D417/2/3

BEFORE THE PRE-TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

FILING DETAILS

(PTC 74)

Case No: 002/19-09-2007-ECCC/OCIJ
Filed to: Pre-Trial Chamber
Party Filing: Civil Party Co-Lawyers
Original Language: English

Date of Document: 27 September 2010

CLASSIFICATION

Classification of the document suggested by the filing party:	CONFIDENTIAL
Classification by Chamber:	~~ឯកជន / Confidential / Confidentiel~~
Classification Status:	សាធារណៈ / Public
Review of Interim Classification:	
Records Officer Name:	
Signature:	

APPEAL AGAINST ORDER ON THE ADMISSIBILITY OF CIVIL PARTY APPLICANTS FROM CURRENT RESIDENTS OF KAMPONG CHHNANG PROVINCE (D417)

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ORIGINAL DOCUMENT/DOCUMENT ORIGINAL
ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/Date de reception): 04 / 01 / 2011
ម៉ោង (Time/Heure): 15:20
មន្ត្រីទទួលបន្ទុកសំណុំរឿង/Case File Officer/L'agent chargé du dossier: Ratanak

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C. THIRD GROUND OF APPEAL

The Co-Investigating Judges erred in fact and in law and violated Internal Rule 55(2) by restricting the scope of investigations to paragraphs 37-72 of the Introductory Submission and the Supplementary Submissions and / or requiring that Civil Party admissibility be linked to the "Scope of Investigations" as it erroneously understands it

D. FOURTH GROUND OF APPEAL

The Co-Investigating Judges erred in law by mis-construing the term "injury" and "direct consequence" under Internal Rule 23 (2)(a) (Rev. 4 and previous) and Internal Rule 23 bis (1) (b) (Rev. 5) respectively, in rejecting victims who suffered injury as a direct consequence of crimes within the ECCC's jurisdiction or under the scope of investigations

E. FIFTH GROUND OF APPEAL

The Co-Investigating Judges were Fully Seised in rem of Facts pertaining to Persecution and Genocide of the Ethnic Vietnamese – including the investigations taken by OCIJ with Vietnamese Civil Party applicants in Kampong Chhnang Province and including the deportation of Vietnamese by boat through Prey Veng Province

I. PROCEDURAL BACKGROUND AND INTRODUCTION

1. On 13 September 2010, the Co-Investigating Judges (**CIJs**) issued the "Order on the Admissibility of Civil Party applicants from Current Residents of Kampong Chhnang Province" (**Kampong Chhnang Order**).[1] On 14 September 2010, Civil Party Co-Lawyers were notified of the Kampong Chhnang Order.
2. In this Order the CIJs declared 25 Civil Party applicants (**CPAs**) to be inadmissible: D22/1901, D22/3180, D22/3183, D22/2057, D22/2154, D22/438, D22/3179, D22/3182, D22/816, D22/3177, D22/2157, D22/3181, D22/817, D22/2155, D22/2153, D22/404, D22/2156, D22/1136, D22/1969, D22/3175, D22/3176, D22/3178, D22/2158, D22/1092, D22/2758.
3. Annex 1 of the Kampong Chhnang Order lists D22/1901 as being represented only by national Civil Party Co-Lawyer, Mr NY Chandy. International Civil Party Lawyer, Ms Lyma NGUYEN, confirms that she is also representing applicant D22/1901, as evidenced by the Power of Attorney (**POA**) dated 20 July 2010, signed by herself, Mr NY Chandy, and the client, applicant D22/1901, and duly submitted to the Victims Support Section (**VSS**) on 3 August 2010. A copy of the POA is at **Annex A**.
4. Of the 25 applicants deemed inadmissible in the Kampong Chhnang Order, four clients, D22/2156, D22/2154, D22/1203 and D22/2057 were designated to the Civil Party Co-Lawyers by an Order of the CIJs on 2 August 2010.[2]
5. One of the 25 applicants whose claims were deemed inadmissible is a Khmer national. The remaining 24 deemed inadmissible are ethnic Vietnamese. Information gathered from inquiries with the VSS, other Civil Party legal teams, the Cambodian Human Rights Action Committee, and various intermediary NGOs such as DC-Cam, ADHOC and KID, indicate that these Vietnamese applicants from Kampong Chhnang are the only Civil Party applicants in Cambodia who identify as ethnic Vietnamese.
6. In this Appeal, submissions concerning the 24 ethnic Vietnamese Appellants will be made as one collective group appeal, as all Vietnamese Appellants raise similar facts and identical legal submissions. A separate submission in this appeal will be made for

[1] OCIJ, "Order on the Admissibility of Civil Pary Applicants from Current Residents of Kampong Chhnang Province", 13 September 2010, Doc. no. D417 (hereinafter referred to as "Kampong Chhnang Order").
[2] OCIJ, "Ordonnance portant organisation de la représentation des parties civiles en application de la règle 23 *ter* du Règlement", 2 August 2010, Doc. no. D337/10.

the individual Khmer Appellant, at paragraphs 69-78. Civil Party Co-Lawyers seek to have the Pre-Trial Chamber (**PTC**) overturn the CIJs' decisions in the Kampong Chhnang Order and to declare the 25 above-listed Civil Party applicants admissible.

II. APPLICABLE LAW AND RULES

7. The relevant Law and Internal Rules to which this Appeal refers are Internal Rules (**IR**) 21, 23 (Revision 3), 23 *bis*, 55, 77 *bis*,114, (Revision 5), Article 13 of the Agreement between the United Nations and The Royal Government of Cambodia[3] Article 14 of the International Covenant On Civil and Political Rights (**ICCPR**).[4]

III. STANDARD OF APPEAL

8. IR 77 *bis* is a special rule for appeals against admissibility orders by the Office of the Co-Investigating Judges (**OCIJ**) and was newly adopted on 9 February 2010. According to IR 114 (3) the amendments on Civil Party participation apply on cases for which a closing order has not been issued at the time of adoption.
9. The special provision for admissibility appeals exhaustively determines the standard of appeal. The reasons are limited to errors in fact and/or law in determining the decision.
10. In addition, pursuant to IR77 *bis* (2), the appellant is permitted to submit "supporting documentation" on an admissibility appeal to the Pre-Trial Chamber. The term "supporting documentation" is not defined and could be understood to be (i) additional material, comprising new facts, to support the Civil Party application and/or (ii) only documentation to strengthen already submitted facts.
11. In an email to the Pre-Trial Chamber dated 25 August 2010, Civil Party Lawyers sought an indication from judges of the PTC, ahead of time, as to what "supporting documentation" would be accepted on appeal.[5] The PTC replied:

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[3] Agreement between The United Nations and The Royal Government of Cambodia Concerning The Prosecution Under Cambodian Law Of Crimes Committed During The Period Of Democratic Kampuchea, at http://www.eccc.gov.kh/english/cabinet/agreement/5/Agreement_between_UN_and_RGC.pdf.

[4] Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49, at http://www2.ohchr.org/english/law/ccpr.htm.

[5] Email from Civil Party Co-Lawyer, Lyma NGUYEN to Greffiers of the PTC, titled, "URGENT: PTC's approach to Supporting Information on Appeal of an Inadmissibility Decision", 25 August 2010, at Annex A.

> "[T]he Pre-Trial Chamber Judges are not in a position to give the required clarification. Were the parties to file an appeal, it is for them or their lawyers to provide the Chamber with such submissions as they find appropriate to prove their claim in a way that would best serve the interests of their client(s). Any application to submit further material would be considered pursuant to the applicable law.[6] (**Annex B**)

12. Civil Party Co-Lawyers submit that the IRs must be always interpreted in a manner to safeguard the interests of victims, in accordance with IR 21 (1), and to keep victims informed that their rights are respected, under IR 21 (1)(c).
13. Civil Party Co-Lawyers submit in **Annex C** of this Appeal, the Written Records of Interviews from investigations conducted by OCIJ investigators with ethnic Vietnamese Civil Party applicants in Kampong Chhnang Province. These documents and the information contained therein have evidentiary value as "supporting documentation" under IR 77 *bis*.

IV. ADMISSIBILITY OF THE APPEAL

14. According to the IR (Revision 5), 77 *bis* (1) and (2), an Order regarding the admissibility of a Civil Party application can be appealed within ten days from notification of the Order. As the Kampong Chhnang Order was notified to Civil Party Co-Lawyers on Tuesday 14 September 2010, the deadline for appeals of these Orders is Friday 24 September 2010. However, as Friday 24 September is a Cambodian national public holiday (Constitution Day), in accordance with IR 39(3), the appeal will be submitted on the next working day, Monday 27 September 2010.
15. On 14 September 2010, Civil Party Co-Lawyers submitted the requisite Notice of Appeal and a Request for an Extension of Page Limit for the Appeal.[7] On 21 September 2010, the PTC granted an extension of page limit to file an appeal, noting that the original request articulated that the appeal would be approximately 50 pages in length, in English, excluding cover pages, references and annexes.[8]

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[6] Email from Greffier of the PTC, responding to email from Civil Party Co-Lawyer, Lyma Nguyen, 31 August 2010 at Annex A.
[7] Civil Party Co-Lawyers, "Request for Extension of Page Limit for Appeal Against Order in the Admissibility of Civil Party applicants from Kampong Chhnang", dated 14 September 2010, Doc. no. D417/2/1.
[8] PTC, Decision on Civil Parties' Request for Extension of Page Limit for Appeal against Order on the Admissibility of Civil Party applicants from Kampong Chhnang, 21 September 2010, Doc. no. D417/2/2.

16. On 15 September 2010, Civil Party Co-Lawyers were notified by the ECCC's Interpretation and Translation Unit that it had exhausted its capacity to translate the appeal into the Khmer language by the required deadline. On this basis, Civil Party Co-Lawyers will file this appeal on the deadline of 27 September 2010 in the English language only, with the Khmer translation to be filed when it becomes available.
17. The CIJ's Kampong Chhnang Order contains decisions on the admissibility of Civil Party applications. The appeal against this Order is therefore factually admissible, and is timely submitted.

V. PRELIMINARY REMARKS

18. Civil Party Co-Lawyers note that the OCIJ's Kampong Chhnang Order is identical in the general reasons listed between paragraphs 4 – 18 to the reasons offered in other Admissibility Orders issued by the OCIJ. The "individual assessment of Civil Party applications" section only provides general reasons corresponding the Case File numbers identifying Civil Party applicants. The Order refers to a footnote which then refers to an Annex in which six different grounds for rejection are listed.[9] All of these grounds are general in nature and not identifiable to any facts raised in an individual's application, so that an Applicant cannot determine what the exact basis of their rejections are, in relation to the facts raised in their individual applications.
19. During the course of admissibility appeals, it has also become apparent to Civil Party Co-Lawyers that different Chambers or sections of the ECCC differ in their understandings, and in their approaches, to what is the "*Scope of Investigations*". In this Appeal, Civil Party Co-Lawyers wish to make a distinction to when referring to the approach taken by the Office of the Co-Prosecutors (**OCP**), as distinct from the approach taken by the Office of the Co-Investigating Judges (**OCIJ**). Civil Party Co-Lawyers will do this by referring to the OCIJ's defined scope as "**scope of investigation**" (lower case) and by referring to the range of facts that OCP referred to OCIJ to investigate, as "**Scope of Investigations**" (capitalised).

[9] Kampong Chhnang Order, Annex 3 ("Inadmissible Civil Parties").

VI. ARGUMENT

A. FIRST GROUND OF APPEAL

The Orders are based on an incorrect application of IR 23(bis)(1)(b) (Rev. 5) and an incorrect interpretation of Internal Rule 21(1), 21(1)(a), (c), 23(2)(Rev. 4 and all previous Revisions) and therefore breaches the requirement of Procedural Fairness

1. Application of Revision 5 of the IRs in Determining Admissibility is Erroneous and Constitutes a Breach of Procedural Fairness

20. The CIJs erroneously applied Revision 5 of the Internal Rules in determining the admissibility of CPAs.[10] Procedural fairness requires that the IRs that were in force at the time that victims filed their Civil Party applications should apply when determining their Civil Party status.

21. Civil Party Co-Lawyers refer to, and incorporate by reference, legal submission made in paragraphs 16 – 25 of the "Appeal against the Order on the Admissibility of Civil Party applicants from the Current Residents of Kep Province".[11]

22. As victims had reasonable expectations that the admissibility of their applications would be decided in accordance with the Practice Directions and according to the Internal Rules provisions which were in force at the time at which their applications were submitted, it is unfair to retroactively apply amended rules which substantially and adversely affect their rights. The amended Rules limit the right of a person to make a claim by applying more onerous criteria for Civil Party admissibility, contrary to the requirement for procedural fairness under Article 14(1) ICCPR.[12]

2. The CIJ's Conduct and Management of the Admissibility Regime is Contrary to Procedural Fairness

23. The first public guideline addressing Civil Party admissibility was released more than two years into the Civil Party participation mechanism envisaged by the original

[10] Kampong Chhnang Order, para 8.
[11] Submitted on 6 September 2010 by Civil Party Co-Lawyers Mr HONG Kimsuon, Mr NY Chandy and Ms Silke STUDZINSKY. At the time of writing this appeal, a document number for the Kep Appeal was not yet available.
[12] *Ibid.* at para. 12, referring to *Obermeier v. Austria and Golder v. UK.*

Internal Rules, via an OCIJ Press Release dated 5 November 2009, declaring the "scope of investigations" to be various crime sites and acts against the population.[13] This Press Release states, "If a victim wishes to become a civil party, his/her alleged prejudice must be personal and directly linked to one or more factual situations that form the basis of the ongoing judicial investigation."

