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

ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia
Nation Religion King

Royaume du Cambodge
Nation Religion Roi

D 364/1/6

អង្គបុរេជំនុំជម្រះ
Pre-Trial Chamber
Chambre Préliminaire

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 (PTC 47 and 53)

PRE-TRIAL CHAMBER

Before: Judge PRAK Kimsan, President
Judge Rowan DOWNING
Judge NEY Thol
Judge Catherine MARCHI-UHEL
Judge HUOT Vuthy

Date: 1st July 2011

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PUBLIC

DECISION ON THE RECONSIDERATION OF THE ADMISSIBILITY OF CIVIL PARTY APPLICATIONS

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D 364/1/6

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THE PRE-TRIAL CHAMBER OF THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA (“ECCC”) was seised of the Appeals¹ filed by the Co-Lawyers for the Civil Parties against the respective Orders of the Co-Investigating Judges on admissibility of the Applications filed by Victims in order to become Civil Parties to the proceedings in Case 002 on which the Pre-Trial Chamber rendered its Decisions on 24 June 2011.² In the course of considering these appeals the Majority of the Pre-Trial Chamber (the “Majority”) noted that, unlike the 15 Vietnamese Civil Parties who filed, with Appeal PTC74, a request for reconsideration, a number of parties who had previously appealed to it respectively in appeals PTC 47 and PTC 53 and who had been rejected had not filed requests for reconsideration³ of the decisions on such appeals.

I. BACKGROUND

1. On 23 June 2011 the Majority of the Pre-Trial Chamber, noting that “its previous decisions on appeals PTC47 and PTC53 which were filed against Co-Investigating Judges’ Orders on admissibility of Civil Party Applicants had the effect of excluding [some applicants] on erroneous legal basis,” determined that it should consider whether it should reconsider the previous decisions it had made on the appeals PTC47 and PTC53 involving the following Civil Party Applicants respectively:

11 Khmer Krom Civil Party Applicants identified as follows: 09-VU-02138 (D230/2/15 formerly D22/260); 09-VU-02151 (D230/2/22 formerly D22/273); 09-VU-02150 (D230/2/21/1 formerly D22/272); 09-VU-02148 (D230/2/20 formerly D22/270); 09-VU-02147 (D230/2/19 formerly D22/269); 09-VU-02146 (D230/2/18 formerly D22/0268); 09-VU-02144 (D230/2/17 formerly D22/266); 09-VU-02143 (D230/2/16 formerly D22/265); 09-VU-00638 (D230/2/9 formerly D22/134); 09-VU-02267 (D230/2/10 formerly D22/135); 09-VU-04265 (D230/2/23 formerly D22/274) and

Civil Party applicant 09-VU-00882 (D230/2/6 formerly D22/288)

¹ PTC73, PTC74, PTC 76, PTC112, PTC113, PTC114, PTC115, 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, PTC142, PTC143, PTC144, PTC148, PTC149, PTC150, PTC151, PTC153, PTC154, PTC155, PTC156, PTC157, PTC158, PTC159, PTC160, PTC161, PTC162, PTC163, PTC164, PTC165, PTC166, PTC167, PTC168, PTC169, PTC170, PTC171 and PTC172.

² See Decisions on Appeals against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, 24 June 2011, D404/2/4 and D411/3/6.

³ See Decision on Appeals against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, 24 June 2011, D404/2/4, para. 117.



2. On 23 June 2011 the Pre-Trial Chamber directed all parties that “any Parties who may wish to make any submission concerning this matter may do so by 3 pm on 27 June 2011.”⁴

3. On 27 June 2011 the Lawyers for the concerned Civil Party Applicants submitted their responses to the Pre-Trial Chamber’s Directions.⁵ These responses were notified immediately to the other parties with an instruction to file a reply, if any, within two days of notification.

4. No replies have been received.

5. In their responses to the Directions the Civil Party Lawyers ask the Pre-Trial Chamber to reconsider its earlier decisions, to admit and to grant to the concerned Civil Party Applicants the status of Civil Parties in Case 002.

