



**អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា**

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: D5/1/4/2**

*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 01)**

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

**Date:** 28 February 2012

**PUBLIC REDACTED**

**CONSIDERATIONS OF THE PRE-TRIAL CHAMBER REGARDING THE APPEAL AGAINST ORDER ON THE ADMISSIBILITY OF CIVIL PARTY APPLICANT** [REDACTED]

**Co-Prosecutors**

CHEA Leang  
Andrew CAYLEY

**Lawyer for the Civil Party Applicant**

[REDACTED]  
CHOUNG Chou-Ngy

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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 Application of [REDACTED]”, filed by [REDACTED] (the “Appellant”) on 18 May 2011 (the “Appeal”).<sup>1</sup>

## I. PROCEDURAL BACKGROUND AND SUBMISSIONS

1. On 20 November 2008, the then International Co-Prosecutor filed the “Third Introductory Submission”<sup>2</sup> with the Co-Investigating Judges requesting them to begin a judicial investigation for Case 004. The Third Introductory Submission was filed as confidential and thus not subject to access by the public, the victims and potential civil parties, including the Appellant.<sup>3</sup>
2. On 3 April 2011,<sup>4</sup> as a result of her research of information available in the public domain,<sup>5</sup> the Appellant submitted a public application to the Victims Support Section of the ECCC (the “VSS”), seeking to be admitted as a civil party in Cases 003 and 004 before the ECCC (the “Application”).<sup>6</sup> In her Application, the Appellant claims to have suffered harm as a direct consequence of crimes within the jurisdiction of the ECCC committed against her and her family by [REDACTED]. In particular, the Appellant declares that her harm relates to the fall of and exodus from Phnom Penh, as well as to the movement of the population from the East Zone, during which she, *inter alia*, suffered forcible evacuation, illegal arrest and detention in Wat Tlork and Boeung Rai Security

<sup>1</sup> Appeal Against Order on the Admissibility of Civil Party Application of [REDACTED], 18 May 2011, D5/1/4/1 (the “Appeal”).

<sup>2</sup> 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.

<sup>3</sup> However, on 8 September 2009, the Acting International Co-Prosecutor confirmed through a press statement the filing of the Third Introductory Submission (Press Release: Statement of the Acting International Co-Prosecutor, 8 September 2009), informing the following: “[t]he Third Introductory Submission requests judicial investigation of thirty-two (32) distinct factual situations of murder, torture, unlawful detention, forced labour and persecution. The factual allegations in the Third Introductory Submission, if proved, would constitute crimes against humanity, violations of the 1956 Cambodian Penal Code and genocide.”

<sup>4</sup> Appeal, para. 1.

<sup>5</sup> Appeal, paras 8 and 22.

<sup>6</sup> Victim Information Form, 5 April 2011, D5/1 (the “Application”), p. 4.

*Considerations of the Pre-Trial Chamber regarding the Appeal against Order on the Admissibility of Civil Party Applicant [REDACTED]*



Centres, compulsory labour as a child, torture and cruel and inhuman treatment.<sup>7</sup> She also submits that she has personally suffered harm from the loss of her father and mother who were victims of forced disappearance and of murder by the Khmers Rouge. This Application was filed with the Co-Investigating Judges by the VSS on 22 April 2011.<sup>8</sup>

3. On 29 April 2011, the Co-Investigating Judges issued the “Order on the Admissibility of the Civil Party Application of [REDACTED]”<sup>9</sup> (the “Impugned Order”), rejecting the Appellant’s Application to become a civil party in Case 004 on the basis that her injury “does not relate to any of the facts under investigation”.<sup>10</sup> The Co-Investigating Judges reasoned that the factual situations where the Appellant’s harm allegedly occurred “[do not] relate to the material facts set out in [...] the Third Introductory Submission; 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.”<sup>11</sup> The Co-Investigating Judges further added that the allegations that the injury the Appellant has suffered is direct consequence of crimes perpetrated by [REDACTED] “are unfounded as the names of the suspects in Case [00]4 are confidential and the names cited in the [Appellant’s Application] are therefore purely speculative.”<sup>12</sup>
  
4. On 18 May 2011, the Appellant concurrently filed a Notice of Appeal<sup>13</sup> with the Co-Investigating Judges and submissions on Appeal with the Pre-Trial Chamber pursuant to Internal Rule 75. Her Appeal lodged under Internal Rules 74(4)(b) and 77bis<sup>14</sup> raises arguments concerning both Case 003 and Case 004 before the ECCC. The Appellant’s claims related to the current case are as follows: she requests the Pre-Trial Chamber to i) declare the Appeal admissible; ii) set aside the Impugned Order deeming her inadmissible as a civil party in Case 004; and iii) grant her the status of civil party in Case

<sup>7</sup> Application, pp. 3 and 4 and attachment to the Application, pp. 1 – 8; Appeal, para. 13.

