

01 November 2019



**អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា**

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

ព្រះរាជាណាចក្រកម្ពុជា

ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia  
Nation Religion King

Royaume du Cambodge  
Nation Religion Roi

**អង្គបុរេជំនុំជម្រះ**

Pre-Trial Chamber  
Chambre Préliminaire

D257/1/8

*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° 004/07-09-2009-ECCC/OCIJ (PTC21)

Before:

Judge PRAK Kimsan, President  
Judge Olivier BEAUVALLET  
Judge NEY Thol  
Judge Kang Jin BAIK  
Judge HUOT Vuthy

Date:

17 May 2016

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**CONFIDENTIAL**

**CONSIDERATIONS ON AO AN'S APPLICATION TO SEIZE THE PRE-TRIAL CHAMBER WITH A VIEW TO ANNULMENT OF INVESTIGATIVE ACTION CONCERNING FORCED MARRIAGE**

**Co-Prosecutors**

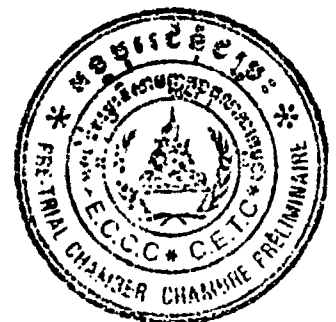
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**THE PRE-TRIAL CHAMBER** of the Extraordinary Chambers in the Courts of Cambodia (the “ECCC”) is seised of “TA An’s Application to Seise the Pre-Trial Chamber with a View to Annulment of Investigative Action Concerning Forced Marriage” filed on 22 December 2014 (the “Application”).<sup>1</sup>

## I. INTRODUCTION

1. The Application was referred to the Pre-Trial Chamber by the International Co-Investigating Judge (the “ICIJ”), pursuant to Internal Rule 76(3) (the “Referral Decision”).<sup>2</sup>

## II. PROCEDURAL BACKGROUND

2. On 7 September 2009, the Acting International Co-Prosecutor filed the Third Introductory Submission (the “Introductory Submission”)<sup>3</sup> with the Office of the Co-Investigating Judges, alleging AO An’s (*aliases* ‘TA An’ and ‘AOM An’) involvement in criminal acts constituting, amongst others, charges of crimes against humanity.
3. On 24 April 2014, the International Co-Prosecutor (the “ICP”) filed before the Office of the Co-Investigating Judges (the “OCIJ”) a confidential “Co-Prosecutor’s Supplementary Submission Regarding Forced Marriage and Sexual or Gender-Based Violence” (the “Supplementary Submission”)<sup>4</sup> and issued a press statement informing the public about the filing of the Supplementary Submission by stating that “the preliminary information available at this time indicates that the forced marriages, [...] were perpetrated by Khmer Rouge cadre and occurred in areas where named suspects in Case 004 held command or political positions of influence” also that the Supplementary “Submission is based on new evidence that has become available since the filing of the Case 004 Introductory Submission”; that the International Co-Prosecutor “*believes* that the factual allegations

<sup>1</sup> TA An’s Application to Seise the Pre-Trial Chamber with a View to Annulment of Investigative Action Concerning Forced Marriage, 22 December 2014, A259.

<sup>2</sup> Consolidated Decision on AO An’s Internal Rule 76(2) Applications, 30 July 2015, D257, paras 41-43 (“Referral Decision”). *See also* Letter from OCIJ Greffier to Case File Officer Regarding Forwarding Copy of Case File 004 to the Pre-Trial Chamber Pursuant to Case File 004-D257, 10 August 2015, D257/1.

<sup>3</sup> Co-Prosecutors’ Third Introductory Submission, 20 November 2008, D1, para. 117(c); *See also* Acting International Co-Prosecutor’s Notice of Filing of the Third Introductory Submission, 7 September 2009, D1/1.

<sup>4</sup> Co-Prosecutors’ Supplementary Submission Regarding Forced Marriage and Sexual or Gender-Based Violence, 24 April 2014, D191 (“Supplementary Submission”).



contained in the new evidence constitute crimes against humanity including [...] other inhumane acts”; that the International Co-Prosecutor “requested that the Office of the Co-Investigating Judges further investigate these crimes and any links to the named suspects”; and finally that “it is important to avoid conclusions until the investigation is complete”.<sup>5</sup>

4. On 22 December 2014, the Co-Lawyers for AO An filed the Application.
5. On 27 March 2015, AO An attended an initial appearance hearing and the ICIJ charged him with, amongst other offences, crimes against humanity.<sup>6</sup> Subsequently, on 30 July 2015, the ICIJ issued the Referral Decision having been “satisfied that the Defence, through the Forced Marriage Application, have put forward an ‘arguable case’ warranting a referral of the Application to the PTC.”<sup>7</sup>
6. On 7 August 2015, the International Co-Prosecutor filed a request seeking permission to file his response to the Forced Marriage Application in English only, with a Khmer translation to follow.<sup>8</sup>
7. The Referral Decision and a copy of the Case File 004 were forwarded to the Pre-Trial Chamber on 10 August 2015.<sup>9</sup>
8. On 13 August 2015, the International Co-Prosecutor emailed the Chamber’s Legal Officer requesting guidance regarding the procedure for filing a response to the Application<sup>10</sup> and on 17 August 2015, submitted for electronic filing a response to the Application.
9. On 3 September 2015, the Case Filing Officer notified the parties with the “Pre-Trial Chamber’s Instructions to the parties by email” (the “3 September PTC Instructions”),

<sup>5</sup> International Co-Prosecutor, Press Release: Statement by the International Co-Prosecutor Nicholas Koumjian Regarding Case File 004, 24 April 2014, [http://www.eccc.gov.kh/sites/default/files/media/ECCC%20OCP%2024%20Apr%202014%20\(En\).pdf](http://www.eccc.gov.kh/sites/default/files/media/ECCC%20OCP%2024%20Apr%202014%20(En).pdf) (emphasis added).

<sup>6</sup> Written Record of Initial Appearance, 30 March 2015, D242.

<sup>7</sup> Consolidated Decision on AO An’s Internal Rule 76(2) Applications, 30 July 2015, D257, para. 30.

<sup>8</sup> International Co-Prosecutor’s Request for Authorisation to File Subsequent Translation of Response, 7 August 2015, D257/1/3.3.

<sup>9</sup> Letter from OCIJ Greffier to Case File Officer Regarding Forwarding Copy of Case File 004 to the Pre-Trial Chamber Pursuant to Case File 004-D257, 10 August 2015, D257/1.

<sup>10</sup> Email Re Due Date for Response for TA An’s Application to Seize the Pre-Trial Chamber with Annulment Concerning Forced Marriage, 13 August 2015, D257/1/3.4.

*CONSIDERATIONS ON AO AN’S APPLICATION TO SEIZE THE PRE-TRIAL CHAMBER WITH  
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advising the Co-Lawyers for AO An to file the Application before the Pre-Trial Chamber within 10 days, at which point and onwards “the order of proceedings on the application shall be governed by the general provisions of Internal Rule 77”.<sup>11</sup>

10. On 14 September 2015, the Co-Lawyers for AO An filed their Reply to the 3 September PTC Instructions submitting that any responses to the Application, filed at this time, would be time barred, therefore the Chamber must only consider the arguments made in the Application (“AO An’s Reply to PTC Instructions”).<sup>12</sup>
11. On 25 September 2015, the International Co-Prosecutor filed his Response to AO An’s Application to Annul Investigative Action Concerning Forced Marriage and His Reply to the Pre-Trial Chamber’s Email of 3 September 2015 (the “ICP Response”).<sup>13</sup>
12. On 21 September 2015, the Civil Party Lawyers filed a Request, in English only, for an extension of time and leave to file in one language only their Response to the Application.<sup>14</sup> The Khmer version of this request was notified on 28 September 2015. On 2 October 2015, the Civil Party Lawyers filed, in English only, their Civil Party Lawyers’ Response to AO An’s Application to Annul All Investigative Action Relating to Forced Marriage and His Reply to the Pre-Trial Chamber’s Email of 3 September 2015 (the “CP Response”).<sup>15</sup> The CP Response was notified, in English only, on 14 October 2015. The Khmer translation of this Response was received on 5 November 2015. On 11 November 2015, the Pre-Trial Chamber issued a notification, pursuant to Internal Rule 77(3)(c), of the decision to proceed on the basis of written submissions. No written reply was submitted within the deadline.

<sup>11</sup> Email from Case File Officer, Pre-Trial Chamber’s Instruction to the parties by email, 3 September 2015, Annex Six to International Co-Prosecutor’s Response to AO An’s Application to Annul Investigative Action Concerning Forced Marriage and His Reply to the Pre-Trial Chamber’s Email of September 2015, 25 September 2015, D257/1/3.7 (“3 September PTC Instructions”).

<sup>12</sup> Reply to the Pre-Trial Chamber’s Email of 3 September 2015 Concerning ‘TA AN’s Application to Seize the Pre-Trial Chamber with a View to Annulment of Investigative Action Concerning Forced Marriage’ (A259), 14 September 2015, D257/1/1.

<sup>13</sup> International Co-Prosecutor’s Response to AO An’s Application to Annul Investigative Action Concerning Forced Marriage and His Reply to the Pre-Trial Chamber’s Email of 3 September 2015, 25 September 2015, D257/1/3.

<sup>14</sup> Civil Party Lawyers’ Request for Extension of Time and to File in One Language to Respond to AO An’s Application to Annul All Investigative Action Relating to Forced Marriage, 21 September 2015, D257/1/2.

<sup>15</sup> Civil Party Lawyers’ Response to AO An’s Application to Annul All Investigative Action Relating to Forced Marriage and His Reply to the Pre-Trial Chamber’s Email of 3 September 2015, 5 October 2015, D257/1/5.