Pre-Trial Chamber’s test for reconsideration:

6. In its previous jurisprudence, the Pre-Trial Chamber has applied the following test for reconsideration:

“25. The Application for Reconsideration may only succeed if there is a legitimate basis for the Pre-Trial Chamber to reconsider its previous decisions.⁶ The Appeals Chamber of the ICTY has held that a Chamber may “always reconsider a decision it has previously made, not only because of a change of circumstances but also where it is realized that the previous decision was erroneous or that it has caused an injustice.”⁷ This has been

⁴ Directions on the Reconsideration of the Admissibility of Civil Party Applicants, 23 June 2011, D364/1/4, D274/4/6 and D250/3/2/1/6.

⁵ Response to the Direction on Reconsideration of the Admissibility of Khmer Krom Civil Party Applications, D250/3/2/1/7, 27 June 2011 (“Khmer Krom Applicants’ Request”); and Demande de reconsideration de la recevabilite de la demande de constitution de partie civile 09-VU-00882 (D230/2/6 autrefois D22/288), D364/1/5, 27 juin 2011 (“D22/288’s Request”).

⁶ Prosecutor v. Milosevic, IT-02-54-T, “Decision on Prosecution Motion for Reconsideration regarding Defence Witnesses Mitar Balevic, Vladislav Jovanovic, Vukasin Andric, and Dobro Aleksovski”, 17 May 2005, para. 6.

⁷ Prosecutor v. Galic, IT-98-29-AR73, “Decision on Application by Prosecution for Leave to Appeal,” 14 December 2001, para. 13, and Prosecutor v Mucic et al, TT-96-21-Abis, “Judgment on Sentence Appeal”, 8 April 2003, para. 49.



described as an inherent power⁸ and is particularly important for a judicial body of last resort like the Pre-Trial Chamber. A change of circumstances may include new facts or arguments.⁹ The standard for reconsideration has also been described as follows: "a Chamber has inherent discretionary power to reconsider a previous interlocutory decision in exceptional cases 'if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent injustice"^{10,11}

Civil Party Lawyers' submissions in support of their requests for reconsideration:

7. The Civil Party Lawyers for the Khmer Krom Civil Party Applicants, adopting and incorporating "in full the arguments made in their Appeal PTC47," ask that "the Khmer Krom Applicants in question be joined as Civil Parties in the interests of fairness and equal treatment of like cases."¹² They submit that "the Co-Investigating Judges Admissibility Order¹³ erroneously rejected the Khmer Krom Applicants on the ground that the "necessary causal link between the alleged injury and the facts under investigation were not established by the applicants"¹⁴ and note that their clients would have no opportunity to pursue this matter further as the Pre-Trial Chamber is the only way to redress the effects of its decision on the First Admissibility Appeal.¹⁵ The Civil Party Lawyers submit that they agree with the Pre-Trial Chamber's Direction and submit that the Khmer Krom Applications must be reconsidered in light of the "broader admissibility criteria" that the majority of the Pre-Trial Chamber laid down in its Decision of 24 June 2011.¹⁶

8. The Civil Party Lawyers for D22/288 refer the Pre-Trial Chamber to their submissions on appeal against the Co-Investigating Judges' Order of 23 February 2010 which found

⁸ Prosecutor v. Galic, IT-98-29-A, "Decision on Defence's Request for Reconsideration", 16 July 2006, p. 2.

⁹ Prosecutor v. Galic, IT-98-29-A, "Decision on Defence's Request for Reconsideration", 16 July 2006, p. 2.

¹⁰ Prosecutor v. Milutinovic et al., IT-05-87-T, "Decision on Prosecution Motion Prosecution Motion for Additional Trial-Related Protective Measure for Witness K56", 9 November 2006, para. 2.

¹¹ Decision on Application for Reconsideration of Civil Party's Right to Address the Pre-Trial Chamber in Person, 28 August 2008, C22/I/68, para. 25 (footnotes not omitted for ease of reference).

¹² Khmer Krom Applicant's Request, para. 7.

¹³ Khmer Krom Applicant's Request, para. 6, referring to paragraph 19 of the Co-Investigating Judges' Order on the Admissibility of Civil Party Applications Related to Request 250/3, 13 January 2010, D250/3/2.

¹⁴ Khmer Krom Applicant's Request, para 6.

¹⁵ Khmer Krom Applicant's Request, para. 8.

¹⁶ Khmer Krom Applicant's Request, paras. 3 and 4.

