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

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

ឯកសារច្បាប់ចំលងបានធ្វើឲ្យត្រឹមត្រូវតាមច្បាប់ដើម
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No. D250/3/2/1/5

អង្គបុរេជំនុំជម្រះ
Pre-Trial Chamber
Chambre Préliminaire

Criminal Case File N° 002/19-09-2007-ECCC/OCIJ (PTC47 & 48)

Before: **Judge PRAK Kimsan, President**
Judge Rowan DOWNING
Judge NEY Thol
Judge Catherine MARCHI-UHEL
Judge HUOT Vuthy

Date: **27 April 2010**

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PUBLIC REDACTED

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

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THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia ("ECCC") is seized of two related appeals: (i) an "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 & the Vietnamese",[1] ("First Appeal") filed on 12 February 2010 by the Co-Lawyers of a group of nine Khmer Krom Civil Parties,[2] seventeen Civil Party Applicants identifying themselves as belonging to the Khmer Krom minority[3] and sixteen Civil Party Applicants identifying themselves as being ethnic Vietnamese from Kampong Chhnang Province[4] ("Civil Parties and Civil Party Applicants") against the Co-Investigative Judges' ("CIJs") "Combined Order on 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" ("First Impugned Order");[5] and (ii) an "Appeal Against Order on the Admissibility of Civil Party Applications Related to Request D250/3" ("Second Appeal"),[6] filed on 12 February 2010 by the same Co-Lawyers for the sixteen Civil Party Applicants identifying themselves as being ethnic

[1] 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 & the Vietnamese, 12 February 2010, D274/4/1 ("First Appeal").

[2] 01 02 ; 04, 06, 07, ; 08, 25, 12, 27 (all accepted as Civil Parties on 14 January 2010).

[3] 03, 05, ; 10, 11, 13, 14 ; 15, ; 16, 17, 18, ; 19, ; 20, ; 21, ; 22, ; 23, ; 24, ; 26 .

[4] 01, 02 03, 04, 05, 06, ; 07, ; 08, ; 09, ; 10, ; 11, 12, ; 13, ; 14, ; 15, , 16, (deceased; *see* Appeal Against Order on the Admissibility of Civil Party Applications Related to Request D250/3, 12 February 2010, D250/3/2/1/1 ("Second Appeal"), footnote ("fn.") 1.

[5] Combined Order on 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 & the Vietnamese, 13 January 2010, D250/3/3 ("First Impugned Order").

[6] Appeal Against Order on the Admissibility of Civil Party Applications Related to Request D250/3, 12 February 2010, D250/3/2/1/1 ("Second Appeal"). Second Appeal and First Appeal, p. 4, which also notes that the Appeal and the Civil Parties Appeal on Inadmissibility are joined by other International Co-Lawyers on behalf of their "recognized Civil Party and Civil Party Applicant clients who are at risk of being similarly deprived of their extant Civil Party status, or denied an opportunity to become Civil Parties, as the case may be, in the event they too are adjudged to fall outside the scope of investigation as determined by the CIJs".

Vietnamese from Kampong Chhnang Province[7] and seventeen Civil Party Applicants identifying themselves as belonging to the Khmer Krom minority,[8] against the "Order on the Admissibility of Civil Party Applications Related to Request D250/3" ("Second Impugned Order").[9]

I. PROCEDURAL BACKROUND

1. During the course of 2009 and until 12 January 2010, civil party applications from victims identifying themselves respectively as "being ethnic Vietnamese from Kampong Chhnang province" and "belonging to the Khmer Krom minority" were placed on the Case File.[10]

2. On 3 December 2009, the Co-Lawyers for the Civil Parties and Civil Party Applicants filed the "Civil Parties' Request for Supplementary Investigations Regarding Genocide of the Khmer Krom & the Vietnamese" ("Civil Parties' Request"),[11] aiming at: (i) drawing the CIJs attention to new evidence establishing the crimes of genocide and crimes against humanity committed against the Khmer Krom minority group in Pursat and Takeo Provinces during the Democratic Kampuchea ("DK") period; and (ii) supplementing the Co-Prosecutors' Introductory Submission with evidence that the territorial sweep of the genocide and crimes against humanity committed against the ethnic Vietnamese minority

[7] 01, 02, 03, 04, 05, 06, ; 07, ; 08 ; 09,); 10, ; 11, 12, 13, 14, 15, 16, (deceased; *see* Second Appeal, footnote 1).
[8] 03, 05, 10, 11, 09 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26
[9] Order on the Admissibility of Civil Party Applications Related to Request D250/3, 13 January 2010, D250/3/2 ("Second Impugned Order").
[10] The detailed list of all Civil Party Applicants is included in the Second Impugned Order at pp. 2-4.
[11] Civil Parties' Request for Supplementary Investigations Regarding Genocide of the Khmer Krom & the Vietnamese, 3 December 2009, D250/3 ("Civil Parties' Request").

group extended to Kampong Chhnang Province during the same period and requesting that the crimes in question become part of Case 002.[12]

3. On 11 December 2009 and 6 January 2010 respectively, the Co-Prosecutors filed the following related requests:

   i. "Co-Prosecutors' Request for Investigative Actions Regarding Khmer Krom and Mass Executions in Bakan District (Pursat)" ("Co-Prosecutors First Request"),[13] "intended to supplement the allegations in the Introductory Submission ("IS") dated 18 July 2007 regarding the treatment of the Vietnamese (IS paragraphs 69-70), the forcible transfer of people from the East Zone (IS paragraph 42) and the purge of the East Zone (IS paragraph 71)",[14] requesting the CIJs to address new facts and evidence regarding the treatment of the Khmer Krom and mass executions in Bakan District, Pursat Province during the DK period"[15] and requesting that a number of specified crimes[16] become part of Case 002;[17] and

   ii. "Co-Prosecutors' Further Investigative Request Regarding Khmer Krom" ("Co-Prosecutors Second Request"),[18] "intended to specify the additional judicial investigation that the Co-Prosecutors believe is necessary in relation to the factual matters set forth [in the First Request] regarding the Khmer Krom and mass executions in Bakan District (D274)."[19]

4. On 13 January 2010, the CIJs issued the First Impugned Order which, in part, rejected: (i) the Co-Prosecutors First Request inasmuch as it seeks to expand the scope of the investigation as defined by the Introductory Submission and the Supplementary Submission;

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[12] Civil Parties' Request, para.1.
[13] Co-Prosecutors' Request for Investigative Actions Regarding Khmer Krom and Mass Executions in Bakan District (Pursat), 11 December 2009, D274 ("Co-Prosecutors' First Request").
[14] Co-Prosecutors' First Request, para. 2.
[15] Co-Prosecutors' First Request, para. 1.
[16] The facts and supporting material are described under the heading "Crimes" at paras 3-6 of the Co-Prosecutors' First Request. The legal qualification of the crimes in question and forms of responsibility the Co-Prosecutors allege against the persons already charged in Case 002 are described under the heading "Legal Classification" at paras 7-8 of the Co-Prosecutors' First Request.
[17] Co-Prosecutors' First Request, para. 1.
[18] Co-Prosecutors' Further Investigative Request Regarding Khmer Krom, 6 January 2010, D274/2 ("Co-Prosecutors' Second Request").

(ii) the Co-Prosecutors' Second Request insofar as it relates to the facts that fall outside the scope of the investigation; and (iii) the Civil Parties' Request insofar as it raises the same issues made by the Co-Prosecutors, which fall outside the scope of the investigation.

5. On the same day, the CIJs issued the Second Impugned Order which, in the relevant part, declared inadmissible the applications of sixteen Civil Party Applicants identifying themselves as being ethnic Vietnamese from Kampong Chhnang Province and seventeen Civil Party Applicants identifying themselves as belonging to the Khmer Krom minority.[20] The CIJs rejected the above Civil Party Applications on the ground that the "necessary causal link between the alleged injury and the facts under investigation was not established by the applicants" in question.[21]

6. The Civil Parties and Civil Party Applicants request the First and Second Appeals to be joined together. They further request that a public hearing be held by the Pre-Trial Chamber because: (i) the appeals are unprecedented;[22] (ii) they raise issues of public interest;[23] (iii) a public hearing could be audio-visually relayed to the Civil Parties and Civil Party Applicants from far away provinces;[24] (iv) the appeal decision will conclusively determine the role of the Civil Party Applicants in Case 002;[25] and (v) a public hearing would not affect public order or any protective measures authorized by the court.[26]

7. The First Appeal raises four grounds of appeal against the First Impugned Order, alleging that: (i) the Co-Prosecutors' First and Second Requests, individually and/or together constitute a Supplementary Submission;[27] (ii) the Co-Prosecutors' First and Second Requests and the Civil Parties' Request fall within the scope of the judicial investigation;[28] (iii) the CIJs can investigate the facts set out in the Civil Parties' Request; and[29] (iv) "by

[19] Co-Prosecutors' Second Request, para. 1.
[20] See fns 7 & 8 above, as well as Second Impugned Order, p. 8.
[21] Second Impugned Order, para. 19.
[22] First and Second Appeals, Section I, para. (a).
[23] First and Second Appeals, Section I, para. (b).
[24] First and Second Appeals, Section I, para. (c).
[25] First and Second Appeals, Section I, paras (d), (e).
[26] First and Second Appeals, Section I, para. (f).
[27] First Appeal, Section II, para. 2.b.
[28] First Appeal, Section II, para. 2.a.
[29] First Appeal, Section II, para. 2.c.

limiting the participation of the Civil Parties and Civil Party Applicants at the ECCC, the ECCC undermines the foundational principles of the ECCC."[30]

8. The Second Appeal moves the Pre-Trial Chamber to set aside the Second Impugned Order and order that the Civil Party Applicants be reinstated or admitted as Civil Parties in Case 002. It alleges that all Khmer Krom and Vietnamese Civil Party Applicants fall within both the jurisdiction of the ECCC[31] and the scope of the Introductory Submission, and that investigations conducted by the CIJs in Kampong Chhnang brought ethnic Vietnamese within the scope of facts under investigation.[32] It further alleges that the Second Impugned Order is: (i) premature until the scope of judicial investigation is fully determined;[33] (ii) contrary to the fundamental principles of the ECCC regarding the participation of victims and is without cause;[34] (iii) errs in law in declaring inadmissible Civil Party applications the CIJs previously admitted;[35] (iv) fails to consider all relevant information and rejects Vietnamese Civil Party Applications *en masse*; [36] and (v) impairs the ECCC's overall case of genocide against the Vietnamese.[37]

9. The Co-Prosecutors did not respond to the Appeals.

10. On 29 March 2010, this Chamber issued its "Decision to Determine the Appeal on Written Submissions and to Invite the Co-Prosecutors to Clarify their Position" ("Decision Inviting Clarification"), inviting the Co-Prosecutors to clarify whether the Co-Prosecutors' First Request was intended to be a Supplementary Submission.[38]

[30] First Appeal, Section II, para. 2.d.
[31] Second Appeal, Section II, paras 1.a, 3.a, 3.c.
[32] Second Appeal, Section II, paras 1.b, 3.b, 3.d.
[33] Second Appeal, Section II, para. 1.c.
[34] Second Appeal, Section II, paras 1.d, 1.e.
[35] Second Appeal, Section II, para. 3.e.
[36] Second Appeal, Section II, para. 3.f.
[37] Second Appeal, Section II, para. 3.g.
[38] Decision to Determine the Appeal on Written Submissions and to Invite the Co-Prosecutors to Clarify their Position, 29 March 2010, D250/3/2/1/2 ("Decision Inviting Clarification").

