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

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

អង្គបុរេជំនុំជម្រះ
Pre-Trial Chamber
Chambre Préliminaire

លេខ៖ D11/3/4/2

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: 003/07-09-2009-ECCC/OCIJ (PTC 05)

Before: **Judge PRAK Kimsan, President**
Judge Rowan DOWNING
Judge NEY Thol
Judge Chang-Ho CHUNG
Judge HUOT Vuthy

Date: **13 February 2013**

PUBLIC (REDACTED VERSION)

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

Lawyers for the Civil Party Applicant

HONG Kimsuon
Silke STUDZINSKY

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 [redacted]" filed by the Co-Lawyers on 15 August 2011 (the "Appeal").[1]

I. PROCEDURAL BACKGROUND AND SUBMISSIONS

1. On 7 September 2009, the then Acting International Co-Prosecutor filed the "Second Introductory Submission Regarding [redacted]"[2] (the "Second Introductory Submission") with the Co-Investigating Judges requesting them to commence a judicial investigation. The Second Introductory Submission was filed as confidential and thus not subject to access by the public, the victims and potential civil parties.[3]

2. On 29 April 2011, the Co-Investigating Judges issued a Notice of Conclusion of the Judicial Investigation in Case 003.[4]

3. On 9 May 2011, the International Co-Prosecutor issued a public statement ("the Statement") disclosing information from the Second Introductory Submission, including the alleged crime sites,[5] which he thereafter retracted.[6]

4. On the same day, [redacted] (the "Appellant") filed an application to the Victims Support Section of the ECCC (the "VSS"), seeking to be admitted as a civil party in Case

[1] Appeal Against Order on the Admissibility of Civil Party Applicant [redacted], 15 August 2011, D11/3/4/1.
[2] Co-Prosecutors' Second Introductory Submission Regarding [redacted], 20 November 2008, D1; Acting International Co-Prosecutor's Notice of Filing of the Second Introductory Submission, 7 September 2009, D1/1.
[3] Note that on 8 September 2009, the Acting International Co-Prosecutor publicly confirmed the filing of the Second Introductory Submission through a press statement (Press Release: Statement of the Acting International Co-Prosecutor, 8 September 2009).
[4] Notice of Conclusion of Judicial Investigation, 29 April 2011, D13.
[5] Press Release: Statement by the International Co-Prosecutor regarding Case File 003, 9 May 2011.
[6] The International Co-Prosecutor retracted his Statement on 27 October 2011 in accordance with the Pre-Trial Chamber's Considerations Regarding the International Co-Prosecutor's Appeal against the Co-Investigating Judges' Order on International Co-Prosecutor's Public Statement Regarding Case 003 (24 October 2011, D14/1/3) and the Co-Investigating Judges' Order on International Co-Prosecutor Public Statement Regarding Case File 003 (18 May 2011, D14).

003 before the ECCC (the "Application"). In the Application, the Appellant claims to have suffered psychological harm as a direct consequence of crimes committed against her husband who was forcibly sent to work under inhumane conditions at [redacted].[7] The Application was filed with the Co-Investigating Judges by the VSS on 3 June 2011. Attached to the Application was a Power of Attorney for the Appellant's Co-Lawyers, Mr. HONG Kimsuon and Ms. Silke STUDZINSKY.[8]

5. On 11 May 2011, the Co-Lawyers filed with the Office of the Co-Investigating Judges a request to be granted access to the Case File and for the suspension of the deadline to submit investigative requests until 30 days after access has been granted to the Case File.[9] Despite several requests allegedly made from 11 May 2011 onwards, the Co-Lawyers had not been granted access to the Case File at the moment the Appeal was filed[10] and this situation appears unchanged at this point in the proceedings.

6. On 27 July 2011, the Co-Investigating Judges issued their Order on the Admissibility of the Civil Party Application of [redacted] (the "Impugned Order") rejecting the Appellant's Application on the basis that she had failed to demonstrate that her "alleged physical injury was caused *directly* by the alleged crime".[11] The Co-Investigating Judges further added that the Application would, in addition, have to be rejected for the reasons that i) the allegation made by the Appellant about her personal injury "cannot be considered as 'more likely than not to be true'" and "the possibility cannot be excluded that it was based on an unsound advice by a third person"[12] and ii) admitting the Application would not be in the interest of the expeditiousness of the proceedings as the Appellant is already "enjoying her rights as a civil party" in Cases 001 and 002 before the

[7] Report on Civil Party Application prepared by the Victims Support Section, 3 June 2011, D11/3/1; Victim Information Form Translation into English from the Original Khmer by the Interpretation and Translation Unit, 29 August 2011, D11/3.
[8] Power of Attorney, 6 May 2011, D11/3/2 placed in the Case File by the Office of the Co-Investigating Judges on 25 August 2011.
[9] Letter of Civil Party Lawyers Mr. Hong Kimsuon and Ms. Silke Studzinsky, dated 9 May 2011, filed on 11 May 2011, D16 (the "Request to access the Case File").
[10] Appeal, para. 3.
[11] Order on the Admissibility of the Civil Party Application of [redacted], 27 July 2011, D11/3/3, para. 5.
[12] Impugned Order, para. 9.

ECCC.[13] The Impugned Order was notified on 5 August 2011 to the Appellant but not to the Co-Lawyers.

7. On 15 August 2011, the Co-Lawyers concurrently filed a Notice of Appeal[14] with the Co-Investigating Judges and submissions on Appeal with the Pre-Trial Chamber, requesting the Pre-Trial Chamber to: i) declare the Appeal admissible; ii) set aside the Impugned Order; iii) grant the Appellant the Civil Party status in Case 003; iv) order the Co-Investigating Judges to grant the Co-Lawyers access to the Case File; and v) allow the Co-Lawyers to make further submissions on the Appeal after having accessed the Case File.[15] In support of their requests, the Co-Lawyers raise the following five grounds of appeal: i) the Co-Investigative Judges have violated Internal Rule 21(1)(c) to ensure legal certainty and transparency of the proceedings by rejecting the Application on the basis that the Appellant is not a "direct victim" of the crimes committed against her husband, in contradiction with their previous jurisprudence (the "First ground");[16] ii) the Co-Investigative Judges have erred in their interpretation of Internal Rule 23*bis*(1)(b) and Article 3.2(c) of the Practice Direction on Victims Participation in finding that the Appellant did not demonstrate that her injury was the direct consequence of the crimes committed against her husband (the "Second ground");[17] iii) the Co-Investigative Judges violated Internal Rules 21(1), 21(1)(c) and 23*bis*(1), the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law[18] and exceeded their power by rejecting the Application on an alternative basis as not meeting the standard of proof (the "Third ground");[19] iv) the Co-Investigative Judges have violated Internal Rules 21(1), 21(1)(c) and 23(1), the fundamental principle of an effective remedy for victims and the right to a reasoned decision by rejecting the application, in the alternative, because of the necessity of an expeditious trial and the satisfaction of being a

[13] Impugned Order, para. 10.
[14] Record of Appeal, 15 August 2011, D11/3/4.
[15] Appeal, para. 105.
[16] Appeal, paras 15 – 35.
[17] Appeal, paras 36 – 53.
[18] General Assembly of the United Nations, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 16 December 2005, UN Doc. A/RES/60/147.
[19] Appeal, paras 54 – 73.

civil party in Cases 001 and 002 (the "Fourth ground");[20] and v) the Co-Investigative Judges have violated Internal Rules 14(1) and 55(5), Article 10 new of the ECCC Law, Article 5(2) and (3) of the Agreement and the "UN Principles against Impunity"[21] by failing to properly and independently investigate Case 003 (the "Fifth ground").[22]

8. On 18 August 2011, the Pre-Trial Chamber accepted a Request for Correction filed by the Co-Lawyers correcting spelling mistakes in the English original.[23] On 8 September 2011, a public redacted version of the Appeal was filed.

9. No response was filed to the Appeal.

II. EXPRESSION OF OPINION AND CONCLUSION

10. 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. 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.