24. On 13 January 2010, the CIJs made an order declaring a number of CPAs inadmissible on the basis that the applicants failed to establish a link between the alleged injury and facts under investigation, even though the Press Release declaring the "scope of investigations" stated, "This information should not be seen as a judicial decision as to the scope of investigations in Case File 2".[14]
25. For applicants whose status had not yet been determined, OCIJ, acknowledging that civil society had been assisting victims complete their forms without any guidelines for over two years, on 29 January 2010, extended the deadline for the submission of supplementary information to ensure that applications submitted were complete.[15] The OCIJ subsequently extended this deadline to 30 June 2010, seemingly to account for the belated public announcement in November 2009 of the "scope of investigation". The CPAs deemed inadmissible on 13 January 2010 (including 16 ethnic Vietnamese applicants) were never given the opportunity to submit supplementary information in support of their claims. Neither were unrepresented CPAs designated to Civil Party Lawyers on 2 August 2010 by order of the CIJs.[16] Later parts of this Appeal will present further submissions about these procedural shortcomings.
26. Against the reasonable expectations that CPAs have before this Court, the OCIJ has time and time again breached its obligation to ensure procedural fairness for Civil Parties and applicants in its conduct and management of the admissibility regime. Specifically, it has violated the rights of CPAs to have fair determination of a matter; particularly certainty and clarity in the expectation that a matter will be dealt with in a predictable and defined manner.

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[13] OCIJ, "Press Release", 5 November 2009, at http://www.eccc.gov.kh/english/cabinet/press/138/ECCC_Press_Release_5_Nov_2009_Eng.pdf.
[14] OCIJ, "Order On Admissibility Of Civil Party Applications", 13 January 2010, D250/3/2.
[15] Brief of OCIJ, 27 January 2010, Doc.no. D 337. OCIJ extended this deadline on request and after rejection on request for reconsideration until 30 June 2010, Doc. no.D337/6.
[16] OCIJ, "Ordonnance portant organisation de la représentation des parties civiles en application de la règle 23 *ter* du Règlement", 2 August 2010, Doc. no. D337/10.

27. In this Appeal, Civil Party Co-Lawyers request that the PTC estop the OCIJ from retroactively deciding on Civil Party applications by the new Internal Rules.

3. The CIJs' Interpretation of the Applicable Internal Rules is Erroneous

28. Having erroneously applied Revision 5 of the Internal Rules to the present cases, the CIJs erred in holding that the admissibility of Civil Parties is restricted to Victims having suffered harm as a direct consequence of *crimes alleged against the Charged Person(s)*, this being crimes listed in paragraphs 37-72 of the Introductory Submission (**IS**) and in the Supplementary Submissions (**SS**).[17]
29. Civil Party Lawyers reiterate that the correct rules to be applied are the old Internal Rules (prior to Revision 5), as these formed the basis of the expectations victims had at the time they filed their applications.
30. In interpreting IR 23(2) (*old*), in the first instance, the meaning of the provision must be sought in the language in which the provision is framed, and if that meaning is clear, the sole function of the court is to enforce the legislation according to its terms. The language of the first sentence of IR 23(2) (*old*) is plain and clear - it grants victims a right to take civil action if they are victims of a ***"crime coming within the jurisdiction of the ECCC"***. The term "jurisdiction" is clearly defined in the Agreement and the implementing ECCC Law and encompasses international and national crimes, committed by senior leaders or those most responsible during the period of Democratic Kampuchea (17 April 1975 to 6 January 1979).
31. Internal Rule 23(2)(b) (*old*) then refers to an injury suffered as a direct consequence of the ***offence***. This provision must be interpreted in the context of the *whole* provision, including the first sentence referring to a crime "within the jurisdiction of the ECCC". A holistic interpretation leads to an understanding that the referral to "direct consequence of the offence" means a referral to "the offence within the jurisdiction of the ECCC". Civil Party Co-Lawyers submit that the applicable Internal Rules at the relevant time that victims filed their applications do not limit the admissibility of Civil Parties to those who are linked to the charges.

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[17] OCIJ Press Release dated 5 November 2009: http://www.eccc.gov.kh/english/cabinet/press/138/ECCC_Press_Release_5_Nov_2009_Eng.pdf.

32. Civil Party Co-Lawyers refer to, and incorporate by reference, legal submissions made in paragraphs 36 - 41 of the Kep Appeal.[18]
33. Civil Party Lawyers ask that the PTC overturn the CIJs' decision declaring the following CPAs inadmissible, on the basis that these applicants were not afforded procedural fairness because the CIJs applied the wrong Internal Rules, and erroneously interpreted the applicable legislation: D22/1901, D22/3180, D22/3183, D22/2057, D22/2154, D22/438, D22/3179, D22/3182, D22/816, D22/3177, D22/2157, D22/3181, D22/817, D22/2155, D22/2153, D22/404, D22/2156, D22/1136, D22/1969, D22/3175, D22/3176, D22/3178, D22/2158, D22/1092 and D22/2758. These applicants have all suffered injury as a direct consequence of crimes within the jurisdiction of the ECCC, on a correct interpretation of the correct IRs.
34. If the judges of the PTC determine that Revision 5 of the IRs is the correct legislation to apply in determining civil party admissibility, Civil Party Co-Lawyers argue, at submissions made in Section 4 of the Fifth Ground of Appeal that even with an application of Revision 5 of the IRs, on a proper assessment of harm being linked to *crimes alleged against the Charged Persons*, all ethnic Vietnamese Civil Party applicants from Kampong Chhnang should be admitted as facts raised by these applicants, obtained by OCIJ Investigations, are directly linked with crimes for which the four Accused Persons have been indicted in the CIJs' Closing Order
35. The Appeal now turns to the CIJs' violations of the fundamental requirement of judicial bodies to make *reasoned* decisions.

[18] Submitted on 6 September 2010 by Civil Party Co-Lawyers Mr HONG Kimsuon, Mr NY Chandy and Ms Silke STUDZINSKY. At the time of writing this appeal, a document number for the Kep Appeal was not yet available.

B. SECOND GROUND OF APPEAL

In making mass rejection orders, the Co-Investigating Judges erred in law and violated IR 23(2)(Rev. 3) and the fundamental principal of procedural fairness to provide reasoned decisions

36. The CIJs rejected CPAs D22/1901, D22/3180, D22/3183, D22/2057, D22/2154, D22/438, D22/3179, D22/3182, D22/816, D22/3177, D22/2157, D22/3181, D22/817, D22/2155, D22/2153, D22/404, D22/2156, D22/1136, D22/1969, D22/3175, D22/3176, D22/3178, D22/2158 and D22/1092 by simply stating that "(6) Harm is not linked to the facts under investigation (outside geographic scope / Vietnamese persecution)". For CPA D22/2758, the Order simply states that "(6) Harm is not linked to the facts under investigation".
37. Unfortunately, for various reasons stated in this appeal, given that the CIJs have erred in their understanding of what are facts within the "Scope of Investigations", there is no clarity *at all*, in the decisions they have produced, as to whether their determination that "harm is not linked to facts under investigation" is a reference to a determination that there was no harm established (that could be linked with facts under investigation) *or* simply that there was no harm established (in cases where applicants explicitly refer to facts under investigation).
38. It would seem that the reference to "outside geographic scope / Vietnamese persecution" is an acknowledgment from the CIJs that harm relating to criminal acts under the scope of Vietnamese persecution was established – but that the harm is not linked with "facts under investigation".
39. The CIJs' first rejections of 16 ethnic Vietnamese applicants residing in Kampong Chhnang, in the "Order on the Admissibility of Civil Party Applications Related to Request 250/3" dated 13 January 2010 (**First Vietnamese Rejection Order**)[19] articulated "reasons" containing more words than the 14 words given in the rejections of each of the 24 ethnic Vietnamese applicants the subject of this Appeal. However, even in that First Vietnamese Rejection Order, there was still a lack of precision in the "reasons" offered, in that no facts raised in any individuals' application was specifically

[19] OCIJ, "Order on the Admissibility of Civil Party Applications Related to Request 250/3", 13 January 2010, Doc. No. D250/3/2 (hereinafter referred to as "**First Vietnamese Rejection Order**").

referred to in the general grounds used to reject all applicants *en masse*. Nor was there any explanation offered by the CIJs about the legal basis upon which its office conducted interviews in Kampong Chhnang with the applicants it initially admitted as Civil Parties, and subsequently rejected.

40. Civil Party Co-Lawyers appealed the CIJs' First Vietnamese Rejection Order in the "Appeal Against Order on the Admissibility of Civil Party Applications Related to Request D250/3" dated 12 February 2010.[20] That appeal will be referred to as "**Appeal against First Vietnamese Rejection Order**", in this Appeal.

41. The CIJs' deficiency of proper and detailed reasons constitutes an error of law and renders the rejection orders invalid. The CIJs' inadequate and insufficient reasoning infringes the fundamental principle of law that proper reasons must be given for a judicial decision. Furthermore, it renders the CPA's right to appeal meaningless under Internal Rules 74(4)(b) and 77 *bis* on the basis that there is insufficient information upon which the CPA could determine the grounds on which to base an appeal to the PTC.[21] Similarly, inadequate and/or insufficient reasoning does not provide PTC the requisite threshold of information upon which to conduct a proper and effective appellate review of the rejection.[22]

1. Right to a Reasoned Decision on Admissibility of a Civil Party Application according to the Internal Rules

42. Civil Party Co-Lawyers reiterate that the previous versions of the IRs should apply, these being the rules conferring substantive rights, in place at the time that applicants submitted their applications. IR 23 (3) and (4) (Rev. 3 and previous Revisions), state that Civil Parties have the right to a reasoned decision in relation to orders on admissibility. IR 23(3) states: " *...[T]he Co-Investigating Judges may decide by reasoned order that the Civil Party application is inadmissible. (...).*" IR 23(4) states: "*...[T]he Trial Chamber may, by written reasoned decision, declare the Civil Party*

[20] Civil Parties Co-Lawyers in the "Appeal Against Order on the Admissibility of Civil Party Applications Related to Request D250/3", 12 February 2010, D250/3/2/1/1 (hereinafter referred to as "**Appeal against First Vietnamese Rejection Order**").
[21] PTC, "Decision on the Ieng Thirith Defence Appeal against 'Order on Requests for Investigative Action by the Defence for Ieng Thirith' of 15 March 2010", 14 June 2010, D353/2/3, para. 23.
[22] *Ibid.*

application inadmissible."

43. The 4th Revision of IR 23 *bis* (4) stipulates that the CIJs are to decide in a separate order on the admissibility of CPAs. It states: *"When issuing the Closing Order, the Co-Investigating Judges shall decide on the admissibility of all remaining Civil Party applications by a separate order. This order shall be open to expedited appeal by the parties or the CPAs as provided for in Rule 77 bis."*
44. Even though the amended IRs have taken away the requirement to issue a *reasoned* order, the obligation to do so remains an implied duty of any judicial body. As the current Internal Rules are silent on this requirement, the Law on the Establishment of the Extraordinary Chambers (**ECCC Law**) allows the PTC to seek guidance in international procedural rules.[23]

2. Right to a Reasoned decision as a Fundamental Principle of Law

45. The right to a fair determination of a matter is protected under Article 14.1 of the International Covenant on Civil and Political Rights (ICCPR).[24] The CIJ's failure to give a properly reasoned decision is a clear denial of the right to a fair determination of these matters. Specifically, these include the right to know exactly why one has been deemed inadmissible, and by extension, since Civil Parties cannot respond to a rejection without knowing the reasons, the right to be properly heard.
46. Civil Party Co-Lawyers refer to, and incorporate by reference, paragraphs 51 – 55 of the Kep Appeal.[25]
47. A failure to issue a properly reasoned decision is a violation of Principle 4 of the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, which provides that victims should be treated with compassion and respect for their dignity.[26] A rejection without a properly reasoned basis is not only a deprivation of a

[23] See ECCC Law Article 20 new, 23 new and 33 new.
[24] Article 14.1 ICCPR states: "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law".
[25] Submitted on 6 September 2010 by Civil Party Co-Lawyers Mr HONG Kimsuon, Mr NY Chandy and Ms Silke STUDZINSKY. At the time of writing this appeal, a document number for the Kep Appeal was not yet available.
[26] *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, adopted by UN General Assembly resolution 40/34, 29 November 1985, Principle 4.

fundamental procedural right, it is also an affront to the dignity of victims and has the effect of victimising these persons yet again, this time by an internationalised judicial institution.

