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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

អង្គបុរេជំនុំជម្រះ

Pre-Trial Chamber
Chambre Préliminaire

លេខ/No: D5/2/4/3

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: 004/07-09-2009-ECCC/OCIJ (PTC 02)

Before: Judge PRAK Kimsan, President
Judge Rowan DOWNING
Judge NEY Thol
Judge Katinka LAHUIS
Judge HUOT Vuthy

Date: 14 February 2012

PUBLIC REDACTED

CONSIDERATIONS OF THE PRE-TRIAL CHAMBER REGARDING THE APPEAL AGAINST ORDER ON THE ADMISSIBILITY OF CIVIL PARTY APPLICANT ROBERT HAMILL

Co-Prosecutors

CHEA Leang
Andrew CAYLEY

Lawyers for the Civil Party Applicant

SAM Sokong
Lyma Thuy NGUYEN

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THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (the “ECCC”) is seised of the “Appeal Against Order on the Admissibility of Civil Party Applicant Mr. Robert Hamill (D11/2/3) (Cases 003 and 004)”, filed by the Co-Lawyers (the “Co-Lawyers”) on 24 May 2011 (the “Appeal”).¹

I. PROCEDURAL BACKGROUND AND SUBMISSIONS

1. On 20 November 2008, the then Acting International Co-Prosecutor filed the Third Introductory Submission² with the Co-Investigating Judges requesting them to begin a judicial investigation for Case 004. This Third Introductory Submission was filed as confidential and thus not subject to access by the public, the victims and potential civil parties.³
2. On 8 April 2011, Mr. Robert HAMILL (the “Appellant”) submitted an application to the Victims Support Section of the ECCC (the “Application” and “VSS”, respectively), seeking to be admitted as a civil party in Cases 003 and 004 before the ECCC. In his Application, the Appellant claims to have suffered harm as a direct consequence of crimes committed against his brother, Mr. Kerry HAMILL, who was arrested in August 1978 by the Democratic Kampuchea Navy and subsequently transferred to the security centre S-21 where he was detained, interrogated, tortured and executed.⁴ The Appellant’s Application was submitted by the VSS to the Co-Investigating Judges on 22 April 2011.⁵
3. On 29 April 2011, the same day as they filed a Notice of Conclusion of Investigation in Case 003, the Co-Investigating Judges issued two orders, namely the “Order on the Admissibility of

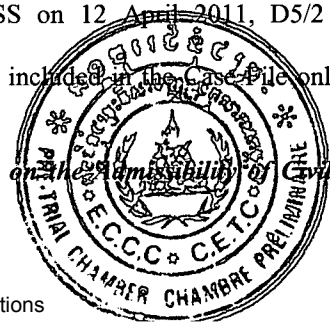
¹ Appeal Against Order on the Admissibility of Civil Party Applicant Mr. Robert Hamill (D11/2/3) (Cases 003 and 004), 24 May 2011, D5/2/4/2 (the “Appeal”).

² Co-Prosecutor’s Third Introductory Submission, 20 November 2008, D1; Acting International Co-Prosecutor’s Notice of Filing of the Third Introductory Submission, 7 September 2009, D1/1.

³ It is noted that, on 8 September 2009, the Acting International Co-Prosecutor publicly confirmed through a press statement the filing of the Third Introductory Submission (Press Release: Statement of the Acting International Co-Prosecutor, 8 September 2009).

⁴ Victim Information Form, signed on 11 April 2011 and filed with the VSS on 12 April 2011, D5/2 (the “Application”).

⁵ Application, bearing a stamp dated 22 April 2011 by the Case File Officer, but included in the Case File only on 29 April 2011, as indicated on the Filing Instructions Form.



the Civil Party Application of Rob Hamill”⁶ (the “Order in Case 003”) and the “Order on the Admissibility of the Civil Party Application of Rob Hamill”⁷ (the “Order in Case 004”), both declaring the Appellant’s Application inadmissible in Cases 003 and 004 respectively, although for different reasons. The Order in Case 004 rejects the Application on the basis that “none of the factual situations” that the Appellant alleges occurred regarding his brother “relate to the material facts set out in the third Introductory Submissions [sic.]; neither do they relate to circumstances surrounding these material facts or would be likely to assist in the determination of the jurisdictional elements and modes of liability of potential suspects.”⁸ The Co-Investigating Judges also find that the Appellant’s allegation that his injury was a “direct consequence of the alleged offences perpetrated by [REDACTED] is “purely speculative” as the names of the suspects are confidential,⁹ and conclude that the Appellant’s injury “does not relate to any of the facts under investigation.”¹⁰

4. On 16 May 2011, the Co-Lawyers filed a Notice of Appeal with the Co-Investigating Judges indicating that neither they nor the Appellant had received the Order in Case 004. They pointed out that the Order in Case 003 mentions that the Appellant’s Application is rejected “in Case File 004”, but that the Greffier of the Office of the Co-Investigating Judges has informed them that a separate order has indeed been issued specifically for Case 004.¹¹ In the Record of Appeal, the Greffier of the Office of the Co-Investigating Judges states that the Co-Lawyers have not yet been recognised by the Co-Investigating Judges and that accordingly the Order in Case 004 was handed to the Appellant on 11 May 2011.¹²
5. On 24 May 2011, the Co-Lawyers filed the “Request for Suspension of Deadline for Appeal Against Order on Admissibility of Civil Party Application of Robert Hamill Pending Grant of

⁶ Order on the Admissibility of the Civil Party Application of Rob Hamill, 29 April 2011, D11/2/3 (the “Order in Case 003”), as originally filed and notified to the Appellant. A modified order was filed on 7 July 2011 without being notified to the Appellant or the Pre-Trial Chamber (for a discussion of this issue, see Considerations of the Pre-Trial Chamber Regarding the Appeal against Order on the Admissibility of Civil Party Applicant Robert Hamill, 24 October, D11/2/4/4).

