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

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

អង្គបុរេជំនុំជម្រះ
Pre-Trial Chamber
Chambre Préliminaire

លេខ/No: D11/2/4/4

In the name of the Cambodian people and the United Nations and pursuant to the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea

Case File N° 003/07-09-2009-ECCC/OCIJ (PTC 02)

Before: **Judge PRAK Kimsan, President**
Judge Rowan DOWNING
Judge NEY Thol
Judge Katinka LAHUIS
Judge HUOT Vuthy

Date: **24 October 2011**

PUBLIC (REDACTED VERSION)
CONSIDERATIONS OF THE PRE-TRIAL CHAMBER REGARDING THE APPEAL AGAINST ORDER ON THE ADMISSIBILITY OF CIVIL PARTY APPLICANT ROBERT HAMILL

Co-Prosecutors

CHEA Leang
Andrew CAYLEY

Lawyers for the Civil Party Applicant

SAM Sokong
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THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (the "ECCC") is seised of the "Appeal Against Order on the Admissibility of Civil Party Applicant Mr Robert Hamill (D11/2/3) (Cases 003 and 004)" filed by the Co-Lawyers on 24 May 2011 (the "Appeal").[1]

I. PROCEDURAL BACKGROUND AND SUBMISSIONS

1. On 7 September 2009, the International Co-Prosecutor filed confidentially the "Second Introductory Submission [redacted]" (the "Second Introductory Submission")[2] with the Co-Investigating Judges requesting them to begin a judicial investigation in Case 003.

2. On 12 April 2011, Mr Robert HAMILL ("the Appellant") submitted an application to the Victims Support Section of the ECCC ("VSS"), seeking to be admitted as civil party in Cases 003 and 004 before the ECCC. In his application, the Appellant claims to have suffered harm as a direct consequence of crimes committed against his brother, Mr Kerry HAMILL, who was arrested in August 1978 by the Democratic Kampuchea Navy and subsequently transferred to S-21 where he was detained, interrogated, tortured and executed.[3] His application was filed with the Co-Investigating Judges on 22 April 2011 by the VSS.[4]

3. On 29 April 2011, the same day they closed their investigation in Case 003, the Co-Investigating Judges issued the "Order on the Admissibility of the Civil Party Application of Rob Hamill" (the "Impugned Order"), declaring the Appellant's civil party application inadmissible on the basis that "the applicant did not demonstrate that he suffered the alleged psychological injury as a direct consequence of the death of his brother."[5] The

[1] Appeal Against Order on the Admissability of Civil Party Applicant Mr Robert Hamill (D11/2/3) (Cases 003 and 004), 24 May 2011, D11/2/4/2 (the "Appeal").
[2] Acting International Co-Prosecutor's Notice of Filing of the Second Introductory Submission, 7 September 2009, D1/1.
[3] Victim Information Form, dated 11 April 2011, filed with VSS on 12 April 2011, D11/2 (the "Application").
[4] Application, bearing a stamp dated 22 April 2011 by the Case File Officer, but included in the case file only on 29 April 2011 as indicated on the Filing Instructions Form.
[5] Impugned Order, para 5.

Co-Lawyers state that the Impugned Order was received by the Appellant via post, at his address in New Zealand, on 12 May 2011, but they were not notified of the decision.[6]

4. On 9 May 2011, the International Co-Prosecutor issued a public statement disclosing the scope of the Second Introductory Submission.[7]

5. On 16 May 2011, the Co-Lawyers filed a Notice of Appeal with the Co-Investigating Judges.[8] In the Register of Appeal, the Greffier of the Office of the Co-Investigating Judges stated that the Co-Lawyers had not been recognised yet by the Co-Investigating Judges.

6. On 24 May 2011, the Co-Lawyers filed a "Request for the Suspension of Deadline for Appeal Against Order on Admissibility of Civil Party Application of Robert Hamill Pending Grant of Access to Case Files 003 and 004" (the "Request for access to the case file"), asking that the Pre-Trial Chamber exercise its discretion to suspend the deadline to file the Appeal to a reasonable time after the Appellant's legal representatives have been granted access to the Case File, or alternatively that the Pre-Trial Chamber grant them leave to submit additional legal and factual arguments at a reasonable time following any grant of access to the Case File.[9] The Co-Lawyers allege that despite a request made on 1 May 2011 to the Co-Investigating Judges, they have not been granted access to the Case File.[10]

7. On the same day, the Co-Lawyers filed the Appeal raising the following six grounds of appeal: i) the Co-Investigating Judges violated Rule 21(c) of the Internal Rules of the ECCC (the "Internal Rules") "to ensure legal certainty and transparency" by rejecting the

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[6] Appeal, para. 3.
[7] Statement by the International Co-Prosecutor regarding Case File 003, 9 May 2011. This statement was followed by the issuance of a retractation order by the Co-Investigating Judges ("Order on International Co-Prosecutor Public Statement Regarding Case File 003, 18 May 2011, D14) and is subject to an appeal currently pending before the Pre-Trial Chamber ("International Co-Prosecutor's Appeal Against the 'Order on International Co-Prosecutor's Public Statement Regarding Case File 003", 25 May 2011, D14/1/1).
[8] Record of Appeal, D11/2/4.
[9] Request for the Suspension of Deadline for Appeal Against Order on Admissibility of Civil Party Application of Robert Hamill Pending Grant of Access to Case Files 003 and 004 ("Request for access to the case file"), 24 May 2011, D11/2/4/1, para. 5.
[10] Request for access to the case file, para. 4.

