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**BEFORE THE SUPREME COURT CHAMBER  
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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**GROUP 1--CIVIL PARTIES' CO-LAWYERS' IMMEDIATE APPEAL OF CIVIL  
PARTY STATUS DETERMINATIONS FROM THE FINAL JUDGEMENT**

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## I. INTRODUCTION

1. In accordance with Internal Rule 104(4)(e), the Co-Lawyers for Civil Parties Group 1 herewith file an appeal on behalf of LY Hor (E2/61); Joshua ROTHSCHILD (E2/88); Jeffrey JAMES (E2/86); (E2/62); SUON Seang (D25/15); NGET Uy (E2/74); THIEV Neab (E2/75); LIM Yun (E2/69); and NORNG Sarath (E2/73), who, in the exercise of the Trial Chamber's discretion, had their Civil Party status revoked in the Judgement of first instance issued 26 July 2010,<sup>1</sup> resulting in prejudice to the appellants.
2. While the appeal was filed on 24 August 2010, it is currently re-filed in accordance with Internal Rule 39 and the ECCC Practice Directions Rule 9 in order to include the power of attorneys signed by the nine Civil Party Group 1 clients. Authorization from these clients to file the appeal on their behalf is attached hereto as Annex B.

## II. GROUNDS OF APPEAL

3. Contrary to ECCC governing documents, the Trial Chamber retroactively revoked the Civil Party status of nine Civil Party Group 1 (CPG-1) victims, causing serious and unnecessary prejudice.
4. Firstly, the Trial Chamber improperly relied on Rule 100(1) in attempting to justify a re-assessment of Civil Party applications, which the Trial Chamber had already assessed and granted prior to the start of trial. Indeed, the grounds given for the exercise of the Trial Chamber's decision are unsupported in law and practice. CPG-1 does not allege that a Chamber can never revoke Civil Party status once granted. It is, however, submitted that once recognized by the Court as Civil Parties, this status should remain unless specific and identifiable evidence is presented that casts doubt on that status.
5. Secondly, the Trial Chamber failed to adequately and in a timely manner inform the parties of the criteria it intended to apply in re-considering Civil Party status determinations. The approach taken by the Chamber in formulating the new criteria of which Civil Parties had no notice, at a time after which they had already

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<sup>1</sup> Judgement, E188, 26 July 2010.

- participated throughout the proceedings was both unjust and unreasonable, and resulted in prejudice to the appellants.
6. Finally, even if this Chamber were to find that the Trial Chamber did not err by carrying out a re-assessment of Civil Party applications or by formulating new criteria and then failing to inform the parties of this criteria until the Judgement, it is nevertheless submitted that the Trial Chamber erred by applying an unreasonably high standard of review and proof for reassessing Civil Party applications. In applying such a standard, the Trial Chamber misdirected themselves as the standard applied was wrong in law.
  7. The relief sought by CPG-1 to the errors alleged in this appeal is that the Supreme Court reverse the revocation of the Civil Party status of the nine victims detailed in this appeal.

### III. BACKGROUND

8. Initial decisions by the Trial Chamber, under a *prima facie* assessment, determined that the criteria for participation were satisfied by all nine victims named in this appeal.<sup>2</sup>
9. In its Closing Order the Co-Investigating Judges conferred Civil Party status on Suon Sieng (D25/15).<sup>3</sup> The Trial Chamber subsequently confirmed that those Civil Parties joined during the investigation phase *remain* as Civil Parties in the case against the Accused.<sup>4</sup>
10. After granting interim Civil Party recognition to 45 of the 66 individuals who applied for Civil Party status following the issuance of the Closing Order, but before the start of trial proceedings, the Civil Party status of LY Hor and E2/62 was *confirmed* by the Trial Chamber on 17 February 2009 at the Initial Hearing.<sup>5</sup>
11. Of the remaining 21 Civil Party applicants who had not received interim recognition the Trial Chamber, after “having carefully reviewed each one of the latest applications, and having applied a *prima facie* standard of proof for the existence of criteria for the evaluation of the Civil Party applicant, and having heard the comments from the other parties, ”*declared*” that apart from applicants

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<sup>2</sup> *Ibid.* at par. 636.

<sup>3</sup> “Closing Order indicting Kaing Guek Eav, *alias* Duch” [hereinafter Closing Order], D99, 8 August 2008, p. 2.

<sup>4</sup> T., 17 February 2009 (Initial Hearing), p. 34.

<sup>5</sup> *Ibid.* at p. 46.

heard the comments from the other parties, "declared" that apart from applicants E2/69, 74 and 87 who still needed to submit proof of identity all other remaining Civil Party applicants who did not have interim recognition were *admitted* as Civil Parties in the case against the Accused, including Joshua ROTHSCHILD (E2/88), Jeffrey JAMES (E2/86); THIEV Neab (E2/75); and NORNG Sarath (E2/73).<sup>6</sup>

12. LIM Yun (E2/69) was subsequently admitted as a Civil Party in the Trial Chamber's decision of 4 March 2009.<sup>7</sup>
13. On three occasions, 17 February 2009, 10 August 2009 and 17 August 2009, the Defense indicated its intent to challenge a number of Civil Party applications.<sup>8</sup> Specifically, the Defense contested the applications of E2/22, E2/37, E2/66, D25/15, E2/30, E2/38, E2/41, E2/49, E2/63, E2/64, E2/65, E2/69, E2/70, E2/71, E2/73, E2/74, E2/75, E2/76, E2/77, E2/81, E2/82, E2/83, E2/35 and E2/62. Argument over these challenges took place on 26 and 27 August 2009.<sup>9</sup> Additionally, during trial proceedings the Defense contested the participation of LY Hor.
14. As a result of these challenges by the Defense, CPG-1 sought to provide additional documentation for some of its Civil Parties. On 7 August 2009 CPG-1 filed its "Request to establish the status of LY Hor as a survivor of S-21 and authenticity of documents as a matter of record."<sup>10</sup> On 13 August 2009 CPG-1 filed its "Motion to establish nature of relationship between four Civil Parties of Group 1 and direct victims of S-21."<sup>11</sup> And on 3 September CPG-1 filed its "Motion to provide exhibits in support of five Civil Parties of Group 1."<sup>12</sup> Finally, on 10 November 2009 CPG-1 requested the Trial Chamber to reconfirm that Civil Party status had been granted to its clients in Case 001.<sup>13</sup>

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<sup>6</sup> *Ibid.* at p. 50.

<sup>7</sup> "Decision on the Civil Party Status of Applicants E2/36, E2/51 and E2/69," E2/94/2, 4 March 2009.

<sup>8</sup> T., 17 February 2009, pp. 41-42; T., 10 August 2009, pp. 8-9; T., 17 August 2009, pp. 2-7.

<sup>9</sup> Written Record of Proceedings, E1/69, 26 August 2009; Written Record of Proceedings, E1/70, 27 August 2009.

<sup>10</sup> "Civil Party Group 1—Request to establish the status of Ly Hor as a survivor of S-21 and authenticity of documents as a matter of record," E137, 7 August 2009.

<sup>11</sup> "Civil Party Group 1—Motion to establish nature of relationship between four Civil Parties of Group 1 and direct victims of S-21," E140, 13 August 2009.

<sup>12</sup> "Civil Party Group 1—Motion to provide exhibits in support of five Civil Parties of Group 1," E165, 3 September 2009.

<sup>13</sup> "Civil Party Group 1—Final Submission," E159/7, 10 November 2009.

