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Nation Religion King

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Nation Religion Roi

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ការិយាល័យសហចៅក្រមស៊ើបអង្កេត
Office of the Co-Investigating Judges
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Case File No: 004/07-09-2009-ECCC-OCIJ

Before:	**The Co-Investigating Judges**
Date:	**13 June 2016**
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CONSOLIDATED DECISION ON THE REQUESTS FOR INVESTIGATIVE ACTION CONCERNING THE CRIME OF FORCED PREGNANCY AND FORCED IMPREGNATION

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I. PROCEDURAL HISTORY

1. Disagreements between the Co-Investigating Judges ("CIJs") in this case were registered on 22 February 2013, 5 April 2013, 22 January 2015, and 21 October 2015.
2. On 20 November 2008, the Co-Prosecutors filed the Third Introductory Submission, requesting the CIJs to open a judicial investigation into the facts alleged therein ("Third Introductory Submission").[1]
3. On 18 July 2011, the International Co-Prosecutor ("ICP") filed a supplementary submission regarding Sector 1 crime sites and persecution of Khmer Krom.[2]
4. On 24 April 2014, the ICP filed a supplementary submission regarding forced marriage and sexual or gender-based violence in Case 004 ("Supplementary Submission").[3]
5. On 27 March 2015, my predecessor charged Ao An with violations of the 1956 Cambodian Penal Code and the crimes against humanity of murder, extermination, persecution, and imprisonment and other inhumane acts.[4]
6. On 5 August 2015, the ICP filed a supplementary submission regarding allegations of crimes committed at Wat Ta Meak.[5]
7. On 9 December 2015, I charged Yim Tith with the crimes of genocide, grave breaches of the Geneva Conventions of 1949, violations of the 1956 Cambodian Penal Code, and the crimes against humanity of murder, extermination, enslavement, imprisonment, torture, persecution, and other inhumane acts.[6]
8. On 4 March 2016, the Civil Party Lawyers ("CPL") filed a request for investigative action against Ao An and Yim Tith requesting that the CIJs conduct investigative actions into forced pregnancy as a crime against humanity of an "other inhumane act" ("CPL Request").[7]
9. On 14 March 2016, I charged Ao An with the further crimes of genocide, and crimes against humanity and violations of the 1956 Cambodian Penal Code committed at additional sites[8]
10. On 17 March 2016, the Yim Tith Defence filed a response opposing the CPL Request ("Defence Response").[9]
11. On 1 April 2016, the ICP filed a response supporting the CPL Request and arguing that, instead of forced *pregnancy*, the CIJs should conduct investigative

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[1] Case File No. 004-D1, *Co-Prosecutors' Third Introductory Submission,* 20 November 2008.
[2] Case File No. 004-D65, *Co-Prosecutors' Supplementary Submission Regarding Sector 1 Crime Sites and Persecution of Khmer Krom*, 18 July 2011.
[3] Case File No. 004-D191, *Co-Prosecutors' Supplementary Submission Regarding Forced Marriage and Sexual or Gender-based Violence,* 24 April 2014.
[4] Case File No. 004-D242, *Written Record of Initial Appearance,* 27 March 2015.
[5] Case File No. 004-D254/1, *Response to Forwarding Order and Supplementary Submission regarding Wat Ta Meak*, 4 August 2015.
[6] Case File No. 004-D281, *Written Record of Initial Appearance,* 9 December 2015.
[7] Case File No. 004-D301, *Civil Party Lawyers' Request for Investigative Action against Ao An and Yim Tith concerning the crime of Forced Pregnancy*, 4 March 2016.
[8] Case File No. 004-D303, *Written Record of Initial Appearance of Ao An*, 14 March 2016.
[9] Case File No. 004-D301/1, *Yim Tith's Response to the Civil party Lawyers' Request for Investigative Action against Ao An and Yim Tith concerning the crime of Forced Pregnancy,* 17 March 2016.

actions into forced *impregnation* as a crime against humanity of an "other inhumane act" ("ICP Request").[10]

12. On 22 April 2016, the CPL filed a reply to the Yim Tith Defence's response ("CPL Reply").[11]

II. SUBMISSIONS

A. The CPL Request

13. The CPL request that the Office of the Co-Investigating Judges ("OCIJ") conduct investigative actions regarding Ao An and Yim Tith's intent to carry out grave violations of international law through the confinement of women made forcibly pregnant.[12] Should evidence of such intent be found, the CPL request that Yim Tith and Ao An be charged with forced pregnancy as a crime against humanity of an "other inhumane act" pursuant to Article 5 of the Law on the Establishment of the ECCC ("ECCC Law").[13]

i. Legality

14. The CPL submit that investigating and prosecuting forced pregnancy as a crime against humanity of an other inhumane act in the ECCC does not violate the principle of legality, given the consistent pronouncements from the Pre-Trial Chamber and Trial Chamber that "other inhumane acts" are crimes of themselves and formed part of customary international law prior to 1975.[14]

ii. Elements of "other inhumane acts" as set out by the Trial Chamber

15. The CPL submit that conduct amounting to forced pregnancy meets the elements of "other inhumane acts" set out by the Trial Chamber, namely that: (i) the acts or omissions caused serious bodily or mental harm or constituted a serious attack on human dignity; (ii) the acts or omissions were 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; and (iii) the acts or omissions were of a nature and gravity similar to other enumerated crimes against humanity, with the severity to be assessed on a case-by-case basis with due regard for the individual circumstances of the case.[15]

16. In establishing the first element, the CPL cite evidence of pregnancy-related pain and suffering that went beyond the consequences of an ordinary pregnancy and

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[10] Case File No. 004-D301/2, *International Co-Prosecutor's Response to Civil Party Lawyers' Request for Investigative Action concerning the crime of Forced Pregnancy,* 1 April 2016.
[11] Case File No. 004-D301/1/1, *Civil Party Lawyers' Reply to Yim Tith's Defence Response on Civil Party Lawyers' Request for Investigative Action Concerning the Crime of Forced Pregnancy*, 22 April 2016.
[12] CPL Request, paras 1, 3, 64, 65.
[13] CPL Request, para. 65.
[14] CPL Request, paras 19-22.
[15] CPL Request, para. 25, citing Case File No. 002-E313, *Judgement*, 7 August 2014, paras 437-438.

that resulted from circumstances specific to the regime of Democratic Kampuchea ("DK Regime").[16]

17. In establishing the second element, the CPL refer to and rely upon the ICP's allegations in the Supplementary Submission as to Yim Tith and Ao An's role in committing, planning, instigating, ordering or aiding and abetting the practice of forced marriage.[17]

18. In submitting that the conduct was of a similar nature and gravity to the other enumerated crimes, the CPL refer to the ICTY Trial Chamber's reliance in *Kupreškić* on international human rights standards for the purposes of identifying prohibited inhumane acts.[18] Adopting that approach, the CPL identify the following standards which they submit demonstrate that forced pregnancy is conduct comparable in gravity to the other crimes against humanity enumerated in Article 5 of the ECCC Law:

    a. Article 16 of Resolution XVII of the Teheran International Conference on Human Rights of 1968, which provided that parents have a basic human right to determine freely and responsibly the number and spacing of their children;

    b. Article 7 (1)(g) and (2)(f) of the Rome Statute of the International Criminal Court of 1998 ("Rome Statute") which defined and criminalised forced pregnancy; and

    c. the Statutes of the Special Court for Sierra Leone ("SCSL") and the Special Panels for Serious Crimes in East Timor of 2000 which included provisions criminalising forced pregnancy.[19]

iii. Chapeau elements of crimes against humanity

19. The CPL cite the ICP's allegations in the Supplementary Submission that there is reason to believe that the chapeau elements of crimes against humanity are met by the practice of forced marriage, and argue that the practice of forced pregnancy will similarly meet those elements.[20]

iv. Forced pregnancy is distinguished from the other enumerated crimes

20. The CPL lastly submit that forced pregnancy warrants its own investigation and prosecution as it involves specific criteria that distinguishes it from the other enumerated acts in Article 5 of the ECCC Law.[21] The CPL rely on the definition of forced pregnancy in the Rome Statute, mirrored in the Regulations of the SCSL, stating that, "*The codification of the crime of forced pregnancy at these two tribunals confirms a common understanding of its definition in international law. The specific elements of crime contained therein thus are applicable at the*

[16] CPL Request, paras 29-41.
[17] CPL Request, para. 42.
[18] CPL Request, para. 47, citing *Prosecutor v. Kupreškić*, Judgement, ICTY Trial Chamber (IT-95-16-T), 14 January 2000, para. 566.
[19] CPL Request, para. 47.
[20] CPL Request, para. 49.
[21] CPL Request, para. 50.

