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BEFORE THE SUPREME COURT CHAMBER

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APPEAL AGAINST REJECTION OF CIVIL PARTY APPLICANTS IN THE JUDGMENT
CO-LAWYERS FOR CIVIL PARTIES – GROUP 2

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I. INTRODUCTION AND PROCEDURAL BACKGROUND

1. On 26 July 2010, the Trial Chamber (*"TC"*) announced the Judgment[1] against Mr. KAING Guek Eav. Under section 4 of the Judgment the Trial Chamber (*"TC"*) decided on reparation requests of Civil Parties and as a prerequisite thereof on the admissibility of ***all*** Civil Parties and Civil Party Applicants. It rejected the applications of Ms. NAM Mon (E2/32)[2], Ms. CHHAY Kan alias LEANG Kan (E2/35)[3], Ms. HONG Savath (E2/83)[4], Mr. CHHOEM Sitha (E2/22)[5] and Ms. NHEB Kimsrea (E2/64)[6]. Accordingly, their joint request for reparations[7] and the particular requests for claims[8] were rejected.

   In order to save resources, Co-Lawyers for Civil Parties submit one single appeal of Co-Lawyers for Civil Parties – Group 2 against the Judgment. This submission is limited to the rejection of Civil Party Applicants, although different national lawyers represent the Civil Party Applicants.

2. The TC gave the following reasons for denying these Applicants the status as Civil Parties:

   (i) **Ms. NAM Mon**: lack of proof that the photographs submitted actually depict the relatives of the Applicant and the absence of any other evidence (standard of proof) and alleged inconsistencies in her testimony (credibility);

   (ii) **Ms. CHHAY Kan *alias* LEANG Kan:** no proof that the photograph of the detainee is her nephew NHEM Chheuy (standard of proof);

   (iii) Ms. **HONG Savath:** failure to submit a photograph of her uncle, who she claims to having seen at S-21, nor any other documentary evidence as proof of her uncle's detention (standard of proof). Additionally, the TC rejected her application for lack of evidence of any *"special bonds of affection"*[9] (lack of proof of special bond of affection);

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[1] Judgment, 26 July 2010, Doc.No. E188.
[2] *Ibid.* para. 647. Ms. NAM Mon is represented by Mr. HONG Kimsuon and Ms. Silke STUDZINSKY.
[3] *Ibid.* para. 648. Ms. CHHAY Kan alias LEANG Kan is represented by Mr. KONG Pisey and Ms. Silke Studzinsky.
[4] *Ibid.* para. 648. Ms. HONG Savath is represented by Mr. HONG Kimsuon and Ms. Silke STUDZINSKY.
[5] *Ibid.* para. 649. Mr. CHHOEM Sitha is represented by Mr. YUNG Phanit and Ms. Silke STUDZINSKY.
[6] *Ibid.* para. 649. Ms. NHEB Kimsrea is represented by Mr. HONG Kimsuon and Ms. Silke STUDZINSKY.
[7] Civil Parties' Co-Lawyers' Joint Submission on Reparation, 14 September 2009, Doc.no. E159/3.
[8] Co-Lawyers for Civil Parties (Group 2) – Final Submission, 11 November 2009, Doc.no. E159/6.
[9] *Ibid.* para. 648, emphasis added.

(iv) Mr. **CHHOEM Sitha:** TC rejected his application because a bond of affection was not proved (lack of proof of special bond of affection);

(v) Ms. **NHEB Kimsrea:** rejected as a Civil Party because she was born after the death of her uncle, aunt and five of her cousins (lack of proof of special bond of affection).

To summarize, the reasons for rejection are:

(i) non compliance with the standard of proof;

(ii) lack of proof of special bond of affection; and

(iii) credibility.

3. In accordance with Internal Rule (*"IR"*) 106(3) the five rejected Civil Party Applicants attached a letter with the special authorization to appeal given to their respective national and international Co-Lawyers together with the notice of appeal.
4. Co-Lawyers for Civil Parties clarify that the term 'Civil Party' is used in this Appeal and further submissions in accordance with the Glossary of the Internal Rules and "refers to a victim whose application to become a Civil Party has been accepted by the Co-Investigating Judges or the Trial Chamber in accordance with these Rules."[10] The term "Civil Party Applicant" will be used for a person who submitted a Victims Information Form (*"VIF"*) to become a Civil Party but who is not admitted yet by the respective body of the Court or whose application is rejected and declared inadmissible.[11]
5. With regard to the applicable Revision of the Internal Rules, Co-Lawyers for Civil Parties adopt the approach of the TC to apply Revision 3 of the Internal Rules unless the context indicates otherwise.[12]
6. This Appeal seeks to have the TC rejection of their applications to become a Civil Party overturned.

II. RELEVANT LAW

7. The relevant law and Internal Rules to which this Appeal refers are IR 21, 23, 83, 100, 104, 105, 106 and 107, and Articles 20new, 23new and 33new of the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the

[10] See Glossary attached to the Internal Rules (Rev.3), 6 March 2009.
[11] This clarification seems to be necessary because the use of the terms of the Trial Chamber is not clear. For example the attached list of "Civil Parties" is composed of admitted Civil Parties and rejected Civil Party Applicants.
[12] See supra note 1, para. 635 with further explanations in footnote 1061.

Prosecution of Crimes committed During the Period of Democratic Kampuchea (*"ECCC Law"*).

III. STANDARD OF APPEAL

8. Pursuant to IR 104(1)(a) and (b) the standard for the Supreme Court Chamber (*"SCC"*) regarding the review of an appeal against a judgment or a decision is either the existence of "(a) an error on a question of law invalidating the judgment or decision; or (b) an error of fact which has occasioned a miscarriage of justice".

   Pursuant to IR 104(4) the Internal Rules outline a list of decisions of the Trial Chamber which are subject to immediate appeal, among them being a decision on admissibility of a Civil Party (Applicant).[13]

   IR 104(4) provides that other decisions of the Trial Chamber are appealable "only at the same time as an appeal against the judgment on the merits."

9. The Internal Rules envisaged outlining the procedure of dealing with any ***decisions*** of the Trial Chamber made during the trial phase. The procedure is split into two groups: a) decisions which are subject to immediate appeal; b) any other decisions. Both kind of decisions are *separate* decisions and not part of the judgment.

   An immediate appeal can be seen as an interlocutory appeal against Trial Chamber's decision(s) during trial phase.

10. The procedures for an appeal against a judgment and for an immediate appeal against decisions of the Trial Chamber are different, and the Internal Rules are silent about the procedure of appeals against "other decisions" of the Trial Chamber.

11. Likewise, the Internal Rules are silent about the standard of appeal and the deadline of an appeal against a decision on admissibility which is *part of a judgment*.

    Therefore, Co-Lawyers for Civil Parties submit that the Rules on an *appeal against a judgment* do apply on this appeal against the decision on admissibility within the Judgment, and not those on an *immediate appeal against a decision.* The Supreme Court Chamber confirmed this approach and stated that "these decisions are

[13] The Internal Rules state: ". . . decisions declaring the application of a civil party inadmissible under Rule 23 (4)." Co-Lawyers for Civil Parties note that the text of this Rule is not accurate, as an application of a *Civil Party* cannot be declared inadmissible and only an application of a *Civil Party Applicant* can be declared inadmissible. A Civil Party has already been declared admissible, otherwise the person would not be a Civil Party. This is in accordance with the Glossary of the Internal Rules.

appealable under the procedural regime applicable to appeals against the Trial Judgment".[14]

12. Thus, the standard of review is limited to "...a) an error on a question of law invalidating the judgment or decision; or b) an error of fact which has occasioned a miscarriage of justice."

    The applicable deadline follows IR 107 (4).

13. The Internal Rules (Rev.3) are silent as to whether any supporting material can be attached to the Appeal, while the Internal Rules (Rev.6) allow this in IR 77*bis*.[15]

    Although Revision 6 of the Internal Rules explicitly does not apply in Case 001, it can help to interpret the spirit of the Internal Rules where a closing order has already been issued.

14. Co-Lawyers for Civil Parties note that the Trial Chamber did not give clear guidelines before issuing the Judgment as to details of requirements that Civil Party Applicants must fulfill, and as to the requisite standard of proof. The only direction in this regard was issued on 27 August 2009,

    > *"...Civil Parties whose applications have been challenged shall submit additional evidential material to the Chamber to show the* ***relevancy between the civil parties and the victims*** *in the case 001."*[16] (Emphasis added).