11. On 31 March 2010, the Co-Prosecutors filed their "Co-Prosecutors' Response to Pre-Trial Request to Clarify 11 December 2009 Filing on Khmer Krom." ("Co-Prosecutors' Clarification").[39]

12. The Khmer Krom Civil Parties' and Civil Party Applicants' Reply to the Co Prosecutor's (sic) Clarification on 11 December 2009 Filing on Khmer Krom" was filed on 5 April 2010.[40],

II. PRELIMINARY CONSIDERATION

13. The Pre-Trial Chamber observes that the Co-Prosecutors confirm that their First Request was "intended to serve as a supplementary submission confirming that the CIJs were seized of the facts relating to the Khmer Krom described in that filing."[41] The confirmation that the Co-Prosecutors' First Request was intended to be a Supplementary Submission is however qualified by the Co-Prosecutors, since they further explain that the sole reason the Co-Prosecutors' First Request did not include the words "Supplementary Submission" in the title related to a [redacted] view that the CIJs were already seized of the facts regarding the Khmer Krom set forth in that filing.[42] In light of the above-mentioned [redacted] as to whether the CIJs were already seized of the facts relating to the Khmer Krom mentioned in their First Request and, as a consequence, as to whether a Supplementary Submission was required prior to moving to their common aim, that is further investigation of the said facts, there were more avenues open to the Co-Prosecutors

[39] Co-Prosecutors' Response to Pre-Trial Chamber Request to Clarify 11 December 2009 Filing on Khmer Krom, 31 March 2010, D274/4/3 ("Co-Prosecutors' Clarification").
[40] Khmer Krom Civil Parties' & Civil Party Applicants' Reply to Co Prosecutor's Clarification on 11 December 2009 Filing on Khmer Krom, 5 April 2010, D250/3/2/1/4 ("Appellants' Reply").
[41] Co-Prosecutors' Clarification, para. 3.
[42] Co-Prosecutors' Clarification, para. 4. See also, Appellants' Reply, paras 7 & 8, according to which, in light of the Co-Prosecutors' Clarification, the Appellants are asking the Pre-Trial Chamber to invite the CIJs to "*give effect* to their discretion which they erroneously eschewed for want of authorization. The Appellant also stress that admitting Khmer

that the one they chose: (i) filing a request for investigative action of the facts relating to the Khmer Krom based on Internal Rule 55(10) and making explicit that in the event the CIJs considered that the facts in question fell outside the scope of the Initial Submission, the filing was to be considered a formal 'Supplementary Submission'; (ii) filing a 'non ambiguous' Supplementary Submission to be on the safe side; (iii) [redacted] or (iv) filing a request for investigating action and, in the event, as in the instant case, of its rejection by the CIJs, filing a Supplementary Submission. In light of the option chosen by the Co-Prosecutors and of the terms of the First Impugned Order, it was still open to the Co-Prosecutors to file a Supplementary Submission or to appeal the First Impugned Order.

14. The Co-Prosecutors did none of the above and explain that they did not consider taking the first course of action because "it was not appropriate to file a Supplementary Submission after the CIJs issued their notice of Conclusion of Judicial Investigation pursuant to Internal Rule 66(1)."[43] According to the said rule, notification to the parties by the CIJs that they consider that the investigation has been concluded opens a delay for parties to request further investigative action. The Internal Rules do not expressly foresee the possibility for the Co-Prosecutors to file a Supplementary Submission at that stage, but they do not exclude it either. The Co-Prosecutors do not fully explain why, since: (i) it was their intention that the CIJs be seized of the facts relating to the Khmer Krom described in their First Request; and (ii) in their view, the CIJ's determination that they were not seized of the facts relating to the mass executions of Khmer Krom in Bakan District was incorrect,[44] they did not appeal the First Impugned Order. They clarify that they considered that the validity of the said order would be best determined through the First Appeal, filed by the Khmer Krom Civil Parties.[45] The next section of the present decision will show that this cannot be so.

Krom Civil Party Applicants from Bakan District as Civil Parties is central to ascertaining the truth and delivering some measure of closure to Khmer Krom victims of mass crime.

[43] Co-Prosecutors' Clarification, para. 10.

[44] Co-Prosecutors' Clarification, para. 8.

[45] Co-Prosecutors' Clarification, para. 10.

II. ADMISSIBILITY OF THE APPEALS

15. The CIJs issued the First Impugned Order on 13 January 2010, and it was notified on 14 January 2010 to the Co-Lawyers of the Civil Parties and Civil Party Applicants, who filed their notice of appeal on 21 January 2010, in accordance with Internal Rule 75(1). The First Appeal was subsequently filed on 12 February 2010, within the time limit set out in Internal Rule 75(3).

16. The First Appeal is filed pursuant to Internal Rule 74(4)(a) according to which Civil Parties may appeal against orders by the CIJs refusing requests for investigative action allowed under the Rules, and Internal Rule 55(10) pursuant to which at any time during an investigation, a Civil Party may request the CIJs to make such orders or undertake such investigative action as he/she considers necessary for the conduct of the investigation. The Pre-Trial Chamber considers that both Internal Rules apply to Civil Party Applicants as well as Civil Parties, unless their civil party application has been declared inadmissible by a final decision. The First Impugned Order considered that insofar as it requests the CIJs to consider new evidence regarding alleged crimes against the Khmer Krom group in Pursat and Takeo Provinces, and against ethnic Vietnamese in Kampong Chhnang Province, the Civil Parties' and Civil Party Applicants' Request raises substantively the same matter as the Co-Prosecutors' First and Second Requests (namely, that investigations into the treatment of Khmer Krom and ethnic Vietnamese people in geographic regions which do not fall within the scope of the Introductory Submission nor the Supplementary Submissions) so the CIJs rejected this aspect of the Civil Parties' Request on the same grounds as for the Co-Prosecutors' Request.[46]

17. The Pre-Trial Chamber recalls that the Civil Parties' Request aims at: (i) drawing the CIJs' attention to new evidence establishing the crimes of genocide and crimes against humanity committed against the Khmer Krom minority group in Pursat and Takeo Provinces during the DK period; and (ii) supplementing the Co-Prosecutors' Introductory Submission with

[46] First Impugned Order, para. 9. The CIJs identified a second aspect of the Civil Parties' Request, namely, arguing that the Khmer Krom have been subjectively perceived to be Vietnamese by the alleged perpetrators, and stated in this respect that the CIJs "will not provide a declaratory relief on the applicable law since such legal characterizations will be set out in the Closing Order in accordance with Internal Rule 67(2)." First Impugned Order, para. 10.

evidence that the territorial sweep of the genocide and crimes against humanity committed against the ethnic Vietnamese minority group extended to Kampong Chhnang Province during the same period, and requesting that the crimes in question become part of Case 002.[47] The Pre-Trial Chamber further notes that, while the First Appeal alleges that the Civil Parties' Request falls within the scope of the judicial investigation,[48] this was clearly not the position the Appellants held before the CIJs when they made their request. Indeed, they then argued that, while the Introductory Submission set forth that the Communist Party Kampuchea (CPK) implemented a policy of physically eliminating the entire Vietnamese population of Prey Veng Province through execution,[49] the Introductory Submission "captures neither the extent of the crimes committed against the ethnic Vietnamese, nor any of the crimes committed against the Khmer Krom minority on the basis of their actual or perceived national, and/or ethic (sic) affiliation to the Vietnamese".[50] The Civil Parties' Request clearly states that it "seeks to fill these lacunae."[51] Without giving excessive weight on the title of the said request, the Pre-Trial Chamber notes that it uses the term "supplementary investigation", which is also in line with the above-mentioned approach. Accordingly, the Pre-Trial Chamber is of the view that the Civil Parties' Request does not qualify as a request for investigative action pursuant to Internal Rule 55(10). Read together, Internal Rules 55(3) and 55(10) show that while Civil Parties and Civil Party Applicants may request the CIJs to make such orders or undertake such investigative action as they consider necessary for the conduct of the investigation, the scope of the investigation is defined by the Introductory and Supplementary Submissions. The Pre-Trial Chamber is of the view that the restriction imposed by Internal Rule 55(3) on the CIJs, who can only investigate new facts that are limited to aggravating circumstances relating to an existing submission, or for which the Co-Prosecutors have filed a Supplementary Submission, equally applies to Civil Parties and Civil Party Applicants, who can bring new facts to the attention of the CIJs or the Co-Prosecutors, but have no standing for requesting investigative actions for such facts unless these are included by the Co-Prosecutors in a Supplementary

[47] Civil Parties' Request, para. 1.
[48] First Appeal, Section II, para. 2.a.
[49] Civil Parties' Request, para. 7 and fn. 13, referring to Introductory Submission, para.69.
[50] Civil Parties' Request, para. 7.
[51] Civil Parties' Request, para. 8.

Submission. Having further reviewed the various grounds of pre-trial appeals open to Civil Parties and Civil Party Applicants by Internal Rule 74(4), the Pre-Trial Chamber concludes that the First Appeal is inadmissible.

18. Before turning to the admissibility of the Second Appeal, the Pre-Trial Chamber notes that the Co-Prosecutors expected[52] that this Chamber would consider the merits of the appeal in question and dispose of it in favour of the Appellants, in finding that the CIJs erred in failing to treat their First Request as a Supplementary Submission. They further indicated that given the interviews that were conducted by the CIJs relating to the Khmer Krom in Rumlech commune during the course of Case 002 and additional investigations conducted pursuant to the CIJ's Order of 16 March 2010,[53] they did not think that substantial further investigative action would be required in the event the Pre-Trial Chamber determined that their First Request did in fact qualify as a Supplementary Submission.[54] They also considered that in such a scenario it would be for the CIJs to determine whether any additional investigative action would be required. As indicated above and as will be further developed below in the context of the Second Appeal, before the ECCC the responsibility for deciding to expand an investigation beyond the scope of initial and existing supplementary submissions solely rests with the Co-Prosecutors, and in light of the position expressed in the Co-Prosecutors' Clarification, the Pre-Trial Chamber has informed the parties of its determination that the First Appeal is inadmissible without waiting for the issuance of the present decision and the reasons it contains.[55] The Co-Prosecutors (and as far as necessary further investigative measures are concerned, the CIJs) are also obviously better placed than the Pre-Trial Chamber to assess the time impact a Supplementary Submission would have on the perspective of bringing Case 002 to a closure and to weigh the respective and potentially conflicting interests of the parties and Civil Party Applicants concerned. The Pre-Trial Chamber is conscious that this is a very difficult call to make and without knowing what the Co-Prosecutors will ultimately decide to do in this respect, the Pre-Trial Chamber turns to the admissibility of the Second Appeal.

[52] Co-Prosecutors' Clarification, paras. 10 and 11.
[53] Order on Co-Prosecutors' Investigative Request Regarding Bakan District and Admission of Khmer Krom Civil Parties, 16 March 2010, D351/1.

19. The CIJs issued the Second Impugned Order on 13 January 2010, and it was notified on 14 January 2010 to the Co-Lawyers of the Civil Party Applicants, who filed their notice of appeal on 21 January 2010, in accordance with Internal Rule 75(1). The Second Appeal was subsequently filed on 12 February 2010, within the time limit set out in Internal Rule 75(3).

20. The Second Appeal is filed pursuant to Internal Rule 74(4)(b) according to which Civil Parties may appeal against orders by the CIJs declaring a civil party application inadmissible. The Pre-Trial Chamber recalls that, with one exception,[56] the Appellants in the Second Appeal are the Civil Party Applicants whose civil party applications were declared inadmissible by the Second Impugned Order.[57] The admissibility of the Second Appeal is therefore unquestionable.