<sup>8</sup> Application, p. 1.

<sup>9</sup> Order on the Admissibility of the Civil Party Application of [REDACTED] (“Impugned Order”), 29 April 2011, D5/1/3.

<sup>10</sup> Impugned Order, para. 14.

<sup>11</sup> Impugned Order, para. 12.

<sup>12</sup> Impugned Order, para. 13.

<sup>13</sup> Notice of Appeal, 19 April 2011, D5/1/4.

<sup>14</sup> Appeal, paras 18 and 60.



004.<sup>15</sup> The four grounds of appeal supporting these claims can be summarised as follows: i) the Appellant has not been afforded the fundamental principle of procedural fairness of timely and sufficient information on the scope of the investigation for Case 004;<sup>16</sup> ii) the Co-Investigating Judges have failed to conduct field investigations of all the crimes sites and criminal episodes of Case 004 especially as it relates to the Appellant;<sup>17</sup> iii) the Co-Investigating Judges misapplied and misinterpreted the facts and law related to the doctrine of joint criminal enterprise and common design and purpose;<sup>18</sup> and iv) the Co-Investigating Judges have failed to provide a reasoned decision for the Appellant's inadmissibility to become a civil party in Case 004.<sup>19</sup>

5. No response was filed to the Appeal.
6. On 15 November 2011, the Appellant sent directly to the Presiding Judge of the Pre-Trial Chamber a document in which she expressed the will to "withdraw all legal associations from the ECCC" (the "Document"). On the same day, the Greffiers of the Pre-Trial Chamber informed the Appellant that the Document could not be considered as a formal withdrawal of her Appeal and that, should she wish to formally abandon the Appeal, she had to follow, , a formal procedure with the Greffiers of the Chamber notifying the Chamber, in explicit and specific terms, her express and voluntary will to do so, in compliance with the Practice Direction on Filings of Documents before the ECCC (the "Practice Direction on Filing"). The same notice was re-addressed to the Appellant on 18 November 2011 after she had forwarded again the Document to the Presiding Judge. To date, the Greffiers' notice has been sent to all email addresses with which the Appellant has provided the ECCC, including that of her National lawyer, but no acknowledgement of receipt has been received by the Greffiers and no formal withdrawal of the Appeal has been filed with the Pre-Trial Chamber by the Appellant. The Pre-Trial Chamber finds that the Document is not in compliance with the Internal Rules and the Practice Direction on Filing and that therefore the Chamber is still seized of the Appeal.

<sup>15</sup> Appeal, para. 69.

<sup>16</sup> Appeal, paras 7 and 21 – 33.

<sup>17</sup> Appeal, paras 7 and 34 – 49.

<sup>18</sup> Appeal, paras 7 and 50 – 54.

<sup>19</sup> Appeal, paras 7 and 55 – 66.



## II. EXPRESSION OF OPINION AND CONCLUSION

7. Despite its efforts, the Pre-Trial Chamber has not attained the required majority of four affirmatives votes in order to reach a decision on the issues raised in the Appeal or even on an approach to deal with the Appeal. Given that Internal Rule 77(14) provides that the Chamber's decision shall be reasoned, the opinions of its various members are attached to these Considerations.
8. As the Pre-Trial Chamber has not reached a decision on the Appeal, Internal Rule 77(13) dictates that the Impugned Order shall stand.

## III. DISPOSITION

**THEREFORE, THE PRE-TRIAL CHAMBER HEREBY:**

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.