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

III. DISPOSITION

THEREFORE, THE PRE-TRIAL CHAMBER HEREBY:

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[20] Appeal, paras. 74 – 80.
[21] Diane Orentlicher, Report of the Independent Expert to Update the Set of Principles to Combat Impunity: Promotion and Protection of Human Rights, 8 February 2005, UN Doc. E/CN.4/2005/102.
[22] Appeal, paras 81 – 104.
[23] Request for Correction, 18 August 2011, D11/4/1/Corr_1.

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

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

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

Phnom Penh, 13 February 2013

President **Pre-Trial Chamber**

PRAK Kimsan **Rowan DOWNING** **NEY Thol** **Chang-Ho CHUNG** **HUOT Vuthy**

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

Judges Rowan DOWNING and Chang-Ho CHUNG append their opinion.

Opinions of Judges PRAK Kimsan, NEY Thol and HUOT Vuthy

1. In her appeal against the Order on the Admissibility of [redacted] Civil Party Application (D11/3) ("Appeal")[1], [redacted] indicated that she appeals against the order rejecting her civil party application. In the appellant's Victim Information Form [redacted] wrote that in early 1977 her husband became a direct victim who was forced to undergo hard work at the [redacted] In effect, [redacted] has endured great mental suffer by the forceful hard work her husband experienced.[2]

2. The facts that [redacted] described in her application and which were also mentioned in her Appeal against the Order on the Admissibility of Civil Party Application, dated 27 July 2011, are facts contained in the First Introductory Submission,[3] dated 18 July 2007:
   - Summary of Facts (Paragraphs 1—36)
   - [redacted] (Paragraph 47 and Paragraphs 49—55)

   These facts are also contained in the Closing Order of Case File 002/19-09-2007-ECCC/OCIJ.[4]

3. Moreover, we are of the view that the facts that were described in the Second Introductory Submission, dated 20 November 2008, which constitute Case File 003, are old facts mentioned in the First Introductory Submission, dated 18 July 2007.

4. During their investigations of Case File 003, i.e., from the inception to notification of conclusion of the investigations, the Co-Investigating Judges did not charge any person. This follows that, with regard to the facts sent by the Co-Prosecutors to the Co-Investigating Judges through the Introductory Submissions, the Co-Investigating Judges found no suspect against whom there was clear and consistent evidence indicating that such person participated in the commission of the crimes charged.

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[1] [redacted] Appeal, D11/4/1
[2] Victim Information Form
[3] Introductory Submission, D3
[4] Closing Order D427, para. 221-282 and para. 383-399.

5. Therefore, the rejection of civil party application at this stage does not infringe the rights of [redacted]. Furthermore, we are also of the view that:

6. According to the principle of prosecutorial opportunity, the Co-Prosecutors shall decide on facts that have characteristics of offences and shall choose to prosecute or to file without processing even though those facts are offenses. In this principle, the Co-Investigating Judges shall investigate the facts sent to them by the Co-Prosecutors, by evaluating inculpatory evidence provided by the Co-Prosecutors in the Case File and exculpatory evidence the Co-Investigating Judges may have collected during the conduct of their investigations. The Co-Investigating Judges shall also examine the consistency of evidence that leads them to believe that a person committed a crime. 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 provides that the Co-Investigating Judges *have the power to charge any Suspects named in the Introductory Submission.* They may also charge any 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 when 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) clearly shows that this rule provides the Co-Investigating Judges with their discretion to charge any persons whose names were mentioned in the Introductory Submission. The Co-Investigating Judges also have the power to charge any other persons whose names were not given in the Introductory Submission. This provision does not force the Co-Investigating Judges to charge all persons whose names were mentioned in the Co-Prosecutors' Introductory Submission. Besides, Internal Rule 55(5) provides the Co-Investigating Judges with the right to, or not to, summon Suspects or Charged Persons.

9. It follows that when the Co-Prosecutors submit their Introductory Submission by requesting a specific person be charged or provisionally detained, it is the Co-Investigating Judges' discretion to decide whether or not that person be charged or provisionally detained. Therefore, the Co-Investigating Judges are not bound by the names of the Charged Persons contained in an Introductory Submission or a Supplementary Submission. It is, therefore, the right of the Co-Investigating Judges to charge any person.

10. Internal Rule 57(1) states, in part, 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 silent." This provision is only to protect the Charged Person (*right to be informed of the charges, right to a lawyer, and right to remain silent*) when he or she is to appear before the Co-Investigating Judges, no matter if the appearance is by one's own initiative, by a subpoena or by an arrest warrant. This provision does not require that the Co-Investigating Judges shall issue a subpoena for the appearance of the Charged Person when the Co-Investigating Judges are seized with an Introductory Submission. In other words, a specific time [to do so] is not determined.

11. The Co-Investigating Judges charge any person against whom there is clear and consistent evidence indicating that such person participated in the commission of a crime in his or her capacity as a perpetrator or an accomplice.

12. As already pointed out in Paragraph 4 above, during the conduct of their investigations in Case File 003, i.e., from the inception to the notification of conclusion of the investigations, the Co-Investigating Judges did not charge any person, meaning that for the facts described in the Introductory Submission sent by the Co-Prosecutors to the Co-Investigating Judges, the Co-Investigating Judges found no Suspect against whom there was clear and consistent evidence which indicated that he or she participated in the commission of the crimes charged.

13. For all of the above mentions, we are of the view that at the time the Impugned Order was issued, the Co-Investigating Judges had not been able to name any Charged Person with

regard to the facts set out in the Introductory Submission sent to the Co-Investigating Judges.

14. Besides, Civil Party Applications have been made in order to seek remedy to damage(s) caused by offenses and to the victim. Those offenses shall stem from the acts of the offender(s), including perpetrator(s) or co-perpetrator(s).

15. We find that in the event that there is no Charged Person to be responsible for the remedy being sought for the damage he or she had caused to the victim, the rejection of Civil Party Application at this stage does not infringe the rights of the victim.[5]

16. In respect of my colleague's statement, "the Charged Persons were informed of the charges by the Reserve International Co-Investigating Judge", we wish to specify that the Reserve International Co-Investigating Judge's notification was made only after the disagreement over accreditation had arosen in the Office of the Co-Investigating Judges.[6] To date no legitimate accredittion has ever been confirmed for the Reserved International Co-Investigating Judge. Therefore, until now we are still of the opinion that the Reserve International Co-Investigating Judge is not authorized to name any Charged Persons yet.

Phnom Penh, 13 February 2013

PRAK Kimsan **NEY Thol** **HUOT Vuthy**

[5] Rule 23 *quater* of the Internal Rules
[6] Document D113.1 of February 27, 2012 of the Office of the International Co-Investigating Judge.

OPINION OF JUDGES CHUNG AND DOWNING

I – Procedural Defects in Treatment of the Application by the Co-Investigating Judges

1. As a preliminary matter, we recall and adopt the observations made by Judges Downing and Lahuis in their Opinion to the Considerations of the Pre-Trial Chamber regarding the Appeal against Order on the admissibility of Civil Party Applicant Robert Hamill concerning the irregularities and inconsistencies in the approach and procedures followed by the Co-Investigating Judges in their conduct of the judicial investigation for Case 003 and their treatment of civil party applications.[1] As explained below, the Appellant has faced problems similar to those identified in the *Hamill* Opinion in filing her complaint and application to become a civil party and having it processed and dealt with in a fair, transparent and adversarial manner by the Co-Investigating Judges. We will briefly highlight the general context in which the Appellant's Application was filed and decided upon by the Co-Investigating Judges and are compelled to raise *proprio motu* a procedural defect in the treatment of the Appellant's Application which, although it is unknown to the Co-Lawyers, affects in our view the validity of the Impugned Order.