ECCC."[22] The CPL submit that the conduct amounting to forced pregnancy during the DK Regime meets the Rome Statute definition.[23]

v. The CIJs are seised of facts relevant to forced pregnancy

21. The CPL contend that their request does not involve the investigation of "new facts", but rather falls within the scope of the allegations made in the Third Introductory and Supplementary Submissions regarding forced marriage.[24]

B. Defence Response

22. The Yim Tith Defence object to the CPL Request on the grounds that: (i) the CPL Request is untimely and that any investigations carried out pursuant to the request will infringe upon Yim Tith's right to be tried without undue delay;[25] (ii) the CPL Request is *ultra vires* in that it seeks to seise the CIJs of new factual allegations, which is beyond the Civil Parties' role, and is therefore inadmissible;[26] and (iii) the CPL Request fails to demonstrate how the investigation may yield exculpatory information and lacks *prima facie* reasons as to why the investigative actions are relevant to ascertaining the truth of the facts alleged in Case 004.[27]

23. The Yim Tith Defence further submit that the CPL Request seeks to investigate facts beyond the scope of the Third Introductory and Supplementary Submissions, neither of which allege the deliberate commission of forced pregnancy or the existence of a state policy to commit forced pregnancy.[28] The Defence submit therefore that any investigation of the facts asserted in the CPL Request will thus offend the principle of legal certainty as it involves an expansion of the crimes for which Yim Tith is being investigated.[29]

C. ICP Request

24. The ICP supports the CPL Request,[30] but submits that the Rome Statute definition of forced pregnancy should not be mechanically transported to the ECCC as it does not reflect the state of customary international law during 1975 to 1979.[31] This is because the drafting of the forced pregnancy definition in the Rome Statute involved a compromise between states, and was influenced by the crimes against women perpetrated in Bosnia and Herzegovina, which contextually differs from conduct committed during the DK Regime.[32]

25. The ICP proposes instead that by 1975, the prohibited conduct was "[f]*orcibly impregnating a woman or girl against her will or under coercive circumstances*".[33] The ICP submits that such conduct violates inalienable rights

[22] CPL Request, paras 51-52..
[23] CPL Request, paras 53-56.
[24] CPL Request, paras 60-63.
[25] Defence Response, paras 6-9.
[26] Defence Response, paras 10-12.
[27] Defence Response, paras 13-15.
[28] Defence Response, paras 17, 20.
[29] Defence Response, para. 23.
[30] ICP Request, paras 2, 15.
[31] ICP Request, paras 3, 6, 9.
[32] ICP Request, paras 7-8.
[33] ICP Request, paras 3, 11.

and values such as human dignity, autonomy, equality, and reproductive choice, and rises to the level of an "other inhumane act".[34]

26. The ICP distinguishes the conduct from forced marriage and rape on the grounds that forced pregnancy can occur outside the context of forced marriage or rape, and results in prolonged harm different from forced marriage and rape whereby the victim's body visibly changes, the victim must give birth to and care for a potentially unwanted child, the victim is reminded that the child is the product of bodily invasion and victimisation, and the victim and child endure social stigma.[35]

27. The ICP identifies specific questions for the CIJs to investigate relevant to forced impregnation.[36] The ICP submits that the legal characterisation of the conduct is best considered at the conclusion of the investigation,[37] but anticipates that the evidence obtained will either demonstrate the commission of a crime against humanity of an "other inhumane act", or the harm suffered by victims of forced marriages and rapes within forced marriages.[38]

D. CPL Reply

28. The CPL assert that the CPL Request is not untimely given the investigation into Ao An and Yim Tith are ongoing and there is no prescribed time limit for making investigative requests pursuant to Internal Rule 55(1).[39] The CPL submit that, in any event, the charged person's right to an expeditious trial is not absolute, and must be balanced against the victims' right to ascertain the truth.[40]

29. The CPL assert it is not necessary that the request demonstrate a *prima facie* reason for the CIJs to believe that the requested information may be exculpatory.[41]

30. While the CPL support the ICP Request and the investigative questions proposed by the ICP,[42] the CPL do not address the ICP's challenge to the appropriateness of applying the Rome Statute definition of forced pregnancy in the ECCC.

III. DISCUSSION

31. Both the CPL and ICP Requests fail for three main reasons:

    a. There was no settled definition of the concept of forced pregnancy in Cambodian or international law between 1975 and 1979, and no clear human rights standard tied to conduct amounting to forced pregnancy, a violation of which could rise to the level of an "other inhumane act". The same applies *a maiore ad minus* to forced impregnation. An investigation is therefore precluded by the principle of *nullum crimen sine lege*. The definition of the applicable law must precede the decision to investigate and cannot be left until the end of the investigations.

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[34] ICP Request, para. 10.
[35] ICP Request, paras 11-12.
[36] ICP Request, para. 13.
[37] ICP Request, para. 14
[38] *Ibid.*
[39] CPL Reply, para. 11.
[40] CPL Reply, para. 12.
[41] CPL Reply, para. 16.
[42] CPL Reply, para. 8.

b. There is at present, after years of investigation into forced marriage, no evidence that would support a policy of forced *impregnation* or forced *pregnancy*, even if one wanted to apply the concept as laid out in the Rome Statute.

c. Finally, even if there was such a definition that could be applied to the temporal jurisdiction of the ECCC, both Requests were filed very late in the day without good cause having been shown; extending the investigation now would put an undue burden on the Defence and cause an unacceptable delay in the investigations, which are already at an advanced stage

E. Standard for investigative action requests

32. Unlike the CPL Request, the ICP Request is not explicitly framed as a request for investigative action pursuant to Internal Rule 55(10), however, in substance it clearly constitutes such a request given the nature of relief sought therein. I therefore assess it, alongside the CPL Request, in accordance with the standards for investigative action requests made under Internal Rule 55(10).

33. Requests for investigative action must: (i) identify with sufficient precision the action requested; and (ii) identify the reasons why the information is *prima facie* relevant to ascertaining the truth.[43] Contrary to the Yim Tith Defence's contention, it is not necessary that the requests also identify *prima facie* reasons as to why the investigative actions will yield exculpatory information; the authorities cited by the Yim Tith Defence in support of that contention were specific to requests made by the Defence in Case 002 for investigative action that would yield exculpatory evidence, and do not create a third criterion for all other investigative action requests.[44]

34. The CIJs also enjoy a broad discretion when deciding on the usefulness or the opportunity to carry out investigative action requested by a party.[45] When exercising that discretion, the CIJs must consider the impact that granting such requests will have on the fairness of proceedings.[46] Relevant to that assessment are the fair trial rights of charged persons, in particular, the right to be tried within a reasonable time and to have adequate time to prepare their defence, both of

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[43] Case File No. 002-D365/2/17, *Decision on Reconsideration of Co-Prosecutors' Appeal against the Co-Investigating Judges Order on Request to Place Additional Evidentiary Material on the Case File Which Assists in Proving the Charged Persons' Knowledge of the Crimes*, 20 September 2010, para. 47; Case File No. 002-D353/2/3, *Decision on the Ieng Thirith Defence Appeal against "Order on Requests for Investigative Action by the Defence for Ieng Thirith" of 15 March 2010*, 14 June 2010, para. 38.

[44] In the *Decision on Ieng Thirith Defence Appeal against "Order on Requests for Investigative Action by Defence for Ieng Thirith* cited by the Yim Tith Defence, the Pre-Trial Chamber clarified the *prima facie* relevance standard of proof for investigative action requests, and went on to confirm this standard also applies where the request is for investigative action that will yield exculpatory evidence (Case File No. 002-D353/2/3, 14 June 2010, paras 38, 47).

[45] Case File No. 002-D365/2/17, *Decision on Reconsideration of Co-Prosecutors' Appeal against the Co-Investigating Judges Order on Request to Place Additional Evidentiary Material on the Case File Which Assists in Proving the Charged Persons' Knowledge of the Crimes*, 20 September 2010, para. 36; Case File No. 002-D164/4/13, *Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive,* 18 November 2009, paras 22, 25.

[46] Case File No. 002-D365/2/17, *Decision on Reconsideration of Co-Prosecutor's Appeal against the Co-Investigating Judge's Order on Request to Place Additional Evidentiary Material on the Case File which Assists in Proving the Charged Person's Knowledge of the Crimes,* 20 September 2010, para. 47.

which are long established fair trial rights guaranteed in international human rights instruments, and before the ECCC.[47]

35. These rights apply equally at the pre-trial stage.[48] For the purposes of assessing the reasonable duration of criminal proceedings, I consider persuasive the jurisprudence of the European Court of Human Rights that the time period commences from the time of "*the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence*".[49]

36. Consistent with the above principles, the Pre-Trial Chamber has previously taken into consideration undue delay to the proceedings when ruling on appeals of the CIJs' decisions on investigative action requests.[50] The Pre-Trial Chamber also stated that "*[t]he opportunity to make any request pursuant to Rule 55(10) is contingent upon the performance by the requesting party of its general obligation 'to proceed in a manner that will not delay the proceedings.* "[51] I consider this an expression of the requirement that the parties act with due diligence when seeking to participate in the investigation through the Internal Rule 55(10) mechanism.