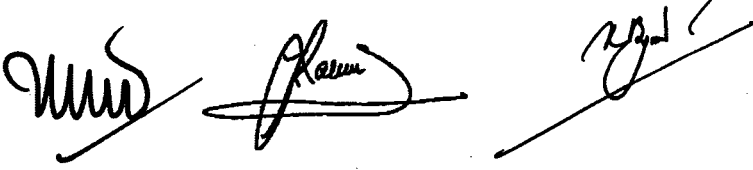
**Phnom Penh, 28 February 2012**

**President**

**Pre-Trial Chamber**

The seal of the Pre-Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia (ECCC) is circular. It features a central emblem with a scale of justice and a sword, surrounded by text in Khmer and English. The English text includes 'PRE-TRIAL CHAMBER', 'E.C.C.C.', and 'CO-INVESTIGATING JUDGES'. The signature 'Rowan DOWNING' is written across the seal.

**PRAK Kimsan**

Three handwritten signatures are shown. The first is 'NEY Thol', the second is 'Katinka LAHUIS', and the third is 'HUOT Vuthy'.

**NEY Thol**      **Katinka LAHUIS**      **HUOT Vuthy**

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

*Considerations of the Pre-Trial Chamber regarding the Appeal against Order on the Admissibility of Civil Party Applicant [REDACTED]*

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

1. [REDACTED] filed an application<sup>1</sup> to participate in Cases 004 and requested that information contained in her Case 002 application (VU Reg#00-VU-00013/Doc No. D22/0001) be included in this application. She attached also to her application an excerpt from Stephen Heder and Brian D. Tittmore's (2001) *Seven Candidates for Prosecution: Accountability for the Crimes of the Khmer Rouge*. [REDACTED] submits that she was between four and eight years old during the Khmer Rouge regime and that she was a victim of forcible transfer from Phnom Penh (Phase 1) and of forced transfer of people of the East Zone (Phase 3) during which time she suffered unlawful arrest and detention at Wat Tlork Security Centre (located in Tlork village, Svay Chrum district, Svay Rieng province, East Zone), and was later on sent to Boeng Rai Security Centre. She was forced to do hard labour. She suffered the death of her mother and the deaths of many innocent women and detainees in these two security centres, as she witnessed them, during the *purges of the East Zone*. [REDACTED] further claims that she is a victim of and a witness to crimes against humanity to which officials of the Lon Nol regime were subjected. She states that during the regime:

- She lost her father named Kao Im, a former military commander who was subjected to enforced disappearance and murder.
- She and her family were forcibly evacuated from Phnom Penh to Svay Rieng province.
- She was deprived of food, medicine, education and other necessities.
- She suffered torture and other cruel and inhumane treatment.
- She witnessed the torture and/or killings of detainees committed by the Khmer Rouge officials.
- She witnessed her mother being tortured or brutally and inhumanely treated.
- She lost her mother who was a victim of forced disappearance and murder.

[REDACTED] also submits in her Appeal<sup>2</sup> against Order on Admissibility of her Civil Party Application that [REDACTED] are to be directly responsible for the appellant's legal injuries during the fall and the forced movement from Phnom

<sup>1</sup> [REDACTED] Application, D5/1/1.

<sup>2</sup> [REDACTED] Appeal, para. 13, D5/1/4/1.



Penh (Phase 1) when her father, who was a Lon Nol military commander “disappeared” among other legal injuries; and the movement of the East Zone people (Phase 3) when the Khmer Rouge imprisoned her and her family first at Wat Tlork and then Boeung Rai Security Centres, where she experienced and witnessed, *inter alia*, the death of her mother, among the 30,000 (thirty thousand) lives estimated to have been extinguished at Boeung Rai.

2. The facts described in [REDACTED] Appeal against Order on Admissibility of Civil Party Applications dated 18 May 2011 all are facts set out in the First Introductory Submission<sup>3</sup> dated 18 July 2007, as well as in the Closing Order of Case No. 002/19-09-2007/ECCC/OCIJ<sup>4</sup>—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 in Case 004, the Co-Investigating Judges did not charge any person. This means that regarding the facts sent by the Co-Prosecutors through the Introductory Submissions to the Co-Investigating Judges, there was no suspect against whom the Co-Investigating Judges find there was clear and consistent evidence indicating that the person participated in the commission of the alleged crimes.

<sup>3</sup> Introductory Submission, D3

<sup>4</sup> Closing Order, D427, paras. 221—282 and paras. 644—666



5. As a result, the rejections of [REDACTED] Civil Party Applications at this stage do not infringe their rights. On top of this, we are of the following view:
6. As a principle, 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. 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.