15. In its Judgement of 26 July 2010 the Trial Chamber carried out a re-assessment of Civil Party applications and subsequently revoked the Civil Party status from the nine Civil Parties represented by CPG-1 mentioned in this Appeal.<sup>14</sup>

#### IV. RELEVANT LAW

16. The Internal Rules are clear with regard to the criteria victim applicants must meet in order to be accorded Civil Party status. Internal Rule 23(2) provides that in order to qualify as a Civil Party the injury suffered by the victim must be “physical, material or psychological,” and the “direct consequence of the offence, personal and have actually come into being.”<sup>15</sup> Additionally, the Internal Rules specify the necessary information applicants must include in their applications in order to gain Civil Party status. Internal Rule 23(5) provides: “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.” Upon receipt of the same, the Trial Chamber shall conduct an assessment of the applications, and then rule on the admissibility of the victim as a Civil Party to the proceedings, as provided for in Internal Rule 23(4).
17. At the Initial Hearing on 17 February 2009, the Trial Chamber laid out the criteria for the evaluation of the admissibility of a Civil Party application. In addition to Internal Rules 23(4) and (5), the Trial Chamber referenced Rule 23(2), adding that sufficient proof-of-identity of the applicant would be required,<sup>16</sup> and noting that “the degree of proof required will be assessed by the Chamber on a case-by-case basis based on the materials before it.”<sup>17</sup>

#### V. ARGUMENT

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<sup>14</sup> Judgement, E188, 26 July 2010, pp. 225-229.

<sup>15</sup> Internal Rule 23(2), Rev. 3.

<sup>16</sup> T., 17 February 2009 (Initial Hearing), p. 33.

<sup>17</sup> *Ibid.* at pp. 33-34.

**A. GROUND 1: The Trial Chamber erroneously relied on Internal Rule 100(1) in reassessing the Civil Party status of CPG-1 victims, thereby causing prejudice.**

18. For the reasons detailed below, CPG-1 submits that the Trial Chamber committed a clear error of law by relying on Internal Rule 100(1) in revoking Civil Party status, thereby causing serious prejudice to its nine Civil Parties. In its Judgement the Trial Chamber “rejected” the Civil Party applications of LY Hor (E2/61); Joshua ROTHSCHILD (E2/88); Jeffrey JAMES (E2/86); (E2/62); SUON Seang (D25/15); NGET Uy (E2/74); THIEV Neab (E2/75); LIM Yun (E2/69); and NORNG Sarath (E2/73) based on Internal Rule 100(1).<sup>18</sup>
19. The Co-Lawyers for Civil Party Group 1 respectfully submit that a plain reading of Internal Rule 100(1) demonstrates that this Rule is concerned with the Chamber’s discretion to rule on issues related to Civil Party claims for reparations. Rule 100(1) is not intended to grant the Chamber an unfettered license to reassess or even determine, in first instance, whether a Civil Party application is admissible.
20. This interpretation is supported by Internal Rule 23(4), which unambiguously provides that the Trial Chamber is to determine the admissibility of the Civil Party applications at the commencement of the trial proceedings. The nine Civil Party applications were all brought to the attention of the Trial Chamber at the Initial Hearing, containing details and evidence in furtherance of their request as required by Rule 23(5). The Trial Chamber, after having conducted a *prima facie* review, explicitly and unequivocally decided that the applications met the requirements and admitted the victims as Civil Parties to the criminal proceedings. A reassessment of that decision finds no support in the governing documents or the jurisprudence. It is the submission of CPG-1 that the absence of any foundation for revoking the Civil Party applications warrants a reversal by the Supreme Court Chamber.

**1) Internal Rule 100(1) does not provide the Trial Chamber with the mandate to decide on issues related to Civil Party applications.**

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<sup>18</sup> Judgement, E188, 26 July 2010, paras 635 – 638, 647-649.

21. CPG-1 respectfully submits that the Trial Chamber acted outside the scope of its authority and fell into error by revisiting its prior decisions on the admissibility of Civil Party applications on the basis of Internal Rule 100(1) absent any change of circumstance or new evidence being adduced which casts doubt on the original decision. Internal Rule 100(1) provides that “[t]he Chamber shall make a decision on any Civil Party claims in the Judgement. It shall rule on the admissibility and the substance of such claims against the Accused.” A plain reading of Rule 100 as a whole shows that the drafters did not intend for a “claim” to include the application to be joined as a Civil Party to the proceedings in the first place. Instead, it clearly refers to the Civil Parties’ claims for reparations against the Accused.
22. Internal Rule 100(2) provides that “[w]here a Civil Party has claimed reparation pursuant to Rule 23 before the start of the trial but he or she does not appear personally or is not validly represented at any time during the trial, and where the Accused was found guilty, the Chamber shall make its decision concerning the reparation based on the case file.” Accordingly, the Chamber shall rule on any substantive claim for reparation advanced by the Civil Parties during the proceedings in the Judgement of first instance. In doing so, the Trial Chamber shall take into account the available evidence and testimony provided by the Civil Parties in their applications and at trial, as well as the evidence provided by the Prosecution and the Defense throughout the proceedings.
23. Where a Civil Party has not been present throughout trial, the Chamber shall have recourse to Rule 100(2), which provides it with the discretion to decide on the issue of reparations based on the facts and evidence contained on the case file. It is thus clear that “a claim” as referred to in Rule 100(1) pertains to the Trial Chamber’s mandate to rule on the admissibility and substance of the claim for reparations submitted by the Civil Parties, whether present throughout the proceedings or not, and not on their initial applications to join the criminal proceedings as Civil Parties proper.
24. Had the drafters of the Internal Rules wished to allow for the Chamber to rule on the admissibility of Civil Party applications at the Judgement stage, they would have explicitly included the language referencing applications therein. They did not. The Chamber is thus precluded from ruling on the issue of Civil Party application on the basis of Rule 100(1), as its ability to do so is limited by the



governing documents. CPG-1 respectfully submits that the Chamber acted *ultra vires* by deciding at the Judgement stage to conduct a reassessment of the Civil Party applications.

**2) Internal Rule 23(4) prevents the Trial Chamber from ruling on the Civil Party applications in the Judgement of final instance**

25. The Internal Rules make it patently clear that the sole basis upon which the Trial Chamber can consider Civil Party applications is based upon Rule 23(4). Internal Rule 23(4) provides, in relevant part, that the “Trial Chamber may, by written reasoned decision, declare the Civil Party application inadmissible.” The heading of Rule 23 “Civil Party action by Victims” sets out the contours for the Rule, which deals with the purpose of a Civil Party action, the manner in which to gain Civil Party status and the corresponding rights and obligations once a victim has obtained Civil Party status.
26. However, even if the Trial Chamber had decided to revoke the applications on the basis of Rule 23(4), as opposed to Rule 100(1), the Chamber still acted outside the temporal scope contained in Rule 23(4). When a victim wishes to join the criminal proceedings as a Civil Party, they are to submit their applications within “at least 10 working days before the initial hearing.”<sup>19</sup> The applications submitted at this stage are to contain the “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.”<sup>20</sup>
27. After the Victims Unit has conducted a formal verification of the entire application, it is submitted to the Trial Chamber “without any delay.”<sup>21</sup> Any applications not decided upon by the Co-Investigating Judges, or in an interim fashion, are to be considered by the Chamber at the Initial Hearing.<sup>22</sup> The Trial Chamber in fact implicitly acknowledged that the appropriate stage for deciding on the issue of admissibility is at the Initial Hearing. In furtherance of a discussion regarding a decision by the Trial Chamber on Civil Party applications right after

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<sup>19</sup> Internal Rule 23(4), Rev. 3.