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13. On 8 October 2015, IM Chaem filed a request for leave to file her submission in support of AO An's Application ("IM Chaem's Request and Submission").<sup>16</sup> On 9 October 2015, the International Co-Prosecutor filed a request for authorization to file his response to IM Chaem's Request and Submission in one language first.<sup>17</sup> On 19 October 2015, the International Co-Prosecutor submitted for filing, in English only, his response to IM Chaem's Request and Submission, which was submitted in Khmer on 21 October 2015 (the "ICP Response to IM Chaem").<sup>18</sup> The ICP Response to IM Chaem was notified on 28 October 2015. The Civil Party Lawyers did not file any response to IM Chaem's Request within the legal deadline. IM Chaem's Co-Lawyers did not submit any reply within the legal deadline.
14. On 14 March 2016, the ICIJ charged AO An with, amongst other offences, crimes against humanity, namely other inhumane acts, including forced marriage.<sup>19</sup>

### III. PRELIMINARY MATTERS

15. The Pre-Trial Chamber shall first address the Parties' requests, raising preliminary procedural issues, which were submitted in reply to the 3 September PTC Instructions that "the order of proceedings on the application shall be governed by the general provisions of Internal Rule 77",<sup>20</sup> which allows for responses to applications. AO An replied that any responses to the Application are, at this time, time barred.<sup>21</sup> IM Chaem requested leave to file submission in support of AO An's Application.<sup>22</sup>

#### III-1. WHETHER RESPONSES TO THE APPLICATION ARE TIME BARRED

16. AO An argues in his Reply to the PTC Instructions that any responses, filed at this time, to his forced marriage application are time barred, therefore the Pre-Trial Chamber must only

<sup>16</sup> IM Chaem's Request for Leave to File Her Submission in Support of AO An's Forced Marriage Annulment Application Pursuant to the Pre-Trial Chamber's Email Dated 3 September 2015, 8 October 2015, D257/1/4.

<sup>17</sup> International Co-Prosecutor's Request for Authorisation to File Subsequent Translation of Response, 9 October 2015, D257/1/6.

<sup>18</sup> International Co-Prosecutor's Response to IM Chaem's Request to Annul Forced Marriage Investigation, 19 October 2015, D257/1/7.

<sup>19</sup> Written Record of Further Appearance, 14 March 2016, D303.

<sup>20</sup> 3 September PTC Instructions, para. 3.

<sup>21</sup> AO An's Reply to PTC Instructions, paras 4, 26.

<sup>22</sup> IM Chaem's Request and Submission, paras 1-3.



consider the arguments made in the application.<sup>23</sup> AO An bases this argument on four grounds, namely that: i) the other parties did not respond to the application when it was first filed on 19 December 2014;<sup>24</sup> ii) they did not respond to the application once AO An was formally charged (on 27 March 2015) either;<sup>25</sup> iii) they did not also appeal the OCIJ Decision that referred the application to the PTC;<sup>26</sup> and iv) so far, there has been no court order under IR39(4) extending any deadlines for responses to the application.<sup>27</sup> The ICP answers that his response to the application is filed in compliance with the deadline set in the 3 September PTC Instructions.<sup>28</sup> The Civil Parties respond that when AO An initially filed the application, on 19 December 2014, the other parties were not bound to respond to it since AO An had no standing - as non-party to investigations - to file such applications at that time.<sup>29</sup> They also add that, unlike the OCP, under the Rules, Civil Parties have only a limited list of appellate rights, which does not include the right to appeal OCIJ Orders approving referral of annulment applications brought by other parties.<sup>30</sup>

17. The Pre-Trial Chamber makes reference to: the provisions of the Internal Rules 76(2), 76(3) and 77; Article 8 of the Practice Direction on Filings; and to the 3 September PTC Instructions.
18. There is no clear provision, in Internal Rule 76, to explicitly direct the other parties to respond to annulment applications. Article 253 of the Cambodian Code of Criminal Procedure ('CCCP') does not shed more light on this issue either.<sup>31</sup> Further, Internal Rule 76(2) provides that appellate rights against such OCIJ orders are "in accordance with these IRs." As also noted in the CP Response, the Pre-Trial Chamber observes that Internal Rule 74(4) does not provide the Civil Parties with a statutory appeal right against those OCIJ Orders, issued under Rule 76(2), that *approve* requests for referral of applications to the Pre-Trial Chamber. As far as the Co-Prosecutors' are concerned, while the Internal Rules

<sup>23</sup> AO An's Reply to PTC Instructions, paras 1-4, 26-27.

<sup>24</sup> *Ibid.*, para. 22.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*, paras 23-24.

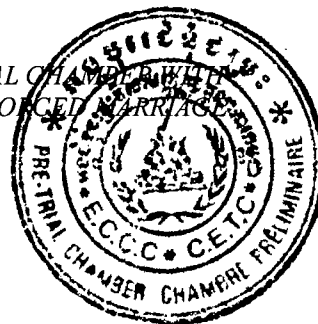
<sup>27</sup> *Ibid.*, para. 25.

<sup>28</sup> ICP Response, paras 1-2, 14-18.

<sup>29</sup> CP Response, para. 13 *citing* OCIJ's Referral Decision, paras 3, 5.

<sup>30</sup> CP Response, para. 14 *citing* IR 74(4).

<sup>31</sup> Code of Criminal Procedure of the Kingdom of Cambodia, Khmer-English Translation, 9 September 2008 ("CCCP").



give them unlimited rights to appeal against all OCIJ Orders, even if they appealed the OCIJ's Referral Decision, all they could address (via such appeal) is whether the ICIJ applied the test for referral of the application to the PTC correctly.<sup>32</sup> Therefore, an appellate right under Internal Rule 76(2) does not translate into a right or obligation, on the part of the OCP, to respond to the merits of the application itself. Lastly, there is no clear provision, in Internal Rule 76, to direct the Pre-Trial Chamber on how to proceed - i.e. whether to inform the other parties of such applications or whether to allow or direct the other parties to respond to an application - once the OCIJ has seised the PTC with annulment applications, pursuant to Internal Rule 76(2) - upon a party's request. Faced with this lack of clarity and, having sought guidance from the fundamental principles of procedure before the ECCC, the Pre-Trial Chamber issued the 3 September PTC Instructions, directing: i) AO An's Defence to file the Application before the Pre-Trial Chamber within ten days from the notification of the PTC Instructions,<sup>33</sup> and ii) the other parties that:

"Once the Application is filed before the Pre-Trial Chamber, or the set deadline for its filing has expired, the order of proceedings on the application shall be governed by the general provisions of Internal Rule 77. As usual, the language, time and page limit requirements for submissions by the parties in relation to this application proceeding shall be governed by the provisions of the Practice Direction on Filings before the ECCC."<sup>34</sup>

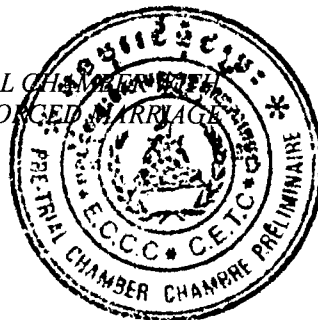
19. The 3 September PTC Instructions are based on the fundamental principle, enshrined in Internal Rule 21(1)(a), that "ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties." The principle of adversarial proceedings relates directly to the requirements for a fair trial,<sup>35</sup> as foreseen by Article 14 of the International

<sup>32</sup> According to precedent, the set standard for OCIJ's review of requests for referral of annulment applications to the PTC is to only to examine whether "there is an application supported by a reasoned argument making assertions that there has been a procedural defect and that such defect infringes the rights of the party making the application." See Case 002 (PTC41), Decision on IENG Thirith's Appeal against the Co-Investigating Judges' Order Rejecting the Request to Seise the Pre-trial Chamber with a View to Annulment of All Investigations (D263/1), 25 June 2010, D263/2/6 ("IENG Thirith Decision"), para. 18.

<sup>33</sup> 3 September PTC Instructions, para. 2.

<sup>34</sup> *Ibid.*, para. 3.

<sup>35</sup> See, e.g., Case 002 (PTC71), Decision on IENG Sary's Appeal against Co-Investigating Judges' Decision Refusing to Accept the Filing of IENG Sary's Response to the Co-Prosecutors' Rule 66 Final Submission and Additional Observations, and Request for Stay of the Proceedings, 20 September 2010, D390/1/2/4, para. 18. In this Decision, the PTC allowed the Defence to file a Response to OCP's Final Submission in Case 002 although neither the CCCP nor the IRs explicitly provide for such right.



Covenant on Civil and Political Rights ('ICCPR'), and "requires each party to be given a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent."<sup>36</sup> Further, it is noted that Internal Rule 21 does not foresee any exception to the rule that ECCC proceedings shall be adversarial. In this regard, the Pre-Trial Chamber has explicitly stated, that:

"*Ex parte* communication shall be strictly limited so as to ensure the rights of the parties in proceedings before the ECCC which, according to Internal Rule 21.1(a) shall be fair and adversarial and preserve a balance between the rights of the parties. The Pre-Trial Chamber notes the views expressed by international tribunals that it is "neither possible nor appropriate to define the circumstances in which such *ex parte* proceedings are appropriate by any limiting definition". As a general rule, motions must be filed *inter partes* although *ex parte* applications may sometimes be necessary in the interests of justice and when the disclosure of the information contained in the application would likely prejudice the persons related to the application. In any event, official *ex parte* communication must take the form of a motion and respect the filing procedure set out in the relevant practice direction. Also, the reasons underlying *ex parte* communications shall be clearly set out in accordance with the Practice Direction on the Filing of documents and, in particular, Article 3.15 so as to allow review by the Pre-Trial Chamber, as appropriate."<sup>37</sup>

20. Article 3.15 of the Practice Direction on Filing requires that a filing party who submits a document with the proposed classification of "Strictly Confidential" must list, on the first page of the document, under the title "Distribution to", the names of all individuals who it proposes should be given access to the document.<sup>38</sup> In the instant case, AO An's Defence has submitted the Application as confidential but has listed in the first page the names of the CIJs and those of the OCP and "All Civil Parties," which clearly implies that, as far as AO An is concerned, there is no claim that prejudice may be caused by informing the other parties of the Application.