Appellant on the basis that he is an "indirect victim"; ii) the Co-Investigating Judges violated Internal Rule 23*bis*(1)(b) and Article 3.2(c) of the Practice Direction on Victims Participation; iii) the Co-Investigating Judges violated Internal Rules 56 and 21, the Basic Principles of Victims Rights and fundamental principal of procedural fairness to provide public information about Cases 003 and 004; iv) in failing to give proper reasons in relation to the Appellant's Civil Party Application in Case 004, the Co-Investigating Judges have violated Internal Rule 21 concerning the fundamental principal of procedural fairness to provide reasons for a decision; v) the Co-Investigating Judges violated Internal Rules 14(1) and 55(5), Article 10 *new* of the ECCC Law and Articles 5(2) and (3) of the Agreement by failing to properly and independently investigate Case 003; vi) in rejecting the Appellants civil claims, the Co-Investigating Judges have blocked the ECCC's process of justice upon which victims and the international community alike have placed their hopes, and in doing so, have fostered a message that impunity prevails, in violation of the primary purposes of the ECCC as set out in the ECCC Law.

8. The Co-Lawyers, noting that the Impugned Order in its operative part "[r]eject[ed] the [Appellant's] application to be a Civil Party in Case File 004"[11], claim that neither themselves nor the Appellant have received the Order issued in Case 004, despite repeated attempts on their part to obtain it.[12] As a result, they have filed in Cases 003 and 004 a single Appeal, which they intended to cover both cases. The Pre-Trial Chamber observes that the current decision deals with the appeal solely insofar as it concerns the Impugned Order in Case 003 and that another decision will be issued in respect of the Appellant's application in Case 004.

9. On 6 July 2011, the Co-Investigating Judges filed a request for correction of the English version of Impugned Order[13] and, on 7 July 2011, they replaced in the case file the English version of the Impugned Order with a new one, dated 29 April 2011 (the "Modified Order").[14] On 26 August 2011, a similar request for correction was made by

[11] Impugned Order, second paragraph of the disposition; Appeal, para. 4.
[12] Appeal, paras 4 and 6.
[13] D11/2/3/Corr. 1.
[14] The Modified Order bears the exact same number as the Impugned Order.

the Interpretation and Translation Unit to the "Khmer translation" of the Impugned Order, which was replaced in the case file with a new translation, dated 29 April 2011.

10. On 13 July 2011, the Pre-Trial Chamber informed the parties that it will decide on the Request for access to the case file when addressing the substance of the Appeal.[15]

11. No response was filed to the Appeal.

II. EXPRESSION OF OPINION AND CONCLUSION

12. Despite its efforts, the Pre-Trial Chamber has not attained the required majority of four affirmative votes in order to reach a decision on the Request for access to the case file nor on the issues raised in the Appeal or even on an approach to deal with the Appeal. Given that Internal Rule 77(14) provides that the Chamber's decision shall be reasoned, the opinions of its various members are attached to these Considerations.

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

III. DISPOSITION

THEREFORE, THE PRE-TRIAL CHAMBER HEREBY:

UNANIMOUSLY DECLARES that it has not assembled an affirmative vote of at least four judges on a decision on the Request to access the case file.

[15] Notice to the parties concerning the Co-Lawyers' Request for suspension of time to file the appeal pending access to the case file, 13 July 2011, D11/2/4/3.

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

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

Phnom Penh, 24 October 2011

President **Pre-Trial Chamber**

PRAK Kimsan **Rowan DOWNING** **NEY Thol** **Katinka LAHUIS** **HUOT Vuthy**

Judges Prak Kimsan, Ney Thol and Huot Vuthy append their opinion.

Judges Downing and Lahuis append their opinion

Opinions of Judge PRAK Kimsan, Judge NEY Thol, and Judge HUOT Vuthy

1. In his Appeal against Order on Admissibility of Civil Party Applicant (D11/2/3) (the "Appeal")[1] Mr Robert HAMILL indicated that he gave testimony in Case 001 against Kaing Guek Eav (*alias* Duch), who was the director of S-21 centre regarding the fate of his brother Kerry HAMILL who was imprisoned, interrogated, tortured and killed at S-21.[2] In his Victim Information Form (11-VSS-00002), Mr Robert HAMILL described the following facts: on 13 August 1978, the Appellant's brother, Kerry George HAMILL, skipper and co-owner of a 28-foot yacht, *Foxy Lady*, together with co-owner, Canadian Stuart GLASS, and a passenger, Englishman John DEWHIRST, were anchored and taking shelter in one of the bays of Koh Tang Island situated 50 kilometres off the coast of south west of Sihanouk Ville. That evening shots were fired upon the *Foxy Lady* and her crew. Stuart GLASS, who was on deck, was shot. Kerry, who was also on deck, managed to get Stuart into a lifebuoy. John DEWHIRST, who had been below deck at the time of the shots, emerged from below and took refuge with Kerry, climbing overboard into the water.[3] Then, a Khmer Rouge gunboat picked up the two men. Stuart died and was buried at sea. The men were shackled and blindfolded then taken to a cinema in Sihanoukville where they were held for a day or two before being transferred to the security centre S-21 in Phnom Penh.[4] At S-21 both men were subjected to interrogation and torture including electric shock administration. Eventually both men were forced to sign confessions stating that they were CIA agents. These confessions were clearly untrue.[5] In his fictitious confession Kerry wove his "CIA training" into real facts about his life. Kerry used the Hamill family home telephone number of the time (8708) as his CIA operative number; he stated that Colonel Sanders (of Kentucky Fried Chicken) was one of his superiors, listed several family friends as supposed members of the CIA who helped train him in CIA surveillance; and that "a Mr S. Tarr" was the public speaking instructor. In fact, S. Tarr is the phonetic spelling of the Appellant's mother's name, Esther.[6] Kerry's confession was signed approximately two months