<sup>20</sup> Internal Rule 23(5), Rev. 3.

<sup>21</sup> Internal Rule 23(4), Rev. 3.

<sup>22</sup> Internal Rule 83(1), Rev. 3: “[a]t the Initial Hearing, the Chamber shall consider any applications submitted by Victims to be joined as Civil Parties, as provided in Rule 23(4).”

the Initial Hearing, the Trial Chamber noted in the Judgement that it “may at this stage declare the Civil Party application inadmissible: a decision that is subject to appeal (Internal Rule 104(4)(e)).”<sup>23</sup> By “this stage” the Chamber cannot be referring to anything other than the start of the proceedings.

28. Once the application has been put before the Chamber, and has not been declared inadmissible,<sup>24</sup> the Victim is considered to have “joined” the criminal proceedings as a Civil Party.<sup>25</sup> The logical consequence of being joined as a Civil Party to the criminal proceedings is the ability to participate at trial, one of the primary purposes of Civil Party participation.<sup>26</sup> To this end, the governing documents leave the Chamber with no other option than to rule on their admissibility at the start of trial. Admission or rejection must be made at that stage. Indeed, the Trial Chamber recognized the importance of a ruling prior to the substantive proceedings. When ruling upon the admissibility of Civil Party applicant E/36, the Trial Chamber found that “the admission as a Civil Party is a trigger, under the Rules, for a variety of other procedural steps before the ECCC.”<sup>27</sup>
29. The significance and immediacy of the Civil Party participation at the proceedings is further evidenced by the fact that an appeal, as of right, is accorded to putative Civil Parties in the event that their application is declared inadmissible by the Trial Chamber.<sup>28</sup> Any appeal that is submitted to the Supreme Court Chamber will not have the affect of staying the proceedings before the Trial Chamber,<sup>29</sup> so as not to prejudice the right of the Accused to a fair and expeditious trial by interrupting the ongoing proceedings. While the Trial Chamber acted outside the temporal scope of Rule 23(4), it did conduct a reassessment of the Civil Party applications in its Judgement. The Civil Parties are thus entitled to have recourse to the Supreme Court by dint of Rule 104(4)(e).
30. The provision of an appeal, as of right, for issues related to the admissibility further illustrates the intent of the drafters to ensure that the Civil Party applications are determined at the start of the proceeding, allowing for those

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<sup>23</sup> Judgement, E188, 26 July 2010, p. 271, footnote 1062.

<sup>24</sup> Internal Rule 23(4), Rev. 3: “This decision may be appealed to the Supreme Court Chamber, which in turn shall not stay the proceedings before the Trial Chamber.”

<sup>25</sup> Internal Rule 23(6), Rev. 3.

<sup>26</sup> Internal Rule 23(1)(a), Rev. 3.

<sup>27</sup> “Decision on Request to reconsider Decision on Proof of Identity for Civil Party Application E2/36,” E2/94/4, 10 August 2009.

<sup>28</sup> Internal Rule 23(4), Rev. 3.

<sup>29</sup> *Ibid.*

admitted to effectively participate, while at the same time guaranteeing the right of the Accused to an expeditious trial. The putative Civil Party, similar to the Accused, has the inherent right to ascertain, in a fair and expeditious manner, whether he or she will be participating as a recognized Civil Party to the proceedings. The determination of Civil Party status at the Judgement stage is not fair or expeditious. A reading of Internal Rule 23 as a whole therefore negates the propriety of a Trial Chamber making a separate and additional finding on this issue at the Judgement stage, absent compelling reasons warranting a reassessment of Chamber's initial decision. It is submitted that such reasons could include new evidence or information being adduced casting doubt on the initial admission of the Civil Parties admitted. No such evidence was adduced or emerged in the present case justifying the revocation of the original decision.

**3) The Trial Chamber already decided on the applications in an unequivocal manner at the start of the proceedings**

31. While Rule 23(4) confers upon the Trial Chamber the right to determine the admissibility of the applications, that Rule does not (and, for that matter, no other Rule) provide that the Chamber may revoke the status granted to Civil Parties pursuant to earlier explicit decisions. Absent compelling circumstances that come to light during the proceedings,<sup>30</sup> (which could, for example, include information casting doubt on the identity of the Civil Party or the relationship between the Civil Party and the victim of S-21) the governing documents do not allow for a reassessment of applications. This is all the more true where none of the parties have voiced their objections against a particular Civil Party.
32. The Chamber, in various decisions at the start of the Trial proceedings, specifically ruled on the Civil Party applications at issue in this appeal. During the Initial Hearing, on 17 February 2009, the Chamber found that, in accordance with Internal Rule 23(4), that 28 Civil Parties, who had been granted interim status during the Pre-Trial phase, were not required to renew their applications before

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<sup>30</sup> See e.g., *The Prosecutor v. Ndindiliyimana et al.*, ICTR-00-56-T, Decision on Prosecution's Motion for Reconsideration of the Chamber's Decision Dated 18 February 2009, 10 March 2009, par. 2: "The Chamber notes that reconsideration of a decision is an exceptional measure that is only available in particular circumstances."; *Prosecutor v. Milutinović et al.*, ICTY-IT-05-87-T, Decision on Prosecution Motion for Reconsideration of Oral Decision Dated 24 April 2007 Regarding Evidence of Zoran Ilić, 27 April 2007, par. 4. (While the Chamber has the discretion to reconsider a previous decision, this can only be done in "exceptional cases, 'if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent injustice.'")

the Trial Chamber. Accordingly, the Chamber found that these 28 individuals “remain as civil parties in the case against the accused person.”<sup>31</sup> After having discussed the issue of Civil Party applicants E2/69, 74 and 87, the Trial Chamber expressly declared that “the remaining civil party applicants who do not have interim recognitions *are admitted as civil parties* in the case against the Accused.”<sup>32</sup> The Trial Chamber, in a subsequent written decision, explicitly “*decide[d]*” that Civil Party application E2/69, LIM Yon, had submitted sufficient proof of identity and is “admitted as a Civil Party in the case against the Accused.”<sup>33</sup>

33. Having ruled on the admissibility of the Civil Party applicants, the Trial Chamber erred in purportedly reconsidering these decisions, without any proper basis allowing them to do so. In responding to a motion by Civil Party Group 3 to reconsider the denial of Civil Party application E2/36, the Chamber held that “the legal framework of the ECCC does not expressly provide for reconsideration as a remedy for denial of Civil Party applications. Instead, Rules 23(4), 104(4)(d) and 107 envisage appeal [...] declaring a Civil Party application inadmissible.”<sup>34</sup> The Chamber itself therefore acknowledged that the Internal Rules provide no basis for it to simply “reconsider” applications that were decided upon, whether at the request of the parties or *proprio motu*. In short, CPG-1 submits that if there was no ground for “reconsidering” an application during the proceedings, there certainly exist no grounds for doing so in the Judgement of first instance.

#### **4) The Civil Parties have already exercised their rights pursuant to the Internal Rules**

34. One of the primary purposes of the Civil Parties’ presence before the ECCC is to participate in the criminal proceedings.<sup>35</sup> As discussed above, by expressly providing that the consideration of the Civil Party applications occur at the time of the Initial Hearing, the Internal Rules ensure that the Civil Parties can effectively exercise their rights before the ECCC.

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<sup>31</sup> T., 17 February 2009 (Initial Hearing), p. 34.

<sup>32</sup> *Ibid.* at p. 50. (Emphasis added).

<sup>33</sup> “Decision on Civil Party Status of Applicants E2/36, E2/51 and E2/69/Public,” E2/94/2, 4 March 2009.

