges to provide a reasoned decision, in particular as the Co-Investigating Judges made "mass rejection orders" and violated Rule 23(3) of the Internal Rules (Rev. 3) in violation of the requirement to proceed with procedural fairness;

(2) Ground 2: erroneous restriction on the rights of civil parties;

(3) Ground 3: erroneous application by the Co-Investigating Judges of Revision 5 of the Internal Rules, and in particular the application of an incorrect interpretation of Rule 23(1)(b) of the Internal Rules (Rev. 5), Rules 21(1), 21(1)(a)(c), 23(2) of the Internal Rules (Rev. 4) and all previous revisions, thus breaching procedural fairness;

(4) Ground 4: erroneous limitation of the "scope of the investigation" by the Co-Investigating Judges and application of this restriction to the civil party applications, in particular by

restricting the scope of investigations to paragraphs 37-72 of the Introductory Submission and the Supplementary Submissions;

(5) Ground 5: erroneous construction of the terms 'injury' and 'direct consequence' under Rule 23(2)(a) of the Internal Rules (Rev. 4 and previous revisions), and Rule 23*bis*(1)(b) (Rev. 5) respectively, resulting in the rejection of victims who suffered injury as a direct consequence of witnessing or having knowledge of crimes within the ECCC's jurisdiction or under the scope of investigation.

10. I have considered the alleged errors of fact that are specific to the case of individual Applicants in the Annex to this Opinion, however specific alleged errors of fact that are repeatedly raised by the Co-Lawyers will be discussed herein. These specific alleged factual errors are noted below under the heading of the general description of the error provided by the Co-Lawyers. My conclusion in relation to the facts in question applies to each appeal that contains the facts related to the alleged error, notwithstanding the fact that the Co-Investigating Judges may have found the application inadmissible for differing reasons. Failure to list the alleged error of fact under every ground retained by the Co-Investigating Judges does not affect my consideration of the facts and the alleged error or the final determinations made for each applicant regarding the same.

(6) Ground 6: erroneous conclusions of fact drawn by the Co-Investigating Judges in rejecting the applications on the basis of insufficient information when there was in fact sufficient information in the applications to allow the judges to verify compliance with Rules 23*bis* (1) and (4) of the Internal Rules, as applied to the following: the Applicant alleges that he was forcibly evacuated from a town to the countryside and the Co-Investigating Judges were seised of the facts related to such evacuation upon receipt of the Introductory or Supplementary Submission by the Co-Prosecutors;

(7) Ground 7: erroneous conclusions of fact drawn by the Co-Investigating Judges in rejecting the applications on the basis of insufficient information when there was in fact sufficient information in the applications to allow the judges to verify compliance with Rules 23*bis* (1) and (4) of the Internal Rules, as applied to the following: killings in other sites than those listed;

(8) Ground 8: erroneous determination by the Co-Investigating Judges that the Applicant did not establish the necessary causal link between the harm and the crimes alleged against the accused, as applied to the following crime: persecution on religious grounds;

(9) Ground 9: erroneous conclusions of fact drawn by the Co-Investigating Judges in rejecting the applications on the basis of insufficient information when there was in fact sufficient information in the applications to allow the judges to verify compliance with

Rules 23*bis* (1) and (4) of the Internal Rules, as applied to the following: the Applicant alleges that he or she experienced persecution on political grounds related to purges of Khmer Republic officials and their families, and, in the alternative, erroneous determination by the Co-Investigating Judges that the applicant did not establish the necessary causal link between the harm and the crimes alleged against the accused, as applied to the following crime: persecution on political grounds related to purges of Khmer Republic officials and members of their families.

11. At this juncture, I wish to stress that while the Co-Investigating Judges knew the content of the Closing Order[6] they were about to issue when they issued the Impugned Orders, this was not the case for the Appellants. As the "Factual Findings of Crimes" section of the Indictment is more detailed than the "Crimes" section of the Introductory Submission, the Indictment may thus contain elements in support of the Appellants' claims that demonstrate that the Co-Investigating Judges erred in declaring certain civil party applications inadmissible. I have therefore considered the merits of the appeal made by each Applicant by reviewing the specific situation of each Applicant in light of the crimes for which the accused have been indicted in the Indictment and those portions of the Factual Findings of Crimes in the Indictment that are related to the crimes for which the accused have been indicted. The Co-Investigating Judges also had the authority in the course of the judicial investigation to narrow the crimes charged from those that were recommended by the Co-Prosecutors. Therefore the Indictment may exclude certain facts relevant to the admissibility of a civil party application that are found in the "Crimes" section of the Introductory Submission. This narrowing from the Introductory Submission to the Indictment will impact on the admissibility of the application in question.

12. In addition to the preliminary remark related to crimes and errors of fact in the preceding paragraph, I note that it is important to bear in mind that the standard of review for the appeals made against the Impugned Orders permits the Pre-Trial Chamber to consider not only whether the Co-Investigating Judges have committed an error of law or an error of fact but also any mixed error of law and fact in their interpretation of admissibility criteria and the application of such criteria. The Co-Investigating Judges were guided by Rules 12, 12 *bis*, 21, 23, 23 *bis*, 23 *ter*, 49, 53, 55, 56(2)(a), 66 and 100 of the ECCC Internal Rules (Rev. 5), the Practice Direction on Victim Participation, Cambodian Law[7] and

[6] Since the Closing Order issued by the Co-Investigating Judges contains an indictment and the appeals against it have been adjudicated by the Pre-Trial Chamber and the accused are indicted, in the remainder of this Opinion and its Annex I will use the term Indictment when referring to the Closing Order unless otherwise required.

[7] Impugned Orders, page 2 and paragraphs 13, 15-16, referring to the Cambodian Penal Code, Article 13 and the Cambodian Code of Criminal Procedure (the "CPC"), Articles 13, 138 to 142.

the determinations of other courts or adjudicatory bodies that permit victim or civil party participation in order to apply the guidelines found in the Internal Rules to the situation of civil party applicants. I recognise that the task before the Co-Investigating Judges necessitated adopting both the findings or standards and the rationale or logic behind such findings or standards of other bodies to make determinations on these civil party applications. I also note that due to the particular circumstances of some victims seeking recognition as civil parties, the Co-Investigating Judges had to make determinations in many cases without full information. As I reviewed the Appeals, I have noted that the following constitute possible mixed errors of law and fact identified by the Co-Lawyers or *ex officio* and I have treated them as such:

(9) Ground 10: erroneous use and application of a presumption of psychological harm for members of the direct and extended family of an immediate victim;

(10) Ground 11: erroneous treatment by the Co-Investigating Judges of a presumption of psychological harm applicable to certain members of the direct family of the immediate victim of forced marriage.

II. MERITS: ERRORS OF LAW

Ground 1: Failure to Provide a Reasoned Decision Resulting in Procedural Unfairness

13. The Co-Lawyers allege that in making "mass rejection orders" the Co-Investigating Judges erred in law and violated Rules 23(3) and (4) of the Internal Rules (Rev. 3) as well as the obligation to proceed with procedural fairness including by providing reasoned decisions. This ground of appeal is supported by the following particular arguments. First, the Appellants criticise particular sections of the Impugned Orders, including paragraphs 22 and 24, inclusive of footnotes, and Annex 3 thereto, which identify the specific ground on the basis of which each particular applicants have been rejected. They state that the Appellants are obliged to guess which, if any, of the general reasons contained in paragraphs 4 to 18 of the Impugned Orders could or should apply to them. In addition, they submit that paragraphs 15-18 of the Impugned Order cannot amount to 'reasons' for rejection of the civil party applications and further note that the Impugned Orders may not contain specific reference to the details provided by each applicant in their respective Victim Information Form and in supplementary materials.

14. I agree with the Co-Lawyers and the Majority that an order rejecting the admissibility of a civil party application must be reasoned. The Co-Lawyers correctly note that this requirement, made explicit in earlier versions of the Internal Rules, is only implicit in Revision 5. Notwithstanding the revisions that have been made to the Internal Rules, the requirement to provide a reasoned decision remains and attaches to any order or decision for which a party has a right of appeal. This requirement exists, in part, to facilitate an appeal by the applicant whose application was rejected. Such applicant must be informed, in sufficient detail, of the reason(s) for the rejection and may thus decide whether or not to appeal and on what grounds. This requirement also enables the appellate body to conduct an effective appellate review.[8]

15. I disagree with the Co-Lawyers and the Majority that the Impugned Orders fail to provide sufficient reasoning in support of the finding of inadmissibility of the civil party applications. The Co-Investigating Judges devote an entire section of the Impugned Orders entitled "II- Reasons for the Decision" to expose their reasoning. The section is divided into two parts. The first section, entitled "Guiding Principles," contains the Co-Investigating Judges' description of the level of proof and sufficiency of information required, the existence of harm and of psychological harm in particular, and the causality link required between the harm and the crimes alleged against the charged persons. Next, the Co-Investigating Judges apply the Guiding Principles to the circumstances of each civil party application in a section entitled "Individual Assessment of Civil Party Applications." This entire section of each Impugned Order unambiguously contains the reasoning of the Co-Investigating Judges. I observe that the inclusion of the legal standards applied to civil party applications in the "Reasons for the Decision" section, including the inclusion of those standards that relate to only certain civil party applicants, does not mitigate or diminish the fact that the Co-Investigating Judges have provided reasoning for rejecting each of the Applicants in each Impugned Order.

16. I did not experience any difficulty in understanding the reasons for the rejection of the civil party applications. The Co-Investigating Judges were not required to make specific reference to the submissions in each Victim Information Form and in any supplementary information related to each Applicant. The reasoning provided by the Co-Investigating Judges is adequate and allows each

[8] See for instance in relation to appeals against orders on request for investigative action and appeals pursuant to Rule 74(3)(b), Decision on the Ieng Thirith Appeal Against 'Order on Request for Investigative Action by the Defense for Ieng Thirith' of 15 March 2010, 14 June 2010, D353/2/3, para. 23.

Applicant to file an appeal in respect of the rejection of his or her application. My finding that the Impugned Order is reasoned is of course independent of any analysis as to whether the reasons provided by the Co-Investigating Judges are legally or factually accurate.

Ground 2: Erroneous Restriction on the Rights of Civil Parties

17. The Co-Lawyers have raised a series of arguments on appeal concerning the general treatment of civil parties before the ECCC. They have labeled specific aspects of their treatment and the general status of civil parties and their counsel by the Co-Investigating Judges as constituting an error of law. I note that not all general arguments on treatment made by the Co-Lawyers are considered herein as many are made in unclear and imprecise terms. The Pre-Trial Chamber is under no obligation to consider such arguments; as such, I will summarize and assess only those arguments which in my view warrant consideration. These arguments include the following allegations by the Appellants: (i) they were not interviewed pursuant to Internal Rule 59; (ii) the facts they reported, which were beyond the scope of investigation, were not communicated to the Co-Prosecutors in accordance with Internal Rule 55; (iii) their rights were infringed owing to material and financial constraints, notably the fact that they were assigned lawyers at the eleventh hour and that they were not granted additional time to provide additional information; and (iv) the information they were given during the judicial investigation was insufficient.