21. Furthermore, the fact that Internal Rule 77(2) expressly refers to the Rule 76(3) decisions suggests that, while Internal Rule 76 only articulates the overall annulment process, Internal Rule 77 is the rule that foresees the procedures for handling annulment applications.

<sup>36</sup> European Court of Human Rights, *Wynen v. Belgium*, Application no. 32576/96, Judgement, 5 February 2003, para. 32.

<sup>37</sup> Case 002 (PTC08), Decision on IENG Sary's Request for Investigation Under Internal Rule 35 into the Actions of [REDACTED] of the Office of the Co-Prosecutors Relating to *Ex-Parte* Communication with the International Component of the OCIJ & Request for a Public Hearing, 27 April 2010, No. 1, para. 15.

<sup>38</sup> Filing of Documents before the ECCC, Practice Direction ECCC/01/2007/Rev.8, Article 3.15.





According to Internal Rule 77, the proceedings for handling appeals and applications are adversarial; in other words, the Internal Rules call for hearings or for responses and replies to be filed by the other parties.

22. In addition to the above, the Pre-Trial Chamber has consistently expressed, at least an expectation that it will hear from the other parties in relation to annulment or similar applications.<sup>39</sup>
23. The Pre-Trial Chamber notes, as made clear in the “Procedural History” part of these Considerations, that the ICP filed his response to AO An’s Application within the deadline set by the 3 September PTC Instructions. Moreover, the Pre-Trial Chamber allowed the late filing of the CP Response only once the deadline for AO An to respond to their request (for extension of time and to file a response in one language first) had expired. It permitted the late filing, having not heard from AO An, based on the reasons for the request and on the provisions of Internal Rule 39(4).
24. For all the above mentioned reasons, AO An’s argument, that the Pre-Trial Chamber must only consider the arguments made in the application because any responses filed at this time are time barred, fails.

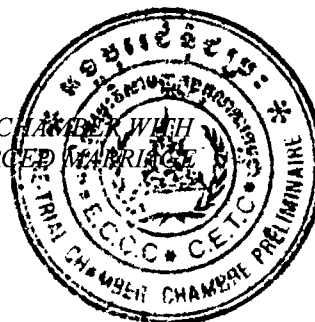
### III-2. WHETHER IM CHAEM CAN BE HEARD IN THESE ANNULMENT PROCEEDINGS

25. IM Chaem asks the Pre-Trial Chamber to grant her “request for leave” to file a submission “in support of” AO An’s Application.<sup>40</sup> She grounds her “request for leave” in Internal Rules 21 and 39.<sup>41</sup> She argues that Internal Rule 21 dictates that she be offered rights equal to those already given to the other parties, including the OCP and the Civil Parties who, unlike her, were notified with the 3 September PTC Instructions that these proceedings

<sup>39</sup> See Decision on Application for Annulment Pursuant to Internal Rule 76(1), 12 November 2013, D165/1 para. 3; Case 003 (PTC 009) Decision on Application for Annulment Pursuant to Internal Rule 76(1), 12 November 2013, D79/1, para. 3. See also Case 002 (Application PTC15), Decision on KHIEU Samphan’s Interlocutory Application for an Immediate and Final Stay of Proceedings for Abuse of Process, 12 January 2011, No.2, para. 1, which states “None of the other parties responded to the application.” and Case 003 (Application PTC01), Decision on Defence Support Section Request for a Stay in Case 003 Proceedings before the Pre-Trial Chamber and for Measures Pertaining to the Effective Representation of Suspects in Case 003, 15 December 2011, No. 3, para. 2, which states “There has been no response to the request.”

<sup>40</sup> IM Chaem’s Request and Submission, paras 1, 2 and final paragraph (i).

<sup>41</sup> *Ibid.*, para. 1.



should be governed by Internal Rule 77.<sup>42</sup> Such leave, she claims, is also warranted because a PTC decision on AO An's Application "may profoundly impact the outcome of proceedings against Ms. IM Chaem" as well.<sup>43</sup> Should it agree with the above-mentioned arguments, IM Chaem suggests, the Pre-Trial Chamber can exercise the discretion allowed under Internal Rule 39(4) to recognize the validity of the late filing of her proposed submission.<sup>44</sup>

26. AO An did not file any reply to IM Chaem's Request and Submission. In his reply to the 3 September PTC Instructions, AO An requested that neither the OCP, nor "other parties" be entitled to submit arguments on the matter to be determined by the Chamber.<sup>45</sup> It is not clear whether the expression "other parties" used by AO An in his Reply to the PTC Instructions is intended to include IM Chaem, however, the fact that on the first page, AO An listed not only the CIJs, OCP and "All Civil Parties" but also the "Co-Lawyers for IM Chaem", may infer AO An's intention to at least inform her of his reply.

27. The ICP does not oppose to IM Chaem's request for leave to file, stating that "IM Chaem has a clear interest in the investigation of forced marriage allegations."<sup>46</sup>

28. In addition, it is emphasised that the request for leave to file the proposed submission at this time is specifically grounded in Internal Rule 21(1)(a) seeking a right to fair and equal (in terms of adversarial) proceedings. In this sense, IM Chaem seeks to be heard in proceedings to which other parties (to the investigation) have been granted a right to be heard.

29. Therefore, the Pre-Trial Chamber has taken into account the following reasons in favour of accepting IM Chaem's proposed Submission: i) the PTC has already granted the right to be heard in these proceedings to the other parties in Case 004, including the OCP and Civil Parties; ii) IM Chaem's proposed submission does not put forward new or different arguments from those already advanced by AO An; iii) IM Chaem's submission in these proceedings is late due to factors beyond her control; iv) IM Chaem acted diligently as soon

<sup>42</sup> *Ibid.*, para. 2, footnote 6, citing Internal Rule 21(1)(a).

<sup>43</sup> IM Chaem's Request and Submission, para. 2.

<sup>44</sup> *Ibid.*

<sup>45</sup> AO An's Reply to PTC Instructions, paras 3, 20, 26.

<sup>46</sup> ICP Response to IM Chaem, para. 2.



as she acquired knowledge of the current proceedings; v) AO An has not explicitly objected to IM Chaem's request (within the legal deadline for such response); and vi) the OCP does not object to the admissibility of IM Chaem's Submission.

30. For all the above mentioned reasons, and based on: i) the provisions of Internal Rule 39(4)(b) which give the Chamber the authority to use its discretion to recognize the validity of actions executed after the expiration of a time limit; and ii) on the provisions of Internal Rule 21 which dictates that proceedings before the ECCC have to be fair and adversarial; The Pre-Trial Chamber has decided to allow IM Chaem's proposed Submission in support of AO An's Application.

#### IV. ADMISSIBILITY OF APPLICATIONS FOR ANNULMENT

31. Internal Rule 76(4) directs that the Chamber may declare an application for annulment inadmissible where the application: i) does not set out sufficient reasons; ii) relates to an order that is open to appeal; or iii) is manifestly unfounded. Accordingly, the Pre-Trial Chamber shall ascertain whether the application for annulment: (i) specified the parts of the proceedings which are prejudicial to the rights and interests of the appellant;<sup>47</sup> (ii) has clearly articulated the prejudice;<sup>48</sup> and (iii) where necessary, has adduced sufficient evidence to sustain the allegations.<sup>49</sup>

32. The Pre-Trial Chamber first notes that the Forced Marriage Application does not relate to any order that is open to appeal. Secondly, the Pre-Trial Chamber finds that AO An has articulated the alleged prejudice clearly by arguing that all investigative actions relating to forced marriage violate his fundamental right in accordance with the principle of legality expressed in Article 15 of the ICCPR, to be tried only for criminal offences on account of acts that constituted crimes in law at the time of their commission. According to AO An, in

<sup>47</sup> See IENG Thirith Decision, para. 24: "An annulment application therefore needs to be [...] specific as to which investigative or judicial actions are procedurally defective [...]."

<sup>48</sup> See Case 002 (PTC06), Decision on NUON Chea's Appeal Against Order Refusing Request for Annulment, 26 August 2008, D55/I/8 ("NUON Chea Decision"), para. 40: "a proven violation of a right [...], recognized in the ICCPR, would qualify as a procedural defect [...]. In such cases, the investigative or judicial action may be annulled." and para. 42: "[In other cases] the party making the application will have to demonstrate that its interests were harmed by the procedural defect".

<sup>49</sup> See IENG Thirith Decision, para. 32 relating to specific allegations which differ in nature from the allegations made in the current Application.



1975-79, acts of forced marriage did not constitute crimes against humanity in the category of ‘other inhumane acts’, hence, the alleged prejudice constituting a procedural defect.<sup>50</sup> Lastly, with respect to the third prong for admissibility, which is optional in that the burden of proving the allegations made in an application depends on the nature of the allegations,<sup>51</sup> the Pre-Trial Chamber finds that, in the instant case, since the application articulates prejudice by alleging errors in law, no evidence is necessary to sustain the allegations.

## V. CONSIDERATION OF THE GROUNDS FOR ANNULMENT

33. Annulment is foreseen under Internal Rule 48, which provides: “Investigative or judicial action may be annulled for procedural defect only where the defect infringes the rights of the party making the application”. Accordingly, a procedural irregularity which is not prejudicial to an applicant does not result in annulment.<sup>52</sup>
34. Under Article 252 of the CCCP, “[p]roceedings shall also be null and void if the violation of any substantial rule or procedure stated in this Code or any provisions concerning criminal procedure affects the interests of the concerned party. For instance, rules and procedures of important nature are those which intend to guarantee the rights of the defence.” In this respect, the Pre-Trial Chamber has found that “a proven *violation of a right of the Charged Person*, recognized in the ICCPR, would qualify as a procedural defect and would harm the interests of a Charged Person. In such cases, the investigative or judicial action may be annulled”.<sup>53</sup> “The final step, once prejudice is established, concerns the identification of the parts of the proceedings to be annulled.”<sup>54</sup> Furthermore, Internal Rule 76(5) provides: “Where the Chamber decides to annul an investigative action, it shall decide whether the annulment affects other actions or orders”.