15. Co-Lawyers for Civil Parties note that the wording "**relevancy** between the civil parties and the victims" is vague, general and unclear. This direction does not provide adequate guidelines as to what would constitute sufficient evidence to demonstrate the "relevancy between the civil parties and the victims". Further, there is no indication as to what constitutes "relevance".

    Therefore, Co-Lawyers for the Civil Parties submit that in accordance with the requirement of fairness to Victims and in light of the Internal Rules (Rev.6), the submission of supporting documentation should be allowed. In addition, it is to be recalled that this Court was established *inter alia* in order to bring justice to victims. The Civil Party Applicants were severely shocked that their applications were rejected for reasons such as, "it is not established that the person that the Civil Party Applicant identify as his/her relative is really your relative."[17] The timing of the decision, at the handing down of the verdict, further violates the reasonable expectations of the

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[14] Decision on Characterization of Group 1-Civil Party Co-Lawyers' immediate Appeal of Civil Party Status Determinations in the Trial Judgment, 30 September 2010, Doc. No. F8/1.
[15] IR 77(2) states: „The Appellant may attach to the appeal supporting documentation."
[16] T. 27 August 2009, p. 2, l. 18-21.
[17] See for example the rejection of Civil Party Applicant Ms. LEANG Kan, para. 648 of the Judgment.

Applicants, who have participated as "interim" Civil Parties throughout the entire proceedings.

In light of the foregoing, the Supreme Court Chamber should declare admissible the submission of any supporting material and take these materials into consideration.

IV. ARGUMENT

A. ADMISSIBILITY OF THE APPEAL

16. According to IR 105(1) an appeal is admissible for "c) *Victims*, in respect of their rights under Rule 23(4); and c) [sic] *The Civil Parties* in respect of their other civil interests, but only when the Co-Prosecutors have appealed." [18]
17. As mentioned above[19], the Supreme Court Chamber has authoritatively decided that an appeal against admissibility decision made in a judgment is an appeal against a judgment and not an immediate appeal against an admissibility decision as envisaged in IR 104(4)(e).
18. Therefore, the deadline for this appeal is the deadline for appealing a judgment rather than the deadline for an immediate appeal against a separate decision of the Trial Chamber.
19. Co-Lawyers for Civil Parties submit that according to the existing Internal Rules, Civil Party Applicants have the following rights:
    (i) to appeal the judgment related to the rejection of their Civil Party application; and
    (ii) to file an appeal against the reparation order when the Co-Prosecutors appeal.
20. According to IR 107(4) and 105(3) the appeal deadline against a judgment is designed in a two-step procedure; first is to file a notice of appeal with a summary of the grounds of appeal, and second is to submit a brief with the arguments and authorities within 60 days from notification of the notice of appeal.

B. FIRST GROUND OF APPEAL

The Rejection of Civil Party Applicants E2/32, E2/35, E2/83, E2/22 and E2/64 is based on an error on a question of law/Internal Rules invalidating the judgment by violating Internal Rules 21(1), 21(1)(a), 21(1)(c), 23(4), 83(1) and 100.

1. THE PROCESS OF DECIDING ON ADMISSIBILITY OF CIVIL PARTY APPLICATIONS

[18] Emphasis added.
[19] See para. `11 of this Appeal.

21. According to the Internal Rules (Rev. 3), applicable in Case 001, the Office of the Co-Investigating Judges (*"OCIJ"*) decides on the applications at the phase of the investigations or the Trial Chamber when it is seized with the Closing Order.

Rule 23(3) states in relevant part that

> *"The Co-Investigating Judges may decide by reasoned order that the Civil Party application is inadmissible. Such order shall be open to appeal."*

IR 23(4) describes similarly that:

> *"The Trial Chamber may, by written decision, declare the Civil Party application inadmissible. (...) a decision of the Trial Chamber may be appealed to the Supreme Court Chamber. (...)"*

According to the applicable rules at the time the deadline for Civil Party applications was 10 days before the Initial Hearing.

The Internal Rules continue in IR 23(6) about the consequences of the admissibility decision:

> *"a) Being joined as a Civil Party, the Victim becomes a party to the criminal proceedings."*

Furthermore, pursuant to Internal Rule 23 the purpose of **Civil Party** action is to:

> *"a) Participate in criminal proceedings against those responsible for crimes within the jurisdiction of the ECCC by supporting the prosecution; and*
> *b) Allow Victims to seek collective and moral reparation, as provided in this Rule."*

22. The decision on admissibility is final (subject to appeal) whether rendered by the Co-Investigating Judges (*"CIJ"*) or by the Trial Chamber, as appropriate. Although the Internal Rules do not stipulate any deadline before which the decision has to be taken, logically this decision has to be issued as soon as possible because only then can a Civil Party Applicant become a party to the proceedings and can exercise his or her full participation rights. But in light of IR 83(1), the decision should be made at the latest during the Initial Hearing. IR 83(1) states:

> *"At the initial hearing, the Chamber shall consider any applications submitted by Victims to be joined as Civil Parties, as provided in Rule 23(4)."*

Although this Rule does not explicitly state that the "TC shall decide," it is submitted that "consider any application as provided in Rule 23(4)" refers to the decision on the admissibility of Civil Party Applicants and to the rejection of those applications who are inadmissible.

23. Nevertheless, the Trial Chamber asserts in the judgment as follows:

> *"In common with the practice before comparable international tribunals, the Chamber undertook a* prima facie *assessment of the credibility of the information*

provided by the applicants. This process is distinct from the Chamber's determination of the merits of all applications in the verdict, on the basis of all evidence submitted in the course of proceedings."[20]

24. The Chamber's approach is erroneous and violates IR 23(4), which does not stipulate an initial *prima facie* assessment, nor does it allow for either an "interim" or "provisional" decision followed by a second final decision on the merits of the application in the judgment.

    If such a procedure were to have been allowed, this would have had to have been authorized by the rules or governing law and the Internal Rules would have stated this important process.[21] But the Internal Rules do not provide for a two-step process. According to the Internal Rules only **one single decision** on admissibility is required. Logically, this has to be issued immediately after the deadline[22] for victims to apply as a Civil Party and at the latest during the initial hearing, pursuant to IR 83. It can be concluded from the silence of the Internal Rules that this two step procedure is not foreseen and therefore is not allowed.

25. The TC refers to the jurisprudence of the International Criminal Court (*"ICC"*) in order to justify its approach. However, referring to international procedural standards is **not** appropriate if the applicable law or Internal Rules are clear on a given question. Seeking guidance in international procedural standards is only required if the Internal Rules and Cambodian Procedural Code do not deal with a particular matter, if there is uncertainty about the statutory interpretation or application of these laws, or if there is a question concerning the consistency of the laws with international standards.[23]

26. But even if the TC could have legally referred to the jurisprudence of the ICC, the content of the cited decision is different from what the Trial Chamber refers to in the footnote.[24]

    The Trial Chamber I of the ICC notes that the *prima facie* process relates to those who apply to join as Civil Parties at the **pre-trial stage**. Their application is not to be renewed and not to be reviewed at the trial stage nor in a second decision newly assessed.

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[20] See supra note 1, para. 634.
[21] Decision on Appeal against Co-Investigating Judges' Combined Order D250/3/3 Dated 13 January 2010 on Admissibility of Civil Party Applications, 27 April 2010, Doc.no. D250/3/2/1/5, para. 14.
[22] According to IR (Rev.3) the deadline for Victims to apply expired 10 days before the Initial Hearing, i.e. 2 February 2009.
[23] See ECCC Law Article 20 new, 23 new, 33 new.
[24] See footnote 1063 of the Judgment and the quote of Trial Chamber I (ICC-01/04-01/06-1119), 18 January 2008, "Decision on victims' participation", para 99.

Trial Chamber I of the ICC continues as follows:

> "The Chamber is conscious that different considerations may apply at the trial, as opposed to the pre-trial stage. By the time *applications to participate in the proceedings are made to the Trial Chamber* a considerable amount will be known about the facts and issues that will arise."[25]

27. The TC misinterpreted this excerpt because Trial Chamber I of the ICC does not state that those who submitted their applications during the investigation phase have to be reviewed at the trial phase. Rather, that court found that they will apply a different standard to persons who apply during and for the trial phase due to the progress already made in the investigation at that point in time.
28. Thus, Co-Lawyers for Civil Parties submit that there is no basis in the Internal Rules nor in international jurisprudence that allows the Trial Chamber to make an initial *prima facie* decision thereby granting the Applicants an "interim" procedural status and a second final one within the judgment on the merits.