IV. MERIT OF THE SECOND APPEAL

21. As a preliminary note, the Pre-Trial Chamber recalls the standard of review applicable before it. An Appellant seeking to overturn a decision from the CIJs shall demonstrate that the challenged decision was: (i) based on an incorrect interpretation of governing law; or (ii) based on a patently incorrect conclusion of fact; or (iii) where the decision in question is a discretionary one, that it was so unfair or unreasonable as to constitute an abuse by the CIJ's discretion.[58]

22. The Pre-Trial Chamber is of the view that arguments of a party which do not have the potential to cause the impugned decision to be reversed or revised may be dismissed immediately by the Pre-Trial Chamber and need not be considered on the merits.[59] With

[54] Co-Prosecutors' Clarification, para. 11.
[55] Information to the Parties by the Greffiers of the Pre-Trial Chamber, sent by e-mail on 31 March 2010.
[56] One of the Civil Party Applicants, namely [redacted]16, is deceased. Second Impugned Order, para. 2, fn. 2. *See also*, Second Appeal, fn.1, according to which, at the time the Second Impugned Order was filed, efforts were being made to seek the view of the family of [redacted]16 as to how to proceed with his Civil Party Application and these efforts were cancelled following notice of the Second Impugned Order.
[57] *See* para. 5 and n.20, *supra*.
[58] Public Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, 18 November 2009, D164/4/13, paras 25-27, adopting the test developed by the ICTY Appeals Chamber in the interlocutory appeal case *Slobodan Milošević v. Prosecutor*, IT-02-54-AR73.7, 1 November 2004.
[59] See in the context of ICTY and ICTR appeals from judgement, *Prosecutor v. Blaškić*, ICTY IT-95-14-A, "Judgement", Appeals Chamber, 29 July 2004 ("*Blaškić* Appeal Judgement"), para. 15, referring to *Rutaganda v. Prosecutor*, ICTR-96-3-A, "Judgement", Appeals Chamber,, 26 May 2003, ("*Rutaganda* Appeal Judgement "), para. 18.

regard to requirements as to form, an appealing party is expected to provide precise references to relevant transcript pages or paragraphs in the decision being challenged.[60] The Pre-Trial Chamber will not give detailed consideration to submissions which are obscure, contradictory, or vague, or if they suffer from other formal and obvious insufficiencies.[61] Thus, in principle, the Appeals Chamber will dismiss, without providing detailed reasons, those submissions which are evidently unfounded.[62]

23. The Second Appeal alleges that all Khmer Krom and Vietnamese Civil Party Applicants fall both within the jurisdiction of the ECCC,[63] are within the scope of the Introductory Submission, and that investigations conducted by the CIJs in Kampong Chhnang brought ethnic Vietnamese within the scope of facts under investigation.[64] It further alleges that the Second Impugned Order is: (i) premature until the scope of judicial investigation is fully determined;[65] (ii) contrary to the fundamental principles of the ECCC regarding the participation of victims and is without cause;[66] (iii) errs in law in declaring inadmissible Civil Party applications the CIJs previously admitted;[67] (iv) fails to consider all relevant information and rejects Vietnamese Civil Party Applications *en mass;* and[68] (v) impairs the ECCC's overall case of genocide against the Vietnamese.[69]

24. The Pre-Trial Chamber notes that the Second Impugned Order declared inadmissible the applications of sixteen Civil Party Applicants identifying themselves as being ethnic Vietnamese from Kampong Chhnang Province and seventeen Civil Party Applicants identifying themselves as belonging to the Khmer Krom minority,[70] on the ground that the

[60] *Blaškić* Appeal Judgement, para. 15 and *Rutaganda* Appeal Judgement, para. 19.
[61] See in the context of an ICTY appeal judgement, *Prosecutor v. Kunarac, Kovač and Vuković*, IT-96-23 & IT-96-23/1-A, "Judgement", Appeals Chamber, 12 June 2002, para. 43.
[62] See *Rutaganda* Appeal Judgement, para. 19.
[63] Second Appeal, Section II, paras 1.a, 3.a, 3.c.
[64] Second Appeal, Section II, paras 1..b, 3.b, 3.d.
[65] Second Appeal, Section II, para. 1.c.
[66] Second Appeal, Section II, paras 1.d, 1.e.
[67] Second Appeal, Section II, para. 3.e.
[68] Second Appeal, Section II, para. 3.f.
[69] Second Appeal, Section II, para. 3.g.
[70] See fn. 7 and 8 above as well as Second Impugned Order, p. 8.

"necessary causal link between the alleged injury and the facts under investigation was not established by the applicants".[71]

25. The above challenged finding is based on the following approach:

- in order for a Civil Party application to be admissible, "the applicant is required to demonstrate that the injury results only from the facts for which the judicial investigation has already been opened, namely in this particular context, the treatment of Vietnamese in Prey Veng and Svay Rieng Provinces and during incursions into the territory of Vietnam";

- "pursuant to paragraphs 69 and 70 of the Introductory Submission, the [CIJs] are seized of facts relating to the treatment of the Vietnamese in Prey Veng and Svay Rieng Province, and during incursions into Vietnam. They are seized neither of facts targeting the Khmer Krom population in Pursat and Takeo provinces nor against the ethnic Vietnamese in Kampong Chhnang [P]rovince."[72] Therefore, the Impugned Order concludes, the reported facts are in their entirety distinct from those of which the CIJs are currently seized. [73]

26. Having found that all Civil Party Applicants provided sufficient evidence to consider it plausible that they suffered personal and direct injury, the CIJs verified whether or not the injury alleged was in relation to *other facts under investigation* as described in the Introductory and Supplementary Submissions.[74] As a consequence it considered that ten Civil Party Applicants provided sufficient evidence to establish *prima facie* that their injury is a direct consequence of the facts within the scope of the investigation, as described in the Introductory and Supplementary Submissions.[75] By contrast, with respect to the thirty two

[71] Second Impugned Order, para. 19.
[72] Second Impugned Order, para. 11.
[73] Second Impugned Order, para. 19 (emphasis added).
[74] Second Impugned Order, para. 11.
[75] Second Impugned Order, para. 18, in relation to Civil Parties who established that their injury is a direct consequence of (i) persecution against Buddhist monks in the territory of DK within the jurisdiction *rationae loci* of the ECCC (para. 72 of the Introductory Submission); and/or (ii) incursions by the DK forces into the territory of Vietnam in 1978 (para. 70 of the Introductory Submission); (iii) the evacuation of Phnom Penh (para. 37 of the Introductory Submission); (iv)

Civil Party Applicants, the CIJs found that no circumstances allowed them to consider the possibility of a direct link between the alleged injury and the alleged crimes under investigation.[76] It must be noted that the Second Impugned Order otherwise found that all Civil Party Applicants justified that they are natural persons and provided proof of their identity.[77]

27. Internal Rule 77*bis*, adopted on 9 February 2010 requires the Appellant to reason why the CIJs are alleged to have erred in fact and/or law in determining the admissibility of the civil party application pursuant to Internal Rule 23*bis*, which only entered into force on 19 February 2010, thus after the filing of the Second Appeal. However, the Pre-Trial Chamber notes that the new rule merely codifies the obvious requirement already spelled out by the Pre-Trial Chamber's jurisprudence.[78] As will be shown below, most but not all of the grounds or sub-grounds of appeal in the Second Appeal articulate the reasons why it alleges that the Impugned Order is in error. The Pre-Trial Chamber will examine each of the said allegations in turn, starting with the allegation that all Khmer Krom and Vietnamese Civil Party Applicants fall both within the jurisdiction of the ECCC, and are therefore admissible.[79]

A. Khmer Krom and Vietnamese Civil Party Applicants allege injuries as consequence of crimes falling within the jurisdiction of the ECCC

28. The Appellants argue that Internal Rule 23(1)(a) according to which, the purpose of a civil party action before the ECCC is notably to participate in criminal proceedings against those responsible for crimes within the jurisdiction of the ECCC by supporting the prosecution, does not limit civil party participation to those within the scope of the prosecutorial investigation. While it is correct that Internal Rule 23(1)(a) merely limits civil party participation to victims of crimes within the jurisdiction of the ECCC, this argument must

forced marriage (Supplementary Submission of 30 April 2009); and (v) forced transfer from the East Zone, and in particular from Prey Veng and Svay Rieng provinces to Pursat and Battambang provinces (para. 42 of the Introductory Submission).

[76] Second Impugned Order, para. 19.

[77] Second Impugned Order, para. 15.

[78] Public Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, 18 November 2009, D164/4/13, paras 25-27.

[79] Second Appeal, Section II, paras 1.a, 3.a, 3.c.

fail because it ignores the additional requirement that for a civil party action to be admissible the applicant must demonstrate that he or she has suffered injury as a direct consequence of at least one of the crimes alleged against the charged person(s).

29. Indeed, in substance, both Internal Rule 23(2), applicable at the time each of the civil party applications in question were placed on the file,[80] and Internal Rule 23*bis*(1)(b) entered into force after the Second Appeal was filed,[81] provide that for a civil party action to be admissible, the Civil Party Applicant shall *inter alia* demonstrate that he or she has suffered injury as a direct consequence of at least one of the crimes alleged against the Charged Person(s).

30. As to the further argument that the Court should not abdicate its investigative jurisdiction over the Khmer Krom (and Vietnamese) Civil Party Applicants' evidence,[82] the CIJs rightly stated that, unlike under Cambodian criminal procedure, "a victim who wishes to be joined as a Civil Party may only do so by *way of intervention*, joining on going procedures".[83] Internal Rule 55(3) restricts the scope of the investigation to that defined by the initial and supplementary submissions. Whereas in the instant case, if new facts which the CIJs consider as exceeding this scope come to their attention during an investigation, they shall, unless the facts in question are limited to aggravating circumstances relating to an existing Introductory or Supplementary Submission, refer them to the Co-Prosecutors, who have sole responsibility for filing Supplementary Submissions. They shall not investigate such facts unless they receive a Supplementary Submission in relation to these facts. The Pre-Trial Chamber is of the view that a proper reading of the Internal Rules dealing with the admissibility of civil party applications and the obligations of the CIJ in the case of new

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[80] Internal Rule 23(2) (Internal Rules (Rev. 3) adopted on 6 March 2009 and identical, in relevant part to Internal Rule 23(2) of Internal Rules (Rev. 4) adopted on 11 September 2009) read, in the relevant part, that in order for civil party action to be admissible the injury must be "the direct consequence of the offence, personal and have actually come into being."

[81] Internal Rule 23bis(2) (Internal Rules (Rev. 5), adopted on 9 February 2010, entered into force on 19 February 2010, read in relevant part that, in order for a Civil Party action to be admissible, "the Civil Party applicant shall 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 [...] injury upon which a claim of collective and moral reparation might be based."

[82] Second Appeal, Section III, paras 5 & 34 by reference.

[83] Second Impugned Order, para. 8, referring to Articles 138-142 of the Cambodian Criminal Procedure Code.

facts coming to their knowledge in the course of an investigation do not support the Appellant's argument.

31. The Pre-Trial Chamber turns now to the Appellants allegations that several Khmer Krom[84] and all Vietnamese[85] civil party applications fall within the scope of the Introductory Submission.