Decision on the Reconsideration of the Admissibility of Civil Party Applicants



D22/288's application inadmissible. They encourage the Pre-Trial Chamber to re-examine the application of D22/288 on the new grounds as indicated in the Pre-Trial Chamber's decisions of 24 June 2011 on the Civil Party Appeals.¹⁷

Pre-Trial Chamber's Considerations on the reconsideration requests:

9. In relation to the request of the Khmer Krom Applicants, having found that the previous decisions on such applications applied the wrong legal criteria in finding them inadmissible,¹⁸ the Majority considers that there is sufficient cause for reconsideration of the previous decisions on these Civil Party applications. These applications shall be reviewed pursuant to the admissibility test applied by the Majority of the Pre-Trial Chamber in its decisions of 24 June 2011 for all the other Civil Party applicants.¹⁹

10. The Majority notes that the request for reconsideration refers, by way of incorporation, to the arguments for admissibility set out by the Co-Lawyers in their Appeal lodged in PTC 47. In their Appeal, the Co-Lawyers stated in essence that the alleged crimes of genocide and certain crimes against humanity alleged in the Introductory and Supplementary Submissions are persecution-based crimes that target particular groups and that the Khmer Rouge targeted the Khmer Krom Civil Party Applicants because of their perceived Vietnamese nationality/ethnic traits.²⁰ They made no specific arguments in relation to the individual applicants, except for one, namely Civil Party Applicant 09-VU-02147. The Majority considers that the general arguments raised by the Co-Lawyers in respect of the admissibility of their clients' civil party applications are insufficient to determine the matter in the light of the admissibility criteria set out by the Pre-Trial Chamber in its Decisions on Civil Party Appeals. The mere assertion by a lawyer that his or her client was victim of persecution is not sufficient in and of itself for an applicant to be admitted on this basis, without any reference to the actual application. Therefore, the Majority considers it appropriate to review and assess

¹⁷ D22/288's Request, paras. 6-8.

¹⁸ Decision on Appeals against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, 24 June 2011, D404/2/4, paras. 101-105 and 113.

¹⁹ Decision on Appeals against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, 24 June 2011, D404/2/4 and D411/3/6

²⁰ Appeal against Order on the admissibility of civil party applications related to request D250/3, 12 February 2010, D250/3/2/1/1, para. 1(b)(ii)-(iv).



de novo the individual applications to determine whether the applicants allege having suffered harm as a result of a crime that forms part of one of the five policies put in place by the Khmer Rouge, as it has done in its Decisions on Civil Party Appeals.

11. In relation to the application of Civil Party applicant D22/288, which was dealt with in the Pre-Trial Chamber's previous decision on Appeal PTC53,²¹ the Majority notes that in its decision on that Appeal it could not reach a majority of four affirmative votes of at least four judges in order to make a decision on the issues raised in the Appeal, therefore the Co-Investigating Judges' Order declaring Civil Party applicant D22/288 inadmissible became final. The Co-Investigating Judges' reasons for rejecting this Applicant were that she offered no proof of a direct link between the alleged injury and the *facts under investigation*.²² The Majority finds that this clear error in the reasoning of the Co-Investigating Judges for this rejection warrants the reconsideration of the application of Civil Party applicant D22/288 afresh on the basis of the general considerations of the majority of the Pre-Trial Chamber in its decisions of 24 June 2011 on the Civil Party appeals.

INDIVIDUAL ASSESSMENT OF CIVIL PARTY APPLICATIONS:

12. The Majority finds in respect of each of the Khmer Krom Civil Party Applicants that it is more likely than not to be true that they have suffered harm as a result of a crime committed in furtherance of one of the five policies allegedly implemented by the Khmer Rouge, as detailed below:

Civil party applicant rejected by the CIJs	Admissibility finding	Immediate victim
09-VU-02138 (D22/260) (D230/2/15)	Enslavement in Takeo province	Applicant
09-VU-02151 (D22/273)	Enslavement in Chum Net village, probably now located in Banteay Meanchey province	Applicant and his family

²¹ Decision on Appeal against the Order Declaring Civil Party Application D22/288 Inadmissible, D364/1/3, 1 June 2010.

²² Co-Investigating Judges Order Declaring Civil Party Application D22/288 Inadmissible, 13 January 2010, D364.