<sup>34</sup> “Decision on Request to reconsider Decision on Proof of Identity for Civil Party Application E2/36,” E2/94/4, 10 August 2009.

<sup>35</sup> Internal Rule 23(1)(a), Rev. 3.

35. The victims who applied and were deemed to have joined the criminal proceedings against the Accused, have already exercised their rights and obligations as parties to the proceedings pursuant to the Internal Rules. They have instructed lawyers to represent them before the criminal proceedings,<sup>36</sup> who have questioned witnesses and filed motions on their behalf.<sup>37</sup> They have provided a list of witnesses to be summoned,<sup>38</sup> and have had continuous access to the case file.<sup>39</sup> The Civil Parties have been questioned as parties to the proceedings, instead of “simple witnesses”<sup>40</sup> and they have made closing arguments through their Co-Lawyers voicing their claims for reparations and other matters relevant to the proceedings.<sup>41</sup>
36. Indeed the victims have already exercised one of the very purposes of their inclusion within the ECCC hybrid system; they have participated as parties to the criminal proceedings against the Accused.<sup>42</sup> This right is distinctly different from the second purpose of their participation, namely the right to seek moral and collective reparations.
37. Moreover, the presence of the Civil Party at this final stage does not prejudice the Accused to the extent that it warrants the revocation of a Civil Party status, especially where the status has already been expressly granted and acted upon. By repealing the victims’ applications, the Chamber is thus not simply denying the right of the victim as part of the ‘collective’ Civil Party Group to seek a substantive award; it is retroactively stripping the victim of its status. The Civil Parties subject to this application had a legitimate expectation that once recognized at the commencement of proceedings, such status would continue absent clear grounds and identifiable evidence casting doubt on the veracity of the original decision or on the continued status granted.<sup>43</sup> The decision to deny Civil

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<sup>36</sup> Internal Rule 23(7)(8), Rev. 3.

<sup>37</sup> See e.g., “Group 1 – Civil Parties Co-Lawyers’ Submission on the Preliminary Objection,” E9/5, 18 May 2009, “Group 1 – Civil Parties’ Co-Lawyers’ Request that the Trial Chamber facilitate the disclosure of an UN-OIOS Report on the Parties,” E65, 11 May 2009, “Civil Parties’ Co-Lawyers’ Joint Submission on Reparations,” E159/3, 14 September 2009.

<sup>38</sup> Internal Rule 80(2), Rev. 3. See also “Group 1 – Civil Parties’ Co-Lawyers Additional Witness List, with Annexes,” E5/12/1, 18 March 2009.

<sup>39</sup> Internal Rule 86, Rev. 3.

<sup>40</sup> Internal Rule 23(6)(a), Rev. 3.

<sup>41</sup> Internal Rule 94(1)(a), Rev. 3.

<sup>42</sup> Internal Rule 23(1)(a), Rev. 3.

<sup>43</sup> See e.g. the *Prosecutor v. Germaine Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, 13 May 2008, par. 45: “Once the Chamber makes a decision on the set of procedural rights that are attached to the

Party status to Civil Parties previously recognized by the Trial Chamber has the unintended consequence of effectively traumatizing the Civil Parties subject to this appeal once again. The victims have invested a tremendous amount of time, expense and emotional well-being by lending their support to the Tribunal. They were forced to relive the horrors that were inflicted upon them personally or upon a family member. Despite these difficulties, the Civil Parties nevertheless chose to be a part of this historic trial, as they knew they were assisting in the documenting of the truth and thereby contributing to the healing process of their individual families and the country as a whole.

38. The Civil Parties did not expect, without adequate warning, to be deprived of the very status they had thought secured. The procedure adopted in the present case is unfair and has resulted in prejudice. CPG-1 respectfully submits that this simply cannot have been the intent of the drafters of the Internal Rules when they decided to afford the victims of the Khmer Rouge the unique opportunity to assist in the unearthing of the truth that has been kept buried for the past 30 years and to claim collective and moral reparations for harm suffered.

#### **5) Conclusion on the first Ground of Appeal**

39. The Trial Chamber, contrary to the spirit and intent of the ECCC governing documents, retroactively revoked the applications of nine Civil Party Group 1 victims, causing serious and unreasonable prejudice. The Trial Chamber not only relied on the wrong Rule in attempting to justify a re-assessment of the applications already granted at the beginning of the proceedings, but also acted outside the temporal scope of the Rules governing the admission of Civil Parties. As explained below, the Trial Chamber could have avoided this prejudice by adequately and in a timely manner having apprised the parties of the criteria it intended to apply in considering their applications, especially where the criteria and standards deviated from that which was contained in the Internal Rules. Not only did the Trial Chamber not inform the Civil Parties of this, they subsequently revoked the status granted in the Judgement on grounds that are unsupported in law and practice. CPG-1 respectfully submits that the only suitable remedy for the

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procedural status of victim at the pre-trial stage of a case, such rights belong to all natural and legal persons for whom the procedural status of victim has been granted in relation to such stage of the proceedings.”

Chamber's erroneous revocation of the status of the nine Civil Parties who are the subject of this appeal is the reversal of this decision and the Supreme Court finding that the nine Civil Parties subject to this appeal retain that status as a matter of law.

**B. GROUND 2: The Trial Chamber erred by requiring Civil Parties to meet criteria not provided for in the Internal Rules and by not giving prior notice to Civil Parties of the criteria it would apply in reassessing applications, thereby depriving Civil Parties of the opportunity to meet the criteria and causing prejudice.**

40. For the reasons set out in this Appeal, CPG-1 submits that the Trial Chamber fell into error in relying on Rule 100(1) to justify the retroactive denial of Civil Party status. Even if the Supreme Court Chamber accepts that the Trial Chamber was justified in relying upon Rule 100(1) to retroactively strip victims of their participatory rights, and that the criteria applied for this re-assessment was in fact reasonable, CPG-1 submits that the Trial Chamber's approach remains otherwise erroneous.
41. This is because, as set out below, the Chamber additionally erred by requiring Civil Parties to meet criteria not provided for in the Internal Rules or previous decisions of the Court, and by failing to give Civil Parties prior notice of the additional criteria it would apply in reassessing Civil Party status after the close of the proceedings. In doing so, the Chamber deprived the Civil Parties of the opportunity to meet these additional re-assessment criteria, and either reinforce or maintain their status as Civil Parties.
42. The Chamber simultaneously prevented the Civil Parties from being able to make an informed decision as to whether to continue to participate in the proceedings after evaluating the additional criteria they were required to meet, in the knowledge that they may later be retroactively stripped of their participatory rights should these criteria not be met. The proper relief for this prejudice which arose out of the Trial Chamber's erroneous approach is the reversal of this revocation, and the maintenance of the Civil Party status of the nine affected victims.

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43. It is not the position of CPG-1 that once Civil Party Status is granted, it can never be revoked. One can certainly imagine situations where the in-court examination of a Civil Party reveals to the parties and the Court that evidence relied upon in support of Civil Party status has been fabricated, or it is demonstrated the documents relied upon in support of an application have been forged. It is submitted, however, that such situations would be rare. Such findings must always be accompanied by an opportunity being granted to the Civil Party concerned to make submissions on the issue. What is at the heart of this ground of appeal is the Chamber's erroneous approach of setting a standard for admission as a Civil Party, allowing victims to rely on the status afforded to them as Civil Parties to actively participate throughout the trial, and then replacing this standard with additional criteria about which the Civil Parties **had no notice**. It is this lack of notice which warrants reversal of the revocation of Civil Party status by the Supreme Court Chamber.

