



ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia
Nation Religion King

Kingdom of Cambodia
Nation Religion Roi

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

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

ការិយាល័យសហចៅក្រមស៊ើបអង្កេត
Office of the Co-Investigating Judges
Bureau des Co-Investigating Judges

Case File No.: 003/07-09-2009-ECCC-OCIJ

Before: **YOU Bunleng**
Laurent KASPER-ANSERMET
Date: **24 February 2012**
Original language: **French**
Classification: **Public**

**ORDER ON THE RECONSIDERATION OF THE ADMISSIBILITY OF
THE CIVIL PARTY APPLICATION OF ROBERT HAMILL**

The Co-Prosecutors

Mrs. CHEA Leang
Mr. Andrew CAYLEY

I, Laurent Kasper-Ansermet, International Reserve Co-Investigating Judge of the Extraordinary Chambers in the Courts of Cambodia (the “ECCC”),

Noting the Agreement signed on 6 June 2003 between the United Nations and the Royal Government of Cambodia (the “ECCC Agreement”);

Noting the Code of Criminal Procedure of the Kingdom of Cambodia of 7 June 2007 (the “Code of Criminal Procedure”);

Noting the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia of 27 October 2004 (the “ECCC Law”);

Noting the on-going judicial investigation against the suspects relating to charges of **Crimes against humanity, Grave breaches of the Geneva Conventions dated 12 August 1949, Torture and Murder**, offences defined and punishable under Articles 3, 4, 5, 6, 29 (new), and 39 (new) of the ECCC Law, and 500, 501, 503, 505, 506, 507 and 508 of the Cambodian Penal Code of 1956;

Noting Rules 12, 12 *bis*, 21, 23, 23 *bis*, 23 *ter*, 49, 53, 55, 56(2)(a), 66 and 100 of the Internal Rules of the ECCC (the “Internal Rules”);

Noting Articles 1, 3 and 6 of Practice Direction 2007/2 on Victim Participation (the “Practice Direction”);

Noting the Second Introductory Submission of 20 November 2008 relating to Case File 003¹ placed on the Case File on 7 September 2009;²

Noting the Co-Investigating Judges’ Notice of Conclusion of Judicial Investigation, dated 29 April 2011;³

Noting the International Reserve Co-Investigating Judge’s Order on Resuming the Judicial Investigation, dated 2 December 2011,⁴ issued after reconsideration of the decision of 27 July 2011, declaring the three requests for investigative action of 18 May 2011 admissible;

I. Procedural background

Noting the Civil Party application of Robert Hamill (the “Applicant”), filed on 12 April 2011 with the Victims Support Section in Case Files 003 and 004;⁵

Noting the forwarding of the said Civil Party application to the Co-Investigating Judges by the Victims Support Section on 22 April 2011;⁶

¹ CF003/20-11-2008/ECCC/OCIJ, Co-Prosecutor’s Second Introductory Submission Regarding the Revolutionary Army of Kampuchea, 20 November 2008, D1.

² Acting International Co-Prosecutor’s Notice of Filing of the Second Introductory Submission, 7 September 2009, D1/1.

³ Case File 003/20-11-2008/ECCC/OCIJ, Notice of Conclusion of Judicial Investigation, 29 April 2011, D13.

⁴ Case File 003/20-11-2008/ECCC/OCIJ, Order on Resuming the Judicial Investigation, 2 December 2011, D28.

⁵ Victims Support Section, Victim Information Form, 11-VSS-0002, 12 April 2011, CF 003/20-11-2008/ECCC/OCIJ, D11/2.

⁶ Victims Support Section, Report on Civil Party Application, 22 April 2011, CF 003/20-11-2008/ECCC/OCIJ, D11/2/1; See also Inter-Office Memorandum (Strictly Confidential), dated 21 April 2011.