[1] Mr Robert HAMILL's Appeal, D11/2/4/2.
[2] Ibid., para. 25.
[3] Ibid., para. 26.
[4] Ibid., para. 27.
[5] Ibid., para. 28.
[6] Ibid., para. 29.

after his capture, and it is assumed that he was executed around the time of signing the confession. The exact method of Kerry's execution is unknown.[7]

2. The facts described in Mr Robert HAMILL's Appeal against Order on Admissibility of Civil Party Applications dated 23 May 2011 all are facts set out in the First Introductory Submission[8] dated 18 July 2007, as well as in the Closing Order of Case No. 002/19-09-2007/ECCC/OCIJ[9]—which include:

- Summary of the Facts (paragraphs 1—36)
- Forced Evacuation (paragraphs 37—42)
- Forced Labour, Inhumane Conditions, and Unlawful Imprisonment (paragraphs 43—48)
- Murder, Torture, and Physical and Psychological Violations (paragraphs 49—55)
- Kampong Som Autonomous Sector (paragraph 59)
- Former North Zone, East Zone

3. The National Judges of the Pre-Trial Chamber find that the facts set out in the Second Introductory Submission dated 20 November 2008 which constitute Case 003, all are old facts contained in the First Introductory Submission dated 18 July 2007.

4. During their investigations in Case 003, from the opening to the announcement of closing of the investigations, the Co-Investigating Judges did not charge any person. This means that regarding the facts sent by the Co-Prosecutors through the Introductory Submissions to the Co-Investigating Judges, there was no suspect against whom the Co-Investigating Judges find there was clear and consistent evidence indicating that the person participated in the commission of the alleged crimes.

[7] Ibid., para. 30.
[8] Introductory Submission, D3
[9] Closing Order, D427, paras. 221—282 and paras. 644—666

5. As a result, the rejections of Mr Robert HAMILL's Civil Party Applications at this stage do not infringe their rights. On top of this, we are of the following view:

6. As a principle, the processing of criminal proceedings begins with the Co-Prosecutors considering criminal facts and deciding whether to proceed with prosecuting the offender(s) or hold a file without processing even if the facts are offences. Through this principle, the Co-Investigating Judges shall investigate facts forwarded to them by the Co-Prosecutors; they shall provide assessment over inculpatory evidence sent by the Co-Prosecutors together with the case forwarded, any exculpatory evidence the Co-Investigating Judges have obtained during their investigations, and any consistency that makes them believe that a person has committed an offence. Rule 55(2) of the Internal Rules requires that the Co-Investigating Judges investigate only the facts set out in an Introductory Submission or a Supplementary Submission.

7. Rule 55(4) of the Internal Rules states that the Co-Investigating Judges *have the power to charge any Suspects named in the Introductory Submission*. The Co-Investigating Judges may also charge other persons against whom there is clear and consistent evidence indicating that such person may be criminally responsible for the commission of a crime referred to in an Introductory Submission or a Supplementary Submission, even where such persons were not named in the submission. In the latter case, they must seek the advice of the Co-Prosecutors before charging such persons.

8. The phrase "have the power to charge" in Internal Rule 55(4) provides a clear indication that the Rule gives the Co-Investigating Judges discretion to decide to charge any person who was named in the Introductory Submission, as well as to charge any other persons who were not named in the submission. This provision does not force the Co-Investigating Judges to charge any person who was named in the Introductory Submission of the Co-Prosecutors. Besides, Internal Rule 55(5) only provides the Co-Investigating Judges a right to decide whether or not to summon and question Suspects or Charged Persons.

9. In other words, when the Co-Prosecutors forwarded their Introductory Submission to the Co-Investigating Judges, requesting them to charge or place any named person in custody, the Co-Investigating Judges at their discretion can decide whether or not to charge or to place that person in custody. Therefore, the Co-Investigating Judges are not bound by the names of persons described in an Introductory Submission or a Supplementary Submission filed by the Co-Prosecutors. Decision to charge a person is the Co-Investigating Judges' discretion.

10. Rule 57(1) of the Internal Rules states that "at the time of the initial appearance the Co-Investigating Judges shall record the identity of the Charged Person and inform him or her of the charges, the right to a lawyer and the right to remain silence." This provision is only about the Accused person's rights to self-protection (i.e., right to be informed of charges against him/her, right to a lawyer, and right to remain silence) when s/he appears before the Co-Investigating Judges even if such an appearance is carried out by a subpoena or by an arrest warrant. This provision does not require the Co-Investigating Judges to absolutely order the appearance of Charged Persons when they are seized with the Introductory Submission. In other words, it does not determine any specific time to do so.

11. Charges are brought against any person against whom there is clear and consistent evidence indicating that the person, as a perpetrator or an accomplice, participated in the commission of crimes.

12. As explained in Paragraph 4 above, during their investigations of Case 003, from the opening to the announcement of closing of the investigations, the Co-Investigating Judges have not charged any person, meaning that with regard to the facts forwarded to the Co-Investigating Judges by the Co-Prosecutors through their Introductory Submission, there is no any suspect against whom the Co-Investigating Judges find there is clear and consistent evidence indicating s/he participated in the commission of the alleged crimes.

13. For the above mentioning, we find that as of the time that the Impugned Order was issued and Civil Party Applications of Mr Robert HAMILL were filed in Case 003, the Co-Investigating Judges have not yet identified any charged person with regard to the facts set out in the Introductory Submission sent to them.