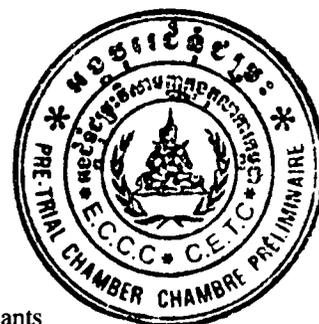
Decision on the Reconsideration of the Admissibility of Civil Party Applicants



(D230/2/22)		
09-VU-02150 (D22/272) (D230/2/21/1)	Enslavement in Ta Lou subdistrict, Pursat province	Applicant
09-VU-02148 (D22/270) (D230/2/20)	Enslavement in Bakan district, Pursat province	Applicant and her family
09-VU-02147 (D22/269) (D230/2/19)	Enslavement and other inhumane acts through attacks against human dignity in Bakan district, Pursat province	Applicant
09-VU-02146 (D22/0268) (D230/2/18)	Enslavement in Bakan district, Pursat province	Applicant and her family
09-VU-02144 (D22/266) (D230/2/17)	Persecution on religious grounds against the Buddhists	Applicant's brother, a monk who was disrobed
09-VU-02143 (D22/265) (D230/2/16)	Enslavement and other inhumane acts through attacks against human dignity in Bakan district, Pursat province	Applicant
09-VU-00638 (D22/134) (D230/2/9)	Enslavement in Bakan district, Pursat province	Applicant and his family
09-VU-02267 (D22/135) (D230/2/10)	Torture, enslavement and persecution on political grounds at Peam Nil prison, in Battambang province	Applicant, a soldier accused of being related to the Lon Nol regime
09-VU-04265 (D22/274) (D230/2/23)	Enslavement in Moug Ruessei district, Battambang province	Applicant's parents

13. For the general reasons provided in the decision of the majority of the Pre-Trial Chamber in its decision notified on 24 June 2011, the Majority finds that the Applicant in PTC 53 shall be admitted as it is more likely than not to be true that the Civil Party Applicant 09-VU-00882 (D230/2/6 formerly D22/288) was a victim of the implementation of the policy of "the reeducation of "bad elements" and killing of "enemies" both inside and outside the Party ranks."²³ As a consequence she shall be admitted as Civil Parties to Case 002.

²³ See paragraph 157 of the Closing Order.

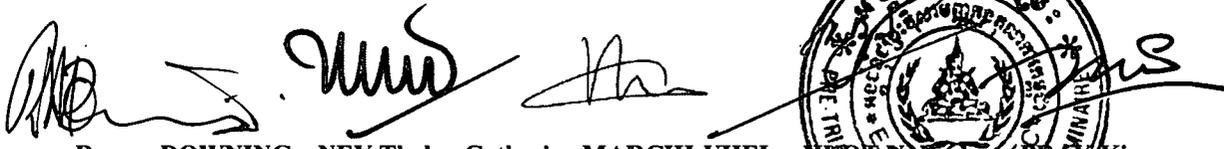


THEREFORE THE PRE-TRIAL CHAMBER DECIDES:

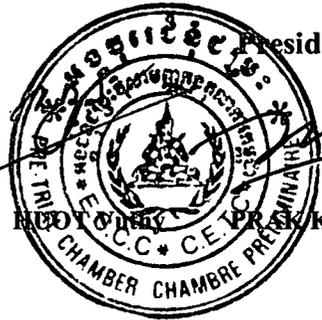
1. By Majority, Judge Marchi-Uhel dissenting, to admit and to grant the status of Civil Parties in Case 002 to the Civil Party Applicants identified as follows: 09-VU-02138 (D230/2/15 formerly D22/260); 09-VU-02151 (D230/2/22 formerly D22/273); 09-VU-02150 (D230/2/21/1 formerly D22/272); 09-VU-02148 (D230/2/20 formerly D22/270); 09-VU-02147 (D230/2/19 formerly D22/269); 09-VU-02146 (D230/2/18 formerly D22/0268); 09-VU-02144 (D230/2/17 formerly D22/266); 09-VU-02143 (D230/2/16 formerly D22/265); 09-VU-00638 (D230/2/9 formerly D22/134); 09-VU-02267 (D230/2/10 formerly D22/135); 09-VU-04265 (D230/2/23 formerly D22/274)
2. By Majority, Judge Marchi-Uhel dissenting, to admit and to grant the status of Civil Party in Case 002 to Civil Party Applicant 09-VU-00882 (D230/2/6 formerly D22/288).