18. Regarding the first issue raised as a general argument, I note that while civil party applicants are interviewed by the investigating judge in the ordinary course under the civil law system,[9] Internal Rule 59 – which quite clearly derives from the context of the ECCC, in particular, the exceptionally large number of people that could potentially file a civil party application – permits an interview by the Co-Investigating Judges but does not require it. Furthermore, the scope of the facts that potentially fall within the ECCC's jurisdiction renders it impossible for the Co-Investigating Judges to investigate all facts, which limitation is seemingly acknowledged by the Appellants who concede that the Co-Investigating Judges *could not* investigate every fact within the jurisdiction of the ECCC. I therefore dismiss any argument that the Co-Investigating Judges committed an error of law because they did not interview every civil party applicant.

[9] See CPC, Article 150.

19. Next, regarding the second issue raised as a general argument, I recall that, as a matter of procedure, the Co-Prosecutors limit the scope of the judicial investigation to certain facts of which they have knowledge at a given time. This is accomplished by selecting which facts to submit to the Co-Investigating Judges in the Introductory Submission and any supplementary submissions. In their general arguments concerning an alleged failure by the Co-Investigating Judges to remit facts to the Co-Prosecutors that were beyond the scope of the investigation, the Appellants do not specify whether the facts they allege to be the cause of their injury – which the Co-Investigating Judges found to be distinct from the ones of which they were seised – amount to new facts that the Co-Investigating Judges must have disclosed to the Co-Prosecutors, pursuant to Internal Rule 55(2).[10] The fact that no supplementary submission was issued on the facts in question does not exempt an Appellant from satisfying the requirement set out in Internal Rule 23*bis*(1)(b), namely that an applicant must demonstrate that he or she in fact suffered physical, material or psychological injury as a direct consequence of at least one of the crimes alleged against the Charged Person, as further explained below. The vagueness of the argument made by the Appellants renders it defective and it does not merit additional consideration. I finally note that the Co-Prosecutors have access to all information provided by civil party applicants and could expand the scope of the judicial investigation on that basis, as necessary.

20. As to the third issue raised as a general argument concerning the facilities afforded to the Appellants to support their civil party applications, I note that the deadline for filing civil party applications was 29 January 2010, corresponding to 15 days after the closing of the judicial investigation.[11] The Co-Investigating Judges however authorised the Applicants to file supplementary information in relation to their initial civil party applications, in consideration of the press release of 5 November 2009 on the scope of the judicial investigation in Case File 002.[12] While they initially set the deadline to 29 April

[10] I note that the Co-Investigating Judges applied the procedure required by Rule 55(2) in relation to several factual circumstances, including the evacuation of Siem Reap in April 1975: Forwarding Order, 29 February 2008, D77.
[11] Press Release entitled "Conclusion of the Judicial Investigation in Case 002/19-09-2007-ECCC-OCIJ", 14 January 2010; Memorandum of the Co-Investigating Judges, 27 January 2009, D337.
[12] OCIJ Press Release entitled "Statement from the Co-Investigating Judges on the Judicial Investigation of Case 002/19-09-2007-ECCC-OCIJ and Civil Party Applications dated 5 November 2009, at http://www.eccc.gov.kh/english/cabinet/press/138/ECCC_Press_Release_5_Nov_2009_Eng.pdf (the "OCIJ Press Release on the Scope of the Investigation"). In the OCIJ Press Release, the Co-Investigating Judges stated that the scope of the investigations can be understood as various crime sites and acts against the population. The Press Release states that "[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."

2010[13], they later extended it to 30 June[14]. I note many applicants filed a power of attorney reflecting the designation of counsel and provided supplementary information in relation to their initial applications. I note, in particular, that in those appeals in which the Co-Lawyers challenge the process of the Co-Investigating Judges, they have not specifically alleged that an Appellant has not filed a power of attorney or provided supplementary information because they were unable to do so. In light of these circumstances, I find that the Co-Investigating Judges did not commit an error of law. I similarly find that there has been no infringement of the Appellants' Rule 21(1) rights as separately alleged by certain Co-Lawyers.

21. In addition to the general argument made in respect of facilities and treatment, the Co-Lawyers note that 799 applicants were not designated counsel until 2 August 2010.[15] These applicants were unable to provide supplementary information prior to 30 June 2010. The Co-Lawyers emphasize that by failing to take this into account, the Co-Investigating Judges placed these appellants in a situation of inequity compared to other applicants. I recognize that the belated assignment of lawyers could have made it challenging for the applicants in this situation to support their respective applications. This is particularly true owing to the Co-Investigating Judges' refusal to grant the Co-Lawyers additional time to obtain and submit additional information in support of the application after designation in August 2010. I observe that not all of the Co-Lawyers who made this general argument on appeal filed a request to submit additional information or filed additional information without a request being made to the Pre-Trial Chamber, as was suggested by the Co-Investigating Judges. Nor have the Co-Lawyers filed a request for additional time to this end. Upon consideration of the argument advanced by the Co-Lawyers with respect to the difficulties caused by the eleventh hour designation of counsel, I find that there has been no demonstration that the Co-Investigating Judges' either (i) committed an error of law culminating in the determination that an application was inadmissible or (ii) committed an error of law in finding the applications inadmissible.

22. The Co-Lawyers have further alleged that they were not provided with sufficient information throughout the course of the judicial investigation. The Co-Lawyers allege that the Co-Investigating Judges have breached their obligation to ensure procedural fairness to civil party applicants through

[13] Press Release entitled "Co-Investigating Judes Set Deadline for Supplementary Information from Case 002 Civil Party Applicants", 25 February 2010.
[14] Memorandum of the Co-Investigating Judges, 29 April 2010, D337/6.
[15] Order on the Organisation of Civil Party Legal Representation under Rule 23*ter* of the Rules , 2 August 2010, D337/10.

their conduct and management of the civil party admissibility regime. In support of this claim, the Co-Lawyers cite the changing deadlines and various pronouncements of the Co-Investigating Judges and note that for multiple years, civil society groups, including volunteers, worked with applicants to complete applications without a full understanding of the final admissibility regime and without knowing the scope of the investigation, which was publicly disclosed on 5 November 2009. The Co-Lawyers have appealed what they have deemed an unfair determination of a matter, in particular the lack of certainty and clarity afforded to them in contravention to their expectation that the matter would be handled in a predictable and defined manner. While I do not fully endorse the management of the civil party admissibility regime by the Co-Investigating Judges, I consider that the Majority has not properly taken into account the relationship between the scope of the judicial investigation and final determinations on civil party admissibility. Since civil party status should only be afforded, at the pre-trial stage, to applicants who can demonstrate the appropriate causal link between the harm and a crime charged and, on appeal, for which an accused is indicted in the Closing Order, it was not possible for the Co-Investigating Judges to know with certainty, prior to the issuance of the Closing Order, precisely which applicants would be found admissible and which would not. In this respect, civil party lawyers face a difficulty that is similar to that faced by the Co-Investigating Judges – the very conduct of an impartial judicial investigation means that it is not possible to know in advance exactly which offenses will form part of any indictment. The factual parameters of the offenses for which a charged person may be indicted will move, which will cause the civil party lawyers to supplement the applications of their clients as the target is moving. This moving target is shared by the Co-Investigating Judges. If civil parties choose to file an application at an early stage of the investigation, they may still file supplementary materials in support of their application. I have noted above that civil parties were directed by the Co-Investigating Judges to file, if necessary, additional supplementary materials on appeal. The task of the civil party lawyers may be difficult, but the process is not unfair as the civil party lawyers have several opportunities to present the best case possible for their clients at different stages of the investigation, including as the judicial investigation neared completion. I accordingly find that the complaints of the civil party lawyers as to the method by which they received information, the timeline for receipt of information and the procedural unfairness resulting therefrom, should have been dismissed.

23. In any event, in fairness to the Applicants and considering the difficulties that some lawyers may have met in assisting their clients in filing their applications, the Pre-Trial Chamber has accepted as

validly filed further information provided by the Applicants as an annex to the appeal or incorporated therein. It has, in some cases, even invited the lawyers to submit additional information, notably in cases where a proof of identification was lacking, or to clarify certain information contained in the application.

Ground 3: Erroneous Application of Revision 5 of the Internal Rules

24. The Co-Lawyers allege that the Co-Investigating Judges erroneously applied Revision 5 of the Internal Rules in determining the admissibility of civil party applications thereby adversely impacting on the applicants. The Co-Lawyers argue that Revision 5 was not in force at the time of the filing of the civil party applications and that the prior rule, Rule 23(2) (Rev. 4), contained broader criteria for admissibility. They submit that to apply Revision 5 to the civil party applications violates the requirement for procedural fairness. They further submit that the Internal Rules in force at the time when an application is filed should be applied in any determination of civil party status.[16]

25. In addition to positing that the "rule" to be applied should be the "rule" in force at the time of the filing of the application, the Co-Lawyers explain that Rule 23(2) (Rev. 4) provided that the right to participate in a civil action could be exercised by victims of a crime within the jurisdiction of the ECCC and that in order for an application to be admissible, the injury had to be a) physical, material or psychological; and b) the direct consequence of the offence, personal and have actually come into being.[17] According to the Co-Lawyers, the entry into force of Rule 23*bis* (1)(b) of the Internal Rules on 9 February 2010 (Rev. 5) expressly limits civil party participation to victims who suffered injury as a direct consequence of at least one of the crimes alleged against the charged persons.[18] The Co-Lawyers submit that the application of Revision 5 results in a substantial restriction of the rights of victims and, as such, should not be retroactively imposed on those applicants whose applications were filed prior to 9 February 2010. They challenge the validity of the Pre-Trial Chamber's prior decision in which the Pre-Trial Chamber unanimously found that both versions of the Internal Rules "provide that for a civil party action to be admissible, the Civil Party Applicant shall *inter alia* demonstrate that he or she has suffered injury as a direct consequence of at least one of the crimes

[16] See for example Appeal against Order on the admissibility of Civil Party Applicants from current residents outside the Kingdom of Cambodia (D404), 15 September 2010, D404/1/3 (Appeal PTC77), paras 12-14. Similar submissions are also made *inter alia* in the appeals filed in cases PTC73, 80, 81, 86, 108, 118, 141.
[17] Internal Rules (Rev. 4), 11 September 2009 (emphasis added).
[18] Internal Rules (Rev. 5), 9 February 2010 (emphasis added).

alleged against the charged person."[19] They argue that Rule 23(2)(b) of Revision 4 of the Internal Rules does not restrict the possible meaning of the term "the offence" to solely those crimes alleged against a charged person, which restriction has been made explicit in Revision 5. In support of this argument, they rely on jurisprudence of the International Criminal Court (the "ICC") according to which Rule 85 of the ICC Rules of Procedure and Evidence does not have the effect of restricting the participation of victims to those who demonstrate a link to the crimes charged.[20]

26. I have considered this alleged error of law and the Internal Rules and have concluded that the Co-Lawyers are incorrect in their submission that the application of Revision 5 was erroneous and prejudicial to the applicants. Revisions 4 and 5 of Rule 23 and 23*bis* contain two admissibility requirements, which in my view are equivalent in the two versions of the rules.

27. The first requirement concerns jurisdiction. Rule 23(2) of Revision 4 and Rule 23(1) of Revision 5 refer to this jurisdictional requirement by specifying that civil parties may only participate in proceedings against those responsible for crimes within the jurisdiction of the ECCC by supporting the prosecution.

