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**EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA
BEFORE THE OFFICE OF THE CO-INVESTIGATING JUDGES**

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**SECOND REQUEST FOR INVESTIGATIVE ACTIONS CONCERNING FORCED
MARRIAGES AND FORCED SEXUAL RELATIONS**

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I. INTRODUCTION

1. The Office of the Co-Investigating Judges (OCIJ) has been seized with a Supplementary Submission to investigate five specific complaints into factual matters related to forced marriages and forced sexual relations.¹ However, no investigative action has yet been taken by the OCIJ nor does it appear that any will be taken in the future. Meanwhile, there are strong indications, based on the complaints, as well as other witness statements, that the Charged Persons may be responsible for crimes of rape, sexual enslavement, forced pregnancy, and forced marriage. Considering the gravity of these crimes, immediate investigation is therefore requested.
2. Pursuant to ECCC Internal Rule 55 (10) stating that “[a]t any time during an investigation, the Co-Prosecutors, a Charged Person or a Civil Party may request the Co-Investigating Judges [...] undertake such investigative action as they consider necessary for the conduct of the investigation.” The Co Lawyers for Civil Parties hereby submit a request for investigative action concerning the occurrence of forced marriages in the DK period and the determination of their legal classification.

II. RELEVANT FACTS

3. On 17 March 2009, the OCIJ forwarded the case file of the judicial investigation to the Co-Prosecutors (OCP) “[f]or advice on the admissibility of [several] [...] civil party applications and, if necessary, any supplementary submission [...]” concerning several civil party applications that claimed that they were victims of forced marriage.² On 30 April 2009, the OCP filed their “response to the forwarding order of the Co-Investigating Judges and supplementary submission”³ to request and authorize the OCIJ to investigate specifically mentioned facts related to allegations of forced marriages and forced sexual relations⁴ and to authorize the CIJ to investigate “any other facts provided that those facts assist in determining either (a) the jurisdictional elements necessary to establish whether the factual matters referenced in paragraph 2 [see footnote 4] constitute crimes within the jurisdiction of

¹ Forwarding Order, Doc. No. D146

² *Id.*

³ Doc.-No. D146/3, (hereinafter Supplementary Submission)

[Redacted]

the ECCC or (b) the mode of liability of NUON Chea, IENG Sary, KHIEU Samphan or IENG Thirith with respect to such matters.”⁵

4. Moreover, the OCP submitted that there were insufficient details on forced marriages or forced sexual relations in the Civil Parties’ applications of [Redacted] [Redacted] and thus they should be admitted as Civil Parties on the basis of other alleged injuries. However, such a conclusion is premature as there has not been any investigative action regarding the specific crimes of forced marriages and/or forced sexual relations.

III. ARGUMENT

A. FORCED MARRIAGE UNDER INTERNATIONAL LAW

5. Forced 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 force, or coercion, to serve as a conjugal partner which results in severe suffering, or physical, mental, or psychological injury to the victim.⁹ The perpetrator also coerces the victim to engage in conduct similar to that arising out of a marriage relationship, including prolonged association, acts of sexual nature, child bearing and the rendering of other conjugal duties, hindering the victims from separation.¹⁰ It is mainly a form of violence against women, as it deprives women (and girls) of their equal enjoyment, exercise, and knowledge of their human rights and fundamental freedoms, while keeping them in subordinate roles.¹¹
6. In its most extreme form, forced marriage can involve threatening behaviour, abduction, imprisonment, physical violence, rape, and in some cases, murder.¹² Forced marriages are certainly as grave as the enumerated crimes against humanity (and is indeed included in some

⁵ *Id.* ¶ 6.

⁶ *Id.* ¶ 3.

⁷ *Id.* ¶ 4.

⁸ *Id.* ¶ 5.

⁹ *Prosecutor v. Brima, Kamara, and Kanu*, Judgment, SCSL-04-16-A, Appeals Chamber, 22 February 2008 (hereinafter AFRC Appeals Judgment) ¶ 196.

¹⁰ Neha Jain, “Forced Marriage as a Crime against Humanity: Problems of Definition and Prosecution,” *Journal of International Criminal Justice* 6 (2008), p. 1018, It is understood that remaining in the forced marriage or its transformation into a consensual situation does not affect the original criminal act.

¹¹ *See* General Recommendation made by the Committee on the Elimination of Discrimination against Women No. 19 (11th session, 1992), comment to art 2(f), 5 and 10 (c) ¶ 11.