2. DIFFERENT GROUPS OF APPLICANTS WITH DIFFERENT RIGHTS

29. During a Trial Management meeting, held on 15 January 2010, the TC noted that those Applicants whose applications were to be decided by the Trial Chamber would receive either a notification of their "*interim recognition*" or would be declared admissible at the Initial Hearing.[26] Both the interim recognition and the admissibility declaration had the same effect for the purposes of performing full party rights. For example, both groups received the Co-Prosecutors' witness list and were allowed to perform their rights pursuant to IR 80(2).
30. During the Initial Hearing the TC **confirmed** the admissibility of 28 Civil Parties who had already been granted the status by OCIJ within the Closing Order.[27]

    However, the Trial Chamber reviewed these applications again within the judgment when it admitted the 66 Civil Parties.[28] Despite its previous confirmation of admissibility for these 28 persons, the Trial Chamber appears to have treated these

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[25] *Ibid.* para. 100. Emphasis added.
[26] T., 15 January 2009, p. 55-56.
[27] T., 17 February 2009, p.34, l. 10-17: "First with regard to civil parties joined during the investigation phase. According to the last sentence of Internal Rule 23(4), a victim who has filed a civil party application during the investigation is not required to renew his or her application before the Trial Chamber. Accordingly, the 28 individuals who have filed civil party applications and were subsequently joined as civil parties in the case therefore remain as civil parties in the case against the accused person."
[28] See supra note 1, para. 645. The TC "considers that the following four Civil Parties have substantiated this claim and hence, to have established that Kaing Guek Eav is directly responsible for their harm suffered."

persons as Applicants until final recognition of their admissibility was assessed or acknowledged within the judgment.

31. Further, the Trial Chamber made the following determination:

> "Prior to issuing interim recognition, the Chamber has carefully received each of the relevant civil party applications and it has applied a prima facie standard of proof. This is not an examination on substance or on merit. Regarding the existence of criteria for the evaluation of a civil party application, at this juncture the Chamber confirms the status of *those that have already received interim recognition as civil parties* in the case against the accused except for cases E2/36 and E2/51. . . ."[29]
>
> "Having carefully reviewed each one of the latest applications, and having applied a *prima facie* standard of proof for the existence of criteria for the evaluation of the civil party application, and having heard the comments from the other parties, the Chamber declares that apart for applicants E2/69, 74, 87, *all other remaining civil party applicants who do not have interim recognitions are* ***admitted as civil parties*** in the case against the accused."[30]

32. With this decision there were three groups: affirmed Civil Parties (recognized by OCIJ), persons with interim recognition and a third group, which does not have interim recognition but where the Applicants were admitted as Civil Parties in the Initial Hearing. It remains unclear what rights these different groups have (or not) and how they are to be distinguished from each other.

    Moreover, the Trial Chamber gave a further indication related to E2/36 and E2/51, who did not prove their identity and did not receive "*interim recognition*". They remained simple applicants but with the right to have access to the case file only. The Chamber explicitly stated that they do not have further rights.[31] This statement created another sub-group of Civil Party Applicants with an interim recognition.

33. Each of the different groups was reviewed by the Chamber at the end of the trial, including those who already had "Civil Party" status granted by OCIJ. That group with OCIJ-granted Civil Party status was in fact subjected to three reviews of admissibility: first by the OCIJ, second by the TC at the Initial Hearing and third by the TC within the Judgment.

34. Co-Lawyers for Civil Parties submit that this procedure is not covered by the Internal Rules. As the Internal Rules do not provide for Civil Parties with *"interim recognition"*, this procedure is a violation of IR 23(3) and (4). These rules are plain and clear about the decision process on admissibility in that admissibility is a final

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[29] *Ibid.*, p. 46, l. 11-19.
[30] *Ibid.*, p. 50, l. 8-`13.
[31] Decision of the Trial Chamber Concerning Proof of identity for Civil Party Applicants, 26 February 2009, Doc.no. E2/97, para. 5.

decision taken either by the OCIJ or by the TC immediately after receipt of the application. Furthermore, it was erroneous that different terms were used, which appear neither in the Internal Rules nor in the Cambodian Procedure Code, where there are no definitions provided for these terms, and no clear explanation as to who has what rights. Moreover, it is confusing for all parties and even more so for the Civil Party Applicants, who are not themselves lawyers.[32]

3. MEANING OF IR 100 AND DIFFERENT TRANSLATIONS

35. The Trial Chamber erroneously derives its right to make a second and final decision on the merits of admissibility at the end of the trial from Rule 100(1).[33]

IR 100 states as follows:

> *"Judgment on Civil Party Claims*
>
> *1. The Chamber shall make a decision on any Civil Party claims in the judgment. It shall rule on the admissibility and the substance of such claims against the Accused."*

The French version is written as follows:

> « Jugement sur les intérêts civils
>
> 1. Dans le même jugement, la Chambre statue sur les intérêts civils. Elle apprécie la recevabilité de la constitution de partie civile et se prononce sur les demandes de la partie civile à l'égard de l'accusé.»

The Khmer version is identical with the English version.

36. IR 1 (1) asserts that the three versions are identical. There is no provision indicating which version is authoritative. Interpreting the English version by its plain meaning it is clear that the Trial Chamber rules "**on the admissibility [of such claims]** and **the substance of such claims."** "Admissibility" in this context does not refer to the Civil Party application, but to "such claims." For example, the TC could rule that a claim for individual reparation would be inadmissible because only the requests for collective and moral reparations are admissible. Civil Party claims and applications are two distinct concepts in the Internal Rules. For the purposes of statutory construction, the fact that the Plenary did not include the Civil Party application in this rule, but rather only included Civil Party claims, means that IR 100(1) does not allow the TC to make any decisions on Civil Party admissibility in the judgment.

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[32] See the Opinion of Judges Prak Kimsan and Rowan Downing in Respect of the Declared Inadmissibility of Admitted Civil Parties, 1 June 2010, Doc.no.D364/1/3,para. 16: "It is important,…that the decisions of this court should be written in such a way as to be fully comprehensible by non lawyers. This is especially so when a decision is addressing an application by a person claiming to be a victim and entitled to be a Civil Party."

[33] See supra note 1, para. 635.

37. In contrast, the French version states that *"Elle [la Chambre] apprécie la recevabilité de la constitution de partie civile"* and links the admissibility requirement to the Civil Party application. This is an irreconcilable difference between the French and English/Khmer versions. While the French version would allow the Chamber to decide at the end on the admissibility of Civil Party Applicants, the English and Khmer versions do not.
38. However, the title of this rule is very clear and refers **only** to the judgment on Civil Party claims, which means on reparation. Co-Lawyers for Civil Parties submit that the content of the English and the Khmer versions are in accordance with the title of this rule.
39. In addition, it is not only logical but necessary that the Chamber has to decide on admissibility as early as possible after receipt of the application, because an interim or provisional acceptance is not provided for in the IR.
40. An early decision on the admissibility is also required as soon as possible upon receipt of an application in order to allow the Applicants to perform their participation rights as Civil Parties. In addition, given the fact that only Civil Parties, and not Victims, have the right to appeal regarding their other civil interests, the decision on their admissibility must be made prior to the judgment being handed down.
41. The Internal Rules do not allow a *Victim* who is rejected as inadmissible within the judgment to appeal the rejection of admissibility ***and*** the reparation order at the same time. Only Civil Parties, as stated above, can appeal the reparation order. The result of this gap in the Internal Rules would be that the Supreme Court Chamber would issue the final decision on admissibility after the deadline to appeal the reparation order expires. This would have the consequence that a Civil Party Applicant whose application was declared inadmissible in the judgment and who successfully appeals the rejection is permanently deprived of the opportunity to appeal the reparation decision. If this is the case, then the resulting Civil Parties would have no opportunity of exercising their right to appeal the reparation order, resulting in the taking away of one of their fundamental rights as Civil Parties.
42. Therefore, Co-Lawyers for Civil Parties submit that a decision on admissibility of a Civil Party Applicant within the judgment is not envisaged by the Internal Rules. On the contrary, the making of admissibility decisions within the judgment is against the interests of justice. It leaves the Civil Party Applicants not only without a legal

remedy against the rejection of their application, but also unable to seek a legal remedy against the reparation order.