<sup>50</sup> Application, para. 35.

<sup>51</sup> See IENG Thirith Decision, para. 32, which required more evidence for an application for annulment on the basis of allegations for bias because of the higher standard of proof applicable to that type of allegation.

<sup>52</sup> Case 003 (PTC20), Decision on MEAS Muth’s Appeal Against Co-Investigating Judge HARMON’s Decision on MEAS Muth’s Applications to Seize the Pre-Trial Chamber with Two Applications for Annulment of Investigative Action, 23 December 2015, D134/1/10, para. 26 *referring to* Decision on IENG Thirith’s Appeal Against the Co-Investigating Judges’ Order Rejecting the Request to Seize the Pre-Trial Chamber with a View to Annulment of all Investigations (D263/1), 25 June 2010, D263/2/6, para. 21.

<sup>53</sup> NUON Chea Decision, para. 40 (emphasis added).

<sup>54</sup> Case 003 (PTC20) Decision on MEAS Muth’s Appeal Against Co-Investigating Judge HARMON’s Decision on MEAS Muth’s Applications to Seize the Pre-Trial Chamber with Two Applications for Annulment of Investigative Action, 23 December 2015, D134/1/10, para. 27.



**V-1. THE GROUNDS ON WHICH ANNULMENT IS REQUESTED****AO An's Application**

35. AO An requests that the Pre-Trial Chamber annul all investigative actions relating to forced marriage (the "Impugned Investigative Actions").<sup>55</sup> AO An's request is based on the argument that such investigations are defective because they violate his fundamental right under Article 15 of the ICCPR, which is applicable at the ECCC,<sup>56</sup> and which requires that "[n]o-one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law, at the time it was committed" (the "principle of legality").<sup>57</sup> AO An first notes that forced marriage is not listed as an enumerated crime against humanity neither in Article 5 of the ECCC Law, nor in Article 7 of the ICC Statute - which, according to Article 9 of the ECCC Agreement, provides applicable definitions for crimes against humanity.<sup>58</sup> Even if it were listed, AO An argues, these articles only establish the boundaries of ECCC's subject matter jurisdiction and do not create crimes.<sup>59</sup> As such, acts of forced marriage must not be prosecuted before the ECCC because the principle of legality "prohibits *retroactivity* of crimes" and extension by analogy.<sup>60</sup> While courts may clarify existing laws, prohibited conduct must be sufficiently specific so that the substance of the law applicable at the time of the alleged offences was foreseeable and ascertainable to the accused.<sup>61</sup>

36. Following this line of argument, AO An contends that the request of the Co-Prosecutors, in the Supplementary Submission, for the OCIJ to investigate forced marriage as a crime against humanity in the category of other inhumane acts is "an unlawful attempt to expand the Court's jurisdiction",<sup>62</sup> and that the "Case 002/01 approach" followed by the PTC and TC "does not satisfy the SCC's second requirement for jurisdiction," that is, that offences

<sup>55</sup> Application, para. 50.

<sup>56</sup> ECCC Law, Article 33 (new).

<sup>57</sup> Application, paras 1, 21-26, 33 and 35.

<sup>58</sup> Application, paras 18-19.

<sup>59</sup> *Ibid.*

<sup>60</sup> Application, para. 21 (emphasis added) citing Antonio Cassese, *International Criminal Law*, Oxford University Press, 2003, pp. 145-147, 153-154. Also citing Case 001/18-07-2007/ECCC/SC (SCC), Appeal Judgement, 3 February 2012, F28, para. 91 ("Case 001 Appeal Judgement").

<sup>61</sup> *Ibid.*, citing Case 001 Appeal Judgement, paras 95, 96.

<sup>62</sup> Application, para. 34.



charged must have existed in law between 17 April 1975 and 6 January 1979.<sup>63</sup> AO An develops his arguments on three grounds:

37. **Ground A: Forced marriage did not exist in law as a crime against humanity in the category of ‘other inhumane acts’ in 1975-79.**<sup>64</sup> Under this ground, AO An submits that: Cambodia’s 1956 Penal Code did not mention forced marriage; Cambodia was not a party to any treaties relevant to forced marriage, and in fact no such treaties existed in 1975-79.<sup>65</sup> He goes on to argue that, in 1975-79 forced marriage was not a crime against humanity under international customary law because: i) “First, there was no settled practice or norm amongst states and no identifiable international convention or treaty that criminalized forced marriage. Although three human rights instruments, the Universal Declaration of Human Rights (a non-binding document), the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, and the ICCPR, stated that consent is required for marriage, none of these instruments specifically *criminalized* forced marriage. Moreover, human rights instruments alone do not provide sufficient evidence of a recognized norm”;<sup>66</sup> and ii) “Second, no international tribunal has recognized forced marriage as a crime against humanity, except the [Special Tribunal for Sierra Leone] SCSL which jurisdiction *ratione temporis* is much more recent (after November 1996) [hence its finding is not applicable to the ECCC] and which failed to provide adequate reasoning and support for its decision”, because it “did not examine the legality of forced marriage beyond analysing the legality of the ‘other inhumane acts’ category of crimes against humanity”

<sup>63</sup> Application, para. 35 *citing* Case 001 Appeal Judgement, paras 98-100, which states that “in order for charged offences and modes of participation to fall within the ECCC’s subject-matter jurisdiction, they must: 1) ‘be provided for in the [ECCC Law] explicitly or implicitly’; and 2) have existed under Cambodian or international law between 17 April 1975 and 6 January 1979.” *See also* Application, para. 27 (describing the “Case 002/01 approach”) with reference to Case 002 (PTC75), Decision on IENG Sary’s Appeal against the Closing Order, 11 April 2011, D427/1/30 (“Judgment on Case 002/PTC75”), paras 371, 378; Case 002 (PTC145 & 146) Decision on Appeals by NUON Chea and IENG Thirith against the Closing Order, 15 February 2011, D427/2/15, D427/3/15 (“Judgment on Case 002/PTC145 & 146”), para. 156; and Case 002/19-09/2007 (TC), Case 002/01 Judgement, 7 August 2014, E313, para. 436 (“Case 002/01 Trial Judgement”).

<sup>64</sup> Application, paras 35, 38-43.

<sup>65</sup> Application, para. 38.

<sup>66</sup> Application, para. 40 (emphasis added) *citing* *Prosecutor v. Stakić*, IT-97-24-T, Judgement, Trial Chamber, 31 July 2003, para. 721.



and “also did not determine when forced marriage was criminalized under international customary law.”<sup>67</sup>

**38. Ground B: It was not foreseeable and accessible to AO An in 1975-79 that the conduct of forced marriages could bring criminal liability.**<sup>68</sup> In paragraph 44 of the Application, AO An refers to jurisprudence of the Supreme Court Chamber of the ECCC, in which it was stated that, “as to foreseeability, [...] [the accused] must be able to appreciate that the conduct is criminal in the sense generally understood, without reference to any specific provision” and “[a]s for [...] accessibility [...] in addition to treaty laws, laws based on custom or general principles can be relied on as sufficiently available to the accused.”<sup>69</sup> AO An contends that in 1975-79, the elements of forced marriage were not clearly defined and it was not foreseeable or accessible to AO An that this type of conduct was prohibited and punishable. The existence of a right to consent to marriage is not sufficient notice to AO An of the potential criminality of forced marriage.<sup>70</sup>

**39. Ground C: Even if ECCC were correct to “retroactively adopt a definition of forced marriage, [...] such conduct is not of ‘a nature and gravity similar to other enumerated crimes against humanity’.”**<sup>71</sup> Even if forced marriage “were unlawful under international customary law in 1975-79, such characterization would not have satisfied the elements of ‘other inhumane acts’, as it would not have been seen as comparatively serious or grave as the enumerated crimes against humanity.”<sup>72</sup> First, the *lack of criminalization* is presented as “compelling evidence that forced marriage was not viewed as serious in 1975-79.”<sup>73</sup> Second, forced marriage is “*not distinguishable from arranged marriage* - an accepted and common practice in Cambodia in 1975-79” and any distinction based on lack of direct consent by parties “is tenuous at best.”<sup>74</sup> Arranged marriage also “may involve

<sup>67</sup> Application, paras 41-42, citing *Prosecutor v. Brima, Kamara & Kanu*, SCSL-2004-16-A, Judgement, Appeals Chamber, 22 February 2008, paras 198, 202 (“*Brima Decision*”).

<sup>68</sup> Application, paras 35, 44-45.

<sup>69</sup> Application, para. 44 referring to Case 001 Appeal Judgement, para. 96, quoting *Prosecutor v. Hadžihasanović & Kubura*, IT-01-47, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, Appeals Chamber, 16 July 2003, para. 34.

<sup>70</sup> Application, para. 45, citing *Brima Decision*, Justice Doherty’s Dissent, para 71.

<sup>71</sup> Application, paras 36, 46-49.

<sup>72</sup> Application, para. 46.

<sup>73</sup> Application, para. 47.