¹² Report of the Secretary General, In-Depth Study on All Forms of Violence Against Women, A/61/122/Add.1. 2006, 122.

of them) such as enslavement, rape and torture.¹³ Moreover, forced marriage is an unlawful intervention into the integrity of a person which causes serious mental and physical suffering and constitutes a grave attack on human dignity.¹⁴

7. International tribunals have recognized forced marriage to be a crime against humanity.¹⁵ Moreover, it also can be included in 'other inhumane acts' as a residual provision, aimed at avoiding an undue restriction of conduct that can be labeled crimes against humanity so long as it is of comparable gravity to the listed crimes against humanity.¹⁶ Forced marriages, aside from involving nonconsensual sex and deprivation of liberty, may also involve: (a) forced conjugal association resulting in great physical and mental suffering; and (b) relationship of exclusivity between the 'couple', with potential disciplinary repercussions for breach of the arrangement.¹⁷
8. Moreover, forced marriages are prohibited by many relevant human rights instruments.¹⁸ According to these various treaties, the single act of forcing someone into a marriage relationship is a serious violation of her (or his) fundamental rights. In addition, forced marriage committed in the context of an armed conflict and on a massive scale, has already been taken into consideration and repeatedly condemned by various human rights bodies.¹⁹

1. IMPOSITION OF FORCED MARRIAGE DURING THE KHMER ROUGE PERIOD

¹³ AFRC Appeals Judgment, ¶ 200-201.

¹⁴ *Prosecutor v. Kayishema and Ruzindana*, Judgment, ICTR-95-1-T, Trial Chamber, 21 May 1999, ¶ 149-151; *Prosecutor v. Bagilishema*, Judgment, ICTR 95-1A-T, Trial Chamber, 7 June 2001, ¶ 91-92.

¹⁵ AFRC Appeals Judgment, ¶ 175-202. Monika Satya Kalra, "Forced Marriage: Rwanda's Secret Revealed", 7 U.C. Davis Journal of International Law and Policy 197,(2001), stating that there is discussion in including forced marriage in the context of Rwanda. See also *Prosecutor v. Sesay, Kallon, Gbao*, Judgment, SCSL-04-15-T, Trial Chamber I, 2 March 2009 ¶ 164 (recognizing forced marriage in Rwanda as a crime against humanity)(hereinafter Sesay Trial Judgment).

¹⁶ AFRC Appeals Judgment, ¶ 183; Sesay Trial Judgment, ¶ 164.

¹⁷ *Id.*, ¶ 195.

¹⁸ See Universal Declaration on Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., at 72, U.N. Doc. A/810 (10 Dec. 1948), Art. 16, and the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16), U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976, Art. 23(3) providing 'No marriage shall be entered into without the free and full consent of the intending spouses'. The most comprehensive rule forbidding forced marriage is contained in Art. 16 of the Convention on the Elimination of All Forms of Discrimination against Women, 1249 U.N.T.S. 20378, (entered into force 3 Sept. 1981).

¹⁹ See, for instance, Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights Resolution 2000/45, UN Doc. E/CN.4/2001/73, 23 January 2001; Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights Resolution and 2001/49, UN Doc. E/CN.4/2002/83, 31 January 2002.

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9. Since at least early 1977 the weddings and subsequent prescription of sexual intercourse were ordered and organized by the senior leaders all over the country.²⁰ Even in the absence of a written order by the Standing Committee, the widespread practice of forced marriage suggests that there was such an order. Forced marriages were clearly carried out as a matter of state policy. They were used statewide as a measure to weaken and attack Cambodian families, to produce more children to join “Angkar’s” revolution, and to control sexuality and reproductive power. There were approximately 400.000 men and women married under the Khmer Rouge regime under the above-mentioned circumstances.²¹ Hence, the crimes were committed as part of a widespread and systematic attack directed against the civilian population.
10. The issue that may arise in this case is the distinction between traditional arranged marriages in the modern Cambodian context and forced marriages as a crime against humanity under the Khmer Rouge. The Co-Lawyers for Civil Parties submit that in contrast to forced marriages, arranged marriages do not amount to the level of a crime against humanity because they are not an ‘attack’ against the civilian population.²²

2. LACK OF CONSENT IN FORCE MARRIAGE RENDERS IT TO REMAIN A CRIME REGARDLESS ITS FATE

11. The Co-Lawyers for Civil Parties consider the widespread and systematic KR practice of forced marriages to constitute grave criminal activity. Far removed from the complex human (individual, social and religious) dimensions of traditional arranged marriage, its rationale and purpose was the full control of human bodies and minds to the most intimate degree. Also contrary to tradition, it was not aimed at creating families since ‘Angkar’ was supposed to be everybody’s father-and-mother and had a policy of separating children from their parents, as well as turning children against their parents. Indeed, Angkar was intent on destroying the family as main pillar of Khmer society. Forced marriage reduced people to mere reproductive bodies, whether it was reproduction for a ‘pure’ Khmer race or for an

²⁰ Civil Parties’ Co-Lawyers’ Request for Supplementary Preliminary Investigations, Redacted Version , Doc. No. E11, ¶ 40.

²¹ *Id.*, ¶ 41.