28. The second requirement is that the injury alleged must be the direct consequence of the offence or crime alleged against a charged person(s). While Rule 23*bis*(1)(b) of Revision 5 is certainly more explicit in this respect, the requirement in Rule 23(2)(b) of Revision 4 that the injury be the direct consequence of "the offence" is without a doubt referring to the offence charged. The second requirement reflects the requirements for eligibility as a civil party according to traditional civil law notions that have been partially adopted and applied at the ECCC. As such, the comparison with the ICC Rules and practice is not determinative. Indeed, in the Cambodian and French systems, a civil party applicant may participate in criminal proceedings in two ways: the victim can either initiate the public action by filing a complaint with a request to become a civil party ("plainte avec constitution de partie civile")[21] or join proceedings initiated by the Prosecutor by way of intervention.[22] In the

[19] The Appellants refer to Decision on Appeals Against Co-Investigating Judges' Combined Order D250/3/3 Dated 13 January 2010 and Order D250/3/2 Dated 13 January 2010 on Admissibility of Civil Party Applications, 27 April 2010, D250/3/2/1/5 ("Decision on Combined Order"), para. 29.
[20] Rule 85 provides, in pertinent part, that "victims means natural persons who have suffered as the result of the commission of any crime within the jurisdiction of the Court." Rules of Procedure and Evidence of the ICC, U.N. Doc. ICC-ASP/1/3 (2002) ("ICC Rules"), Rule 85.
[21] CPC, Article 138; French Code of Criminal Procedure ('French Code'), Articles 1, 2 and 85.
[22] CPC, Article. 137; French Code, Article 87.

two cases, there is necessarily a link between the harm alleged by the civil party in his or her application and the crime for which the accused is prosecuted at trial. As emphasized by the Co-Investigating Judges in the Impugned Orders, "[under the ECCC procedure], contrary to the Cambodian Criminal Procedure, an applicant cannot launch a judicial investigation simply by being joined as a Civil Party: being limited to action by *way of intervention*, he or she may only join ongoing proceedings through the application, and not widen the investigation beyond the factual situations of which the *Co-Investigating Judges are seized by the Co-Prosecutors (in rem seisin).*"[23] In other words, at the ECCC, the prosecution has sole authority to delimit the scope of all potential criminal proceedings against a suspect in each case by filing an Introductory and Supplementary Submissions at the investigative stage and prosecutes within the confines of the indictment at the trial stage and beyond. As a consequence, a civil party application, to be found admissible, has to fall within the ambit of the crimes the Co-Prosecutors have elected to prosecute and that are ultimately part of the Indictment issued by the Co-Investigating Judges. The second requirement is thus consistent with the purpose of a civil party action at the ECCC, which is to support the prosecution. Furthermore, the fact that the cost of moral and collective reparations that may be awarded to the civil parties shall be borne by the convicted person is an additional reason for civil party status to be restricted to those victims whose applications are found to relate to those crimes of which a charged person may ultimately be convicted.[24]

29. The two requirements for admissibility are cumulative. If a civil party alleges an injury as a direct consequence of a crime charged but it is determined that the ECCC has no jurisdiction over the crime in question, the civil party application is inadmissible, unless the conduct that allegedly caused the injury also forms part of another crime for which the ECCC has jurisdiction. Equally, if the civil party applicant alleges an injury as a direct consequence of a crime falling within the jurisdiction of the ECCC but for which no indictment has been issued by the Co-Investigating Judges, the civil party application is inadmissible. I find that none of the arguments raised by the Co-Lawyers under this ground of appeal are cogent reasons to depart from the Pre-Trial Chamber's prior decision that

[23] See for instance Impugned Order D417, para. 16.

[24] See Rule 23 (11) of Revision 4 and Rule 23 *quinquies* of Revision 5. Revision 6 of the Internal Rules entered into force on 17 September 2010. Rule 23 *quinquies* (3) of Revision 6 provides that in addition to the traditional regime which permits the Trial Chamber to order that the convicted person bear the costs of an award, the Trial Chamber may elect to recognise that a specific project appropriately gives effect to the award sought by the Lead Co-Lawyers and may be implemented. In order to be eligible for such recognition by the Trial Chamber, the project shall have been designed or identified in cooperation with the Victims Support Section and have secured sufficient external funding.

both Rule 23(2) of Revision 4 and Rule 23*bis*(1)(b) of Revision 5 provide that "for a civil party action to be admissible, the Civil Party Applicant shall *inter alia* demonstrate that he or she has suffered injury as a direct consequence of at least one of the crimes alleged against the Charged Person(s)."[25] For the aforementioned reasons, I consider that this ground of appeal should have been rejected.

Ground 4: Erroneous limitation of the "scope of the investigation" and application of this restriction to the civil party applications

30. The Co-Lawyers have alleged that the Co-Investigating Judges erred in fact in constructing the definition of "scope of the investigation" and in law by requiring that admissibility be linked to the "scope of the investigation."[26] I consider that this ground is properly considered as a ground of appeal concerning an alleged error of law, as the relationship between the matters which may be investigated and charged and civil party participation is a matter of law. It is upon the establishment of the contours of this relationship that the determination to be made by the Co-Investigating Judges or Pre-Trial Chamber becomes a matter of fact.

31. The Co-Lawyers refer to the clarification made on 13 August 2008 by the Co-Prosecutors in response to a Forwarding Order from the Co-Investigating Judges[27] concerning the scope of the investigation requested (the "Co-Prosecutors' Response").[28] The Co-Lawyers argue that the Co-Investigating Judges' restriction of the matters that fall within the scope of the investigation to only parts of the Introductory and Supplementary Submission(s) and not incorporating each submission in its entirety is contrary to the Co-Prosecutors' Response and has no basis in the Internal Rules or

[25] Decision on Combined Order, para. 29. See also, Confidential Decision on the Appeal Against the Order Declaring Civil Party Application [REDACTED] Inadmissible, 1 June 2010, D364/1/3 ("PTC 53"), separate opinion of Judges NEY Thol, Catherine MARCHI-UHEL and HUOT Vuthy (the "Opinion"), para. 1, in which the three judges noted, adopting by reference the Decision on Combined Order, that the terms in question are no more stringent than those of Rule 23(2)(b) as they stood when the Appellant filed her Civil Party Application.

[26] See for example Appeal PTC77, paras 53-65. Similar submissions are made inter alia in the appeals filed in cases PTC73, 78, 80, 85, 108, 116, 118, 141.

[27] Forwarding Order, 8 August 2008, D98.

[28] Co-Prosecutor's Response to the Co-Investigating Judges Request to Clarify the Scope of the Judicial Investigation Requested in its Introductory and Supplementary Submissions, 13 August 2008, D98/I (the "Co-Prosecutors' Response"), para. 2. In this response, the Co-Prosecutors clarify that the judicial investigation requested is not limited to the facts specified in paragraphs 37 to 72 of the Introductory Submission and paragraphs 5 to 20 of the Supplementary Submission but extends to all facts, referred to in these two Submissions, provided these facts assist in investigating (a) the jurisdictional elements necessary to establish whether the factual situations specified in paragraphs 27 to 72 and 5 to 20 respectively, constitute crimes within the jurisdiction of the ECCC or (b) the mode of liability of the Suspects named in the Introductory Submission.

Cambodian law.[29] The Co-Lawyers challenge the definition of the term "scope of the investigation" used by the Co-Investigating Judges as unduly restricted to the sites and acts described under the heading "Crimes" of the Introductory Submission, which corresponds to paragraphs 37 to 72, or the facts contained in any Supplementary Submission. The Co-Lawyers also submit that this interpretation is contrary to a prior decision of the Pre-Trial Chamber.[30] They argue that admission should not be limited to those applicants who can show a link between the harm suffered and a crime described in the enumerated paragraphs of the Introductory Submission or any Supplementary Submission. They submit that civil party status should also extend to applicants who can demonstrate a link between the harm suffered and facts found in other sections of the Introductory Submission, including under the heading "Participation and Knowledge." The Co-Lawyers submit that due to this unduly restrictive interpretation of the parameters of the scope of the investigation, the Co-Investigating Judges erred in declaring the civil party applications of many applicants inadmissible on the ground that "they do not establish a link between the harm suffered and areas under the 'scope of investigation'".

32. This ground of appeal appears to conflate two distinct notions, i.e. the scope of the investigation and the crimes for which the charged persons have been charged and subsequently indicted. In light of the Co-Prosecutors' Response, I agree with the Co-Lawyers that the former is broader than the latter since the scope of the judicial investigation is not limited to the facts specified under the heading "Crimes" of the Introductory Submission (paragraphs 37 to 72) and the First Supplementary Submission (paragraphs 5 to 20)[31] but extends to all facts, referred to in these submissions, provided

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[29] The Co-Lawyers sometimes refer to Rule 55(2) of the Internal Rules and Article 125 of the CPC, which reads:
"The investigating judge is seized with the facts specified in the introductory submission. The investigating judge shall investigate only those facts.

If during a judicial investigation, new facts susceptible to be qualified as a criminal offense arise, the investigating judge shall inform the Prosecutor. The Prosecutor can ask the investigating judge to investigate the new facts by making a supplementary submission. If there is no such supplementary submission, the investigating judge has no power to investigate the new facts.

However, if the new facts only constitute aggravating circumstances of the facts already under judicial investigation, no supplementary submission is required."

[30] The Co-Lawyers refer to PTC 53, in particular paragraph 16 of the Opinion of Judges PRAK Kimsan and Rowan DOWNING.

[31] Co-Prosecutors' Supplementary Submission Regarding the North Zone Security Centre, 26 March 2008, D83 ("First Supplementary Submission"). I consider that paragraphs 12-20 of the First Supplementary Submission, found under the heading "II. Context of Crimes", contain information that exceeds the "facts" alleged by the Co-Prosecutors in the First Supplementary Submission under "Crimes" In the first paragraph of the First Supplementary Submission, the Co-

that these facts assist in investigating a) the jurisdictional elements necessary to establish whether the factual situations, specified in paragraphs 37 to 72 and 5 to 20 respectively, constitute crimes within the jurisdiction of the ECCC, or b) the mode of liability of the Suspects named in the Introductory Submission.[32] As the Co-Prosecutors' Response was issued prior to the issuance of several supplementary submissions, the Co-Prosecutors' Response was logically restricted to specifying only the relevant paragraphs of the submissions in existence as of the date of the Co-Prosecutors' Response, 13 August 2008, as pertaining to the scope of the investigation. It is self-evident that the clarification provided by the Co-Prosecutors' Response applies to subsequent supplementary submissions.[33]

33. In the context of civil party participation, during the judicial investigation, the *scope of the investigation* is relevant in particular to determine whether investigative actions can be undertaken by the Co-Investigating Judges on their own initiative or upon request by a party.[34] During the investigative stage of proceedings, a civil party may request the Co-Investigating Judges to undertake an investigative action which it deems necessary for the conduct of the investigation, even if it goes beyond the material facts alleged by the Co-Prosecutors as underlying the crimes charged, provided it remains within the broader scope of the investigation as determined by the Co-Prosecutors.[35] In contrast to the relatively wide range of matters that fall within the scope of the

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Prosecutors ask the Co-Investigating Judges to investigate crimes it has reason to believe were committed and that are described in paragraphs 5-11 of the First Supplementary Submission. Thereafter, however, the Co-Prosecutors implicitly affirmed in the Co-Prosecutors' Response that paragraphs 12-20 of the First Supplementary Submission are also to be considered factual situations constituting the alleged crimes. The Pre-Trial Chamber does not have the authority to change the scope of the investigation set by the Co-Prosecutors. The Chamber cannot either modify the crimes charged in the Closing Order if it disagrees with the Co-Prosecutors' decision to include paragraphs 12-20 of the First Supplementary Submission in the directions it issued in the Co-Prosecutors' Response.