14. Besides, Civil Party Applications shall be filed with a purpose to seek remedy for the damage caused to the victims by criminal acts. Such criminal acts shall be committed directly by the offenders including the perpetrator, co-perpetrator, etc.

15. We find that where there is no charged person to be held responsible for the remedy of harms caused to the victims, the rejection of civil party applications at this stage does not infringe the rights of the victims.[10]

Phnom Penh, 24 October 2011

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

[10] Rule 23 *quinquies* of the Internal Rules

OPINION OF JUDGES LAHUIS AND DOWNING

1. At the outset, we consider it important to briefly highlight the context in which the Application was filed and decided upon which, although largely unknown to the Appellant and his lawyers who have had no access to the case file, inevitably has consequences on the way we have formed our Opinion in this matter.

1. Preliminary Observations on Transparency and Adversarial Character of Proceedings

2. As a preliminary observation, we note that the approach and procedures followed by the Co-Investigating Judges in the judicial investigation for Case 003 are significantly different from those taken in Cases 001 and 002 before the ECCC and that explanations for adopting a different course of action have not been provided. First, the Co-Investigating Judges' approach in conducting this judicial investigation is on the whole unclear. Although the investigation has been closed, very little information has been provided to permit an understanding in respect of the focus of this investigation. Further, it is not understood whether the scope of the investigation has in any way been limited from that defined in the Second Introductory Submission, if there were any issues of particular import and how the rights of the various parties to the proceedings were taken into consideration and balanced against the specific nature of this investigation. Second, the procedures followed by the Co-Investigating Judges, notably in processing and dealing with applications from the parties and applicants in the proceedings have, in several respects, differed from the ones adopted in Cases 001 and 002, without any explanation nor any prior notice given to the parties and the appellate body by the Co-Investigating Judges. We note, in particular, that the Co-Investigating Judges have not been consistent in the way they manage the civil party admissibility regime in this case and the filing of documents by civil party applicants. The information and explanations the Co-Investigating Judges provided to parties or applicants in the proceedings, if any, often does not have a consistent rationale. Below are a few examples of the behaviour to which we are referring. We consider that the information mentioned below can be made public without breaching the principle of confidentiality of the judicial investigation as no information is disclosed on the substance of the investigation nor on the identity of the possible Suspects.

a) Notification of charges to the persons named in the Second Introductory Submission

3. From the opening to the announcement of the closing of the judicial investigation and until now, the Co-Investigating Judges have not formally notified the charges to, nor informed of the existence of the judicial investigation, the persons named as Suspects in the Second Introductory Submission. This approach departs from that taken for Case 001 and Case 002 whereby the persons named in the First Introductory Submission were brought before the Co-Investigating Judges within the months that followed the filing of the Introductory Submission in order to be formally informed of the charges against them through an initial appearance held in pursuance to Internal Rule 57. Although the Co-Investigating Judges enjoy certain discretion in their decision to formally notify of charges a person named in an introductory submission, no explanation has ever been provided by the Co-Investigating Judges in the case file or otherwise as to why their practice in Case 003 differs from the preceding cases and why the Suspects have not been notified of such status in the investigation. This may be perceived as questionable given the requests made by the International Co-Prosecutor, which have not been determined and no explanation for such course of action has been given.[1]

b) Information to the victims and potential civil party applicants

4. Contrary to the practice adopted in Case 002,[2] victims were not given any information about the investigation in Case 003 nor about their right to apply to become civil parties or to file a complaint in the case prior to the Co-Investigating Judges' decision to close the investigation on 29 April 2011. The Co-Investigating Judges merely announced to the public, on 29 April 2011, that they had closed their investigation, without giving any

[1] In particular, the International Co-Prosecutor has specifically requested [redacted] Despite this request being made on 20 November 2008, it has not been determined and no explanation for such course of action has been given either [redacted]

[2] In Case 002, the Co-Investigating Judges issued a press release on 5 November 2009 disclosing the scope of the investigation and informing victims of their right to apply to become civil parties in the case, more than two months prior to the closing of the investigation (on 14 January 2010). They extended two times the deadline for civil party applicants to file further information in order to support their application, giving an additional 5 months for doing so (until 30 June 2010). The Pre-Trial Chamber considered in Case 002 that the information provided to the victims was insufficient and not provided in a timely manner, thus infringing upon the rights of the victims: Decision on appeals against orders of the Co-Investigating Judges on the admissibility of civil party applications, 24 June 2010, D404/2/4, paras 51-54.

information about the scope of such investigation or any other information whatsoever. The only information made available to the public about the scope of the investigation in Case 003 was provided in a press release issued on 9 May 2011 by the International Co-Prosecutor,[3] which was the subject of a retraction order issued by the Co-Investigating Judges.[4] Pursuant to the Internal Rules, the closing of the investigation triggers a 15 day time limit for victims to submit Civil Party Applications, which therefore expired in principle on 18 May 2011.[5] As emphasised by the Pre-Trial Chamber in its "Decision on appeals against orders of the Co-Investigating Judges on Civil Party Applications" in Case 002, the disclosure of sufficient information about the scope of the investigation, in a timely manner, is essential to permit victims to exercise the rights provided to them under Internal Rule 23*bis*.[6] In particular, for victims to apply to become civil parties in a case, they have to demonstrate, *inter alia*, a link between the injury suffered and at least one of the crimes alleged against a charged person. Such a demonstration cannot be made when no information whatsoever is available. Already, in Case 002 where more information was disclosed to the victims at an earlier stage, the Co-Investigating Judges were found by the Pre-Trial Chamber to have violated the rights of the victims for not having provided them sufficient information. In contrast to their previous practice in Case 002 and despite the specific and directed framework established by the Internal Rules, especially the right to apply to become civil parties in cases before the ECCC, the Co-Investigating Judges have offered no explanation whatsoever for not giving the victims, as potential civil party applicants and complainants, any information about the judicial investigation conducted in Case 003.