Noting the Co-Investigating Judges' rejection of the Civil Party application by order, dated 29 April 2011 (hereinafter the "First Decision");⁷

Noting the Applicant's 12 May 2011 request to the Pre-Trial Chamber⁸ to suspend the deadline for appeal to allow him, pursuant to a decision of the Co-Investigating Judges, to consult Case File 003;

Noting the Applicant's appeal filed on 23 May 2011 before the Pre-Trial Chamber against the First Decision⁹ requesting mainly that he be granted Civil Party status in Case File 003;

Noting the replacement, on 7 July 2011, by the Co-Investigating Judges, of a modified English version of the First Decision (the "Second Decision"), dated 29 April 2011;¹⁰

Noting the Considerations of the Pre-Trial Chamber, dated 24 October 2011,¹¹ giving effect to the First Decision, because the required super majority vote had not been attained [Rule 77(13)];

Noting the dissenting opinion of Judges Rowan Downing and Katinka Lahuis of the Pre-Trial Chamber¹² declaring the appeal moot, as it was taken against an order that was modified after the appeal had been filed;

Noting the Applicant's submissions of 30 December 2011¹³ requesting access to Case Files 003 and 004 as well as reconsideration by the Co-Investigating Judges of the First Decision rejecting his Civil Party application;

II. Admissibility of the present decision

1. **Whereas** the International Reserve Co-Investigating Judge, duly sworn in at the ECCC Judges' Plenary Session of 21 February 2011, has validly assumed the functions exercised by his predecessor who resigned [Art. 5(6) of the ECCC Agreement; Art. 12, 23, 26 and 27 of the ECCC Law];

2. And that he therefore has the power to issue this order whose admissibility cannot be called into question having regard to the recent opinion of the Pre-Trial Chamber;¹⁴

⁷ CF 003/20-11-2008/ECCC/OCIJ, Order on the Admissibility of the Civil Party Application of Robert Hamill, 29 April 2011, D11/2/3.

⁸ CF 003/20-11-2008/ECCC/OCIJ, Request for Suspension of Deadline for Appeal against Order on Admissibility of Civil Party Application of Robert Hamill Pending Grant of Access to Case File 003 and 004, 12 May 2011, D11/2/4/1.

⁹ CF 003/20-11-2008/ECCC/OCIJ, Appeal against Order on Admissibility of Civil Party Application of Robert Hamill (D11/2/3) (Cases 003 and 004), 23 May 2011, D11/2/4/2.

¹⁰ CF 003/20-11-2008/ECCC/OCIJ, Order on the Admissibility of the Civil Party Application of Robert Hamill, 7 July 2011, dated 29 April 2011, D11/2/4/4.1.

¹¹ CF 003/20-11-2008/ECCC/OCIJ, 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.

¹² *Ibid.*, ERN 00748553-00748564.

¹³ CF 003/20-11-2008/ECCC/OCIJ, Request for Co-Investigating Judges to Reconsider Decision on Admissibility of Civil Party Applicant Mr Robert Hamill (D11/2/3) (Cases 003 and 004), 30 December 2011, filed on 04 January 2012.

¹⁴ CF 003/16-12-2011-ECCC/PTC, Opinion of Pre-Trial Chamber Judges Downing and Chung on the Disagreement Between the Co-Investigating Judges pursuant to Internal Rule 72, 10 February 2012, Opinion 1002012, paras. 42-47.

III. Grounds for the decision

A. Reconsideration of the admissibility of the Civil Party application

3. **Considering** that the Co-Investigating Judges have the power to reconsider all prior decisions, even after the notice of conclusion of judicial investigation has been issued;¹⁵
4. **Considering** that, where the Internal Rules and the Code of Criminal Procedure do not deal with a particular matter, guidance may be sought at the international level;¹⁶
5. **Considering** that international law provides that a previous decision may be reconsidered on legitimate grounds, not only because of a change of circumstances (new facts, new arguments), but also where it is realised that the decision was erroneous or has caused an injustice;¹⁷
6. **Considering** that the Special Court for Sierra Leone recognized as a general principle that each court could, in the interests of justice, vary, rescind or reconsider an earlier decision;¹⁸
7. **Considering** that the Pre-Trial Chamber itself has in fact reconsidered previous decisions;¹⁹
8. **Considering** that a judge's discretion to reconsider previous decisions is recognized by the law and case law;²⁰
9. **Considering** that the numerous procedural "irregularities" decried in the Dissenting Opinion of the Pre-Trial Chamber, *inter alia*, the substitution on the Case File, on 7 July 2011, of the First Decision with a new version dated 29 April 2011, failure to disclose information on the scope of the investigation in a timely manner in order to permit victims to