²² Michael P. Scharf and Suzanne Mattler, “Forced Marriage: Exploring the Viability of the Special Court for Sierra Leone’s New Crime Against Humanity”, Case Research Paper Series in Legal Studies (2005), <http://ssrn.com/abstract=824291>, last visit on 5 February 2009, p.12.

enslaved labor force. Forced marriage correlated with (if it was not a "remedy" to) the genocidal killing or starving of countless children. It was quite evidently on a continuum with the overall KR policy of total human 'reengineering'. Clearly, the coercive policy of arbitrarily forming couples and dictating their sexual behavior, against their individual inclinations, was a severe violation of the most fundamental human rights and human integrity, causing considerable suffering to both the females and males concerned.

12. The relatively unprecedented nature of this crime in human history and in international law and jurisprudence does not diminish the gravity of what happened. Rather, it demands due attention by ECCC, both in order for justice to be done, and to expand legal coverage to a criminal component that is part and parcel of a policy of crimes against humanity, aimed at total human reengineering of a population.
13. The fact that some of the couples coercively formed have stayed together into the present does not diminish the criminal nature of the sexual and reproductive violence inflicted at the time, and it should not be used as a convenient excuse to evade the real issue. We find regrettable the insensitivity still surrounding this matter at the Court, and hope this does not imply a lack of will or capability to investigate with appropriate seriousness and skill, the full extent of suffering under the KR. It is thus unambiguously reiterated that a crime has been committed at the moment the forced marriage/intercourse occurred, regardless of whether couples remained together thereafter. The widespread and systematic nature of the practice makes it an integral part of the KR policy and must be deemed a criminal violation of victims' fundamental human rights, to be duly investigated and prosecuted.
14. Another reason that forced marriage remains a crime regardless of the fate of the marriage is in the existence of its most important element, which is the lack of 'free and valid consent of at least one of the parties'.²³ Consent must be free, fair, and beneficial in order to be ethically valid. When consent is obtained under circumstances of coercion or force, then that apparent consent is negated. The circumstances in the DK under which marriages as group weddings were organized were generally coercive, as the consequences for not abiding by the orders were severe punishment, re-education and death. Therefore, it is impossible to have

²³ Report of the Secretary General, In-Depth Study on All Forms of Violence Against Women, A/61/122/Add.1. 2006, ¶ 122.

voluntary and genuine consent to the marriage, the associated marital status, prescribed sexual intercourse, and conjugal relationship.²⁴

3. CUMULATIVE CHARGES

15. Forced marriage, as described by both the victims and numerous experts asked to give their opinion on this practice, is a multi-layered crime. It may involve rape, sexual slavery, forced pregnancy, and forced domestic labor, that taken individually may all amount to crimes against humanity.²⁵ These separate crimes contain a materially distinct element that does not exist in the other.²⁶ Therefore, seeing this unique character and nature of forced marriage, we submit that possibilities of cumulative charges shall be open for this particular crime. This is supported by the ruling of the Pre-Trial Chamber ("PTC") on 5 December 2008 which stated that it is possible to charge different legal offences in relation to the same facts.²⁷ On the basis of national (in particular French law) and international law and jurisprudence, the Co-Lawyers for the Civil Parties reaffirm, that it is acceptable to convict the accused person of several offences in relation to the same set of facts, where the offences have different elements or where the offences protect different interests.²⁸

²⁴ See *Gacumbitsi v. Prosecutor*, Judgment, ICTR-2001-64-A, Appeals Chamber, ¶ 155 (stating non-consent can be shown by proving the existence of coercive circumstances). See also Wolfgang Schomburg and Ines Peterson, "Genuine Consent to Sexual Violence under International Criminal Law", 101 Am. J. of Intl. Law (2007) 121 at 126, 130.

²⁵ Micaela Frulli, "Advancing International Criminal Law The Special Court for Sierra Leone Recognizes Forced Marriage as a 'New' Crime against Humanity," Journal of International Criminal Justice 6 (2008), p. 1036

²⁶ *Id.*

²⁷ *Case of Kaing Guek Eav*, 001/18-07-2007/ECCC/OCIJ, Decision on Appeal against Closing Order Indicting Kaing Guek Eav Alias "Duch", 8 December 2008, D99/3/42, ¶ 86 ff. The PTC stated that "neither the Internal Rules nor Cambodian law contains provisions related to the possibility to set out different legal offences for the same acts in an indictment. As prescribed in Article 12 of the Agreement, the Pre-Trial Chamber will therefore seek guidance in procedural rules established at the international level. The jurisprudence of the ad hoc international tribunals holds that it is permissible in international criminal proceedings to include in indictment different legal offences in relation to the same acts. Both the ICTY and ICTR have considerable jurisprudence supporting the use of cumulative charging. The Special Court for Sierra Leone (SCSL) has also upheld this practice. The Pre-Trial further notes that including more than one legal offence in relation to the same acts in an indictment does not inherently threaten the *ne bis in idem* principle because it does not involve the actual assignment of liability or punishment."