B. Several Khmer Krom and all Vietnamese Civil Party applications fall within the scope of the Introductory Submission

32. The Appellants develop five sub-grounds of appeal under this second ground of appeal alleging that: (i) a Khmer Krom Civil Party Applicant establishes injuries caused by crimes under investigation in Takeo Province; (ii) Khmer Krom Civil Party Applicants established injuries linked to crimes of displacement of persons from the East Zone under investigation; (iii) the Introductory Submission unduly limits to specific locations crimes against Khmer Krom and Vietnamese victims; (iv) Vietnamese civil party applications fall within the scope of the Introductory Submission; and (v) investigations conducted in Kampong Chhnang brought ethnic Vietnamese victims within the scope of facts under investigations. The Pre-Trial Chamber will examine these sub-grounds of appeal in turn.

1. Takeo Province

33. According to the Appellants, the Second Impugned Order erred in declaring the civil party application of [redacted]05[86] inadmissible because he alleges injury linked to facts under investigation[87] at Sre Ronong commune, in Takeo Province.

34. The Pre-Trial Chamber notes that the Co-Prosecutors decided to open a judicial investigation against the Charged Persons into the facts specified in paragraphs 37 to 72 of the Introductory Submission, [88] including at paragraph 43 of the Introductory Submission: unlawful detention, forced labour, inadequate food, mass starvation and arbitrary arrests that

[84] Second Appeal, Section III, paras. 8-13.
[85] Second Appeal, Section III, paras. 35-38.
[86] Second Appeal, Section III, para. 9, referring to Civil Party Applicant [redacted]
[87] Second Appeal, Section III, para. 9, referring to Introductory Submission, para.43.
[88] Introductory Submission, para. 122.

occurred in cooperatives located in the communes of *inter alia* Sre Ronong in Tram Kok District of Takeo Province in the Soutwest Zone. As rightly pointed out by the Appellant,[89] his application stresses that, in late 1976, he was arrested,[90] placed in Prison 204 located in Prey Mouk village, Srae Ronoung commune, one of the Tram Kok District Cooperatives in Takeo Province and subjected to forced labour and starvation.[91]

35. The Pre-Trial Chamber notes that the Second Impugned Order considered that the causality link between the injury alleged and the facts under investigation is not established.[92] According to the Second Impugned Order, the reported facts are in their entirety distinct from those of which the CIJs are currently seized and no circumstances allowed them to consider the possibility of a direct link between the alleged injury and the alleged crimes under investigation.[93] The Pre-Trial Chamber is of the view that, in so far as it relates to [redacted]05, this conclusion is unsupported for the aforementioned reasons and that the CIJs erred in fact in reaching this conclusion which shall therefore be reversed and [redacted]05's civil party application admitted in so far as it establishes a link between the injury alleged and the above mentioned crimes alleged in the Introductory Submission.

2. Displacement of Persons from the East Zone

36. According to the Appellants, the Second Impugned Order erred in declaring the Civil Party Application of [redacted]14, [redacted]15, [redacted]19, [redacted]20, [redacted]23 and [redacted]24[94] inadmissible because they suffered personal psychological harm as a direct consequence of witnessing crimes coming within the jurisdiction of the ECCC under Internal Rule 23.[95] For the reasons stated at paragraph 22 above, this argument is not capable of showing an error on the part of the CIJs.

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[89] Second Appeal, Section III, para. 10.
[90] Victim Information Form, [redacted]05[redacted], page 5, specifies that he was accused by the Khmer Rouge of being a Lon Nol soldier.
[91] Victim Information Form, [redacted]05[redacted] page 5, alleges that he was made to work hard, to dig out tree roots and that meals were very little, small portions of rice twice a day and that he survived by eating tree roots and leaves.
[92] Second Impugned Order, para. 16 and, as to [redacted]05 specifically, p 5.
[93] Second Impugned Order, para. 19.
[94] Second Appeal, Section III, paras 11-13 and fn. 25, referring to Victim Information Forms and affidavits for Civil Party Applicants [redacted]14[redacted]15[redacted]19[redacted]20[redacted]23[redacted]24[redacted]
[95] Second Appeal, Section III, para. 13.

However, the Appellant also argues that selected Khmer Krom Civil Party Applicants allege injury linked to the mass forced displacement of population from the East Zone, in particular from Prey Veng and Svay Rieng Provinces and stressed that this forced displacement forms part of the Introductory Submission and was seeking to "forcibly disperse people and groups that the CPK considered to be potentially disloyal."[96]

37. The Pre-Trial Chamber notes that, as part of the crimes alleged under the heading 'forced movement' and forcible transfer of people from the East Zone: phase 3, in addition to the above-mentioned excerpt from paragraph 42 of the Introductory Submission, the paragraph in question alleges that in mid 1978, the CPK leadership ordered a third large scale movement, which resulted in tens of thousands of people living in the East Zone being forcibly relocated to the Central, West and Northwest Zones, including people from the provinces of Prey Veng and Svay Rieng. It also adds that many people were deliberately killed or died as a direct result of the forcible transfer.

38. Having reviewed the six above-mentioned applications, the Pre-Trial Chamber notes that the Second Impugned Order's conclusion that the reported facts are in their entirety distinct from those of which the CIJs are currently seized and no circumstances allowed them to consider the possibility of a direct link between the alleged injury and the alleged crimes under investigation,[97] is unsupported in relation to [redacted]15, [redacted]19, [redacted]20, [redacted]23 and [redacted]24, because in their respective victim information form the events they describe and as a result of which they *inter alia* allege mental harm are linked to the forcible transfer of populations from the East Zone to the Central, West and Northwest Zones as shown below:

- [redacted]15, who was living in Phnum Kravanh district before the Khmer Rouge regime, alleges that in 1978 he and his children were brought to Kamprak Koun, Khnar Totueng Commune, Bakan District, Pursat Province where they were assigned to make ploughing tools and subjected to forced labour. He states that during the same year the Khmer Rouge brought Khmer Krom and Vietnamese who were accused of being enemies to Tuol Kor (Damnak Thong village, Khnar

[96] Second Appeal, Section III, para. 11 and fn 24, referring to Introductory Submission, para. 42.
[97] Second Impugned Order, para. 19.

Toteung, Bakan District) and Tuol Ben (Rung Ta Kok village, Rumlech commune, Bakan District) to be killed. Immediately after this statement he indicates under the heading 'targeting Eastern (sic) Zone victims' that he witnessed Khmer Rouge soldiers *killing people from the East Zone* by cutting their throats with an M16 bayonet. In the absence of contradictory information on the form, the Pre-Trial Chamber understands that [redacted]15 alleges that the events he witnessed also took place in 1978 while he had already been transferred in Pursat Province.[98] Furthermore, although [redacted]15 essentially alleges mental harm from the lost of his two children and wife, in light of the violence of the above events which [redacted]15 attests to have witnessed, the Pre-Trial Chamber understand that he also alleges mental harm as a consequence of these events;

- [redacted]19 alleges that, among other crimes, in relation to the targeting of East Zone Victims, in 1978, he saw about 20 people who were *from Svay Rieng province* with their hands tied behind their backs, walking in line from a village of Battambang Province to another village of Battambang Province. He also saw graves, containing the naked bodies of Khmer Krom and Khmer people and was forced by the Chief of his unit to cover those graves.[99] [redacted]19 also *inter alia* alleges mental pain as a result of the crimes witnessed;

- [redacted]20, who was relocated to Bakan District in 1976 until 1979, alleges that, among other crimes, in relation to the targeting of the East Zone, he saw in 1977-1978, the Khmer Rouge trying to kill all Khmer Krom living in his community as well as *bringing* Khmer Krom and other *people* accused of being Vietnamese *from Svay Rieng* to be killed.[100] [redacted]20 *inter alia* alleges mental suffering;

- [redacted]23 alleges that cadres from the Southwest ruled by TA Mok began to arrest former cadres and chiefs of communes, collectives, districts and sectors in the East Zone, imprisoned and killed most of them and also *sent the Khmer Krom to the*

[98] Victim Information Form, [redacted]15
[99] Victim Information Form, [redacted]19
[100] Victim Information Form, [redacted]20

collective in Khnar Totueng.[101] [redacted]23 also seems to date the killing of his parents and siblings between July and August 1978 but it is unclear whether he alleges that they were also forcibly transferred.[102] [redacted]23 alleges mental harm essentially in relation to the killings of members of his family, however, the Pre-Trial Chambers understands from [redacted]23's statement that 1978 was the worst year in the Khmer Rouge Regime, when cadres from the Southwest ruled by TA Mok were transferred and the above-mentioned crimes were committed so that he suffered from these events as well; and

– [redacted]24 alleges that killings of people *from Svay Rieng* was invasive in Bakan District, Pursat Province where he was detained in the village of Veal, Ta Lou commune. He added that the Khmer Rouge tried and killed 100 people each time, and that he and others were ordered to dig pits and bury the dead bodies. Around July 1978, he heard them saying that they killed thousands of the Yuon enemy in the cooperatives of Rumlech and Khnar Totueng.[103] He *inter alia* alleges mental harm resulting from the mistreatment he and other people endured.

For the aforementioned reasons, the second Impugned Order shall be reversed in relation to [redacted]15, [redacted]19, [redacted]20, [redacted]23 and [redacted]24 and their respective civil party applications shall be admitted in so far as it establishes a link between the injury alleged and the above mentioned crimes alleged.

39. By contrast, review of the victim information form submitted by [redacted]14[104] does not support the Appellants' contention that the challenged conclusion is erroneous in relation to his application. This sub-ground of the Appeal is accordingly dismissed. The Pre-Trial Chamber turns next to the Appellants' sub-ground of appeal, according to which the CIJ's definition of the scope of investigation is unduly narrow.

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[101] Pursat Province.
[102] Victim Information Form, [redacted]23
[103] Victim Information Form, [redacted]24
[104] Victim Information Form, [redacted]14. The Second Appeal, fn. 26, merely paraphrases [redacted]14's statement explaining the meaning of a slogan used at the time 'eating mango is better than tamarined' which, other than his description of the killing of Khmer Krom family members in 1977 and 1978, neither contains any reference to forced displacement or even displacement of the persons killed.

3. Does the Introductory Submission unduly limit crimes alleged against Khmer Krom and Vietnamese victims to the locations it referred to?