<sup>74</sup> Application, para. 48.



coercion and duress, including intense psychological pressure and manipulation, threats of abandonment or excommunication from the family unit, and fears of being stigmatized by the community.”<sup>75</sup> Third, “even though such violations of individual autonomy and the right to self-determination may be detrimental, the resulting harm does not compare to that of enumerated crimes against humanity.”<sup>76</sup>

### **IM Chaem’s Submission in Support of the Application:<sup>77</sup>**

40. In her Submission, IM Chaem requests the same relief as AO An, namely that the Pre-Trial Chamber annul the investigative actions concerning forced marriage in Case 004. She does so by putting forward the same principal argument, that such investigation violates the principle of legality and therefore the Charged Persons’ right under Article 15 of the ICCPR, and hence also their right to legal certainty. Similarly to AO An, IM Chaem submits that “the principle of legality must be applied to both the ‘other inhumane acts’ category and to each prohibited inhumane act within this category.”<sup>78</sup> According to IM Chaem, the “vagueness of the ‘other inhumane acts’ category of crimes against humanity [...] does not satisfy the principle of legality.”<sup>79</sup> IM Chaem adopts the rest of the arguments put forward by AO An<sup>80</sup> and submits that “the Pre-Trial Chamber should address whether the ECCC have jurisdiction to investigate and prosecute forced marriage.”<sup>81</sup>

## **V-2. RESPONSES TO THE APPLICATION**

### **Co-Prosecutor’s Response**

41. The International Co-Prosecutor requests that the Pre-Trial Chamber deny the annulment application on the grounds that the investigations into the conduct of forced marriages do not cause prejudice to the applicant.<sup>82</sup> The ICP submits that the Case 002/01 approach to the principle of legality is supported by customary international law, and therefore the

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

<sup>76</sup> Application, para. 49.

<sup>77</sup> IM Chaem’s Request and Submission, paras 3-10.

<sup>78</sup> *Ibid.*, para. 6. Application, paras 27-32.

<sup>79</sup> *Ibid.*, para. 7.

<sup>80</sup> *Ibid.*, para. 8 *citing* Application, paras 27-32 and 38-49.

<sup>81</sup> *Ibid.* paras 9-10.

<sup>82</sup> ICP Response, paras 19-43.





ECCC has subject matter jurisdiction.<sup>83</sup> According to the ICP, “[t]he principle of legality ‘does not prevent a court, either at the national or international level, from determining an issue through a process of interpretation and clarification as to the elements of a particular crime’ or ‘as to the meaning to be ascribed to particular ingredients of the crime.’”<sup>84</sup> They explain that “[f]orced marriage satisfies the test identified by the SCSL Appeals Chamber as set out at paragraph 198 of its judgment in *Brima et al.* The elements of that test are not limited to the temporal jurisdiction of the SCSL, and apply equally to 1975-1979. Though not binding on the PTC, the SCSL jurisprudence on forced marriage is persuasive and applicable authority in this case”.<sup>85</sup> According to the ICP, the notion of “other inhumane acts” formed part of customary international law since before 1975-79.<sup>86</sup> They go on to explain in detail why acts of forced marriage differ from other crimes against humanity and also from acts of arranged marriages.<sup>87</sup> Finally, in Cambodia at the time within ECCC’s temporal jurisdiction, forced marriages caused serious mental or physical suffering,<sup>88</sup> and were acts committed as part of a widespread and systematic attack carried out against civilians under Khmer Rouge control resulting in ramifications such as consistent physical violence, sexual violence, re-education or death.<sup>89</sup> They were also “part of a policy targeting the civilian population on the political grounds of controlling civilians and ensuring the birth of workers for the future”<sup>90</sup> and are acts “sufficiently similar and of comparative gravity” to the “types of conduct which have previously been found to be ‘other inhumane acts’ by international tribunals, such as forcible transfer, forced prostitution, or forced nudity.”<sup>91</sup> As regards the definition of forced marriage, the ICP makes reference to that employed by the SCSL Appeals Chamber which is: “[F]orced marriage describes a situation in which the perpetrator through his words or conduct, or those of someone for whose actions he is responsible, compels a person by force, threat of

<sup>83</sup> ICP Response, paras 19-24.

<sup>84</sup> ICP Response, para. 24 quoting *Prosecutor v. Aleksovski*, Judgment, Appeals Chamber, 24 March 2000, para. 127.

<sup>85</sup> ICP Response, para. 24.

<sup>86</sup> ICP Response, para. 21.

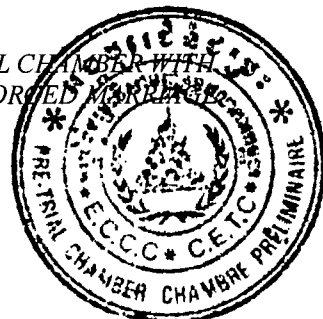
<sup>87</sup> ICP Response, paras 25-36.

<sup>88</sup> ICP Response, paras 37-39.

<sup>89</sup> ICP Response, para. 40.

<sup>90</sup> ICP Response, para. 41.

<sup>91</sup> ICP Response, para. 42 citing *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment, Trial Chamber, 2 September 1998, paras 685-687.



force, or coercion to serve as a conjugal partner, resulting in severe suffering, or physical, mental or psychological injury to the victim.”<sup>92</sup>

### Civil Parties’ Response

42. According to the Civil Party Lawyers, “[t]he [C]ase 002/01 approach that AO An challenges does not violate the principle of legality. The recognition of other inhumane acts as a crime against humanity of its own category under customary international law is consistent with a longstanding and well-established international jurisprudence that has its origin in the Nuremberg Charter for the International Military Tribunal and has been adhered to not only by the [Pre-Trial Chamber] and the Trial Chamber, but also by all major international tribunals after 1945.”<sup>93</sup> “By 1975, the elements of other inhumane acts were sufficiently specific and it was thus foreseeable for AO An the implementation of a nationwide policy that caused great harm and suffering among the civilian population could constitute a crime against humanity.”<sup>94</sup> Forced marriage is of comparable gravity to the enumerated crimes against humanity and AO An’s contention in this respect is premature at this stage because the OCIJ can only assess the comparable gravity of forced marriage on the basis of a complete set of facts at the end of the investigations when a Closing Order is issued.<sup>95</sup>

### V-3. THE PRE-TRIAL CHAMBER’S ASSESSMENT OF MERIT:

43. Upon deliberation, the Judges of the Pre-Trial Chamber could not reach a majority of votes for a decision on the merits of this Application.

44. Therefore, while the decision of the Pre-Trial Chamber in respect of the admissibility of the Application is expressed in the preceding paragraphs, the separate opinions of the various Judges of the Pre-Trial Chamber in respect of the merits of the Application are appended, as required by Internal Rule 77(14).

<sup>92</sup> ICP Response, para. 26 quoting *Brima* Decision, para. 196.

<sup>93</sup> CP Response, para. 24.

<sup>94</sup> *Ibid.*, para. 25 referring to Decision on IENG Sary’s Appeal against the Closing Order, 11 April 2011, D427/1/30, para. 385.

<sup>95</sup> *Ibid.*, paras 27-38.



1. **FINDS** the Application admissible;
2. **DECLARES** that it has not assembled an affirmative vote of at least four Judges to issue a decision on the merits of the Application.

~~President~~

**AK Kimsan Olivier BEAUVALLET NEY Thol Kang Jin BAIK HUOT Vuthy**

Judges Olivier BEAUVALLÉ and Kang Jin BAIK append their opinion with regard to the Merits of the Appeal.

**OPINIONS OF JUDGES PRAK KIMSAN, NEY THOL AND HUOT VUTHY**

1. The National Judges of the Pre-Trial Chamber (“PTC”) will present their views concerning Mr AO An’s Appeal. At the outset, we wish to clarify our views on the publication of the PTC’s decisions.
2. Article 3.12 of the ECCC Practice Direction authorises AO An to request that the PTC reclassify as “Public” any documents classified as “Confidential” or “Strictly Confidential”, in accordance with the provisions of the Practice Direction on the Classification and Management of Case-related Information.
3. The second sentence of Article 3.12 of the Practice Direction states, “Until the issuance of a Closing Order and the determination of any appeal against the Closing Order, the Co-Investigating Judges and the Pre-Trial Chamber, as appropriate, shall consider whether the proposed classification is appropriate and, if not, determine what the appropriate classification is.”
4. For the foregoing reasons, the National Judges consider that it is not yet necessary to reclassify documents from “Confidential” to “Public” at the moment, and that AO An’s rights and interest are not affected because he has access to documents classified as “Confidential.” In this regard, the PTC should consider reclassification until the issuance of a Closing Order and the determination of any appeal against the Closing Order, pursuant to the second sentence of Article 3.12 of the Practice Direction.
5. The Counsel for AO An [“Defence”] submit that the principle of legality, also referred to as *nullum crimen sine lege* (no crime without law), prohibits the retroactivity of crimes and requires that prohibited conduct be sufficiently specific so as to guide the behaviour of citizens. Under this principle, criminal laws must be strictly construed and extension by analogy is prohibited. Courts may interpret and clarify existing laws, but the substance of



the law must be foreseeable and ascertainable to the accused at the time of the alleged crimes.<sup>96</sup>

6. The Defence argue that the ECCC Law requires this Court to respect the principle of legality. Article 33 new of the ECCC Law provides, in relevant part: The ECCC “shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law as set out in Article 14 and 15 of the International Covenant on Civil and Political Rights”<sup>97</sup>:

No-one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law, at the time it was committed.”

7. The Defence submit that the principle of legality is applied *particularly strictly in civil law jurisdictions*. The ECCC Supreme Court has explained that legality should have a ‘refraining function’ in international criminal law, ‘preventing international or hybrid tribunals and courts from unilaterally exceeding their jurisdiction by providing clear limitations on what is criminal.’ In doing so, legality safeguards individuals against the arbitrary power of governments, majorities and excessive judicial discretion and ensures that all individuals know in advance what conduct is proscribed.<sup>98</sup>
8. The Defence submit that the Cambodian Constitution and Cambodian criminal law also require courts to respect the principle of legality. Article 31 of the Cambodian Constitution obliges courts to protect the rights recognised in key human rights instruments. It provides, in relevant part: ‘The Kingdom of Cambodia shall recognise and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights, covenants and conventions related to human rights, women’s and children’s rights.’<sup>99</sup>
9. The Defence add that Article 38 of the Cambodian Constitution provides: “the prosecution, arrest or detention of any person shall not be done except in accordance with the law” and

<sup>96</sup> Ta An’s Application to Seize the Pre-Trial Chamber with a view of Annulment of Investigative Action concerning Forced Marriage, 2 February 2015, Paragraph 21, DA259.