5. We take note that no civil party applicant has been in a position to effectively exercise the right to participate in the judicial investigation expressly provided for under the Internal Rules[7] and that this situation appears to result, to a significant extent, from the lack of information surrounding the investigation in Case 003. As such, we consider that the

[3] Press Release entitled "Statement by the International Co-Prosecutor regarding Case File 003", 9 May 2011.
[4] Order on International Co-Prosecutor's Public Statement Regarding Case File 003, 18 May 2011, D14.
[5] Internal Rule 23*bis*(2).
[6] Decision on appeals against orders of the Co-Investigating Judges on the admissibility of civil party applications, 24 June 2010, D404/2/4, paras 51-54.
[7] See *inter alia* the rights granted to civil parties during the judicial investigation under Internal Rules 55(8) (to attend on-site visits conducted by the Co-Investigating Judges), 55(10) (to request investigative actions), 58(5) (to participate in confrontations), 59(5) (to request the Co-Investigating Judges to interview him or her, interview witnesses, go to a site, order expertise and collect evidence), 74(4) (to appeal against certain orders issued by the Co-Investgiating Judges) and 76(2) (to request annulment of any part of the proceedings).

rights of the victims have been ignored thus far to their detriment. We also emphasise that by being allowed under the Internal Rules to participate in the judicial investigation in various ways, victims, as complainants[8] or civil party applicants, may bring important information pertaining to the facts under investigation, including the role the Suspects may have played in the alleged crimes. Refusing them the possibility to participate in the investigation may deprive the Co-Investigating Judges of important information in their search for the truth, leading to an incomplete investigation and raising doubts about its impartiality.

c) Access to the case file by the lawyers for civil party applicants

6. In contrast with the practice in Cases 001 and 002, lawyers for the civil party applicants in Case 003 were not given access to the case file after civil party applications and power of attorneys were filed. Indeed, the lawyers' repeated requests to have access to the case file remained unanswered at the moment their clients' civil party applications were rejected until now.[9] As a result, the lawyers for the Appellant, who had to file their appeal without having access to the case file, submitted to the Pre-Trial Chamber their Request to access the case file. In our opinion, Internal Rule 23*bis*(2), when read in conjunction with Internal Rule 55(6) and (11), gives civil party applicants the right to have access to the case file, through their lawyers, from the moment the application is filed until the rejection of such application becomes final. In the absence of any reason or explanation provided by the Co-Investigating Judges for not giving the Appellant's lawyers access to the case file at this stage and given the importance for the lawyers of having access to the case file in order to lodge their appeal, we are in favour of granting their Request to access the case file and, as such, that they be granted leave to file further submissions on the Appeal after having accessed the case file. However, considering that the Pre-Trial Chamber could not assemble a majority of four votes, no decision could be reached on the Request.

d) Notification of documents to lawyers and civil party applicants

[8] Internal Rule 49(2) allows complainants to bring information to the Co-Prosecutors.
[9] *See inter alia*: Appeal, para. 6; Appeal Against Order on the Admissibility of Civil Party Application of SENG Chan Theary, 18 May 2011, D11/1/4/1; Appeal Against Order on the Admissibility of Civil Party Applicant [redacted], 15 August 2011, D11/4/1 ("Appeal D11/4/1").

7. On repeated occasions, lawyers for the civil party applicants, despite having filed a power of attorney, have not been notified of any document filed in Case 003, including those relating to their own clients' applications. For instance, national and international lawyers for the Appellant, who have filed a power of attorney on 22 April 2011 specifically empowering the Co-Lawyers to receive service of documents on the Appellant's behalf, have been put on notice that they had "not been recognized yet by the Co-Investigating Judges" when they filed the Notice of Appeal on 19 May 2011.[10] The situation appears unchanged at this point in the proceedings. As a consequence, no instruction was given to the case file officer to notify the Appellant's lawyers of any document related to the appeal they have filed on his behalf.[11] This course of action is in contradiction with the general approach taken in Case 002 whereby a decision on the recognition of lawyers for civil party applicants was made upon the filing of a power of attorney prior to any other action being taken with regards to a given civil party applicant and all subsequent documents filed were notified to the lawyer, in compliance with Internal Rules 46(1) and 23*ter*(2), as well as Cambodian and international practices. It remains unexplained why the Co-Investigating Judges considered that the Appellant's lawyers needed further recognition by them, especially given that the Cambodian lawyer enjoys a *de jure* right[12] to act immediately before the ECCC upon filing of a power of attorney and the international counsel has been accredited and recognized as the co-lawyer of a civil party in case 002 "as well as any other civil party who may designate [her] in the future for the purposes of the judicial investigation before the ECCC".[13] In our view, this decision is very broad and, read in conjunction with Internal Rule 22(2)(a), provides that once recognised, the foreign lawyer "shall enjoy the rights and privilege before the ECCC as a national lawyer". In any event, if the Co-Investigating Judges considered that recognition is necessary for lawyers, such decision shall be taken prior to dealing with the application filed on behalf of their client so as to not circumvent the possibility allowed by the Internal Rules for civil party applicants to be assisted by lawyers. We are of the view that, by their course of action, the Co-Investigating Judges have deprived some civil party applicants, including the Appellant, of the fundamental right to legal representation.