²⁸ See *Prosecutor v. Akayesu*, Judgment, ICTR-96-4-T, Trial Chamber, 2 September 1998, ¶ 468; *Prosecutor v. Kayishema and Ruzindana*, Judgment, ICTR-95-1-T, Trial Chamber, 21 May 1999, ¶ 627; the ICTR adopted the French-influenced approach. The French principle, called "*concoure d'Infractions*", has two applications where the court cannot find the accused responsible for more than one crime: "firstly, when the same set of facts gives rise to the application of multiple criminal provisions; and secondly (*concoure ideal d'infraction*), when the facts could be subject to multiple provisions which differ in nature, but are predicated on the same material element"; see Attila Bogdan, "Cumulative Charges, Convictions and Sentencing at the Ad Hoc International Tribunals for the former Yugoslavia and Rwanda", Melbourne Journal of International Law, 2002, <http://www.austlii.edu.au/au/journals/MelbJIL/2002/1.html>; visited on 27 January 2009, p.6 and 7.

B. FORCED MARRIAGES AS CRIMES AGAINST HUMANITY

1. EXISTENCE OF WIDESPREAD OR SYSTEMATIC ATTACK DIRECTED AGAINST ANY CIVILIAN POPULATION

16. Forced marriages during the DK period were organized since early 1977 and were systematic and widespread. The entire population that was not yet married and over a certain age was a target of the attack.²⁹ Among the target group were often cadres and soldiers at the beginning of the DK period in 1975. Although their status might not be civilian-protected by the Geneva Conventions, they are still protected from vicious and inhumane actions undertaken on a large scale by governments against their human dignity.³⁰
17. The acts of forced marriages were carried out as a matter of state policy.³¹ They were used as methods to weaken the traditional family structure and to guarantee the loyalty of the people to the regime. By forcing people into random marriages the Khmer Rouge intended to obtain control over people's sexuality and to ensure that the reproductive function was managed by the state to produce more workers for the revolution.³² The Khmer Rouge enforced strict limits on how often husbands and wives could meet and their relationship was under permanent observation by "the Party".³³ The couples were forced to conduct sexual relations on behalf of the Party's order and were compelled to procreate. More than a severe violation of the victims' sexual integrity, forced marriages in Cambodia appear as an almost complete deprivation of the people's autonomy and right to self-determination.

2. THE ELEMENT OF DISCRIMINATORY INTENT

18. The Law on the Establishment of the Extraordinary Chambers (ECCC Law)³⁴ characterizes the requirement for crimes against humanity as an attack against any civilian population based on 'national, political, ethnical, racial or religious grounds'. This discriminatory intent requirement, which clearly limits the subject matter jurisdiction of the Court, is not

²⁹ See Laura McGrew, *Cambodian Women at Year Zero* (1999), available at <http://advocacynet.org/resource/530>; Michael Vickery, *Cambodia 1975-1982, Thailand* (1984) at p. 189.

³⁰ Antonio Cassese, *International Criminal Law*, Oxford (2008), p. 122.

³¹ Neha Jain, *supra fn 10*, p. 1024.

³² *Id.*

³³ *Id.*

³⁴ 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, as amended, and promulgated on 27 October 2004 with inclusion of amendments as promulgated on 27 October 2004.

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incorporated in the Agreement³⁵ between the United Nations and Cambodia, which refers to the 1998 Rome Statute of the International Criminal Court (ICC) and does not require discriminatory grounds for any attack in general, as it only applies to persecution-type crimes.³⁶ In addition, the discriminatory intent for crimes against humanity does not appear to be supported by applicable international instruments.³⁷

19. In the case of inconsistency between the Agreement and the ECCC, international law, specifically Vienna Convention on the Law of Treaties (VCLT) rules that the Agreement would prevail, as the ECCC law is drafted to implement the Agreement.³⁸ As such, the content should not deviate from the object and purpose of the Agreement. This is strengthened by the notion that State must not act inconsistently with the object and purpose of a treaty they are a party to.³⁹ The principle of *lex prior*, which prioritizes the first agreement as the prevailing law by making an analogy to a general principle of domestic contract law, (“illegality of a contract to break a contract”), also supports the applicability of

³⁵ 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 dated June 2003; entered into force on April 29, 2005, (“Agreement”).

³⁶ See Darryl Robinson, “Defining Crimes Against Humanity at the Rome Conference,” Am. J. Intl. L. (1999) at n. 17, When the 1954 ILC draft Code of Crimes suggested that discriminatory motive was required for all crimes against humanity, it was strongly criticized for misconstruing the Nuremberg Charter in D. H. N. Johnson, *Draft Code of Offenses against the Peace and Security of Mankind*, 4 INT’L & COMP. L.Q. 445 (1955). Johnson’s article was widely received as expressing the correct interpretation, and the subsequent ILC draft codes have reflected Johnson’s approach; See also Martin, Schnably, Wilson, Simon and Tushnet, *International Humanitarian Rights & Humanitarian Law, Treaties, Cases and Analysis* (Cambridge University Press, 2006) p.486.