40. The Appellants argue that for the crime of genocide and other crimes against humanity premised on an element of persecution of a targeted group, evidence of the crimes in question is not limited to specific regions and the scope of the investigation was erroneously limited by the Second Impugned Order to the provinces listed in the Introductory Submission.[105] The Appellants assert that the Co-Prosecutors merely used specific instances in the communes and security centres listed in the Introductory Submission as evidence of a broad criminal plan,[106] the scope of which extends beyond these individual locations and occurrences. Thus additional instances of crimes raised by Khmer Krom Civil Party Applicants are within the scope of the investigation, because they serve to establish the persecutory/genocidal element of the Charged Person's plan and the CIJs erred by declaring them inadmissible.[107]

41. The Pre-Trial Chamber notes that the Introductory Submission alleges against the Charged Persons the existence of a common criminal plan involving systematic discrimination against targeted groups including the Vietnamese religious and ethnic minority.[108] It also listed a number of 'criminal acts' demonstrating the extent of this systematic discrimination, which read in the relevant part :

> "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. However, the CPK's relationship with Vietnam steadily 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."[109]

This indeed supports the argument that the evidence from the Appellants may well contribute to establishing the existence of a criminal plan of targeting and eliminating

[105] Second Appeal, Section III, paras. 14-17, referring to Second Impugned Order, para. 9 and Introductory Submission, paras 122(b) and 122(c).
[106] Second Appeal, Section III, para. 17, referring to Introductory Submission, paras 69-70.
[107] Second Appeal, Section III, para.15.
[108] Introductory Submission, para. 12
[109] Introductory Submission, para. 12(f).

people the Khmer Rouge considered to be Vietnamese or to have some association or connection with Vietnam. However, when it comes to establishing the scope of the investigation in relation to the crimes charged which specifically targeted the Vietnamese population and aimed at eliminating it, paragraph 122 of the Introductory Submission explicitly decides to open an investigation into the facts specified in paragraphs 37 to 72 in relation to the crime of genocide of Vietnamese (sub-paragraph (b)) and persecutions (as a crime against humanity) on political, racial and religious grounds of Vietnamese (sub-paragraph (c)) : these are the facts related to the forcible transfer from Phnom Penh: phase 1;[110] the forcible transfer to the North and Northwest Zones: phase 2;[111] the forcible transfer of people from the East Zone: phase 3;[112] the forced labour, inhumane living conditions and unlawful detention in various zones and locations;[113] and the killing, torture and mental abuse at S21[114] and in various sectors and zones.[115] In this last section, the Introductory Submission specifically refers to crimes targeting the entire Vietnamese population of Prey Veng and Svay Rieng Provinces and refers to a policy of physical elimination through execution, the removal and execution of Vietnamese fathers of mixed Cambodian-Vietnamese marriage as well the removal and execution of both the mother and children if the mother was Vietnamese.[116] Additionally, the Introductory Submission refers to the killing of Vietnamese during incursions into Vietnam, as well as the wanton destruction of civilian property in Vietnamese territory.[117] In this light, the Second Impugned Order[118] was correct in requiring the Appellants to establish a direct link between their alleged respective injury and one of the facts underlying crimes specifically targeting the Vietnamese population (paragraphs 69-70 of the Introductory Submission) or at least one of the facts underlying the other crimes under investigation (paragraphs 37-68 and/or 71-72 of the Introductory Submission). The Appellants' final argument relating to the scope of the investigation for the crime of genocide and persecution is therefore dismissed. The Pre-Trial

[110] Introductory Submission, paras 37-39.
[111] Introductory Submission, paras 40-41.
[112] Introductory Submission, paras 42.
[113] Introductory Submission, paras 43-48.
[114] Introductory Submission, paras 49-55.
[115] Introductory Submission, paras 56-72.
[116] Introductory Submission, para. 69.
[117] Introductory Submission, para. 70.
[118] Second Impugned Order, para. 11.

Chamber now turns to the Appellants' sub-ground of appeal, according to which all Vietnamese Civil Party Applicants fall within the scope of the Introductory Submission.

4. Vietnamese Civil Party Applicants Fall Within the Scope of the Introductory Submission

42. The Appellants merely refer to paragraphs 41 to 76 of the Civil Party Applicants' and Civil Parties' Request and state that: (i) acts amounting to genocide included forced deportations to Vietnam of all sixteen ethnic Vietnamese Civil Party Applicants from Cambodia, the deliberate infliction of conditions of life calculated to bring about the destruction of the ethnic Vietnamese, and measures imposed to prevent births within the group; while, (ii) acts amounting to crimes against humanity include forced relocations within and outside Cambodia, extermination, enslavement and persecution. They assert on the basis of the ICTR definition of an ethnic group as a 'group whose members share a common language or culture',[119] that ethnicity is not defined by geographic location and that the crime of genocide against the ethnic Vietnamese cannot be limited to specific geographical areas. They similarly assert, without more justification, that imposing a geographical limitation on areas where the crimes against humanity were committed would fundamentally ignore the requirement to show that acts amounting to such crimes were conducted systematically and in a widespread manner.

43. The Pre-Trial Chamber is of the view that this ground of appeal is deficient in that it merely amounts to an assertion without articulating a specific error, or without referring to a specific finding of the Second Impugned Order or of the Introductory Submission. As such, it does not have the potential to cause the impugned decision to be reversed or revised and will be dismissed without being considered on the merits.[120] The Pre-Trial Chamber now turns to the Appellants' last sub-ground of appeal, which alleges that the investigations conducted by the CIJs in Kampong Chhnang brought ethnic Vietnamese victims within the scope of facts under investigation.

[119] Second Appeal, Section III, para. 37 and fn 66, referring to *Prosecutor v. Akayesu*, ICTR-96-4-T , "Judgment", Trial Chamber, 2 September 1998, p.512-15.
[120] See para. 22 above.

5. Whether Investigations conducted in Kampong Chhnang brought ethnic Vietnamese victms within the scope of facts under investigation

44. The Appellants firstly contend under this sub-ground of appeal that following release by the CIJs on 15 December 2009 of information about the scope of the judicial investigation in Case 002, investigators interviewed one Civil Party and one Civil Party Applicant from Kampong Chhnang about the singling out of the Vietnamese by the Khmer Rouge; the treatment of Vietnamese as well as events leading to their forcible deportation to Vietnam; the forced nature of their relocation there; whether Vietnamese victims remained in Cambodia; how Vietnamese were identified; and the separation of Khmer persons from Vietnamese persons at the point of deportation, including the separation of families in mixed marriages.[121] According to the Appellants this amounted to investigation in Kampong Chhnang into areas where crimes amounting to genocide against the ethnic Vietnamese group occurred and this is supported by the fact that the CIJs granted civil party status to one of the interviewees on the same date that the interview was conducted, which was the day before the first genocide charges were instituted by the CIJs in Case 002.[122]

45. The Pre-Trial Chamber notes that the Appellants fail to demonstrate that the above-mentioned investigative action went beyond the scope of the Introductory Submission, and that, where it did exceed the scope, the absence of a Supplementary Submission by the Co-Prosecutors, would be contrary to the restriction imposed on the CIJs by Internal Rule 55(3), and would have no impact on the admissibility of the civil party applications, which are equally limited by the scope of the Introductory and Supplementary Submissions.

46. The Appellants finally argue that the rejection *en masse* of sixteen ethnic Vietnamese Civil Party Applicants has had a devastating effect on these victims and is contrary to Principle 4 of the 1985 Victims Declaration, which provides that victims should be treated with compassion and respect for their dignity.[123] The Pre-Trial Chamber finds that, in so far as it provides reasons for its decision to reject each of the Civil Parties in question and refers both to the scope of the investigation and the applications in question, the Second Impugned

[121] Second Appeal, Section III, para. 41.
[122] Second Appeal, Section III, para. 42.

Order cannot be said to show a lack of compassion or disrespect for the victims. This final argument is therefore rejected and the Pre-Trial Chamber now turns to the Appellants' next ground of appeal, which alleges that the Second Impugned Order is premature.

C. Is the Second Impugned Order Premature?

47. Under this ground of appeal, the Appellants raise a number of arguments to which the Pre-Trial Chamber need not give detailed consideration because they are obscure, vague and do not clearly identify a specific error.[124] The Pre-Trial Chamber will therefore only consider the Appellants' arguments that: (i) the CIJs prematurely ruled on the admissibility of their civil party application instead of allowing them to be joined as Civil Parties pending the issuance of the Closing Order, until which time the scope of the investigation remains undetermined; and that[125] (ii) if the CIJs were of the opinion that the Appellants' civil party applications raised 'new facts', they should have referred these facts to the Co-Prosecutors pursuant to Internal Rule 55(3) at the earliest opportunity for the latter's immediate action.[126]

48. The Pre-Trial Chamber firstly observes that Internal Rule 23*bis*(2) specifically provides that the CIJs "may reject Civil Party applications, at any time until the date of the closing order."[127] In that it is based on the assessment by the CIJs that the Appellants did not establish that their alleged injury was a direct consequence of one of the crimes charged and, in light of the absence of filing of a Supplementary Submission by the Co-Prosecutors in relation to the new facts raised by the applications, the Second Impugned Order cannot be said to be premature. While in principle the Co-Prosecutors can file a supplementary submission until the Closing Order and accordingly expand the scope of the investigations as defined by the Introductory Submission and if any, earlier Supplementary Submission(s), the scope of the investigation cannot be said to be 'undefined' until the issuance of the Closing Order. The scope of the investigation is defined at any moment until the issuance of

[123] Second Appeal, Section III, para. 43.
[124] Second Appeal, Section III, para. 43.
[125] Second Appeal, Section III, para. 23.
[126] Second Appeal, Section III, para. 22.
[127] Internal Rule 23*bis*(3) also provides that when issuing the Closing Order, the CIJs shall decide on the admissibility of all remaining Civil Party applications by a separate order.

the Closing Order by the above-mentioned filings by the Co-Prosecutors. Turning to the second above-mentioned argument, the Pre-Trial Chamber recalls its earlier finding that the restriction imposed by Internal Rule 55(3) on the CIJs, who can only investigate new facts that are limited to aggravating circumstances relating to an existing submission, or for which the Co-Prosecutors have filed a Supplementary Submission, equally applies to Civil Parties and Civil Party Applicants, who can bring new facts to the attention of the CIJs or the Co-Prosecutors, but have no standing for requesting investigative actions for such facts unless these are included by the Co-Prosecutors in a Supplementary Submission. In the case at hand, the Pre-Trial Chamber notes that it does not appear that the "new facts"[128] described in paragraphs 3 to 6 of the Co-Prosecutors First Request were referred to the Co-Prosecutors by the CIJs. However, the terms of the First Request show that the Co-Prosecutors were aware of the new facts in question and that it was open to them to file a Supplementary Submission related to these facts.. This ground of appeal is thus dismissed and the Pre-Trial Chamber turns to the next ground of appeal alleging that the Second Impugned Order is contrary to the core principles regarding the participation of victims on which the ECCC is established and that it violated admitted Civil Parties' rights without cause.

D. Does the Second Impugned Order violate ECCC Core Principles or is it Without Cause?

1. Alleged violation of ECCC core principles in relation to Civil Parties' participation

49. The Appellants argue under this ground of appeal that the Second Impugned Order contravenes the central purpose of the ECCC – the pursuit of "justice and national reconciliation, stability, peace and security and runs contrary to the civil party process, which was designed to allow victims to actively participate in criminal proceedings."[129] It also argues that the CIJs violated admitted Civil Parties' by declaring them inadmissible without cause.[130]

50. The Pre-Trial Chamber notes that the ECCC law, whose purpose is to bring to trial senior leaders of DK and those who were most responsible for the crimes and serious violations of

[128] Co-Prosecutors First Request, para. 1.
[129] Second Appeal, Section III, paras 28-29.
[130] Second Appeal, Section III, paras 32-33.

Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1976,[131] also indirectly recognizes the participation of victims to proceedings since it acknowledges the possibility for victims to appeal a decision of the Trial Chamber before the Supreme Court of the ECCC.[132]

51. The procedural system in place at the ECCC, resulting both from the ECCC Law and the Internal Rules, provides for Co-Prosecutors solely responsible for exercising the public action for crimes within the jurisdiction of the ECCC, at their own discretion or on the basis of a complaint,[133] conducting preliminary investigations and,[134] opening a judicial investigation by sending an Introductory Submission to the CIJs, if they have reasons to believe that crimes within the jurisdiction of the ECCC have been committed.[135] As already indicated in the present decision, the CIJs responsible for conducting the judicial investigation are not only restricted to investigating crimes for which the ECCC has jurisdiction but are also limited to investigating the facts as set out in Introductory and/ or Supplementary Submissions.[136] The same restrictions apply to civil party applicants who wish to participate in proceedings to support the prosecution and seek collective and moral reparation.[137] During the investigation and within its scope, they can request such orders and investigative actions they deem necessary for the conduct of the investigation.[138] The admissibility of their application during the investigation is strictly dependant on their capacity to establish that their alleged injury is a direct consequence of one or more crime(s) alleged by the Co-Prosecutors against the Charged Person(s).[139] Once the Closing Order, if any, is final and any challenge brought to the CIJ's decision on the admissibility of civil party applications has been disposed of then at the trial stage and beyond the admitted Civil

[131] Law on Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea ("ECCC Law" and "DK"), paras 1-2.
[132] ECCC Law, para. 36 new.
[133] Internal Rule 49(1). See also ECCC Law, para. 16 recognizing the responsibility of the two Prosecutors for 'indictments'.
[134] Internal Rule 50.
[135] Internal Rule 53(1).
[136] Internal Rule 55(1).
[137] See, para. 16 above.
[138] Internal Rule, 55(10).
[139] Internal Rule (Rev.4) 23(1) and Internal Rule (Rev. 5) 23*bis*1.