2. Regarding the context in which the Appellant's Application was filed, we first note that the Co-Lawyers, who have filed a power of attorney on 9 May 2011 specifically empowering them to receive service of documents on the Appellant's behalf,[2] have not been notified of the Impugned Order.[3] Although Internal Rule 46(1) provides that the Co-Investigating Judges' orders shall be notified "to the parties or their lawyers", we consider, in light of the larger context in which the Co-Investigating Judges repeatedly abstained from notifying documents to lawyers for civil party applicants in Case 003,[4] that this course of action may be perceived as an attempt to impair the Appellant's right to

[1] 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 "*Hamill* Opinion"), paras 2-9.
[2] Power of Attorney, dated 6 May 2011, D11/3/2, said to have been filed with the Application on 9 May 2011 (Appeal, para. 2), placed in the Case File by the Office of the Co-Investigating Judges on 25 August 2011.
[3] Appeal, paras 4 and 11; the Filing Instruction Form of the Impugned Order contains no instruction for the Case File Officer to notify the Co-Lawyers.
[4] *See* in particular *Hamill* Opinion, para. 7.

legal representation.[5]

3. Second, the Co-Lawyers' repeated requests to have access to the Case File have remained unanswered by the Co-Investigating Judges, so the Appellant's legal representatives have not been able to access the Case File prior to the filing of the Appeal and Application and this situation appears unchanged at this point in the proceedings.[6] This prompted the Co-Lawyers to request the Pre-Trial Chamber to order the Co-Investigating Judges to grant them access to the Case File and leave to make further submissions on the Appeal.[7] For reasons previously expressed by Judges Downing and Lahuis in the *Hamill* Opinion,[8] we consider that the Co-Lawyers were entitled by the Internal Rules to access the Case File after the Application was submitted to the Office of the Co-Investigating Judges and a Power of Attorney was filed until the rejection of the Application becomes final. Consequently, we are in favour of granting the Co-Lawyers' Request to access the Case File and allowing them to file further submissions on the Appeal; however, as the Pre-Trial Chamber could not assemble the required majority of four votes, no decision could be reached on this Request.

4. Third, the Appellant's Application was filed, dealt with and rejected by the Co-Investigating Judges without the Appellant having access to any information about the scope of the investigation. In particular, the Co-Investigating Judges merely announced to the public on 29 April 2011 that they had filed a Notice of Conclusion of the Judicial Investigation without giving any information about the scope of this investigation or any other information whatsoever. The only information made available to the public, the victims and potential civil parties about the scope of the investigation in Case 003 was provided in a Press Statement issued on 9 May 2011 by the International Co-Prosecutor,[9] which was the subject of a Retraction Order by the Co-Investigating Judges[10] and was retracted thereafter by the International Co-Prosecutor on 27 October 2011.[11] After the filing of the Application, the Appellant has not been given access to the Case File, nor has

[5] Internal Rule 46(1) and 23*ter*(2), as well as Cambodian and international practices, directed that the Impugned Order shall have been notified to the Co-Lawyers (*see Hamill* Opinion, para. 7).
[6] Appeal, paras 3 and 11; Letter from the Co-Lawyers to the Co-Investigating Judges dated 9 May 2011, placed in the case file on 11 May 2011, D16 (the "Request to have access to the Case File").
[7] Appeal, para. 105(v).
[8] *Hamill* Opinion, para. 6.
[9] Press Release: Statement by the International Co-Prosecutor regarding Case File 003, 9 May 2011.
[10] Order on International Co-Prosecutor's Public Statement Regarding Case File 003, 18 May 2011, D14.
[11] Press Release: Statement by the International Co-Prosecutor Regarding the Co-Investigating Judges' Retraction Order in Case 003, 27 October 2011.

been provided, in any other manner, with information about the scope of the investigation prior to the Application being rejected. Consequently, we find that the total absence of information about the scope of the investigation disclosed by the Co-Investigating Judges has impaired the Appellant's ability to effectively exercise the right to make and substantiate the Application to become a civil party under Internal Rule 23*bis*[12] and to participate in the judicial investigation as a right under the Internal Rules.[13] We recall that, by being allowed under the Internal Rules to participate in the judicial investigation in various ways, victims, as complainants or civil party applicants, may bring important information pertaining to the facts under investigation, including the role suspects may have played in the alleged crimes.[14] Refusing to victims the possibility to participate in the investigation can deprive the Co-Investigating Judges of significant information in the search for the truth, leading to an incomplete investigation and raising doubts about its impartiality.

5. It is within this context, where the Appellant's right to effective legal representation, to have access to the Case File and to be provided with timely and sufficient information about the judicial investigation have been impaired, that we are compelled to raise *proprio motu* as a procedural defect which, in our view, affects the validity of the Impugned Order. This defect pertains to the fact that, at the time the Pre-Trial Chamber was seised of the Appeal on 15 August 2011, the sole document relating to the Appellant's Application that was effectively *in* the Case File was the Impugned Order and the Co-Lawyers' Request to have access to the Case File. In other words, the Appellant's Application and its supporting documents, the Report on the Civil Party Application from the VSS and the Power of Attorney (the "Application and its related documents") were not part of the Case File at the time the Impugned Order was issued, although they appear to have been submitted to the Office of the Co-Investigating Judges by the VSS no later than 3 June 2011.[15] Upon request of a Pre-Trial Chamber's Greffier,[16] these documents

[12] *Hamill* Opinion, para. 4.
[13] 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-Investgiating Judges) and 76(2) (request annulment of any part of the proceedings).
[14] *Hamill* Opinion, para 5;
[15] Impugned Order, p. 1 and footnote 1.
[16] Internal Rule 77(2) provides that the Greffier of the Office of the Co-Investigating Judges shall forward the Case File or a copy of it to the Pre-Trial Chamber when the latter is seized of an appeal. On 25 August 2011, a Greffier of the Pre-Trial Chamber requested by email the Case File Officer and the Greffier of the Office of the

were placed in the Case File by the Office of the Co-Investigating Judges on 25 August 2011.[17] Hence, it appears that the Co-Investigating Judges have issued the Impugned Order without being formally seized of the Application, nor notifying it to the Co-Prosecutors and the Charged Person.

6. We note that the proper placement of the Application and its related documents in the Case File and their effective notification *prior to* the issuance of the Impugned Order were required under the Internal Rules and international standards. First, Internal Rules 55(6) and (11), by providing that parties shall have access to the Case File, imply that the Case File shall be updated in a prompt and diligent manner by the Office of the Co-Investigating Judges, otherwise the right to access the Case File would be meaningless.[18] It follows that documents submitted by parties or participants in the proceedings, through the Case File Officer,[19] shall be filed and placed in the Case File by the Greffier of the Office of the Co-Investigating Judges as soon as possible. Second, Internal Rule 23*bis*(2) specifically requires that any civil party application be notified to the Co-Prosecutors and the Charged Person before any decision is taken by the Co-Investigating Judges on the application. It is further noted that the Application also constitutes a complaint under Internal Rule 49 which, as such, shall have also been notified to the Co-Prosecutors for their action under the said Rule. This, indeed, is the practice that the Co-Investigating Judges followed in Cases 001 and 002 before the ECCC, whereby documents submitted by parties or applicants in the proceedings were filed, notified and placed in the Case File upon their receipt by the Greffier of the Office of the Co-Investigating Judges from the Case File Officer. The obligations imposed by the Internal Rules to duly place documents submitted by parties or applicants to the proceedings into the Case File and to notify relevant documents to those who are entitled to receive notification reflect the procedural

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Co-Investigating Judges to include in the Case File all documents submitted prior to the issuance of the Impugned Order, including *inter alia* the Application itself, the Power of Attorney and the Memorandum from the Victim Unit.

[17] Filing Instruction Form of the Civil Party Application of [redacted], dated 25 August 2011. The Case File Officer confirmed in an email to the Greffier of the Pre-Trial Chamber that "[t]he filing instruction D11/3 is used for document (sic.) D11/3 [Civil Party Application of [redacted] D11/3.1 [Identity Card of [redacted]], D11/3.2 [Civil Party Application of [redacted] in Case 002], D11/3.3 [Request for Protective Measures], D11/3/1 [Victim Unit Report on Civil Party Application of [redacted] and D11/3/2 [Power of Attorney of Civil Party Applicant [redacted]".

[18] The ECCC has adopted the system of a "dossier" kept by the Co-Investigating Judges during the pre-trial stage, which is used in Cambodia and other civil law systems such as France. The French Code of Criminal Procedure, which contains more developed provisions than the ECCC Internal Rules or the Cambodian Code of Criminal Procedure, clearly states, in its Article 81, the obligation to place documents in the Case File as they are drafted or received by the French investigating judge.