³⁷ See *Prosecutor v. Tadic*, Opinion and Judgment, No. IT-94-1-T, 7 May 1997, ¶ 652, (referring to the Nuremberg and Tokyo Charters, the Allied Control Council Law No. 10, the Genocide Convention, the Apartheid Convention and the ILC draft Code of Crimes.)

³⁸ Agreement, art. 2(2). See U.N. Daily News, Issue DH/4283,3, Dec. 2004, <http://www.un.org/news/dh/pdf/english/03122004.pdf>, visited on 21 Jan. 2009, indicating the Agreement has direct effect in Cambodia and the given provisions are directly applicable, See also Cesare P.R. Romano/André Nollkaemper/Jann K. Kleffner, *Internationalized Criminal Courts – Sierra Leone, East Timor, Kosovo, and Cambodia*, Oxford (2004), p. 210; *supra* note 25; Susanne Dyrchs, *Das hybride Khmer Rouge-Tribunal – Entstehung, Entwicklung und rechtliche Grundlagen*, Frankfurt am Main (2008), p. 120 ff.

³⁹ See VCLT, art. 18; *Acquisition of Polish Nationality*, P.C.I.J. (1923), Series B, No. 7, pp. 16 and 17, and *Exchange of Greek and Turkish Populations*, P.C.I.J. (1925), Series B, No. 10, p. 25; *Advisory Opinion Concerning Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, I.C.J. (1951)(compatibility with the object and purpose of the treaty constitutes the touchstone of its admissibility); See the Draft Articles on the Law of Treaties with commentaries, 1966, Text adopted by the International Law Commission at its eighteenth session, in 1966, *Yearbook of the International Law Commission, 1966*, vol. II; *Interpretation of Peace Treaties Advisory Opinion*, I.C.J. Reports 1950, p. 229 stating: “The principle of interpretation expressed in the maxim: *ut res magis valeat quam pereat*, often referred to as the rule of effectiveness, cannot justify the Court in attributing to the provisions for the settlement of disputes in the Peace Treaties a meaning which...would be contrary to their letter and spirit.”; *Corfu Channel Case*, I.C.J. Reports 1949, p. 24.

the Agreement over ECCC Law.⁴⁰ In the 1988 *Belilos* case, for example, the European Court of Human Rights found that a declaration made by Switzerland in its instrument of ratification was incompatible with the object and purpose of the Convention, and held that Switzerland was bound by the Convention “irrespective of the validity of the declaration”.⁴¹

20. Furthermore it seems clear that the discrepancies between the ECCC Law and the Agreement are the result of an oversight.⁴² The discussion at the National Assembly pursuant to the drafting of ECCC Law also did not specifically refer to any specific definition of crimes against humanity.⁴³ Therefore, we hold the position that the Agreement, which requires no discriminatory intent to establish crimes against humanity, should be followed. Hence, national, political, ethnic, racial or religious grounds shall not be a necessary element as it was absent in the Agreement. As such, the attack against the civilian population by organizing mass weddings does not need a discriminatory ground to be a crime against humanity.

3. FORCED MARRIAGE AS CRIMES AGAINST HUMANITY OF ‘OTHER INHUMANE ACTS’

21. The ICC Statute describes ‘other inhumane acts of a similar character intentionally causing great suffering, or serious injury to the body or to mental or physical health.’⁴⁴ As forced marriage involves specific elements of psychological and moral suffering,⁴⁵ this crime fits the definition of other inhumane acts perfectly. Moreover, pursuant to a request for

⁴⁰ “Fragmentation of International Law: Difficulties Arising from The Diversification and Expansion of International Law” Report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi on Fifty-eighth session Geneva, 1 May-9 June and 3 July-11 August 2006, A/CN.4/L.682, 13 April 2006 (quoting C. Wilfried Jenks, “The Conflict of Law-Making Treaties”, BYBIL vol. 30, (1953), p. 442); See other cases that implement this principle, namely, *Costa Rica v. Nicaragua*, AJIL vol. 11 (1917) No. 1, p. 228.; *Customs regime between Germany and Austria*, Advisory opinion, *P.C.I.J. Series A/B*, No. 41 (1931), p. 42.; *Oscar Chinn case*, *P.C.I.J. Series A/B*, No. 63 (1934) (separate opinion of Judge Eysinga) p. 131 and (separate opinion of Judge Schücking) p. 148.

⁴¹ *Belilos v. Switzerland*, Judgment of 29 April 1988, ECHR Series A (1988) No. 132, p. 28, ¶ 60.

⁴² The original draft of the Law, based on negotiations before the adoption of the Rome Statute, to which Cambodia is a party, includes the definition of Crimes Against Humanity found in the Statute of the International Criminal Court for Rwanda. The purpose of the Agreement was to amend the existing ECCC Law dated from 2001, but the changes dictated by the Agreement have not been amended; see Craig Etcheson, A “Fair and Public Trial”: A Political History of the Extraordinary Chambers, Justice Initiative (2006), http://www.justiceinitiative.org/db/resource2?res_id=103182, visited on 21 January 2009.