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







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 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 of 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 Applications of [REDACTED] were filed in Case 004,

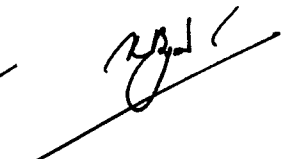


the Co-Investigating Judges have not yet identified any charged person with regard to the facts set out in the Introductory Submission sent to them.

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.<sup>5</sup>

Phnom Penh, 28 February 2012

  
  
PRAK Kimsan NEY Thol

  
HUOT Vuthy

<sup>5</sup> Rule 23 *quinquies* of the Internal Rules.

## OPINION OF JUDGES DOWNING AND LAHUIS

### I– Summary of Submissions:

1. The Appeal is lodged pursuant to Internal Rules 74(4)(b) and 77bis.<sup>1</sup> The Appellant submits three requests, namely that the Pre-Trial Chamber declare the Appeal admissible, set aside the Impugned Order and grant her the status of civil party in Case 004, in support of which she raises the following four grounds of appeal:

**Ground 1:**<sup>2</sup> The Co-Investigating Judges have violated Internal Rules 56 and 21 in depriving her of the procedural fairness guarantee of timely and sufficient information on the scope of the judicial investigation. She submits in particular that in failing to properly inform the public, the victims and the potential civil party applicants about the scope of the judicial investigation for Case 004, the Co-Investigating Judges have breached their obligation under Internal Rule 21(1)(c), as well as the general principles in Article 6 of the Basic Principles for Victims,<sup>3</sup> to ensure that victims are kept informed and that their rights are respected “throughout the proceedings”. The Appellant accepts that the judicial investigation is confidential, but claims that the Co-Investigating Judges have applied unreasonable secrecy in Case 004 and that the lack of information resulted in procedural unfairness as she has not been afforded the possibility to effectively participate in the proceedings and to adequately support her application to become a civil party in this case.

**Ground 2:**<sup>4</sup> The rejection of her Application to become a civil party in Case 004 resulted from the failure by the Co-Investigating Judges to properly and independently investigate the facts in Case 004 contrary to Article 5(2) and (3) of the Agreement, Article 10 new ECCC Law, and Internal Rules 14(1) and 55(5). She alleges in particular that the Co-Investigating Judges have failed their legal duties and functions by not conducting field

<sup>1</sup> Appeal, para. 18.

<sup>2</sup> Appeal, paras 21 – 33.

<sup>3</sup> United Nations General Assembly, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Resolution 40/34, 29 November 1985.

<sup>4</sup> Appeal, paras 34 – 49.



investigations of all crimes sites and criminal episodes relevant to Case 004 especially as it relates to the facts the Appellant has submitted in her Application. She claims that such failure adversely affected her ability to make a stronger civil party application and eventually contributed to the rejection of her Application by the Co-Investigating Judges.

**Ground 3:**<sup>5</sup> The Co-Investigating Judges misapplied and misinterpreted the facts and law related to the participation of [REDACTED] in a joint criminal enterprise (JCE) and common design and purpose. The Appellant points in particular that her admissibility as a civil party under Internal Rule 23*bis* requires her to relate her injury to “only one” of the crimes alleged against the charged person. She suggests that the Co-Investigating Judges erred in the current case by applying the causal link requirement to geographical districts and zones [REDACTED] instead of to the crimes these persons are purportedly alleged to have committed by way of participation into a JCE under the Second Introductory Submission, and

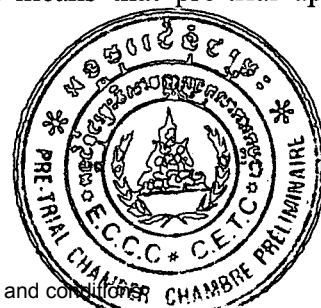
**Ground 4:**<sup>6</sup> The Co-Investigating Judges have failed to provide a reasoned decision on the inadmissibility of her Application, thus violating Internal Rule 21 and Article 4 of the Basic Principles for Victims. She claims that failure by the Co-Investigating Judges to issue a properly reasoned decision violated their obligations to ensure legal certainty and transparency, to keep victims properly informed throughout the proceedings, and to treat victims with compassion and respect for their dignity.