¹⁵ French Case Law: Cass. Crim. 9 January 1995, Appeal No. 94-84975, Bull. Crim. No. 6 (D 1995 Somm. 322 obs. Pradel; JCP 1996 I 3906 chron. J.-H. Robert); Cass. Crim. 4 August 1998, Appeal No. 98-81678, Bull. Crim. 220.

¹⁶ Article 12(1) of the ECCC Agreement; Article 23 of the ECCC Law.

¹⁷ *Milosevic* ICTY [2005] TC Decision on Prosecution Motion for Reconsideration Regarding Evidence of Defence Witnesses Mitar Balevic, Vladislav Jovanovic, Notingkasin Andric, and Dobre Aleksovski and Decision *proprio motu* Reconsidering Admission of Exhibits 837 and 838 Regarding Evidence of Defence Witness Barry Lituch, para. 7 *et seq.*; *Galic* ICTY [2001] AC Decision on Application by Prosecution for Leave to Appeal, Appeals Chamber, para. 13; *Mucic et al* ICTY [2003] AC Judgement on Sentence Appeal, para. 49; *Milutinovic et al* ICTY [2006] TC Decision on Prosecution Motion for Reconsideration of Decision on Prosecution Motion for Additional Trial-Related Protective Measures for Witness K56, para. 2; *Jadranko Prlic et al* ICTY [2009] TC Decision on Defence Motion for Reconsideration of the Decision on Admission of Documentary Evidence, para. 25.

¹⁸ *Brima et al* SCSL [2005] AC Separate and Concurring Opinion of Justice Robertson on the Decision on Brima-Kamara Defence Appeal Motion Against Trial Chamber II Majority Decision on Extremely Urgent Confidential Joint Motion, paras. 24 and 49; *Norman et al* SCSL [2005] TC Decision on Urgent Motion for Reconsideration of the Orders for Compliance with the Order Concerning the Preparation and Presentation of the Defence case, paras. 9-14.

¹⁹ Decision on Application for Reconsideration of Civil Party's Rights to Address Pre-Trial Chamber in Person, Case File 002/19-09-2007-ECCC/OCIJ, 28 August 2008, C22/I/68, para. 25; and Decision on the Reconsideration of the Admissibility of Civil Party Applications, Case File 002/19-09-2007-ECCC/OCIJ, 1 July 2011, D364/I/6, para. 9.

²⁰ *Milosevic v. Prosecutor* ICTY [2004] AC Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Appointment of Defense Counsel, paras. 9-10; cited in Case File 002/19-09-2007-ECCC/OCIJ, Decision on Appeal Against the Co-Investigating Judges' Order on Request to Seek Exculpatory Evidence in the Shared Material Drive, 18 November 2009, D164/4/13, para. 26.

exercise their rights pursuant to rule 23 *bis* of the Internal Rules and delays in placing several documents on the case file fully justify reconsideration of the First Decision;

10. **Considering** that it will be established (under Part b) that the First Decision is both erroneous and unjust;

11. **Considering** that this approach is consistent with rule 21(1)(a) of the Internal Rules which provides that “Administrative Regulations shall be interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims and so as to ensure legal certainty and transparency of proceedings”;

B. Admissibility of the Civil Party application

a) Existence of direct harm

12. **Considering** that the First Decision rejected the Applicant’s Civil Party application on the ground that he had not demonstrated that he suffered the psychological injury as a direct consequence of his brother’s death;²¹

13. **Considering** that it is therefore justified to reconsider this reasoning in light of the applicable law and case law;

14. **Considering** that the Code of Criminal Procedure of the Kingdom of Cambodia provides a civil action may be brought by the victim of an offence, that to give rise to reparations, the injury must be a direct consequence of the offence, that it must be personal damage that has actually occurred and still exists, and may include damage to property or physical or psychological injury;²²