48. Finally, and most importantly to the victim her/himself, all decisions of this court "should be written in such a way as to be fully comprehensible by non lawyers. This is especially so when a decision is addressing an application by a person claiming to be a Victim and entitled to be a Civil Party."[27]

3. The Extent of the Reasoning

49. IR 21 states:

> *"The applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safe guard the interests of Suspects, Charged Persons, Accused and Victims, and so as to ensure legal certainty and transparency of proceedings ... In this respect:... (c) The ECCC shall ensure that victims are kept informed and that their rights are respected throughout the proceedings..."*

50. In failing to provide sufficiently detailed reasons, the CIJs have failed to fulfill their obligations under IR 21 "to ensure legal certainty and transparency". They further violate IR 21(c) by failing to keep victims properly informed of the basis for decisions adverse to the victims' interests, and thereby failing to respect victims' rights throughout the proceedings.

51. International Jurisprudence acknowledges two principal reasons underlying the right to a reasoned decision. First the concerned person must be able to identify the reasons for a rejection against which s/he wants to appeal; second the Appeal Chamber cannot conduct a fair and comprehensive appellate review of a decision if no reasons are given.

52. International Courts have abstained from defining the exact extent of reasoning required, deciding instead that the scope of reasons must be considered on a case-by-case basis, depending on the circumstances. The International Criminal Court stated *The Prosecutor v Lubanga*[28]:

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[27] PTC, "Decision on the Appeal against Provisional Detention Order of Kaing Guek Eav alias 'Duch'", para. 3, cited in PTC, "Decision on the Appeal against the Order Declaring Civil Party Application D22/288 Inadmissible", Judges Rowan Downing and Prak Kimsan dissenting, para. 16.

[28] The Pre-Trial Chamber of the ECCC referenced the jurisprudence of the Appeals Chambers of the International Criminal Tribunal for the Former Yugoslavia and analyzed the jurisprudence of the European Court of Human Rights and concluded that the principle of having the right to a reasoned decision "applies with similar force to the case at hand", at para. 29 of the 14 December 2006 Decision, para. 30.

> *"Decisions of a Pre-Trial Chamber authorizing the non-disclosure to the defence of the identity of a witness of the Prosecutor must be supported by sufficient reasoning. The extent of the reasoning will depend on the circumstances of the case, but it is essential that it indicates with sufficient clarity the basis of the decision. Such reasoning will not necessarily require reciting each and every factor that was before the Pre-Trial Chamber to be individually set out, but it must identify which facts it found to be relevant in coming to its conclusion."*[29]

53. According to the Lubanga case, the given reasons must at least clearly articulate the relevant facts which lead to the given conclusion. The formulaic repetition and catch-all ground for rejection, or the rejection *en masse* of CPAs on broad or ambiguous grounds is not sufficient to fulfill with the requirement of providing sufficient reasons for a decision. A properly reasoned decision would have, at the very least, referred to the main facts stated in each application and discussed these facts in application of the Internal Rules.[30]
54. Fundamental principles of justice require that a victim be informed of the reasons for which the crimes they experienced and the harm they suffered were rejected by the Court as not admissible. Civil Party Co-Lawyers request that PTC overturn the CIJ's order in relation to D22/1901, D22/3180, D22/3183, D22/2057, D22/2154, D22/438, D22/3179, D22/3182, D22/816, D22/3177, D22/2157, D22/3181, D22/817, D22/2155, D22/2153, D22/404, D22/2156, D22/1136, D22/1969, D22/3175, D22/3176, D22/3178, D22/2158, D22/1092, D22/2758, on the basis that rejected Civil Party applications must be issued by reasoned order.

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[29] *Prosecutor vs. Thomas Lubanga Dyilo*, Judgment, 14 December 2006, para 30. Situation in the Democratic Republic of the Congo, *Prosecutor vs. Thomas Lubanga Dyilo*, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81", ICC-01/04-01/06-779, 14 December 2006, para.30. The ICC Statute and the ICC Rules of Procedure and Evidence stress in various places the importance of sufficient reasoning, for example in the context of evidentiary matters rule 64 (2) of the Rules of Procedure and Evidence, which requires a Chamber to "give reasons for any rulings it makes".

[30] In the jurisprudence of the ICC, each decision on admissibility of an applicant is discussed in detail with reasoned explanations for each applicant as to whether or not victim status is granted, including clear reasons for each decision.

C. THIRD GROUND OF APPEAL

The Office of the Co-Investigating Judges erred in fact and in law and violated Internal Rule 55(2) by restricting the scope of investigations to paragraphs 37-72 of the Introductory Submission and the Supplementary Submissions and / or requiring that Civil Party admissibility be linked to the "Scope of Investigations" as it erroneously understands it.

1. The Co-Investigating Judges Erroneously Limited the Scope of Investigations

55. In rejecting the Civil Parties' applications, the CIJs erroneously limited the scope of the investigation to the facts described in paragraphs 37 to 72 of the Introductory Submission (**IS**) and the facts contained in Supplementary Submissions (**SS**).

56. Under paragraph 122 of the IS, OCP decided to "open a judicial investigation ... into facts specified in paragraphs 37-72". However, on 8 August 2008, more than one year after having been seised with the entire Introductory Submission, the CIJs requested clarifications from OCP "as regards the scope of investigations".[31] The CIJs asked OCP

> "to indicate whether the judicial investigations should be limited to the facts specified in paragraphs 37 to 72 of the IS and paragraphs 5 to 20 of the Supplementary Submission or extended to all facts, whether referred to or not in the Introductory Submission and the Supplementary Submission, provided that they assist in investigating whether the factual situations specified in the above-mentioned paragraphs constitute crimes within the jurisdiction of the ECCC or assist in investigating the liability of any such crimes."[32]

57. On 13 August 2008, the OCP responded:

> "The Co-Prosecutors clarify that the judicial investigation requested is not limited to the facts specified in paragraphs 37 to 72 of the Introductory Submission and paragraph 5 to 20 of the Supplementary Submission but extends to all facts, referred to in these two Submissions, *provided* that these facts assist in investigating
> a. the jurisdictional elements necessary to establish whether the factual situations, specified in paragraphs 37 to 72 and 5 to 20 respectively, constitute crimes within the jurisdiction of the ECCC or
> b. the mode of liability of the Suspects named in the Introductory Submission."[33]

58. The CIJ's limiting of the Scope of Investigations to facts contained in paragraphs 37 to 72 of the IS is a clear error of fact and law insofar as OCP has instructed the OCIJ, through its express response, that the Scope of Investigations extends to all facts

[31] OCIJ, "Forwarding Order", 8 August 2008, D98.
[32] *Ibid.*
[33] OCP, "Co-Prosecutor's Response to the Co-Investigating Judges Request to Clarify the Scope of the Judicial Investigation Requested in its Introductory and Supplementary Submission", 13 August 2008, D98/I, at para 2.

referred to in the IS and SS, to investigations that assist with establishing jurisdictional elements of an offence, and to investigations that assist with ascertaining modes of liability.

59. Further, there is no basis under the Internal Rules or Cambodian law for limiting the scope of investigations to only facts forming **part** of the IS.[34] Under Article 125 of the Code of Criminal Procedure of the Kingdom of Cambodia (**CPC**) and IR 55 (2), the CIJs "...[s]hall only investigate the facts set out in the Introductory Submission...". This provision refers to the *facts* in the IS *as a whole*.
60. The PTC affirmed in a unanimous decision dated 1 June 2010 that "[t]he Co-Prosecutors are clearly the party responsible for determining the scope of the investigations"[35]

2. The CIJs Erred in Requiring a Link between Harm Suffered and its Misapplication of the "Scope of Investigations"

61. The PTC further held, in a decision concerning an appeal against the rejection order of applicant D22/288, that a CPA *could* be admitted even where the crime site from which she suffered was neither listed in the OCIJ Press Release of 5 November 2009 as being under the "Scope of Investigation", nor in paragraphs 37 to 72 of the Introductory Submission or the facts of any Supplementary Submission.[36] In this matter, the PTC effectively recognized that the facts under investigations, as determined by OCP, are significantly broader than those declared by the CIJs.
62. A majority of three Judges of the PTC agreed that that appellant was "correct in relying on the relevant passage of the Introductory Submission, namely paragraph 88(d)"[37]. The PTC itself took into account paragraph 88 (e)[38] of the IS in determining whether a link could be established between the injury suffered and at least one of the crimes

[34] The drafting of the Internal Rules have similar effect to the relevant Article 44 and 124, 125 of the CPC.
[35] PTC, "Decision on Appeal of Civil Party Co-Lawyers against Order Rejecting Request to Interview Persons Named in the Forced Marriage and Enforced Disappearance Request for Investigative Action", 21 July 2010, D310/1/3, para. 38.
[36] PTC, "Decision on Appeal against the Order Declaring Civil Party Application D22/288 Inadmissible", 1 June 2010, Doc no. D364/1/3.
[37] PTC, "Decision on the Appeal against the Order Declaring Civil Party Application D22/288 Inadmissible", 1 June 2010, Doc. No. D364/1/3, para. 3 of the Opinion of Judge Ney Thol, Judge Catherine Marchi-Uhel and Judge Huot Vuthy.
[38] *Ibid* at para 5.

alleged against the Charged Person."[39] Significantly, this judgment established that the "crimes alleged" comprise not only those mentioned in paragraphs 37 to 72, but also those alleged against the Charged Person(s) in the Introductory Submission under the heading "Knowledge and Participation".[40]

63. The minority view of Judges Downing and Prak Kimsan also affirmed that the majority's "explanation of the reasons for the termination of the Civil Party status of the Appellant [were] more fully expressed and provide[d] the Appellant with a greater appreciation and understanding of the matters under consideration."[41]

64. The heading 'Participation and Knowledge' within the IS describes facts which form the basis for determining the mode of liability for each charged person, including the specific acts carried out by each charged person in relation to the crimes specified in the IS, stating that this section shows "evidence of the crimes specified in paragraphs 37 to 72 of the IS."[42] For example, in relation to Ieng Sary, paragraphs 88 and 88 (e) of the Introductory Submission states:

> *"IENG Sary as a member of the Standing Committee and as Deputy Prime Minister for Foreign Affairs, promoted, instigated, facilitated, encouraged and/or committed the perpetration of the crimes described in paragraphs 37-72. Evidence of IENG Sary's participation in these crimes is detailed below:*
> *[...] e) IENG Sary was aware of and facilitated the large-scale forced labour, unlawful detention, ill-treatment, torture and extra-judicial executions of Ministry of Foreign Affairs personnel, former GRUNK/FUNK personnel an diplomatic officials at various detention centres, such as the Ministry's M1 Office at* ***Chrang Chamreh and Boeung Trabek****.(...)".*[43]

65. Chrang Chamreh and Boeung Trabek, are not crime sites mentioned in paragraphs 37 to 72. Thus, the PTC's reference to paragraph 88 of the IS, and the weight it placed on this paragraph demonstrates that admissibility is not limited to the concrete crime sites and acts listed in paragraphs 37 to 72, but includes facts contained beyond

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[39] *Ibid.* at para 2.
[40] Para 81 (a) – (g) for Nuon Chea; para 88 (a) – (g) for Ieng Sary; para 97 (a) – (g) and para 103 (a) – (c) for Ieng Thirith.
[41] *Ibid.* at para 16.
[42] Para 81 and subsections a) - g) for Nuon Chea, para 88 and subsections a) - g) for Ieng Sary, para 97 and subsections a) - g), para 103 a) —c) for Ieng Thirith and para 113 with subsections a) - b) for Kaing Guek Eav.
[43] Para 88 e) of the Introductory Submission. Footnotes ommitted.

paragraph 72, listing "evidence of the participation in crimes described in paragraphs 37-72".[44]

66. The effect of this PTC decision is an affirmation from an appellate court, that (i) the Scope of Investigations is broader than the sites and acts listed in the OCIJ Press Release and paragraphs 37-72 of the IS and facts in the SS and / or (ii) Civil Party admissibility is not dependant on a link to the "scope of investigation", as the OCIJ understands the scope to be. Civil Party Co-Lawyers conclude that the CIJs has erroneously limited the "scope of investigations" to the crime sites and acts against groups referred to between paragraphs 37 to 72 of the IS. The CIJs interpreted IR 55 (2) erroneously and erred in its application of the scope of investigation with which OCP seised OCIJ.
67. These rulings establish important precedents that the PTC should reaffirm in this case. Civil Party Lawyers call on the PTC to overturn the CIJ's order declaring the following CPAs inadmissible on the erroneous basis that they do not establish a link between the harm suffered and areas under the "scope of investigation".
68. The appeal now turns to establishing that the CIJs erred when deeming applicant D22/2758 (the individual Khmer applicant in Kampong Chhnang) inadmissible on an erroneous application of the Scope of Investigation that OCP had referred to OCIJ.