**1) The Trial Chamber erred by requiring Civil Parties to meet criteria not provided for in the Internal Rules**

44. The Internal Rules are clear with regard to the criteria victims must meet in order to be accorded Civil Party status. Likewise, the Internal Rules are clear with regard to what Civil Party information applications must contain in order for the Court to grant the requested status. Internal Rule 23(2) provides that in order to qualify as a Civil Party the injury suffered by the victim must be "physical, material or psychological," and the "direct consequence of the offence, personal and have actually come into being."<sup>44</sup> Internal Rule 23(5) provides in pertinent part: "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."
45. In addition, *prior* to the start of trial, the Trial Chamber laid out additional criteria for the evaluation of the admissibility of a Civil Party application. The Trial Chamber referenced Rule 23(2) and added that sufficient proof-of-identity of the

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<sup>44</sup> Internal Rule 23(2), Rev. 3.



applicant would be required.<sup>45</sup> All victim applicants were therefore put on notice what they would need to provide for their proof-of-identity.

46. All nine individuals represented by CPG-1, who later had their Civil Party status revoked by the Trial Chamber, were found to have met the criteria for participation as provided for in the Internal Rules by the Trial Chamber prior to the start of trial. And, through their lawyers, all nine individuals exercised their rights as provided for in the Internal Rules.
47. Despite having exercised their rights to participation, in its Judgement the Trial Chamber laid out additional criteria that Civil Parties would have to meet in order to maintain their Civil Party status. The Trial Chamber found that “once declared admissible in the early stages of the proceedings, Civil Parties must satisfy the Chamber of the existence of wrongdoing attributable to the Accused which has a direct causal connection to a demonstrable injury personally suffered by the Civil Party.”<sup>46</sup> In specifically recognizing the nature of familial relationships within Cambodian culture and determining that, in exceptional circumstances, a direct victim’s extended family may qualify as Civil Parties, the Trial Chamber further found that in order to meet the criteria of Rule 23(2), applicants must submit proof of (1) the alleged kinship and (2) the existence of circumstances giving rise to special bonds of affection or dependence on the deceased.<sup>47</sup> These additional criteria created by the Trial Chamber are nowhere to be found in the Internal Rules, Practice Directives on participation or prior decisions of the Trial Chamber.
48. The inclusion of additional criteria not found in the Internal Rules, Practice Directives on participation or prior decisions causes prejudice to our clients because they have now been stripped of their Civil Party status for having not met the additional criteria.

## 2) The Trial Chamber’s Erroneous Approach

49. The nine victims who are the subject of this appeal did everything right. They first made considered assessments of whether they met the criteria for participation as Civil Parties as set out in the Internal Rules. They then brought timely and

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<sup>45</sup> T., 17 February 2009 (Initial Hearing), p. 33.

<sup>46</sup> Judgement, E188, 26 July 2010, par. 639.

<sup>47</sup> *Ibid.* at par. 643.

complete applications containing the relevant information in accordance with the Internal Rules and Practice Direction on Victims' Participation. It is accepted that, in the proper exercise of its duties, the Trial Chamber considered these applications, following which it rendered decisions finding that these victims indeed met the criteria for participation as Civil Parties as set out in the Internal Rules. As such, Civil Party status was granted to each. In reliance on these findings, these victims undertook the significant and often difficult process of participating in Case 001 as Civil Parties.

50. In none of the decisions granting status as Civil Parties were these victims or their lawyers told that they were only being conditionally admitted as Civil Parties in Case 001 pending the satisfaction of additional criteria. There was no indication of what these additional criteria were and no suggestion that such additional criteria would be formulated and revealed to the parties at a later stage.
51. In none of the decisions granting status as Civil Parties were these victims, or their lawyers, told that it may be the case that following their months of participation, the Trial Chamber may rule in the Judgement that, in fact, they should never have been given Civil Party status at all. However, as outlined above, this is precisely what happened. The Civil Party status granted to these nine victims was revoked in the Trial Judgement, after the Chamber re-assessed the Civil Party status of victims on the basis of previously unknown criteria and in the absence of any evidence that was capable of contravening the correctness of the original decision.
52. Nothing in the Practice Direction on Victims' Participation, nothing in the Chamber's decisions on Civil Party participation, and nothing in the Internal Rules gave any indication that additional criteria would be used to make a second-round assessment of the Civil Party status already afforded to these victims. CPG-1 does not submit on this fact *per se*. Rather, what is being contested is the fact that no prior notice was given by the Chamber itself of the additional re-assessment criteria. The hearing of evidence in Case 001 was completed without the Civil Parties being informed that in order to maintain their Civil Party status until the Judgement was rendered, they would be required to (a) provide documentary proof substantiating their relationship with direct victims;<sup>48</sup> or (b) substantiate special bonds of affection or dependency in relation to the direct

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<sup>48</sup> *Ibid.* at par. 645, footnote 1076: "The Chamber, however, is unable to determine a Civil Party application based on uncorroborated Civil Party statements alone."

victim;<sup>49</sup> or (c) provide additional proof to substantiate claims of incarceration and torture at S-21 itself.<sup>50</sup> The Trial Chamber certainly had the opportunity prior to, or even during the proceedings to inform or instruct Civil Parties that it would be requiring them to meet these additional criteria in order to maintain their Civil Party status. No such notice was given.

53. Apart from the inherent unfairness and prejudice discussed below, the Chamber's failure to give prior notice of the re-assessment criteria suffers from another fundamental flaw. The question of standing to participate in legal proceedings is one which would normally always be resolved at the commencement of proceedings. This avoids wasted time and resources, both those of the parties and of the Chamber. It avoids the risk that the Chamber will spend valuable court time hearing evidence which will later be deemed inadmissible, and precludes the possibility that participants in the proceedings will later be shut out following a significant personal investment in the process. It avoids the risk that the Accused will be required to waste resources countering evidence which may not end up forming part of the case against him, and the risk that the Prosecution is put in a situation where it is unknowingly left with parts of its case unsupported after the close of the evidence, and at a time when it is too late to bring additional evidence to remedy these failings. The rationale behind resolving questions of standing and participation at the commencement of the proceedings is clear. The Trial Chamber in this case, however, determined questions of standing at the time of the first instance Judgement, after the close of the evidence, and after the participatory rights of the Civil Parties had been exercised. The prejudice this has caused is discussed below.

### **3) The Prejudice Arising from the Lack of Notice of the Additional Criteria**

54. The prejudice suffered as a result of the Trial Chamber's silence as to the additional re-assessment criteria is twofold. Firstly, the victims in question were deprived of the opportunity of being able to locate and produce relevant evidence during the proceedings in order to maintain their Civil Party status. Had the

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<sup>49</sup> *Ibid.* at par. 649.

<sup>50</sup> *Ibid.* at par. 647.

victims been made aware of these additional criteria, they would have been afforded the opportunity to seek out and produce additional documentary proof, or bring evidence before the Chamber to establish special bonds of affection or dependency. Secondly, the victims were also deprived of the opportunity to review these criteria and make an informed decision, together with their lawyers, as to whether to take the step of participating in months of proceedings, with full knowledge of the risk that their participatory rights may be publicly stripped at a later stage, thus avoiding the emotional impact of the present situation. The simple act of informing the Civil Parties of the additional threshold for participation would have given the Civil Parties options, of which they have now been deprived.