[19] Articles 2.1 and 2.4 of the Practice Direction on Filing of Documents before the ECCC

norms established at the international level, as other international or internationalized criminal tribunals also provide in their respective regulations the obligation for the Registrar to keep a full and accurate record of all proceedings and to file and distribute documents submitted by the parties or participants to the proceedings in an expeditious manner.[20] Strict respect for these basic principles of due process is necessary to ensure transparency of the proceedings and preserve their adversarial nature by clearly identifying the matter which is before the Court and allowing the parties or participants to the proceedings the opportunity to be heard or more generally to exercise their rights. Only when an application is placed in the Case File is a judicial authority formally seized of it and only when it has been duly notified can a decision be made.

7. In the current case, the placement of the Application and its related documents in the Case File *after* the issuance of the Impugned Order and the absence of notification, especially to the Co-Prosecutors, have had the concrete effects of depriving the Co-Prosecutors of the opportunity to make submissions on the Application and take any other action they may have considered appropriate, such as requesting further investigative actions. This course of action also had the consequence of preventing the Appellant's Co-Lawyers from having access to the Case File from the moment the Application was filed, thus depriving the Appellant the opportunity to supplement her Application if she deemed it necessary to do so.

8. As a result of the aforesaid, we are of the opinion that by not placing the Application and its related documents in the Case File and not notifying these to the Co-Prosecutors and the Charged Person prior to issuing the Impugned Order, the Co-Investigating Judges have circumvented the procedural regime established by the Internal Rules as well as the fundamental guarantees of due process provided by internationally recognized standards. It follows that the Co-Investigating Judges were not yet in a position to decide on the Application at the time they issued the Impugned Order and could not validly issue such decision according to law. Given the adverse effects these procedural irregularities have for the rights of parties and participants to the proceedings, they constitute in our view a cause for annulment of the Impugned Order pursuant to Internal Rule 48. Such a conclusion would normally lead an appellate body to remit the matter back to the lower

[20] See *inter alia*: ICC, Regulations of the Court (ICC-BD/01-02-07), Regulation 26; Regulations of the Registry (ICC-BD/03-01-06-Rev.1), Regulations 21(2) and 24; ICTR, Directive for the Registry – Judicial and Legal Services Division, Court Management Section (March 14 2008), Article 9(iv).

body in order for it to comply with all the necessary legal requirements and allow the relevant parties and participants to the proceedings to exercise their rights prior to determining the Application afresh. In this case, however, given the absence of a request for annulment made by a party or the Appellant, who had in practice no possibility to do so and given the lack of the required majority of the Pre-Trial Chamber to pronounce the annulment of the Impugned Order, we consider that it is in the best interest of the Appellant not to limit our Opinion to these procedural irregularities, but to also consider the admissibility and merits of the Appeal. This is also necessary to expose the extent to which such procedural defect has impacted on the Appellant's rights under Internal Rule 23*bis*(2) establishing the admissibility regime for victims before the ECCC.

9. Before turning to the examination of the Appeal, we note that the belated placement of the Application and its related documents in the Case File reflects a pattern of conduct that has been adopted by the Co-Investigating Judges in Case 003. Other civil party applications have been placed in the Case File many days after their filing or only few days or even minutes prior to being rejected.[21] The filing of documents submitted by the International Co-Prosecutor in this case has also been considerably delayed, as well as the filing by the Co-Investigating Judges of Rogatory Letters, Report of Execution of Rogatory Letters and Written Records of Interviews.[22] As stated above and also emphasized by Judges Downing and Lahuis in their previous opinions in Case 003, delays in placing documents in the Case File adversely impact on the exercise of rights provided to parties or participants in the proceedings under the Internal Rules. The absence of any explanation or remedy afforded by the Co-Investigating Judges to the parties or participants in the proceedings, to permit an understanding of or compensate for the procedural irregularities, casts doubts about their willingness to conduct the proceedings in a transparent, fair and adversarial manner that would ensure respect of the rights of the parties and the participants to the proceedings.

II – Admissibility of the Appeal

[21] *See* for instance *Hamill* Opinion, para. 9.

[22] Considerations of the Pre-Trial Chamber regarding the International Co-Prosecutor's Appeal against the Decision on Re-Filing of Three Investigative Requests. Opinion of Judges Lahuis and Downing, para. 12

10. In this case, the Impugned Order rejecting the Appellant's Application to become a civil party in Case 003 was issued by the Co-Investigating Judges on 27 July 2011 and notified to the Appellant on 5 August 2011. The Notice of Appeal and the submissions on Appeal, which were both filed on 15 August 2011, were accordingly brought in time under Internal Rules 75 and 77*bis*(2).

11. Internal Rules 77*bis*[23] and 74(4)(b) respectively allow civil party applicants to appeal to 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 errors of fact and/or law made by the Co-Investigating Judges in the determination of the admissibility of a civil party application(s) pursuant to Internal Rule 23*bis*, which means that pre-trial appeals under Internal Rules 74(4)(b) and 77*bis* 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.

12. As regards the jurisdiction of the Pre-Trial Chamber, we consider that the First, Second, Third and Fourth grounds of appeal are admissible pursuant to Internal Rules 74(4)(b) and 77*bis*, but that the Fifth ground 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 – Merits of the Appeal

13. The Appellant's contentions that warrant consideration are examined hereunder 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

[23] Appeal, paras 6, 7 and 8.

finding of fact at issue."[24]

Errors Alleged Under the First and Second Grounds: Violation of the Principles of Legal Certainty and Transparency of the Proceedings and Error of Law Committed by the Co-Investigating Judges in rejecting the Appellant's Application on the Basis that the Applicant is not a "direct victim"

14. The Co-Lawyers submit, in essence, that the Co-Investigating Judges have erred in declaring the Appellant's Application inadmissible on the basis that she did not suffer harm as "a direct consequence" of the crimes allegedly committed against her husband, who was forced to work under inhumane conditions at [redacted]. In the First ground, they claim that by rejecting the Application in Case 003 for reasons departing from their previous case-law, without providing explanation or information to the victims, and whilst the Appellant has been admitted as a Civil Party on the same basis in Cases 002, the Co-Investigating Judges were inconsistent in their interpretation of the law and violated Internal Rule 21(1)(c) that guarantees transparency and certainty in the conduct of proceedings before the ECCC.[25] In the Second ground, the Co-Lawyers argue that the Co-Investigating Judges erred in fact and in law in not considering the harm suffered by the Appellant as a consequence of the forced labour of her husband, a next of kin, as sufficient to be admitted as a Civil Party, in contradiction with the definition of "victim" provided in the Internal Rules' Glossary, the Judgement of the Trial Chamber in Case 001, Article 3.2(c) of the Practice Direction on Victim Participation, the UN Basic Principles on Victims, as well as the jurisprudence of the International Criminal Court (the "ICC") and the Inter-American Court of Human Rights (the "IACHR").[26]

15. At the outset we note that the Appellant was admitted as a Civil Party in Case 002 by the Co-Investigating Judges, partly, on the basis of the same injury she alleges in her Application in Case 003, i.e. the psychological harm she suffered has a result of the forced labour of her husband [redacted]. The Co-Investigating Judges

[24] 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 ("Civil Parties Decisions"), common para. 34.
[25] Appeal, paras 15 – 35.
[26] Appeal, paras 36 – 53.

in the impugned Order go ahead and, in their own motion, reconsider the reasons of their previous decision in Case 002, giving no sufficient reasoning or legal basis for doing so,[27] finding their previous considerations non-binding and not correct,[28] and implying that this Civil Party Applicant should not have been admitted even in Case 002.[29] The decision deeming the application admissible in Case 002 was not challenged on appeal before the Pre-Trial Chamber, but in appeals lodged by other civil party applicants whose application had been rejected by the Co-Investigating Judges in this case the Pre-Trial Chamber recognized the admissibility of civil parties on the basis of injuries resulting from crimes committed against their next of kin, including spouses.[30] Similarly, the Appellant has also been admitted as a Civil Party in Case 001 for crimes committed against her husband, in this case for his death at the Security Centre S-21. In sum, the Co-Investigating Judges,[31] the Pre-Trial Chamber[32] and the Trial Chamber[33] of the ECCC have thus far considered and also admitted as civil parties in Cases 001 and 002 victims who have alleged harm as a result of crimes committed against their direct family members, including their spouses. In most instances, these bodies applied a presumption of psychological harm, while in contrast to this approach followed for more than 4000 civil parties in Cases 001 and 002, the Co-Investigating Judges have found in the Impugned Order that the injury alleged by the Appellant was not sufficient to meet the requirements of Internal Rule 23*bis*(1)(b) for the reason that the Applicant "failed to demonstrate that the alleged physical injury was caused directly by the alleged crime".[34] In reaching this conclusion, the Co-Investigating Judges not only departed from their previous jurisprudence, they also ignored the decisions of the Pre-Trial Chamber on the matter. They interpreted Internal Rule 23b*is*(1)(b) anew, specifically stating that they were not bound by previous decisions of the Co-Investigating Judges and could apply