3. The CIJs erred when deeming Applicant D22/2758 inadmissible on an erroneous application of the Scope of Investigations

69. As it is difficult to determine from the reason of "harm not linked to facts under investigation", whether the contended matter is the establishment of harm, or the linkage between any (established) harm to "facts under investigation", the following

[44] Another example is paragraph 103 (c) (v), related to IENG Thirith stating, *"IENG Thirith participated in planning, direction, co-ordination and ordering of widespread purges which resulted in the unlawful arrest and detention ,inhumane living conditions and/or forced labour ....of staff members from within the Ministry of Social Affairs. ....Sending Ministry staff to labour re-education worksites, notably at ... Pich Nil on National Road 4."* Pich Nil on National Road 4 is not listed as one of the work sites under investigation in paragraphs 37- 72. However, IENG Thirith is charged with having sent staff members to this work site. The effect of this PTC decision is that any applicant from the Ministry of Social Affairs who was forced to work at Pich Nil could be declared admissible if they successfully established a direct link between the harm they suffered and this fact, within OCP's clarified scope of investigations.

part of the appeal, concerning applicant D22/2758, will address both matters of fact raised by the applicant falling within the OCP's Scope of Investigations, as well as the impact of these factual events on the applicant – namely, the existence of direct and personal harm.

70. Applicant D22/2758 raises facts under investigation in her original VIF and Supplementary Statement dated 4 May 2009. Her parents were accused of being "CIA under the Lon Nol regime," brought to the [redacted] grave in Kampong Chhnang Province in approximately July 1975, and later killed.[45] The applicant's parents were not CIA agents but were accused to be so, because they were relatively more affluent than other farmers in their area before 1975[46]. On this basis, they were also assumed to work for the Lon Nol regime.[47] Even though they were not CIA agents or any other type of officials under Lon Nol, the Khmer Rouge perceived them to be and persecuted them on this basis.

71. Paragraph 12(a) of the IS states that the CPK "actively searched for and executed former Khmer Republic officials."[48] The OCIJ's Closing Order further confirms the targeting of former Khmer Republic officials during the entire period of Khmer Rouge control[49]. The applicant's parents were persecuted and killed on the Khmer Rouge's perception of their affiliation with the Lon Nol regime, which are clearly facts under investigation as confirmed by both the IS and the OCIJ's Closing Order. The harm the applicant suffered when her parents were killed is clearly personal and direct.

72. The applicants' parents were labeled by the Khmer Rouge as "capitalists" and "feudalists" and persecuted against because of their wealth and higher standard of living. The Scope of Investigation, as referred by OCP to OCIJ, includes the Khmer Rouge's persecution of "feudalists" and "capitalists". Paragraph 12(a) of the IS, referring for investigation states:

> *The CPK pursued an explicit policy of eliminating the "feudalists", "capitalists" and "bourgeois." The party declared that due to their class nature, the feudalists and*

[45] Interview with [redacted] by Civil Party Lawyer, dated 4 May 2009. Doc. no. D22/2758a
[46] Ibid.
[47] Ibid.
[48] OCP, "Introductory Submission", 18 July 2007, D3, para 12a.
[49] OCIJ, "Closing Order," dated 15 September 2010, Doc. no. D427, para 205, 208, 209

capitalist could not be re-educated, and asserted that enemy infiltration would not stop until the ''reactionary classes'' were completely eliminated.[50]

73. The CIJs' Closing Order explains, "an objective of this policy was to establish an atheistic and homogenous society without class divisions, abolishing all ethnic, national, religious, class and cultural differences".[51]

74. The Khmer Rouge persecuted the applicant and her family on an accusation that her parents were "capitalists", "feudalists" and "CIA of Lon Nol". Soon after the applicant's parents were arrested and killed, the Village Chief took 10 of the applicant's family members and killed them because of their association with the applicant's parents.[52] The applicant suffered personal and direct harm because of the death of her family members, which included her aunts and uncles.[53]

75. The Kampong Chhnang Order states in paragraph 14(a)(i) that, in the case of extended family members, "the presumption will be considered as determinant when the immediate Victim is deceased or has disappeared as a direct consequence of facts under investigation". Thereby, the presumed harm caused to the applicant from the deaths of her extended family is to be considered determinant.

76. The applicant herself suffered direct and personal harm as an immediate victim, from the persecution that her family faced. After the Khmer Rouge killed her parents and 10 members of her family, the applicant was able to survive by giving the Khmer Rouge cadre valuables such as gold and silver[54]. While her life was spared, she was soon imprisoned and kept under tight surveillance near [redacted], Kampong Chhnang Province[55]. She remained in prison for approximately four years and was forced to do manual labor, digging dams[56]. She was forced to carry double the amount of soil as other prisoners because of her parents' ties to capitalism and perceived ties to Lon Nol.[57]

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[50] OCP, "Introductory Submission", 18 July 2007, D3, para 12(b).
[51] OCIJ, ''Closing Order,'' dated 15 September 2010, Doc. no. D427, para. 207
[52] Interview with [redacted], dated 4 May 2009. Doc. no. D22/2758a
[53] *Ibid.*
[54] *Ibid.*
[55] Summary of Supplementary Information, [redacted], Doc. no. D22/2758b.
[56] Interview with [redacted], dated 4 May 2009. Doc. no. D22/2758a
[57] Ibid.

77. The applicant saw fellow prisoners who could not keep up with the work, taken to [redacted] to be executed – from this, she knew that would also be killed if she could not keep up the work.[58] The applicant went through great physical and mental trauma due to the workload of the forced labor and the looming possibility of death at the hands of the Khmer Rouge. As the applicant was imprisoned and forced to labor more intensely directly because of the accusations made against her parents as capitalists and former Lon Nol officials, the harm suffered is related to facts under investigation.

78. The CIJs erred in fact and in law when determining that the harm the applicant suffered is not related to the facts under investigation. The applicant suffered direct harm from the death of her parents and other family members and additionally from her prison time and forced labor. As a direct result of the Khmer Rouge policy to discriminate against and persecute "capitalsts", "feudalists" and "former Khmer Republic officals", the applicant's parents were arrested and killed, and thus, the harm suffered by the applicant because of the death of her parents is linked to the facts under investigation. Civil Party Co-Lawyers request that the PTC overturn the inadmissibility decision based on these facts and on the facts under investigation that OCP referred to OCIJ.

D. FOURTH GROUND OF APPEAL

The Co-Investigating Judges erred in law by mis-construing the term "injury" and "direct consequence" under Internal Rule 23 (2)(a) (Rev. 4 and previous) and Internal Rule 23 bis (1) (b) (Rev. 5) respectively, in rejecting victims who suffered injury as a direct consequence of crimes within the ECCC's jurisdiction or under the scope of investigations

1. Defining Harm/Injury as a Direct Consequence of Crimes within the ECCC's Jurisdiction or Scope of Investigations

79. The CIJs have erred factually when establishing that harm is not established, *or* that harm is established, but that there can be no harm established that could be linked to facts under investigation. Further, the CIJs erred in law when determining what is within the "Scope of Investigations" as there is no clarity *at all* in the decisions they have produced as to whether their determination that "harm is not linked to facts under

[58] Ibid.

investigation" is a reference to a determination that there was no harm established that could be linked with facts under investigation *or* simply that there was no harm established (for example, in cases where applications did, in fact, bring up facts under investigation).

80. As the Current Order states that "Harm is not linked to the facts under investigation (**outside geographic scope / Vietnamese persecution**)" (*emphasis added*), it is understood that the conclusion the CIJs arrived at, is not that harm *is not*, or *cannot* be established, but that the conclusion is that the facts raised by the applicants are not within the OCIJ's "geographic" scope of investigations.

81. Civil Party Co-Lawyers note, that in the CIJs' First Vietnamese Rejection Order, concerning 16 ethnic Vietnamese applicants from Kampong Chhnang, the CIJs had noted that "all the applicants provided sufficient evidence to consider it plausible that they suffered personal and direct injury".[59]

82. However, due to the lack of clarity in the wording of the "reasons" in the Kampong Chhnang Order, Civil Party Co-Lawyers submit that the CIJs erred in fact if the applicants were rejected on a conclusion that direct and personal harm could not be established. The policies of the CPK, aimed at eliminating the ethnic Vietnamese from Cambodia, were so widely propogated that these policies were made known to all members of our client group. Mere knowledge of such State-organised policies to *wholly* destroy the ethnic Vietnamese group of which our clients were members, caused a "reign of terror" amongst our client applicants. This "reign of terror" caused real, personal and direct harm to the Vietnamese Civil Party applicants – for our clients, the "reign of terror" manifested in a widespread state of knowing, believing, and understanding that, at any moment, they, or their loved ones could be eliminated, or targeted for elimination.

83. Civil Party Co-Lawyers refer to the description of crimes and harm established for each rejected applicant in this Appeal, all of whom raise the fact of being forcibly deported by boat from Kampong Chhnang Province to Vietnam, which necessarily involved transiting and/or stopping at the Neak Loeang Markets on the Tonle Sap River

[59] OCIJ, "Order on the Admissibility of Civil Party Applications Related to Request 250/3", 13 January 2010, D250/3/2, para 16.

bordering Prey Veng Province and Kandal Province; and noting that applicants D22/2136 and D22/2135, both of whom were admitted on the basis of "Treatment of the Vietnamese / Harm as immediate victim", happened to mention this fact in their Victim Information Forms. We incorporate by reference, the legal submissions made in paragraphs 64 – 88 of the Kep Appeal[60] including:

- Sub-ground 1: "Defining Harm/Injury as a Direct Consequence of Crimes within the ECCCs Jurisdiction or Scope of Investigations"
- Sub-ground 2: "Victims Suffering Harm/Injury from Witnessing Crimes within the ECCC's Jurisdiction/Scope of Investigations"
- Sub-ground 3: "Civil Party Applicant Suffered Harm as a Result of the Knowledge of Crimes committed against Loved Ones," and
- Sub-ground 4: "There is no Hierarchy of Crimes upon which to Measure Harm Experienced by Victims."

84. Civil Party Co-Lawyers submit that the direct and personal harm that resulted for each individual was directly linked with facts of which the OCIJ were seised *in rem* to investigate, and in fact, did investigate, particularly concerning the treatment of these Vietnamese persons in Prey Veng Province.[61]

85. As the majority of the rejected applicants bring up crimes against the ethnic Vietnamese, the appeal now turns to submissions setting out that the Scope of Investigations, properly construed, and as clarified previously by the OCP, includes persecution of the Vietnamese throughout Cambodia.

F. FIFTH GROUND OF APPEAL

The Co-Investigating Judges were Fully Seised in rem of Facts pertaining to Persecution and Genocide of the Ethnic Vietnamese – including the investigations taken by OCIJ with Vietnamese Civil Party applicants in Kampong Chhnang Province and including the deportation of Vietnamese by boat through Prey Veng Province

[60] Submitted on 6 September 2010 by Civil Party Co-Lawyers Mr HONG Kimsuon, Mr NY Chandy and Ms Silke STUDZINSKY. At the time of writing this appeal, a document number for the Kep Appeal was not yet available.

[61] OCIJ, "Written Record of Interview of Civil Party", 4 January 2010, D296/6; and OCIJ, "Written Record of Interview of Civil Party", 11 January 2010, D296/5.

1. The CIJs were Seised *in rem* of Facts presented in the OCP's Introductory Submission which assist to Determine Jurisdictional Elements and the Accused Persons' Mode of Criminal Liability in relation to Crimes against the Ethnic Vietnamese

86. Civil Party Co-Lawyers refer to and reiterate submissions made under paragraphs 51 – 56, pertaining to the CIJs erroneous limitation on the Scope of Investigation referred to the OCIJ by the OCP.

87. The OCP's Forwarding Order dated 8 August 2008 defined the Scope of Investigation as including investigations that assist with determining both jurisdictional elements necessary to establish crimes under the jurisdiction of the ECCC, and mode of criminal liability as alleged against the Charged Persons.[62]

88. Apart from persecution of the Vietnamese, and genocidal policies to eliminate the group in Prey Veng, Svay Reing and during incursions into Vietnam, the widespread and whole-scale persecution and killing of the ethnic Vietnamese, *as a group*, constitute facts of which OCIJ are seised *in rem*, to investigate, being facts referred to it for judicial investigations in the OCP's Introductory Submission (**IS**) proposing charges for the defendants.[63]

89. Paragraph 12(f) states that the CPK "pursued a policy of discriminating against and killing the ethnic Vietnamese. Initially the CPK adopted a policy of purging those who were considered Vietnamese or who had some association with Vietnam. However, the CPK's relationship with Vietnam slowly deteriorated and Vietnam was increasingly viewed as the enemy. This coincided with a belief that Vietnamese spies were seeking to overthrow the CPK. By mid to late 1977, the policy evolved into one of eliminating all those with any connections to Vietnam."

90. The Scope of Investigations, as referred to OCIJ by the OCP, clearly includes facts beyond paragraphs 37 – 72 of the IS – and includes matters pertinent to Accused Persons' "knowledge and participation" of crimes forming the OCP's proposed charges. These criminal acts targeted at members of the ethnic Vietnamese group, include Genocide, Crimes against Humanity, and Grave Breaches of the 1949 Geneva

[62] OCP, "Co-Prosecutor's Response to the Co-Investigating Judges Request to Clarify the Scope of Judicial Investigation Requested in its Introductory and Supplementary Submissions", 13 August 2008, D98/1, in response to OCIJ "Forwarding Order", 11 August 2008, D98.
[63] OCP "Introductory Submission", 18 July 2007, D3, para 122.