⁷ Order on the Admissibility of the Civil Party Application of Robert Hamill, 29 April 2011, D5/2/3 (the “Order in Case 004”).

⁸ Order in Case 004, para. 10.

⁹ Order in Case 004, para. 11.

¹⁰ Order in Case 004, para. 12.

¹¹ Appeal, paras 3 and 4.

¹² Record of Appeal, D5/2/4, 19 May 2011.

Access to Case File 003 and 004” (the “Request for access to the Case File”), asking the Pre-Trial Chamber to exercise its discretion to suspend the deadline to file the Appeal until a reasonable time after the Appellant’s legal representatives have been granted access to the Case File or, alternatively, to grant them leave to submit additional legal and factual arguments at a reasonable time following any grant of access to the Case File.¹³ The Co-Lawyers submit that, despite their request made on 1 May 2011 to the Co-Investigating Judges, they have not been granted access to the case file for Case 004.¹⁴ They further allege that, while the Greffier of the Office of the Co-Investigating Judges mentioned on 9 May 2011 that two rejection orders had been issued, neither the Appellant nor his lawyers have received the Order in Case 004.¹⁵

6. On the same day, the Co-Lawyers filed their Appeal with the Pre-Trial Chamber. They claim that, as of 23 May 2011, neither they nor the Appellant had yet received the Order in Case 004 despite repeated attempts on their part to obtain it.¹⁶ Consequently, the Co-Lawyers have filed a single appeal challenging the Order issued in Case 003 which “Reject[s] the [Appellant’s] application to be a Civil Party in Case File 004”.¹⁷ The Pre-Trial Chamber, in a separate decision, has already dealt with the Appeal insofar as it concerns Case 003.¹⁸
7. In the current Appeal lodged pursuant to Internal Rule 77bis, the Co-Lawyers request the Pre-Trial Chamber to: i) declare the Appeal admissible; ii) set aside the Co-Investigating Judges’ Order deeming the Appellant inadmissible as a civil party; and iii) determine the civil party status of the Appellant in Case 004.¹⁹ With regards to the arguments brought in relation to Case 004 or more generally aimed at supporting the admissibility of the Appellant’s Application, the Appeal raises the following five grounds, which are essentially directed at the

¹³ Request for Suspension of Deadline for Appeal Against Order on Admissibility of Civil Party Application of Robert Hamill Pending Grant of Access to Case File 003 and 004, dated 12 May 2011, filed on 24 May 2011, D5/2/4/1, para. 5.

¹⁴ Request for access to the Case File, para. 4.

¹⁵ Request for access to the Case File, paras 1 – 2 and footnote 1.

¹⁶ Appeal, paras 4 and 6.

¹⁷ Order in Case 003, second paragraph of the disposition; Appeal, para. 4.

¹⁸ Considerations of the Pre-Trial Chamber regarding the Appeal against Order on the Admissibility of Civil Party Applicant Robert Hamill, 24 October 2011, D11/2/4/4.

¹⁹ Appeal, para. 9 – 11 and 109.

Order issued in Case 003:²⁰ i) the Co-Investigating Judges have failed “to ensure legal certainty and transparency” thus violating Internal Rule 21(1)(c) in rejecting the Appellant’s Application on the basis that he is an “indirect victim”;²¹ ii) the Co-Investigating Judges have violated Internal Rule 23bis(1)(b) and Article 3.2(c) of the Practice Direction on Victim Participation in finding that the Appellant did not demonstrate that he suffered the alleged psychological injury as a direct consequence of the death of his brother;²² iii) the Co-Investigating Judges have violated Internal Rules 56 and 21, as well as the Basic Principles of Victims Rights²³ and the fundamental principle of procedural fairness, in failing to provide public information about the scope of the judicial investigation for Case 004;²⁴ iv) the Co-Investigating Judges have violated Internal Rule 21 “concerning the fundamental principal [sic.] of procedural fairness to provide reasons for a decision” in failing to provide a properly reasoned decision for the rejection of the Appellant’s Application in Case 004;²⁵ and v) in rejecting the Appellant’s Application, the Co-Investigating Judges “have blocked the ECCC’s process of justice, in which victims and the international community, alike, have placed their hopes, and in doing so, have fostered a message that impunity prevails, in violation of the primary purposes of the ECCC as set out in the [ECCC Law]”.²⁶

8. No response was filed to the Appeal.

II. EXPRESSION OF OPINION AND CONCLUSION

9. Despite its efforts, the Pre-Trial Chamber has not attained the required majority of four affirmative votes in order to reach a decision on the issues raised in the Appeal and the Request for access to the case file or even on an approach to deal with the Appeal and the

²⁰ The Pre-Trial Chamber observes that the Appeal raises an additional ground (the “Fifth Ground of Appeal” according to the Appeal, paras 84 – 101) alleging that the Co-Investigating Judges have failed to “properly and independently investigate Case 003”, which raises arguments in relation to Case 003 only and does not relate in any way to the admissibility of the Appellant’s Application.