## II – Admissibility of the Appeal

2. Internal Rules 74(4)(b) and 77*bis* respectively allow civil party applicants to appeal before the Pre-Trial Chamber against orders by the Co-Investigating Judges declaring a civil party application inadmissible and prescribe that such appeal shall be filed within 10 days of the notification of the order on admissibility. Under Internal Rule 77*bis*, the Pre-Trial Chamber has jurisdiction to consider alleged errors of fact and/or law made by the Co-Investigating Judges in their determination of the admissibility of a civil party application pursuant to Internal Rule 23*bis*, which means that pre-trial appeals under

<sup>5</sup> Appeal, paras 50 – 54.

<sup>6</sup> Appeal, paras 55 – 66.



Internal Rules 74(4)(b) and 77bis are admissible insofar as they challenge the consideration by the Co-Investigating Judges of a civil party application and/or the way the Co-Investigating Judges generally managed the civil party admissibility regime provided for victims under the ECCC legal framework.

3. The Impugned Order rejecting the Appellant's Application to become a civil party in Case 004 was issued by the Co-Investigating Judges on 29 April 2011 and notified to the national lawyer of the Appellant on 3 May 2011. Considering that the 13 May 2011 was an official holiday, the Notice of Appeal and the submissions on Appeal, which were both filed on 18 May 2011, were brought in time under Internal Rules 75 and 77bis(2).
4. As regards the jurisdiction of the Pre-Trial Chamber, we consider that grounds of appeal 1, 3 and 4 are admissible pursuant to Internal Rules 74(4)(b) and 77bis and that Ground 2 is inadmissible as it is directed against the conduct of the judicial investigation by the Co-Investigating Judges and does not challenge the Impugned Order nor any other order by the Co-Investigating Judges and thus does not fall under any of the matters contemplated by Internal Rule 74(4).

### III – Standard of Review

5. The Appellant's alleged violations of rights are examined according to the standards of review on appeal accepted by the Pre-Trial Chamber, namely that "on appeal, alleged errors of law are reviewed *de novo* to determine whether the legal decisions are correct and alleged errors of fact are reviewed under a standard of reasonableness to determine whether no reasonable trier of fact could have reached the finding of fact at issue."<sup>7</sup>
6. Considering the nature of the issues raised in the submissions on Appeal, we refer also to the Pre-Trial Chambers considerations in the Civil Parties Decisions in Case 002 regarding its inherent jurisdiction to also examine due diligence by the Co-Investigating Judges.<sup>8</sup> In that decision "The Pre-Trial Chamber [took] note of the issue also raised by

<sup>7</sup> 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, ("Civil Parties Decisions in Case 002") common para. 34.

<sup>8</sup> Civil Parties Decisions in Case 002, common paras. 51-53.



some of the Civil Party Lawyers in the appeals that the Co-Investigating Judges did not keep the victims informed in a timely fashion. The Pre-Trial Chamber [considered] that the due diligence displayed in the Co-Investigating Judge's conduct is a relevant factor when considering victims' rights in the proceedings. Therefore, examination of what steps have been taken by the Co-Investigating Judges and to what degree they affect the situation of the victims [was found] necessary."<sup>9</sup>

#### IV – Examination of errors alleged in the first Ground of Appeal

7. The Appellant argues that the Co-Investigating Judges have breached their obligation under Internal Rule 21(1)(c) by not providing timely and sufficient information to the Victims about the investigation which has resulted procedural unfairness and violations of the rights of Victims.
8. We observe,<sup>10</sup> as also claimed by the Appellant, that, contrary to the practice adopted in Case 002,<sup>11</sup> victims were not, prior to the filing of the Application or of this Appeal, given any information about the investigation in Case 004 nor about their right to apply to become civil parties or to file a complaint in the case. As emphasised by the Pre-Trial Chamber in its "Decision on appeals against orders of the Co-Investigating Judges on Civil Party Applications" in Case 002, the disclosure of sufficient information about the scope of the investigation, in a timely manner, is essential to permit victims to exercise the rights provided to them under Internal Rule 23bis.<sup>12</sup> In particular, for victims to apply to become civil parties in a case, they have to demonstrate, *inter alia*, a link between the injury suffered and at least one of the crimes alleged against a charged person. Such a demonstration cannot be made when no information whatsoever is available. Already, in

<sup>9</sup> Civil Parties Decisions in Case 002, common para.51.