⁴³ Minute on the Session of National Assembly of Kingdom of Cambodia, a Draft Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea.

⁴⁴ Rome Statute of the International Criminal Court, 2187, U.N.T.S 90, entered into force 1 July 2002 (“Rome Statute”), Art. 7 (1) (k).

⁴⁵ *Kayishema* Trial Judgment, ¶ 149-151; *Bagilishema* Trial Judgment, ¶ 91-92.

amendment of the indictment by the Prosecution, acts of forced marriage were included as a new Count 8 of 'other inhumane acts' in the Statute of the Special Court of Sierra Leone.⁴⁶

22. As the AFRC Appeals Chamber stated in its judgment, a tribunal must take care not to adopt too restrictive an interpretation of the prohibition against other inhumane acts.⁴⁷ The ICTY Trial Chamber has also recognized that the more specifically inhumane acts are defined, the more restrictive such crimes become, as "one would never be able to catch up with the imagination of future torturers who wish to satisfy their bestial instincts."⁴⁸ Therefore, we submit that the crimes of forced marriage can be listed under the form of "other inhumane acts"

C. FORCED MARRIAGE AS RAPE UNDER ARTICLE 5 ECCC LAW

23. Rape is defined as "a physical invasion of a sexual nature",⁴⁹ however slight, that occurs without the consent of the victim.⁵⁰ The sexual penetration is either accompanied by (i) force or threat of force to the victim or a third party; (ii) force *or* a variety of other specified circumstances which made the victim particularly vulnerable or negated her ability to make an informed refusal; or (iii) the sexual activity occurs without the consent of the victim.
24. In this present case, the existence of a specific order and expectation to have a sexual intercourse fulfills the requirement of rape, as the couples conducted sexual intercourse against their consent. After the wedding ceremony, husband and wife were usually *obliged* to spend one night or at most one week together before they were separated into work units. In some cases this was controlled by spys (*chhlob*) or assumed to be controlled by "Angkar".⁵¹

⁴⁶ Sesay Trial Judgment, ¶ 164.

⁴⁷ *Id.*, ¶ 185.

⁴⁸ *Blaskic*, Judgment Case IT-95-14-T, Trial Chamber, 3 March 2000, ¶ 237, citing with approval J. Pictet, *Commentary on the 1st Geneva Convention of 12 August 1949*, Geneva, 1952, p. 454. See also *Kayishema* Trial Judgment, ¶ 149.

⁴⁹ *Akayesu* Trial Judgment, ¶ 598

⁵⁰ *Prosecutor v Furundžija*, Judgment, IT-95-17/1-T, 10 Dec 1998, ¶ 177.

⁵¹ See Kalyanee Mam, *Democratic Kampuchea (1975-1979): Women as Tools for Social Change*, New Haven, (2000), p. 70.

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25. In all cases, it was not only expected by “Angkar” that the individuals would have sexual intercourse, sexual intercourse was also expressively ordered by superiors.⁵² Research shows that out of 88 men, 76 were explicitly ordered to have sexual intercourse with their new wedded wife.⁵³ This sexual intercourse against the will of the victims clearly falls under separate count falling under article 5 of the ECCC Law, as crimes against humanity of rape.

D. FORCED MARRIAGE AS ENSLAVEMENT UNDER ARTICLE 5 ECCC LAW

26. Enslavement as a crime against humanity requires that ‘the perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty’.⁵⁴

27. In this case, the couples were convened, married, and then assigned to spend night(s) together and to have conjugal visits later on. People were controlled and ordered how, where, and when, to conduct their conjugal life as a wedded couple with their new partner. This practice should be considered as enslavement as a crime against humanity.

E. FORCED MARRIAGE AS CRIME OF FORCED PREGNANCY

28. Forced pregnancy is defined as “the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law”.⁵⁵ It is distinct from rape since it involves reproductive freedom and sexual autonomy.⁵⁶ The crime of forced pregnancy is not included

⁵² At the wedding ceremony the couples had to promise to have a child within a year; see Phen Hang statement in Kamboly Dy, *A History of Democratic Kampuchea*, DC-Cam, Phnom Penh (2007), p. 34; Ian Harris, *Buddhism under Pol Pot*, DC-Cam, Phnom Penh (2007), p. 128.

⁵³ Peg LeVine, *Love and Dread in Cambodia, Weddings and Births under the Khmer Rouge*, (2009, in press) National University of Singapore Press (NUS Press, Singapore).

The author interviewed 192 persons, married in mass weddings under the Khmer Rouge. She stated that if sexual intercourse was prescript it was addressed to the males. Among interviewed males, more than 86 % received the order to have sexual intercourse.