55. Of course, a counter-argument exists that even had the Trial Chamber given Civil Parties prior notice of the additional re-assessment criteria, there is no evidence in front of the Supreme Court Chamber that these additional criteria would have been able to have been met, and as such the arguments contained under this Ground II are hypothetical, and any alleged prejudice is speculative. This argument is without merit. What is relevant and significant to the discussion of prejudice is the loss of opportunity. Whether or not the victims would have been able to meet these additional criteria is irrelevant to the Supreme Court Chamber's determination of whether the Trial Chamber acted properly and within the spirit of the Rules which govern the participation of victims in imposing additional criteria for re-assessment of Civil Party status of which the victims had no notice. Moreover, prior notice would have given the Civil Parties the opportunity of withdrawing, had it been clear that they were not in a position to meet the additional criteria.
56. The additional and more personal prejudice suffered by the Civil Parties in having their Civil Party status revoked is also important to consider. Put simply, the participation of the nine victims in Case 001 involved no small amount of personal turmoil. Even those who did not give testimony before the Chamber were required to remember and recount in detail extremely difficult histories to DC-Cam representatives, and then again to Civil Party lawyers. For those who gave testimony, they were required to take the traumatic step of recalling these details in the courtroom environment, and undergo the testing of their evidence. For months on end, the lives of these victims again became about the horrors of the

past, and not about rebuilding their lives and those of their families. They participated in this process, however, knowing that they were contributing to the creation of a record of the crimes which had occurred, and to the ultimate Judgement against the accused. However, it was this Judgement that first informed these victims that they had not met the criteria “to the required standard.”<sup>51</sup> The fact that they knew nothing of this standard was never addressed by the Chamber. CPG-1 is compelled to submit that this revocation of Civil Party status has caused significant anguish, confusion, and additional grief to the Civil Parties whose recognition was revoked or otherwise overturned.

#### 4) LY Hor

57. CPG-1 respectfully submits that a useful example of the practical effect of the Trial Chamber’s failure to make appropriate rulings prior to the issuing of the Judgement is its treatment of Civil Party LY Hor (E2/61) who, it is maintained, was detained in S-21. LY Hor was stripped of his Civil Party status in the Judgement.<sup>52</sup>
58. On 6 July 2009, LY Hor, alias EAR Hor, appeared in court to testify to his time as a prisoner at S-21. Due to apparent inconsistencies in his testimony, doubt was cast over the truthfulness and the veracity of his claim to have been detained at S-21. In addition, the documents provided in support of his application were also subject to dispute. In order to address these apparent inconsistencies, CPG-1 filed its *Request to establish the status of Ly Hor as a survivor of S-21 and authenticity of documents as a matter of record*, on 7 August 2009.<sup>53</sup> This motion, *inter alia*, annexed a declaration from KE Sopannaka, Head of Tuol Sleng Genocide Museum, certifying that the original copies of the documents provided in support of Ly HOR’s application as a Civil Party were found at S-21.<sup>54</sup>
59. Despite having been seized with this Request since August 2009, the Trial Chamber never rendered a decision ruling on the admissibility of the additional

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<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.*

<sup>53</sup> See “Civil Party Group 1—Request to establish the status of Ly Hor as a survivor of S-21 and authenticity of documents as a matter of record,” E137, 7 August 2009.

<sup>54</sup> *Ibid.* at par. 2.

information, or considered the submissions contained therein. In the Judgement, the Chamber ruled as follows, addressing the issue in one short paragraph:<sup>55</sup>

LY Hor (E2/61) avers that he was detained first at the S-21 complex and later transferred to S-24, from where he escaped. While the existence of a detainee named EAR Hor at S-21 may be accepted on the basis of the documents and explanations provided, there is doubt as to whether this detainee was the Civil Party. Further, there is no indication in the S-21 archives of the detainee having been transferred from S-21 to S-24 and no explanation was given for this alleged transfer, which was contrary to the norm. The Chamber accordingly also finds LY Hor's Civil Party application not to have been established to the required standard.

60. The Chamber does refer to the CPG-1 Request of 7 August 2009 in a footnote to this paragraph, but neither ruled on the Request, nor gave reasons for rejecting the additional information provided therein. It appears that the Chamber rather chose to accept the testimony of the Accused that generally all detainees were executed, rather than accept a handwritten annotation on the biography of EAR Hor corroborating LY Hor's claims.<sup>56</sup>
61. The problem with the Trial Chamber's approach is as follows. Having been seized with a request by a party, the Chamber was required to deliberate and rule. It did not. Had the Chamber decided the Request at the appropriate time, and ruled that LY Hor's Civil Party status had been revoked on the basis of the Chamber's lingering doubts as to the veracity of his claims, LY Hor would have been in a position to appeal this decision as of right pursuant to Internal Rule 23(4) and 104(4)(e), or locate and bring further documentation and information at the appropriate time, namely during the trial proceedings. The Chamber's failure to rule on the Request has prevented these steps, and rendered any meaningful remedy, provided in a timely manner, impossible. This is perhaps the clearest example of the unfairness and prejudice caused by the Chamber's failure to make timely rulings on admissibility of Civil Parties, or provide prior notice of the criteria by which it would be making such assessments.

### **5) Conclusion on the second Ground of Appeal**

62. The surprise and confusion which greeted the Trial Chamber's decision to re-assess the Civil Party status of victims in a wholesale manner after the close

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<sup>55</sup> Judgement, E188, 26 July 2010, par. 647.

<sup>56</sup> *Ibid.* at p. 225, footnote 1092.

proceedings was not insignificant.<sup>57</sup> In doing so, the Chamber acted unfairly, and caused prejudice to the very people who the entire process was designed to help. CPG-1 does not allege that a Chamber can never revoke Civil Party status once granted. However, the manner in which this Chamber acted in formulating new criteria of which Civil Parties had no notice, at a time after which they had already taken the huge step of being part of these proceedings was unjust and unreasonable, and caused direct prejudice. The Chamber could easily have avoided this prejudice by informing Civil Parties and their lawyers of the additional criteria at an appropriate time. It did not. CPG-1 submits that the appropriate remedy for the Chamber's erroneous approach is the reversal of the revocation of the Civil Party status of the nine victims the subject of this appeal.

**C. GROUND 3: The Trial Chamber erred by applying an improperly high standard of review for reassessing Civil Party applications and by requiring an unreasonably high standard of proof, thereby failing to take into account the individual circumstances of our clients and causing them extreme prejudice.**

63. Even if the Supreme Court Chamber were to find that the Trial Chamber did not err on the grounds discussed above, namely erroneously relying on Rule 100(1) when revoking Civil Party status and the failure to notify the victims of the standards they intended to maintain when reassessing the Civil Party applications, CPG-1 respectfully submits that the Trial Chamber committed clear error in applying an unreasonably high standard of review and proof in reassessing Civil Party applications.
64. Contrary to its prior pronouncement that “the degree of proof required will be assessed by the Chamber on a case-by-case basis based on the materials before

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<sup>57</sup> See, for example, Steve Finch, *30 Years in Jail Too Short for Khmer Rouge Leader*, 26 July 2010, available at: <http://ipsnews.net/news.asp?idnews=52275>: ‘In a surprise move, President of the Trial Chamber Nil Nonn told the packed courtroom that only 66 of the civil parties would be recognized in relation to the groundbreaking verdict, meaning that some 21 who had formed part of the process – mostly relatives of those killed under Duch’s command – were not eligible for this recognition. “I am not happy,” said Hong Savath, whose uncle died in S-21. “The judge should have told me from the beginning that I am not a civil party.”’ See also James O’Toole, *Reparations Remain a Key Issue*, The Phnom Penh Post, 27 July 2010, available at <http://www.phnompenhpost.com/index.php/2010072740791/National-news/reparations-remain-a-key-issue.html>.

it,”<sup>58</sup> the Chamber in fact did not take into account the individual circumstances of the Civil Parties, causing them extreme prejudice.