43. Co-Lawyers for Civil Parties conclude that the English and Khmer version are the applicable versions.

44. Therefore, the erroneous application of IR 100 invalidates the judgment. There is no legal basis to decide on the admissibility of **de facto** admitted Civil Parties a second time, within the Judgment. Such a final decision would retroactively invalidate all participating activities which Civil Parties have engaged in the proceedings.

Therefore, the Supreme Court Chamber should overturn the rejection order and declare E2/32, E2/35, E2/83, E2/22 and E2/64 admissible.

4. VIOLATION OF IR 23(3), 23(4), 21, 21(1)(a) AND (c) BY GROUPING CIVIL PARTY APPLICANTS AND BY APPLYING A TWO STEP DECISION PROCESS

45. Internal Rules 21(1)(a) and (c) stipulate that

> " The applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safeguard the interests of...Victims and so as to ensure legal certainty and transparency of proceedings...
> (a) ECCC proceedings shall be fair. . . .
> (b) . . .
> (c) The ECCC shall ensure that victims are kept informed and that their rights are respected throughout the proceedings."

46. Each of our rejected clients received an "interim recognition" letter,[34] except Ms. HONG Savath, who was declared "admissible" at the Initial Hearing.[35] All of them are seriously affected by the violation of IR 23(4), 21, 21(1)(a) and (c).

47. As outlined above, according to the Internal Rules the TC would necessarily and logically have had to decide on the Civil Party applications immediately after receipt of their application forms, and at the latest during the Initial Hearing. The Internal Rules only allow the TC to make **one** decision. By applying a two-step process the TC deprived the Civil Party Applicants of their right to have only **one clear decision** at the outset in accordance with procedural fairness. The use of unclear language in calling these persons "admitted Civil Parties" (related to Ms.HONG Savath), or in granting "interim recognition" (concerning E2/32, E2/35, E2/22, E2/64), and in granting them full rights as Civil Parties, including the same rights as those who were admitted by OCIJ, for over 17 months violates the Civil Parties' right to procedural fairness. It is the duty of the Chamber to preserve their rights and to guard their

[34] E2/64/3 for Nheb Kimsrea, E2/22/3 for Chhoem Sitha, E2/35/3 for Leang Kan and E2/32/3 for Nam Mon.
[35] T. 17 February 2009, p.50, l.11-13.

interests. The Chamber did not ensure legal certainty and transparency by issuing first an "interim recognition" and then a second rejection decision on their admissibility within the Judgment.

48. The consequence of this violation is a new level of severe trauma for victims who have now been re-victimized. The rejected Civil Party Applicants had a reasonable belief, for more than 17 months, that they were Civil Parties. This is because they were treated equally and granted all the rights of a Civil Party. Thus it was also reasonable for them to believe that they **were in fact** admitted as a Civil Party. Hence, they were proud and benefitted from special informational meetings with their lawyers and they were involved in the whole process. Ms. NAM Mon even testified as a Civil Party. It remains unclear as to what consequences or implications arise out of testimony given by an "interim" Civil Party.

    This firmly demonstrates that the decision on admissibility must be taken in one single and final decision at the beginning, because it is through this final determination of having a status as a Civil Party that a Victim can legitimately exercise all her or his legal rights and duties with the corresponding legal consequences.

    All of the Civil Parties enjoyed a heightened reputation in their respective villages over that time and were highly esteemed and admired.

    The result of the belated rejection is a loss of face in their communities and in society. They have been defamed by the Judgment and re-victimized. One Civil Party Applicant expressed suicidal intention to Transcultural Psychosocial Organization in the case of the final rejection of her application.

49. Co-Lawyers for Civil Parties submit that the non-compliance with the general fairness principle is erroneous. Co-Lawyers for Civil Parties further submit that the Trial Chamber violated Internal Rules 21, 21(1)(a) and (c), which invalidates the Judgment with regard to the rejection of admissibility.

    Therefore, Co-Lawyers for Civil Parties seek to have the Supreme Court Chamber overturn the rejection order and declare E2/32, E2/35, E2/83, E2/22 and E2/64 admissible.

C. SECOND GROUND OF APPEAL

The Rejection of Civil Party Applicants E2/32, E2/35, E2/83 is based on an error on a question of law/Internal Rules invalidating the judgment and violates Internal Rules 23(5) (Rev.3) by applying a wrong standard of proof.

1. STANDARD OF PROOF

50. The Trial Chamber violated IR 23(5) (Rev.3) and applied the wrong standard of proof by rejecting Civil Party Applicants E2/32, E2/35, E2/83. The TC erroneously concluded that these Civil Party Applicants did not prove that the respective photographs that they submitted are actually photographs of their relatives (E2/32 and E2/35) and that one Applicant did not submit a photograph at all.

    IR 23(5) states as follows:

    > *"All Civil Party applications must contain **sufficient information** to allow verification of their compliance with these IRs. In particular, the application must provide details of the status as a Victim, specify the alleged crime and attach any evidence of the injury suffered, or tending to show the guilt of the alleged perpetrator; ..."*

51. The Internal Rules (Rev.3), applicable in Case 001, do not elaborate further on the standard of proof or what kind of evidence, if any, is required to substantiate the statement of an Applicant, which is as such evidence.

52. In Revision 6 of the Internal Rules, IR 23*bis*(1) added the following as a general rule:

    > *"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."*

    The Cambodian Criminal Procedure Code (*"CPC"*) does not mention any standard of proof.

53. Although the last amendments (Revision 6) concerning Civil Party participation do not apply for Case 001,[36] the new IR 23 *bis* (1) could at least assist in indicating the applicable standard of proof. The new Rule 23 *bis*(1) states that OCIJ must be satisfied that the **alleged facts in support of the application** are more likely than not to be true**.** This standard is a preponderance of the evidence—a relatively low standard—and, as to be demonstrated below, is similar to the approach of the ICC.

    The wording suggests that the "alleged facts" are submitted (at least *inter alia*) through the Applicant's **statement.** Consequently, the statement of the Applicant, similar to a witness statement, is evidence and proof of the facts.

54. Given that both the CPC and the applicable IR do not deal with the matter, and the new Internal Rules can only indicate the spirit of the rules, the Supreme Court should look to international procedural rules for guidance.

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[36] See IR 114 (3).

a) Practice of International Criminal Courts and Human Rights Courts

55. When confronted with the general incapacity of victims of serious human rights violations to provide evidence, all international tribunals – whether criminal or not – have considerably lower standards for evidence than national courts.[37] "International tribunals [International Criminal Court for the former Yugoslavia ("ICTY") and the International Criminal Court for Rwanda ("ICTR")] have taken an ad hoc and fairly liberal approach to evidentiary matters", allowing "any relevant evidence"[38] and evaluating it at any time ("flexibility principle").[39] Rules of evidence "enjoy great flexibility" and are "guided (…) by general principles of fairness".[40]

56. Additionally, the assessment of evidence by the Inter-American Court of Human Rights ("IACHR") has been "less formal and more flexible".[41] Its jurisprudence provides for a number of reversals of the burden of proof[42]. In restricted cases under Articles 2, 3 or 5, even the European Court of Human Rights (ECHR) has reversed the burden of proof, requiring satisfactory, plausible, convincing explanations.[43]

57. Both the ICTY and ICTR have accepted uncorroborated evidence and have accentuated that absence of corroboration did not disqualify the testimony[44]. The IACHR weighs evidence freely and on a case-by-case basis, avoiding "a rigid

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[37] E. Dwertmann, *The Reparation System of the International Criminal Court: its Implementation, Possibilities and Limitations*, (Leiden/Boston, Martinus Nijhoff, 2010), p.226. For the **ICC**, cf. Rule 94-1-g („to the extent possible"). For proof of identity allowed by the Court see: *Decision on the Requests of the Legal Representative of Applicants on application process for victims' participation and legal representation*, 17 August 2007, ICC-01/04-274, para.15; Trial Chamber, *Prosecutor v Lubanga, Decision on victims' participation*, 18 January 2008, ICC-01/04-01/06-1119, paras.87-89; and C.Ferstman/M.Goetz, *Reparations and the International Criminal Court*, C.Ferstman/M.Goetz/A.Stephens, 'Reparations for Victims of Genocide, War Crimes and Crimes against Humanity': Systems in Place and Systems in the Making, (Leiden/Boston, Martinus Nijhoff, 2009), pp.321-324.