37. I am satisfied that both the CPL and ICP Requests identify the requested investigative action with sufficient precision; specifically, both requests identify the investigative steps to be taken and questions to be posed to witnesses in respect of forced pregnancy and forced impregnation. I am also satisfied that both requests identify reasons why the requested action is *prima facie* relevant to ascertaining the truth.

38. However, as elaborated below, I deny both requests on the grounds: (i) they do not satisfy the principle of legality; (ii) the requests are untimely to a degree that evinces a lack of due diligence; (iii) the requests will, if granted, cause undue delay to the proceedings; and (iv) the requested investigations are unlikely to be fruitful given that the evidence obtained in the Case 004 investigation to-date does not support allegations of forced pregnancy or forced impregnation.

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[47] ECCC Law, Article 33*new* expressly incorporates Article 14 of the ICCPR, to which Cambodia is a signatory. Article 14(3) of the ICCPR provides: "*In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees in full equality* (...) *(c) To be tried without undue delay* (...)"; *see also* Internal Rule 21 containing comparable provisions.

[48] Case File No. 002-D264/2/6, *Decision on Ieng Thirith's Appeal against the Co-Investigating Judges' Order Rejecting the Request for Stay of Proceedings on the Basis of Abuse of Process (D264/1),* 10 August 2010, para. 13.

[49] ECtHR, *Deweer v. Belgium*, 27 February 1980, para. 46; a definition that also corresponds to the test of whether the situation of the suspect has been "*substantially affected*"; ECtHR, *Neumeister v. Austria*, 27 June 1968, "Arguments of the Commission and the Government", para. 13; ECtHR, *Eckle v. Germany*, 15 July 1982, para. 73; ECtHR, *McFarlane v. Ireland*, 10 September 2010, para. 143).

[50] *See* Case File No. 002-D315/1/5, *Decision on the Appeal against Order on Nuon Chea's Requests for Investigative Action Relating to Foreign States and on the Appeal against the Order on the Requests for Investigative Actions Relating to Foreign States, in Respect of the Denial of the Request for Witness Interviews by Khieu Samphan*, 7 June 2010, para. 22; Case File No. 002-D365/2/17, *Decision on Reconsideration of Co-Prosecutors' Appeal against the Co-Investigating Judges Order on Request to Place Additional Evidentiary Material on the Case File Which Assists in Proving the Charged Persons' Knowledge of the Crimes*, 27 September 2010, paras 53-54.

[51] Case File No. 002-D365/2/17, *Decision on Reconsideration of Co-Prosecutor's Appeal against the Co-Investigating Judge's Order on Request to Place Additional Evidentiary Material on the Case File which Assists in Proving the Charged Person's Knowledge of the Crimes*, 20 September 2010, para. 53.

F. The legality of forced pregnancy as an "other inhumane act" from 1975 to 1979

39. Forced pregnancy was not a crime under the Cambodian 1956 Penal Code,[52] which formally still applied from 1975 to 1979.[53]

40. Forced pregnancy was also not criminalised, let alone defined in international instruments codifying the laws of war by 1975. These instruments contained broad protections for individuals against violence, for their honour and family rights, and for the protection of women from rape.

41. The Lieber Code of 1863 criminalised the rape of persons in an invaded country, and provided for the protection of the "*persons of the inhabitants, especially those of women: and the sacredness of domestic relations*".[54] Neither the Hague Convention of 1899 nor that of 1907 made any provision concerning the physical integrity of women.[55] The charters of the Tokyo and Nuremberg tribunals did not explicitly criminalise acts of violence against women, either.[56]

42. Geneva Convention IV of 1949 reintroduced specific protections for women against violence in armed conflict, stating that "protected persons" are entitled to "*respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence of threats thereof and against insults and public curiosity. Women shall be especially protected against any attack on their honour, in particular against rape enforced prostitution, or any form of indecent assault.*"[57]

43. The Additional Protocols of 1977 expressly prohibited rape, forced prostitution or any other form of indecent assault against women.[58] In addition, they prohibited violence to the life, health, or physical or mental well-being of persons, in particular murder, torture of all kinds (whether physical or mental), corporal punishment, and mutilation, and outrages upon personal dignity.[59]

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[52] The revised Penal Code of 2009 codified, for the first time, crimes against humanity which included forced pregnancy amongst the enumerated crimes, however, did not define forced pregnancy. *See* Article 188(7) of the 2009 Penal Code.

[53] Case File No. 001-E188, *Judgement*, 26 July 2010, para. 29.

[54] Articles 37 and 44 of the General Orders No. 100: The Lieber Code – Instructions for the Government of Armies of the United States in the Field.

[55] In the context of regulating military authority over the territory of a hostile state, the Hague Conventions merely required that "family honour and rights" be respected (Article 46 of the Regulation concerning the Laws and Customs of War on Land, annexed to the Conventions (II) and (IV) with respect to the Laws and Customs of War on Land, 29 July 1899 and 18 October 1907).

[56] *See* Article 6 of the Charter of the International Military Tribunal and Article 5 of the Charter of the International Military Tribunal for the Far East, which list crimes against peace, war crimes, and crimes against humanity as crimes within the jurisdiction of the Nuremberg and Tokyo Tribunals. The provision regarding crimes against humanity only enumerates "*murder, extermination, enslavement, deportation, and other inhumane acts...*"

[57] Geneva Convention IV, Article 27.

[58] Article 4(2)(e) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977 expressly prohibits rape in the context of non-international armed conflict; Article 75(2) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts prohibits, *inter alia*, humiliating and degrading treatment, enforced prostitution and any form of indecent assault, whether committed by civilian or military agents. .

[59] Article 75 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts; Article 4(2)(a) of the Protocol Additional

44. Forced pregnancy was first codified and defined as a crime against humanity in Article 7 of the Rome Statute.[60] There, it 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.*"[61] The Rome Statute adds that, "*this definition shall not in any way be interpreted as affecting national laws relating to pregnancy.*"[62]

45. The subsequent statutes of the Special Court for Sierra Leone and the East Timor Special Panel for Serious Crimes similarly enumerated forced pregnancy as a crime against humanity.[63]

i. <u>The framework for assessing "other inhumane acts"</u>

46. That forced pregnancy was not criminalised as an autonomous crime by 1975 does not preclude it from being considered a crime against humanity of "an other inhumane act" provided the requisite elements are met.[64] The category of "other inhumane acts" was already criminalised in customary international law by 1975.[65] It is therefore not necessary to find that the underlying conduct was itself a crime from 1975 to 1979.[66] This is consistent with the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and SCSL.[67]

47. The category of "other inhumane acts" as a crime against humanity was also accessible and foreseeable to the accused, thus complying with the principle of legality.[68] It is therefore only necessary to determine whether conduct amounting to forced pregnancy amounts to an "other inhumane act".

48. The Trial Chamber identified the elements of "other inhumane acts" applicable in customary international law by 1975 to be:

a. an act or omission of the perpetrator causing serious bodily or mental harm or constituting a serious attack on human dignity. The effect of

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to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977.

[60] *See* Kristen Boon, "Rape and Forced Pregnancy under the ICC Statute: Human Dignity, Autonomy and Consent", *Columbia Human Rights Law Review*, 32, 2000-2001, p. 630; Soh Sie Eng Jessie, "Forced Pregnancy: Codification in the Rome Statute and its Prospect as Implicit Genocide", *New Zealand Journal of Public International Law*, 4, 2006, p. 319.

[61] Article 7(2)(f) of the Rome Statute.

[62] *Ibid.*

[63] *See* Article 2(g) of the Statute of the Residual Special Court for Sierra Leone, and Section 5.1(g) of Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences.

[64] Case File No. 004-D257/1/8, *Considerations on Ao An's Application to Seise the Pre-Trial Chamber with a View to Annulment of Investigative Action Concerning Forced Marriage*, Opinion on Merit of the Application by Judges Baik and Beauvallet, 17 May 2016, para. 10.

[65] Case File No. 002-D427/2/15, *Decision on Appeals by Nuon Chea and Ieng Thirith against the Closing Order*, 15 February 2011, paras. 156-157; Case File No. 002-E313, *Judgement*, 7 August 2014, paras. 435-436; Case File No. 001-E188, *Judgement*, 26 July 2010, para. 367; Case File No. 004-D257/1/8, *Considerations on Ao An's Application to Seise the Pre-Trial Chamber with a View to Annulment of Investigative Action Concerning Forced Marriage*, Opinion on Merit of the Application by Judges Baik and Beauvallet, 17 May 2016, para. 9.

[66] *Ibid.*

[67] *Prosecutor v. Blagojević and Jokić*, Judgement, ICTY Trial Chamber (IT-02-60-T), 17 January 2005, para 624; *Prosecutor v. Stakić*, Judgement, ICTY Appeals Chamber (IT-97-24-A), 22 March 2006, para. 315; *Prosecutor v. Brima & Others*, Judgement, SCSL Appeals Chamber (SCSL-2004-16-A), 22 February 2008, para. 183.