**1) Erroneous standard of review and unreasonable standard of proof**

65. As noted above, Internal Rule 23(2) provides that in order to qualify as a Civil Party the injury suffered by the victim must be “physical, material or psychological,” and the “direct consequence of the offence, personal and have actually come into being.”<sup>59</sup> No standard of review for the assessment of Civil Party applications is provided for in the Internal Rules.
66. In its Judgement of first instance, the Trial Chamber recognized that the victims may include indirect victims, or people who were not the intended targets of the criminal acts, and not simply direct victims.<sup>60</sup> This notion, according to the Chamber, finds its support both in the Internal Rules, in Article 13 of the 2007 Cambodian Code of Criminal Procedure and in international law.<sup>61</sup> The Trial Chamber, however, limited the notion of an “indirect victim” to familial relationships, and in exceptional circumstances, extended family, provided the victim can prove (i) kinship and (ii) the existence of circumstances giving rise to special bonds of affection or dependence on the deceased.<sup>62</sup>
67. The Trial Chamber thus found that four categories of Civil Parties could be distinguished in the Case 001, namely (1) direct survivors of S-21 or S-24; (2) the immediate family member of a victim of S-21 or S-24 (3) extended family members of a victim of S-21 or S-24, in exceptional circumstances (4) and finally the successor of a deceased Civil Party applicant.<sup>63</sup>
68. When first determining whether the applications were admissible, the Trial Chamber explained that it conducted a *prima facie* standard of review in assessing the Civil Party applications.<sup>64</sup> Based on this standard of review, the Trial Chamber unambiguously ruled that a total of 93 Civil Parties were qualified to actively participate throughout trial; 22 of which addressed the Court directly during trial

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<sup>58</sup> T., 17 February 2009 (Initial Hearing), pp. 33-34.

<sup>59</sup> Internal Rule 23(2), Rev. 3.

<sup>60</sup> Judgement, E188, 26 July 2010, par. 642.

<sup>61</sup> *Ibid.* at p. 221, footnote 1076.

<sup>62</sup> *Ibid.* at par. 643.

<sup>63</sup> *Ibid.* at par. 641.

<sup>64</sup> *Ibid.* at par. 636.



proceedings. The Trial Chamber, without providing the Civil Parties with prior notice, subsequently adopted vastly higher standards not rooted in law, and proceeded to re-assess the Civil Party applications anew in the Judgement of first instance. After having weighed the applications against this novel, unspecified, standard of review and having increased their demand for proof of identity, the Chamber came to the conclusion that 20 Civil Parties, of which nine pertain to the present appeal, did not meet the “required standard.”<sup>65</sup>

69. The Trial Chamber found that while the “immediate family members of a victim fall within the scope of Internal Rule 23, direct harm may be more difficult to substantiate in relation to more attenuated relationships.”<sup>66</sup> The Chamber does not elaborate on what an “immediate family member” is, or what the “exceptional circumstances” are which have to occur for such an “attenuated relationship” to be admissible. As this requirement is nowhere to be found in the governing documents, the Chamber, in a footnote, refers to decisions by the Inter-American Court on Human Rights and the International Criminal Court (ICC) in support of its notion of an indirect victim.<sup>67</sup> Within the nine CPG-1 Civil Parties discussed herein, at least two were dismissed for having failed to establish this exceptional circumstance, linking them to their lost family member.<sup>68</sup>
70. However, the very decisions it cites to in support of its limited notion of what constitutes a victim all seem to argue in favor of a broad and flexible approach towards victim applications.<sup>69</sup> Such an approach the Trial Chamber eschewed in its Judgement. Indeed, the *Lubanga* case cited to and paraphrased by the Chamber, uses a “broad notion of family,” without referencing the difficulties in providing evidence thereto.<sup>70</sup> Other ICC cases, not referenced by the Chamber, further have held that while a causal link must exist between the crimes charged and the harm alleged, this does not preclude indirect victims from participating.<sup>71</sup> In discussing the notion of an “indirect victim” Trial Chamber I in the *Lubanga*

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<sup>65</sup> *Ibid.* at par. 647.

<sup>66</sup> *Ibid.* at par. 643.

<sup>67</sup> *Ibid.* at par. 644.

<sup>68</sup> *Ibid.* at p. 229.

<sup>69</sup> *Ibid.* at p. 221, footnote 1076.

<sup>70</sup> *Ibid.*, citing to ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Judgement on the Appeals of the Prosecutor and the Defense against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, Appeals Chamber (ICC-01/04-01/06-1432) 11 July 2008, par. 32.

<sup>71</sup> ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Applications for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6, Pre-Trial Chamber I (ICC-01/04-01/06-172-tEN) 20 July 2006, p. 8.

case found that various forms of indirect victims can exist.<sup>72</sup> The only category that the Chamber found to be excluded from “indirect victims” are “those who suffered harm as a result of the (later) conduct of the direct victims.”<sup>73</sup> Contrary to the Trial Chamber in Case 001, the Chamber in *Lubanga* did not find it necessary to limit the definition of “indirect victim” at the cost of the victims.

71. In addition to the increased standard imposed upon the Civil Parties in a retroactive manner, the Trial Chamber also heightened the burden of proof in support of their applications. In reassessing the applications the Chamber noted that it had accepted documents such as detainee lists, official lists or registers, confessions, photographs and other evidence from S-21 that identified the detainees as evidence in support of the Civil Party applications.<sup>74</sup> The Chamber went on to state that it considered as valid the Accused’s acknowledgement of the “truthfulness” of the Civil Party statements,<sup>75</sup> but refused to accept uncorroborated Civil Party statements alone.<sup>76</sup>
72. Citing an appeals’ decision in the *Prosecutor v. Kony et al.* from the ICC, which emphasized the need that judicial decisions [concerning the determination of victim status] be based on evidence,<sup>77</sup> the Trial Chamber then proceeded to revoke Civil Party status from recognized Civil Parties. While the Chamber is correct in asserting that the Civil Parties need to provide some form of evidence in corroboration of their identity, their reliance on this case is misplaced. Contrary to the Trial Chamber in Case 001, the ICC has recognized that while the applications are to be based on documentary evidence, the conditions of war and upheaval may hinder the submission of evidence in furtherance of their identification.<sup>78</sup>
73. The ICC thus allowed for the applicants to submit a variety of documents as proof of their identity or kinship, including, for example, a letter from a local authority

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<sup>72</sup> ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Redacted version of Decision on Indirect Victims, Trial Chamber I (ICC-01/04-01/06-1813) 8 April 2009, pp. 20-21.

<sup>73</sup> *Ibid.* at par. 52.

<sup>74</sup> Judgement, E188, 26 July 2010, p. 222, footnote 1079.

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.*

<sup>78</sup> See e.g. ICC, *Prosecutor v. Omar Hassan Achmad Al-Bashir*, Decision on Applications [...] for Participation in the Proceedings at the Pre-Trial Stage of the Case, Pre-Trial Chamber I (ICC-02/05-01/09), 10 December 2009, par. 9. The Single Judge noted that “in regions which are or have been ravaged by conflict, not all civil status records may be available, and if available, may be difficult or too expensive to obtain.” For these reasons, as recognized by other Chambers at the ICC, the Judge held that a “flexible approach shall again be taken with respect to such applications....”

and a statement signed by two witnesses attesting to the identity of the applicant.<sup>79</sup> The same level of flexibility was not shown by the Trial Chamber in Case 001. On the contrary, the Trial Chamber was more willing to accept a statement by the Accused regarding the validity of Civil Party evidence, rather than take into account the documents and statements by the Civil Parties.