[32] Co-Prosecutors' Response, para. 2.

[33] See, e.g. Co-Prosecutor's Supplementary Submission Regarding Genocide of the Cham, 31 July 2009, D196, paras 3-23. See also, Co-Prosecutors Response to the Forwarding Order and Supplementary Submission, 30 April 2009, D146/3, para. 2; Further Authorization Pursuant to Co-Prosecutor's 30 April 2009 Response to the Forwarding Order of the Co-Investigating Judges and Supplementary Submission, 5 November 2009, D146/4; Further Statement of Co-Prosecutors Regarding 30 April 2009 Response to the Forwarding Order of the Co-Investigating Judges and Supplementary Submission, 26 November 2009, S146/5 and Co-Prosecutors' Clarification of Allegations Regarding five Security Centres and Execution Sites Described in the Introductory Submission, 11 September 2009,paras 3-13. The inclusion of the crimes in the paragraphs listed above from supplementary submissions of the Co-Prosecutors must be read alongside the crimes charged in the Indictment.

[34] Decision on Combined Order, paras 17, 48, 51.

[35] Rule 55(10) gives the civil parties (and civil party applicants) the right to make requests to the Co-Investigating Judges for investigative action. In the Decision on Combined Order, the Pre-Trial Chamber affirmed that civil parties and civil party applicants have no standing for requesting investigative actions for "new facts" unless they are included by the Co-Prosecutors in a supplementary submission. Decision on Combined Order, para. 48. "New facts" are facts that go beyond the material facts alleged by the Co-Prosecutors in an existing submission and are therefore not subject to investigation by the Co-Investigating Judges without the issuance of a supplementary submission by the Co-Prosecutors. The Co-Prosecutors'

judicial investigation which may be the subject of a request for investigative action, the admissibility of a civil party application is strictly dependant on his or her ability to establish that the harm suffered is a direct consequence of at least one of the crimes charged.[36]

34. I note that there is ambiguity in this respect in the Impugned Orders, which seem to treat both notions as interchangeable, which is not the case. When identifying the applicable standard, the Impugned Orders elaborate on the requirement of, on the one hand, a "causality link between the harm and the crimes alleged against the charged persons"[37] and, on the other hand, demonstrating that the "alleged harm results only from facts for which the judicial investigation has already been opened."[38] Moreover, the Co-Investigating Judges find that the necessary causal link between the harm alleged by the Co-Lawyers and the facts under investigation was not established to the extent that the reported facts are in their entirety distinct from those of which the Co-Investigating Judges are seized and no circumstances allow them to consider the possibility of a direct link between the alleged injury and the alleged crimes under investigation.[39] As stressed above, the link that must be made by the civil party applicants is to a crime charged and not to (i) the broader scope of the investigation, (ii) facts for which the judicial investigation has already been opened, or (iii) facts under investigation.

35. I have considered the arguments made by the Co-Lawyers concerning PTC 53 and concede that paragraph 4 of the separate opinion of Judges MARCHI-UHEL, HUOT and THOL ("the PTC 53 Opinion") may have caused the Co-Lawyers to believe that civil party applications establishing a causal link between the harm alleged and a fact contained in the Introductory Submission under the heading "Participation and Knowledge" would be found admissible irrespective of whether such facts are the material facts alleged by the Co-Prosecutors as underlying the particular crimes recommended for charging by the Co-Prosecutors and, since the Closing Order has been issued, for which the accused have been indicted. This interpretation was not intended. As one of the authors of

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Response clarifies that matters which may be investigated during the judicial investigation are not limited to the material facts underlying the crimes charged. It is implicit that they must, however, be within the scope of the investigation, as determined by the Co-Prosecutors in the Introductory and Supplementary Submissions and as clarified in the Co-Prosecutors' Response. As previously confirmed by the Pre-Trial Chamber, civil parties and civil party applicants may, during the judicial investigation, make a request under Rule 55(10), and thereby cause the investigation of such matters, with due regard for the discretion of the Co-Investigating Judges.

[36] Rule 23*bis* (b) of the Internal Rules. See also Decision on Combined Order, para. 51.

[37] Impugned Orders, page 7 (title of heading for (A)(iii)).

[38] Impugned Orders, para. 18.

[39] Impugned Orders, para. 24.

the PTC 53 Opinion, I believed that the facts contained in paragraphs 88(d) and (e) of the Introductory Submission were also found within the material facts in the "Crimes" section of the Introductory Submission, specifically under either of the following headings: "Forced Labour, Inhumane Living Conditions and Unlawful Detention" or "Killing, Torture and Physical and Mental Abuse." The PTC 53 Opinion was implicitly based on this mistaken understanding.

36. With the issuance of the Indictment, I now have the occasion to consider that while many factual references in the Introductory Submission not enumerated as "Crimes" in paragraphs 37-72 re-appear as material facts underlying the crimes for which the accused are indicted, this is not the case for all facts that can be found in the Introductory Submission, any supplementary submission or the Indictment.[40] For instance, the Co-Prosecutors did not plead the facts alleged by the applicant in the case PTC 53 (detention and ill-treatment directed against staff of the Ministry of Foreign Affairs at the Ministry building) as material facts of a crime charged in paragraphs 37-72 of the Introductory Submission (or in a supplementary submission). Since the Co-Investigating Judges cannot expand the crimes for which the investigation is conducted as set by the Co-Prosecutors, the applicant in PTC 53 could not succeed in her application to be a civil party.

Ground 5: Erroneous construction of the terms 'injury' and 'direct consequence' under Rule 23(2)(a) of the Internal Rules (Rev. 4 and previous revisions), and Rule 23*bis*(1)(b) (Rev. 5) respectively,

[40] I note that as the Appellants have carefully parsed the decision of the Pre-Trial Chamber in PTC 53, an examination of the position of such applicant may prove instructive in demonstrating the relationship between admissibility of civil party applicants in light of the crimes charged in the Indictment, the information provided by applicants in civil party applications and the facts contained in the Introductory Submission and any Supplementary Submissions, as such submissions delineated the scope of the judicial investigation. The applicant in PTC 53 alleged harm as a result of her arrest at the Ministry of Foreign Affairs ("the Ministry"). In the Introductory Submission in the section titled Participation and Knowledge of the charged person IENG Sary (paragraphs 87-88), the Co-Prosecutors state that IENG Sary allegedly facilitated, planned, supervised and coordinated the arrest and execution of individuals within the Ministry (Introductory Submission, para. 88 (d)). Some persons who were detained at the Ministry were subsequently confined, tortured and suffered other forms of ill-treatment when they were sent to re-education sites such as the Ministry's M-1 Office of Boeung Trabeck and Chraing Chamres (Introductory Submission, para. 88(e)). The applicant was not transferred to Boeung Trabeck or Chraing Chamres. The authors of the PTC 53 Opinion found that based on the facts contained in her application, she failed to prove that she was under arrest at the Ministry (Opinion, para. 4). The authors of the PTC 53 Opinion took note of the fact that her freedom of movement was severely curtailed but determined that she was not subject to an "arrest proper"(PTC 53 Opinion, para. 4). The authors noted that her experience, namely the confinement, torture and ill-treatment she suffered as a staff member of the Ministry could be linked to a crime within the scope of the investigation had she endured such experiences in one of the locations that are part of the crimes to be investigated in the Co-Prosecutors' submissions. Since the Co-Prosecutors specify in the Introductory Submission that staff of the Ministry were subject to ill-treatment at "various detention centres, such as the Ministry's M-1 Office at Chrang Chamres and Boeung Trabek" and not at the Ministry itself, the authors of the PTC 53 Opinion could not conclude that the harm suffered by the applicant was linked to the crimes for which the charged person was under judicial investigation (PTC 53 Opinion, paras 4-5).

resulting in the rejection of victims who suffered injury as a direct consequence of witnessing or having knowledge of crimes within the ECCC's jurisdiction or under the scope of investigation.

37. The Co-Lawyers have alleged that the Co-Investigating Judges erred in rejecting the applications of victims who claim that they suffered psychological harm as a direct consequence of witnessing a crime. The Applicants have specified that the Co-Investigating Judges found the applications in question inadmissible because they misconstrued and wrongly applied the requirement of "injury suffered as a direct consequence of a crime." These Appellants rely on ICC case law according to which "psychological trauma as a result of 'witnessing events of an exceedingly violent and shocking nature' may qualify a person to acquire the status of a victim."[41] Paragraph 14 of the Impugned Orders addresses the situation of civil party applicants who witnessed crimes and this discussion closely follows the Co-Investigating Judges' discussion of the attachment of a presumption of having suffered psychological harm for certain categories of applicants and in respect of certain crimes. Having found that there is a presumption of psychological harm for the members of the direct family of the immediate victim (parents, children, spouse and siblings of the direct victim), the Impugned Order concludes as follows for civil party applicants who witnessed crimes:

> "Therefore the personal psychological harm alleged as a consequence of the murder or disappearance if a next of kin will be more easily admissible than in relation to forced marriage or religious persecution. Similar reasoning must apply a fortiori to simple witnesses of facts under investigation: psychological harm has a dimension and character distinct from the emotional distress that may be regarded as inevitably caused to witnesses of crimes of this nature and their application will be rejected unless they have witnessed events of an exceedingly violent and shocking nature."[42]

38. As a preliminary note, I stress that I have *ex officio* considered the use of presumptions by the Co-Investigating Judges in this Opinion (see Grounds 10 and 11). While the Co-Investigating Judges have not cited any authority in support of their implicit finding that persons having witnessed events of an exceedingly violent and shocking nature may qualify as civil parties, the Co-Investigating Judges have in fact adopted the language of ICC jurisprudence referred to by the Appellant. Given the context in which the above-mentioned finding is made, I understand it to mean that such persons are presumed to have suffered psychological injury as a result of witnessing such events. I agree

[41] The Applicants refer to the following decision from the ICC: Situation in Uganda, Prosecutor v. Joseph Kony *et al.*, Decision on Victims' Applications for Participation A/0010/06, a/0064/06, to a/0070/06, a/0081/06 to a/0104/06 and a/0111 to a/0127/06, 10 August 2007, ICC-02/04-01-01/05-252, paras 27 and 31, 36 and 40.
[42] Impugned Orders, para. 14(d).

with such finding. I find, however, that the Co-Investigating Judges erred in finding that the applications of witnesses of crimes charged will be rejected unless they have witnessed events of an exceedingly violent and shocking nature. I am not satisfied that witnesses of events underlying the crimes charged but other than of an exceedingly violent and shocking nature may under no circumstances qualify as civil parties. Indeed, this class of applicants should be able to choose to adduce evidence to establish that it is plausible that they suffered psychological injury as a direct consequence of the crime committed against the immediate victim. I am of the view that the Co-Investigating Judges erred in finding that the application of such class of applicants will be rejected unless they have witnessed events of an exceedingly violent and shocking nature.