Conventions.[64] Facts relating to the OCP's proposed charges against *all Accused Persons*, and forming the *proper* Scope of Investigations, are referred to in the following paragraphs of the IS:

a. **Para 81(d):** *"Nuon Chea planned, directed, co-ordinated, and ordered the unlawful killing of various groups within the population of DK such as ... (b) alleged CIA, KGB and Vietnamese agents and other so-called enemy 'informers' (kinh) and alleged 'traitors'..."*

b. **Para 81(g):** *"Nuon Chea planned, oversaw and monitored the atrocities committed by DK forces against the Vietnamese population on the Democratic-Kampuchea-Vietnamese border from mid-1977 onwards."*

c. **Para 97**, *concerning KHIEU Samphan's participation in crimes, evidenced by his position as senior cadre and Chairman of Office 870, where he "issued, ordered and gave instructions on the implementation of correct revolutionary policies and ideology to diverse administrative and geographical units in the Democratic Kampuchea ... [I]n particular, Office 870 was instrumental in inciting hatred against the Vietnamese ... political and military instructions were given by Office 870 to the CPK, the army, every office and ministry and "the entire Kampuchean people ... these instructions were reinforced two days later in a second announcement advocating the ill-treatment and intentional killings of Vietnamese civilians, prisoners of war and other Cambodian-Vietnamese."*

d. **Para 102(i)**: *"IENG Thirith as Minister of Social Affairs promoted, instigated, facilitated, encouraged and/or condoned the perpetration of crimes ... by ... speaking and chairing work meetings in which she explained CPK policies in respect of enemies, such as the Vietnamese (Yuon), CIA and undisciplined elements."*

91. These facts, properly construed, with reference to OCP's clarification as to the OCP's *intended* scope of judicial investigations, are all facts of which OCIJ are *seised in rem* by the OCP to investigate.[65]

92. Moreover, the CIJs' Closing Order indicted *all Accused Persons* on charges persecution (of the Vietnamese on racial grounds) and of Genocide against the ethnic Vietnamese.[66] The OCIJ Closing Order confirms that, "the killing of Vietnamese civilians was not limited to Prey Veng and Svay Rieng Provinces, thus demonstrating that it was organized as a national policy."[67]

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[64] OCP, "Introductory Submission", 18 July 2007, D3, paras, 81(d), 81(f), 81(g), 87(f), 97, and 102(i).
[65] OCP, "Co-Prosecutor's Response to the Co-Investigating Judges Request to Clarify the Scope of Judicial Investigation Requested in its Introductory and Supplementary Submissions", 13 August 2008, D98/I, in response to OCIJ "Forwarding Order", 11 August 2008, D98.
[66] OCIJ, "Closing Order", 15 September 2010, Doc. no. D427.
[67] *Ibid*, para. 802

93. The appeal now turns to establishing that 24 ethnic Vietnamese applicants, deemed inadmissible by the CIJs, in fact, suffered harm directly linked with "facts under investigation". The following part of the appeal sets out that "facts under investigation" positively includes facts brought up by our clients in Kampong Chhnang, of whom all Vietnamese were all forcibly deported out of Cambodia by boat through the Tonle Sap River, transitting or stopping at Neak Loeang Markets in Prey Veng Province, with two Vietnamese civil parties (D22/2136 and D22/2135) admitted on this basis alone, and only because this fact was mentioned in their Victim Information Forms.

2. The CIJ's were Seised of Facts pertaining to the Treatment of the Vietnamese in Kampong Chhnang and Investigations into this area conducted by OCIJ were within the Scope of Investigations as referred to OCIJ by OCP

94. In the CIJs' "Combined Order on Co-Prosecutors' Two Requests for Investigative Action Regarding Khmer Krom and Mass Executions in [redacted]) and the Civil Parties Request for Supplementary Investigations Regarding Genocide of the Khmer Krom and the Vietnamese" (**Combined Order**), the CIJs reasoned that the scope of OCIJ's judicial investigations is limited only to those facts set out in the OCP's IS or a Supplementary Submission (**SS**) by OCP, pursuant to IR 53 and 55(2).[68]
95. On 15 December 2009, OCIJ investigators conducted interviews with two Vietnamese Civil Party applicants from Kampong Chhnang.[69] The OCIJ interviews with these two Civil Party applicants[70] were focussed around issues pertaining to Genocide and Crimes against Humanity committed against the ethnic Vietnamese group in Kampong Chhnang. Interview questions concentrated on ascertaining facts which would support the persecutory and jurisdictional elements of these crimes, by focussing on the identification, targeting, singling out, and discrimination against the Vietnamese in

[68] OCIJ, "Combined Order on Co-Prosecutors' Two Requests for Investigative Action Regarding Khmer Krom and Mass Executions in [redacted] and the Civil Parties Request for Supplementary Investigations Regarding Genocide of the Khmer Krom and the Vietnamese", 13 January 2010, D250/3/3, para 4.
[69] OCIJ, "Written Record of Interview of Civil Party", 4 January 2010, D296/6; and OCIJ, "Written Record of Interview of Civil Party", 11 January 2010, D296/5.
[70] Referred to in the First Vietnamese Admissibility Appeal as VN01 and VN10. Interviews took place with these clients on 15 December 2009, days before the defendants were charged with Genocide.

Kampong Chhnang by the Khmer Rouge. The interviews also focussed on events leading to mass forcible deportations of Vietnamese residents of Kampong Chhnang out of Cambodia, through boat transfers down the Tonle Sap River into Vietnam.

96. All questions and answers were made into formal "Written Records of Interview" and placed on the Case File.[71] On 16 and 17 December 2009, just days after the OCIJ interviews with our clients took place in Kampong Chhnang, the CIJs charged defendants in Case 002 with Genocide against the ethnic Vietnamese.[72]

97. The OCIJ investigations were clearly conducted pursuant to facts raised by the OCP's IS under section 12(f), which states that

> "the CPK pursued a policy of discriminating against and killing ethnic Vietnamese. Initially, the CPK adopted a policy of purging those who were considered Vietnamese or who had some association with Vietnam."

98. The investigative action by OCIJ, in fact, went beyond the scope of the crimes listed between paragraphs 37 – 72 of the IS. Indeed, if the CIJs were of the view that these investigations raised "new facts", they should have referred these facts to the OCP under IR 55(3) at the earliest opportunity, for the OCP to act on the "new facts". As the OCIJ did not inform the OCP of any new facts uncovered in Kampong Chhnang during its investigation, these facts were clearly considered by the CIJs to be "new facts limited to aggravating circumstances relating to an existing submission", under IR 55(3).[73]

99. The CIJs, in their First Vietnamese Rejection Order (rejecting 16 Vietnamese in Kampong Chhnang), stated that they were "limited by the fundamental principle under which they may not investigate beyond that of which they are seised *in rem* by the Co-Prosecutors".[74] In our submission, the CIJs were always seised *in rem* by the OCP to investigate into Kampong Chhnang, insofar as the new facts that they produced from their investigations in that area assisted to establish jurisdictional elements, and the appropriate mode of criminal liability of the Charged Persons, in accordance with the

[71] OCIJ, "Written Record of Interview of Civil Party", 4 January 2010, D296/6; and OCIJ, "Written Record of Interview of Civil Party", 11 January 2010, D296/5.
[72] See, for example, "Written Record of Interview of Charged Person (Nuon Chea)", 15 December 2009, D275, para 13.
[73] OCP confirmed that its Office had not separately requested OCIJ to interview facts in Kg Chhnang, essentially confirming that these OCIJ investigations were investigations into "aggravating facts arising from the IS" (under IR 55(3).
[74] OCIJ, "Order on Admissibility of Civil Party Applications", 13 January 2010, Doc. no. D274/3, para 9.

OCP's defined Scope of Investigations in its Forwarding Order dated 13 August 2008, clarifying what OCIJ were *seised in rem* to investigate.[75]

100. Further, in an Internal Memo to Co-Lawyers for Civil Parties dated **4 June 2010**[76], the CIJs stated, "It must be recalled that where the Co-Investigating Judges deem it useful to interview a witness during the investigation of the facts before them, the interview must not in any way affect the scope of the judicial investigation, and by implication, the admissibility of a civil party application".

101. Indeed, it is our submission that the OCIJ's investigations in Kampong Chhnang do not "affect the scope of judicial investigation" – *these were conducted under the Scope of Investigations, as referred to OCIJ by OCP.*

102. There is no basis, therefore, for the CIJs to declare that the harm suffered by any of our clients is "not linked to facts under investigation" or that the CIJs are "seised [only] of facts relating to the treatment of the Vietnamese in Prey Veng and Svay Rieng Province, and during incursions into Vietnam".[77]

103. Further, there is no basis for a conclusion by the CIJs that Civil Party applicants suffering crimes amounting to Genocide, Crimes against Humanity, war crimes, persecution, or any other crime directed at the Vietnamese *group*, should be deemed inadmissible for having claims of Vietnamese persecution that are "outside" the "geographical scope [of investigations]", particularly when all Vietnamese were transferred through Neak Loeang Markets on the Tonle Sap River, in Prey Veng Province and when D22/2135 and D22/2136 were admitted on this basis.

104. As such, the PTC should overturn the rejection decisions made by the CIJs, and grant civil party status to the following applicants who suffered harm linked to facts under investigation: D22/1901, D22/3180, D22/3183, D22/2057, D22/2154, D22/438, D22/3179, D22/3182, D22/816, D22/3177, D22/2157, D22/3181, D22/817, D22/2155, D22/2153, D22/404, D22/2156, D22/1136, D22/1969, D22/3175, D22/3176, D22/3178, D22/2158 and D22/1092.

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[75] OCP, "Co-Prosecutor's Response to the Co-Investigating Judges Request to Clarify the Scope of Judicial Investigation Requested in its Introductory and Supplementary Submissions", 13 August 2008, D98/I, in response to OCIJ "Forwarding Order", 11 August 2008, D98.

[76] OCIJ Internal Memo titled, "Your requests of 29 April 2010 concerning the Admissibility of Civil Party Applications", D250/3/2/4.

[77] As the CIJs concluded in its "Order on the Admissibility of Civil Party Applications Related to Request D250/3", 13 January 2010, D250/3/2, para 19.

3. The OCP's inclusion of facts about the Vietnamese Persecution and Genocide in Kampong Chhnang in its Final Submission Provides Clear Indication that OCP intended that the Scope of Investigations include Facts in Kampong Chhnang relevant to the Charges against the Accused Persons (including Charges of Forced Deportations out of Cambodia)

105. The OCP's Final Submission, which includes facts about the "CPK policy to annihilate all ethnic Vietnamese inhabitants in Cambodia" leading to an "almost complete extermination of this ethnic group in Cambodia"[78] demonstrate that the Scope of Investigations was always intended to be broader than what OCIJ understood it to be.

106. Both the OCP's Final Submission and the OCIJ's Closing Order[79] contain facts raised by Civil Party applicants in Kampong Chhnang about the Vietnamese persecution and Genocide in that area. The OCP Final Submission, in particular, contains the entire collective narrative of all 45 ethnic Vietnamese Civil Party applicants in Kampong Chhnang, including the 40 who have been deemed inadmissible by the CIJs.[80] The facts raised in the OCP Final Submission include *facts produced by OCIJ investigations into this area*[81] as follows:

> "In the Kampong Chhnang Province, around April 1975, the CPK military authorities relocated ethnic Vietnamese residing in towns and villages around the [redacted] to various communes within [redacted], including [redacted] and [redacted].[82]
>
> Then, from on or about June to September 1975, several thousand ethnic Vietnamese, who were initially transferred to communes in [redacted] were transferred to Vietnam. The first transfer, involving 400 Vietnamese families, occurred around mid-July 1975. Further deporations occurred after negotiation between the CPK and SRV authorities where ethnic Vietnamese persons were exchanged for salt and rice. In some

[78] OCP "Co-Prosecutor's Rule 66 Final Submission", paras 787 – 789. See also section on "Crimes against the Vietnamese", para 779.
[79] OCIJ, "Closing Order", dated 15 September 2010, Doc no D427.
[80] On 13 January 2010, the CIJs declared 16 ethnic Vietnamese applicants to be inadmissible in the "Order on the Admissibility of Civil Party Applications Related to Request 250/3", Doc no D250/3/2 . On 14 September 2010, the CIJs declared a further 25 ethnic Vietnamese applicants from Kampong Chhnang to be inadmissible in the Kampong Chhnang Order.
[81] OCIJ, "Written Record of Interview of Civil Party", 4 January 2010, D296/6; and OCIJ, "Written Record of Interview of Civil Party", 11 January 2010, D296/5.
[82] OCP "Co-Prosecutor's Rule 66 Final Submission", paras 787 – 789. See also section on "Crimes against the Vietnamese", para 787.