74. Additionally, this decision of the ICC Appeals Chamber was handed down during the pre-trial phase of that case, well before the start of trial proceedings. In fact, the accused individuals in that case have yet to be apprehended by the ICC. Therefore the higher standard of proof seemingly required by this decision was communicated to victims by the Court well before the start of trial. Again, this was not the situation in the present case, where the high standard of proof was only communicated in the Judgement of first instance.
75. It is therefore respectfully submitted that reliance on this ICC decision is inappropriate. Unlike in the ICC decision relied on by the Court, Civil Parties in Case 001 already fully participated at trial. For this reason, a strict standard of proof communicated to the victims in the Final Judgement does not protect the rights of the Accused in trial proceedings but rather only unjustly prejudices previously recognized Civil Parties. The Trial Chamber abused its discretion by unreasonably augmenting the standards of review and proof in its Final Judgement causing severe prejudice to the Civil Parties by depriving them of the opportunity to meet these standards.

## 2) LY Hor

76. As discussed above,<sup>80</sup> in the reassessment and revocation of LY Hor's Civil Party status, the Trial Chamber makes no real evaluation of the additional evidence submitted by CPG-1 in its filing of 28 July 2009.<sup>81</sup> The Trial Chamber simply

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<sup>79</sup> *Ibid.*, citing to ICC, *Situation in the Democratic Republic of Congo*, Decision on the Requests of the Legal Representative of Applicants on application process for victims' participation and legal representation, Pre-Trial Chamber I (ICC-01/04-374) par. 15; ICC, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Public Redacted Version of the 'Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case,' Pre-Trial chamber I (ICC-01/04-01/07-579) par. 46; ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, Fourth Decision on Victims' Participation, Pre-Trial Chamber III (ICC-01/05-01/08-320), paras 36-37.

<sup>80</sup> See *supra* B.3. at paras 54-58.

<sup>81</sup> "Civil Party Group 1—Request to establish the status of Ly Hor as a survivor of S-21 and authenticity of documents as a matter of record," E137, 7 August 2009.

expressed doubt as to whether LY Hor was the detainee EAR Hor as claimed,<sup>82</sup> choosing to accept the testimony of the Accused generally claiming that apart from very few exceptions all detainees were executed over that of a handwritten annotation on the biography of EAR Hor corroborating LY Hor's claims.<sup>83</sup> The unreasonably high standard of proof required by the Trial Chamber is particularly troubling because it was done after the conclusion of trial proceedings and therefore had no purpose other than to disqualify Civil Parties from receiving collective and moral reparation in the form of recognition in the Judgement.

### 3) Jeffrey JAMES and Joshua ROTHSCHILD

77. In the case of Jeffrey JAMES (E2/86) and Joshua ROTHSCHILD (E2/88), who positively showed that their uncle James W. CLARK was detained and executed at S-21, their Civil Party status was revoked due to a finding by the Trial Chamber that they were unable to substantiate any special bond of affection or dependency in relation to their uncle. In order to show a special bond of affection the Chamber appears to require that that the extended family member had lived with the Civil Party at some point,<sup>84</sup> without consideration of other circumstances that could also qualify as special bonds of affection. Indeed, the Trial Chamber took particular note of the expert testimony of CHHIM Sotheara where he explained the historical tendency of Cambodian families to live together with other family members and the likelihood of strong bonds between grandparents, cousins, uncles and aunts.<sup>85</sup> The Trial Chamber erroneously applied its high standard of proof of a special bond, namely living together based on Cambodian familial relationships, in a blanket manner without consideration of the particular circumstances of individual Civil Parties, for example non-Cambodian Civil Parties.
78. Together with their mother, JAMES and ROTHSCHILD are the only living relatives of their uncle, the Civil Party application of JAMES specifically

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<sup>82</sup> Judgement, E188, 26 July 2010, par. 647.

<sup>83</sup> *Ibid.* at p. 225, footnote 1092.

<sup>84</sup> *Ibid.* at par. 650, acceptance of TOCH Monin as a Civil Party for the loss of his cousin with whom he was raised and of whom he is the only surviving relative; acceptance of SIN Sinet for the loss of her grandfather in whose house she had lived; acceptance of YUN Chhoeun for the loss of his nephew who lived in his house until the age of 15 and acceptance of SEK Siek for the loss of her cousin and fiancé who was living in the family home.

<sup>85</sup> *Ibid.* at p. 221, footnote 1077, citing T., 25 August 2009, pp. 36-37, 48.

mentions the frequent visits made by their uncle to family home when they were growing up, and he writes in his application that he and his uncle “were very close.”<sup>86</sup> By only applying a high standard of proof based on Cambodian familial relationships, the Trial Chamber failed to take into account the specific circumstances of these Civil Parties and therefore erred when revoking their Civil Party status.

#### **4) Conclusion for the third Ground of Appeal**

79. Even if this Chamber were to find that the Trial Chamber did not err by carrying out a re-assessment of Civil Party applications or by formulating new criteria and then failing to inform the parties of this criteria until the Judgement, the Trial Chamber erred by applying an improperly high standard of review for reassessing Civil Party applications and by requiring an unreasonably high standard of proof. Without taking into consideration the individual circumstances of Civil Parties and misapplying case law from the ICC, the Trial Chamber prejudiced the victims of this case. CPG-1 submits that the proper remedy for the Trial Chamber’s erroneous approach is reversal of the revocation of the Civil Party status of the nine victims named in this Appeal.

### **VI. CONCLUSION**

80. All nine victims named in this Appeal met the criteria for participation as provided for in the Internal Rules and decisions made prior to the start of trial. All nine victims were unequivocally granted Civil Party status by the Trial Chamber. In reliance upon that decision and the status conferred, all nine Civil Parties participated throughout the trial, assisting in the documenting of the truth and aiding the healing process of their individual families as well as the country as a whole. These nine Civil Parties then erroneously had their Civil Party status revoked by the Trial Chamber. The revocation of their Civil Party status came at the last possible moment of the criminal process, causing not only shock and dismay, but real prejudice to our clients as they were not recognized in the Final Judgement of the Court. Such recognition was one of only two forms of reparation

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<sup>86</sup> Civil Party application of Jeffrey James.

the Trial Chamber ordered.<sup>87</sup> The fact of this being an unsatisfactory state of affairs is perhaps evidenced by the recent Rules change in February 2010. But the fact that Civil Parties in Case 002 will not suffer a similar fate, does not lessen the prejudice suffered by the 9 Civil Parties in the present case.

## VII. REQUEST

81. On the premises, and for the reasons adumbrated above, CPG-1 prays that the Supreme Court Chamber **reverse** the revocation of Civil Party status found in the Judgement and **confirm** the Civil Party status for the nine affected victims named in this Appeal.

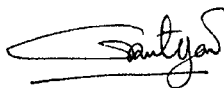
Respectfully submitted by

Co-Lawyers for Civil Parties (Group 1)

Signed on 14 September 2010



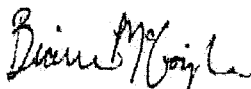
Karim A. A. Khan



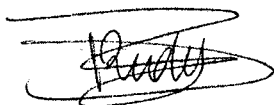
Ty Srinna



Alain Werner



Brianne McGonigle



Daniella Rudy



Kate Gibson

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<sup>87</sup> Judgement, E188, 26 July 2010, par. 667-668.