15. **Considering** that Rule 23 *bis* of the Internal Rules provides that in order for Civil Party action to be admissible, the Civil Party applicant shall be clearly identified and 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 harm upon which a claim of collective and moral reparation might be based;

16. **Considering**, further, that any Civil Party application must provide “details of the status as a Victim, specify the alleged crime and attach any evidence of the injury suffered, or tending to show the guilt of the alleged perpetrator. With a view to service and notifications, the domicile of the Victim, the registered office of the Victims’ Association of which he or she is a member, or the address of the lawyer, as appropriate, must also be stated. Where this address is outside of Cambodia, an address in Cambodia shall be provided”;²³

17. **Considering** that while these two provisions do not define the exact nature of the causal link, it should be pointed out that the definition has become clearer in the course of the judicial investigation and trial in Case 002;

18. **Considering** that the Practice Direction issued pursuant to Rule 23 of the Internal Rules notes that “psychological injury may include the death of kin who were the victim of such crimes”;

²¹ CF 003/20-11-2008/ECCC/OCIJ, Order on the Admissibility of the Civil Party Application of Rob Hamill, 29 April 2011, D11/2/3, para. 5.

²² Code of Criminal Procedure of the Kingdom of Cambodia, Article 13.

²³ Rule 23 *bis* (4) of the Internal Rules.

19. **Considering** that in their Order, dated 6 September 2010, the Co-Investigating Judges expressly acknowledged that there is “a presumption of psychological harm for the members of the direct family of the immediate victim”;²⁴
20. **Considering** that the notion of direct family includes not only parents and children but also the spouse and brothers and sisters of the immediate victim;²⁵
21. **Considering** that the Co-Investigating Judges considered this presumption as conclusive particularly when the immediate victim died or disappeared as a consequence of an act under investigation;²⁶
22. **Considering** that in a Decision of 24 June 2011,²⁷ the Pre-Trial Chamber, taking into account the nature of the mass crimes within the jurisdiction of the ECCC and the Khmer family tradition, toned down the requirement of a causal link and broadened the notion of “psychological harm”, highlighting, for example, the extremely powerful impact of the emotional distress suffered by a person from simply recalling events witnessed more than 30 years ago;²⁸
23. **Considering** that the Supreme Court Chamber, in its Judgement (summary) of 3 February 2012,²⁹ held that the criterion of special bonds of affection or dependence connecting the applicant with the direct victim captures the essence of inter-personal relations, the destruction of which is conducive to an injury on the part of indirect victims;
24. **Considering** that this criterion therefore applies to all persons claiming to be indirect victims, whether or not they are members of the family as well as to the notion of injury within the meaning of Article 13 of the Code of Criminal Procedure as applicable to indirect victims;
25. **Considering**, further, that the forced disappearance, imprisonment, torture and eventually the murder of a family member may cause other forms of suffering, anxiety and

²⁴ CF002/19-09-2007-ECCC-OCIJ, Order on the Admissibility of Civil Party Applicants residing outside the Kingdom of Cambodia, 6 September 2010, D404, para. 14(a); See also Inter-American Court of Human Rights, *Valle-Jaramillo et al.*, Judgment, 27 November 2008, para. 119; Inter-American Court of Human Rights, *Kawas-Fernandez*, Judgment, 3 April 2009.

²⁵ United Nations Organisation, Resolution 40/34 adopted on 29 November 1985, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power; Resolution 60/147, adopted on 16 December 2005, 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, para. 8; *Thomas Lubanga Dyilo* ICC [2008] Trial Chamber I, Judgment, para. 32; Inter-American Court of Human Rights, *Street Children*, Judgment, 26 May 2001, para. 68; Inter-American Court of Human Rights, *Myrna Mack Chang*, Judgment, 25 November 2003, paras. 232, 244.