> instances, Vietnamese officials gave 20 kilgorams of rice and 20 kilograms of salt to the CPK for each ethnic Vietnamese person who left Cambodia. At [redacted], the resistance of some Vietnamese to being deported to Vietnam resulted in the mass exectution of 200 – 300 ethnic Vietnamese families.[83]
>
> Very few Vietnamese remained in Kampong Chhnang, mainly people in mixed Khmer-Vietnamese marriages. Those who remained in Kampong Chhnang in 1976 were subjected to a mixed marriage policy, designed to "eliminate the Vietnamese root from the Cambodian population. Under this policy, Khmer partners in mixed marriages were ordered to kill their ethnic Vietnamese spouses and any offspring from that marriage, or face the death of their entire family."[84]

107. These facts depict the Khmer Rouge's attempt to eliminate the ethnic Vietnamese from Kampong Chhnang through:

a. Forcible relocation of ethnic Vietnamese from various towns and villages around the [redacted] and the gathering of these persons at various communes within [redacted];
b. Forcible deportation of the entire Vietnamese population comprising of our clients, to Vietnam from June to September 1975, and
c. Implementation of a mixed marriage policy in 1976 for those who remained in Cambodia, where Khmer spouses in mixed Khmer-Vietnamese marriages were ordered to kill their Vietnamese spouse and in some cases, their mixed children.

108. The significance about the Kampong Chhnang Genocide case is that facts about forcible transfer of the ethnic Vietnamese from Kampong Chhnang to Vietnam in mid-1975 highlight that there was an intention to eliminate this group, as well as positive acts taken to implement the genocidal policies, from as early as 1975. These facts are complementary to the Prosecution's case of forced transfer of the ethnic Vietnamese from the Eastern Zones, which focus on events of mid-1978. These facts are also in line with the OCIJ's investigations concerning deportations of the Vietnamese out of Cambodia, in this case, through Prey Veng, on the Tonle Sap River.

109. Importantly, these facts lay a foundation to establish that intent to destroy the ethnic Vietnamese group existed at the very beginning of the Khmer Rouge's reign, and not just when conflict with Vietnam escalated. For this reason, it remains of vital

[83] *Ibid.*, para 788. Note that the transfer of persons for rice and salt often occurred at Neak Loeang Markets in Prey Veng Province, on the way out of Cambodia to Vietnam.
[84] *Ibid.*, para 789.

importance to the case of Genocide against the ethnic Vietnamese, that this crime, which focuses on a protected "ethnic group", is not confined to specific crime sites or subjected to geographical limitations. Even if it is subjected to geographical limitations, it should be noted that D22/2135 and D22/2136 were admitted for mentioning the passing through the Leak Noeang Markets in Prey Veng Province, a place within the geographic scope of investigations.

110. Inclusion of the Kampong Chhnang facts into the Final Submission is therefore clear confirmation that OCIJ investigations in this area, assisting with establishing jurisdictional elements, have produced facts within the Scope of Investigations with which OCP had *seised* OCIJ, and *intended* for OCIJ to open judicial investigations into.

111. The CIJs' *mis*application of the proper Scope of Investigations in its determination on admissibility constitutes errors of fact and law. The CIJs have denied, misunderstood and/or confused what the Scope of Investigations are, in excluding these facts referred to it by the OCP. Under the properly applied Scope of Investigations of which OCP had seised OCIJ, *all* our ethnic Vietnamese clients from Kampong Chhang should be admitted, as the necessary casual link between the alleged injury and the facts under investigation have been established on the facts raised in our clients' applications, noting that all Vietnamese were forcibly deported via boats on the Tonle Sap River, through the Leak Noeang Markets in Prey Veng Province.

112. Civil Party Co-Lawyers call on the judges of the PTC to admit all rejected Vietnamese applicants on the basis that the harm they suffered from genocidal and persecutory acts committed against them are directly linked with facts under investigation, and in fact, *constitute* evidence, raised by OCIJ investigations, and used by the CIJs to support charges against the four Accused Persons in Case 002.

113. The appeal now turns to establishing that the interviews conducted by the OCIJ in Kampong Chhnang were used to support the Genocide and Crimes against Humanity charges with which the CIJs indicted the four Accused Persons in the CIJs' Closing Order.

4. Facts Raised by Ethnic Vietnamese Clients in Kampong Chhnang, obtained by OCIJ Investigations, are directly linked with Crimes for which the four Accused Persons have been Indicted in the CIJs' Closing Order

114. The CIJs' Closing Order indicts IENG Sary, IENG Thirith, KHIEU Samphan and NUON Chea on Genocide of the ethnic Vietnamese as well as persecution [of the Vietnamese] on racial grounds and deportation of the Vietnamese, the latter two falling under charges of Crimes against Humanity.[85]

115. Under the First Ground in this Appeal, Civil Party Co-Lawyers submitted that the CIJs erroneously applied Revision 5 of the IRs when deciding on civil party admissibility, raising procedural fairness concerns. Under this ground of appeal, Civil Party Co-Lawyers argue that, even on an application of Revision 5 of the IRs, our clients should be admitted.

116. IR 23 *bis* (1) states:

> "In order for Civil Party action to be admissible, the Civil Party applicant shall: ...(b) 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."

117. Every single ethnic Vietnamese applicant from Kampong Chhnang who has applied to participate at the ECCC has suffered forcible deportation out of Cambodia as an act committed pursuant to a genocidal policy to eliminate the Vietnamese ethnic group from Cambodia. These facts now *constitute* paragraphs 787 – 789 the OCP's Final Submission, as well as facts established in the CIJs' Closing Order, supporting the charges against the defendants on persecution of the Vietnamese, deportation of the Vietnamese as a Crime Against Humanity and Genocide of the ethnic Vietnamese.

118. IR 23 *bis* (1) (Revision 5) clearly states that the harm must be directly linked with a crime *alleged* against the Charged Person(s). In this case, the Accused Persons have already been *indicted* on charges of Genocide against the ethnic Vietnamese in the CIJs' Closing Order which states that there is "sufficient evidence" that NUON Chea, IENG Sary, KHIEU Samphan and IENG Thirith committed (via a joint criminal enterprise), planned, instigated, ordered, or aided and abetted, or are responsible by virtue of superior responsibility, for Crimes against Humanity, Genocide, Grave Braeches of the Geneva Conventions of 1949 and Violations of the 1956 Penal Code.[86]

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[85] OCIJ, "Closing Order", dated 15 September 2010, Doc no D427, Part 5 ("Dispositive"), para 1613.
[86] OCIJ, "Closing Order", 15 September 2010, Doc. no.D427, para 1613 ("Dispositive").

119. The "evidence" referred to, include facts raised by OCIJ investigations into Kampong Chhnang, via interviews with Civil Party applicants, about the forced mass deportations to Vietnam of members of the ethnic Vietnaemse group. Deportation of the Vietnamese as a Crime Against Humanity is explicitly spelt out in the OCIJ Press Release dated 16 September 2010, setting out the charges upon which NUON Chea, KHIEU Samphan, IENG Sary and IENG Thirith have been sent for trial.[87] Deportation of the Vietnamese is made out in the Closing Order, citing "Written Records of Interview with Civil Part[ies]", who were initially admitted as Civil Parties and subsequently rejected in the CIJs' First Vietnamese Rejection Order, after the relevant information about their forced deportation to Vietnam, through the Tonle Sap River was obtained. These official Records of Interview with our clients are submitted at Annex B, as "supporting documentation", pursuant to IR 77 *bis* (2).

120. The four Accused Persons are to be tried for the *crime* of Genocide against the ethnic Vietnamese. In our submission, *all* ethnic Vietnamese victims in Kampong Chhnang should be admitted, upon an application of the criteria set out in any revision of the IRs, including Revision 5. Later parts of this Appeal will focus on establishing that the evidence and facts raised by the ethnic Vietnamese applicants in Kampong Chhnang have, *in fact*, supported the charges, as demonstrated in both the OCP's Final Submission and the CIJs' Closing Order.

5. The CIJ's "Closing Order" contains Facts about Treatment of the Vietnamese in Kampong Chhnang taken from Investigations in Kampong Chhnang conducted by OCIJ

121. In spite of the CIJs' determination that "harm is not linked to facts under investigation" and its further qualification that the Vietnamese persecution in Kampong Chhnang is not within the "geographical scope of investigation"[88], its office *did*, in fact, investigate into Kampong Chhnang, and *used* the information obtained from these interviews to make out the facts about "Treatment of the Vietnamese" in the Closing

[87] OCIJ, "Press Release" (about Closing Order), dated 16 September 2010. OCIJ, "Press Release" (about Closing Order), dated 16 September 2010, at http://www.eccc.gov.kh/english/cabinet/press/169/ECCC_OCIJ_PR_16_Sep_2010(En).pdf

[88] Kampong Chhnang Order, Annex 3 ("Inadmissible Civil Party applicants").

Order.[89] Further, the Closing Order cites facts raised by Vietnamese Civil Party applicants in Kampong Chhnang – even after the CIJs had, in the First Vietnamese Rejection Order, rejected the civil claims of the two individuals it had interviewed (see "Written Records of Interview with Civil Parties" at **Annex C**).

122. *Using information obtained from interviews with Civil Party applicants in Kampong Chhnang*, the Closing Order sets out "Movement of the Vietnamese from Cambodia to Vietnam" as follows:

> "Initially the CPK focussed on expelling all Vietnamese people from Cambodian territory and sending them to Vietnam. The policy commenced as early as 1973 and was further applied in 1975 and 1976 ... in Prey Veng and Svay Rieng and throughout Cambodia. Vietnamese people were transported by foot, train and boat to Vietnam... Some witnesses state that they were made to go to Vietnam and some state that Vietnamese people could choose to accept an invitation to go to Vietnam. Some witnesses suspected that it was a trap and that people were actually being taken to be killed. The Cambodian spouses and families of Vietnamese people were not permitted to go to Vietnam, so it appears that many Vietnamese people who had Cambodian spouses or one Cambodian parent chose to remain in Cambodia."[90]

123. Under the heading, "Killings of Vietnamese Civilians outside of Prey Veng and Svay Rieng", the Closing Order states:

> "The killing of Vietnamese civilians was not limited to Prey Veng and Svay Rieng Provinces, thus demonstrating that it was organised as a national policy".

The Closing Order also sets out the "Treatment of Cambodian People with Vietnamese Spouses and Children with one Vietnamese Parent", which references to interviews with Civil Party applicants from Kampong Chhnang.

124. The blatant denial by the CIJs in concluding that the ethnic Vietnamese who suffered persecution and Genocide in Kampong Chhnang do not raise "facts under investigation" is simply unacceptable – the Office of the CIJs *investigated* facts in Kampong Chhnang, and *used* these facts in its Closing Order. This subsequent denial that these were facts under investigation – even after the CIJs were fully aware of the inclusion of these facts, in full, in the OCP's Final Submission – and after having themselves used these facts in their Closing Order – conveniently maintains the same stance that the CIJs made in the First Vietnamese Rejection Order, with the effect of

[89] OCIJ, "Closing Order", dated 15 September 2010, Doc no D427, pages 196 – 209, paras 791 – 841.
[90] OCIJ, "Closing Order", dated 15 September 2010, Doc no D427, para 794.

denying Vietnamese applicants their rights to Civil Party participation in accordance with the IRs.

125. Civil Party Co-Lawyers for the ethnic Vietnamese applicants request that PTC overturn the inadmissibility decisions of the CIJs and grant civil party status to all ethnic Vietnamese applicants in Kampong Chhnang, noting that the OCIJ investigations uncovered the fact that forced deportation by boat down the Tonle Sap River to Vietnam necessarily entails transitting through Prey Veng Province and that applications D22/2135 and D22/2136 were admitted simply because they mentioned this fact.

VII. REQUEST FOR RECONSIDERATION

Civil Party Co-Lawyers Request that Judges of the PTC Re-consider the Status of 15 Civil Party applicants from Kampong Chhnang deemed Inadmissible on the same Factual and Legal basis as presented in the Current Appeal

126. In light of factual and legal matters raised and expressed in the Current Appeal, Co-Lawyers for the ethnic Vietnamese applicants ask that PTC reconsider its previous determination in its "Decision on Appeals against Co-Investigating Judges' Combined Order D250/3/3 dated 13 January 2010 and Order D250/3/2 dated 13 January 2010 on Admissibility of Civil Party Applications" (**PTC Admissibility Decision**), where the PTC upheld the CIJs' rejection of ethnic Vietnamese applicants residing in Kampong Chhnang Province.

127. The legal basis for the reconsideration of a previous decision by judges of the PTC will be addressed in this section of the appeal, but as a preliminary matter, the procedural history and background to the proceedings thus far, concerning the admissibility of ethnic Vietnamese applicants from Kampong Chhnang, will be set out.

1. Background and History to Proceedings

128. On **13 January 2010**, the CIJs issued two orders: (D250/3/3)[91], rejecting Civil Party Lawyers' request for further investigations into Genocide against the ethnic Vietnamese and Khmer Krom (**Rejection of CPLs' Request to Investigate**), and D250/3/2)[92], deeming as inadmissible, all 16 ethnic Vietnamese applicants from Kampong Chhnang (**First Vietnamese Rejection Order**). The CIJs erroneously linked the first decision refusing to further investigate, with the second decision, on admissibility, as there was no legal basis for it to do so.