[27] Impugned Order, para. 7.
[28] Impugned Order, para 7 (last sub-para).
[29] Impugned Order para. 9.
[30] Civil Parties Decisions.
[31] See *inter alia*: Case 002/19-09-2007-ECCC/OCIJ, Order on the Admissibility of Civil Party Applicants from Current Residents of Prey Veng Province, 9 September 2010, D410, para. 14.
[32] Civil Parties Decisions.
[33] Case File 001/18-07-2007-ECCC/TC, Judgement, 26 July 2010, E188, paras 642-643. Further, although it was not available to the Co-Investigating Judges at the time of issuing the impugned Order, we note that the Supreme Court Chamber recently arrived at the same conclusion. *See* Case File 001/18-07-2007-ECCC/SC, Appeal Judgement, Supreme Court Chamber, F28, 3 February 2012 ("Duch Appeal Judgement"), paras. 417, 418, 447 and 448.
[34] Impugned Order, para. 5.

Internal Rule 23*bis*(1)(b) "in the manner considered to be correct."[35]

16. Pursuant to the ECCC Internal Rules, determination of the admissibility of civil party applications is performed by the Co-Investigating Judges with a right to appeal to the Pre-Trial Chamber. The decision of the latter is final,[36] meaning that the Pre-Trial Chamber is responsible for conclusively settling questions of law and fact arising in the determination of the admissibility of civil party applicants by the Co-Investigating Judges. While there is no provision in the ECCC legal compendium dealing explicitly with the issue of the binding force of decisions of the Pre-Trial Chamber, Internal Rule 21 clearly requires ECCC judicial bodies to ensure legal certainty and that "[p]ersons who find themselves in a similar situation [...] shall be treated according to the same rules". As observed by the Appeals Chamber of the United Nations International Criminal Tribunal for the Former Yugoslavia (the "ICTY"), the need for "consistency, certainty and predictability" in the law is generally recognized in national jurisdictions, both of common law and civil law traditions, as well as before international tribunals."[37] In order to respect these principles, lower courts, as a matter of doctrine or practice, either consider themselves bound by decisions of higher courts or, at the very least, tend to follow their previous decisions.[38] Similarly, "highest courts [...] will normally follow their previous decisions and will only depart from them in exceptional circumstances"[39] as the principle of the continuity of judicial decisions must also be balanced by a residual principle ensuring that "justice is done in all cases."[40] Accordingly, a court should normally follow its previous decisions but should be free to depart from them for "cogent reasons in the interest of justice". Instances of situations where cogent reasons in the interests of justice require a departure from a previous decision include:

> "[C]ases where the previous decision has been decided on the basis of a wrong legal principle or cases where a previous decision has been given *per incuriam*, that is a judicial decision that has been 'wrongly decided, usually because the judge or judges were ill-informed about the applicable law.'"[41]

17. In the context of the ECCC, this means that a proper construction of Internal Rule 21

[35] Impugned Order, para. 7.
[36] Internal Rules 23 and 77*bis*(2).
[37] *Prosecutor v. Aleksovski*, IT-95-14/1-A, Judgement, Appeals Chamber (the "*Aleksovski* Appeal Judgement"), para. 97.
[38] *Aleksovski* Appeal Judgement, paras 112 – 113.
[39] *Aleksovski* Appeal Judgement, para. 97.
[40] *Aleksovski* Appeal Judgment, para. 102.
[41] *Aleksovski* Appeal Judgment, para. 108.

requires that the Co-Investigating Judges should follow their previous decisions and depart from them only for cogent reasons in the interest of justice. The normal rule is that previous decisions are to be followed, and departure from them is the exception and can be made only after the most careful consideration has been given to a precedent, "both as to the law, including the authorities cited, and the fact."[42] With regard to the binding character of the Pre-Trial Chamber's decisions on the Co-Investigating Judges, we consider that the principles of legal certainty and equality before the law, enshrined in the Internal Rules and forming part of international standards, require the Co-Investigating Judges to follow, as a matter of principle, the *ratio decidendi* of decisions of the Pre-Trial Chamber, that is the legal principle on which a decision is based and which shall apply in similar or substantially similar cases.[43] This is supported by the jurisdictional hierarchy of the Pre-Trial Chamber over the Co-Investigating Judges under the ECCC legal system and is also in the interest of judicial economy and expediency in the proceedings given that decisions of the Co-Investigating Judges are subject to appeal before the Pre-Trial Chamber which, in principle, follows its previous decisions according to the standard set out above and will therefore overturn decisions of the Co-Investigating Judges departing from its existing jurisprudence.

18. In the case under examination, we note that the Co-Investigating Judges did not refer to, nor appear to have considered, the jurisprudence of the Pre-Trial Chamber directly relevant to determine the admissibility of the Appellant's Application. They have referred exclusively to the Oxford Dictionary to define the term "direct" contained in Internal Rule 23*bis*(1)(b) and Article 3.2(b) of the Practice Direction on Victim Participation and determined that the forced labour of the Appellant's husband created an "intermediary link" so the injury is not a "direct" consequence of the crimes alleged in the Second Introductory Submission.[44] This interpretation implies that the right to become a civil party before the ECCC is limited to immediate victims of alleged crimes and exclude any possibility for victims in Case 003 to be admitted as civil party for crimes committed against their next of kin. The Co-Investigating Judges found that this interpretation is "not inconsistent" with Paragraph 8 of the UN Basic Principles on Victims as the latter cannot abrogate the requirement of Internal Rule 23*bis*(1)(b) and that Cambodian domestic law

[42] *Aleksovski* Appeal Judgment, para. 109.
[43] *Aleksovski* Appeal Judgment, para. 110.
[44] Impugned Order, para. 5.

also requires "direct causality".[45] We will now consider whether the Co-Investigating Judges have committed errors in reaching these conclusions.

19. Internal Rule 23*bis*(1)(b) provides that, in order to be admitted as a civil party before the ECCC, a victim must "demonstrate as a *direct consequence* of at least one of the crimes alleged against the Charged Person, that he or she has in fact suffered physical, material or psychological injury upon which a claim of collective and moral reparation might be based". The use of the expression "direct consequence" entails that there must be a causal link between the injury and a crime alleged. As explained below, this terminology does not mean that the civil party applicant must be a "direct victim" of the alleged crime.