Parties comprise a single, consolidated group.[140] In enacting the above-mentioned right for 'victims' to appeal foreseen in the ECCC Law, the Internal Rules provide for Civil Party Applicants and Civil Parties the right to appeal a limited number of decisions of the CIJs,[141] and the right for Civil Parties to appeal decisions of the Trial Chamber in respect of their civil interests where the Co-Prosecutors have appealed.[142]

52. The participation of victims before the ECCC is not unlimited. It provides the possibility for victims alleging injuries as a direct consequence of crimes alleged against the Charged Persons to effectively become part of the ECCC proceedings at the investigating stage and beyond. This is less than under Cambodian law, since a victim who wishes to be joined as a Civil Party before the ECCC may only do so by way of intervention, joining ongoing proceedings[143] and within the scope determined by the Co-Prosecutors' Introductory and Supplementary Submissions. This is more than under the systems in place in, for instance, *ad hoc* International Tribunals where victims' participation is limited to testifying. Against this legal framework, the Pre-Trial Chamber is of the view that under the present ground of appeal, the Appellants have not shown that the Second Impugned Order contravenes the principles according to which the ECCC has been established or the above system, or that it is "without cause".

53. As to the Appellants further argument that, if excluded from the proceedings as Civil Parties, they will be denied participation in the determination of the facts and the identification of those responsible for crimes within the jurisdiction of the ECCC that have victimized them,[144] the Pre-Trial Chamber notes that, as rightly pointed by the Appellants, their evidence may support the establishment of the criminal plan alleged in the Introductory Submission, or even the establishment of the *mens rea* required for the crimes and modes of responsibility alleged against the Charged Persons and it cannot be excluded that some of the Appellants be called upon to testify against the accused in the event of a trial in Case 002. As to the final argument under this ground of appeal, that the Second Impugned Order

[140] Internal Rules, 23(5).
[141] Internal Rule 74(4).
[142] Internal Rule, 105(1).
[143] Second Impugned Order, para.8.
[144] Second Appeal, Section III, para. 28.

silences the history and social memory of the Khmer Krom people and denies their suffering as a group during the DK period,[145] this is unsupported. The Pre-Trial Chamber notes that the Second Impugned Order has admitted ten civil party applications concerned by the Civil Party Applicants' and Civil Parties' Request and that the Pre-Trial Chamber decided to admit five more civil party applications. The Pre-Trial Chamber turns now to the second limb of the present ground of appeal, alleging an absence of cause in the Second Impugned Order.

2. Alleged declaration of inadmissibility of admitted Civil Parties' rights without cause

54. The Appellants allege that the CIJs erred in law and fact in violating the rights of four admitted Civil Parties by declaring them inadmissible without cause and that these victims' rights should be reinstated.[146] They specifically argue that once the CIJs formally admitted Khmer Krom Civil Party applications [redacted] these victims became fully-fledged Civil Parties and the CIJs had no power to reject their application pursuant to Internal Rule 23(3).[147] They also argue that there are only two possible interpretations of the significant fact that these admitted Civil Parties were questioned by investigators pursuant to a Rogatory Letter from the CIJs:[148] (i) either the CIJs originally considered them victims of crimes within the jurisdiction of the ECCC, and therefore the judicial investigation, and then subsequently changed their policy without informing the public; or (ii) alternatively, the CIJs considered these applicants to be within the scope of 'facts' forming part of the Introductory Submission. In either case, according to the Appellants, the CIJs have failed to fulfil their obligation under Internal Rule 21 "to ensure legal certainty and transparency" and to keep victims "informed and that their rights are respected throughout the proceedings."[149]

[145] Second Appeal, Section III, para. 30.
[146] Second Appeal, Section III, paras 32-33. See also paras 39-40 and 44 regarding Vietnamese Civil Party Applicants.
[147] Second Appeal, Section III, para. 32.
[148] Second Appeal, Section III, para. 33, referring to OCIJ's Rogatory Letter to ECCC Investigators, 18 August 2009, D246.
[149] Second Appeal, Section III, para. 33, fn. 65, referring to Decision on Admissibility of the Appeal Against Co-Investigating Judges' Order on Use of Statements which were or may have been Obtained by Torture, 18 December 2009, D130/9/21, para. 24, which merely quotes the part of Internal Rule 21 relevant to victims' rights.

55. The Appellants develop the same argument and request four Vietnamese victims previously admitted as Civil Parties [redacted], be reinstated in their rights as Civil Parties.[150]

56. After extensive deliberations, the Pre-Trial Chamber has not reached a super-majority of votes on the merits of this ground of appeal. As a consequence, pursuant to Internal Rule 77(13)(a) it has been unanimously decided that the Second Impugned Order will remain undisturbed on that ground. In order to ensure transparency, the Pre-Trial Chamber finds it necessary to express the opinions of its various members, which are attached to the present decision.

E. Alleged Failure by the Second Impugned Order to consider all information

57. The Appellants allege under this ground of appeal that the Second Impugned Order failed to consider all relevant information and rejected Vietnamese civil party applications en masse.[151] The Appellants merely point at supplementary statements admittedly submitted to the Victims Units by the Civil Party Applicants' Co-Lawyers concerning applicant [redacted] and to missing important attachments or significant clarifications provided by the Co-Lawyers of applicants [redacted].[152]

58. The Second Appeal fails to point at any particular additional information contained in these documents and does not even argue how, had they been taken into account by the CIJs, they could have had an impact on the Second Impugned Order in relation to the three Appellants in question. The Pre-Trial Chamber notes in particular that the only reference by the Second Appeal to the content of the documents in question is, in relation to the last two Appellants to specify that they brought 'clarifications about identity', a question which is clearly not at issue in the instant case since the Second Impugned Order conceded that all the applicants have provided proof of their identity.[153] This ground of appeal is therefore rejected and the Pre-Trial Chamber turns to the last ground of appeal related to the fact that the Impugned Order would impair the ECCC's overall case of genocide against the Vietnamese.

[150] Second Appeal, Section III, paras 39-40 and 44.
[151] Second Appeal, Section II, para. 3.f.

F. Does the Second Impugned Order impair the ECCC's Overall Case of Genocide Against the Vietnamese?

59. The Appellants' last ground of appeal alleges that the Second Impugned Order impairs the ECCC's overall case of genocide against the Vietnamese.[154]

60. The Pre-Trial Chamber is cognizant of the fact that the current scope of the investigation, as defined by the Introductory and Supplementary Submissions, may not reflect the full dimension of crimes committed by the Khmer Rouge against victims of Vietnamese origin during the relevant period. As indicated earlier, under the law applicable before the ECCC, the Co-Prosecutors have sole responsibility for determining the scope of the judicial investigation, and it is not for the Pre-Trial Chamber to comment on whether their decision in this respect may have an impact on their capacity to prove their case in relation to the allegation against the charged persons of genocide targeting the Vietnamese group.

THEREFORE, THE PRE-TRIAL CHAMBER HEREBY:

1) Decides that the First Appeal is inadmissible;

2) Decides that the Second Appeal is admissible;

3) Reverses the Second Impugned Order in that it declared inadmissible the Civil Party Applications of [redacted]05, [redacted]15, [redacted]19, [redacted]20, [redacted]23 and [redacted]24. Accordingly declares admissible Civil Party Application [redacted], in so far as it establishes a link between the injury alleged and the crimes alleged at paragraph 43 of the Introductory Submission; declares admissible Civil Party Applications [redacted], in so far as it establishes a link between the injury alleged and the crimes alleged at paragraph 42 of the Introductory Submission;

[152] Second Appeal, Section III, paras 45-48.
[153] Second Impugned Order, para. 15.

4) DECLARES that: (i) it had not assembled an affirmative vote of at least four judges on the ground of appeal alleging that the CIJs erred in law and fact in violating the rights of eight admitted Civil Parties, namely, by declaring them inadmissible without cause; and (ii) thus the Second Impugned Order remains undisturbed on that ground;

5) Dismisses the Second Appeal in all other respects.

In accordance with Internal Rule 77(13), this Decision is not subject to appeal.

Phnom Penh, 27 April 2010

Pre-Trial Chamber **President**

Rowan DOWNING NEY Thol Catherine MARCHI-UHEL HUOT Vuthy PRAK Kimsan

[154] Second Appeal, Section II, para. 3.g.

OPINION OF JUDGES NEY THOL, CATHERINE MARCHI-UHEL and HUOT VUTHY IN RESPECT OF THE DECLARED INADMISSIBILITY OF ADMITED CIVIL PARTIES

1. We hereby express our views on the question of whether, as alleged by the Appellants, the Co-Investigating Judges ("CIJs") erred in law and fact in violating the rights of eight admitted Civil Parties by declaring them inadmissible without cause.[155]

2. In the case at hand, eight Khmer Krom and Vietnamese Civil Party Applicants, namely [redacted]21, [redacted]22, [redacted]23, [redacted]24, [redacted]01, [redacted]02, [redacted]04 and [redacted]10 respectively received a letter[156] from the Greffiers of the CIJs acknowledging receipt of their civil party application and informing them that (i) the said application has been placed on the Case File and was, as a result, "subject to any later decision of the [CIJs, they] are now considered to be a Civil Party in the judicial investigation relating to" Case 002; (ii) the CIJs "may, at any time during the investigation, make a formal decision with respect to the admissibility of" their application and "may reject [it] if they consider that it does not fulfil the criteria set out in the Internal Rules and in the Practice Direction on victim participation''; (iii) such rejection is appealable before the Pre-Trial Chamber.[157]

3. The question before us is whether, as alleged by the Appellants, the letter in question amounts to a formal admission of the persons in question as Civil Parties and if so, whether the CIJs had the power to reject these 'fully-fledged' Civil Parties pursuant to Internal Rule 23(3).

4. We note that the terms of Rule 23(3) have changed during the period within which the Letters from the Greffiers were sent to each of the eight Civil Party Applicants.

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[155] Second Appeal, Section III, paras 32-33, 39-40 and 44. See also, paragraphs 54-56 of the present decision summarizing the Appellant's arguments in support of this ground of appeal.

[156] Letter of 3 August 2009 regarding the civil applications of [redacted]23 [redacted]24 [redacted] letter of 17 August 2009 regarding the civil applications of [redacted]21 [redacted]22 [redacted] letter of 17 August 2009 regarding the civil application of [redacted] letter of 1 September 2009 regarding the civil application of [redacted]02 [redacted] letter of 2 October 2009 regarding the civil application of [redacted]04 [redacted] and letter of 4 December 2009 regarding the civil application of [redacted]10 [redacted] ("Letters from the Greffiers").