39. In the case of those persons who seek admissibility as witnesses of events not considered as being of an exceedingly violent and shocking nature, I find that the Applicant must adduce evidence to establish that it is plausible that he or she suffered psychological injury as a direct consequence of the crime committed against the immediate victims. By way of example, certain Co-Lawyers have produced, on appeal, statements from an Applicant who witnessed the evacuation of Phnom Penh. The Applicant states that he was very scared when he witnessed crimes taking place because he believed that the people he saw being separated were going to be killed. I have no reason to doubt that this statement is genuine and I consider given the circumstances of the case that this is sufficient to make it plausible that the Applicant suffered psychological injury as a direct consequence of the crime committed against immediate victims of the evacuation of Phnom Penh. However, whilst I have accepted statements made by the lawyers for the Appellants stated to be directly upon instruction from their client, I have not accepted speculations from lawyers as to their belief as to how their clients were affected psychologically.

40. The Co-Lawyers also submitted that "by extension" of previous findings concerning suffering caused to victims from witnessing events under investigation, persons, including extended family members and others living abroad, who had knowledge of crimes committed against persons in Cambodia, can equally be considered as entitled to a presumption that they have suffered direct psychological harm stemming from this knowledge. I recall that in my view the link to be established between such class of applicants would in any event be between the injury suffered and the crimes for which the accused are indicted, rather than with the broader scope of events under investigation. The situation of a person witnessing a crime is not necessarily equivalent to that of a

person having knowledge of crimes, by other means than having witnessed the commission of crimes against their relatives. For the reasons indicated below (Grounds 10 and 11), I am of the view that members of the family of the immediate victim are presumed to have suffered psychological injury as a result of the crime committed against their relative. There is therefore no need to address separately the impact of knowledge by an applicant that a member of his/her family was the immediate victim of a crime for which the accused are indicted.

III. MERITS: ERRORS OF FACT

Ground 6: Insufficient Information – Forced Transfer

41. Many Applicants allege that the Co-Investigating Judges erred in finding that they had provided insufficient information to satisfy the requirements of Rules 23*bis*(1) and 23*bis*(4) as they have described being relocated from their town to the countryside. I have, where possible, reviewed the submissions, applications and supplementary material to determine whether the Applicant provided sufficient information to find it plausible that he or she satisfies the requirements of the Internal Rules. Broadly speaking, I observed that those Applicants who stated that they experienced the forcible transfer of the population as charged in the Indictment as phase 2 and phase 3 made explicit such link to the crimes as described in the Introductory and Supplementary Submissions and the Indictment.

42. However, I observed that many Applicants did not describe their experience in such detail, and instead merely stated they were forcibly transferred in April 1975.[43] The Co-Lawyers' arguments made on behalf of these Applicants failed to specify, in the affirmative or the negative, whether the Applicants experienced forcible transfer as charged in the Indictment. The question of whether the Co-Prosecutors intended, in the Introductory Submission, to limit the facts to be investigated concerning forcible transfer in April 1975 to the forcible evacuation of the population of Phnom Penh to the countryside or, alternatively, extended to the proffered charge of forcible evacuation of other cities of Democratic Kampuchea in April 1975 or thereabouts, has been clarified by the Co-Prosecutors.[44] In response to the direct questions asked by the Co-Investigating Judges in the

[43] I consider that Phases 2 and 3 of the movements of population would not applicable as those incidents of forced transfer occurred outside the temporal descriptions provided by this category of applicant.
[44] First Supplementary Submission, para. 4. This clarification was made following the Forwarding Order issued on 3 March 2008 by the Co-Investigating Judges, D77 (the "Forwarding Order").

Forwarding Order about the possible ambiguity of paragraphs 37-39 of the Introductory Submission, the Co-Prosecutors clarified as follows:

> "[p]aragraphs 37-39 of the Introductory Submission constitute *a request to investigate only the forcible transfer of people from Phnom Penh (as stated in the title heading which precedes those paragraphs)*. Paragraph 39 describes the origin of the policy that led to the evacuation and simply notes that the policy was applied to all cities in Cambodia, not just Phnom Penh (emphasis added)."[45]

43. In light of the above clarification, there is no doubt that the matter of which the Co-Investigating Judges were seised did not include the forcible evacuation of cities other than Phnom Penh in April 1975. Therefore, I find that any Applicant seeking admission on appeal related to the forcible transfer of the population in 1975 from towns other than Phnom Penh to the countryside, and other than as specified in the Indictment as forming part of phase 2 or phase 3, cannot succeed on appeal on the basis of this ground.

Ground 7: Insufficient Information – killings in other sites than those listed

44. A number of Applicants allege that the Co-Investigating Judges erred in finding that they had provided insufficient information to satisfy the requirements of Rules 23*bis*(1) and 23*bis*(4) as they had alleged a crime of murder of the same nature than those charged, but committed in another worksite, cooperative, security center or execution site than those specifically listed in the charging documents and ultimately the Indictment.

45. In reviewing this argument, I have noticed a discrepancy between the Khmer and French versions of the second sentence of paragraph 1373 of the Indictment containing legal findings regarding the crime against humanity of murder committed at execution sites and security centers, on the one hand, and its English version, on the other hand. While the English version states that the legal elements of the crimes against humanity of murder have been established and that the facts in question concern the persons killed at a number of enumerated execution sites and security centres, the French and Khmer versions of the same paragraph use an expression suggesting that the list of execution sites and security centres in question is open ended.[46] No such discrepancy exists between

[45] First Supplementary Submission, para. 4.

[46] The French version of the second sentence of para. 1373 states that "[c]es faits concernent les personnes tuées dans les sites d'exécution tels *que* [...]" akin to the Khmer version which state that "អង្គហេតុទាំងនេះពាក់ព័ន្ធជាចំបងទៅនឹងជនដែលត្រូវបាន

the three versions of the Indictment in relation to murder at worksites and cooperatives as well as during phases 1 and 3 of population movements and in relation to the treatment of Buddhists, Vietnamese and the Cham, as the Indictment makes it clear that only those killings that occurred at the specific sites or in the course of the specific events or circumstances listed are charged.

46. I find that the ambiguity resulting from the contradiction pertaining to the second sentence of paragraph 1373 is lifted when reading it in conjunction with paragraph 178 of the Indictment. In that paragraph, the Co-Investigating Judges state that approximately 200 security centres and countless execution sites had been established, located in every Zone throughout Cambodia as part of the five policies to implement and defend the socialist revolution including the reeducation of "bad-elements" and the killing of "enemies", both inside and outside the Party ranks and stress that they are *seized of eleven security centres* (S-21 security centre, Au Kanseng security centre, Koh Kyang security centre, Kok Kduoch security centre, Kraing Ta Chan security centre, North Zone security centre, Prey Damrei Srot security centre, Phnom Kraol security centre, Sang security centre, Wat Kirirum security centre, Wat Tlork security centre) and *three execution sites*, in addition to Choeung Ek, related to S-21: (Execution Sites in District 12, Steung Tauch and Tuol Po Chrey execution sites).[47] In light of this explicit language, I have no doubt that the killings for which the accused are indicted for the crime against humanity of murder committed in execution sites and security centres are limited to those committed in the sites listed in paragraph 1373. Therefore, I find that an applicant can only succeed in his or her appeal if he or she provides sufficient information to make it plausible that the alleged murder occurred at one of the specific sites or during one of the events listed in the Indictment.

Ground 8: Failure to Establish the Necessary Causal Link: Persecution on Religious Grounds

i) Persecution on religious grounds of the Buddhists

សម្លាប់នៅតាមកន្លែង សម្លាប់មនុស្សទាំងឡាយ [...]". This language in the French and Khmer versions suggests that killings in execution sites *such as* the one listed would be charged, which is not reflected in the English version whereby it is stated that "[t]hese facts concern the persons killed at execution sites in District 12, [...]". The execution sites and security centers in question are execution sites in District 12, Steung Tauch, Tuol Po Chrey and Choeung Ek; and in security centres Koh Kyang, Kok Kduoch, Kraing Ta Chan, the North Zone security centre, Phnom Kraol, Au Kanseng, Prey Damrei Srot, S-21, Sang, Wat Kirirum and Wat Tlork.

[47] Indictment, para. 178.

47. The Co-Lawyers have appealed the rejection of Applicants who suffered harm caused by persecution on religious grounds and the alleged limitation of the findings of the Co-Investigating Judges of the harm to monks and their immediate relatives. I note that in the Indictment section containing the Factual Findings of Crimes related to the treatment of Buddhists, the Co-Investigating Judges find that the "CPK adopted a policy of *prohibiting Buddhism and the practice of Buddhism*" (emphasis added).[48] In addition to alleging (i) the destruction of many pagodas and sanctuaries or their conversion for other purposes such as serving as security centres, pig pens, dining halls, hospitals or warehouses; (ii) the destruction of images of Buddha; (iii) the prohibition of lighting incense; (iv) the incitement to hatred of monks and nuns, and (v) the dissemination of related propaganda, in the same paragraph of the Indictment, the Co-Investigating Judges specifically allege on the basis of witness testimony that:

> "immediately after the Khmer Rouge took control of this area, *they forbid religions*. They did not allow ceremonies or alms giving. The monks were all forced to leave the monkhood. The unit chiefs, the village chiefs, and the subdistrict chiefs announced that *religious beliefs were not permitted*" (emphasis added).[49]

48. The next paragraph alleges that virtually all Buddhist monks and nuns were disrobed and that some of them were threatened with death or killed if they did not comply.[50] Finally, the same section of the Indictment alleges that the "abolition of religion" occurred throughout every area of Cambodia during the CPK regime.[51]

49. The section of the Indictment containing Legal Findings in respect of the persecution of Buddhists alleges that:

> "religious persecution has been established throughout every zone in Cambodia including at the following sites (...). *Buddhism was prohibited.* Pagodas and sanctuaries were destroyed, or converted for other purposes, and images of Buddha were destroyed. Virtually all Buddhist monks and nuns were defrocked and some monks were threatened with death or killed if they did not comply."[52]

50. In light of the very broad terms of the charge, i.e. the prohibition of Buddhism throughout every zone in Cambodia charged as an act underlying the crime of persecution on religious grounds, I am

[48] Indictment, para. 740.
[49] Indictment, para. 740.
[50] Indictment, para. 741.
[51] Indictment, para. 743.
[52] Indictment, para. 1421.

of the view that it is not necessary for an application to allege having suffered harm as a result of crimes committed against monks, as retained by the Co-Investigating Judges, but that having suffered from the prohibition of Buddhism, as described above, is sufficient for an applicant to be admitted as a civil party. The only relevant question in respect of applicants who have alleged that they should be admitted on the basis of religious persecutions of Buddhists is whether it is plausible that they suffered the alleged psychological harm as a result of one of the acts underlying the crime of persecution on religious grounds of Buddhists for which the accused are indicted, including the general prohibition to practice Buddhism. The role of religion in the life of its adherents is personal and not capable of universal qualification. As such, it is to be expected that individuals will have varying reactions to the prohibition of their religion. As a result of the inherently subjective nature of the exercise of and importance placed upon religion by individuals, and especially as viewed by others, I will consider the merits of an appeal based on this ground by determining whether there is any information before the Pre-Trial Chamber to cause me to have reason to believe that an applicant is not genuine in making a statement concerning the harm he suffered as a result of the prohibition of Buddhism, as charged by the Co-Investigating Judges. If I have no reason to believe that an applicant is not genuine in such an assertion, I will conclude that it is plausible that he is a direct victim of the crime of persecution as charged because it is plausible that he suffered psychological harm as a direct consequence of the prohibition of Buddhism. In these instances, I find that the Co-Investigating Judges erred in finding applications inadmissible.

ii) Persecution on religious grounds of the Cham population

51. Similarly, a number of civil party applicants, members of the Cham community, submit that the Co-Investigating Judges erroneously failed to find the existence of a link between their harm and the crimes charged because they unduly restricted on a geographical basis the admissibility of civil party applications alleging persecution against the Cham population. They argue that such restriction is not justified by the relevant Supplementary Submission. I agree and consider that the Co-Investigating Judges erred in fact in doing so for the reasons expressed below.