20. First, the requirement that the injury must be the "direct consequence" of an alleged crime echoes one of the criteria for admissibility of civil party application provided for in Article 13 of the Code of Criminal Procedure of Cambodia (the "CPC"),[46] which, in turn, finds its origins in Article 2 of the French Code of Criminal Procedure.[47] The French jurisprudence, for instance, has long acknowledged that civil party participation is not limited to the immediate victim of a crime but that next of kin, at the very least, can suffer injury as a direct consequence of a crime committed against the immediate victim.[48] The interpretation according to which only the immediate victim may be considered as having suffered injury as a direct consequence of a crime has long been expressly rejected by the

[45] Impugned Order, para. 6.
[46] Article 13 of the CPC states that "the injury must be the direct consequence of an offense".
[47] Article 2 of the French Code of Criminal Procedure states: "Civil action aimed at the reparation of the damage suffered because of a felony, a misdemeanour or a petty offence is open to all those who have personally suffered damage directly caused by the offence."
[48] JurisClasseur Procédure Pénale, Fascicule 20: Constitution de Partie Civile, 30 June 2008 ("JurisClasseur"), para. 24 (stating that next of kin of the immediate victim, where the latter is deceased following assault, who has suffered a material or psychological injury as a result of the death may have suffered a personal and direct injury); Philip Bonfils, "Partie civile", Répertoire pénal Dalloz, October 2005, paras 51, 57. Cass. crim. 15 October 1979, Bull. Crim. 177 (recognizing the status of civil party to children, daughter-in-law and grandchildren of the immediate victims, who deceased in a car accident, on the basis that they have suffered an injury as a direct consequence of the crime committed by the accused); Crim. cass. 21 October 1982, Bull. crim. 231 (where the Court of Cassation confirmed the decision of the "Chambre d'accusation de la Cour Criminelle" to declare admissible the civil party applications of next of kin of immediate victims of deportation and extermination during the Second World War in a case of crimes against humanity); Crim. cass. 16 June 1998, Bull. crim. 191 (where the Court of Cassation annulled the decision of the "Chambre d'accusation de la Cour Criminelle" to declare inadmissible the civil party application of the grandmother of the immediate victim of sexual assault); Crim. cass. 2 March 1967, Bull. crim. 87 (where the Court of Cassation confirmed the decision of the "Chambre d'accusation de la Cour Criminelle" to admit as civil party and award her compensation the wife of the immediate victim of homicide); Crim. cass. 20 March 1973, Bull. crim. 137 (where the Court of Cassation confirmed the decision of the Appeal Court to accept as civil party the housekeeper of the immediate victim, deceased in a car accident, on the basis that their long relationship made it plausible that the housekeeper has suffered a personal injury as a result of the death of the immediate victim).

French Court of Cassation for at least the last 30 years ago.[49]

21. Second, the notion of victim of gross violations of international human rights law or serious violations of international humanitarian law generally encompasses under international criminal law and human rights law not only the immediate victim of a crime but more broadly next of kin who, international law recognizes, may have suffered harm as a consequence of a crime committed against the immediate victim. In particular, the UN Basic Principles on Victims adopted in 2005 by the United Nations General Assembly recognizes that:

> "[V]ictims are persons *who individually or collectively suffered harm*, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, *the term 'victim' also includes the immediate family or dependants of the direct victim*" (emphasis added).[50]

22. Similarly, the participation of victims in criminal proceedings before the International Criminal Court (ICC)[51] is not limited to the immediate victim of a crime but can encompass other victims who have suffered personal harm as a result of a crime committed against the immediate victim. In the *Lubanga* Case, the ICC Appeals Chamber determined:

> "[T]hat the harm suffered by a natural person is harm to that person, i.e. personal harm. Material, physical, and psychological harm are all forms of harm that fall within the rule if they are suffered personally by the victim. Harm suffered by one victim as a result of the commission of a crime within the jurisdiction of the Court can *give rise to harm suffered by other victims*. This is evident for instance, when there is a *close personal relationship* between the victims such as the relationship between a child soldier and the parents of that child. The recruitment of a child soldier may result in personal suffering of both the child concerned and the parents of that child. It is in this sense that the Appeals Chamber understands the Trial Chamber's statement that 'people can be the direct or indirect victims of a crime within the jurisdiction of the Court'. The issue for determination is whether the harm suffered is personal to the individual. If it is, it can attach to

[49] Crim. cass. 6 May 1982, Bull. Crim. 115 (finding that the Appeal Court erred in law in finding that the injury of the applicant was not the direct consequence of the accident involving his wife and son, which resulted in their death).

[50] General Assembly of the United Nations, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 16 December 2005, UN Doc. A/RES/60/147, Principle 8.

[51] Article 85(a) of the ICC Rules of Procedure and Evidence provides that "'Victims' means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court".

both *direct and indirect victims*."[52]

The ICC Appeals Chamber concluded that "the notion of victim necessarily implies the existence of personal harm but does not necessarily imply the existence of direct harm".[53] The Inter American Court of Human Rights (IACHR) has also recognized that next of kin may have suffered from the violation of human rights of the immediate victim so they may be entitled to reparation.[54] The definition of victim of human rights humanitarian law violations is directly relevant for interpreting Internal Rule 23*bis*(1) as it takes into account the particular consequences of the crimes the ECCC is mandated to prosecute, which are the most serious known to mankind.

23. Third, in the absence of a clear indication as to how the admissibility criteria set out in Internal Rule 23*bis*(1)(b) are to be applied, the Pre-Trial Chamber previously emphasized that "the provision must be read in context and in accordance with its object and purpose".[55] As such, the Pre-Trial Chamber considered that "the object and purpose of Internal Rule 23*bis*(1) is not there to restrict or limit the notion of victim or civil party action in the ECCC [but] to set criteria for admissibility of civil party applications".[56] It considered that a contextual interpretation of Internal Rule 23*bis*(1) requires to take into account, *inter alia*:

- Internal Rule 21, which sets the fundamental principles of procedure before the ECCC and provides that the Internal Rules shall be interpreted so as to always safeguard the interests of victims and ensure legal certainty and transparency of proceedings, in light of the inherent specificity of the ECCC, set out in the ECCC Law and the Agreement;

- Internal Rule 23, which sets the general principles of victims participation as Civil Parties before the ECCC that is to participate in criminal proceedings against those allegedly responsible of crimes within the jurisdiction of the ECCC by supporting the prosecution and to seek collective and moral

[52] *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06 OA 9 OA 10, Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, 11 July 2008 (the "*Lubanga* Judgement"), para. 32.
[53] *Lubanga* Judgement, para. 38
[54] See *inter alia Case of Valle Jaramillo v. Colombia*, Judgement, 27 November 2008, para. 119.
[55] Civil Parties Decisions, common para. 60.
[56] Civil Parties Decisions, common para. 62.

reparations as provided in Internal Rule 23*quinquies*;

- Internal Rules 23*ter* and 23*quarter*, which respectively provide for the way in which representation of Civil Parties is arranged in a collective manner and for the possibility for "a group of victims" to organize their Civil Party action together by becoming members of a "Victims Association;"[57]

- The need to pay special attention and ensure a meaningful participation for the victims as part of the ECCC's pursuit for national reconciliation, which is a fundamental principle of its establishment;[58]

- The fact that the alleged crimes are crimes of mass atrocities, directed not only against individuals but also against the collective.[59]

24. Taking this whole context into account, the Pre-Trial Chamber adopted the finding of the ICC Appeal Chamber in the *Lubanga* Case and confirmed the conclusion of the Co-Investigating Judges in Case 002 that, under Internal Rule 23*bis*(1)(b), the injury must be personal but that it does not necessarily have to be direct.[60] It also found that the Co-Investigating Judges' interpretation of the notion of "injury" under Internal Rule 23*bis*(1)(b) was too restrictive in that it should have applied a broader presumption of injury taking into account the nature of victimization for crimes such as those falling under the jurisdiction of the ECCC, the nature and extent of such injury and the fact Internal Rule 23*bis*(1)(b) involves considerations of "injury upon which a claim of collective and moral reparations might be based".[61] The Pre-Trial Chamber concluded, in its decisions related to admissibility of Civil Party applications in Case 002, that a presumption of psychological harm shall apply not only when the alleged crimes were committed against members of the family of the immediate victim but also against members of the same persecuted group or community as the immediate victim.[62]Applying in most cases a presumption of personal psychological harm, it admitted an additional number of 1728 civil parties to the 2123 already admitted by the Co-Investigating Judges

[57] Civil Parties Decisions, common para. 61.
[58] Civil Parties Decisions, common para. 65.
[59] Civil Parties Decisions, common paras 66 and 68.
[60] Civil Parties Decisions, common para. 83.
[61] Civil Parties Decisions, common para. 44.
[62] Civil Parties Decisions, common para. 88.

in Case 002.

25. We find no cogent reasons that would require a departure from these legal principles in the current case. In light of the above legal principles, we consider that the Co-Investigating Judges have committed an error of law in concluding that Internal Rule 23*bis*(1)(b) requires civil party applicants to demonstrate that their injury is caused "without any intermediary causal link" to the crimes alleged in the Introductory Submission and that the forced labour of the Applicant's husband creates such an intermediary link. They erred in particular in their interpretation of Internal Rule 23*bis*(1)(b) by focusing solely on the term "direct", which they define by reference to a dictionary, and fail to take into account the context of civil party participation in proceedings before the ECCC, as well as the definition of "victim" under international law. We note that their approach is not supported either by the conception of civil party's participation in French criminal law, where Cambodian law finds its origin. Considering that the Co-Investigating Judges have also ignored the binding rationale of a Pre-Trial Chamber's decision directly applicable to the issue at stake, we further consider that they have infringed upon the principles of legal certainty and transparency of proceedings before the ECCC enshrined in Internal Rule 21.