[38] S.R.Ratner/J.S.Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, 2nd edition, (Oxford, Oxford University Press, 2001), pp.253-254; citing ICTY Appeals Chamber, *Prosecutor v Tadić*, Decision on Appellant's Motion for the Extension of the Time Limit and Admission of Additional Evidence, 15 October 1998, paras.33-45, 60-74, 535-539 (single witness); ICTY Appeals Chamber, *Prosecutor v Aleksovski*, Decision on the Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, para.15 (hearsay); ICTR TC 1, *Prosecutor v Akayesu*, Judgment, 2 September 1998, paras.132-136 (hearsay, single witness) .

[39] S.Zappalà, *Human Rights in International Criminal Proceedings*, (Oxford, Oxford University Press, 2005), p.134.

[40] ICTY TC I, *Prosecutor v Blaškić,* 03/03/2000, IT-95-14-T, para.34, „extensive admissibility of evidence – questions of credibility or authenticity being determined according to the weight given to each of the materials by the Judges at the appropriate time"; Cassese, *supra*, no.1, p.414, citing Justice Robert H. Jackson.

[41] *Cantoral Benavides v Peru*, Merits, 18/08/2000, para.45.

[42] See for instance *Velásquez Rodríguez*, paras.123, 125, 131; *Cantoral Benavides*, para.189; *Bámaca Velasquez*, Merits, 25/11/2000, paras.152-153; *Villagrán Morales et al. v Guatemala*, Merits, paras.128, 142, 169.

[43] For example, *Tomasi v France*, 27/08/1992, paras.110, 115; *Salman v Turkey*, 27/06/2000, paras.99-102.

[44] In a recent judgment (on accomplice testimonies), the ICTR sums up relevant jurisprudence regarding corroboration in footnotes: *Siméon Nchamihigo v The Prosecutor,* Case No. ICTR-2001-63-A, Judgment, 18 March 2010, paras. 42-48.

determination of the amount of evidence required", in order "to evaluate the evidence within the limits of a sound judicial discretion".[45]

58. In terms of types of evidence, Rule 89(c) of the ICTR allows "any relevant evidence", at the judges' discretion[46]. ICTY and ICTR have accepted written instead of oral statements by victims under defined conditions, i.e. an attestation of a person witnessing the declaration (affidavits, Rule 92*bis*)[47]. The amendment of the rules in practice indicates the possibility of written statements as evidence.[48] The IACHR, in *Velásquez Rodríquez*, found that it was sufficient, that the pattern of the violations was of "public and notorious knowledge" in the population at the time.[49] It has accepted all kinds of evidence: testimonial evidence (including affidavits[50] and hearsay[51], the latter only to confirm other evidence), even of "interested persons"[52], all kinds of documentary evidence,[53] demonstrative evidence[54] and even circumstantial evidence.[55] Even newspaper articles can be used at least for corroboration or can have their own evidentiary value in case of corroboration of testimonies or public statements.[56] This allows the establishment of kinship by simple uncorroborated statement.

59. International and regional courts have used lower thresholds for the identification of victims in particularly complex situations. Albeit generally strict, the ECHR has changed its paradigm in the difficult evidentiary situations in Turkey and Russia. Indirect victims have to prove such a close link to the direct victim that they can justifiably be considered as a victim.[57] The Court has accepted this case by case for instance for spouses, parents, (twin) brothers or sisters[58], and it has held that the proof beyond reasonable doubt "may follow from the coexistence of sufficiently strong,

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[45] *Velásquez Rondríguez v Honduras*, Merits, 29/07/1988, paras.127-128; *Castillo Páez v Peru*, Reparations, 27/11/1998, para.38; *Cesti Hurtado v Peru*, Reparations, 31/05/2001, para.21.
[46] See also ICTR Appeals Chamber, *Musema v Prosecutor*, 16/11/2001, ICTR-96-13-A, paras.18-20.
[47] I.Bantekas/S.Nash, *International Criminal Law*, 3rd edition, (Oxon/New York, Routledge, 2007), pp.446,449.
[48] *Ibid*, pp.446,449.
[49] Paras.147-b and 147-c.
[50] *Loayza Tamayo*, para.13.
[51] *Blake v Guatemala*, Merits, 24/01/1998, para.31.
[52] *Suárez Rosero v Equador*, Merits, 12/11/1997, para.32.
[53] *Bámaca Velasquez*, paras.31, 58, 104-105.
[54] *Loayza Tamayo*, paras.48-49.
[55] *Blake v Guatemala*, para.49 *Villagrán Morales et al. v Guatemala*, paras.68-71.
[56] *Velásquez Rodríguez*, para.146; *Ivcher Bronstein v Peru*, 06/02/2001, para.70.
[57] P.van Dijk et al., *Theory and Practice of the ECHR*, 4th edition, (Antwerpen/Oxford, Intersentia, 2006), p.68.
[58] *Y v Belgium*, YB VI (1963), p.590 (620); *X v Belgium*, D&R 8 (1978), p.220 (221); *Y v Austria*, Coll.8 (1962), p.136; *Andronicou Constantinou v Cyprus*, D&R 85-A (1996), p.102.

clear and concordant inferences or of similar unrebutted presumptions of fact".[59] Notably in the Turkish cases, the Court has accepted inconsistent or contradictory evidence, and evidence based on a sole victim as witness.[60]

60. In several cases, the IACHR has given high significance to the statements of the victims, especially for reparations and consequences of the crime, and has concluded that it has to be "weighed with the full body of evidence".[61] Regarding moral damage of next of kin, the Court has established presumptions for parents, children, spouse or companion and heirs in general.[62] Other members of the extended family (step children, sisters in law, nieces or cousins) have been considered as being entitled to reparations, as injured parties.[63] Until recently, the Court also presumed moral damage for the next of kin, installing a rebuttable presumption, leaving it to the respondent State to prove the absence of such damage.[64]

61. It can be observed that all international tribunals, even the ECHR, apply low and flexible standards of proof in situations linked to armed conflict where proof is nearly impossible. It has been general practice for mass claims processes and reparations mechanisms, to alleviate the standard of proof for harm and causation and to have lower expectation of evidence, even for compensation for moral harm.[65]

62. However, out of all these International Courts, only the ICC allows victims to participate. Therefore, the ICC jurisprudence should guide this Court in its decision on appeal.

b. *ICC standard of proof for Applicants applying during the investigation phase*

63. The ICC distinguishes between "situations" and "cases". The status as a victim, pursuant to rule 85 of the Rules of Procedure and Evidence (*"RPE"*) is accorded either in relation to the *situation* or to the relevant *case* in the pre-trial stage.[66]

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[59] *Ireland v UK*, 18/01/1978, para.161.
[60] For example, *Kurt v Turkey*, 25/05/1998, paras.94-99.
[61] *Loayza Tamayo*, paras.72-73.
[62] *Caracazo v Venezuela*, Reparations, 29/08/2002, para.51.
[63] *Mapiripán v Colombia*, Merits and Reparations, 15/09/2005, para.259a, *Paniagua Morales v Guatemala*, para. 109; *19 Merchants v Colombia*, Merits and Reparations, 05/07/2004, paras.244-264g; cf. C.Sandoval, p.263.
[64] For instance, *Aloeboetoe v Suriname*, Reparations, 10/09/1993, paras.54,75, 86-90; see D.Shelton, *Remedies in International Human Rights Law*, 2nd edition, (Oxford, 2005), p.251.
[65] See for examples and further references, Dwertmann, pp.237-242.
[66] Example for a decision on Applicants in a situation see: Situation in the Democratic Republic of the Congo, ICC-01/04-101-tEN-Corr22-03-2006, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, and VPRS 6, 17 January 2006, para. 66. Emphasis added. As example for the case see: Situation in the Democratic Republic of the Congo, Prosecutor v. Germain Katanga

PTC I of the ICC held that "in the absence of any criterion in the Statute of the ICC, on how to examine and assess if the Applicant could be accorded the status of a Victim, PTC I finds it reasonable that the threshold is relatively low during the investigation of the situation."[67] PTC I borrows the criteria used at the preliminary investigation phase for a charged person when issuing a warrant of arrest, testing if there are "reasonable grounds to believe"[68] that the person has committed a crime. Following this, PTC I of the ICC applies the same standard on Applicants and accords the procedural status of a victim if there are "grounds to believe" that they meet the criteria set forth in Rule 85(a) of the RPE.[69]

64. PTC I outlines the steps of the examination as follows:

> *"...[t]he Chamber will first examine each Applicant's statement. It will then consider the arguments presented by ad hoc Defence Counsel and the Prosecutor. The Chamber will draw on other sources such as official United Nations reports. The next step will not consist in assessing the credibility of the statement or engaging in a process of consideration* stricto sensu *but rather in checking whether the victim's account of the events is consistent with official reports (...). The Chamber can then assess whether there are 'grounds to believe" that the criteria (...) are met."*[70]

65. This standard applies to the Applicants in the investigation phase of the situations and the cases.[71] As TC I noted, at this stage "the Single Judge will not determine in any great detail the precise nature of the causal link and the identity of the person(s) responsible for the crimes."[72]

66. Furthermore, the Single Judge elaborates on the standard of proof,

> *"[t]hat the applicants are only required to demonstrate that the four requirements established by rule 85(a) of the Rules are met* prima facie *and that therefore the Single Judge's analysis of the Applications 'will not consist in assessing the*

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and Mathieu Ngudjolo Chui, Public Redacted Version of the Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case, ICC-01/04-01/07-579, 10 June 2008, para 67.