<sup>10</sup> See also Considerations of the Pre-Trial Chamber Regarding the Appeal against Order on the Admissibility of Civil Party Applicant ██████████, 24 October 2011, D11/2/4/4, Opinion of Judges Lahuis and Downing ["████████ Opinion"], paras. 4-6.

<sup>11</sup> In Case 002, the Co-Investigating Judges issued a press release on 5 November 2009 disclosing the scope of the investigation and informing victims of their right to apply to become civil parties in the case, more than two months prior to the closing of the investigation (on 14 January 2010). They extended two times the deadline for civil party applicants to file further information in order to support their application, giving an additional 5 months for doing so (until 30 June 2010). The Pre-Trial Chamber considered in Case 002 that the information provided to the victims was insufficient and not provided in a timely manner, thus infringing upon the rights of the victims: See Civil Parties Decisions in Case 002, paras 51-54.

<sup>12</sup> Civil Parties Decisions in Case 002, common paras 51-54.



Case 002 where more information was disclosed to the victims at an earlier stage, the Co-Investigating Judges were found by the Pre-Trial Chamber to have violated the rights of the victims for not having provided them sufficient information. 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:

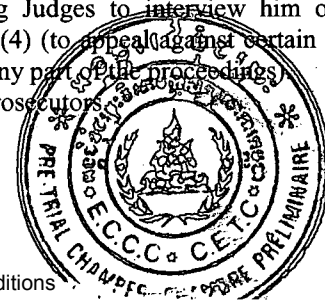
"So far, the Office of the Co-investigating Judges did not notify the public of the crime sites in Case 004, because, unlike in Case 002, there are serious doubts whether the suspects are "most responsible" according to the jurisdictional requirement of Article 2 ECCC Law. If the Court had no jurisdiction, 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."<sup>13</sup>

9. In the Press Statement the Co-Investigating Judges also informed which crime sites and criminal episodes are included in the Third Introductory Submission in Case 004.
10. Notwithstanding this belated information, we consider that, as far as this Appeal is concerned, the rights of the Appellant for timely and sufficient information about the investigation in Case 004 have been ignored to their detriment. We also take note that no civil party applicant has been in a position to effectively exercise the right to participate in the judicial investigation expressly provided for under the Internal Rules<sup>14</sup> and that this situation appears to result, to a significant extent, from the lack of information surrounding the investigation in Case 004. As such, we consider that the rights of the victims have been ignored thus far to their detriment. We also emphasise that by being allowed under the Internal Rules to participate in the judicial investigation in various ways, victims, as complainants<sup>15</sup> or civil party applicants, may bring important information pertaining to the facts under investigation, including the role the Suspects

<sup>13</sup> Press Release by the Co-Investigating Judges Regarding Civil Parties in Case 004 (004/07-09-2009/OCIJ), 8 August 2011.

<sup>14</sup> See *inter alia* the rights granted to civil parties during the judicial investigation under Internal Rules 55(8) (to attend on-site visits conducted by the Co-Investigating Judges), 55(10) (to request investigative actions), 58(5) (to participate in confrontations), 59(5) (to request the Co-Investigating Judges to interview him or her, interview witnesses, go to a site, order expertise and collect evidence), 74(4) (to appeal against certain orders issued by the Co-Investigating Judges) and 76(2) (to request annulment of any part of the proceedings).

<sup>15</sup> Internal Rule 49(2) allows complainants to bring information to the Co-Prosecutor.



may have played in the alleged crimes. Refusing them the possibility to participate in the investigation may deprive the Co-Investigating Judges of important information in their search for the truth, leading to an incomplete investigation and raising doubts about its impartiality.

11. As a general matter, the Pre-Trial Chamber has emphasized that provisions of the Internal Rules related to confidentiality of the judicial investigation, which restrict the information that the Co-Investigating Judges can publicly disclose, shall at all times be read in conjunction with the fundamental principles governing the conduct of proceedings before the ECCC, which, *inter alia*, command “that victims are kept informed and that their rights are respected *throughout* the proceedings”.<sup>16</sup> It was determined that this fundamental guarantee afforded to victims leaves no room for interpretation and entails that proper and timely information shall be provided to victims all through the pre-trial stage of proceedings.<sup>17</sup> During the stage of the judicial investigation, this obligation is directly incumbent upon the Co-Investigating Judges,<sup>18</sup> as they are responsible under the Internal Rules for conducting such investigation and accordingly possess an informed knowledge of the scope and factual parameters of it.
12. We consider that the Co-Investigating Judges have the obligation, when seised of an application to become a civil party, to decide on the substance of such application. The Co-Investigating Judges appear to be of the same opinion as they have examined and decided upon the merit of the Appellant’s Application. As a consequence, when the information necessary to appraise the substance of a victim application to become a civil party in a case before the ECCC is not yet available, the Co-Investigating Judges or the Pre-Trial Chamber should reserve their decision on this matter until such information becomes available in the course of the investigation, as required by the Internal Rules. To act otherwise would lead to a premature rejection of the civil party applications and defeat the whole admissibility regime established for victims under the ECCC Internal Rules.