⁵⁴ Elements of Crimes under the Rome Statute, Art. 7 (1) (c), ¶ 1. Factors indicating the existence of enslavement include: “the control of someone’s movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality (...); Final Submission of the Office of the Co-Prosecutors, Court Doc. No. D96, citing *Prosecutor v. Kunarac et al*, Judgment, Case IT-96-23-T & IT-96-23/1-T, 22 Feb. 2001 at ¶ 543.

⁵⁵ Elements of Crimes under the Rome Statute Article 7 (1) (g)-4.

⁵⁶ See Kristen Boon, “Rape and forced Pregnancy under the ICC Statute: Human Dignity, Autonomy and Consent”, *Colum. H. R. L. Rev.* (2001), pp. 625-675; p. 665.

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in the ECCC Law but appears in the Agreement by reference to the 1998 Rome Statute where forced pregnancy is included as a specific form of a crime against humanity.⁵⁷ As outlined above, the Agreement includes the crime 'forced pregnancy' as directly and explicitly applicable.

29. In light of the Khmer Rouge's intent to form a new society, one of the main purposes of the organized marriages and the repetition of forced acts of sexual intercourse was the intention of DK to have forced pregnancies. The main purpose of the weddings was indeed not to form family units, but to produce children who could serve the revolution.⁵⁸ "Angkar's" intent to force pregnancies in order to establish an "efficient workforce dedicated to working towards a level of maximum productivity"⁵⁹ is a serious abuse of Cambodian civilians.⁶⁰ It therefore meets all required elements of the underlying crime of forced pregnancy as a Crime against Humanity.

F. DUTY TO INVESTIGATE

30. It is acknowledged, that the OCIJ have discretion concerning the scope and conduct of judicial investigations. If there is a matter that the OCIJ has knowledge of, however, that could amount to a crime within the jurisdiction of the ECCC, they are under a duty to investigate into these matters. This duty, although not mentioned specifically for the OCIJ in the Internal Rules, is inherent to civil law systems of criminal law,⁶¹ such as the Cambodian criminal law system, whose procedural law the ECCC is to follow.⁶² Furthermore it correlates with the specific duty of the Co-Prosecutors, who must open a judicial investigation if they have reason to believe that crimes within the jurisdiction of the ECCC

⁵⁷ Art. 7 of the ICC stipulates that for the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: [...] (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; [...].

⁵⁸ See Khamboly Dy, *supra* note 52, p. 35.

⁵⁹ See *supra* note 51, p. 59.

⁶⁰ According to Boon the required "intent of carrying out other grave violations of international law" applies regardless of race, culture, or religion, and captures the frequent situations in which members of the military abuse their own civilians (*See supra* note 56).

⁶¹ Brianne N. McGonigle, *Bridging the Divides in International Criminal Proceedings: An Examination into the Victim Participation Endeavor of the International Criminal Court*, 21 *FJIL* 93, 104-105 (2009).

⁶² See Art. 12 (1) of the Agreement and ¶ 5 of the Preamble of the Internal Rules.

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have been committed.⁶³ In this case, there are strong indications made by Civil Parties, Civil Party applicants, and other witnesses, that the crimes of rape, sexual enslavement, forced pregnancy, and forced marriage were likely committed by the Charged Persons. A Supplementary Submission was issued to investigate these indications. In the case of five complaints, the OCIJ have even been “**requested**” to investigate by the Co-Prosecutors. Yet no investigations in this regard have taken place.

III. INVESTIGATIVE ACTION REQUESTED

31. Considering the gravity of the crimes of forced marriage, which includes other crimes against humanity, the ECCC must not turn a blind eye upon this grave violation of human rights, conducted widespread and systematically. It is therefore hereby requested that the OCIJ

a. Conduct a full investigation on the existence of crimes of forced marriage, namely rape, enslavement, forced marriage and forced pregnancy;

b. Investigate, as requested by the Co-Prosecutors, into the allegations made [Redacted]

[Redacted] ⁶⁴

Identify and interview the Civil Party applicants [Redacted]

[Redacted] who were declared by the OCP as having an unclear background, and investigate their allegations of forced marriages, with the focus on how they became wedded, who ordered the marriage and if sexual intercourse was directly prescribed, the surveillance of the first night, the further conjugal relationship, and the mental effects of having sexual intercourse and living a life not of your choosing.

c. Identify and interview the following witnesses:

[Redacted]

⁶³ Rule 53 IR: “If the Co-Prosecutors have reason to believe, that crimes within the jurisdiction of the ECCC have been committed, they **shall** open a judicial investigation [...]” (emphasis added).