[67] *Ibid.*, 17 January 2006 Decision, para. 97.

[68] *Ibid.*, para. 98.

[69] *Ibid.*, para. 99.

[70] *Ibid.*, para. 101.

[71] This standard was upheld and repeated. See for example PTC I, Situation in the Democratic Republic of Congo, Decision on the OPCD's request for leave to appeal the 3 July 2008 decision on applications for participation, ICC-01/04-535, 4 September 2008, para. 20: The Single Judge still applied the existing standard for the burden of proof for such decisions, namely that the "applicants demonstrate that the elements established by rule 85 of the Rules are met *prima facie.*"

[72] See also supra note 56, Decision dated 17 January 2006, para. 94 and reiterated in: Situation in the Democratic Republic of Congo, Decision on the applications for participation filed in connection with the investigation in the Democratic Republic of Congo by Applicants a/0047/06 to a/0052/06, a/ 0163/06 to a/0187/06, a/0221/06, a/0225/006, a/0226/06, a/231/06, a/0233/06, a/0237/06 to a/0239/06, and a/0241/06 to a/0250/06, ICC-01/04-505, 3 July 2008, para. 27. See also Situation in Darfur, Sudan, Prosecutor v. Bahar Idriss Abu Garda, ICC-02/05-02/09-255, Decision on Applications a/0655/09, a/0656/09, a/0736/09 to a/0747/09, and a/0750/09 to a/0755/09 for Participation in the Proceedings at the Pre-Trial Stage of the Case, 19 March 2010, para. 10.

credibility of the [applicants'] statement[s] or engaging in a process of corroboration stricto sensu,*' but will assess the* ***applicants' statements first and foremost on the merits of their intrinsic coherence****, as well as on the basis of the information otherwise available to the Single Judge.'"*[73]

67. Following this, the Pre-Trial Chambers of the ICC accords the procedural status as Victim to an Applicant first and foremost based on the **statement** of the Applicant if this is intrinsically coherent. Numerous Applicants simply submit their story without giving further evidence that the event happened, for example that their house was destroyed or their relatives attacked and disappeared. The simple statement is sufficient for the assessment if it is as such conclusive and corroborates with generally available (UN) information.

c. *ICC standard of proof for Applicants applying in the trial stage*

68. In its landmark decision TC I at the ICC ruled that the Trial Chamber decides on a victim's application to participate in the proceedings before or during trial (or both) by examining the criteria of Rule 85 of the RPE and Article 68(3) of the Rome Statute.[74]

According to Rule 85, TC I of the ICC examines whether the Applicant is a natural or legal person who suffered "[a]ny harm of a crime within the jurisdiction of the Court." TC I stresses that only Rule 85(b) (related to legal entities) requires a direct link between the harm allegedly suffered and the crime, whereas Rule 85(a) (related to natural persons) does not include that stipulation. It follows that "[p]eople can be direct or indirect victims of a crime **within the jurisdiction of the Court**."[75]

69. TC I notes that Rule 68(3) of RPE requires that the personal interests of victims must be affected in order to grant participation rights and requires a link between the victim and the evidence heard against the charged person.[76] (Emphasis added)

The standard of proof to be applied before the Trial Chamber is, like in the pre-trial phase, that the Chamber will ensure "[t]hat there are ***prima facie*****, credible grounds** for suggesting that the applicant has suffered harm **as a result of a crime committed within the jurisdiction of the Court**. The Chamber will assess the **information**

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[73] See supra note 56, Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case, ICC-01/04-01/07-579, 10 June 2008, para 67.
[74] Situation in the Democratic Republic of the Congo, Prosecutor v. Thomas Lubanga Dyilo, Decision on victims' participation, ICC-01/04-01/06-1119, 18 January 2008, paras. 87 and 90.
(The decision was appealed but the appeal did not affect the ruling on the applicable standard of proof).
[75] *Ibid.*, para. 91.
[76] *Ibid.*, para. 95.

included in the victim's application form and his or her statements (if available) to ensure that the necessary link is established." [77] (Emphasis added)

70. To conclude, Co-Lawyers for Civil Parties submit that the ICC jurisprudence regarding the standard of proof for affording the procedural status of a victim is as follows:

For the pre-trial and trial stage the Chambers decides first and foremost on the content of the statement of the Applicant with a *prima facie* standard. If the statement is conclusive and intrinsically coherent and if UN information corroborates the account or at least do not contrast it, this is sufficient evidence to believe that the person complies with the requirement of Rule 85 of the RPE of the ICC.

In the absence of any law or Internal Rule on the applicable standard of proof before the ECCC, Co-Lawyers for Civil Parties will refer to the above outlined jurisprudence of the ICC in this regard and apply this standard on those whose rejections were dismissed on the basis that they did not prove a required fact.

2. THE REJECTION OF THE APPLICATION OF MS. LEANG KAN (E2/35) RELATED TO THE STANDARD OF PROOF

71. Co-Lawyers for Civil Parties assert that the TC applied a wrong standard of proof by rejecting the application of Ms. LEANG Kan. By doing this the TC violated the applicable governing procedural standards, which invalidates the judgment as it relates to the rejection.

72. Ms. LEANG Kan's application (E2/35) was rejected by the Trial Chamber for the reason that "[i[t has not been established that the photograph of the detainee provided in support of her application is in fact her nephew NHEM Chheuy."[78]

In order to additionally justify the rejection, the TC referred to the closing statement of Co-Lawyers for Civil Parties and noted that according to this "[t]he search for further information proved fruitless."[79]

73. Co-Lawyers for Civil Parties note that the following was said in the closing statement:

> *"She could not receive any further information about him in the current proceedings and all research she has done so far was not successful. Due to the lack of further information she still lives with huge uncertainty."*[80]

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[77] *Ibid.*, para. 99.
[78] See supra note 1, para 648 (p.226).
[79] *Ibid.*, footnote 1097 of the Judgment.
[80] T. 23 November 2009, p.49, l. 6-9.

The foregoing description refers to the lack of further information about the fate of her nephew in S-21; the torture methods that were applied on him; whether or not he made a confession, and if so the content of the confession; in which cell he was held and for which reasons; and when and how exactly he died.

It was **not** expressed that Ms. LEANG Kan could not submit enough information to establish that she is a victim of a crime within the jurisdiction of the ECCC who suffered as a direct consequence of the offence mental harm. This is an error in fact by the TC that should invalidate Ms. LEANG Kan's rejection.

74. Applying the standard of the ICC, the application form and her statement therein has to be examined. In this form she submits, after telling in great detail what happened to her during the DK period, in relation to her nephew NHEM Chheuy:

> *"On 27 May 2008, when I was visiting Tuol Sleng prison under the coordination of the Center for Social Development, I saw a photo of my nephew named NHEM Chhoeuy, No. 567. Suddenly I fell overwhelmed with emotion. It made me so heartbroken that I had to find a place to cry. It makes me realize how miserably my nephew died in this Tuol Sleng prison."*

75. By giving this statement she **identified** her nephew, whom she lived together with and raised as a child because he was an orphan. Furthermore, she added how shocked she was and described her emotions when she discovered his photograph. The photograph of the visit in Tuol Sleng was attached to her application form. It is clearly visible that she is crying in that photograph.

Co-Lawyers for Civil Parties submit that this statement is conclusive and intrinsically coherent, and there are no discernible indications that her identification does not meet a preponderance standard.

Thus, Ms. LEANG Kan's statement about the identification process is fully sufficient to establish that the photograph of the prisoner with number 567 is her nephew, Mr. NHEM Chhoeuy.