[68] Case File No. 002-E313 *Judgement*, 7 August 2014, paras. 435-436.

the suffering is not required to be long-term, although this may be a relevant factor for the determination of the seriousness of the act;[69]

b. the perpetrator must have deliberately performed the act or omission 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;[70] and

c. the acts or omissions of the perpetrator must be of a nature and gravity similar to the other crimes against humanity enumerated under Article 5 of the ECCC Law, to be assessed on a case-by-case basis, with due regard to the individual circumstances of the case.[71] The circumstances may include the nature of the act or omission, the context in which it occurred, the personal circumstances of the victim (age, sex, health, etc.) and the physical, mental, and moral effects of the act upon the victim.[72]

49. In determining the nature of the conduct, and whether the conduct is of a similar nature and gravity to the other enumerated acts, international criminal jurisprudence demonstrates that courts have sought to identify parameters for the conduct and then undertake a comparison of that conduct against international human rights standards and/or international criminal jurisprudence to determine whether the conduct rises to the level of an "other inhumane act".

50. This level of inquiry reflects the cautious approach taken by the international and ad hoc tribunals to ensure that the principle of *nullum crimen sine lege*[73] is not violated. Fundamental tenets of that principle include the non-retroactivity of the law,[74] and the requirement of strictly construing criminal statutes, where there is ambiguity, in favour of the charged person.[75] The latter principle has, for example, more recently been adopted in the Rome Statute in Article 22(2), which states:

> "(2) The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted."

51. Identifying clear parameters for the underlying conduct is also necessary to be able to determine whether it was foreseeable and accessible to the charged person that they could be investigated and prosecuted for the underlying conduct

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[69] Case File No. 002-E313, *Judgement*, 7 August 2014, para. 439; Case File No. 001-E188, *Judgement*, 26 July 2010, para. 369.
[70] Case File No. 002-E313, *Judgement*, 7 August 2014, para. 437; Case File No. 001-E188, *Judgement*, 26 July 2010, paras 368, 371.
[71] Case File No. 002-E313, *Judgement*, 7 August 2014, para. 438; Case File No. 001-E188, *Judgement*, 26 July 2010, paras 367-369.
[72] Case File No. 001-E188, *Judgement*, 26 July 2010, para. 369
[73] The principle of *nullum crimen sine lege* is affirmed in Article 15 of the International Covenant on Civil and Political Rights, which is incorporated into ECCC proceedings through Article 33*new* of the ECCC Law
[74] Article 6 of the 1956 Cambodian Penal Code, and updated in Article 3 of the 2009 Cambodian Penal Code.
[75] *See* Article 5 of the 2009 Cambodian Penal Code; Case File No. 002-E138, *Decision on Ieng Thirith's Fitness to Stand Trial*, 17 November 2011, para. 80, citing *Prosecutor v. Delalić et al*, Judgement, ICTY Trial Chamber (IT-96-21-T), 16 November 1998, para. 413.

(fundamental requirements of the principle of legality).[76] This approach has been applied in the ICTY, SCSL and ECCC as demonstrated in the following analysis.

ii. The assessment of "other inhumane acts" in the ICTY

52. The ICTY Trial Chamber in *Kupreškić* gave careful consideration to the scope and meaning of "other inhumane acts" due to its concern that the category could be too general to comply with the requirements of legal certainty.[77] The Trial Chamber considered that, rather than looking to the ICTY Statute for the meaning of "other inhumane acts",

> "[l]ess broad parameters for the interpretation of "other inhumane acts" can instead be identified in international standards on human rights such as those laid down in the Universal Declaration on Human Rights of 1948 and the two United Nations Covenants on Human Rights of 1966. Drawing upon the various provisions of these texts, it is possible to identify a set of basic rights appertaining to human beings, the infringement of which may amount, depending on the accompanying circumstances, to a crime against humanity...[The acts] must be carried out in a systematic manner and on a large scale. In other words, they must be as serious as the other classes of crimes provided for in the other provisions of Article 5. Once the legal parameters for determining the content of the category of "inhumane acts" are identified, resort to the *ejusdem generis* rule for the purpose of comparing and assessing the gravity of the prohibited act may be warranted."[78]

53. The application of the *ejusdem generis* rule[79] led the *Kupreškić* Chamber to conclude that "*only gross or blatant denials of fundamental human rights can constitute crimes against humanity.*"[80] The Trial Chamber went on to confirm that, "*Although individual acts may not be inhumane, their overall consequences must offend humanity in such a way that they may be termed "inhumane". This delimitation also suffices to satisfy the principle of legality, as inhumane acts are clearly proscribed by the Statute.*"[81]

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[76] As to the requirements of the principle of legality espoused by the Trial and Supreme Court Chambers of the ECCC, see: Case File No. 002-E313, *Judgement*, 7 August 2014, para. 16; Case File No. 001-F28, *Appeal Judgement*, 3 February 2012, paras 96, 97, 160, 162, 211, 212, 280.

[77] *Prosecutor v. Kupreškić*, Judgement, ICTY Trial Chamber (IT-95-16-T), 14 January 2000, paras 563-565.

[78] *Ibid.*, para. 566.

[79] The *ejusdem generis* rule is defined as "*A canon of construction holding that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed*" (Black's Law Dictionary, 9th Ed.). The International judges of the ECCC Pre-Trial Chamber have stated that resort to the *ejusdem generis* rule does not violate the rule against analogy found in civil law jurisdictions. Applying a crime by analogy to unregulated conduct is distinguishable from applying a subcategory within a crime (as with other inhumane acts) to another subcategory within that crime for the purposes of clarifying the definition of that other category. Given that the category of "other inhumane acts" was designed as a residual category to avoid a lacunae in the law, the term is meaningless without applying an *ejusdem generis* canon of construction (Case File No. 004-D257/1/8, *Considerations on Ao An's Application to Seise the Pre-Trial Chamber with a View to Annulment of Investigative Action Concerning Forced Marriage*, Opinion on Merit of the Application by Judges Baik and Beauvallet, 17 May 2016, fn. 130).

[80] *Prosecutor v. Kupreškić*, Judgement, ICTY Trial Chamber (IT-95-16-T), 14 January 2000, para. 620.

[81] *Ibid.*, para. 622.

54. In *Blagojević*, the Trial Chamber added that the principle of legality requires that the underlying act must also be distinct from other enumerated crimes against humanity.[82]

55. Applying these principles, the ICTY Trial and Appeal Chambers found conduct to constitute "other inhumane acts" in the following instances:

    a. In *Blaskić*, the Trial Chamber, relied upon jurisprudence of the International Criminal Tribunal for Rwanda, the Rome Statute provisions, and the International Law Commission's Draft Code of Crimes Against the Peace and Security of Mankind ("ILC Draft Code"), to find that assault causing injury, apart from murder, constituted an "other inhumane act".[83]

    b. The Trial Chamber in *Krstić* applied as authority the finding in *Krajišnik* that forcible displacement within or between national borders was an inhumane act.[84] To determine whether the conduct amounted to forced transfer or deportation, the Trial Chamber considered the permissible circumstances for evacuation of the population under Article 49 of Geneva Convention IV and Article 17 of the Additional Protocol II.[85] The Chamber found that in the circumstances of the case, the forcible transfer of civilians constituted a form of inhumane treatment.[86]

    c. In *Blagojević*, the Trial Chamber held that the prohibition against forcible displacement formed part of customary international law, and was therefore satisfied that the conduct fell within the category of other inhumane acts.[87]

    d. In *Stakić*, the Appeals Chamber referred to and relied upon the definition and elements of forcible transfer established in previous ICTY jurisprudence.[88] The Appeals Chamber cited the condemnation of such acts in the Geneva Convention IV, Additional Protocol I and the 1996 ILC Draft Code, concluding that forcible transfer had clearly been criminalised at the time of the case and accordingly did not violate the principle of *nullum crimen sine lege*.[89] Given the conduct had also been found to constitute an "other inhumane act" in previous ICTY jurisprudence, the Appeals Chamber considered that acts of forcible transfer may be sufficiently serious as to amount to other

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[82] *Prosecutor v. Blagojević and Jokić*, Judgement, ICTY Trial Chamber (IT-02-60-T), 17 January 2005, para. 624-625.
[83] *Prosecutor v. Blaskić*, Judgement, ICTY Trial Chamber (IT-95-14-T), 3 March 2000, paras 238-239.
[84] *Prosecutor v. Krstić*, Judgement, ICTY Trial Chamber (IT-98-33-T), 2 August 2001, para. 523.
[85] *Ibid.*, para. 524.
[86] *Ibid.*, para. 532.
[87] *Prosecutor v. Blagojević and Jokić*, Judgement, ICTY Trial Chamber (IT-02-60-T), 17 January 2005, para. 629.
[88] *Prosecutor v. Stakić*, Judgement, ICTY Appeals Chamber (IT-97-24-A), 22 March 2006, para. 317.
[89] *Ibid.*.