[157] *Ibid.*

5. At the time relevant for each of the letters sent to [redacted] 21, [redacted]22, [redacted]23, [redacted] 24, [redacted]01 and [redacted]02, Internal Rule 23(3) read :

> "[a]t any time during the judicial investigation, a Victim who wishes to be joined as a Civil Party before the Co-Investigating Judges shall submit such application in writing in accordance with the regulations set forth in the Practice Direction on Victim Participation. Subject to the provisions in these IRs relating to the protection of Victims, the Co-Investigating Judges must notify the Co-Prosecutors and the Charged Person. The Co-Investigating Judges may decide by reasoned order that the Civil Party application is inadmissible. Such order shall be open to appeal by the Victim."[158]

Internal Rule 23(4) also provided the possibility for victims to be joined as a Civil Parties before the Trial Chamber. This is no longer possible under the new regime, which was adopted on 11 September 2009 and applicable at the time relevant for the letters sent to [redacted]04 and [redacted]10.

6. We note that the previous regime did not prescribe that any decision be taken by the CIJs to declare a civil party application admissible. By contrast, it provided the possibility for the CIJs to declare a civil party application inadmissible. In spite of this situation, the Internal Rules provide for a number of rights attaching to Civil Parties at the investigating stage. This is the legal framework within which the first six Letters from the Greffiers were issued. By comparison, under Cambodian law Article 139 of the Code of Criminal Procedure[159] provides that the investigative judge confirms the reception of a complaint with an application to become a Civil Party in an order, and much like the previous ECCC regime, it does not require a decision to admit such applicants as Civil Parties at the investigating stage.

7. Under the new regime, which, as stated above, was applicable at the time the relevant letters were sent to [redacted]04 and [redacted]10, Internal Rule 23(3) and (4) reads:

> (3). A Victim who wishes to be joined as a Civil Party shall submit such application in writing no later than fifteen (15) days after the Co-Investigating Judges notify the parties of the conclusion of the judicial investigation pursuant to Internal Rule 66(1). Subject to the provisions in these IRs relating to the protection of Victims, the Co-Investigating Judges must notify the Co-Prosecutors and the Charged Person. The Co-Investigating Judges may reject

[158] Internal Rules (Rev.3), 6 March 2009.
[159] Code of Criminal Procedure of the Kingdom of Cambodia, September 2008, Article 139.

> Civil Party applications at any time until the date of the Closing Order. Such orders shall be open to expedited appeal by the Civil Party applicant as prescribed by Practice Direction.
>
> (4). 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 Civil Party applicants as prescribed by Practice Direction. Such appeal shall not stay the proceedings.[160]

The new regime uses the term "may reject", thus providing the CIJs with the possibility of rejecting a civil party application at any time before the Closing Order, however, they are under no obligation to do so until the Closing Order is actually made. Whereas, under the previous regime the possibility of declaring a civil party application *inadmissible* was open to the CIJs at any time, under the new regime the CIJs can *reject* a civil party application a civil party application at any time prior to the Closing Order. Once the Closing Order stage is reached, they are required to determine the admissibility of all outstanding civil party applications by a separate order. This is the legal framework within which the last two Letters from the Greffiers were issued

8. Having carefully reviewed the terms of the Letters from the Greffiers and considered them in the light of the above mentioned legal frameworks, we understand the logic behind the approach adopted by the CIJs as being aimed at preserving the rights of Civil Party Applicants until such time as their final status is decided.[161] By treating the Civil Party Applicants as 'Civil Parties', while reserving the right foreseen by Internal Rule 23(3) to declare such application inadmissible, the CIJs aimed at providing them and their lawyers[162] access to confidential information contained in the Case File,[163] and at granting them the rights attaching to Civil Parties according to the Internal Rules during the course of the investigation, such as requesting

[160] Internal Rules (Rev.4), 11 September 2009.
[161] We note that new Internal Rule 23 *bis* (2) (Internal Rules (rev. 5)) provides that unless and until rejected Civil Party Applicants may exercise Civil Parties rights follows the same logic.
[162] We note that, on the basis of this provisional admission, the CIJs then requested ECCC investigators, by Rogatory Letter of 18 August 2009, to invite a number of these Civil Parties to agree to be interviewed without the presence of a lawyer and to notably specify the facts of which they have personal knowledge, were told about or found about through any other means, generally concerning the facts under judicial investigation and, in particular, the role of the Charged Persons.
[163] Letters from the Greffiers, para. 3..

investigative actions (Internal Rule 55(10) and the rights attaching to the interview of a civil party (Internal Rule 59).

9. We understand our colleagues to consider the Letters from the Greffiers as conveying a decision from the CIJs declaring the civil party application admissible. We disagree with this analysis. In light of the terms of the letters in question, any decision from the CIJs in this respect would, in our view, not amount to an adjudication of the admissibility of the civil party application, but to granting *provisionally* to the civil party applicants the rights attaching to civil parties or, in other words, *treating* them *as* civil parties until such time as their final status is decided. We acknowledge that the said letters do not specifically use the term 'provisionally' or 'treating as'. The Letters use the term "considered to be" a Civil Party. Also, the reference to "any later decision" and the fact that "at any time" the CIJs "may make a formal decision with respect to the admissibility" of the civil party application is, in our view, non ambiguous as to the provisional aspect of the situation, even if it may not have been that obvious to non lawyer civil party applicant. We note that under the domestic Cambodian practice, the investigative judge does not instruct the Greffiers to send letters to Civil Party Applicants to inform them that they will be considered as Civil Parties until a formal decision is made with respect to the admissibility of their application, but they actually also treat Civil Party Applicants as Civil Parties during the investigation unless their application is formally declared inadmissible.

10. The relevant part of Internal Rule 21(1) states:

> "[t]he applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safeguard the interest of Suspects, Charged Persons, Accused and Victims and so as to ensure legal certainty and transparency of proceedings, in light of the inherent specificity of the ECCC, as set out in the ECCC Law and the Agreement."[164]

Furthermore, Internal Rule 21(1)(a) states that "ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties".

11. We accept that a provisional status may not meet the requirement of certainty foreseen by Internal Rule 21(1), but it is clearly more favourable to the victims than a conservative decision to deny them any right to participate in the proceeding until such time as the rules foresaw

[164] Internal Rule 21(1).

determination of their status, which under the regime then applicable could have been delayed until the trial stage,[165] or until such time as the CIJs – without legal basis in the Rules – formally and positively declared them admissible. We further note that this approach has to be seen in light of the specific circumstances of the ECCC and the particular scope of Case 002, that is the wide scope of the Introductory Submission and the vast number of Civil Party Applicants. In this light, we are of the view that the challenged approach is not inconsistent with the Internal Rule. We find that the said approach made the participation of Civil Party Applicants more meaningful than a more conservative approach would have, without prejudicing the rights of the Charged Persons. At least, we are not aware that the approach in question was ever challenged by the Charged Persons. In any event, we are satisfied that the provisional status of Civil Party did not provide to its beneficiaries an unqualified right to retain it. From the moment the CIJs had completed their analysis of whether the Appellants established that their alleged injury was the direct consequence of at least one of the crimes charged and found in the negative, they had an obligation to reject the civil party application in order to preserve the rights of the Charged Persons.

12. We note that under the old regime the CIJs were not bound to determine the status of a Civil Party Applicant. As stated above, we consider that the first six letters sent by the Greffiers did not, as permitted by the old regime, convey a decision declaring those civil party applications inadmissible, and as such can be understood as provisionally granting to Civil Party Applicants the rights of Civil Parties until such time as their final status is formally determined. We also note that under the new regime the CIJs are now able to reject a Civil Party Applicant, however, they are under no obligation to do so until the Closing Order is made. In our view the last two letters sent by the Greffiers do not amount to an adjudication of the admissibility of the civil party application and can also be viewed as granting provisionally to the Civil Party Applicants the rights attached to Civil Parties until such time as their final status is determined

[165] We note in this respect that under the old regime, no obligation existed either for the Trial Chamber to pronounce on the admissibility of a civil party prior to rendering its judgement. As during the investigative phase, Rule 23(4) of Internal Rules (Rev.3) merely provides the possibility for the Trial Chamber to declare a civil party application inadmissible.

Phnom Penh, 27 April 2010

Judge NEY Thol **Judge Catherine MARCHI-UHEL** **Judge HUOT Vuthy**

OPINION OF JUDGES PRAK KIMSAN and ROWAN DOWNING IN RESPECT OF THE DECLARED INADMISSIBILITY OF ADMITED CIVIL PARTIES

1. We agree with the opinion of Ney, Huot and Marchi-Uhel JJ on all grounds in the decision of the Pre-Trial Chamber in this Appeal, except in respect of the grounds of Appeal being, "The CIJs Violated Admitted Civil Parties' Rights by Declaring them Inadmissible Without Cause", as set out in paragraphs 32 and 33 of the Appeal,[166] and "CIJs Previously Recognised that Vietnamese Civil Party Applicants Fall within the Jurisdiction of the ECCC", as set out in paragraphs 39 and 40 of the Appeal.[167] Ney, Huot and Marchi-Uhel JJ have found that the admission of the Appellants to the Case File by the Co-Investigating Judges was initially by a provisional or interim decision which was later followed by a final decision to reject the applications of the Appellants. We find that a decision had been made by the Co-Investigating Judges in respect of the admission of the Appellants to the Case File as Civil Parties, with all the rights attached thereto, and that a subsequent unauthorised or unfair (within the meaning of Article 14 of the International Covenant of Civil and Political Rights), and thus void, decision was made by the Co-Investigating Judges to remove them from the Case File. We publish a separate joint opinion in respect of these grounds.

2. We note that eight of the Khmer Krom and Vietnamese Civil Party Applicants, [redacted]21, [redacted]22, [redacted]23, [redacted]24, [redacted]01, [redacted]02, [redacted]04 and [redacted]10 each received a letter from the Greffier of the Co-Investigating Judges (the "Letter") to the following effect:

> "Your Civil Party Application form has been received by the CIJs Greffier and, upon instructions from the Co-Investigating Judges, has been placed on the Case File. As a result, subject to any later decision of the Co-Investigating Judges, you are now considered to be a Civil Party in the judicial investigation relating to case 002/19-09-2007-ECCC-OCIJ.
>
> The Co-Investigating Judges may, at any time during the judicial investigation, make a formal decision with respect to the admissibility of your application. They may reject your application if they consider that it does not fulfil the criteria set out in the Internal Rules and in the Practice Direction on victim participation. Such a decision can be appealed before the ECCC Pre-Trial Chamber.

[166] Second Appeal, Section III, paras 32-33.
[167] Second Appeal, Section III, paras 39-40.