<sup>97</sup> *Ibid*, para. 22.

<sup>98</sup> *Ibid*, para. 23.

<sup>99</sup> *Ibid*, para. 24.



any subsequent “trials shall be conducted [...] in accordance with the legal procedures in force.” In addition, Article 6 of the Penal Code of Cambodia 1956, the law in effect during 1975-79, requires a strict application of the principle of legality, prohibiting the retroactive effect of the law.<sup>100</sup> Finally, the importance of the principle of legality has not only been recognised and emphasised by the ECCC and Cambodian law, but also by international, regional and national tribunals and courts and academics.<sup>101</sup>

10. Rule 76(2) of the Internal Rules states: “Where, at any time during the judicial investigation, the parties consider that any part of the proceedings is null and void, they may submit a reasoned application to the Co-Investigating Judges requesting them to seise the Pre-Trial Chamber with a view to annulment. The Co-Investigating Judges shall issue an order accepting or refusing the request as soon as possible and, in any case, before the Closing Order.” Rule 48 of the Internal Rules states: “Investigative or judicial action may be annulled for procedural defect only where the defect infringes the rights of the party making the application.”
11. The National Judges understand that the ECCC was established in accordance with the Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea (“Agreement”), and the Law on the Establishment of the ECCC (“ECCC Law”), and applies its Internal Rules.
12. The ECCC is a special court that applies the procedures of prosecution and judicial investigation different from those of Cambodia’s national courts. Prosecution and judicial investigation under the national courts merely concern facts, not personal jurisdiction.<sup>102</sup> On the contrary, at the ECCC, prosecution and judicial investigation can proceed only where the two conditions—first, *the Fact* “the crimes and serious violations of Cambodian laws related to crimes, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17

<sup>100</sup> *Ibid*, para. 25.

<sup>101</sup> *Ibid*, para. 26.

<sup>102</sup> Articles 44 and 125 of the Cambodian Code of Criminal Procedure.



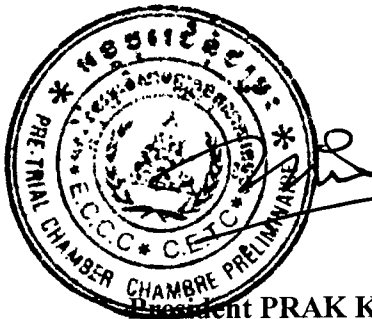
April 1975 to 6 January 1979”, and second, *Personal Jurisdiction* “senior leaders of Democratic Kampuchea and those who were most responsible for the crimes”— are met.<sup>103</sup>

13. The National Judges will therefore consider whether the International Co-Investigating Judge’s judicial investigation into the alleged forced marriage fails to meet the conditions specified in Paragraph 12, leading to procedural defect in the investigation as described in Paragraph 10 that infringes AO An’s rights and thus warrants annulment.


14. The National and International Co-Prosecutors disagreed over the issuance of the Third Introductory Submission in Case 004. While the International Co-Prosecutor requested to submit the Third Introductory Submission, the National Co-Prosecutor rejected it on the ground that “the suspects are not senior leaders and/or those who were most responsible.”<sup>104</sup> The National and International Judges of the PTC also disagree over this matter. The National Judges support the National Co-Prosecutor’s argument.<sup>105</sup>

15. In light of the foregoing considerations, the National Judges are of the view that the International Co-Investigating Judge cannot investigate AO An regarding the alleged forced marriage.

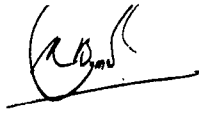
Phnom Penh, 17 May 2016



President PRAK Kimsan



Judge NEY Thol



Judge HUOT Vuthy

<sup>103</sup> Article 1 of 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; Article 1 of the Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea; and Rule 53 of the Internal Rules.

<sup>104</sup> National Co-Prosecutor’s Response to the Pre-Trial Chamber’s Direction to Provide Further Particulars, dated 24 April 2009, and National Co-Prosecutor’s Additional Observation, 22 May 2009, para. 86(a).

<sup>105</sup> Opinions of Judges PRAK Kim, NEY Thol and HUOT Vuthy, 17 August 2009, “AO An is not a senior leader of Democratic Kampuchea or among those who were most responsible for the crimes.”

**OPINION ON MERIT OF THE APPLICATION****BY JUDGES BAIK AND BEAUVALLET**

1. AO An argues that the violation – by investigations into forced marriage – of his right to legality under Article 15 of the ICCPR, qualifies as a procedural defect that harms his interests, hence, warranting nullity of such proceedings. While AO An does not point at specific documents in the Case File, the Undersigned Judges agree that Article 15 of the ICCPR is a rule of important nature intended to guarantee the right to legality of those appearing before the ECCC. According to Article 15 of the ICCPR, no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law, at the time it was committed. Given the important nature of the right to legality, the Pre-Trial Chamber has consistently taken the position that, for such right to be safeguarded, even if enumerated in the ECCC Law, criminal acts or forms of liability charged before the ECCC must have existed in law at the time within ECCC's temporal jurisdiction.<sup>106</sup> As required by Article 12 of the Agreement, the Undersigned Judges note that the standards set out in Article 15 of the ICCPR relate, in effect, directly to ECCC's *exercise* of jurisdiction.<sup>107</sup> With regards to exercise of jurisdiction, the Pre-Trial Chamber has held that it is incumbent upon courts to ascertain whether they have jurisdiction when they are seised.<sup>108</sup> Moreover, it has found that challenges to such orders of the Co-Investigating Judges that confirm – either implicitly,<sup>109</sup> or explicitly<sup>110</sup> – ECCC's jurisdiction, can be brought at the pre-trial stage of proceedings and, give rise to a right of appeal under Internal Rule 74(3)(a).<sup>111</sup>
2. The Undersigned Judges note that, in the instant case, AO An is not impugning any OCIJ order confirming ECCC's jurisdiction. AO An challenges a series of investigative actions

<sup>106</sup> Judgment on Case 002/PTC75, paras 210, 226, 240, 321-327, 341-351, 366.

<sup>107</sup> Article 12 of the Agreement: “[t]he Extraordinary Chambers shall *exercise* their jurisdiction in accordance with the international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights, to which Cambodia is a party”.

<sup>108</sup> Decision on the Appeals against the Co-Investigating Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, D97/14/15, para. 22: “In Cambodian law, as in French law for instance, a court must ascertain whether it has temporal and territorial jurisdiction over facts brought before it as well as material jurisdiction for the crimes charged.” (“JCE Decision”).

<sup>109</sup> Challenges such as those brought by the JCE Appeals in Case 002 (*see* JCE Decision, para. 24).

<sup>110</sup> Challenges brought against the Closing Order in Case 002 (*see* PTC75, PTC145 & PTC146).

<sup>111</sup> JCE Decision, paras 23-24.





undertaken by the ICIJ consequent upon the filing of the Supplementary Submission by the ICP. AO An argues that such investigations are defective because the Supplementary Submission itself is an “unlawful attempt to expand the Court’s Jurisdiction.”<sup>112</sup>

3. Indeed, the investigation into acts of forced marriages was requested by the International Co-Prosecutor’s Supplementary Submission, which suggested that the facts described therein constitute crimes within the jurisdiction of the court, including but not limited to: a) Homicide and Torture under Cambodia’s 1956 Penal Code; and b) “Crimes against Humanity” (including “other inhumane acts”).<sup>113</sup>
4. The Undersigned Judges observe that the ICIJ has informed AO An that “there is clear and consistent evidence indicating that he may be criminally responsible for Crimes Against Humanity committed as part of a widespread or systematic attack targeting a civilian population on national, political, ethnical, racial or religious grounds” and “that he is charged with: The Crimes Against Humanity of murder, extermination, persecution on political or religious grounds [...] [and] [...] imprisonment and *other inhumane acts (namely inhumane conditions of detention)*.”<sup>114</sup>
5. The ICIJ has also advised AO An that the ICIJ “*may, before the end of the investigation, decide to charge Ao An with additional crimes based on allegations in the Introductory Submission, First Supplementary Submission, and Second Supplementary Submission, should he become satisfied that there is clear and consistent evidence indicating that Ao An may be responsible for such crimes.*”<sup>115</sup> On 14 March 2016, the ICIJ charged AO An with crimes against humanity, namely other inhumane acts, including forced marriage and associated sexual violence in Kompong Siem and Prey Chhor District, Sector 41.<sup>116</sup>
6. From the history of investigations, it is clear that the International Investigating Judge is acting upon the allegations and suggestions made by the ICP in the Supplementary Submission. The Supreme Court Chamber has found that, as far as jurisdiction is

<sup>112</sup> Application, para. 34.

<sup>113</sup> Co-Prosecutors’ Supplementary Submission Regarding Forced Marriage and Sexual or Gender-Based Violence, 24 April 2014, D191, para. 13.

<sup>114</sup> Written Record of Initial Appearance, 30 March 2015, D242, p. 7.

<sup>115</sup> *Ibid.*, p. 8.

<sup>116</sup> Written Record of Further Appearance, 14 March 2016, D303, p. 8, para. 12.



concerned, the Co-Investigating Judges have no discretion to exercise.<sup>117</sup> Had the ICIJ found that the Supplementary Submission was defective, with respect to allegations into acts of forced marriage, it would have either declared lack of jurisdiction or, as the Pre-Trial Chamber has found,<sup>118</sup> it would have submitted an application under Internal Rule 76(1) for annulment, at least in part, of the Supplementary Submission. Instead, the ICIJ has carried out investigations, has seised the Pre-Trial Chamber with AO An's Application, and has recently on 14 March 2016 charged AO An with crimes against humanity, namely other inhumane acts, including forced marriage.