²¹ Appeal, paras 22 – 43.

²² Appeal, paras 44 – 60.

²³ United Nations General Assembly, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Resolution 40/34, 29 November 1985.

²⁴ Appeal, paras 61 – 72.

²⁵ Appeal, paras 73 – 83.

²⁶ Appeal, paras 102 – 108.

Request. Given that Internal Rule 77(14) provides that the Chamber's decisions shall be reasoned, the opinions of its various members are attached to these Considerations.

10. As the Pre-Trial Chamber has not reached a decision on the Appeal and the Request, Internal Rule 77(13)(a) dictates that the Order of the Co-Investigating Judges shall stand. The same rationale shall apply to the Request for access to the Case File which, in the absence of the affirmative vote of at least four Judges, cannot be granted.

III. DISPOSITION

THEREFORE, THE PRE-TRIAL CHAMBER HEREBY:

UNANIMOUSLY DECLARES that it has not assembled an affirmative vote of at least four judges on a decision on the Request to access the Case File;

UNANIMOUSLY DECLARES that it has not assembled an affirmative vote of a least four Judges on a decision on the Appeal.

In accordance with Internal Rule 77(13), there is no possibility to appeal.

Phnom Penh, 14 February 2012



The seal of the Pre-Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia (ECCC) is circular, featuring a central emblem with a scale of justice and a sword, surrounded by the text 'CHAMBRE PRE-TRIALE' and 'ECCC'. Below the seal are five handwritten signatures in black ink, each corresponding to a name listed below.

PRAK Kimsan Rowan DOWNING NEY Thol Katinka LAHUIS HUOT Vuthy

Judges PRAK Kimsan, NEY Thol and HUOT Vuthy append their opinion.

Judges Rowan DOWNING and Katinka LAHUIS append their opinion.

Considerations of the Pre-Trial Chamber Regarding the Appeal against Order on the Admissibility of Civil Party Applicant Robert Hamill

Opinions of Judge PRAK Kimsan, Judge NEY Thol, and Judge HUOT Vuthy

1. In his Appeal against Order on Admissibility of Civil Party Applicant (D11/2/3) (the “Appeal”)¹ Mr Robert HAMILL indicated that he gave testimony in Case 001 against Kaing Guek Eav (*alias* Duch), who was the director of S-21 centre regarding the fate of his brother Kerry HAMILL who was imprisoned, interrogated, tortured and killed at S-21.² In his Victim Information Form (11-VSS-00002), Mr Robert HAMILL described the following facts: on 13 August 1978, the Appellant’s brother, Kerry George HAMILL, skipper and co-owner of a 28-foot yacht, *Foxy Lady*, together with co-owner, Canadian Stuart GLASS, and a passenger, Englishman John DEWHIRST, were anchored and taking shelter in one of the bays of Koh Tang Island situated 50 kilometres off the coast of south west of Sihanoukville. That evening shots were fired upon the *Foxy Lady* and her crew. Stuart GLASS, who was on deck, was shot. Kerry, who was also on deck, managed to get Stuart into a lifebuoy. John DEWHIRST, who had been below deck at the time of the shots, emerged from below and took refuge with Kerry, climbing overboard into the water.³ Then, a Khmer Rouge gunboat picked up the two men. Stuart died and was buried at sea. The men were shackled and blindfolded then taken to a cinema in Sihanoukville where they were held for a day or two before being transferred to the security centre S-21 in Phnom Penh.⁴ At S-21 both men were subjected to interrogation and torture including electric shock administration. Eventually both men were forced to sign confessions stating that they were CIA agents. These confessions were clearly untrue.⁵ In his fictitious confession Kerry wove his “CIA training” into real facts about his life. Kerry used the Hamill family home telephone number of the time (8708) as his CIA operative number; he stated that Colonel Sanders (of Kentucky Fried Chicken) was one of his superiors, listed several family friends as supposed members of the CIA who helped train him in CIA surveillance; and that “a Mr S. Tarr” was the public speaking instructor. In fact, S. Tarr is the phonetic spelling of the Appellant’s mother’s name, Esther.⁶ Kerry’s confession was signed

¹ Mr Robert HAMILL’s Appeal, D5/2/4/2.

² *Ibid.*, para. 25.

³ *Ibid.*, para. 26.

⁴ *Ibid.*, para. 27.

⁵ *Ibid.*, para. 28.

⁶ *Ibid.*, para. 29.

approximately two months after his capture, and it is assumed that he was executed around the time of signing the confession. The exact method of Kerry's execution is unknown.⁷

2. The facts described in Mr Robert HAMILL's Appeal against Order on Admissibility of Civil Party Applications dated 23 May 2011 all are facts set out in the First Introductory Submission⁸ dated 18 July 2007, as well as in the Closing Order of Case No. 002/19-09-2007/ECCC/OCIJ⁹—which include:
 - Summary of the Facts (paragraphs 1—36)
 - Forced Evacuation (paragraphs 37—42)
 - Forced Labour, Inhumane Conditions, and Unlawful Imprisonment (paragraphs 43—48)
 - Murder, Torture, and Physical and Psychological Violations (paragraphs 49—55)
 - Kampong Som Autonomous Sector (paragraph 59)
 - Former North Zone, East Zone
3. We find that the facts set out in the Third Introductory Submission dated 20 November 2008, which constitute Case 004, all are old facts contained in the First Introductory Submission dated 18 July 2007.
4. During their investigations thus far in Case 004, the Co-Investigating Judges have not charged any person. This means that regarding the facts sent by the Co-Prosecutors through the Introductory Submissions to the Co-Investigating Judges, there is no suspect in respect of whom the Co-Investigating Judges find there was clear and consistent evidence indicating that a person, being a leader or most responsible participated in the commission of the alleged crimes.
5. As a result, the rejection of Mr Robert HAMILL's Civil Party Applications at this stage does not infringe his rights. In addition of this, we are of the following view:

⁷ Ibid., para. 30.