²⁶ CF002/19-09-2007-ECCC-OCIJ, Order on the Admissibility of Civil Party Applicants residing outside the Kingdom of Cambodia, 6 September 2010, D404, para. 14(a)(i); See also *Thomas Lubanga Dyilo* ICC [2008] Pre-Trial Chamber I, paras. 23-25; *Ahmad Harun et al* ICC [2005] Pre-Trial Chamber I, para. 35; European Court of Human Rights, *Kurt* (15/1997/799/1002), Judgment, Chamber 25 May 1998, paras. 130-134; ECHR, *Cakici* (23657/94), 8 July 1999; ECHR, *Bamaca Velasquez*, Judgment, Chamber, 25 November 2000, paras. 147 ss.; ECHR, *Blake*, Judgment, Chamber, 24 January 1998, paras. 114-116; Inter-American Court of Human Rights, *La Cantuta*, Merits, Reparations and Costs, 29 November 2006, para. 123; IACHR, *Myrna Mack Chang*, Reasoned Concurring Opinion of Judge Sergio Garcia-Ramirez, paras. 56, 57 and 59-62.

²⁷ CF002/19-09-2007-ECCC/OCIJ (PTC76, PTC112, PTC113, PTC114, PTC115, PTC142, PTC157, PTC164, PTC165, PTC172), Decision on Appeals against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, 24 June 2011, D411/3/6, pp. 23-28.

²⁸ *Ibid.*, p. 24.

²⁹ CF001/18-07-2007-ECCC/SCC (KAING Guek Eav), Summary of Appeal Judgement, 3 February 2012, F26/3.

injury of a different nature, such as financial loss, to members of the victim's immediate family;

26. **Considering** that it is therefore just and reasonable to relieve immediate family members of the burden of proof of the injury;

27. **Considering** that having regard to the sole ground for rejecting the Applicant's Civil Party application, as determined by the Co-Investigating Judges, the First Decision appears to be baseless since the notion of psychological injury was defined arbitrarily, without taking into account the case law cited;

28. **Considering** further that the decision is totally unjust in that it deprives the Applicant of the possibility of participating in the proceedings against the persons allegedly responsible for the disappearance of his brother and seeking reparation, as appropriate, pursuant to Rules 23(1)(a) and (b) of the Internal Rules;

b) Analysis of the other requirements for admissibility of the Civil Party application of the Applicant

29. **Considering** that it is therefore proper to determine whether the Applicant's Civil Party application meets the other requirements for admissibility under Rule 23 *bis* of the Internal Rules;

30. **Considering** that it should be noted that the Applicant provided all the required information in his "Victim Information Form";³⁰

31. **Considering** that in an appended document,³¹ the Applicant went to some pains to describe in detail the acts with which the suspects in Case File 003 could be charged, as a result of the abduction of his brother Kerry George Hamill on his boat, the "Foxy Lady", off the coast of Koh Tang Island, on 13 August 1978, and his disappearance and very likely murder referring therefor to the statements of John Dewhirst, who was present on the boat and was subsequently detained with his brother at S-21 ;

32. **Considering** that he has also accurately described the nature of his injury, making reference to his witness statement of 17 August 2009 in Case File 001;

33. **Considering** that the Applicant therefore clearly fulfils the requirements for admission as a Civil Party in Case File 003;

34. **Considering** that he has already been admitted as a Civil Party both in Case File 001 in 2009, in the proceedings against Kaing Guek Eav (alias "Duch") who was sentenced to life imprisonment on 3 February 2012, and in Case File 002 in the proceedings against Nuon Chea, Ieng Sary, Khieu Samphan and Ieng Thirith currently at the trial stage;

35. **Considering** lastly that one may legitimately wonder about the surprising circumstances under which Robert Hamill's Civil Party application was initially rejected.

³⁰ Victim Support Section, Victim Information Form, 11-VSS-0002, 12 April 2011, CF 003/20-11-2008/ECCC/OCIJ, D11/2.

³¹ *Ibid.*, ERN 00681112 to 00681120.

FOR THESE REASONS

- 36. **Declare** Robert Hamill's request for reconsideration of his Civil Party application admissible.
- 37. **Grant** Robert Hamill's Civil Party application and grant him access to Case File 003.
- 38. **Declare** that his Civil Party application in Case File 004 will be considered separately.

Phnom Penh, 24 February 2012

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International Reserve Co-Investigating Judge

Laurent Kasper-Ansermet