[10] Record of Appeal, 16 May 2011.
[11] A similar situation has occurred in another appeal filed by lawyers Silke Studzinsky and Hong Kimsuon on behalf of a civil party applicant whose identity is confidential: Appeal D11/4/1, para. 4.
[12] A right as a result of the operation of the law.
[13] D22/171/4.

8. Furthermore, we note that notification of documents directly to civil party applicants by way of service of a hard copy has generally been done in Case 003 without securing sufficient evidence of notification, making it impossible to ascertain whether some documents have actually been received by their intended recipients. The Internal Rules and the Practice Direction on Filing of Documents before the ECCC direct that the Greffier and/or Case File Officer shall i) record in a written report the means of notification used, the time, date and place of service, as well as any other relevant circumstances,[14] ii) use their best endeavours to obtain acknowledgement of receipt, which shall be appended to the report of notification[15] and iii) complete the "Acknowledgement of Service" form,[16] whereby the Case File Officer or Designated Officer shall confirm service of the document on its recipient.[17] A number of documents in Case 003 were sent for notification by TNT or other messengers without any record of precisely what document or documents were sent or who actually received the document, without any acknowledgement of service by the recipient and even without any confirmation by the Case File Officer or Designated Officer that the document has indeed been delivered to its recipients.[18] A number of "Acknowledgement of Service" forms completed in Case 003 only certify that the document has been received by the Case File Officer in charge of proceeding with the notification. The notification of the Modified Order, which is more amply discussed below, is an example of the notification practice followed in Case 003 and illustrates the adverse consequences for the parties of not following proper notification procedures.

e) Delays in registration of filed documents

9. While it is expected and has been the practice in Cases 001 and 002 that documents submitted by the parties or applicants in the proceedings are filed, notified and placed in the case file upon their receipt by the Greffier of the Office of the Co-Investigating Judges from the Case File Officer,[19] significant unexplained delays in processing documents and placing these in the case file have been noted in Case 003. The date of

[14] Internal Rule 46(2).
[15] Internal Rule 46(3).
[16] Article 11.2 of the Practice Direction on Filing of Documents before the ECCC.
[17] Appendix E to the Practice Direction on Filing of Documents before the ECCC.
[18] See *inter alia* the notification of the Impugned and Modified Orders to the Appellant and the notification of the Order on the Admissibility of the Civil Party Application of [redacted], D11/3.
[19] Articles 2.1 and 2.4 of the Practice Direction on Filing of Documents before the ECCC.

filing is registered in Zylab, the electronic system of the Court, solely by reference to the date the document was submitted by the party, without any indication of the date it was actually notified and placed in the case file. For instance, the Appellant's civil party application, although received by the Case File Officer on 22 April 2011 and registered on Zylab as having been filed on this date, was only filed and placed in the case file on 29 April at 14h40,[20] 30 minutes before the Impugned Order was itself filed, as disclosed by the Filing Instructions which do not form part of the case file but are maintained by the Case File Officer.[21] The filing of several documents submitted by the International Co-Prosecutor in this case has also been considerably delayed, as well as the filing by the Co-Investigating Judges of Rogatory Letters, Report of Execution of Rogatory Letters and Written Records of Interviews.[22] We emphasise the importance of court officers fulfilling their duty to process documents as soon as they are submitted in order to ensure that the case file is up to date[23] and that deadlines are honoured. Delays in filing documents may adversely impact on the exercise of rights provided to parties or applicants in the proceedings under the Internal Rules, as this seems to have occurred in the present case whereby the filing of the Appellant's civil party application a few minutes before rejecting it may be seen as an attempt to prevent him from exercising his right to have access to the case file[24] and to participate in the judicial investigation. It is further noted that the civil party applications filed thus far in this case are also complaints and, as such, had to be immediately forwarded to the Co-Prosecutors for their action under Internal Rule 49(2).

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[20] Filing Instruction Form completed by the Greffier of the Office of the Co-Investigating Judges on 29 April 2011. This form is not available on the case file and has been obtained from the Case File Officer by the International Judges upon their request.

[21] The same occurred in the case of Theary Seng, who also lodged an application to become a civil party in Case 003. In the case of a third applicant, whose identity is confidential at this point, the civil party application and related documents were even filed after the issuance of the rejection order. When the Pre-Trial Chamber was seised of the appeal, the documents were still not in the case file and were only put after the Greffier of the Office of the Co-Investigating Judges was requested to update the case file.

[22] Delays of up to seven weeks have been noticed for several documents submitted by the International Co-Prosecutor, while almost a year had elapsed before the First Rogatory Letter in this case was placed onto the case file. For more details, see *inter alia* the Table of delays in notification by the Office of the Co-Investigating Judges of key decisions and submissions in relation to Case File 003, filed as Annex 1 of the International Co-Prosecutor's Appeal against the "Decision on International Co-Prosecutor's re-filing of three investigative requests in Case 003", 26 August 2011, D26/1/1.1.28.

[23] Pursuant to Internal Rule 77(2 and 3), the Pre-Trial Chamber shall be forwarded a case file that is up to date when seised of an appeal.

[24] See the discussion in paragraph 6 above on the right to access the case file.