129. On **29 January 2010**, approximately two weeks after the CIJs' First and Second Decisions (the latter of which rejected 16 ethnic Vietnamese applicants and a number of Khmer Krom applicants), OCIJ extended the deadline for Civil Party applicants to

[91] OCIJ, "Combined Order n Co-Prosecutors' Two Requests for Investigative Action Regarding Khmer Krom and Mass Executions in Bakan District (Pursat) and the Civil Parties Request for Supplementary Investigations Regarding Genocide of the Khmer Krom and the Vietnamese", 13 January 2010, D250/3/3.
[92] OCIJ, "Order on the Admissibility of Civil Party Applications Related to Request D250/3"

submit supplementary information in support of their applications. This deadline was subsequently extended to 30 June 2010.[93] *None of the applicants rejected by the CIJs' Order of 13 January 2010 had the opportunity to submit supplementary documentation in support of their claims.* This is an unacceptable and regrettable, major procedural shortcoming in the way the court has conducted admissibility determinations.

130. On **12 February 2010**, Co-Lawyers for the Civil Parties submitted an Appeal against the CIJs' Decision Rejecting the Request for Further Investigations (D274/4/1)[94] and an Appeal against the CIJ's First Vietnamese Rejection Order (D250/3/2/1/1) (**Appeal Against First Vietnamese Rejection Order**).[95]

131. On **27 April 2010**, the PTC issued its Decision on the Appeals Against the Co-investigating Judges' Combined Orders D250/3/3 and D250/3/2, upholding the inadmissibility decisions of the CIJs in relation to all ethnic Vietnamese applicants (**PTC Decision on Vietnamese Applicants**).

132. On **29 April 2010**, pursuant to the separate opinions of Judges PRAK and DOWNING concerning four applicants who were given "provisional civil party status"[96], the applications of clients D22/125/3, D22/171/4, D22/172/2 and D22/205/2 were submitted to the OCIJ via the Victims Support Section, by Co-Lawyers for the Civil Parties.[97] This letter is at **Annex D**.

133. By Internal Memo dated **4 June 2010**[98], Co-Lawyers for Civil Parties were informed by the CIJs that these applications were not re-considered on the basis that

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[93] OCIJ Brief, 27 January 2010, D337. See also D337/6.

[94] Co-Lawyers for Civil Parties, "Appeal against Combined Order on Co-Prosecutors' Two Requests for Investigative Action regarding Khmer Krom and the civil Parties Request for Supplementary Investigations Regarding Genocide of the Khmer Krom and Vietnamese", 12 February 2010, D274/4/1.

[95] Co-Lawyers for Civil Parties, "Appeal Against Order on the Admissibility of Civil Party Applications Related to Request D250/3", 12 February 2010, D250/3/2/1/1.

[96] The separate opinion of Judges Downing and Prak Kimsan, emphasised that: (a) a letter from the CIJs' Greffier "evinced a decision to accept our clients (VN01, VN02, VN04 and VN10) as Civil Parties; (b) previously admitted Civil Parties such as our clients "should retain their status as Civil Parties in the proceeding, leaving it to the Trial Chamber" to make further determinations regarding their right to request reparations; and (c) these Civil Parties may re-submit "their civil party applications should they believe that their circumstances and claims falling within the scope of the investigation have not been initially properly expressed". PTC, "Decision on Appeals against CIJs Combined Order D250/3 dated 13 January 2010 and Order D250/3/2 dated 13 January 2010 on Admissibility of Civil Party Applications", para 15 – 17.

[97] Letter from Civil Party Co-Lawyers, NY Chandy and Lyma NGUYEN, to the Co-Investigating Judges, titled, "REQUEST TO ADMIT CIVIL PARTY APPLICATIONS 08-VU-02379 (VN01), (VN02), 08-VU-02116 (VN04) and 08-VU-02291 (VN10)", 29 April 2010.

[98] OCIJ Internal Memo titled, "Your requests of 29 April 2010 concerning the Admissibility of Civil Party Applications", D250/3/2/4.

"it is not permissible to challenge an order declaring a civil party application inadmissible otherwise than by way of appeal, a recourse that has already been undertaken in this case ..

The CIJs concluded that "there is no need to reconsider the admissibility of the civil party applications in question."[99]

134. The effect of these proceedings has been that first 16 (rejected) ethnic Vietnamese Civil Party applicants have been deprived of important procedural rights and opportunities afforded to all other Civil Party applicants. The clearest example of this is that these applicants were rejected before the CIJs decided to grant further opportunities for all other Civil Party applicants to submit supplementary information in support of their claims – including the submission of any facts that place them within the OCIJ's narrow (and erroneously applied) scope of investigations. This has resulted in a miscarriage of justice for the 16 applicants the subject of the CIJs' First Vietnamese Rejection Order.

2. Basis Upon which PTC May Reconsider a Decision Previously Made

135. We note that the principle of *res judicata* can often lead to an unjust decision where there is no right of further appeal or review. In the present circumstances, we ask that PTC exercise its discretion in reconsidering a decision it has previously decided upon, on the basis that new facts, new circumstances and new arguments have arisen in relation to a situation identical in nature to that concerning its previous decision.[100]

136. Given that the Current Appeal raises new facts and argument that apply in an identical way to the previous decision, it would be appropriate, at the least, and essential, at the most, for PTC to review the decision concerning 15 applicants whose status was previously determined on incomplete information and submissions (note that

[99] *Ibid.*, page 2.

[100] In PTC, "Decision on Application for Reconsideration of Civil Party's Right to Address Pre-Trial Chamber in Person", 28 August 2008, C22/I/68, PTC considered that new facts, arguments or a change of circumstances are grounds relevant to an Application for Reconsideration. Under the international jurisprudence of the *ad hoc* Tribunals, new facts and new arguments are circumstances which can sustain a motion for reconsideration. See *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06, Motion for Reconsideration to Pre-Trial Chamber, 22 May 2006, para 8; *Prosecutor v Milosovic,* IT-02-54-T, Decision on Prosecution Motion for Reconsideration Regarding Evidence of Defence Witnesses, 17 May 2005, para 7.

one of the 16 applicants the subject of that decision is deceased).[101] A failure to do so, in these circumstances, may result in a miscarriage of justice for those Applicants.

137. We note that the PTC has, in a previous decision concerning a request for reconsideration of a matter by Civil Party Co-Lawyers, stated that an application for reconsideration "may only succeed if there is a legitimate basis for the Pre-Trial Chamber to reconsider its previous decision".[102] It further found, on the basis of jurisprudence from the international *ad hoc* tribunals, that it has an inherent power to reconsider a decision it has previously made because of a change of circumstances or when it realises that the previous decision was erroneous or that it has cause an injustice.[103] The PTC more recently took a position that "The Pre-Trial Chamber determines each case upon its merits and the issues raised therein".[104]

138. This approach is consistent with jurisprudence from the ICTY Appeals Chamber which has stated that "[it] must be emphasised that a Trial Chamber may always reconsider a decision it has previously made"[105]; the ICTR Trial Chamber which observed that "the chamber has an inherent power to reconsider its own decisions"[106], and the Special Court for Sierra Leone, which recognised the general principle that "every court may, if justice requires, vary or rescind an earlier order or reconsider an interlocutory decision".[107]

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[101] 09-VU-00685 (D22/287), also rejected by the CIJs in the 13 January 2010 Order, is deceased. Family members have confirmed that they do not wish to continue the application of this Applicant.
[102] PTC, "Decision on Application for Reconsideration of Civil Party's Right to Address the Pre-Trial Chamber in Person", 28 August 2008, C22/I/68, para 25.
[103] *Ibid.*
[104] *Ibid.*, para 12.
[105] *Prosecutor v Milosevic*, IT-02-54-AR73, Reasons for Refusal of Leave to Appeal from Decision to Impose Time Limit, 16 May 2002, para 17. See also *Prosecutor v Milosevic*, IT-02-54-T, Decision on Prosecution Motion for Reconsideration Regarding evidence of Defence Witnesses, 17 May 2005, para 6-7. *Prosecutor v Nikolic*, IT-02-60/1-A, Decision on appellant's Urgent Motion for Reconsideration, 6 April 2005; *Prosecutor v Blaskic*, IT-95-14-A, Decision on "Prosecutor's Preliminary Response and Motion for Clarification", 23 May 2003, para 7.
[106] See, for example, *Prosecutor v Karemera et al*, ICTR-98-44-T, Decision on Joseph Nzirorera's Motion for Reconsideration or Certification to Appeal, 11 October 2005, para 8; *Nahimana et al v Prosecutor*, ICTR-99-52-A, Decision on Jean-Bosco Barayagwiza's Request for Reconsideration, 4 February 2005.
[107] *Prosecutor v Brima et al*, SCLSL-04-16-AR73, 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, 8 December 2005, para 24 and 49; *Prosecutor v Normal et al*, SCSL-04-14-T, Decision on Urgent Motion for Reconsideration of the Orders for Compliance with the Order Concerning the Preparation and Presentation of the Defence case, 76 December 2005, paras 9 – 14.

3. Request for Reconsideration of the PTC Decision in D274/4/5 in the Interests of Justice, on the basis of new Facts, Circumstances and Legal Submissions

139. For all the above-mentioned factual, legal and procedural reasons, in the event that the PTC determines that the Vietnamese Civil Party applicants the subject of this appeal are admissible, Co-Lawyers for these applicants request that the PTC reconsider the status of 15 ethnic Vietnamese applicants from Kampong Chhnang who had previously been determined to be inadmissible by the CIJs (the decision of which was upheld by a majority of the PTC).[108]

140. The basis of this request is that those claims, which raise essentially the same factual and legal matters presented in this current appeal, were not "initially properly expressed".[109] In particular, the First Vietnamese Admissibility Appeal (D250/3/12/1/1), concerning the first 16 rejected Vietnamese applicants, had argued that "all Vietnamese Civil Party applicants fall within the scope of OCP's Introductory Submission",[110] and that "investigations conducted by OCIJ in Kampong Chhnang brought ethnic Vietnamese victims within the scope of 'facts under investigation'".[111] However, those submissions were made without reference to the OCP's Forwarding Order clarifying the proper Scope of Investigations, and without proper expression that the OCIJ interviews in Kampong Chhnang amounted to investigations which assist to establish "jurisdictional elements"[112] within the meaning of "new facts limited to aggravating circumstances relating to an existing submission", under IR 55(3)." On this basis, Co-Lawyers for these applicants submit that the PTC upholding of the CIJ's rejection orders was made on incomplete information, or submissions not initially properly expressed.

141. Collectively, the first 16 applicants, together with the 24 applicants the subject of

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[108] One applicant, 09-VU-00685 (D22/287), also rejected by the CIJs in the 13 January 2010 Order, is deceased. Family members have confirmed that they do not wish to continue the application of this Applicant.

[109] Judges Rowan DOWNING and PRAK Kimsan, in the PTC's "Decision on Appeals against CIJs Combined Order D250/3 dated 13 January 2010 and Order D250/3/2 dated 13 January 2010 on Admissibility of Civil Party Applications", in paragraph 17 recognised that "the circumstances and claims falling within the scope of the investigations [may] not [have] been initially properly expressed".

[110] Civil Party Co-Lawyers, "Appeal Against Order on the Admissibility of Civil Party Applications related to Request 250/3", 12 February 2010, D250/3/2/1/1, paras 3 and 35 -38.

[111] *Ibid.*, paras 3 and 41 – 43.

[112] *Ibid.*, paras 41 – 43.

this appeal, bring up identical stories demonstrating a pattern of persecution and a designed implementation of the Khmer Rouge's genocidal policies as carried out in Kampong Chhnang Province. All 40 applicants suffered acts amounting to Genocide (including forced mass transfer out of Cambodia, the infliction of conditions of life calculated to bring about the destruction of their group, measures imposed to prevent births within the group) and Crimes against Humanity (including forced relocation, extermination, enslavement and persecution of the ethnic Vietnamese group). These facts, initially described in the "Civil Parties' Request for Supplementary Investigations Regarding Genocide of the Khmer Krom and the Vietnamese",[113] and now described in the OCP Final Submission[114] are incorporated by reference in this Appeal. Importantly, forced deportation to Vietnam involved "treatment of the Vietnamese in Prey Veng Province", as all boat transfers either passed through, or stopped at, Neak Loeang Markets in Prey Veng, and two Vietnamese civil parties (D22/2135 and D22/2136) were admitted on this basis.

142. For all the reasons referred to in this Appeal, the CIJs erroneous rejected applicants on the basis that the harm suffered by these applicants was not linked to "facts under investigation" – in these admissibility determinations, the CIJs have mis-understood and mis-applied the "facts" of which they were seised *in rem*, by the OCP, to investigate. Further, the CIJs erroneously determined, in the Kampong Chhnang Order, that harm was "not linked to facts under investigation", qualifying this with "outside geographic scope/Vietnamese persecution", knowing full well that the harm suffered by Vietnamese applicants in Kampong Chhnang *constituted* facts under investigation.

143. To the extent that this appeal properly expresses the basis upon which the CIJs were *seised in rem* with the facts raised by the Vietnamese applicants, and to the extent that this Current Appeal makes out that the CIJs erroneously rejected these applicants on an incorrect understanding of the "Scope of Investigations", Co-Lawyers for these applicants request that PTC reconsider the status of 15 ethnic Vietnamese applicants from the First Vietnamese Admissibility Appeal, on the same basis as consideration of

[113] Civil Party Co-Lawyers, "Civil Parties' Request for Supplementary Investigations Regarding Genocide of the Khmer Krom and the Vietnamese", paras 41 – 63.
[114] OCP "Co-Prosecutor's Rule 66 Final Submission", paras 787 – 789. See also section on "Crimes against the Vietnamese", para 787 - 789.

the 29 applicants the subject of the current Appeal.