76. On 27 August 2009, the Trial Chamber directed Co-Lawyers for Civil Parties as follows:

> *"...Civil Parties whose applications have been challenged shall submit additional evidential material to the Chamber to show the relevancy between the civil parties and the victims in the case 001."*[81]

[81] T. 27 August 2009, p. 2, l. 18-21.

Further guidance was not given. This general direction is insufficient and does not outline the criteria for assessing an application. In addition the language used is again confusing while calling Civil Party Applicants "Civil Parties."

Thus, in the absence of any criteria as to what the standard of proof before the Trial Chamber is, Co-Lawyers for Civil Parties submit that it was not foreseeable that the Chamber could doubt this strong evidence of identification and would reject the application.

77. Therefore, Supreme Court Chamber is respectfully requested for leave to submit a supporting document. This is the confirmation letter of Ms. LEANG Kan's older sister, Ms. CHHAY Kaen, that the prisoner on the submitted photograph with the number 567 is Mr. NHEM Choeuy. She lived in the same village as Ms. LEANG Kan and her nephew Mr. NHEM Chhoeuy, whom she clearly knew and recognized as having been raised by the Civil Party Applicant.

3. THE REJECTION OF THE APPLICATION OF MS. HONG SAVATH (E2/83) RELATED TO THE STANDARD OF PROOF

78. The TC applied the wrong standard of proof by rejecting the application of Ms. HONG Savath. By doing this the TC violated the applicable governing procedural standards, which invalidates the judgment related to the rejection.

79. The Trial Chamber rejected the application of Ms. HONG Savath (E2/83) for two reasons. First, TC concluded that no documentary evidence was submitted as proof of her uncle's detention in S-21. In particular, that the photograph of her uncle that she claims to have seen at Tuol Sleng museum was not filed. Secondly, the TC rejected her application for lack of evidence of any *"special bonds of affection."*[82]

80. In this section of the Appeal, Co-Lawyers for Civil Parties deal only with the first ground for rejection which concerns the standard of proof.

As outlined above in paragraphs 63-70 of this Appeal, Co-Lawyers for Civil Parties apply the standard of proof of the ICC and will first consider the statement of the Civil Party Applicant, and then other evidence submitted by Ms. Hong Savath.

Ms. Hong Savath reported that in 2008 she saw a photograph in Tuol Sleng in which she identified her uncle, Mr. LOEK Sreng. This photograph was submitted to the Court. This statement is clear, conclusive and without contradictions. Therefore this statement of identification of her uncle is the proof that he was detained at S-21.

[82] See supra note 1, para. 648, emphasis added.

In addition, Mr. LOEK Sreng's brother, Mr. YOU Hong, confirmed that Mr. LOEK Sreng is the uncle of Ms. HONG Savath.

81. Therefore, Co-Lawyers for Civil Parties submit that Ms. HONG Savath first and foremost submitted **through her statement** sufficient evidence to substantiate that Mr. LOEK Sreng is her uncle, and that he was detained in S-21, because she found his photo in the Tuol Sleng museum. This evidence is corroborated by the confirmation letter of YOU Hong and by the photograph from Tuol Sleng. In addition, Co-lawyer Mr. HONG Kimsuon confirmed on behalf of Ms. HONG Savath that the submitted photograph was taken in Tuol Sleng.[83]
82. Co-Lawyers for Civil Parties include by reference paragraph 69 of this Appeal.

    The Supreme Court Chamber is respectfully requested for leave to submit a supporting document, this being another confirmation letter of Mr. YOU Hong, the brother of Mr. LOEK Sreng, and the person who had taken the photograph in Tuol Sleng. He confirms that the submitted photograph shows his brother Mr. LOEK Sreng as a detainee in S-21.

4. THE REJECTION OF THE APPLICATION OF MS. NAM MON (E2/32) RELATED TO THE STANDARD OF PROOF

83. The TC applied the wrong standard of proof by rejecting the application of Ms. NAM Mon. By doing this the TC violated the applicable governing procedural standards, which invalidates the judgment related to the rejection.
84. The TC rejected the application of Ms. NAM Mon because of (i) inconsistencies in her application form, in-court statement and later submission; and (ii) not having established that the photographs of detainees are her relatives. This section only deals with the second reason related to the standard of proof.
85. Co-Lawyers for Civil Parties refer and include by reference to paragraphs 50-70 of this Appeal. Ms. NAM Mon added in her in-court statement that she and her brothers worked at S-21; and in a later submission she added that she was raped during her detention by a guard. Adding facts is not per se inconsistent if the omission was reasonable and understandable under the circumstances. Ms. NAM Mon explained that she did not dare to disclose in her application form that she and her brothers worked in S-21, which was understandable at the time when she submitted the form in

[83] T. 27 August 2009, p. 8, l. 13-14.

July 2008. Many Victims at this time, including Ms. NAM Mon, were still afraid that they would be the target of reprisals if they admitted that they were part of the prison system at S-21.

The omission at first of the fact that she had been raped is also understandable because of the lasting trauma of the experience and because she was ashamed to talk about it. These are not inconsistencies. They are reasonable and understandable omissions given the circumstances that should not invalidate Ms. NAM Mon's initial statement. Thus her declaration of identification of her family members is sufficient evidence to demonstrate that her father, mother and brothers were detained in S-21.

86. Co-Lawyers for Civil Parties include by reference paragraph 69 of this Appeal.

The Supreme Court Chamber is respectfully requested for leave to submit a supporting document, this being a confirmation letter of the commune chief who confirmed that the father of Ms. NAM Mon is depicted in one of the submitted photos.

D. THIRD GROUND OF APPEAL

The Rejection of Civil Party Applicant E2/83 is based on an error of fact which has occasioned a miscarriage of justice by ignoring the fact that a photograph of the direct Victim as detainee was submitted

87. The TC rejected the application of Ms. HONG Savath *inter alia* because she did not submit the photograph of her uncle as detainee in S-21. The TC states:

> *"She claims to have recognized him in a photograph she saw in 2008 during a visit to the Tuol Sleng Museum. However, neither this photograph nor any documentary evidence was provided as proof of her uncle's detention at S-21."*[84]

88. This is incorrect and is an error of fact. The TC overlooked and did not consider the most important piece of evidence submitted by the Civil Party Applicant in support of her statement—the photograph of her uncle, LOEK Sreng, taken at Tuol Sleng museum. In addition, Co-Lawyer Mr. HONG Kimsuon informed the TC on behalf of Ms. HONG Savath that this photo was taken in Tuol Sleng.[85]

89. Co-Lawyers for Civil Parties submit that the TC rejection order is based on this error of fact. If the TC had not overlooked this photograph, then the TC would have had to acknowledge that the Applicant had submitted evidence beyond her statement and that she had seen the photograph of her uncle in Tuol Sleng.

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[84] See supra note 1, para. 648.
[85] See supra note 36.

90. This error in fact leads to a miscarriage of justice as it deprived Ms. HONG Savath of the status of a Civil Party and from reparations.

E. FOURTH GROUND OF APPEAL

The Rejection of Civil Party Applicants E2/64, E2/22 and E2/83 is based on an error on a question of law/Internal Rules invalidating the judgment by violating IR 23(2) through demanding the requirement of "special bond of affection".

1. PERSONAL HARM AS A DIRECT CONSEQUENCE OF THE CRIME

91. The TC rejected the Civil Party Applicants E2/83, E2/22 and E2/64 because they did not prove a "special bond of affection."[86] By doing this TC violated IR 23(2) (Rev.3) by demanding the requirement of a "special bond of affection" with no basis for this.

92. IR 23(2) stipulates the following requirements to be admissible as a Civil Party:

> *"The right to take civil action may be exercised by Victims of a crime coming within the jurisdiction of the ECCC, (...) 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."*

93. Three main elements must be demonstrated and established by the Applicant:

(i) existence of injury;

(ii) direct consequence of the crime;

(ii) harm must be personal;

94. The Internal Rules do not mention that a kinship should exist or that a "bond of affection" must be demonstrated. These elements might provide an indicator—no more and no less—that substantiates that the victim suffered harm as a direct consequence of the crime. But they cannot amount to the mandatory prerequisite which must be demonstrated in order to become a Civil Party.

95. Likewise, the ICC does not necessarily require a kinship as a prerequisite to demonstrate suffering from emotional harm, but it points out that the standard of proof is higher for more distant family or from outside the family circle.[87]

96. In addition, Rule 85(a) of the RPE of the ICC does **not** require that the harm be a **'direct'** consequence[88]. This is in accordance with the definition of the term "victim"

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[86] See supra note 1: HONG Savath at p. 227-228; Choeum Sitha at p. 228; Nheb Kimsrea at p. 229.