inhumane acts.[90] This finding was upheld in subsequent trial judgements of the ICTY.[91]

iii. The assessment of "other inhumane acts" in the SCSL

56. In *Brima*, the Appeals Chamber of the SCSL stated in respect of "other inhumane acts" that, "*care must be taken not to make it too embracing as to make a surplusage of what has been expressly provided for, or to render the crime nebulous and incapable of concrete ascertainment. An over-broad interpretation will certainly infringe the rule requiring specificity of criminal prohibitions.*"[92] The Appeals Chamber went on to find that forced marriage in the Sierra Leonean context constituted a crime against humanity of an "other inhumane act", on the basis: (i) victims endured physical injury due to being subjected to repeated acts of rape and sexual violence, forced labour, corporal punishment, and deprivation of liberty;[93] and (ii) the nature and gravity of forced marriage was comparable to the other enumerated crimes against humanity, taking into account the perpetrators' conduct, the atmosphere of violence in which victims were abducted, the vulnerability of women and girls, and the effects of the perpetrators' conduct on the physical, moral, and psychological health of the victims.[94] The Appeals Chamber also considered that the perpetrators ought to have known that forced marriage was criminal given the conduct involved the commission of one or more other international crimes such as enslavement, imprisonment, rape, sexual slavery, and abduction.[95]

iv. The assessment of "other inhumane acts" in the ECCC

57. The ECCC's Pre-Trial and Trial Chambers have consistently applied the principles set out in *Kupreškić*. The Pre-Trial Chamber stated that when determining what conduct rises to the level of "other inhumane acts", reference can be made to serious breaches of international law regulating armed conflict from 1975 to 1979, including the grave breaches provisions of the 1949 Geneva Conventions or serious breaches of fundamental human rights norms protected under international law during that time.[96] In order to reach the level of gravity required, the conduct needs to be a gross or blatant denial of a fundamental human right.[97]

58. The application of these principles was particularly evident in Case 002. While in Case 001, the Trial Chamber found that the conditions of detention imposed on S-21 detainees amounted to the crime against humanity of "other inhumane acts" without reference to international human rights standards or international criminal jurisprudence[98], in Case 002 it cited ICTY jurisprudence in determining that such

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[90] *Prosecutor v. Stakić*, Judgement, ICTY Appeals Chamber (IT-97-24-A), 22 March 2006, para. 317.
[91] *See for example: Prosecutor v. Milutinović*, Judgement, ICTY Trial Chamber (IT-05-87-T), 26 February 2009, para. 172; *Prosecutor v. Krajišnik*, Judgement, ICTY Appeals Chamber (IT-00-39-A), 17 March 2009, para. 331.
[92] *Prosecutor v. Brima & Others*, Judgement, SCSL Appeals Chamber (SCSL-2004-16-A), 22 February 2008, para. 185.
[93] *Ibid.*, para. 199.
[94] *Ibid.*, para. 200.
[95] *Ibid.*, para. 201.
[96] Case File No. 002-D427/2/15, *Decision on Appeals by Nuon Chea and Ieng Thirith Against the Closing Order*, 15 February 2011, para. 164.
[97] Case File No. 001-E188, *Judgement*, 26 July 2010, para. 378.
[98] Case File No. 001-E188, *Judgement*, 26 July 2010, paras 372-373.

attacks on human dignity in the context of detention rose to the level of gravity of the other crimes enumerated in Article 5 of the ECCC Law.[99]

59. In neither case did the Trial Chamber seek to define the conduct, presumably because the relevant conduct (e.g. shackling, chaining, corporal punishment, deprivation of adequate food) consisted of single or easily identifiable acts that required no definition in order to understand their parameters.

60. By contrast, in ascertaining the elements of forced disappearances in Case 002, the Trial Chamber relied on definitions for the conduct provided in the *Justice Case*,[100] the Rome Statute and ICTY Trial Chamber pronouncements.[101]

61. In concluding that enforced disappearances were of similar nature and gravity to the other enumerated crimes against humanity,[102] the Trial Chamber took into consideration the Nuremberg Judgement which considered enforced disappearances to be a war crime, post-1975 judgements and instruments which recognised such conduct to be of the utmost gravity, post-1975 decisions of the Human Rights Committee that found enforced disappearances to constitute inhumane or degrading treatment, recent international instruments that have emphasised that enforced disappearances are acts of extreme gravity, jurisprudence from the ad hoc tribunals that have recognised that enforced disappearances may be serious enough to constitute other inhumane acts, and the codification in the Rome State of enforced disappearances as a discrete underlying crime against humanity.[103]

62. The Trial Chamber also held that forced transfer constituted an "other inhumane act", defining the act based on the Nuremberg and various Control Council Law No. 10 judgements and ICTY appeal judgements.[104] The Trial Chamber concluded that forcible transfer was conduct of a similar nature and gravity to other enumerated acts given it had been codified in the Tokyo Charter, Nuremberg Charter and Control Council Law No. 10 as a crime against humanity.[105]

v. Distilling the requirements of "other inhumane acts"

63. The above analysis demonstrates that courts have taken a cautious approach in assessing "other inhumane acts" so as to ensure the principle of legality is not violated. This approach has almost always involved reference to international criminal jurisprudence and international human rights and legal instruments to

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[99] Case File No. 002-E313, *Judgement*, 7 August 2014, para. 457.
[100] *United States of America v. Josef Alstotter and others*, Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Nuernberg, October 1946-April 1949, Vol. III.
[101] The Trial Chamber identified the elements of the conduct as follows: "*Enforced disappearances occur when: (i) an individual is deprived of his or her liberty; (ii) the deprivation of liberty is followed by the refusal to disclose information regarding the fate or whereabouts of the person concerned, or to acknowledge the deprivation of liberty, and thereby deny the individual recourse to the applicable legal remedies and procedural guarantees, and (iii) the first and second elements were carried out by state agents, or with the authorization, support or acquiescence of a State or political organization.*" (Case File No. 002-E313, *Judgement*, 7 August 2014, para. 448.)
[102] *Ibid.*
[103] *Ibid.*, paras 444-447.
[104] Forcible transfer was defined as: "*the (i) intentional, (ii) forced displacement of individuals (iii) from an area in which they are lawfully present, (iv) not justified by concerns regarding the security of the civilian population or military necessity.*" (*Ibid.*, para. 450.)
[105] *Ibid.*, para. 454.

define or outline the elements of the conduct, including the mental element, and to determine whether the conduct in question is of a similar nature and gravity to other enumerated crimes against humanity. 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*" does not flout the principle of legality, as the International Judges of the Pre-Trial Chamber recently confirmed.[106] Reference to such sources also serves the purposes of determining whether it was foreseeable and accessible to accused persons that they could be investigated and prosecuted for such conduct, and of ensuring the conduct is distinct from other enumerated crimes against humanity.

64. The analysis also supports the conclusion that there must be a customarily accepted standard, tied to the appropriate human right, by which the "inhumanity" of the act is judged.[107]

65. I adopt the approach taken by the authorities cited above to ascertain, for the purposes of assessing the legality of forced pregnancy as an "other inhumane act", whether there was a widely accepted definition and a customarily accepted standard relevant to forced pregnancy in 1975 to 1979.

vi. A definition of forced pregnancy

66. The Rome Statute definition of forced pregnancy, which, as noted above, was the first in international criminal law,[108] established two key elements to the conduct: making a woman pregnant and keeping her pregnant.

67. The CPL's reliance on the Rome Statute definition is problematic for various reasons. Firstly, while Article 9 new of the Agreement Between the United Nations and the Royal Government of Cambodia provides that the subject-matter jurisdiction of the ECCC includes crimes against humanity as defined in the Rome Statute, this does not mean such crimes can be applied without giving due regard to the principle of legality. Offences charged in the ECCC must have existed in national or international law from 1975 to 1979 in order to comply with the principle of legality.[109] The principle of legality also requires that offences were sufficiently foreseeable and that the law providing for such liability was sufficiently accessible to the accused at the relevant time.[110] The CPL fail to

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[106] The International Judges of the Pre-Trial Chamber stated, "*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.*"(Case File No. 004-D257/1/8, *Considerations on Ao An's Application to Seise the Pre-Trial Chamber with a View to Annulment of Investigative Action Concerning Forced Marriage,* 17 May 2016, Opinion on Merits of the Application by Judges Bauk and Beauvallet, para. 13.)

[107] Terhi Jyrkkiö, "'Other inhumane acts' as Crimes Against Humanity", *Helsinki Law Review*, 1 (2011), p. 204.

[108] *See supra* para. 444.

[109] Case File No. 001-F28, *Appeal Judgement,* 3 February 2012, para. 91; confirmed by the PTC in Case File No. 002-D427/2/15, *Decision on Appeals by Nuon Chea and Ieng Thirith Against the Closing Order*, 15 February 2011, para. 96; *see also* Case File No. 004-D257/1/8, *Considerations on Ao An's Application to Seise the Pre-Trial Chamber with a View to Annulment of Investigative Action Concerning Forced Marriage*, Opinion on Merit of the Application by Judges Baik and Beauvallet, 17 May 2016, para. 1.