144. Co-Lawyers for the Vietnamese applicants do not contend that judges of the PTC decided erroneously when the PTC upheld the CIJs' determination not to admit the first 16 ethnic Vietnamese Civil Party applicants – to the contrary, the timing of the present Appeal has rendered information from the OCP's Final Submission and the CIJs' Closing Order able to be used. The current Appeal also refers to clarifications from the OCP about the Scope of Investigations, and thus presents matters of fact and law better expressed than those made in the First Vietnamese Admissibility Appeal. This Appeal therefore presents judges of the PTC with more complete factual information and more extensive legal submissions, to decide on admissibility in accordance with the Internal Rules.

145. For the reasons stated in this Appeal, Civil Parties Co-Lawyers have established the requisite causal link between the harm suffered by ethnic Vietnamese applicants from Kampong Chhnang, and the "facts under investigation" – being facts with which the OCIJ were seised *in rem* to investigate; and *did* in fact, investigate; and being facts forming significant parts of the OCP's Final Submission and the CIJs' Closing Order relating to persecution and treatment of the Vietnamese. The fact that these investigations were conducted pursuant to establishing "jurisdictional elements" does not, in any way, preclude the facts obtained from these interviews with our clients from being within the "Scope of Investigations".

146. Civil Party Co-Lawyers therefore request that the following 15 applications (rejected in the CIJ's First Vietnamese Rejection Order and the corresponding PTC Decision), whose applications raise identical facts and legal submissions to those raised in the current Appeal, be reconsidered by PTC: D22/125[115]; D22/171[116]; D22/276[117]; D22/172[118]; D22/277[119]; D22/278[120]; D22/279[121]; D22/280[122]; D22/281[123]; D22/205[124];

[115] Victim Information Form and Supplementary Information 08-VU-02397 (D22/125).
[116] Victim Information Form and Supplementary Information 08-VU-02380 (D22/171).
[117] Victim Information Form and Supplementary Information 08-VU-02378 (D22/276).
[118] Victim Information Form and Supplementary Information 08-VU-02116 (D22/172).
[119] Victim Information Form and Supplementary Information 09-VU-01723 (D22/277).
[120] Victim Information Form and Supplementary Information 09-VU-01722 (D22/278).
[121] Victim Information Form and Supplementary Information 09-VU-02241 (D22/279).
[122] Victim Information Form and Supplementary Information 09-VU-02242 (D22/280).
[123] Victim Information Form and Supplementary Information 09-VU-02243 (D22/281).
[124] Victim Information Form and Supplementary Information 08-VU-02291 (D22/205).

D22/282[125]; D22/283[126]; D22/284[127]; D22/285[128]; D22/286[129] (noting that D22/287 is deceased).[130]

4. Being the only Civil Party applicants Identifying as Ethnic Vietnamese at the ECCC, all Vietnamese Survivors of Genocide from the Current Residents of Kampong Chhnang Province should be Admitted from a Moral Standpoint

147. As cited in the Closing Order, a Demographic Expert Report, dated 30 September 2009, concluded that in April 1975, there were approximately 20 000 ethic Vietnamese persons still residing in Cambodia, and that "*all 20 000 of them died from the hands of the Khmer Rouge during the years April 1975 to January 1979*".[131] This 100% elimination rate of the ethnic Vietnamese resulted from the implementation of genocidal policies by the Khmer Rouge, through deportations out of Cambodia and/or elimination by killing. Our clients were amongst those eliminated out of Cambodia – they returned to Cambodia at various times after 1979 when the Khmer Rouge regime collapsed.

148. Of the 100% eliminated from the statistics, our clients form Kampong Chhnang Province are the only survivors identifying themselves as ethnic Vietnamese to have applied to participate at the ECCC. This has been confirmed by collective information gathered from inquiries with the Victims Support Section, Civil Party legal teams, the Cambodian Human Rights Action Committee, and various intermediary NGOs such as DC-Cam, ADHOC and KID. These stakeholders have further indicated that, of the Civil Party applicants admitted on the basis of *persecution of the Vietnamese* – including in Prey Veng Province, Svay Rieng Province and incursions into Vietnam – these being areas declared by the OCIJ as being within its narrowly-construed, geographical scope of investigations – none identify as ethnic Vietnamese. Rather,

[125] Victim Information Form and Supplementary Information 09-VU-02239 (D22/282).
[126] Victim Information Form and Supplementary Information 09-VU-02240 (D22/283).
[127] Victim Information Form and Supplementary Information 09-VU-00687 (D22/284).
[128] Victim Information Form and Supplementary Information 09-VU-00686 (D22/285).
[129] Victim Information Form and Supplementary Information 09-VU-00688 (D22/286).
[130] Applicant 09-VU-00685 (D22/287), also rejected by the CIJs' First Vietnamese Rejection Order (13 January 2010), is deceased. Family members have confirmed that they do not wish to continue the civil claims of the deceased applicant.
[131] OCIJ, "Closing Order", 15 September 2010, Doc. no. D427, para 792, citing Demographic Expert Report by Dr Ewa Tabeau and They Kheam, page 49, 30 September 2009, Doc. no. D140/1/1.

these Civil Parties were admitted on the basis that they suffered harm from the loss of Vietnamese relatives or otherwise suffered persecution on a perception of being Vietnamese, or a perception of being affiliated with the Vietnamese.

149. Civil Party Co-Lawyers assert that Genocide and Crimes against Humanity are, by definition, crimes directed against *groups*, and that probative evidence of a plan to target a group can be inferred from the "scale that the crimes themselves are committed".[132] The intentional extermination of a people is a crime of unfathomable horror – the scale and nature of human suffering in the aftermath of Genocide leads it to be considered, "the supreme crime, in the view of the international community, of history, of victims, and of generations of their descendants".[133]

150. In light of the 100% elimination rate of ethnic Vietnamese from Cambodia under the Khmer Rouge regime, it is a rarity to encounter a Vietnamese survivor of that Genocide. It would indeed be an affront to the collective experience of this victim group, and an outright absurdity, if no ethnic Vietnamese civil parties are admitted in these proceedings *on the basis of persecution or Genocide of the Vietnamese*, despite the institution of Genocide charges against all Accused Persons, reflecting their responsibility and participation in acts implemented throughout Cambodia pursuant to an intention to eliminate the ethnic Vietnamese group.

151. In the eyes of the victims, the decision of the CIJs to deny the participation at this Tribunal of members of the ethnic Vietnamese group is akin to a denial that these persons are victims of Genocide. The CIJs' denial of the civil claims of these applicants suggests that justice is an arbitrary and selective process – that Genocide can be committed with impunity and without any recognition of the profound impact of these crimes for victims of this horrible crime, including the impact on their descendants.

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[132] *Prosecutor v Milosevic*, ICTY Case No IT-02-54-T, Decision on Motion for Judgment of Acquittal, dated 16 June 2004, at para 246 states, "The genocidal intent of the Bosnian Serb leadership can be inferred from all the evidence ... the scale and pattern of the attacks, their intensity, the substantial number of Muslims killed ... the detention of Muslims, their brutal treatment in detention centres and elsewhere, and the targeting of persons essential to the survival of the Muslims as a group are all factors that point to Genocide."

[133] *Convention on the Prevention and Punishment of the Crime of Genocide,* adopted by the UN General Assembly Resolution 260 (III) A of the UN General Assembly, 9 December 1948. Entry into force 12 January 1951.

152. The CIJs' denial of the participation rights of this group violates the core purpose of the ECCC – the pursuit of "justice and national reconciliation, stability, peace and security".[134] It strips this collective victim group of their rights to participate in the proceedings to seek truth and justice for the serious, mass scale, profoundly inconceivable violations of their human rights and dignity – and in doing so, to confront their perpetrators in moving forward to redress the incomprehensible harm suffered by each individual, their families and their entire community, across the generations.

153. The effect of this denial has been to silence the voices of the victims in circumstances where there are very few survivors of this specific Genocide in Cambodia, and in a context where, as a minority group suffering ongoing discrimination in Cambodian society, the voices of the ethnic Vietnamese victims are already silenced. From a moral standpoint, there must be ethnic Vietnamese survivors of Genocide admitted at this Court if the ECCC is to have any legitimacy before the international stage.

154. Furthermore – if the ECCC is to have any legitimacy in the eyes of the victims, it is essential that the court recognise that *all* ethnic Vietnamese applicants in Kampong Chhnang Province are *immediate victims* of Genocide, having suffered direct and personal harm from genocidal acts of the Khmer Rouge. The crime itself is *characterised by the targeting of a specific group – in this case the ethnic Vietnamese, based on their race – in the implementation of policies based on an intention to destroy that group.* As such, these victims must be admitted as Civil Parties on the basis of *persecution of the Vietnamese*, whatever geographical location they reside at, and whether or not the applicants raise facts bringing them under other crimes within the Scope of Investigations.

155. Most importantly, as made out in earlier sections of this Appeal, it is of great legal significance that the factual experiences of these applicants form the very evidence upon which Genocide and Crimes against Humanity charges against each of the Accused Persons has been made. These "facts under investigation" are directly

[134] General Assembly of the United Nations, Resolution 57/228, 18 December 2001, and the Preamble of the Internal Rules of the ECCC.

associated with the direct and personal harm suffered by each individual, satisfying the requisite criteria for them to be admitted as Civil Parties.

156. Civil Party Co-Lawyers ask judges of the PTC, in considering the admissibility outcome for the ethnic Vietnamese applicants from Kampong Chhnang Province, to give weight to these circumstances, including: the denial of procedural fairness to rejected applicants from the CIJs' First Vietnamese Rejection Order; the fact that these victims, the only applicant survivors of the Vietnamese genocide to identify as ethnic Vietnamese at the ECCC, have been let down by this Tribunal time and time again; and the need for the ECCC to have legitimacy before these victims and the world at large.

157. Civil Party Co-Lawyers request that the judges of the PTC, in recognition that each of the Vietnamese applicants is an immediate victim of the crime of Genocide against the Vietnamese, grant *all* Vietnamese applicants from Kampong Chhnang the status as Civil Parties, *in accordance with their rights under the Internal Rules*.

158. For the reasons set out, Civil Party Co-Lawyers ask judges of the PTC to set aside decisions previously made, and to admit applicants D22/125, D22/171, D22/276, D22/172, D22/277, D22/278, D22/279, D22/280, D22/281, D22/205, D22/282, D22/283, D22/284, D22/285 and D22/286 (from the First Vietnamese Rejection Order) and applicants D22/1901, D22/3180, D22/3183, D22/2057, D22/2154, D22/438, D22/3179, D22/3182, D22/816, D22/3177, D22/2157, D22/3181, D22/817, D22/2155, D22/2153, D22/404, D22/2156, D22/1136, D22/1969, D22/3175, D22/3176, D22/3178, D22/2158, and D22/1092, on the basis that each victim suffered direct and personal harm as *immediate victims*, the injury of which can be linked directly with facts under investigation, including forced deportation, through Prey Veng Province, to Vietnam.

VIII. CONCLUSION AND RELIEF REQUESTED

159. Civil Party Co-Lawyers submit that the Orders of the Co-Investigating Judges erred in fact and in law when they rejected the civil party applications of D22/1901, D22/3180, D22/3183, D22/2057, D22/2154, D22/438, D22/3179, D22/3182, D22/816, D22/3177, D22/2157, D22/3181, D22/817, D22/2155, D22/2153, D22/404, D22/2156, D22/1136, D22/1969, D22/3175, D22/3176, D22/3178, D22/2158, and D22/1092, on the grounds that "harm is not linked to facts under investigations (outside geographic scope/Vietnamese persecution)", and that they erred in law and in fact when they rejected D22/2758 on the basis that "harm is not linked to facts under investigation".

160. Civil Party Co-Lawyers respectfully request that the PTC:

(i) Declare this Appeal admissible

(ii) Set aside the decision of the CIJs declaring the 25 above-listed Applicants inadmissible

(iii) Consider the supporting documentation submitted at Annexes A, B and C, including the OCIJ Written Records of Interview with ethnic Vietnamese Civil Party applicants in Kampong Chhnang

(iv) Reconsider the admissibility of the 25 applicants the subject of this Appeal

(v) Reconsider the admissibility of applicants affected by the First Vietnamese Rejection Order and the corresponding PTC Decision: D22/125, D22/171, D22/276, D22/172, D22/277, D22/278, D22/279, D22/280, D22/281, D22/205, D22/282, D22/283, D22/284, D22/285 and D22/286, and

(vi) Grant all 40 Appellants the status of Civil Parties.

Respectfully submitted by:

Mr. NY Chandy
National Civil Party Co-Lawyer

Ms. Lyma NGUYEN
International Civil Party Co-Lawyer

Signed in Phnom Penh, Kingdom of Cambodia on this 27th day of September, 2010.