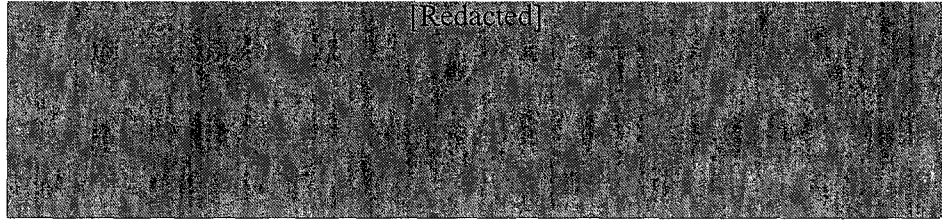
⁶⁴ See *supra* note 3.

⁶⁵ (Indicated that by the end of 1975 groups of around 20 people were married and the chief of the group read a paper aloud in which Angkar ordered weddings in order to have an increasing number of revolutionary children. Women were encouraged to marry handicapped revolutionary men.)

[Redacted]

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Respectfully submitted,

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Hong Kimsuon
Co-Lawyer

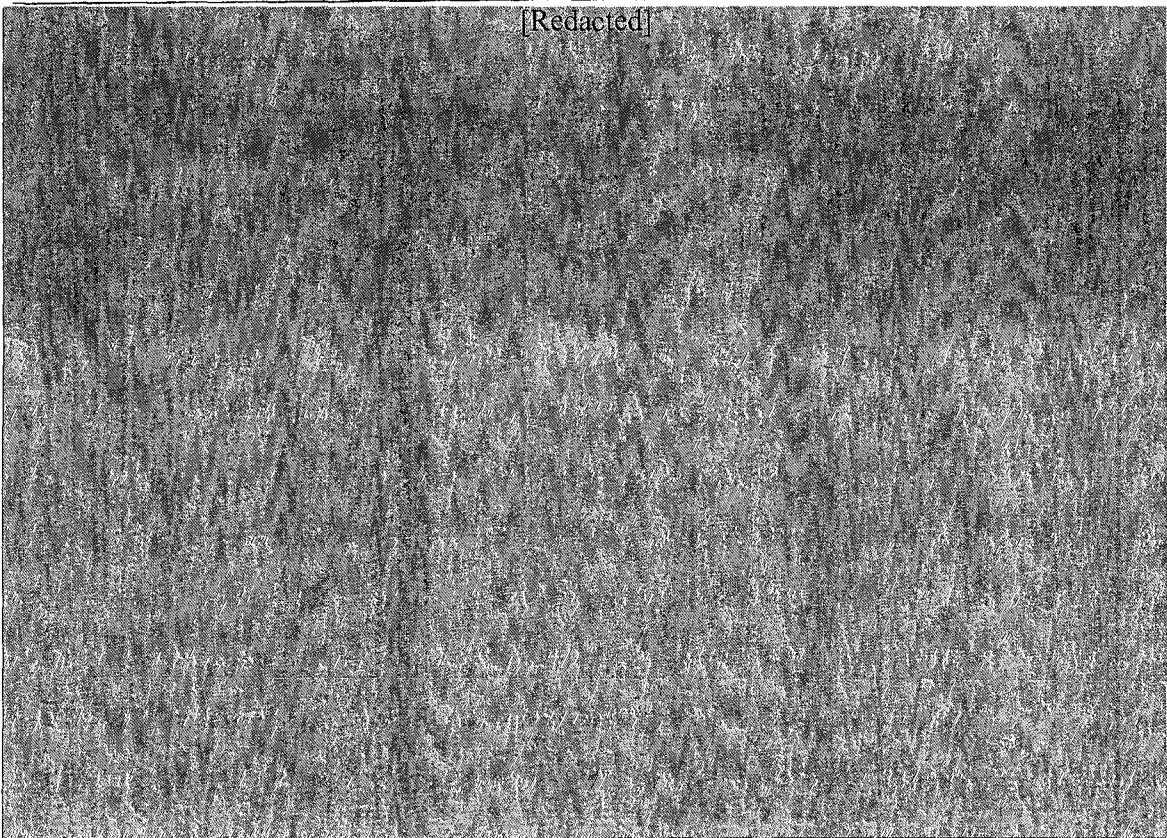
A handwritten signature in black ink, featuring a prominent 'A' shape and several sharp, angular strokes.

Kong Pisey
Co-Lawyer


Yung Panith
Co-Lawyer

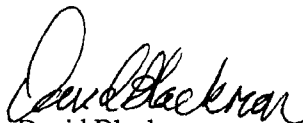
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Lor Chunty
Co-Lawyer

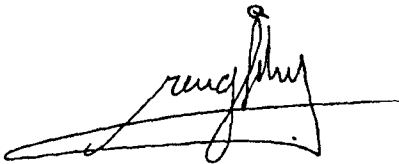


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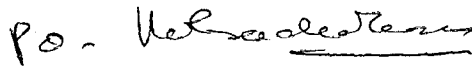
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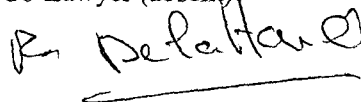
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Annie Delahie
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Mahdev Mohan
Co-Lawyer (absent)



Signed in Phnom Penh on 16 July 2009.