[110] Case File No. 001-F28, *Appeal Judgement,* 3 February 2012, para. 96.

consider with the necessary rigour whether the application of that definition in the DK context would flout the principle of legality.

68. Secondly, the Rome Statute itself acknowledges that it does not purport to codify customary international law,[111] let alone the customary international law in force from 1975 to 1979, and should therefore not be applied without appropriate scrutiny. In that regard, it is relevant that the Rome Statute definition of forced pregnancy resulted from a compromise between states, with some dispute as to whether it should be a crime at all,[112] rendering the provision *"one of the most difficult and controversial to draft."*[113] There was division between states that prohibited abortion or restricted women's control over reproduction (and thus did not want to risk criminalisation of their domestic policies in that regard), and those that did not.[114] The definition that resulted was therefore a negotiated compromise between those states based on significant remaining differences even at the time of the negotiations and hence cannot in any manner be considered to reflect even an approximate common understanding of the definition in international law in 1975 to 1979.

69. Thirdly, even if applied in the ECCC, the elements of the Rome Statute definition regarding forcible confinement and the intent to change the ethnic composition of the population are unlikely to be met by the factual circumstances relevant to forced pregnancy during the DK Regime. The Rome Statute definition of forced pregnancy was drafted in response to the atrocities committed against women in Bosnia and Rwanda in the early 1990s, which took place in the context of changing the ethnic composition of a territory and of terrorising or shaming the local population.[115] This is different to the Cambodian context in which, the CPL allege, a policy of forced marriage was implemented to increase the population.[116] A corollary of that policy is procreation, but for the purposes of establishing whether a definition of forced pregnancy existed and could be relevant to conduct

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[111] Article 10 of the Rome Statute provides in respect of Part II on jurisdiction, admissibility and applicable law: "*Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.*"

[112] *See* Alyson M. Drake, "Aimed at Protecting Ethnic Groups or Women? A look at Forced Pregnancy Under the Rome Statute", *William & Mary Journal of Women and the Law*, 18(3), 2012, p. 606.

[113] Christopher Hall, Joseph Powderly and Niamh Hayes, "Crimes Against Humanity", in Triffterer & Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd edition 2016, Munich, p. 274.

[114] Specifically, objections were raised by the Holy See and Arab States. The Holy See expressed concern that the criminalisation of forced pregnancy could pave the way to legitimise abortions, including those resulting from rape. The Arab States expressed concern that the provision would place pressure on them to adopt legislation to legalise abortion, and concern that the provisions interfered with marital relations including rape within marriage, which was not considered a crime in certain states (Kristen Boon, "Rape and Forced Pregnancy under the ICC Statute: Human Dignity, Autonomy and Consent", *Columbia Human Rights Law Review*, 32, 2000-2001, pp. 639-640; Soh Sie Eng Jessie, "Forced Pregnancy: Codification in the Rome Statute and its Prospect as Implicit Genocide", *New Zealand Journal of Public International Law*, 4, 2006, pp. 323-325; Rhonda Copelon, "Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law", *McGill Law Journal*, 46, 2000-2001, p. 236).

[115] Alyson M. Drake, "Aimed at Protecting Ethnic Groups or Women? A look at Forced Pregnancy Under the Rome Statute", *William & Mary Journal of Women and the Law*, 18(3), 2012, p. 602; Christopher Hall, Joseph Powderly and Niamh Hayes, "Crimes Against Humanity", in Triffterer & Ambos (Eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd edition 2016, Munich, p. 274.

[116] CPL Request, para. 17.

in Cambodia from 1975 to 1979, it needs to be established whether the conduct required, for example: the forcible impregnation of women, the deliberate denial of access to contraception, preventing the termination of the pregnancy, or the confinement of pregnant women against their will. The CPL also fail to establish the extent to which the circumstances pregnant women faced during the DK Regime arose due to the living conditions faced generally by the civilian population.

70. Pre-1975 international human rights instruments contained neither a definition of forced pregnancy, nor a clear human rights standard against which to assess forced pregnancy. Various international human rights instruments acknowledged the rights to physical integrity and freedom from interference with one's privacy and family life,[117] which encompassed "*the right to personal autonomy, personal development and to establish and develop relationships with other human beings and the outside world.*"[118]

71. The first explicit acknowledgement of a right to reproductive choice was made in the 1968 Proclamation of Tehran at the Tehran International Conference on Human Rights, which stated that parents have a basic human right to determine freely and responsibly the number and spacing of their children.[119] This was reiterated in the 1979 Convention on the Elimination of all Forms of Discrimination Against Women.[120]

72. The linkage between reproductive choice and sexual violence in the context of armed conflict was not articulated until 1993 in the Vienna Declaration and Programme of Action,[121] and the 1995 Beijing Declaration and Platform for Action.[122] In 1998, the United Nations Commission on Human Rights passed a

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[117] Article 16 of the 1948 Universal Declaration of Human Rights ("UDHR") provides that men and women of full age have the right to marry and found a family. Article 8 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") provides for the right to respect for private and family life. Article 17 of the International Covenant on Civil and Political Rights ("ICCPR") provides that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour or reputation. In addition to these rights, various instruments enshrine the protection of the life, liberty and security of the person (Article 3 of the 1948 UDHR, Article 5 of the 1950 ECHR), the protection of women from attacks on their honour in times of armed conflict (Article 27(2) of the 1949 the Geneva Convention IV and Article 76 of the 1977 Additional Protocol I), and prohibitions on torture, cruel, inhumane or degrading treatment or punishment (Article 5 of the 1948 UDHR, Article 7 of the 1966 ICCPR).

[118] ECtHR, *Tysiąc v. Poland*, 20 March 2007, para. 107.

[119] Article 16 of the Proclamation of Tehran states: "*Parents have a basic human right to determine freely and responsibly the number and spacing of their children*" (Final Act of the International Conference of Human Rights, Teheran, 22 April to 13 May 1968, U.N. Doc. A/Conf. 32/41 at 3).

[120] Article 16(1)(e) of the Convention on the Elimination of All Forms of Discrimination Against Women provides that women are to have the same rights as men, "*to decide freely and responsibly on the number and spacing of their children...*"

[121] The Vienna Declaration states: "*Violations of the human rights of women in situations of armed conflict are violations of the fundamental principles of international human rights and humanitarian law. Violations, including murder, systematic rape, sexual slavery, and forced pregnancy, require a particularly effective response.*"(Vienna Declaration and Programme of Action, World Conference on Human Rights, pt. 2, para. 38 (1993)).

[122] The Beijing Declaration states: "*Parties to conflict often rape women with impunity, sometimes using systematic rape as a tactic of war and terrorism. Women and girls are victims of acts of murder, terrorism, torture, involuntary disappearance, sexual slavery, rape, sexual abuse and forced pregnancy in situations of armed conflict, especially as a result of policies of ethnic cleansing and other new and emerging forms of violence.*" (Beijing Declaration and the Platform for Action, Fourth World Conference on Women 84, para. 135 (1996)).

resolution condemning violations of the human rights of women in armed conflict, including forced pregnancy.[123]

73. Given that by 1975 in Cambodia, there was no law against forced pregnancy, and abortion was explicitly criminalised,[124] and that even today there is no global consensus on abortion rights, even after rape,[125] it cannot readily be said that the rights to physical integrity, freedom from interference in family and private life and to determine the number and spacing of children were widely accepted as fundamental rights, the serious violation of which could amount to "other inhumane acts". The lack of jurisprudence assessing the nature of such violations adds to the uncertainty, and leaves open the question as to the requisite elements of the conduct in the context of the DK Regime.

74. The gradual, but slow, acknowledgement of forced pregnancy as a crime in international criminal law highlights the divide between collectivist and individualistic legal traditions, where differences in norms have resulted in contrasting views on reproductive choice, sexual relations, abortion, and the expansion of women's rights.[126] While the concept of personal and reproductive autonomy has gained prominence, there is insufficient evidence of state practice or *opinio juris* on which to assert that from 1975 to 1979, breaches of such autonomy were considered by the international community to be a serious violation of fundamental human rights.

75. A broad range of acts have previously been found to constitute the crime against humanity of "other inhumane acts", including mutilations, beatings and other forms of severe bodily harm, serious bodily and mental injury, forcible transfer, inhumane and degrading treatment, forced disappearance, torture, sexual violence, and confinement in inhumane conditions.[127] These acts were either single, distinct acts that need no definition in order to understand their elements, or if comprised of multiple acts, were already defined in international criminal law or tied to widely accepted international human rights prior to their assessment as "an other inhumane act".

76. Forced pregnancy is comprised of multiple elements, and given the lack of widely accepted definition of the conduct by 1975, the notion of what those elements might be is far too nebulous to tie the conduct to a customarily accepted standard of human rights, the serious violation of which would clearly rise to the level of an "other inhumane act". The elements of the conduct are therefore unclear, with the result that it would not have been foreseeable and accessible to charged persons from 1975 to 1979 that they could be investigated and prosecuted for such conduct. Moreover, in light of the principle of strict construction, the doubt as to

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[123] Commission on Human Rights, Resolution 1998/52, The Elimination of Violence Against Women, 17 April 1998, Article 4.