52. The Co-Investigating Judges indicated in a number of Orders on the Admissibility of Civil Party Applicants that they considered that they were only authorized to investigate crimes in relation to the treatment of the Cham population – according to the Communist Party of Kampuchea's system of

identifying administrative boundaries – in the Central and Eastern Zones and in context of the forcible transfer of population (phase 2), as described in paragraph 41 of the Introductory and paragraphs 3-23 of the Supplementary Submission (D196).[53] I am of the view that this geographical limitation is indeed unambiguously contained in the section of the Introductory Submission related to the "Forcible transfer to the North and Northwest Zones : Phase 2", whose paragraph 41, related to the transfer of members of the Cham population, reads:

> "Among those forcibly removed were members of the Cham ethnic and religious minority. In 1975, the Cham population in Democratic Kampuchea was concentrated in Kampong Chhnang and Pursat. Beginning in late 1975, the CPK forcibly moved the Cham population from their villages and forcibly dispersed them throughout ethnically Khmer villages. Tens of thousands of Cham were forcibly moved to the North and Northwest Zones as part of a specific policy designed to "break [the Cham] up." This took place in a number of locations including Koh Sotin sub-district, Koh Sotin district, Kampong Cham province and Koh Thom district, Kandal province. This forced movement, and the systematic discrimination that accompanied it, resulted in the death of many Cham (footnote omitted)[54]."

53. This limitation however does not apply to forms of persecution other than forcible transfer retained in the Co-Prosecutors' Supplementary Submission Regarding Genocide of the Cham.[55] Indeed, in spite of its title, the Supplementary Submission in question is not limited to the supplementary submission that in 1977 and 1978 the policy became genocide in that whole communities of the Cham were gathered and victim of mass execution with a view to destroy, in whole or in part, their ethnic and religious group. The Supplementary Submission also extends the investigation to various acts which it alleges amount to persecution of the Cham on religious and ethnic grounds. These acts are described at paragraphs four to six of the Supplementary Submission, in a section entitled "Persecution of the Cham". It firstly refers to acts of forcible transfer of members of the Cham population from the above mentioned regions.[56] It secondly refers to the ban of "reactionary" religions, including Islam, by the DK Constitution and to the fact that "Cham were forbidden to partake in any Islamic duty (*vachip*), such as praying (*sambayang*), fasting, alms giving or any other religious ceremony or funeral. They were banned from possessing Islamic texts, which were

[53] See for instance, Order on the Admissibility of Civil Party Applicants from Current Residents of Kampot Province, 14 September 2010, D419, para. 26, rejecting on that basis the civil party applications of sixty-four applicants in relation to the treatment the Cham minority in Kampot province.
[54] Introductory Submission, 18 July 2007, D3, para. 41.
[55] Co-Prosecutors' Supplementary Submission Regarding Genocide of the Cham, 31 July 2009, D196 (the "Cham Supplementary Submission").
[56] Cham Supplementary Submission, para. 4, referring specifically to the forcible transfer of Cham population from Kang Meas, Kroch Chhmar and Koh Sotin districts of Kampong Cham province.

collected and burnt by Khmer Rouge cadres. Many mosques were damaged or destroyed. The CPK targeted Cham Muslim religious and political leaders, as well as those Cham who refused to renounce their religion, for execution."[57] "The Cham language was prohibited, as was wearing traditional Cham attire (the *sarong*, *fez* and *makhna*, a long prayer garment for women) and using Cham names. The Cham were forced to commit acts strictly forbidden by their faith (*haram*), such as eating pork, and Cham women were forced to cut their hair short, and were not allowed to use the traditional covering for their heads. Failure to follow these rules could result in execution."[58] I note that these forms of persecution other than the forcible movements of the Cham population are not limited by the Supplementary Submission to specific geographical areas.

54. Furthermore, I note that the Co-Investigating Judges have themselves followed the same approach in the Indictment in relation to these forms of persecution. They have not been limited to specific geographical areas but rather cover the whole country. Indeed, the Indictment states at paragraph 756 in the Factual findings of crimes related to the treatment of Cham between 1975 and 1977, that "[w]itnesses (Cham and non-Cham) from throughout Cambodia consistently state that the CPK banned the practice of Islam and forbade the Cham from praying, seized and burned Qurans, closed or destroyed mosques, or used them for other purposes such as communal dining halls, store houses, or facilities for pigs. Many witnesses (with the exception of three amongst them) state that Cham were forced to eat pork. Religious leaders and learned Islamic scholars were arrested and/or killed. Cham women were forced to cut their hair and were prohibited from covering their heads. The Cham language was prohibited. Cham traditional dress was prohibited." The Indictment's section containing legal findings related to religious persecution further states:

> "1419. As regards religious persecution, Buddhists and Chams were systematically targeted for persecution on a widespread basis. Buddhist and Cham people were targeted on discriminatory grounds, due to their membership of the group. The acts described below constituted violations of their fundamental rights.
>
> 1420. The elements of the crime of religious persecution of the Cham have been established (see the sections regarding **"Treatment of the Cham", phase 2 of the movement of population** and the **"1st January Dam"**). There was a country-wide suppression of Cham culture, traditions and language. The

[57] Cham Supplementary Submission, para. 5.
[58] Cham Supplementary Submission, para. 6.

CPK banned the practice of Islam and forbade the Cham from praying, seized and burned Qurans, closed or destroyed mosques, and forced Cham people to eat pork. Religious leaders and learned Islamic scholars were arrested and killed. Cham women were forced to cut their hair and were prohibited from covering their heads. Cham communities were broken up and Cham people were forcibly moved throughout Cambodia and dispersed among other communities."

55. In light of these provisions, I am of the view that the Co-Investigating Judges erred in rejecting civil party applications alleging forms of persecutions related to the treatment of Chams other than their forcible transfer on the basis of geographical limits which both the relevant Supplementary Submission and the Indictment only establish in relation to forced transfers.

Ground 9: Failure to Establish the Necessary Causal Link: Purges/Persecution on Political Grounds

56. The Co-Lawyers have appealed the determination of inadmissibility for several applicants by arguing that the Co-Investigating Judges erred in declaring inadmissible the civil party applications of certain applicants because the prejudice they allege resulted from purges. The Co-Lawyers have noted that the 5 November 2009 Statement from the Co-Investigating Judges[59] included purges as within the scope of the investigation, and defined the term "purge" as an act against a group "conducted by the Democratic Kampuchea regime and in particular in the (Old and/or New) North Zone in 1976 and (New) North Zone in late 1976 and early 1977, and in the East Zone in 1978."[60]

57. The Co-Prosecutors have clarified that the scope of the judicial investigation is not limited to the facts specified under the heading "Crimes" of the Introductory Submission (paragraphs 37 to 72) and the First Supplementary Submission (paragraphs 5 to 20)[61] "but extends to all facts, referred to in these two Submissions, *provided* these facts assist in investigating a) the jurisdictional elements necessary to establish whether the factual situations, specified in paragraphs 37 to 72 and 5 to 20 respectively, constitute crimes within the jurisdiction of the ECCC or b) the mode of liability of the Suspects named in the Introductory Submission."[62] In so far as purges are concerned, in particular, it is clear that the scope of investigations included, as forming part of the common plan, the targeting of former officials of the Khmer Republic (both of civil servants and former military personnel and

[59] OCIJ Press Release on the Scope of the Investigation.
[60] OCIJ Press Release on the Scope of the Investigation.
[61] First Supplementary Submission.
[62] Co-Prosecutors' Response, para. 2.

their families)[63] and that the purges involved searches and executions resulting therefrom. The Co-Prosecutors submitted that beginning in 1976, these searches and executions were committed against ordinary soldiers and minor officials.[64] The Introductory Submission contains the following information related to the treatment of former Khmer Republic officials: in relation to the crimes of (1) forced evacuation of the population (Phase I), paragraph 38 discusses the searches and executions carried out by CPK troops of former Khmer Republic government officials and military officers; (2) Forced Labour, inhumane living conditions and unlawful detention, e.g. in the Southwest Zone, paragraph 43 discusses the following acts committed at the cooperatives in Tram Kok District against former Khmer Republic officials and soldiers being discriminated against, spied upon, arrested and executed; and (3) killing, torture and physical and mental abuse, e.g. in Kratie Sector, Kok Kduoch Security Centre, paragraph 63 notes that prisoners included former Khmer Republic officials.

58. The Indictment states that the legal elements of the crime against humanity of persecution on political grounds have been established in the following instances and that the facts cover nearly all the sites within the scope of the investigation, namely: phases 1, 2 and 3 of the population movements; the worksites 1st January Dam, Kampong Chhnang Airport, Prey Sar, Srae Ambel, the Tram Kok Cooperatives and the Trapeang Thma Dam; the security centres at Koh Kyang, Kok Kduoch, Kraing Ta Chan, the North Zone, Phnom Kraol, Au Kanseng, Prey Damrei Srot, S-21, Sang, Wat Kirirum, and Wat Tlork; and the execution sites at Choeung Ek and in District 12, Steung Tauch and Tuol Po Chrey.[65] As to groups targeted, it further specifies that:

> "[t]he CPK authorities identified several groups as "enemies" based on their real or perceived political beliefs or political opposition to those wielding power within the CPK. Some of these categories of people, such as former ranking civilian and military personnel of the Khmer Republic, were automatically excluded from the common purpose of building socialism. As for junior officials of the former regime, some were arrested immediately after the CPK took power, because of their allegiance to the previous government, and many were executed at security centres such as **S-21** and at **Tuol Po Chrey.** The entire population remaining in towns after the CPK came to power was labelled as "new people" or "17 April people", and subjected to harsher treatment than the old people, with a view to reeducating them or identifying "enemies" amongst them. Intellectuals, students and diplomatic staff who were living abroad were recalled to Cambodia and, upon arrival, were sent to reeducation camps or to **S-21**. The categories of

[63] Introductory Submission, para. 12.
[64] Introductory Submission, para. 12(a).
[65] Indictment, paras 1415-1416.

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> so-called "enemies" continued to expand over time. Moreover, the identification of people as targets for persecution, on the basis that anyone who disagreed with the CPK ideology was excluded, amounts to persecution on political grounds.[66]
>
> In **cooperatives and worksites**, and during **population movements**, real or perceived enemies of the CPK were subjected to harsher treatment and living conditions than the rest of the population. Also, they were arrested *en masse* for reeducation and elimination at **security centres** and **execution sites**."[67]

59. I stress that it is within the discretion of the Co-Investigating Judges to decide not to charge every instance of persecution on political grounds that may have occurred between 17 April 1975 and 6 January 1979. Upon review of the Indictment, I consider that the instances comprising the charge of persecution on political grounds, as pleaded, are those that encompass the material facts identified in the Factual Findings of Crimes. Therefore, any Applicant who alleged persecution on political grounds but not as charged in the Indictment, in particular purges of Khmer Republic officials and their families, and is seeking admission on appeal on the basis of an alleged error committed by the Co-Investigating Judges in rejecting the application for failing to (i) establish the necessary causal link between the harm and crime alleged, (ii) provide sufficient information for the Co-Investigating Judges to verify compliance with Rules 23*bis*(1) and (4) of the Internal Rules, or (iii) any other ground, cannot prevail on appeal on the basis of this ground.