26. Applying the Pre-Trial Chamber's rationale in its previous decision on civil party appeals in Case 002, we consider that there is a presumption that the Appellant has suffered a personal psychological injury as a direct consequence of the forced labour of her husband. This presumption is further supported by the allegations of the Appellant in her Application, where she confirms that she has indeed suffered psychological injury when seeing her husband sick after his [redacted][63] Given that the Second Introductory Submission includes crimes of forced labour committed at [redacted],[64] and that the Appellant has provided sufficient proof of identification,[65] we are of the view that her Application satisfies the criteria to be declared admissible as a Civil Party in Case 003 insofar as Internal Rule 23*bis*(1) (a) and (b) require clear identification of the applicant and demonstration that the injury she suffered is, likely, the

[63] VU's Report on Civil Party Application, 3 June 2011, D11/3/1.
[64] Second Introductory Submission, paras 47 – 51.
[65] Identity Card of [redacted], 3 June 2011, D11/3.1.

direct consequence of a least one of the crimes alleged in the Second Introductory Submission.

Errors Alleged Under the Third Ground: Co-Investigating Judges violated Internal Rules 21(1), 21(1)(c) and 23*bis*(1), UN Basic Principles and Guidelines, and exceeded their powers by Rejecting the Appellant's Application on an alternative basis as not meeting the standard of proof

27. The Co-Lawyers submit that the Co-Investigating Judges' finding that the Applicant failed to meet the standard of proof is not supported by objective reasons and appears to be mere speculation without reference to any facts. They add that by reaching a "sweeping conclusion" the Co-Investigating Judges exceeded their competence as Judges who are neither psychologists or psychiatrists nor trauma experts.[66] The Co-Lawyers then make reference to expert articles which touch upon the issue of the individual nature of traumatic experiences and on the specific effects of such experiences in situations of mass crimes.[67] The Co-Lawyers also submit that such findings of the Co-Investigating Judges are in violation of the principle of respecting and safeguarding the rights of victims as provided in Internal Rule 21(1) and 21(1)(c) and in the Basic Principles and Guidelines.[68]

28. We find that the approach taken by the Co-Investigating Judges, especially in relation to those paragraphs in the Impugned Order regarding alternative ground of inadmissibility, is not such as to demonstrate a proper or adequate consideration of the application. In this respect, we observe that the Co-Investigating Judges, where they reject Civil Party applicant, mention as grounds only that "the allegation by the applicant cannot be considered as more likely than not to be true" and that "as such pain and pity would have been overshadowed by her husband's later disappearance and killing at S-21, and therefore been relegated to the back of the consciousness". There was no evidence whatsoever referred to upon which such a finding could be based. Further, while noting that the standard of proof referred to by the Co-Investigating Judges is the correct one,[69] that: "facts alleged in support of the application are more likely than not to be true," as also submitted by the Appellant, the Pre-Trial Chamber observes that, in their review of

[66] Appeal, paras. 56-59.
[67] Appeal, para. 60.
[68] Appeal, paras. 65-73.
[69] Impugned Order, para. 9. See Internal Rule 23 bis (1). See also Pre-Trial Chamber's Decisions of 24 June 2011 on Civil Party appeals in Case 002, para. 94.

the facts alleged by the Applicant,[70] the Co-Investigating Judges make an analysis that is rather typical of a review by an expert in psychology which indeed overcomes their ability or competence as Judges. Such an analysis could have been legitimate were it supported by references to accepted relevant expertise, which is especially necessary in cases where an application is rejected. Furthermore, we observe that the Co-Investigating Judges admitted the Appellant as a Civil Party in Case 002 on the same allegation raised in this case that the Appellant suffered psychological injury as a direct consequence of crimes committed against her husband.

29. Having made the above observation, we note that the Pre-Trial Chamber has recognized the requirement for judicial bodies to provide reasoned decisions as an international standard.[71] In previous decisions, the Pre-Trial Chamber has found that although the Co-Investigating Judges are not required to 'indicate a view on all the factors' considered in their decision making process,[72] it is important that all parties concerned know the reasons for a decision. The Chamber considered this necessary in order to place 'an aggrieved party in a position to be able to determine whether to appeal, and upon what grounds. Equally a respondent to any appeal has a right to know the reasons of a decision so that a proper and pertinent response may be considered.'[73] An "aggrieved party" will be any person who may have a right of appeal, and may include an accused person as well as a rejected Applicant. Reasons are also necessary for the Pre-Trial Chamber to be able to 'conduct an effective appellate review pursuant to Rule 77(14).'[74] Following an Appeal by the Ieng Thirith Defence team against a rejection of a request for investigative action, the Pre-Trial Chamber considered "how detailed the Co- Investigating Judges' reasons must be under Rule 55(10). The Chamber examined the Rules of the Court[75] and the jurisprudence of both the European Court of Human Rights (ECtHR)[76] and the

[70] Impugned Order, para 9.
[71] Decision on Nuon Chea's Appeal against Order Refusing Request for Annulment, 26 August 2008, D55/I/8, para. 21.
[72] Decision on Appeal against Provisional Detention Order of Ieng Sary, 17 October 2008, C22/I/73, para. 66.
[73] Decision On Co-Prosecutors' Appeal Against The Co-Investigating Judges Order On Request To Place Additional Evidentiary Material On The Case File Which Assists In Proving The Charged Persons' Knowledge Of The Crimes, 15 June 2010, D365/2/10, para. 24.
[74] Decision on Appeal against Co-Investigating Judges' Order on Requests D153, D172, D173, D174, D178 & D284 (Nuon Chea's Twelfth Request For Investigative Action), 14 July 2010, D300/1/5, para. 41.
[75] Decision on the Ieng Thirith Defence Appeal against 'Order on Requests for Investigative Action by the Defence for IENG Thirith' of 14 June 2010, D353/2/3, para. 23.
[76] *Ibid*, paras. 24 - 26

International Criminal Tribunal for the Former Yugoslavia (ICTY)[77] before providing the following guidance:

> "The Co-Investigating Judges have the discretion – reviewable by the Pre-Trial Chamber upon an admissible appeal - to determine the degree of specific detail that is required by the legal framework of the ECCC. The Co-Investigating Judges must be guided in their discretion by the purposes of the requirement in Rule 55(10) to issue a reasoned rejection of a request, as stated above. The Pre-Trial Chamber does not take the position that the Co-Investigating Judges should have exhaustively presented every detail of all the "information already existing on the Case File." Rather, the Pre- Trial Chamber decides that the Co-Investigating Judges should have provided, at a minimum, a representative sample of such information, including, where appropriate, the relevant Document numbers. If a Document number is not available, then the Co-Investigating Judges must provide sufficient details on the source, location, and content of a representative sample of information already on the case file."[78]

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

[77] *Ibid*, para. 27
[78] *Ibid*, para 30.

31. Therefore, we find that this is a significant error in law made by the Co-Investigating Judges in the Impugned Order in relation to this part of the order where they reject Civil Party Applicant.

Errors Alleged Under the Fourth Ground: The Co-Investigative Judges Erred in Rejecting the Appellant's Application in the alternative because of the Necessity of an Expeditious Trial and Satisfaction of Being a Civil Party in Cases 001 and 002

32. The Co-Lawyers submit that rejecting Civil Party applicants on the grounds of expeditiousness is a serious violation of the substance and intention of the Internal Rules, the Cambodian Code of Procedure and of international norms and also that it is an illegal introduction of new criteria for admissibility. The Co-Lawyers argue that the rejection on such grounds constitutes a serious violation of the basic rights as victims to be heard, to have access to the truth and to an effective remedy. They add that such finding also lacks proper and adequate reasons.[79]

33. We observe that by rejecting the Applicant on the grounds of effectiveness of proceedings pursuant to Internal Rule 21(4), the Co-Investigating Judges have not introduced new admissibility criteria as suggested by the Co-Lawyers. The Co-Investigating Judges appear to have rather attempted to employ Internal Rule 21(4) as a general ground for not admitting an application *ab initio*. We agree with the Appellant that this part of the Impugned Order[80] lacks any proper and adequate reasons.