7. The Undersigned Judges consider that, although the annulment of the Supplementary Submission – as far as allegations into acts of forced marriage are concerned - is not part of the relief sought in the Application, the request for its nullity is implied given the statement in the Application that “the Supplementary Submission is an unlawful attempt to expand the Court’s jurisdiction” and also by virtue of requesting annulment of all investigative actions consequent upon it. Therefore, in its review of the grounds of the Application, the Undersigned Judges shall examine the regularity of, not only the investigative actions taken in isolation, but also of the Supplementary Submission, in its relevant parts.
8. In the Supplementary Submission, the ICP alleges that acts of forced marriages took place “in districts *under the control or authority of the Case 004 Suspects*.”<sup>119</sup> With respect to AO An, according to the Supplementary Submission, the alleged marriages “*involved as many as 50 couples forced to marry at the same time, and were organized and conducted by unit chiefs and other local CPK cadres (who would have reported through a hierarchical chain-of-command to the Sector Secretary). AOM An was the Secretary of Sector [...]*”<sup>120</sup> and “[v]ictims subjected to forced marriages were *subsequently monitored by spies or militia to ensure that their marriage was consummated, in inherently coercive circumstances established and maintained by the CPK cadre*. One source from this district

<sup>117</sup> Case 001 Appeal Judgment, para. 80.

<sup>118</sup> Case 003 (PTC26), Considerations on MEAS Muth's Appeal Against the International Co-Investigating Judge's Re-Issued Decision on MEAS Muth's Motion to Strike the International Co-Prosecutor's Supplementary Submission, 26 April 2016, D120/3/1/8, para. 31.

<sup>119</sup> Supplementary Submission, para. 1 (emphasis added).

<sup>120</sup> Supplementary Submission, paras 2-3 (emphasis added).



also states that female prisoners were raped before being killed.”<sup>121</sup> Furthermore, the acts alleged in the Supplementary Submission “were *part of a common criminal plan* or joint criminal enterprise, as described in paragraph 21 of the Supplementary Submission dated 18 July 2011 and paragraphs 16 to 17 of the [Third Introductory Submission].”<sup>122</sup> According to paragraphs 16-17 of the Introductory Submission, “the *specific targets of the JCE were the local cadre, their families and “connections,” and people with connections to the “old society,” new or “1975 people”, the Cham ethnic and religious minority and persons of Vietnamese ethnicity.*”<sup>123</sup> Furthermore, according to paragraph 21 of the Supplementary Submission dated 18 July 2011, “the common criminal plan was *knowingly implemented* by various persons, including CPK district secretaries and chairman of security offices, each of whom were also members of a joint criminal enterprise within their district or security centre. Each of these individuals, by their acts or omissions, *contributed to achieving the shared objectives* of the joint criminal enterprise and *intended the results* thereof.”<sup>124</sup> Under the heading “legal classification” in the Supplementary Submission, the ICP states: “The Co-Prosecutors have reason to believe that the facts described above constitute crimes within the jurisdiction of the court”, including but not limited to the crimes against humanity of: “Murder, Extermination, Enslavement, Imprisonment, Torture, Rape, Persecutions on political and racial grounds, and Other Inhumane acts.”<sup>125</sup>

**Ground A: Forced marriage did not exist in law as a crime against humanity in the category of ‘other inhumane acts’ in 1975-79.**

9. The Pre-Trial Chamber, as well as the Trial Chamber, has found that ‘other inhumane acts’ were established as crimes against humanity under customary international law before 1975.<sup>126</sup> The conduct underlying the crime of ‘other inhumane acts’ need not itself have

<sup>121</sup> Supplementary Submission, para. 2 (emphasis added).

<sup>122</sup> Supplementary Submission, para. 14 (emphasis added).

<sup>123</sup> Introductory Submission, paras 16-17 (emphasis added).

<sup>124</sup> Co-Prosecutors’ Supplementary Submission Regarding Sector 1 Crime Sites and Persecution of Khmer Krom, 9 December 2015 (dated 18 July 2011), D65, para. 21 (emphasis added).

<sup>125</sup> Supplementary Submission, para. 13.

<sup>126</sup> Case 001/18-07-2007/ECCC/TC, Judgement, 26 July 2010, E188 (“Case 001 Trial Judgement”), para. 367; Judgment on Case 002/PTC75, paras 379-385, 395-396, 398; Judgment on Case 002/PTC145 & 146, paras 130-131, 157, 165; See also *Prosecutor v. Stakić*, IT-97-24-A, Judgment, Appeals Chamber, 22 March 2006, para. 315.



had the status of a crime against humanity. The Pre-Trial Chamber has previously ruled that ‘other inhumane acts’ is in itself a crime under international law and that it is accordingly unnecessary to establish that each of the sub-categories alleged to fall within the ambit of this offence were criminalized.<sup>127</sup> Rather, the principle of legality attaches to the entire category of ‘other inhumane acts’ and not to each sub-category of this offence.<sup>128</sup>

10. The other acts not found in the instruments constitute a broad range of breaches of fundamental individual rights including “rights to property, a fair trial, equal protection of the law, citizenship, work, education, *marriage*, privacy and freedom of movement.”<sup>129</sup> That said, ‘not every denial of a human right was found to constitute a crime against humanity under post-World War II jurisprudence. Rather, the doctrine of *ejusdem generis* was used to interpret the charters of the tribunals to set ‘clearly defined limits on types of acts,’ which guarantees some degree of precision.<sup>130</sup> The Undersigned Judges agree that this rule is important for it may function as a residual clause covering instances of inhuman behaviour that do not neatly fall under any of the other existing categories of crimes against humanity.<sup>131</sup> Indeed, there is no need to look for traces of criminalization of each underlying act since ‘other inhuman acts’ already existed as a crime in law. A further

<sup>127</sup> Judgment on Case 002/PTC75, paras 371, 378; Judgment on Case 002/PTC145 & 146, para. 156.

<sup>128</sup> Judgment on Case 002/PTC75, para. 378.

<sup>129</sup> Case 001 Appeal Judgment, para. 254 (emphasis added).

<sup>130</sup> Judgment on Case 002/PTC75, paras 388-389: “The ECCC Law, as well as the Nuremberg Charter, the Tokyo Charter, Control Council No. 10, and the Nuremberg Principles, list certain acts that are deemed to be crimes against humanity including ‘other inhumane acts.’ The word ‘other’ imports an *ejusdem generis* rule of interpretation, whereby ‘other inhumane acts’ can only include acts which are both ‘inhumane’ and of a “similar nature and gravity” to those specifically enumerated; namely, murder, extermination, enslavement and deportation. 389. In finding that the doctrine of *ejusdem generis* is relevant for determining the content of “other inhumane acts”, the Pre-Trial Chamber emphasises that this is not in violation of the rule against analogy found in civil law jurisdictions. Applying a crime by analogy to unregulated conduct (*analogia lexis*) is distinguishable from – as with “other inhumane acts” – applying a subcategory within a crime by analogy to another subcategory within that crime for purposes of clarifying the definition of that other subcategory. In the latter scenario, if the conduct at issue falls within the definition of the crime, then it is in fact regulated conduct, such that the rationale of the rule against analogy does not apply. This distinction is unavoidable when it is further considered that the category of “other inhumane acts” as crimes against humanity was specifically designed as a residual crime to avoid lacunae in the law, and that the term is rendered meaningless without applying an *ejusdem generis* canon of construction.”

<sup>131</sup> Antonio Cassese, *Cassese’s International Criminal Law*, Third Edition, Oxford University Press, 2013 (“Cassese 2013”), p. 98.



requirement for criminality of each sub-category of inhuman behaviour would seriously undermine the important function of 'other inhumane acts' as crimes.<sup>132</sup>

**Ground B: It was not foreseeable and accessible to AO An in 1975-79 that the conduct of forced marriages could bring criminal liability.**

11. In its quest to find the definition, as it existed in law prior to 1975-79, of the term 'other inhumane acts', the Pre-Trial Chamber relied on an elaborate list of sources explaining in detail the roots<sup>133</sup> and the development in post-World War II jurisprudence of such definition,<sup>134</sup> all of which were indicative that a general understanding of what type of acts<sup>135</sup> were prohibited existed at the time relevant to ECCC's temporal jurisdiction.

12. The Undersigned Judges conclude that although by 1975 the articulation of the contours of the elements of other inhumane acts as crimes against humanity was not always clear or complete in accordance with our understanding of them today, the principle that an individual may be held criminally responsible for committing crimes which are 'similar in

<sup>132</sup> The Supreme Court Chamber has also provided some guidance in respect of the steps to be followed in examining whether underlying acts could constitute the crime against humanity of an enumerated crime. In addressing the appeal grounds in Case 001, the Supreme Court Chamber went to the extent of undertaking, *proprio motu*, an examination "whether an act of rape such as occurred at S21 could constitute the crime against humanity of torture during ECCC's temporal jurisdiction" (*see* Case 001 Appeal Judgment, paras 184-210). It is clear that in the process of such examination, the Supreme Court Chamber, having found that that torture existed as an enumerated crime against humanity and having determined its definition at the time, did not proceed to also examine whether the act of rape at issue was itself a crime. It rather proceeded to compare the factual findings for that act of rape against the definition of torture as it was in law at the time within ECCC's temporal jurisdiction.

<sup>133</sup> Judgment on Case 002/PTC75, para. 383: "The definition of crimes against humanity codified under Principle VI(c) of the Nuremburg Principles derives from the preamble of the Declaration of St. Petersburg in 1868 and the Martens Clause in the Hague Conventions of 1899 and 1907 invoking "the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience" as residual protection against acts not specifically prohibited in the text of the Hague Conventions. While Principle VI(c) articulates specific acts that constitute crimes against the laws of humanity, it nevertheless provides a non-exhaustive list and includes "other inhumane acts" as a residual category, in order to, in the spirit of the Martens Clause, avoid creating an opportunity for evasion of the laws of humanity."