60. The same rationale applies in relation to purges of the Old and New North Zone[68] as well as of the East Zone.[69] The Indictment describes purges in these Zones in the Factual Findings of Joint

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[66] Indictment, para. 1417.
[67] Indictment, para. 1418.
[68] The Indictment (paras 193-198) specifies that purges started following the decision of 30 March 1976 to conduct "smashings" inside the revolutionary ranks and were implemented *inter alia* by mass killings of Party members in the North Zone and in Sector 106, from the end of 1976. This escalated dramatically in early 1977 and continued until the end of that year. Inside the North Zone, the implementation of this 30 March 1976 decision led to the arrests of high-level cadres in late 1976, which were sent to S-21 and were made to produce confessions under torture implicating other cadres. This lead to a sharp increase in the scope of the purges of alleged traitors from Sector 106 who arrived at S-21 beginning early 1977. Lower-ranking victims of the purge where executed locally and replaced by Southwest Zone cadre that had been sent to assist in the purge by relatives of Ke Pork. The purges of the North Zone continued until 1978.
[69] The Indictment (paras 199-203) specifies that purges of the East zone started from mid-1976 with the arrest, interrogation and torture of former cadres of Sector 24, and of East Zone Division 170, followed by a series of arrests of East Zone cadre, many of whom were sent to S-21 through 1977. In March 1978, a massive escalation of purges of East Zone cadre and combatants occurred in Svay Rieng in Sector 23. This was followed by even more arrests and executions in May-June 1978 in other parts of the East Zone. Purges of remaining East Zone cadres, and of cadre who, although operating outside the East Zone were originally from the East Zone, including in various Ministries such as the Ministry of Social Affairs, continued through to the end of the CPK regime. Some of these cadres were sent from the East Zone to S-21 while others were killed on the spot or moved to other parts of the country. Many other East Zone or ex-East Zone cadre and combatants were sent for "reeducation" at worksites such as the Kampong Chhnang Airport construction site. Further facts relating to the East Zone

Criminal Enterprise.[70] It states that the term "purge" means to politically purify by means of a range of sanctions, from being demoted or reeducated, to being smashed. It adds that this applied to both members of the Party and non-members and that a number of situations under investigation may be described factually as purges.[71] I note that all facts that formed part of the phenomena of purges during the Regime do not necessarily amount to crimes and that in so far as the Co-Investigating Judges claim that they do, including illegal detention, torture, forced labour and executions, the findings of facts supporting those of these crimes which have been charged are to be found in the Factual Findings of Crimes, to which the relevant legal findings refer.[72] The link to be established by an Appellant is between the alleged harm and the criminal acts that are alleged to have taken place in the worksites, cooperatives, detention centers and execution sites as well as during the relevant phases of population movements retained in the Indictment. In my view, any Applicant who alleged a harm resulting from purges in the Old/New North Zone or in the East Zone but not as charged in the Indictment, and is seeking admission on appeal on the basis of an alleged error committed by the Co-Investigating Judges in rejecting the application for failing to (i) establish the necessary causal link between the harm and crime alleged, (ii) provide sufficient information for the Co-Investigating Judges to verify compliance with Rules 23*bis*(1) and (4) of the Internal Rules, or (iii) any other ground, cannot succeed on appeal on the basis of this ground.

IV. MERITS: MIXED ERRORS OF LAW AND FACT

Grounds 10 and 11: Erroneous use and application of a presumption of psychological harm for members of the direct and extended family of an immediate victim and erroneous treatment by the Co-Investigating Judges of a presumption of psychological harm applicable to certain members of the direct family of the immediate victim of forced marriage

i) General scope of the presumption of psychological harm

purges are set out the section of the Indictment regarding S-21, Kampong Chhnang airport, Steung Tauch execution site and the movement of people from the East Zone (Phase 3).

[70] Indictment, paras 193-204.

[71] Indictment, para. 192.

[72] See for instance in relation to executions, paras 1373 and 1381 concerning the underlying crimes of murder and extermination as crimes against humanity.

61. The Co-Lawyers also appealed against the Impugned Orders on the basis that the Co-Investigating Judges erred in excluding siblings of a direct victim from the benefit of a presumption of psychological harm in cases of forced marriage. This ground of appeal is interrelated to my *ex officio* consideration of the terminology and substance of the presumptions utilised by the Co-Investigating Judges. I shall consider the presumptions and terminology and then determine whether it is erroneous to exclude members of the extended family from the presumption of harm as the result of the crimes charged in the Indictment committed against the immediate victim and, more particularly, siblings from the presumption of harm in cases of forced marriage.,

62. Relying on jurisprudence from the ICC and the Inter-American Court of Human Rights ("IACHR"), the Impugned Orders state that there is a presumption of psychological harm for the members of the direct family of the immediate victim and that, applying the criteria in the Impugned Orders, the term "direct family" encompasses parents, children, spouses and siblings of the immediate victim.[73] They add that the "presumption will be considered as *determinant* when the immediate victim is deceased or has disappeared, or has been forcibly moved and separated from the direct family as a direct consequence of the facts under investigation" (emphasis added).[74] However, only parents, spouse and children would benefit from a presumption of harm in cases of forced marriages, siblings being excluded, and nothing is mentioned in respect of the other crimes that are indicted such as imprisonment, torture, enslavement, other inhuman acts through attacks against human dignity and persecutions. As to members of the "extended family" (grand-parents, aunts and uncles, nieces and nephews, cousins, in-laws and other indirect kin), the Co-Investigating Judges agreed with the Trial Chamber's finding that "direct harm may be more difficult to substantiate in relation to more attenuated familial relationship" and considered that "only a *relative presumption* exists" in their regard. These instances were to be addressed on a case-by-case basis, by determining "whether there are sufficient elements to presume bonds of affection or dependency between the applicants and the immediate Victim". The Co-Investigating Judges added that "[t]he presumption will be considered *determinant* when the immediate Victim is deceased or has disappeared as a direct consequence of facts under investigation."

[73] Impugned Orders, para. 14 (a), relying on the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (UNGA Resolution 40/43 adopted on 29 November 1985); Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. It also refers to several ICC and IACHR cases (see, fn. 12 of the Impugned Orders).

[74] Impugned Orders, para. 15 (a) (i) and (ii). As indicated earlier the harm must be a direct consequence of the crimes charged rather than the facts under investigation.

63. At the outset, I observe that it is not clear precisely how the Appellants and the Pre-Trial Chamber are meant to interpret the Co-Investigating Judges' statement that some presumptions are "determinant" and other are "relative". A presumption is a means of proving a fact, without having to adduce evidence of its existence. If the statement by the Co-Investigating Judges on the determinant nature of the presumption in certain circumstances means that in these cases, the applicant does not need to adduce evidence for the fact to be considered as having been established, in the absence of any contradictory evidence, then I agree that it is so.

64. However, I note that the Co-Investigating Judges state that "only a relative presumption exists for extended family members."[75] If this statement means that the presumption of psychological harm can be refuted as to extended family members of the immediate victim but cannot be refuted as to direct family members, I disagree in two respects. First, the presumption which benefits direct family members of the immediate victim is refutable. The defence or the Co-Prosecutors may, in principle, adduce evidence in support of the non-existence of psychological harm alleged by any civil party applicant. Second, to refer to the position of extended family members as subject to a "relative presumption" is misleading. If the members of the extended family represent a class of applicants who were in the views of the Co-Investigating Judges not presumed to have suffered psychological harm as a result of crimes committed against the immediate victim, and therefore had to demonstrate that they have suffered psychological harm through providing evidence of bonds of affection or dependency with the immediate victim, they did not benefit from any presumption, whether described as "determinant" or "relative". I understand that the Co-Investigating Judges did not admit applications of members of the extended family unless they had adduced evidence that it is plausible that they experienced personal psychological direct harm as a result of a crime committed against the immediate victim. I also note that there is uncertainty as to how the Co-Investigating Judges have treated those instances where a member of the direct family alleges crimes not involving the decease, disappearance or forced transfer of the immediate victim, as the presumption appears not to have been considered as "determinant".

65. Given the crimes charged in the Indictment which, by nature, all affect the liberty, the life, the physical or mental integrity or the dignity of the immediate victim, I find that it is plausible that those applicants who have a bond of affection with the latter may have suffered a psychological

[75] Impugned Orders, para. 14(c).

harm as a direct consequence of the commission of these crimes. I see no reason to distinguish, for the purpose of the presumption, between the various crimes set out in the Indictment.

66. Furthermore, I take into consideration that the crimes for which the accused are prosecuted, namely genocide, crimes against humanity and war crimes, are not only among the most serious crimes known to mankind but also occurred in a very particular context where a large part of the population, if not all, was allegedly subject to a "widespread or systematic attack" and where some groups were allegedly targeted for the purpose of bringing about their destruction. The crimes for which the accused are indicted committed during the Khmer Rouge regime, throughout Cambodia, have affected broad aspects of the society by *inter alia* prohibiting the practice of any religion, imposing mistrust in families and thus attempting to undermine family relationships, forcing people to marry, depriving individuals of their property, forcing people to evacuate their home in order to live in inhuman conditions and to be forced to work and destroying public institutions, including the judicial system. As a result, individuals lost their references and landmarks, lived in constant fear and could hardly heal their suffering. The fact that the population was left in an extremely vulnerable state shall be taken into consideration when assessing whether it is plausible that an individual applicant has suffered harm as a result of a crime committed against an immediate victim. Moreover, given the fact that most applicant allege a psychological harm as a result of a variety of crimes, some that might be committed against themselves and/or members of their direct family as well as crimes committed against members of the extended family or of the same community, it would in any event be difficult to determine exactly how each crime have impacted upon the applicant. I also understand the difficulty in obtaining evidence such as medical and psychological reports to substantiate the claim of direct consequential harm. While this type of evidence may be standard in other jurisdictions, it is not necessarily possible for all applicants to obtain it.

67. In light of the submissions of the Co-Lawyers and the insight provided by the national judges on Cambodian society, I acknowledge the particular bond of affection between members of the extended family in the context of Cambodian culture where members of the extended family tend to live together or close to each other and very often provide support to each other. A profound respect is paid to older members of the extended family and some often play the role of a model for the younger ones. The same holds true for some communities where people live together as a group, have very close ties and sometimes even share their resources. While I do not endorse the very broad

notion of "community" upon which the Majority has based its opinion, I have accepted a few applicants who, for instance, have described being part of a small community sharing the belief in forest spirits, burying their dead in forest burials and holding various ceremonies together and have alleged suffering from crimes committed against members of their community.[76] In sum, I consider that the more restricted notion of family adopted so far by the jurisprudence of the ICC and the IACHR does not correspond to the Cambodian reality and the particular context of the crimes committed during the Democratic Kampuchea regime. Due to their close relationship and to the context in which the crimes were allegedly committed throughout Cambodia, which left the population in a state of extreme vulnerability, I find it plausible that members of the extended family of the immediate victim of (a) crime(s) for which the accused are indicted, or of his/her community in Cambodia may have suffered psychological harm as a result of such crime. The fact that an applicant takes the time and makes the effort to submit an application to become a civil party for the purpose of obtaining "moral reparation", knowing that he or she will not receive a financial compensation, means that the applicant remains, even more than 30 years after the commission of the alleged crimes, deeply affected by them.