Phnom Penh, 1st July 2011

Pre-Trial Chamber



 Rowan DOWNING NEY Thol Catherine MARCHI-UHEL President Kimsan



Judge Catherine Marchi Uhel appends a dissenting opinion.

DISSENTING OPINION OF JUDGE MARCHI-UHEL

1. I have read the opinion of the majority of judges (the “Majority”) in the Decision on Reconsideration of the Admissibility of Civil Party Applications. I consider that the Majority decision to reconsider the Civil Party Applications that had been rejected in its previous decisions in cases PTC 47 and 53 is consistent with the new approach it adopted in its Decision on Appeals against Orders of the Co-Investigating Judges on the Admissibility of Civil Party applications appeals (the “Decision on Civil Party Appeals”), whereby i) it concluded that the various errors committed by the Co-Investigating Judges in the management of the admissibility regime of civil party applicants warranted a *de novo* review of the appellants’ applications²⁴ and ii) it found that it is sufficient for the applicants to state that they have suffered from one of the five policies which form the basis of the joint criminal enterprise alleged in the Indictment to be admitted as civil parties in Case File 002.²⁵
2. However, for the reasons expressed in my Separate and Partially Dissenting Opinion on the Decision on Civil Party Appeals, I disagree with the Majority that the Pre-Trial Chamber’s previous decisions had the effect of excluding on erroneous legal basis the civil party applicants currently seeking reconsideration.²⁶ My divergent opinion on the two points mentioned above leads me to conclude that a reconsideration of these applications declared inadmissible in the Decisions PTC 47 and 53 is unwarranted.²⁷ The Co-Lawyers’ request for reconsideration are based on the same arguments raised in their Appeal in PTC 47 and PTC 53, incorporated by reference in their current requests for reconsideration. As my position has not changed as to the necessary link

²⁴ See *inter alia* para. 55 of the Decision on Appeals against Orders of the Co-Investigating Judges on the Admissibility of Civil Party applications, 24 June 2011, D404/2/4 (“Decision on Civil Party Appeals”).

²⁵ See *inter alia* para. 77 of the Decisions on Civil Party Appeals.

²⁶ I do not concur either with the statement made to this effect in the Direction on the reconsideration of the admissibility of civil party applications, 23 June 2011, D250/3/1/6, para. 1.

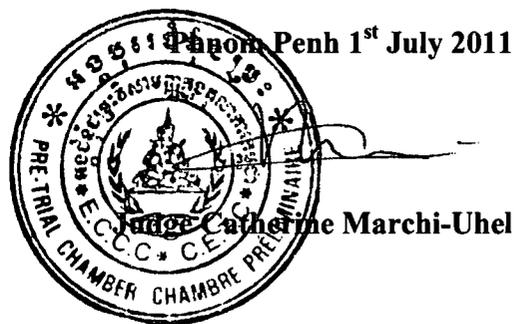
²⁷ For the same reason, I have refused to reconsider the applications of the ethnic Vietnamese who have presented a request for reconsideration in the Appeal against Order on the Admissibility of Civil Party Applicants from Current Residents of Kampong Chhnang Province (D417), 27 September 2010, D417/2/3 (“Appeal PTC 74”): Decision on Civil Party Appeal, Annex concerning civil party applicants whose applications are, in the view of Judge Marchi-Uhel, inadmissible, p. 155.



002/19-09-2007-ECCC/OCIJ (PTC 47 and 53)

D 364/116

between the alleged harm and the crimes for which the accused are indicted, I consider that there is no ground for reconsideration. Insofar as the applicant in PTC 53 is more particularly concerned, I emphasize that in addition to the opinion expressed in the Decision on PTC 53, I gave further explanations in my Dissenting Opinion as to why, in my view, this applicant could not be admitted as a civil party in Case File 002.²⁸



²⁸ Decision on Civil Party Appeals, Separate and Partially Dissenting Opinion on the Decisions on Civil Party Appeals, paras 35-36.