[87] See supra footnote 41, Situation in Darfur, Sudan, Prosecutor v. Bahar Idriss Abu Garda, para 30. "As such emotional harm is less apparent in the case of persons from a more distant family or from outside of the family circle, more information and/or evidence would be required to substantiate the claim that the relationship of the applicant and the deceased person was of such a nature that the death of that person caused emotional harm to the applicant and/or resulted in a loss of economic support."

in the Glossary of the Internal Rules and which is identical with the definition of the RPE of the ICC. Thus, the harm suffered does not need to be a "**direct** result of the commission of any crime within the jurisdiction."

However, IR 23(2) at the ECCC purports to require as admissibility criteria for becoming a Civil Party that the harm that the victim has suffered appears as a "***direct* consequence of the offence.**"

97. In defining the prerequisite that the harm has to be a ***direct*** consequence of the crime/offence, the Trial Chamber established in principle that harm can be suffered by attenuated family relationships and that "[h]arm alleged by members of a victim's extended family **may in exceptional circumstances** amount to a direct and demonstrable consequence of the crime." [89] As a necessary condition, the Trial Chamber requires that "the applicants prove both the **alleged kinship** and the **existence of circumstances giving rise to special bond of affection** or dependence of the deceased." [90]

98. The TC reverts to the kinship and special bond of affection in order to give weight to the requirement of "personal harm being a direct consequence of the crime[91]."

99. While such criteria may be relevant for the purpose of determining an appropriate reparation order, Co-Lawyer for Civil Parties submit that "kinship" and "special bond of affection" should not be accorded as much weight in the determination of admission as a Civil Party because these are merely indicators for demonstrating a direct link between harm and offence. More importantly, these two elements are not specifically required by the applicable Law/Internal Rules as criteria for admissibility.

100. Referring to the ICC standard for purposes of participation, PTC II of the ICC adopted a similar approach as PTC I and ruled:

> *"The Single Judge will therefore refrain from analyzing the various theories on causality and will instead adopt a pragmatic, strictly factual approach, whereby the alleged harm will be held as "resulting from" the alleged incident when the spatial and temporal circumstances surrounding the appearance of the harm and the occurrence of the incident seem to overlap, or at least to be compatible and not clearly inconsistent....*
> *Similarly to the method followed by Pre-Trial Chamber I, the Single Judge will therefore assess each statement by applicant victims first and foremost on the merits of its intrinsic coherence, as well as on the basis of information otherwise available*

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[88] Rule 85 (a) of the RPE states: "'Victims' means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court."
[89] See supra note 1, para. 643.
[90] *Ibid.*
[91] See Internal Rule 23 (2).

to the Chamber."[92]

101. The Appeal Chamber of the ICC acknowledges direct and indirect victims and ruled:

> *"The issue for determination is* ***whether the harm suffered is personal to the individual. If it is, it can attach to both direct and indirect victims.*** *Whether or not a person has suffered harm as the result of a crime within the jurisdiction of the Court and is therefore a victim before the Court would have to be determined in light of the particular circumstances."*[93]

102. The TC of the ECCC erroneously required elements such as kinship and special bond of affection because the Internal Rules do not require them. The Applicant must only demonstrate that s/he suffered harm as a direct consequence of the crime. In doing so, the Chamber violated IR23(2), and made an error of law that should invalidate the judgment.

2. THE INDIVIDUAL CASES OF APPLICANTS E2/64, E2/22 AND E2/83

103. Following this approach it is necessary and sufficient for the purpose of admissibility that the Victim suffered harm *because* of the death of the direct victim. All three rejected Applicants, E2/64, E2/22 and E2/83, submitted sufficient evidence that they suffered harm because of the killing of their relatives.

104. On behalf of Ms. NHEB Kimsrea Co-Lawyers for Civil Parties submitted:

> "Ms. NHEB Kimsrea learned from her parents about the fate of a part of the family. Her parents had a strong relationship with Mr. CHEAB Baro and his family and the suffering of her parents accompanied her during her life. Having lost a significant part of her family under horrible circumstances in S-21, she grew up rather alone and missed her uncle, aunt and cousins. She
> wants to memorialize her family by representing them in the proceedings."[94]

105. Ms. NHEB Kimsrea lives with her elderly father, who is the brother of the deceased victim. An additional confirmation letter[95] describes how her father and his family lived together with the deceased and his family. The Civil Party Applicant is the only person who is capable of representing the family before the ECCC. She is on a daily basis confronted with the suffering of her father, which causes harm directly to her.

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[92] Situation in Uganda, 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/0111/06 to a/0127/06, ICC-02/04.101, 10 August 2007, paras. 14-15. The Appeal Chamber did not overturn the decision in this regard.
[93] Situation in the Democratic Republic of the Congo, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-1432, 11 July 2008, para. 32. Emphasis added.
[94] Closing statement, T. 23 November, p. 48, l. 6-14.
[95] See confirmation letter in the Annex.

For a comparison, second-generation of Holocaust survivors' suffering is acknowledged as proper suffering and is a 'personal' suffering of an indirect victim.[96] Such cases of second-generation Holocaust survivors, is not under discussion yet at the ICC because the criminal incidents are much fresher than those before the ECCC.

106. In addition, the Applicant clearly declared that her suffering, which results from the loss of her uncle and his family, continues until today. She further adds that she wants to have a funeral for the deceased persons.[97] This demonstrates that there must be a "bond of affection" that the Applicant expressed by requesting as reparation the financial means for a funeral. As there are no contradicting facts, Ms. NHEB Kimsrea's statement about her personal suffering resulting from the crime against the direct victims is coherent and conclusive and is proof as such in light of the ICC jurisprudence.

107. Ms. HONG Savath personally suffered harm due to the loss of her uncle Mr. LOEK Sreng, who lived near to her in the same village. She submits in addition a confirmation letter of her uncle, Mr. YOU Hung, who confirmed that she suffered after having discovered the photograph of Mr. LOEK Sreng in Tuol Sleng museum, and that she held a ceremony with her uncle YOU Hung and her cousin who came from France. The statement of the victim alone, which is consistent and plausible, demonstrates that she complies with the requirement of Internal Rule 23(2).

108. Mr. CHHOEM Sitha describes his suffering in the application form and states that he suffered pain because of the killing of his comrades of Division 310, including the killing of his nephew KAUV Phala, with whom he joined the army at the same time. The statement of the victim is consistent and plausible, and there is no discernible contradiction. He demonstrates that his suffering is personal and a direct result of the crime against his nephew and the other comrades from Division 310. Thus, the Applicant complied with the requirement of the Internal Rules. Additionally, his sister's confirmation letter affirmed the close relationship between CHOEM Sitha and KAUV Phala: they were about the same age, they grew up together, and they both enlisted in the army after long deliberations about whether to join or not.

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[96] For example with further references: D. Harvery, Intergenerational Transmission of Trauma from Holocaust Survivors to their Children, at http://michaelaanavi.com/articles_files/transmission-from-holocaust-survivors-to-their-children---diane-harvey.pdf, pp.6-7. Last accessed on 13 October 2010.

[97] See page 3 of the VIF, ERN 00364540.

109. Co-Lawyers for Civil Parties submit that the three Applicants E2/32, E2/22 and E2/64 comply with the requirement of the Internal Rules; this is demonstrated first and foremost by their statements that they suffered harm as a direct consequence of the killing of their relatives, and these statements are confirmed by third-party statements as well.

V.CONCLUSION AND REQUEST

110. For all the foregoing reasons, Co-Lawyers for Civil Parties submit that both the Trial Chamber's erroneous interpretation of the Internal Rules amounting to errors of law and its errors of fact occasioning miscarriages of justice should invalidate the judgment related to the rejection of these Civil Party Applicants' Applications.

Co-Lawyers for Civil Parties therefore respectfully request,

- To declare the Appeal admissible;
- To accept additional supporting documents;
- To overturn the rejection order against the Civil Party Applicants Ms. NAM Mon (E2/32), CHHAY Kan alias LEANG Kan (E2/35), Ms. HONG Savath (E2/83), Mr. CHHOEM Sitha (E2/22) and Ms. NHEB Kimsrea (E2/64) and to admit them as Civil Parties in case 001.

Mr. HONG Kimsuon

Mr. KONG Pisey

Mr. YUNG Phanit

Ms. Silke STUDZINSKY

Signed in Phnom Penh, Kingdom of Cambodia on this 22 October 2010.