34. The reasons provided in paragraph 10 of the impugned order show that the Co-Investigating Judges used Internal Rule 21(4) in a way that contradicts the requirements of the provisions of paragraphs (1)[81] and (1)(a)[82] of the same Rule. The Co-Investigating Judges disregarded the requirement for respect of victims' rights *throughout* the proceedings and for *due diligence* to that effect. As previously noted by the Pre-Trial Chamber,[83] we consider that the due diligence[84] displayed in the Co-Investigating Judge's

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[79] Appeal, paras. 74-80.
[80] Impugned Order, para. 10.
[81] Internal Rule 21(1) provides that the applicable laws "shall be interpreted so as to always safeguard the interests [of the parties] and Victims."
[82] Internal Rule 21(1)(a) provides that ECCC proceedings shall "preserve a balance between the rights of the parties."
[83] Civil Parties Decisions, common paras. 51-52.
[84] The Pre-Trial Chamber has previously considered that an analysis of Co-Investigating Judges' due diligence is relevant when considering continuation of detention or release issues raised in appeals by the Charged Persons. *See for instance* Decision on Ieng Sary's Appeal against Order on Extension of Provisional Detention,

conduct is a relevant factor when considering victims' rights in the proceedings. Therefore, examination of what steps have been taken by the Co-Investigating Judges and to what degree they affect the situation of the victims is necessary. While the Pre-Trial Chamber has previously found that "many factors affect the timing of decisions"[85], it notes that such specific provisions should, at all times, be read in conjunction with the provisions on the fundamental principles of procedure before the ECCC which require that "victims are kept informed and that their rights are respected *throughout* the proceedings."[86]

35. In addition, we note that there is no requirement anywhere in the applicable law that once a victim has been admitted as a civil party in one case he/she cannot be admitted as a Civil Party in another case in order to expedite the proceedings in the latter. Doing so, notwithstanding similarities in the factual circumstances between cases, would put the victims who have been admitted as civil parties in other cases in a disadvantageous position with those who have not been previously admitted and also with the other participants to the proceedings. It would amount to an abuse of a fundamental right of a person to seek to be joined as a civil party against the further alleged perpetrators of criminal acts.

36. In criminal proceedings the right to "trial within a reasonable time" serves mainly the defendant's interests and an application of such right without proper consideration of all the other factors involved or without proper reasoning may place the other parties at a disadvantageous position. In cases where expeditiousness of proceedings is necessitated due to the fact that the defendant(s) is/are in detention,[87] expedition of proceedings has to be done in a reasonable manner. It is a fundamental principle in ECCC[88] and in international law[89] that any decision serving the purpose of expediting the proceedings is

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C22/9/14, 30 April 2010, paras. 57-61; Decision on Ieng Thirith's Appeal against Order on Extension of Provisional Detention, C20/9/15, 30 April 2010, paras. 44-50; Decision on Khieu Samphan's Appeal against Order on Extension of Provisional Detention, C26/9/12, 30 April 2010, paras. 40-47; Decision on Appeal against Order on Extension of Provisional Detention of Nuon Chea, C9/4/6, 4 May 2009, paras. 44-49.

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

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

[87] Please note that in Case 003 nobody has been arrested or detained as of this date.

[88] Internal rule 21(4).

[89] ICCPR, Article 14(3)(c), ECHR, Article 6.

taken in order to ensure that proceedings "shall be brought to a conclusion within a *reasonable* time" or "without *undue* delay." The requirement of "reasonableness" in expediting the proceedings is there in order to ensure that any such decision would not infringe upon the rights of *all those involved* in the proceedings and is made in a way that is consistent with the proper administration of justice.[90]

37. We find that the reasons provided by the Co-Investigating Judges in paragraph 10 of the Impugned Order are not grounded in law or in sustainable reasoning and violate the fundamental rights of victims.

IV – Conclusions

38. We are of the opinion that the Appeal should be declared admissible, that the Impugned Order should be quashed and that such matters should be remitted to the Co-Investigating Judges in order for them to decide in due course on the issue of whether the Appellant's personal injury is a direct consequence of at least one crime alleged against a "Charged Person" in Case 003. This new decision of the Co-Investigating Judges should be subject to pre-trial appeal under Internal Rules 74(4)(b) and 77*bis*. Although the Impugned Order stands because the Pre-Trial Chamber could not reach a decision on the Appeal, we note that it remains possible for the Co-Investigating Judges to use their judicial discretion to reconsider this Order,[91] taking into account the considerations in this Opinion and any other relevant considerations as necessary. In particular, we recall that the Co-Investigating Judges have an obligation to decide any civil party application on its merit and that where the information necessary to appraise the substance of a victim's application is not yet available, the Co-Investigating Judges shall reserve their decision until such information becomes available.[92]

39. Having said the above, we note that, recently, on 3 April 2012, the Reserve International

[90] ECHR judgment in Boddaert v. Belgium, para 39: "Article 6 commands that judicial proceedings be expeditious, but also lays down the more general principle of the proper administration of justice [...] [a] fair balance has to be struck between the various aspects of this fundamental requirement."

[91] We refer to the authorities relied on by Judges Downing and Lahuis in their Opinion to the Considerations of the Pre-Trial Chamber Regarding the International Co-Prosecutor's Appeal against the Decision on Re-Filing of Three Investigating Requests (15 November 2011, D26/1/3, Opinion of Judges Lahuis and Downing, para. 20, note 34).

[92] *Hamill* Opinion, para. 16.

Co-Investigating Judge reconsidered the Impugned Order.[93] The Reserve International Co-Investigating Judge found that the applicant more likely than not suffered personal injury as a direct consequence of a crime alleged in the Second Introductory Submission.[94] Finding that all requirements for admission as a civil party were met, the Reserve International Co-Investigating Judge admitted the Appellant as a civil party in Case 003 and granted her access to the case file.[95] The post-dated Reconsideration Order renders the Impugned Order without further legal effect and makes this Appeal moot. Even so, the issues addressed, in particular, civil party admissibility and procedural fairness, are of general significance to the practice and jurisprudence of the ECCC and international criminal law.[96] Therefore, we issue this Opinion for the purposes of guidance and in an effort "to avoid uncertainty and ensure respect for the values of consistency and coherence in the application of the law."[97]

Phnom Penh, 13 February 2013

Rowan DOWNING **Chang-Ho CHUNG**

[93] Order on the Reconsideration of the Admissibility of Civil Party Applicant [redacted], D11/3/5, 3 April 2012 ("Reconsideration Order").
[94] Reconsideration Order, para. 30.
[95] Reconsideration Order, para. 32.
[96] Other international courts have similarly issued decisions on appeals that are moot or do not tend to invalidate an impugned decision. e.g. *Prosecutor v. Tadić*, IT-94-1-A, "Judgement", Appeals Chamber, 15 July 1999 ("Tadić Appeal Judgement"), paras. 247, 281, 316-7; *Prosecutor v. Furundžija*, IT-95-17/1-A, "Judgement", Appeals Chamber, 21 July 2000, paras. 172-5; *Prosecutor v. Akayesu*, ICTR-96-4-A, "Judgement", Appeals Chamber, 1 June 2001, paras. 18-27 *Prosecutor v. Brima et al.*, SCSL-04-16-A, "Judgment", Appeals Chamber, 22 February 2008, para. 181; *Prosecutor v. Fofana and Kondewa,* SCSL-04-14-A, "Judgment", Appeals Chamber, 28 May 2008 ("Fofana and Kondewa Appeal Judgement"), para. 451.
[97] *Prosecutor v. Stakić*, IT-97-24-A, "Judgement", Appeals Chamber, 22 March 2006, para. 59; Fofana and Kondewa Appeal Judgment, para. 451(the Appeals Chamber exercised "its discretion to consider this ground as guidance to the Trial Chamber").