[124] Article 455 of the 1956 Cambodian Penal Code criminalised abortion.

[125] As at 2011, only 58 out of 196 states permitted abortion without restriction, and only 99 states permitted abortion in cases of rape or incest (Pew Research Center, "Worldwide Abortion Policies", accessed 9 June 2016 at http://www.pewresearch.org/interactives/global-abortion/, citing United Nations Department of Economic and Social Affairs, "World Abortion Policies 2013").

[126] *See* Kristen Boon, "Rape and Forced Pregnancy under the ICC Statute: Human Dignity, Autonomy and Consent", *Columbia Human Rights Law Review*, 32, 2000-2001, p. 643.

[127] As summarised in *Prosecutor v. Prlić & Others*, Judgement, ICTY Trial Chamber (IT-04-74-T), 29 May 2013, Volume 1, para. 79, and *Prosecutor v. Brima & Others*, Judgement, SCSL Appeals Chamber (SCSL-2004-16-A), 22 February 2008, para. 184.

the definition of forced pregnancy must be resolved in the charged person's favour.

77. There is accordingly insufficient basis on which to say that, applying the framework for analysing "other inhumane acts", forced pregnancy constituted a crime against humanity of an "other inhumane act" from 1975 to 1979. The principle of legality will be violated if charged persons were to be investigated and prosecuted for such conduct.

G. The legality of forced impregnation as an "other inhumane act" from 1975 to 1979

78. The ICP's request to investigate *forced impregnation* is *a maiore ad minus* even more problematic. Firstly, the ICP's definition of forced impregnation, being the forced or coerced impregnation of women and girls against their will,[128] does not identify with sufficient detail the requisite elements of the conduct, including any necessary mental element. Where conduct involves multiple underlying acts, the elements must have been clearly established and understood by 1975 in order to determine whether it was conduct that rose to the level of an "other inhumane act". In that regard, the analysis above regarding the lack of definition of forced pregnancy by 1975[129] applies equally to forced impregnation.

79. It is also important to identify the elements of the conduct, including the specific mental elements, for the purposes of determining whether cumulative charges may be laid in respect of forced impregnation in addition to any other crime within the ECCC's jurisdiction. The Supreme Court Chamber has held that cumulative convictions may be entered in respect of offences that involve the same factual conduct, but only where the crimes are "*sufficiently distinct or possess "a materially distinct element" not found in the other*".[130] The ICP outlines the harm caused by forced impregnation,[131] but that harm is arguably no different from the harm that results from pregnancy following rape or the consummation of a forced marriage. Absent any specific mental elements, rape and forced impregnation as an "other inhumane act" cannot be clearly delineated to the degree required to provide legal certainty to charged persons.

80. Secondly, the principle of legality requires a strict analysis to ascertain what, if any, were the widely accepted fundamental rights in 1975 to 1979 that would be seriously violated by forced impregnation. The nature of the rights identified by the ICP such as the rights to human dignity, autonomy, and reproductive choice,[132] and the severity of breaches of such rights were still underdeveloped by the 1970s. This is evidenced by the fact that parents' rights to determine freely and responsibly the number and spacing of their children was first acknowledged in 1968 and only condemned in the context of armed conflict in 1993,[133] with no findings in international criminal or human rights jurisprudence on violations of

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[128] ICP Request, paras 3, 11.
[129] *See supra* paras 70-744.
[130] Case File No. 001-F28, *Appeal Judgement,* 3 February 2012, para. 288, citing *Prosecutor v. Delalić et al*, Judgement, ICTY Appeals Chamber (IT-96-21-A), 20 February 2001, paras 412-413.
[131] *See* ICP Request, para. 12 which lists the visible effect of pregnancy on the woman's body, giving birth to and caring for an unwanted child, being reminded that the child is the product of a bodily invasion, as harms from forced impregnation.
[132] ICP Request, para. 10.
[133] *See supra*, paras 711-722.

such rights at that time. The nature of these rights by 1975 appears even more imprecise when juxtaposed with widespread anti-abortion laws in the 1970s, and placed in the context of the circumstances faced by the Cambodian population during the DK Regime. Tying the conduct of forced impregnation under the DK Regime to a clear set of fundamental rights, the violation of which would be serious enough to amount to an "other inhumane act", would involve a degree of ambiguity that would violate the principle of legal certainty.

81. Finally, the ICP's definition of forcible impregnation seeks to criminalise a lower standard of conduct (i.e. forcibly *making* a woman pregnant) than the Rome Statute definition (forcibly *making* and *keeping* a woman pregnant). Given the concern about the legality of the Rome Statute definition when applied to the Cambodian context of 1975 to 1979,[134] the prejudice to the charged persons would be even greater if the ICP's formulation, which lowers the criminalisation threshold even further, were to be applied.

H. Lack of evidence to support the allegations

82. Even if forced pregnancy or forced impregnation had existed as a crime against humanity from 1975 to 1979 the evidence obtained to-date by the OCIJ does not support the existence of such practices on a material scale, let alone on a widespread or systematic basis. This is even more so the case with forced pregnancy when applying the Rome Statute definition of the crime.

83. Witnesses in Case 004 state that they observed or had heard about local militiamen spying on newlywed couples to see if they "*got along well*", a traditional euphemism for sexual intercourse between husband and wife.[135] Two witnesses who attended wedding ceremonies heard couples being told to procreate, or "*create children to build the country*".[136] Others state they were not aware of why people were forced to get married, nor whether the practice of spying on newlywed couples was to ensure the women became pregnant.[137] One witness who confirms the practice of spying on newlyweds states, "*Angkar did not focus on children: they allowed us to have children naturally.*"[138]

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[134] *See supra,* paras 67-69.

[135] Case File No. 004-D219/125, *Written Record of Interview of Civil Party Srey Soeum*, 15 December 2014, A88; *see also* Case File No. 004-D219/261, *Written Record of Interview Witness Khoeun Sngoeun*, 6 April 2015, A59; Case File No. 004-D219/300, *Written Record of Interview Witness Im Bun Chhoeun*, 2 May 2015, A10, A18-19; Case File No. 004-D219/42, *Written Record of Interview of Civil Party Chech Sopha*, 13 October 2014, A119; Case File No. 004-D219/46, *Written Record of Interview of Civil Party Sorm Vanna*, 17 October 2014, A93; Case File No. 004-D117/68, *Written Record of Interview of Civil Party Va Limhun*, 15 September 2014, A34; Case File No. 004-D219/47, *Written Record of Interview of Civil Party Khov Net*, 20 October 2014, A28-31; Case File No. 004-D219/687, *Written Record of Interview Witness Mao Saroeun*, 15 February 2016, A82; Case File No. 004-D219/171, *Written Record of Interview of Civil Party Nhim Kol*, 11 February 2015, A44.

[136] Case File No. 004-D219/125, *Written Record of Interview of Civil Party Srey Soeum*, 15 December 2014, A97; Case File No. 004-D219/502, *Written Record of Interview of Civil Party Applicant Muojk Sengly,* 14 September 2015, A34-35, A37.

[137] Case File No. 004-D219/261, *Written Record of Interview Witness Khoeun Sngoeun*, 6 April 2015, A59-61; Case File No. 004-D219/356, *Written Record of Interview Witness Van Nak*, 4 June 2015, A73; Case File No. 004-D219/314, *Written Record of Interview of Civil Party Chech Sopha*, 15 May 2015, A21; Case File No. 004-D117/60, *Written Record of Interview of Civil Party Sum Pet,* 4 August 2014, A40; Case File No. 004-D219/442, *Written Record of Interview of Witness Chom Vong alias Youk Nhov or Ngov,* 3 August 2015, A230.

[138] Case File No. 004-D219/113, *Written Record of Interview of Civil Party Keo Theary,* 8 December 2014, A77.