⁸ Introductory Submission, D3.

⁹ Closing Order, D427, paras. 221—282 and paras. 644—666.

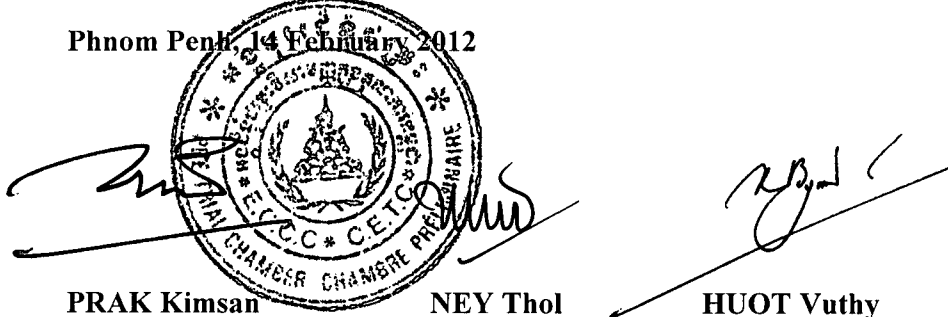
6. As a principle of prosecutorial discretion (*opportunité de la poursuite*), the processing of criminal proceedings begins with the Co-Prosecutors considering criminal facts and deciding whether to proceed with prosecuting the offender(s) or hold a file without processing even if the facts are offences. Through this principle, the Co-Investigating Judges shall investigate facts forwarded to them by the Co-Prosecutors; they shall provide assessment over inculpatory evidence sent by the Co-Prosecutors together with the case forwarded, any exculpatory evidence the Co-Investigating Judges have obtained during their investigations, and any consistency that makes them believe that a person has committed an offence. Factually, Rule 55(2) of the Internal Rules requires that the Co-Investigating Judges investigate only the facts set out in an Introductory Submission or a Supplementary Submission.
7. Rule 55(4) of the Internal Rules states that the Co-Investigating Judges *have the power to charge any Suspects named in the Introductory Submission*. The Co-Investigating Judges may also charge other persons against whom there is clear and consistent evidence indicating that such person may be criminally responsible for the commission of a crime referred to in an Introductory Submission or a Supplementary Submission, even where such persons were not named in the submission. In the latter case, they must seek the advice of the Co-Prosecutors before charging such persons.
8. The phrase “have the power to charge” in Internal Rule 55(4) provides a clear indication that the Rule gives the Co-Investigating Judges discretion to decide to charge any person who was named in the Introductory Submission, as well as to charge any other persons who were not named in the submission. This provision does not force the Co-Investigating Judges to charge any person who was named in the Introductory Submission of the Co-Prosecutors. Besides, Internal Rule 55(5) only provides the Co-Investigating Judges a right to decide whether or not to summon and question Suspects or Charged Persons.
9. In other words, when the Co-Prosecutors forwarded their Introductory Submission to the Co-Investigating Judges, requesting them to charge or place any named person in custody, the Co-Investigating Judges at their discretion can decide whether or not to charge or to place that person in custody. Therefore, the Co-Investigating Judges are not bound by the names of persons described in an Introductory Submission or a Supplementary Submission filed by the

Co-Prosecutors. Decision to charge a person, therefore, is the Co-Investigating Judges' discretion.

10. Rule 57(1) of the Internal Rules states that "at the time of the initial appearance the Co-Investigating Judges shall record the identity of the Charged Person and inform him or her of the charges, the right to a lawyer and the right to remain silence." This provision is only about the Accused person's rights to self-protection (i.e., right to be informed of charges against him/her, right to a lawyer, and right to remain silence) when s/he appears before the Co-Investigating Judges even if such an appearance is carried out by a subpoena or by an arrest warrant. This provision does not require the Co-Investigating Judges to absolutely order the appearance of Charged Persons when they are seized with the Introductory Submission. In other words, it does not determine any specific time to do so.
11. Charges are brought against any person against whom there is clear and consistent evidence indicating that the person, as a perpetrator or an accomplice, participated in the commission of crimes.
12. As explained in Paragraph 4 above, during their investigations thus far in Case 004, the Co-Investigating Judges have not charged any person, meaning that with regard to the facts forwarded to the Co-Investigating Judges by the Co-Prosecutors through their Introductory Submission, there is no any suspect against whom the Co-Investigating Judges find there is clear and consistent evidence indicating s/he participated in the commission of the alleged crimes.
13. For the above mentioning, we find that as of the time that the Impugned Order was issued and Civil Party Application of Mr Robert HAMILL was filed in Case 004, the Co-Investigating Judges have not yet identified any charged person with regard to the facts set out in the Introductory Submission sent to them.
14. Besides, Civil Party Applications shall be filed with a purpose to seek remedy for the damage caused to the victims by criminal acts. Such criminal acts shall be committed directly by the offenders including the perpetrator, co-perpetrator, etc.