<sup>134</sup> Judgment on Case 002/PTC75, paras 385-394.

<sup>135</sup> Judgment on Case 002/PTC75, para. 395: "Accordingly, the Pre-Trial Chamber finds that, by 1975-1979, provided that the requisite *chapeau* and *mens rea* elements existed, an impugned act or omission constituted an "other inhumane act" as a crime against humanity where it was of a similar nature and gravity to the enumerated crimes against humanity of murder, extermination, enslavement or deportation such that: 1) it seriously affected the life or liberty of persons, including inflicting serious physical or mental harm on persons or 2) was otherwise linked to an enumerated crime against humanity. In this respect it was foreseeable that acts prohibited by the international regulation of armed conflict on the basis of being inhumane would similarly be prohibited as a crime against humanity. The definition of "other inhumane acts" was likely to encompass acts that would amount to serious violations or grave breaches of, *inter alia*, the 1899 Hague Regulations, the 1907 Hague Regulations, the 1929 Geneva Convention and the 1949 Geneva Conventions provided that they would meet the other requirements specific to these instruments."



nature and gravity' to the other listed crimes against humanity was established and generally understood and was both accessible and foreseeable to the Accused.<sup>136</sup>

13. It was clear that conduct of forcing people to act against their will in a way or another could fall under the definition of 'other inhumane acts' by judicial clarification based on the use of the doctrine of *ejusdem generis* on a case by case basis.<sup>137</sup> The principle of legality does not prevent a court, either at the national or international level, from determining an issue through a process of interpretation and clarification as to the elements of a particular crime or as to the meaning to be ascribed to particular ingredients of the crime.<sup>138</sup>

14. The Undersigned Judges do not find AO An's arguments on point compelling to depart from these precedents.

**Ground C: Even if ECCC were correct to "retroactively adopt a definition of forced marriage, [...] such conduct is not of 'a nature and gravity similar to other enumerated crimes against humanity'.**

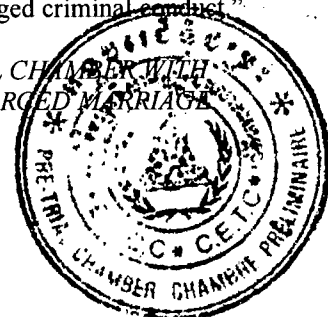
15. The list of elements of the crime of 'other inhumane acts' includes that an act or omission of the accused or of his subordinate:

- (i) caus[ed] serious bodily or mental harm or constitut[ed] a serious attack on human dignity; and

<sup>136</sup> Judgment on Case 002/PTC75, para. 396.

<sup>137</sup> Post-World War II Tribunals used such doctrine to clarify the law also. See Judgment on Case 002/PTC75, paras 388-390.

<sup>138</sup> Case 001 Appeal Judgment, para. 95: "[o]nce a Chamber has determined that a charged offence or mode of liability existed as a matter of national or international law at the time of the alleged criminal conduct, the international principle of legality does not prohibit it from interpreting and clarifying the law or from relying on those decisions that do so in other cases" See also para. 100: "the exercise of jurisdiction by the ECCC is limited by the definition of crimes [...] as it stood under [...] law at the time of the alleged criminal conduct".



(ii) [was] performed deliberately with the intent to inflict serious bodily or mental harm or commit a serious attack upon the human dignity of the victim at the time of the act or omission.<sup>139</sup>

Acts or omissions must be of a nature and gravity similar to other enumerated crimes against humanity.<sup>140</sup>

16. AO An submits that, in order for underlying conduct to be of a similar nature and gravity to the enumerated crimes against humanity, it *must* be criminal because “[c]riminality is a fundamental part of the nature or character of each enumerated crime [against humanity].”<sup>141</sup> The Undersigned Judges consider that severity of particular conduct is assessed on a case-by-case basis with due regard to the individual circumstances of each case. These may include “the nature of the act or omission, the context in which it occurred, the personal circumstances of the victim, including age, sex and health, as well as physical, mental and moral effects of the act upon the victim.”<sup>142</sup> While criminality of particular acts may provide a general indication of their gravity, it is not a *determinative* indicator, or the sole factor taken into account.

17. Furthermore, as the ECCC’s Supreme Court Chamber has recalled, antecedents to crimes against humanity, dating back to 1868-1907, made reference to “violations of the [...] ‘laws of humanity’,” and to “violation[s] of [...] *elementary laws of humanity*.”<sup>143</sup> The Supreme Court Chamber stated that “the juxtaposition of ‘laws and customs of war’ and ‘laws of humanity’ clearly presupposed that the crimes so envisaged would result from offending against *two different legal regimes*.”<sup>144</sup> In the *plain-text reading* of the Undersigned Judges, the phrase ‘other inhumane acts’ found in Article 6(c) of the

<sup>139</sup> See Case 001 Trial Judgement, para. 371; Judgment on Case 002/PTC75, paras 395-396; Case 002/01 Trial Judgment, para. 437 referring to *Prosecutor v. Dragomir Milošević*, IT-98-29/1-A, Judgement, Appeals Chamber, 12 November 2009, para. 108.

<sup>140</sup> Case 001 Trial Judgement, para. 367; Case 002/01 Trial Judgment, para. 438 referring to Judgment on Case 002/PTC75, paras 395-396 and to *Prosecutor v. Krajišnik*, IT-00-39-A, Judgement, Appeals Chamber, 17 March 2009, para. 331.

<sup>141</sup> Application, para. 32.

<sup>142</sup> Case 001 Trial Judgment, para. 369. See also Application, footnotes 75 and 76 referring to *Prosecutor v. Kupreškić et al.*, IT-95-16-T, Judgement, Trial Chamber, 14 January 2000, para. 566; *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T, Judgement, Trial Chamber, 21 May 1999, para. 151; and *Prosecutor v. Vasiljević*, IT-98-32-T, Judgment, Trial Chamber, 29 November 2002, para. 165.

<sup>143</sup> Case 001 Appeal Judgment, para. 102 (emphasis added).

<sup>144</sup> *Ibid.*, (emphasis added).



Nuremberg Charter does not include the word “criminal”, it rather contains the word “inhumane”. According to post-World War II jurisprudence also, when addressing the issue of crimes against humanity as violations of international law, the judges stated that “[t]he charge, in brief, is that of conscious participation in a nation-wide government-organized system of cruelty and injustice, in violation of the laws of war *and of humanity*.”<sup>145</sup>

18. Lastly, with regards to the arguments that: i) forced marriage is not distinguishable from arranged marriage; and that ii) even though violations of individual autonomy and of the right to self-determination may be detrimental, the resulting harm does not compare to that of enumerated crimes against humanity; the Undersigned Judges reiterate that such comparisons involve mixed questions of law and fact.<sup>146</sup> At this stage of proceedings when investigations are still ongoing, it is premature to undertake any comparisons because an assessment, whether the alleged acts are of a severe nature, can only be undertaken once any alleged circumstances, pointing at severity, are first proved to have existed.

## VI. CONCLUSION

19. In conclusion, the Undersigned Judges do not find merit in any of AO An’s arguments that investigations into the alleged acts of forced marriages are defective because the Supplementary Submission is an “unlawful attempt to expand the Court’s Jurisdiction.” The crime against humanity of ‘other inhumane acts’ alleged in the Supplementary Submission,<sup>147</sup> falls within ECCC’s jurisdiction. Having been seised with crimes within

<sup>145</sup> Judgment on Case 002/PTC75 para. 392 referring to *United States of America v Josef Altstötter et al.*, Case No. 3, NMT Vol. 3, p. 985. See also Judgment on Case 002/PTC75, paras 393-394: “In the *Medical Case*, the war crime of conducting ‘medical experiments’ *without consent* against non-German civilians and armed forces was also charged and found to constitute ‘other inhumane acts’ as crimes against humanity against German nationals. 394. In the *Ministries case*, defendants were charged and convicted under Count 5 for: ‘war crimes and crimes against humanity in that they participated in atrocities and offenses, including murder, extermination, enslavement, deportation, imprisonment, killing of hostages, torture, persecutions on political, racial, and religious grounds, and *other inhumane and criminal acts* against German nationals and members of the civilian populations of countries and territories under belligerent occupation of, or otherwise controlled by Germany [. . .].”

<sup>146</sup> Judgment on Case 002/PTC75, para. 397.


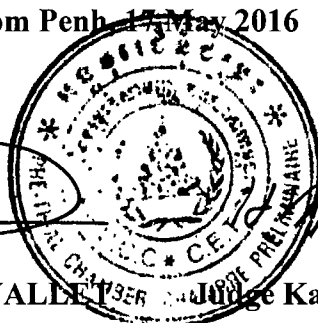

<sup>147</sup> Supplementary Submission, para. 13: “The Co-Prosecutors have reason to believe that the facts described above constitute crimes within the jurisdiction of the court”, including but not limited to the crimes against humanity of “Murder, Extermination, Enslavement, Imprisonment, Torture, Rape, Persecutions on Political and Racial grounds, *and Other Inhumane Acts*.”





ECCC's jurisdiction, the OCIJ is obliged by law to conduct investigations,<sup>148</sup> in order to "ascertain the truth".<sup>149</sup> The ongoing investigations into the acts alleged in the Supplementary Submissions do not violate AO An's right to legality, under Article 15 of the ICCPR, hence, no procedural defect that harms his interests exists to warrant nullity of such proceedings.

Phnom Penh, 17 May 2016

    
**Judge Olivier BEAUVALLET** **Judge Kang Jin BAIK**

<sup>148</sup> Internal Rule 55(1): "A judicial investigation is compulsory for crimes within the jurisdiction of the ECCC."

<sup>149</sup> Internal Rule 55(5).