10. At this juncture, we wish to highlight that although the Co-Investigating Judges enjoy some discretion in the conduct of their judicial investigation and may adapt their course of action to the necessities of a case, this discretion has to be exercised within the framework provided for by the Internal Rules and other rules applicable before the ECCC. While recognising the principle of the confidentiality of the judicial investigation,[25] we emphasise that the Co-Investigating Judges' discretion has to be exercised in a sufficiently transparent manner so as to allow the involved parties the opportunity to exercise their rights during the judicial investigation and the appellate body responsible for the review of orders and decisions taken sufficient information to make a determination of these rights. In that sense, we note that the Co-Investigating Judges are directed to ensure legal certainty and transparency of their proceedings, pursuant to Internal Rule 21(1). Sufficient information and clarity about the approach and procedures being followed is also necessary to afford the involved parties the opportunity to present their case and influence the court's decision where allowed to do so under the Internal Rules, thus ensuring that the proceedings are fair and adversarial,[26] as required by Internal Rule 21 and Article 14(1) of the International Covenant on Civil and Political Rights. It is of the most fundamental importance for the Co-Investigating Judges to ensure respect of these procedural guarantees "designed to secure 'procedural justice' rather than 'result-oriented justice'".[27] As stated by the European Court of Human Rights, knowledge by the litigants that they have had the opportunity to express their views before a decision affecting their rights is taken is fundamental to their confidence in the workings of justice, hence securing the interests of the parties as well as those of the proper administration of justice.[28] We cannot emphasise enough the importance for a judicial body, such as the Co-Investigating Judges, to strictly respect the right to a fair trial and the procedural rights of individuals involved in the proceedings, which hold a prominent place in any democratic society[29] as a basic guarantee of the rule of law[30], in particular in the context of Case 003.

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[25] Internal Rule 56(1).

[26] The right to adversarial proceedings, as defined by the European Court of Human Rights ("ECtHR"), more specifically means "the opportunity for the parties to a criminal or civil trial to have knowledge of and comment on all evidence adduced or observations filed, with a view to influencing the court's decision": *Ferreira Alves v. Portugal*, Application no. 25053/05, Judgement of 21 June 2007, para. 37.

[27] Stefan Trechsel, *Human Rights in Criminal Proceedings*: Oxford University Press ("Trechsel"), p. 83.

[28] *Niderost-Huber v. Switzerland,* Judgement, 18 February 1997, paras 29-30; *Ferreira Alves v. Portugal,* Application no. 25053/05, Judgement of 21 June 2007, para. 41. See also Trechsel, p. 89.

[29] See *inter alia* ECtHR, *AB v. Slovakia*, Application no. 41784/98, Judgement, 4 March 2003, para. 54.

[30] ECtHR, *Golder v. United Kingdom,* Application no. 4451/70, Judgement, 21 February 1975,

11. As will be further discussed below, ensuring that documents submitted by the parties are filed and properly notified to those entitled to receive notification is the very first and necessary step to ensure fairness of the proceedings.

B) The Modified Order

12. As briefly stated in the Procedural Background, the Co-Investigating Judges filed a modified order in English on 7 July 2011 and then a Khmer translation on 26 August 2011, holding the following corrections on the Impugned Order:
    - While the Impugned Order, in its final and operative part, rejected the Appellant's application D5/2 to become a civil party in Case 004, the Modified Order rejects his application D11/2 in Case 003;
    - While the Impugned Order refered, in its Header, to the case file number of Case 004, the Modified Order bears the number of Case 003;
    - While the Impugned Order refered to the consideration of the Third Introductory Submission prior to making the determination, the Modified Order refers to consideration of the Second Introductory Submission;
    - The signature block of the Impugned Order is different from that of the Modified Order.

13. The Impugned Order was removed from the case file and replaced by the Modified Order, which, although it appears to have been made on 6 July 2011, is backdated to 29 April 2011. It is further noted that the Filing Instructions are also backdated to 29 April 2011, although the Modified Order is clearly noted by the Case File Officer as being actually lodged for filing on 7 July 2011. The Modified Order was not notified to the parties nor the Pre-Trial Chamber, notwithstanding the fact that a Notice of Appeal was registered and notified on 18 May 2011. In particular, we note that no instruction was given to notify the Appellant's lawyers[31] and that there is insufficient evidence to conclude that

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para. 34, reiterated in *Z and Others v. United Kingdom*, Application no. 29392/95, Judgment, 10 May 2001, para. 91.

[31] See the Filing and Notification Instruction of document number D11/2/3, 29 April 2011, as sent by the Case File Officer to the Pre-Trial Chamber in relation to the Modified Order.

the Order has been notified to the Appellant.[32] The same holds true for its Khmer translation, filed on 26 August but dated 29 April 2011, and not notified to the Pre-Trial Chamber, the Appellant nor his lawyers.

14. We note that the modifications were aimed at improperly curing fundamental defects in the Impugned Order whereby an application made in Case 004 was rejected, upon consideration of the Introductory Submission filed in that case, instead of addressing the application filed in Case 003. Some of these defects were highlighted in the Appeal. The modifications made to the Impugned Order are so fundamental that they affect its very substance. Considering the replacement made by the Co-Investigating Judges, they must have also considered the defects to be fundamental as the Modified Order was backdated and signed by them with the same date as the date of the Impugned Order, being the original order made by them. These modifications could not be made by way of a corrigendum, especially where an appeal has been lodged against the order and raises some of the very defects the Modified Order intends to cure. Therefore, the Modified Order has to be seen as a totally different order from the Impugned Order, which has been