> Through your participation as a Civil Party, you and your lawyers may have access to confidential information contained in the case file. Due to the confidential nature of the judicial investigation, you are bound not to disclose any such information. Such information can be made public only by a decision of the ECCC Judges.[168]

3. Internal Rule 23, sub rules 3 and 5 govern the applications for admission as a Civil Party in the instant case. It is noted that the Internal Rules were amended after the Appeal was lodged, meaning that the Appeal is considered under the Rules as they were prior to the amendments being made. The sub-rules provided, up until 11 September 2009:

> **Rule 23. General Principles of Victims Participation as Civil Parties**
> "3. At any time during the judicial investigation, a Victim who wishes to be joined as a Civil Party before the Co-Investigating Judges shall submit such application in writing in accordance with regulations set forth in the Practice Direction on Victim Participation. Subject to the provision in these IRs relating to the protection of Victims, the Co-Investigating Judges must notify the Co-Prosecutors and the Charged Person. The Co-Investigating Judges may decide by reasoned order that the Civil Party application is inadmissible. Such order shall be open to appeal by the Victim.
> [...]
> 5. All Civil Party Applications must contain sufficient information to allow verification of their compliance with these IRs. In particular, the application must provide details of the status as a victim, specify the alleged crime and attach any evidence of the injury suffered, or tending to show the guilt of the alleged perpetrator. With a view to service and notifications, the domicile of the Victim, the registered office of the Victims' Association of which he or she is a member, or the address of the lawyer, as appropriate, must also be stated. Where this address is outside Cambodia, an address in Cambodia shall be provided."[169]

4. On 11 September 2009 sub-rule 3 was amended to provide:

> "A victim who wishes to be joined as a Civil Party shall submit such application in writing no later than fifteen (15) days after the Co-Investigating Judges notify the parties of the conclusion of the judicial investigation pursuant to Internal Rule 66(1). Subject to the provisions in these IRs relating to the protection of Victims, the Co-Investigating Judges must notify the Co-Prosecutors and the Charged Person. The Co-Investigating Judges may reject Civil Party applications at any time until the date of the Closing Order. Such orders

[168] Letter of 3 August 2009 regarding the civil applications of [redacted]23[redacted]24[redacted] letter of 17 August 2009 regarding the civil applications of [redacted]21[redacted]22[redacted] letter of 17 August 2009 regarding the civil application of [redacted]01[redacted] letter of 1 September 2009 regarding the civil application of [redacted]02[redacted] letter of 2 October 2009 regarding the civil application of [redacted]04[redacted] and letter of 4 December 2009 regarding the civil application of [redacted]10[redacted] ("the Letter").
[169] Internal Rules (Rev. 3), 6 March 2009.

shall be open to expedited appeal by the Civil Party applicant as prescribed by Practice Direction."[170]

5. The Appellants made their applications in compliance with the stated Internal Rules and regulations provided as they were at the time of their application to be joined as Civil Parties. Civil Parties [redacted]21, [redacted]22, [redacted]23, [redacted]24, [redacted]01 and [redacted]02 applied prior to 11 September 2009 and Civil Parties [redacted]04 and [redacted]10 applied after 11 September 2009 and before 9 February 2010. For current purposes there is no relevant difference in effect between the sub-rule 3 prior to 11 September 2009 and after that date.

6. It is noted from the Letter that the CIJs Greffiers are acting upon "instructions from the Co-Investigating Judges" with the Application being placed upon the Case File. As a consequence of such placement it is then specifically stated, "As a result, subject to any later decision of the Co-Investigating Judges, you are now considered to be a Civil Party in the judicial investigation relating to case 002/19-09-2007-ECCC-OCIJ". This is a decision under Internal Rule 23(3). This is made clear by the apparent reservation in respect of a "later decision". As the Letter states it was issued under the authority of the Co-Investigating Judges, it thus contains all the indicia of a decision. The Pre-Trial Chamber has previously held that a memorandum from the Office of the Co-Investigating Judges constitutes a decision from the Co-Investigating Judges.

7. The terms of Internal Rule 23(3) require a decision to be made and once made in the affirmative, a Civil Party acquired a number of rights under the Internal Rules, including the following:

(i) becomes a party to the criminal proceedings – IR 23(3)(a);
(ii) can be afforded protective measures – IR 23(3)(b);
(iii) can be represented by lawyers – IR 23(4);
(iv) can be questioned in the presence of their lawyer - IR 23(3)(a)
(v) can request investigative actions – IR 55(10);
(vi) can lodge appeals – IR 74(4);
(vii) can participate as a party in appeals generally;

[170] Internal Rules (Rev. 4), 11 September 2009.

(viii) can support the prosecution – IR 23(1)(a); and

(ix) can make a claim for moral and collective reparations – IR 23(1)(b).

The granting of such rights of participation is a most serious matter given the effect of participation in the investigative stage of the proceedings and the role provided for a Civil Party to support the prosecution, as provided for in Internal Rule 23(1)(a). Given the effect upon the issue of equality of arms that such support may have and the effect of being able to request investigative action, any decision whereby a person is admitted to the case file cannot be taken lightly. Furthermore, paragraph three of the Letter clearly states that Civil Parties and their lawyers are bound not to disclose any confidential information arising from the judicial investigation. As a whole, the Letter grants the Civil Party Applicants the full and final rights and obligations of a Civil Party, and as such, the Letter is a decision of the Co-Investigating Judges.

8. The terms of Internal Rule 23(3) authorised the making of only one decision by the Co-Investigating Judges, in respect of which, should it not be in the affirmative, a reasoned decision must be provided. An appeal right is provided in such cases. The Internal Rules do not provide for a two part process. The Civil Party must make the application with the details, as provided for in Internal Rule 23(5). They have no other opportunity to make submissions, thus their application, in effect, contains their submissions. To this extent the submissions represent an expression of the right of the Civil Party Applicant to be heard in respect of an application. The reason for the notification to the Co-Prosecutors and the Charged Person(s) of an application to the Co-Prosecutors and the Charged Person is for them to be able to respond, if so advised, to the application.

9. Once the decision is made under Internal Rule 23 the Co-Investigating Judges are *functus officio*, that is, they have exhausted their power in this regard. The Co-Investigating Judges are not authorised to make a second decision or to revisit and reconsider the decision. The reservation contained in the second paragraph of the Letter was *ultra vires*, that is, beyond the power of the Co-Investigating Judges.

10. The Co-Investigating Judges, by the Letter, have introduced a change to the stated procedures, giving themselves a right to make a "later decision" to discontinue the right of action by the

Civil Party, which appears to be based upon the contents of the original submission and the circumstances of the investigation, as they perceive it at the time they make the later decision. In the instant case, the Civil Parties were not informed of the view taken by the Co-Investigating Judges in respect of the investigation, of the timing of any subsequent decision or given an opportunity to make further submissions directed to the issues as they may have then been. To deny a person an opportunity to make submissions before such a fundamental decision to terminate given rights, were such a decision to have been permitted, would be, in any event, a clear denial of the right to a fair determination of the matter. The right to know what case one has to meet at the relevant time and the right to be heard, which in this case would have been expressed through a right to put further submissions, have been denied to the Civil Party Appellants.

11. It is clear that the right to a fair determination of a matter, whether it be in a criminal matter or a civil suit, or, as in this instance, a civil action within a criminal matter, is a right protected by Article 14.1 of the International Covenant on Civil and Political Rights (ICCPR), which provides:

> "1. 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."[171]

12. The Pre-Trial Chamber is specifically directed to take into account Article 14 of the ICCPR by the operation of Article 13 of the Agreement between the United Nations and the Royal Government of Cambodia[172] establishing the ECCC and by Article 33 new of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia.[173] In the instant matter there is a determination of the rights of the Civil Party appellants, to remain a party to the proceeding. This is a fundamental determination of rights within the proceeding. The procedures and determination must be fair, with the process clear and the expressed rules

[171] International Covenant on Civil and Political Rights, United Nations General Assembly Resolution 2200A [XX1], 16 December 1966, Article 14.1.
[172] 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, 2003, Article 13.
[173] Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Presecution of Crimes Committed during the Period of Democratic Kampuchea, Article 33 new.

applied. Article 14.1 of the ICCPR will apply in such instances where the decision will be determinative of the rights and obligations concerned in a "suit at law". We refer to *Ringeisen v. Austria* A13 (1971);[174] *Le Compte, Van Leuven and De Meyere v. Belgium* A43 (1981),[175] being decisions in respect of Article 6 (1) of the European Convention on Human Rights,[176] which is in the same terms as Article 14(1) of the ICCPR. Whilst the instant matter is not clearly with a final determination of a claim, it is a determination of the right of the person to make a claim and thus remain as a Civil Party. In respect of a civil suit such a right is basic to the action itself and must be considered in respect of the specific nature of civil claims made before the ECCC. This view is supported by *Obermeier v. Austria* A179 (1990)[177] where it was determined that a preliminary decision of rights and obligations which was crucial to an applicant's claim was subject to the consideration of Article 6 of the European Convention on Human Rights, and thus applicable as an interpretive guide in respect of Article 14 of the ICCPR. See also *Golder v. UK* A18 (1975).[178]

13. A fair hearing or determination of a matter will involved not only a right to know the case one has to answer and a right to be heard, but also a right to procedural fairness. Procedural fairness in this regard will include a transparent and authorised procedure where the rights and obligations are properly provided, expressed and applied. In this way there is certainty in the expectation that a matter will be dealt with in a predictable, proper and defined manner. It is not for a court or judges, without any authorisation, to change stated procedures as a matter of expediency or for any other unauthorised reason. This is fundamentally procedurally unfair. Any action taken in respect of such unauthorised procedure is void.

14. Thus we are of the opinion that if a second decision is to have been considered as valid it would have had to be specifically authorised by the rules or governing laws, which it is not. If it was authorised, it failed to comply with the right of the Civil Parties to have the determination made fairly.

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[174] *Ringeisen v. Austria* (1971) EHRR 455.
[175] *Le Compte, Van Leuven and De Meyere v. Belgium* (1983) 5 EHRR 183.
[176] Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11, Rome 4.XI, 1950.
[177] *Obermeier v. Austria* (1991) 13 EHRR 290.
[178] *Golder v. UK* (1991) 1 EHRR 524.

15. We note that Article 139 of the Code of Criminal Procedure of the Kingdom of Cambodia provides that the investigating judge confirm the reception of a civil party application "in an order". Article 139 then goes on to require an investigating judge to "immediately issue an order with the statement of reasons" in circumstances where a decision is made either not to investigate, or to investigate if that decision is contrary to the Royal Prosecutor's request.[179] We read Article 139 as authorising the investigating judge to confirm the receipt of the civil party application, and to then issue an order giving reasons for the decision to either accept or reject that civil party application to commence an investigation. In effect, the making of the application is the laying of a complaint as an initiating procedure in respect of an alleged criminal action. This is a different procedure from that of the Civil Party before the ECCC who seeks to join into an existing investigation. In any event in the instant matter, the Letter from the CIJs Greffiers not only confirmed receipt of civil party applications, it also evinced a decision to accept the applicants as Civil Parties.

16. We are thus of the opinion that the decision made to reject the Civil Parties, once admitted, as they have been in these instances, cannot be reconsidered or the subject of a further decision by the Co-Investigating Judges and they should retain their status as Civil Parties in the proceeding, leaving it to the Trial Chamber, in the event of an indictment of any of the Charged Persons, to ultimately determine whether an order for collective and moral reparations should or should not be made in their favour on the basis of its findings at trial.

17. We are aware that the absence of a super majority of votes on the merits of this ground of appeal will, pursuant to Internal Rule 77(13)(a), result in a decision that the Second Impugned Order remaining undisturbed on this ground. As such, we would note that there is nothing in the Internal Rules to prevent the applicants resubmitting 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. We note that in a Public Interoffice Memorandum from the

[179] Code of Criminal Procedure of the Kingdom of Cambodia, September 2008, Article 139.

Co-Investigating Judges to the Victims Support Section dated 26 March 2010, the deadline for the filing of civil party applications was extended until 30 April 2010.[180]

Phnom Penh, 27 April 2010

Judge Rowan DOWNING **PRAK Kimsan**

[180] Interoffice Memorandum from Co-Investigating Judges You Bunleng and Marcel Lemonde to Vicitims Support Section Chief Dr Helen Jarvis, 26 March 2010, D337/1.