15. We find that where there is no charged person to be held responsible for the remedy of harms caused to the victims, the rejection of civil party applications at this stage does not infringe the rights of the victims.¹⁰

Phnom Penh, 14 February 2012



The seal of the Extraordinary Chambers in the Courts of Cambodia (ECCC) is circular, featuring a central emblem with a traditional Khmer design. The text around the seal includes 'ROYAUME DU CAMBODGE' at the top, 'CHAMBRE EXTRAORDINAIRE' on the right, 'ECCC * C.E.T.C.' at the bottom, and 'MINI CHAMBER CHAMBRE PRELIMINAIRE' on the left. Three handwritten signatures are present: PRAK Kimsan on the left, NEY Thol in the middle, and HUOT Vuthy on the right.

PRAK Kimsan NEY Thol HUOT Vuthy

¹⁰ Rule 23 *quinquies* of the Internal Rules.

OPINION OF JUDGES DOWNING AND LAHUIS

1. Preliminary Observations on Transparency and Adversarial Character of Proceedings

1. At the outset, we note that the Appellant, as well as at least another civil party applicant¹ whose application had been registered in Case 004 at the time the Appeal² was filed,³ have faced similar problems as those we have identified in our Opinion in Case 003⁴ in filing their complaints and applications to become civil parties before the ECCC and having them processed and dealt with in a transparent and adversarial manner by the Co-Investigating Judges. We will briefly highlight the context in which the Appellant's Application⁵ was filed and decided upon by the Co-Investigating Judges which, although largely unknown to the Appellant and his Co-Lawyers who have had no access to the Case File in either Case 003 or Case 004, inevitably has consequences on the way we have formed our Opinion on this Appeal.
2. First, we note that as part of significant unexplained delays in processing documents submitted in Case 004 by applicants or parties to the proceedings and in placing these in the Case File, the Appellant's Application was placed in the Case File by the Office of the Co-Investigating Judges a week after it was received from the VSS and only within the minutes preceding its rejection in the Order for Case 004.⁶ As noted in our Opinion in Case 003 and for the reasons explained therein, this belated filing of the Application may be perceived as an attempt to

¹ Victim Information Form, 5 April 2011, D5/1.

² Appeal Against Order on the Admissibility of Civil Party Applicant Mr. Robert Hamill (D11/2/3) (Cases 003 and 004), 24 May 2011, D5/2/4/2 (the "Appeal").

³ In their Press Statement of 8 August 2011, the Co-Investigating Judges stated that they had already received 200 civil party applications, but only two were actually placed in the Case File at the time the Appeal was filed, having been included in the Case File only a few days or minutes before being rejected.

⁴ Considerations of the Pre-Trial Chamber Regarding the Appeal against Order on the admissibility of Civil Party Applicant Robert Hamill, 24 October 2011, D11/2/4/4, Opinion of Judges Lahuis and Downing (the "Opinion in Case 003"), paras 2 – 9.

⁵ Victim Information Form, signed on 11 April 2011 and filed with the VSS on 12 April 2011, D5/2 (the "Application").

⁶ The Appellant's Application, although received by the Case File Officer on 22 April 2011 and registered on Zylab as having been filed on this date, was only filed and placed in the Case File on 29 April 2011 at 14h40, that is 30 minutes before the Order for Case 004 was itself filed on 29 April 2011 at 15h10. The filing of documents submitted by the International Co-Prosecutor in this case has also been delayed.

prevent the Appellant's Co-Lawyers from having access to the Case File in Case 004.⁷ Furthermore, although the Application is also filed as a complaint, it appears not to have been immediately forwarded to the Co-Prosecutors for their action, as required under Internal Rule 49(2).

3. Second, the Co-Lawyers, who submitted a power of attorney on 20 April 2011,⁸ were advised on 19 May 2011 that they were not yet recognised by the Co-Investigating Judges⁹, notwithstanding that they had already been recognised in Case 002 pursuant to Internal Rule 22. This situation remains unchanged according to the information currently available to the Pre-Trial Chamber. As a result, the Co-Lawyers have not been notified of any document in relation to the Application of their client, including the Order in Case 004, hence impairing the Appellant's right to legal representation.
4. Third, the Request to have access to the Case File¹⁰ has remained unanswered by the Co-Investigating Judges, thus the Co-Lawyers have not been able, as yet, to access the Case File.¹¹ This situation has prompted the Co-Lawyers to submit to the Pre-Trial Chamber the said Request in order to be able to ensure that the Appellant can effectively and efficiently exercise his right to pre-trial appeal. For the same reasons expressed in our Opinion in Case 003,¹² we would grant this Request and allow the Co-Lawyers to file further submissions on the Appeal, but as the Pre-Trial Chamber has not assembled the required majority of four votes, no enforceable decision could be reached on this matter.
5. Fourth, the Appellant's Application was filed, dealt with and rejected by the Co-Investigating Judges without him having been provided with any information about the scope of the investigation, thus impairing his ability to effectively exercise his right to make and

⁷ Internal Rule 23bis(2), when read in conjunction with Internal Rule 55(6) and (11), gives civil party applicants the right to have access to the case file, through their lawyers, from the moment the application is filed until the rejection of such application becomes final (Opinion in Case 003, para. 6). As such, we previously expressed our view that the belated filing of a civil party application may be seen as an attempt to deprive the applicant of his right to have access to the case file (Opinion in Case 003, para. 9).