<sup>16</sup> Internal Rule 21(1)(c) (emphasize added); Civil Parties Decisions, common para. 52.

<sup>17</sup> Civil Parties Decisions in Case 002, common paras 52 – 53.

<sup>18</sup> Considerations of the Pre-Trial Chamber Regarding the International Co-Prosecutors’ Appeal against the Co-Investigating Judges’ Order on International Co-Prosecutor’s Public Statement Regarding Case 002 (“Considerations on Appeal against the Retraction Order”), 24 October 2011, D14/1/3, para. 31.





13. Further we observe, as also claimed by the Appellant<sup>19</sup> that, in contrast with the practice in Cases 001 and 002, lawyers for the civil party applicants in Case 004 were not given access to the case file after civil party applications and power of attorneys were filed. In our opinion, 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.
14. We consider that, the Co-Investigating Judges have failed to fulfil the requirement of due diligence by not informing the victims in a timely and sufficient manner about the scope of investigation and that they have also committed an error of law in depriving access to the Victims' lawyers to the Case File in Case 004 before deciding on the application, thus denying the Appellant the opportunity to make an informed decision to either amend her Application to become a civil party in Case 004 or to abandon it in the event she determines that she has no reason to believe that the injuries she claims have the necessary causal link with the crimes.
15. Further, considering that the Appellant has been deprived of the opportunity to be timely informed of the investigation and therefore to adequately submit and support her Application to become a civil party in Case 004, we are of the view that it is not possible to examine the other errors alleged under Grounds 3 and 4 of the Appeal. The errors committed by the Co-Investigating Judges have rendered the whole determination of the Appellant's Application unfair and accordingly we consider that the Impugned Order should be annulled and the matter should be remitted to the Co-Investigating Judges in order for them to: first, provide the Appellant's legal representative with access to the Case File for Case 004 as provided for by Internal Rules 23bis (2) and 55(6) and (11); second,, allow the Appellant to amend her Application<sup>20</sup> to become a civil party in Case 004 within ten (10) days of her lawyer being provided access to the Case File; and third, examine afresh and according to law any renewed Application filed by the Appellant. Although the Impugned Order stands because the Pre-Trial Chamber could not reach a

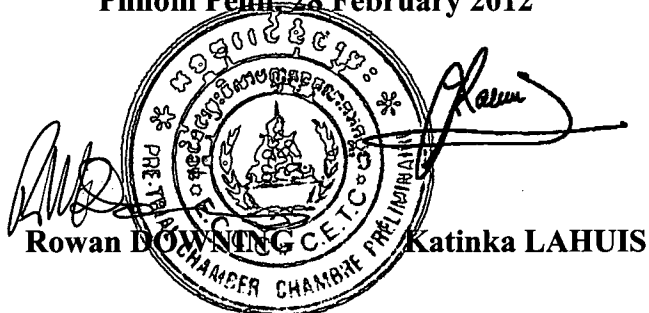
<sup>19</sup> Appeal, para. 6.

<sup>20</sup> Appeal, para 4: "On 5 May 2011, Appellant sent out a pres release stating her intention to lodge another application against [...] in Case 004."



decision on the Appeal, we note that it remains possible for the Co-Investigating Judges to use their judicial discretion to reconsider this Order,<sup>21</sup> taking into account the considerations in this Opinion and any other relevant considerations as necessary.

Phnom Penh, 28 February 2012



Rowan DOWNING C.E.T.C. Katinka LAHUIS

<sup>21</sup> We refer to the authorities relied on in our Opinion related to the Appeal filed by the International Co-Prosecutor on Re-Filing three Investigative Requests, 15 November 2011, D26/1/3, para. 20, note 34.