[32] The Filing Instruction Form that was used to notify the Modified Order appears to have been the one issued in respect of the Impugned Order as, upon request, the Pre-Trial Chamber has received from the Case File Officer the exact same Filing Instruction Form for the Modified Order as the one issued for the Impugned Order. This form instructed notification only to the Offices of the Co-Investigating Judges and Co-Prosecutors, and to Mr. Hamill (Filing and Notification Instruction of document number D11/2/3, 29 April 2011 as sent by the Case File Officer to the Pre-Trial Chamber in relation to the Modified Order). The acknowledgement of service signed by the General Service Section of the Court (GSS) mentions that this Service has received on 11 July 2011 the "Order on the Admissibility of the Civil Party Application of Rob Hamill, D11/2/3 (EN) and contains the following handwriting note: "GD 996 064 755 WW" (Acknowledgement of Service, signed by Kann Sereimony from GSS, 11 July 2011). The TNT order, which has been signed by the Case File Officer, comprises two signatures: one dated of 10 July 2011 and the other dated of 12 July 2011. There is no signature acknowledging the receipt on the TNT slip. The report of delivery by TNT is contradictory in itself and cannot confirm receipt of the Modified Order by Mr. Hamill. In particular, it contains as its last entry "Shipment arrived in warehouse, 23.39.49, on 15 July 2011 but in its heading, it mentions that it was delivered on 15 July 011, at 08:40. It also notes that it was still with customs at 10:30 am, that is after the time of alleged delivery. Furthermore, the report of delivery by TNT does not indicate to whom it would have been delivered nor to what address. The record simply indicates "Signatory: CD5718174", which does not in any way constitute evidence of receipt by Mr. Hamill. While an acknowledgment of service is intended to confirm service of a given document on persons who shall be notified of it, the acknowledgement in this case only indicates that a document has been received by the "GSS messenger", whose sole role was to send the documents via TNT after the Case File Officer had completed the TNT order. Such document cannot, in and of itself, serve as an evidence of *notification* or *receipt* of the Modified Order by Mr. Hamill in the circumstances above described. Further, contrary to Article 11.2 of the Practice Direction on Filing of Document before the ECCC and Form E attached to that Practice Direction, neither the Greffier nor the designated officer in this case has acknowledged that the order has actually been served on Mr. Hamill. Finally, the form used in this case is different from the one attached to the Practice Direction, which clearly provides that the Greffier or designated officer shall confirm service upon "the recipient", not upon an internal messenger. As a whole, the notification procedures followed in respect of the Modified Order do not allow to confirm or verify that Mr. Hamill has indeed received this order. For the sake of clarity and as the documents related to the notification are not part of the case file *per se*, we attach these documents to our Opinion.

removed from the case file and replaced by a new order. The consequence is that the Impugned Order no longer exists.

15. Since the Appeal has been lodged against the Impugned Order, at a time when the Modified Order did not even exist, the Appeal can only be considered in respect of the Impugned Order. Therefore, we consider that the Appeal is moot, as the Impugned Order no longer exists. We further emphasize that it is impossible and would infringe upon the rights of the Appellant to determine the Appeal on the basis of the Modified Order as there is no evidence of it having been actually served upon him or his lawyers so that they may react to it. However, we note that from the moment of the notification of the Modified Order to the Appellant and the lawyers acting on his behalf a right of appeal against this order will arise. We attach the Modified Order in English (Attachment A) and Khmer (Attachment B) and the Correction Forms dated 6 July 2011 (Attachment C) and 26 August 2011 (Attachment D) to our opinion, to ensure that it is duly notified to the Appellant and his lawyers. We also attach the following documents, which are necessary to understand our conclusion that the Modified Order was not properly notified to the Appellant and his lawyer, as none of them have access to the case file: E) Filing and Notification Instruction of document number D11/2/3, 29 April 2011, as sent by the Case File Officer to the Pre-Trial Chamber in relation to the Modified Order, F) Acknowledgement of Service, signed by Kann Sereimony from GSS, 11 July 2011, G) TNT Order number GD 996 064 755 WW and H) TNT Report of Delivery. We further note that given all the procedural mistakes committed in this case, reconsideration of the Appellant's civil party application should be seriously considered by the Co-Investigating Judges, after having followed the proper procedure.

16. In the circumstances we have mentioned before, we are of the opinion that we cannot enter into a discussion on the merits of the Appeal. However, we note that all the issues raised in the Appeal shall be examined before a conclusion could be reached by judges that the rights of the Appellant have not been infringed upon by the rejection of his civil party application. Also, as we already fully explained in our previous Opinion on the disagreement between the Co-Prosecutors dealing with the issue of whether the Second Introductory Submission should be filed, we are of the view that new facts have been

introduced in the Second Introductory Submission.[33] In any event, we consider that the absence of new facts would have no consequences on the admissibility of civil party applications pursuant to Internal Rule 23*bis* now that a judicial investigation into the facts set out in the Second Introductory Submission has been opened. Furthermore, although we consider that the Co-Investigating Judges have some discretion in deciding when to formally charge a person subject to prosecution, reasons for not doing so after the opening of a judicial investigation shall be provided given the past pratice of the Co-Investigating Judges in Cases 001 and 002. This being said, we consider that the Co-Investigating Judges have the obligation, when seised of an application to become a civil party, to decide on the substance of such application. The Co-Investigating Judges appear to be of the same opinion as they have examined and decided upon the merit of the Appellant's Application. As a consequence, when the information necessary to appraise the substance of a victim application to become a civil party in a case before the ECCC is not yet available, the Co-Investigating Judges or the Pre-Trial Chamber should reserve their decision on this matter until such information becomes available in the course of the investigation, as required by the Internal Rules. To act otherwise would lead to a premature rejection of the civil party applications and defeat the whole admissibility regime established for victims under the ECCC Internal Rules.

Phnom Penh, 24 October 2011

Judge Rowan DOWNING **Judge Katinka LAHUIS**

[33] Disagreement No. 001/18-11-2008-ECCC/PTC, Considerations of the Pre-Trial Chamber Regarding The Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71, 18 August 2009, Opinion of Judges Lahuis and Downing.