84. Witnesses were led to believe that the ramifications of not "*getting along*" was that the couples would be "*criticised*",[139] sent for re-education,[140] reported to the upper echelons of the regime,[141] or tortured.[142] Certain witnesses were told by village chiefs or militiamen that they would be killed if they did not consummate their marriages.[143]

85. Many witnesses report that while they believed they were being spied on as newlyweds, they did not consummate their marriages and faced no consequences for not doing so, as they gave the impression to others that they "*got along well*".[144] One Civil Party who gave such evidence confirms that she did not have any children with her husband, and did not face any repercussions for this.[145]

86. One witness states that she and her husband consummated their marriage after the tenth day, as her husband had convinced her that militiamen had been spying on them, and that they would be killed if they did not consummate their marriage.[146] She became pregnant seven months after her marriage, but did not give any evidence of feeling forced to carry the pregnancy through to full term.[147] Another witness, who believed she would be killed for not consummating her marriage, ultimately fell in love with her husband and became pregnant shortly before the arrival of Vietnamese troops in 1979 and by that time had fallen in love with her husband.[148] Others similarly report that after first consummating their marriage out of fear, they fell in love with their spouses and continued to have intercourse willingly.[149]

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[139] Case File No. 004-D219/123, *Written Record of Interview of Sar Khim*, 15 December 2014, A23.
[140] Case File No. 004-D117/68, *Written Record of Interview of Civil Party Va Limhun*, 15 September 2014, A36-37; Case File No. 004-D117/60, *Written Record of Interview of Civil Party Sum Pet,* 4 August 2014, A31; Case File No. 004-D219/136, *Written Record of Interview of Civil Party Than Yang,* 22 December 2014, A40-42.
[141] Case File No. 004-D219/159, *Written Record of Interview of Civil Party Ny Huon*, 29 January 2015, A136; Case File No. 004-D219/47, *Written Record of Interview of Civil Party Khov Net*, 20 October 2014, A28.
[142] Case File No. 004-D219/47, *Written Record of Interview of Civil Party Khov Net*, 20 October 2014, A32.
[143] Case File No. 004-D117/68, *Written Record of Interview of Civil Party Va Limhun*, 15 September 2014, A41-42; Case File No. 004-D219/83, *Written Record of Interview of Suon Yim*, 24 November 2014, A19, A21; Case File No. 004-D219/113, *Written Record of Interview of Civil Party Keo Theary,* 8 December 2014, A30, A40.
[144]Case File No. 004-D219/125, *Written Record of Interview of Civil Party Srey Soeum*, 15 December 2014, A145; Case File No. 004-D219/42, *Written Record of Interview of Civil Party Chech Sopha*, 13 October 2014, A120; Case File No. 004-D219/300, *Written Record of Interview Witness Im Bun Chhoeun*, 2 May 2015, A17, A19-20; Case File No. 004-D219/46, *Written Record of Interview of Civil Party Sorm Vanna*, 17 October 2014, A94-96.
[145]Case File No. 004-D219/125, *Written Record of Interview of Civil Party Srey Soeum*, 15 December 2014, A145.
[146] Case File No. 004-D219/356, *Written Record of Interview Witness Van Nak*, 4 June 2015, A68.
[147] Case File No. 004-D219/356, *Written Record of Interview Witness Van Nak*, 4 June 2015, A74.
[148] Case File No. 004-D117/68, *Written Record of Interview of Civil Party Va Limhun*, 15 September 2014, A49-50.
[149] Case File No. 004-D219/47, *Written Record of Interview of Civil Party Khov Net*, 20 October 2014, A43-44; Case File No. 004-D219/687, *Written Record of Interview Witness Mao Saroeun,* 15 February 2016, A84; Case File No. 004-D219/113, *Written Record of Interview of Civil Party Keo Theary,* 8 December 2014, A58-59, A66.

87. One witness who said that she was raped by her husband after their marriage states that the militiamen stopped spying on them after the first instance of rape.[150] That witness was married in 1976, and first became pregnant in 1978.[151]

88. The above analysis, which broadly reflects the evidence obtained to-date in Case 004, demonstrates that while there is evidence that couples were encouraged or coerced to consummate their marriages, there is no evidence of any efforts by the DK Regime to ensure that women became pregnant following their marriages.

89. To pursue the lines of inquiry requested by the CPL and ICP would at this late stage of the investigation disproportionately and negatively impact on the factual need to allocate the OCIJ's finite resources to finish the investigation into the most complex parts of Case 004, notwithstanding the fact that the prosecution of sexual and gender-based violence has rightly been given an emphasis in recent international criminal policy considerations.

I. Untimeliness of the requests and undue delay

90. While Internal Rule 55(10) allows requests for investigative action to be made at any time during the investigation, in deciding on such requests I must take into account the impact of the further investigations on the charged persons' right to expeditious proceedings and the need to ensure the efficient and effective progress of the investigations.[152] I also take into account the extent to which the CPL and ICP have failed to act with due diligence in making their requests at this stage of the proceedings.[153]

91. The earliest reference in the Case 004 investigation to forced marriage during the DK Regime was made in witness statements obtained by the Office of the Co-Prosecutors as early as November 2008.[154] The relevance of the issue of forced marriage, and any corollary or aggravating conduct, would therefore have been abundantly clear to the CPL and the ICP since that time.

92. Since the filing of the Third Introductory Submission on 20 November 2008, the OCIJ has obtained approximately 1,950 written records of interviews with witnesses and civil parties in Case 004. *Colorandi causa*, the Completion Plan published on the ECCC website, states that the Case 004 investigation is projected to close by the fourth quarter of 2016 for Ao An if his case were to be severed, and for the second quarter of 2017 for both charged persons if there were to be no severance.[155] The investigation is at an advanced stage, as all parties are aware.

93. Ao An and Yim Tith's right to expeditious proceedings became relevant from 24 February 2012 when they were first notified of their rights as suspects in the Case

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[150] Case File No. 004-D219/24, *Written Record of Interview of Preap Sokhoeurn*, 8 October 2014, A47.
[151] Case File No. 004-D219/24, *Written Record of Interview of Preap Sokhoeurn*, 8 October 2014, A49.
[152] *See supra* paras 34-36.
[153] Case File No. 002-D365/2/17, *Decision on Reconsideration of Co-Prosecutors' Appeal against the Co-Investigating Judges Order on Request to Place Additional Evidentiary Material on the Case File Which Assists in Proving the Charged Persons' Knowledge of the Crimes,* 20 September 2010, para. 53.
[154] *See for example* Case File No. 004-D1.3.11.19, *OCP Interview of Kao Cheng,* 15 August 2008.
[155] *Completion Plan*, Revision 8, 31 March 2016, para. 9, available < http://www.eccc.gov.kh/en/eccc-completion-plan-revision-8>. I hasten to add that the completion plans are budgetary planning tools and do not proscribe any timelines to which the CIJs or any other judicial panel in the ECCC are bound.

004 investigation.[156] The investigative actions requested by the CPL and ICP will require the re-interviewing of numerous Case 004 witnesses, and locating further witnesses, which will take up significant investigative resources and delay the proceedings considerably, infringing Ao An and Yim Tith's rights to expeditious proceedings.

94. Charged persons have the right to know the nature and cause of charges against them and it is the CIJs' task, among other things, to ensure as much as possible within the parameters of legitimate procedural development that an investigation does not too much attain the nature of a moving target.[157] Ao An and Yim Tith have faced allegations of forced marriage since 24 April 2014 with the filing of the Supplementary Submission. The requests made by the CPL and ICP seek to broaden the scope of crimes, nearly seven years after evidence of forced marriage emerged, and two years after forced marriage was first alleged. No good cause for this delay has been advanced by either the CPL or the ICP. This is an unacceptably late stage in the proceedings in which to confront a charged person with potential new charges.

95. I also note that this is the first investigative action request filed by the CPL in Case 004, and one of very few substantive investigative matters raised by the CPL in Case 004 at all. In the absence of any explanation as to the delay in making their requests, I consider there has been a failure by the CPL and ICP to exercise due diligence in their participation in the investigation under Internal Rule 55(10).

96. In light of the prejudice to Ao An and Yim Tith's fair trial rights, particularly their rights to expeditious proceedings and to know the nature and cause of the case against them, the undue delay that would be caused by conducting the requested investigative action at this stage of the proceedings would be a significant factor warranting the dismissal of both Requests in and of itself.

97. I should thus formally put in particular the CPL and the ICP on notice now that I will find it difficult to entertain any requests for the extension of the investigation's ambit by inclusion of new allegations of factual scenarios underlying potential new crimes, unless exceptionally good cause was shown. This was not such a case.

J. Facts alleged in the Third Introductory and Supplementary Submissions

98. While the Yim Tith Defence are correct in submitting that there is no explicit reference to forced pregnancy in the Third Introductory and Supplementary Submissions,[158] if I had concluded that further investigations were warranted on the evidence obtained to date, but that the facts alleged fell outside the scope of the Third Introductory and Supplementary Submissions, it would merely have been a matter of submitting a forwarding order to the ICP seeking clarification of the scope of the investigation. In any event, assuming that there was a DK Regime policy of increasing the population through the practice of forced marriages, then arguably forced pregnancy or forced impregnation could be viewed as a likely or

[156] Case File No. 004-D110, *Notification of Suspect's Rights [Rule 21(1)(D)*, 24 February 2012; Case File No. 004-D109, *Notification of Suspect's Rights [Rule 21(1)(D)*, 24 February 2012.
[157] Article 14(3)(a) of the ICCPR, incorporated into ECCC proceedings by Article 33*new* of the ECCC Law.
[158] Defence Response, paras 17, 20.

foreseeable consequence of that practice and therefore within the scope of the Supplementary Submission.

99. This decision is filed in English, with a Khmer translation to follow.

FOR THE FOREGOING REASONS, I

100. **DENY** both the CPL Request and the ICP Request.

Dated 13 June 2016, Phnom Penh

Judge Michael Bohlander

សហចៅក្រមស៊ើបអង្កេតអន្តរជាតិ

International Co-Investigating Judge
Co-juge d'instruction international