⁸ Appeal, para. 5.

⁹ Record of Appeal, 16 May 2011, D5/2/4.

¹⁰ Request for Suspension of Deadline for Appeal Against Order on Admissibility of Civil Party Application of Robert Hamill Pending Grant of Access to Case File 003 and 004, dated 12 May 2011, filed on 24 May 2011, D5/2/4/1.

¹¹ Appeal, para. 6.

¹² Opinion in Case 003, para. 6.

substantiate his Application to become a civil party under Internal Rule 23*bis*. In particular, no information whatsoever about the scope of the investigation was available to the public, the victims and potential civil parties, including the Appellant, at the moments the Appellant filed his Application and Appeal. In particular, after he had filed his Application, the Appellant had not been given access to the Case File, nor had been provided, in any other way, information about the scope of the investigation prior to his Application apparently being rejected on 29 April 2011, together with that of the other registered civil party applicant in this case.¹³ The Co-Investigating Judges disclosed information about the scope of the investigation only on 8 August 2011, by explaining through a Press Statement (the “Press Statement”) that:

“So far, the Office of the Co-investigating Judges did not notify the public of the crime sites in Case 004, because, unlike in Case 002, there are serious doubts whether the suspects are “most responsible” according to the jurisdictional requirement of Article 2 ECCC Law. If the Court had no jurisdiction, it would be inappropriate to encourage civil party applications further to the 200 already received in this case, as this could raise expectations which might not be met later on.”¹⁴

As already emphasised by the Pre-Trial Chamber in its Decisions on Appeals against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications in Case 002¹⁵ and reiterated in our Opinion in Case 003,¹⁶ the disclosure of sufficient information about the scope of the investigation, in a timely manner, is essential to permit victims to exercise their right to file an application to become a civil party under Internal Rule 23*bis*. If the Co-Investigating Judges considered that it was too early to disclose the scope of their investigation in April 2011, then the Internal Rules required them to wait until such information is indeed disclosed and civil party applications lodged before them are adequately supplemented accordingly prior to deciding on the merits of these applications, as they did for the Appellant’s Application. Acting otherwise amounts in our view to a premature rejection of the Application and defeats the whole regime established for victims under the ECCC Internal Rules. Given the premature

¹³ Order on the Admissibility of the Civil Party Application of [REDACTED], 29 April 2011, D5/1/3.

¹⁴ Press Release by the Co-Investigating Judges Regarding Civil Parties in Case 004 (004/07-09-2009/OCIJ), 8 August 2011.

¹⁵ Decision on Appeals against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, 24 June 2010, D404/2/4 and D411/3/6, common paras 51 – 54.

¹⁶ Opinion in Case 003, para. 4.

rejection of the Application and the fact that the Appellant was not afforded any possibility to supplement his Application in the light of the information that was subsequently disclosed in August 2011, we are of the view that nothing would prevent him from submitting a new application should he consider it appropriate on the basis of the information that is now available. These conclusions are made regardless of whether or not the Appellant's Application satisfies, as currently based, the criteria to be admitted as a civil party in Case 004 pursuant to Internal Rule 23*bis*.

6. Further we note that the explanation given by the Co-Investigating Judges to justify the delay in providing victims and potential civil party applicants information about the investigation does not have a solid rationale according to law. As we have previously emphasized, the fact that the Co-Investigating Judges consider that the ECCC may not have personal jurisdiction to prosecute the persons named as alleged perpetrators or accomplices in the Third Introductory Submission does not discharge them from their obligation to undertake investigative actions concerning the facts imputed to these persons in the Third Introductory Submission in order to fulfil the requirements of their obligation to investigate in a complete and impartial manner all the facts set out in the Third Introductory Submissions, as directed by Internal Rule 55(1).¹⁷ In this respect, we recall that victims, as either complainants¹⁸ and/or civil party applicants, can exercise rights and participate in judicial investigations conducted before the ECCC,¹⁹ which may consequently bring forward information conducive to ascertaining the truth, including information that may prove relevant or determinative in assessing the personal jurisdiction of the Court over the persons designated by name in the Introductory Submission. Hence, when a judicial investigation has been opened, as in Case 004, the Co-Investigating Judges shall, as a matter of principle, afford the victims the possibility to effectively and efficiently file complaints and/or civil party applications and more generally to participate in the investigation if they meet the legal requirements set out in Internal Rule 23*bis*.

¹⁷ Considerations of the Pre-Trial Chamber regarding the International Co-Prosecutor's Appeal against the Decision on Re-Filing of Three Investigative Requests, 15 November 2011, D26/1/3, Opinion of Judges Lahuis and Downing, paras 16 – 18.

¹⁸ Internal Rule 49.

¹⁹ See, *inter alia*, the rights granted to civil parties during the judicial investigation under Internal Rules 55(8) (attend on-site visits conducted by the Co-Investigating Judges), 55(10) (request investigative actions), 58(5) (participate in confrontations), 59(5) (request the Co-Investigating Judges to interview him or her, interview witnesses, go to a site, order expertise and collect evidence), 74(4) (appeal against certain orders issued by the Co-Investigating Judges) and 76(2) (request annulment of any part of the proceedings).

7. Where the lack of transparency in the proceedings has seriously impaired the right of the Appellant to present the best case possible, not only with regards to his Application to become a civil party but also to his Appeal before the Pre-Trial Chamber, we are additionally compelled to address the specific issue of the notification of the Order in Case 004 to the Appellant and his Co-Lawyers. Such notification is a basic tenet upon which the right of appeal is based.