68. In these circumstances, I deem it appropriate to adopt a broader approach than that adopted by the Co-Investigating Judges and the Trial Chamber in Case 001 and accept that there is a presumption that where crimes charged in the Indictment have been committed against members of the applicant's family – direct or extended – defined as including parents, children, siblings, grand-parents, in-laws, uncles and aunts and cousins, such crimes have caused a psychological harm to the applicant. I will also apply a presumption of psychological harm in those instances where the applicants allege to be part of a community with close ties and allege to have suffered harm as a result of a crime committed against a member of his or her community.

69. I note that most applicants did not provide any information in their application in respect of the bond of affection they may have with members of their extended family or other next of kin, probably due to the fact that the application form did not specifically require it. The Pre-Trial Chamber, when considering the first appeals, has initially asked further particulars to some of those who did not mention the existence of a bond of affection with members of their extended family in their application. Some applicants then provided a statement, directly or through their lawyers, confirming

[76] See *inter alia* Applicant D22/0154 and D22/0932, in Annex A.

the existence of as bond of affection or dependency. The answers received thus far contributed to confirm the existence of bonds of affection between members of the extended family in the Cambodian society. After further deliberations, the Chamber considered that a bond of affection can be presumed and that it was therefore not necessary anymore to obtain, from each individual applicant, a statement to this effect.

70. Having extended the scope of the presumption from which applicants may benefit, I will consider on an individual basis, for each applicant, whether the Co-Lawyers have properly alleged that certain applicants should be admitted as civil parties on the basis of having suffered harm as the immediate victim or as a member of his/her direct or extended family or of his/her community. Outside the confines of the presumption described above, I will assess individual cases on the basis of the information provided by the applicant as to the existence of a bond of affection or dependency with the immediate victim, such as a statement of the applicant describing the bonds or other evidence adduced to that effect. As the nature of a relationship with an individual is subjective, I find it appropriate to rely on the statement of the applicant in this respect, which I considered sufficient to establish, *prima facie,* a bond of affection.

ii) Presumption of psychological harm in the cases of forced marriages

71. Insofar as the forced marriages are more particularly concerned, I note that the Co-Investigating Judges have limited the presumption of psychological harm to parents, spouse and children of the immediate victim, without citing any authority in support of their findings which implicitly exclude siblings of the immediate victim from the benefit of the presumption of psychological harm as a direct consequence of the forced marriage of the immediate victim. I see no cogent reason to consider that siblings of the immediate victim, who are also members of the victim's direct family, should be excluded from the benefit of such presumption for the crime of other inhumane acts through forced marriage. Furthermore, upon review of the submissions of certain Co-Lawyers, I have noted that the Co-Investigating Judges did admit a few civil party applicants on the basis of the harm they suffered as the sibling of an immediate victim of forced marriage. This was the case of applicants in the following Impugned Orders: D396,[77] D397,[78] D401,[79] D406,[80] D408,[81] D409,[82]

[77] D22/1674 (forced marriage of the applicant's older sister) and D396.1.
[78] D22/1069 (forced marriage of the applicant's brother and sister) and D397.1
[79] D22/1165 (forced marriage of the applicant's two brothers) and D401.1.

D411,[83] D414,[84] D415,[85] D416,[86] D417,[87] D418,[88] D423,[89] D426[90], who appear to have benefited from a determinant presumption. I therefore find that the Co-Investigating Judges erred in law in concluding that siblings should be excluded from the benefit of the presumption of psychological harm in the case of forced marriage of the immediate victim. I further find that the presumption of psychological harm should equally apply to members of the extended family and of the community of the immediate victim as there is, in my view, no distinction to be made between the other crimes charged in the Indictment and the crimes of forced marriages. In the context prevailing in Cambodia at the time and in light of the societal relationships in the Cambodian society, I find it plausible that any person who is deemed to have a bond of affection with an immediate victim of forced marriage may have suffered a personal psychological harm as a result of such crime.

72. Given that the crimes of other inhumane acts through forced marriages are subject to a specific ground of appeal and that an error of law has been identified as the Co-Investigating Judges have specifically excluded from the presumption of psychological harm the siblings of the immediate victim and have generally rejected those applicants who I deem have a sufficient bond of affection with the immediate victim to be presumed to have suffered harm as a result of the crime of forced marriage committed against the immediate victim, I consider it appropriate to examine whether this error of law caused the Co-Investigating Judges to err in their consideration of the admissibility of civil party applicants.

73. The English version of the Indictment states in the section containing legal findings with respect to "Crimes Against Humanity, Other Inhumane Acts Through Forced Marriage" that for "*each of the incidences listed* in the section '[Regulation of] Marriage' and 'Factual Findings [of] Crimes', the Co-Investigating Judges find that the constitutive elements of the crime against humanity of other inhumane acts through acts of forced marriage have been established nationwide as well as the

[80] D22/2531 (forced marriage of the applicant's older sister) and D406.1.
[81] D22/2892 (forced marriage of the applicant's elder sister) and D408.1.
[82] D22/2218 (forced marriage of the applicant's younger sister) and D409.1.
[83] D22/0701 (forced marriage of the applicant's younger sister) and D411.1.
[84] D22/1510 (forced marriage of the applicant's sister) and D414.1.
[85] D22/2141 (forced marriage of the applicant's younger sister) and D415.1.
[86] D22/2596 (forced marriage of the applicant's two younger brothers) and D416.1.
[87] D22/3678 (forced marriage of the applicant's younger sister) and D417.1
[88] D22/0593 (forced marriage of the applicant's older sister), D22/0974 (forced marriage of an older brother) and D418.1.
[89] D22/1581 (forcible marriage of the applicant's elder brother) and D423.1.
[90] D22/3101 (forced marriage of the applicant's older sister and older brother), D22/1471 (forced marriage of the applicant's older sister) and D426.1.

worksites 1st January Dam, Tram Kok Cooperatives, and Trapeang Thma Dam, at the Kok Kduoch security centre and in regard to the treatment of Buddhists."[91] I note that part of the English version of the Indictment may suggest that the accused are only indicted for the few specific instances of forced marriage specifically described by the Co-Investigating Judges in the sections '[Regulation of] Marriage' contained in the section 'Factual Findings [of] Crimes' and/or in the evidence referred to in footnotes 3545 to 3651 of the Indictment.[92] In other words, the English version of the Indictment may give the impression that the accused are only indicted for those specific instances of forced marriages and not generally for all facts of forced marriages that are alleged to have occurred in Cambodia during the DK regime as part of the policy of the Khmer Rouge, which would prevent me from declaring admissible those civil party applications alleging instances of forced marriage other than these specifically described in the Indictment or to which the Indictment specifically refers.

74. At the outset, I note that the French version of the Indictment does not contain such ambiguity and clearly states that the accused are indicted for all the facts set out in the section "Regulation of Marriage".[93] Both the English and French versions also state that the "the constitutive elements of the crime against humanity of other inhumane acts through acts of forced marriage have been established nationwide", making clear that the Indictment for the crimes of other inhumane acts through forced marriages is not limited in its geographical scope, as it is the case for some other crimes.[94] I also note that the facts described in support of the charges of other inhumane acts through forced marriages are set out in a general way rather than by reference to specific instances, with the underlying idea of supporting the finding that the Khmer Rouge's policy in relation to the regulation of marriages was implemented systematically throughout Cambodia.

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[91] Indictment, para. 1442 (our emphasis). I note that the French version of para. 1442 does not refer to two sections of the Indictment but rather to the sub-section '[Regulation of] Marriage' within the section 'Factual Findings [of] Crimes', i.e. "'Le mariage' (dans la partie 'Caractérisation factuelle des crimes')", which is consistent with the approach adopted by the Co-investigating judges in the remainder of the legal conclusions.

[92] Paras 842-861 of the Indictment, in the section "Factual Findings [of] Crimes".

[93] The French version of para. 1442 of the Indictment reads as follows: « Pour chacun des faits décrits dans la section « *Le mariage* » (dans la partie « *Caractérisation factuelle des Crimes* »), les éléments constitutifs du crime contre l'humanité constitué d'autres actes inhumains sous forme de mariages forcés ont été établis dans l'ensemble du Cambodge et, en particulier, dans les sites suivantes : **Barrage du premier janvier**, **Barrage de Trapeang Thma, Cooperatives de Tram Kok**, le centre de sécurité de **Kok Duoch,** ainsi que dans le contexte du **traitement des bouddhistes**. »

[94] Indictment, para. 1442.

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75. This approach is in line with the Co-Prosecutors' submissions who requested the Co-Investigating Judges to investigate instances of forced marriages throughout Cambodia, without setting out a geographic limitation or any other kind of limitation. Indeed, on 30 April 2009, they authorised the Co-Investigating Judges to investigate the complaints of certain civil parties and civil party applicants related to allegations of forced marriage and forced sexual relations in Kampot and Takeo Provinces (the "30 April 2009 Response")[95] and, on 5 November 2009, they further authorised the Co-Investigating Judges to "consider and investigate further alleged incidents of forced marriage and sexual relations other than those identified in paragraph 2 of the 30 April 2009 Response."[96]

76. Furthermore, I note that the Co-Investigating Judges did not restrict themselves to admitting civil party applicants who have alleged having suffered harm as a result of one of the specific instances of forced marriage referred to in the footnotes supporting the factual conclusions related to forced marriage. Indeed, the Co-Investigating Judges listed in the Indictment an important number of civil party applicants that they have admitted as victims of forced marriages and whose application is not necessarily referred to in the above-mentioned footnotes. The approach adopted by the Co-Investigating Judges confirms that not only the instances listed to support the description of the facts supporting the crimes for which the accused are indicted are covered by the Indictment but that the accused are indicted, more generally, for all facts set out in the Indictment in the section "Regulation of Marriage" contained in the section "Factual Findings of Crimes" of the Indictment.

77. For all these reasons, I find that the Indictment allows me to admit those civil party applicants who benefit from the presumption of psychological harm as a result of forced marriage and whose application have been, in my view, erroneously rejected by the Co-Investigating Judges.

Done in Phnom Penh, on 24 June 2011

[95] Response to the Forwarding Order of the Co-Investigating Judges and Supplementary Submission, 30 April 2009, D146/3, (the "30 April 2009 Response"), para. 2.

[96] Further Authorisation Pursuant to the Co-Prosecutors' 30 April 2009 Response to the Forwarding Order of the Co-Investigating Judges and Supplementary Submission, 5 November 2009, D146/4, (the "5 November 2009 Further Authorisation"), para. 3. On 26 November 2009, the Co-Prosecutors filed an additional statement concerning the authorisation given to the Co-Investigating Judges to investigate alleged incidents of forced marriage and sexual relations that stated that the incidents "may be legally characterised as Crimes Against Humanity (rape and other inhumane acts), punishable under Articles 5, 29 (new) and 39 (new) of the ECCC Law, where such acts were committed as part of a widespread or systematic attack against a civilian population, on national, political, ethnical, racial or religious grounds.": Further Statement of Co-Prosecutors Regarding 30 April 2009 Response to the Forwarding Order of the Co-Investigating Judges and Supplementary Submission, 26 November 2009, D146/5, para. 3.

Catherine MARCHI-UHEL
Judge, Pre-Trial Chamber