2. Notification of the Order in Case 004

8. As briefly noted in the Procedural Background of the Pre-Trial Chamber's Considerations, the Co-Lawyers allege that they were alerted by the Order in Case 003²⁰ to the fact that the Appellant's Application to become a civil party in Case 004 had been rejected. They later obtained confirmation by the Greffier of the Office of the Co-Investigating Judges that a separate inadmissibility order bearing the document number D5/2/3 had been issued in reference to Mr. Hamill's Application for Case 004.²¹ The Co-Lawyers contend that no such order had been received by them or by the Appellant at the time of the filing of the Notice of Appeal and the Appeal.²² Thus, the Notice of Appeal was filed as a "Notice of intention" to file an appeal against the order D5/2/3 "if/when the order" is received",²³ together with the Request to access the Case File in Case 004 and leave to submit additional arguments on appeal at a reasonable time following any grant of access to the Case File.²⁴ In the Appeal, the Co-Lawyers assert that "repeated attempts to obtain [the Order in Case 004]" have been made",²⁵ however, we note that this assertion is not supported by references to, or explanations of, the steps taken by the Co-Lawyers or the Appellant to obtain this order.

9. As a general matter, we note that the Internal Rules and the Practice Direction on Filing of Documents before the ECCC direct that the Greffier and/or Case File Officer shall: i) record in

²⁰ Order on the Admissibility of the Civil Party Application of Rob Hamill, 29 April 2011, D11/2/3.

²¹ Order on the Admissibility of the Civil Party Application of Robert Hamill, 29 April 2011, D5/2/3.

²² Notice of Appeal, second paragraph; Appeal, paras 3 and 4. See also Request to access the Case File, paras 1 and 2.

²³ Notice of Appeal, third paragraph.

²⁴ Request to access the Case File, paras 1 – 4, 12 and 14; the content of this request was renewed in the Appeal, para. 8.

²⁵ Appeal, para. 4.

a written report the means of notification used, the time, date and place of service, as well as any other relevant circumstances;²⁶ ii) use their best endeavours to obtain acknowledgement of receipt, which shall be appended to the report of notification;²⁷ and iii) complete the “Acknowledgement of Service” form,²⁸ whereby the Case File Officer or Designated Officer shall confirm service of the document on its recipient.²⁹

10. In this case, on the basis of evidence contained in the Case File for Case 004, we have no reason to conclude that the Co-Lawyers’ contention that neither they nor the Appellant have been notified or provided with the Order in Case 004 is erroneous. First, there was no instruction given to notify the Co-Lawyers of the Order.³⁰ Second, the proof of delivery available in the case file does not allow for the conclusion that the Appellant or his Lawyers have indeed been served with the Order.³¹ Third, as they have had no access to the Case File, the Appellant and his Lawyers could not, by themselves, consult the Order. Fourth, the submissions contained in the Appeal visibly fail to address the specific reasons for rejection

²⁶ Internal Rule 46(2).

²⁷ Internal Rule 46(3).

²⁸ Article 11.2 of the Practice Direction on Filing of Documents before the ECCC.

²⁹ Appendix E to the Practice Direction on Filing of Documents before the ECCC.

³⁰ Filing Instruction Form of the Order in Case 004, obtained from the Case File Officer by the Pre-Trial Chamber.

³¹ The record shows that the Case File Officer has been instructed by the Greffier of the Office of the Co-Investigating Judges to notify the order D5/2/3 (EN) to Mr. Robert Hamill together with the order D11/2/3 issued for Case 003 (Filing and Notification Instruction of document number D5/2/3, 29 April 2011). The acknowledgement of service signed by the General Service Section of the Court (GSS) mentions that this Service has received the “Order on the Admissibility of the Civil Party Application of Rob Hamill, D11/2/3 & D5/2/3 (EN)” for “Cases 003 & 004/07-09-2009-ECCC/OCIJ” without specific indication as to whether there were two different orders. The acknowledgement of service contains the following handwriting note: “TNT ID: gd 996064631 ww” (Acknowledgement of Service, signed by [REDACTED] from GSS, 3 May 2011). The TNT order, which has been signed by the Case File Officer, comprises two signatures: one dated 5 May 2011 and the other dated 8 May 2011. There is no signature acknowledging the receipt on the TNT slip, which only bears the mention “rural” for the signatory. The report of delivery by TNT contains not one, but two distinct mentions indicating that the shipment “996064631” has been delivered “in good condition” on 11 May 2011, respectively at 08:40:00 and 09:40:26 in “North Island”. There is no indication as to what the shipment contained nor as to who has received it. While an acknowledgment of service is intended to confirm service of a given document on persons who shall be notified of it, the acknowledgement in this case only indicates that a document has been received by the “GSS messenger”, whose sole role was to send the documents via TNT after the Case File Officer had completed the TNT order. Such document cannot, in and of itself, serve as an evidence of *notification* or *receipt* of the order D5/2/3 by Mr. Hamill in the circumstances above described. Besides, we note that a rather uncommon procedure has been followed in this case, in having two distinct documents issued in two separate cases referred to in a single acknowledgement of service. Further, contrary to Article 11.2 of the Practice Direction on Filing of Document before the ECCC and Form E attached to that Practice Direction, neither the Greffier nor the designated officer in this case has acknowledged that the order has been served on Mr. Hamill. Finally, the form used in this case is different from the one attached to the Practice Direction, which clearly provides that the Greffier or designated officer shall confirm service upon “the recipient”, not upon an internal messenger. As a whole, the notification procedures followed with respect to the order D5/2/3 do not allow to confirm or verify that Mr. Hamill or his Co-Lawyers have indeed received this order.

enclosed in the Order in Case 004³², thus clearly indicating that it has not been sighted by the Appellant or his Lawyers.

11. According to Internal Rule 46(1) “[a]ll orders of the Co-Investigating Judges [...] shall be notified to the parties or their lawyers, if any, either orally or at their last known address, by the Greffier [...] using an appropriate means.” As pointed out above, the Order in Case 004 shall have been, at the very least, notified to the Appellant’s Lawyers and, if a decision was made to also notify the Appellant by service of a hard copy, sufficient proof of notification should have been secured. The requirement of notification is meant to ensure that the knowledge of documents filed in the course of proceedings is directly provided to all those affected by these proceedings. This formality is not only essential to the integrity of the proceedings, it is also a vital principle of fairness and of due process as it prevents a judicial body from operating in secret from parties and individuals affected by its decisions. In this case, the notification has very concrete legal consequences as it triggers both the capacity to exercise the right to pre-trial appeal against the Co-Investigating Judges’ Order³³ and the start of the calculation of the time limits for filing of documents³⁴ which applies to pre-trial appeals and impacts on their validity.³⁵

12. In our opinion, the absence of notification of the Order in Case 004 to the Appellant’s Lawyers and the absence of a clear evidence of notification to the Appellant himself is a procedural defect that infringes upon the Appellant’s fundamental rights. Considering that the Appeal is, as a consequence, directed against the Order in Case 003 and not against the Order issued for Case 004, which contains different reasons for the rejection of the Application than those expressed in the Order in Case 003, it would be contrary to the interests of justice and fundamentally unfair to the Appellant to consider the merit of this Appeal. However, we note that from the moment of the effective notification of the Order in Case 004 to the Appellant and the Co-Lawyers acting on his behalf, a right of appeal against this Order will arise and the

³² For instance, the First and Second Grounds of Appeal challenge the rejection of the Application on the basis that the Appellant is an “indirect victim”, whereas in fact this reason for rejection was set out in the Order in Case 003 and not in the one issued in Case 004. Obviously this is a consequence of the Co-Lawyers not having seen the actual Order in Case 004 and thus re-using the arguments raised in relation to the Order in Case 003.

³³ Internal Rules 74(4)(b) and 77bis.

³⁴ Internal Rules 75 and 77bis.

³⁵ Internal Rule 39(1).

time limits for filing an appeal will then start to run. We attach the Order in Case 004 to our opinion (Annex A), to ensure that it is duly notified to the Appellant and his Co-Lawyers. We also attach the following documents, which are necessary for understanding our conclusion that the Order was not properly notified to the Appellant and his Co-Lawyers, as none of them had access to the Case File: Filing and Notification Instruction of the Order in Case 004, 29 April 2011, as sent by the Case File Officer to the Pre-Trial Chamber (Annex B); Acknowledgement of Service, signed by [REDACTED] from GSS, 3 May 2011 (Annex C); TNT Order number GD9960664631WW (Annex D); and TNT Report of Delivery for Order number GD9960664631WW (Annex E). We further note that given all the procedural irregularities that occurred in this case, reconsideration of the Appellant's Application according to law should be seriously considered by the Co-Investigating Judges, after having followed the proper procedure, including allowing the Appellant the opportunity to either amend his Application or abandon it in the event he determines that he has no reason to believe that the harm he claims has the necessary relationship with the crimes in Case 004 and any further relevant information that could be provided by the Co-Investigating Judges.³⁶

13. Given these circumstances, we are of the opinion that we cannot enter into a discussion on the merits of the Appeal. However, we reiterate in this case the observations that we made in our Opinion in Case 003.³⁷ First, all issues raised in the Appeal shall be examined before a conclusion can be reached by judges that the rights of the Appellant have not been infringed upon by the rejection of his civil party application. Second, new facts have been introduced in the Third Introductory Submission³⁸ and, in any event, this has no impact on the admissibility of civil party applications pursuant to Internal Rule 23*bis*. Third, the discussion on whether there is, at this point in time, any "Charged Person" in Case 004 is as such immaterial to determining the Appeal given that the Co-Investigating Judges have an obligation to decide on the substance of a civil party application, as they did in the current case. As emphasized above,

³⁶ We note that, shortly after his taking of office, the International Reserve Co-Investigating Judge has informed the public that he will "in accordance with ECCC Internal Rule 56(2) endeavor to keep the public sufficiently informed about major developments in Case File [...] 004" (Press Release by the International Reserve Co-Investigating Judge, 6 December 2011).

³⁷ Opinion in Case 003, para. 16.

³⁸ Disagreement No. 001/18-11-2008-ECCC/PTC, Considerations of the Pre-Trial Chamber Regarding The Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71, 18 August 2009, Opinion of Judges Lahuis and Downing..

any alleged impediment to making such a determination at a given time should necessarily lead to the conclusion that the decision on the admissibility of civil party applicants shall be postponed until all relevant information is available.

Phnom Penh, 14 February 2012 ^{CR}


Rowan DOWNING


Katinka LAHUIS