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

ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

អង្គបុរេជំនុំជម្រះ
Pre-Trial Chamber
Chambre Preliminaire

D344/1/6

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

Case File N° 004/07-09-2009-ECCC/OCIJ (PTC38)

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

Date: 25 July 2017

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(PUBLIC REDACTED)

CONSIDERATIONS ON [REDACTED] APPLICATION TO ANNUL THE INVESTIGATION INTO FORCED MARRIAGE IN SANGKAE DISTRICT (SECTOR 1)

Co-Prosecutors

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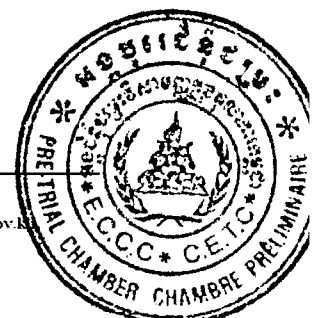
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THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (the “ECCC”) is seized of “██████████ Application to Annul the Investigation into Forced Marriage in Sangkae District (Sector 1)” (“Application”)¹ filed by the Co-Lawyers for ██████████ (respectively the “Co-Lawyers” and “Applicant”) on 21 February 2017.

I. INTRODUCTION

1. The Application was referred to the Pre-Trial Chamber by the International Co-Investigating Judge on 10 February 2017 (“Referral Decision”).²

II. PROCEDURAL HISTORY

2. On 7 September 2009, the International Co-Prosecutor (“ICP”) filed with the Office of the Co-Investigating Judges (“OCIJ”) the Third Introductory Submission, alleging the involvement of the Applicant in criminal acts and proposing to press charges against him.³ On 24 April 2014, the ICP filed a Supplementary Submission regarding forced marriage.⁴ On 5 November 2015, the International Co-Investigating Judge (“ICIJ”) issued a Forwarding Order,⁵ seeking clarification concerning the “intended geographical scope of the investigation into forced marriages in Sangkae District”⁶ and the “scope of investigation into forced marriage in Sector[s] 1 and 4”,⁷ to which the ICP responded on 20 November 2015.⁸ On 9 December 2015, ██████████ appeared before the ICIJ who charged him with, *inter alia*, the crime against humanity of forced marriage (“Charges”).⁹

¹ ██████████ Application to Annul the Investigation into Forced Marriage in Sangkae District (Sector 1), 21 February 2017, D344/1/2 (“Application”).

² Decision on ██████████ Application to Seize the Pre-Trial Chamber with a View to Annulment of the Investigation into Forced Marriage in Sangkae District (Sector 1), 10 February 2017, D344/1 (“Referral Decision”). *See also* Letter from the Greffier of the Office of the Co-Investigating Judges to the Case File Officer, “Forwarding Copy of Case File 004 to the Pre-Trial Chamber Pursuant to Case File 004-D344/1”, 14 February 2017, D344/1/1.

³ Case 004/07-09-2009-ECCC/OCIJ (“Case 004”), Co-Prosecutors’ Third Introductory Submission, 20 November 2008, D1 (“Introductory Submission”). *See also* Case 004, Acting International Co-Prosecutor’s Notice of Filing of the Third Introductory Submission, 7 September 2009, D1/1.

⁴ Case 004, Co-Prosecutors’ Supplementary Submission Regarding Forced Marriage and Sexual or Gender-Based Violence, 24 April 2014, D191 (“Second Supplementary Submission”).

⁵ Case 004, Forwarding Order, 5 November 2015, D272 (“Forwarding Order”).

⁶ Forwarding Order, Section ‘A’.

⁷ Forwarding Order, Section ‘B’.

⁸ Case 004, Response to Forwarding Order Dated 5 November 2015 and Supplementary Submission Regarding the Scope of Investigation into Forced Marriage in Sectors 1 and 4, 20 November 2015, D272/1 (“Final Supplementary Submission”).

⁹ Case 004, Written Record of Initial Appearance, 9 December 2015, D281 (“Record of Initial Appearance”).



3. On 3 February 2017, the Defence filed the Application before the OCIJ¹⁰ and, on 10 February 2017, the ICIJ issued the Referral Decision. On 15 February 2017, the Pre-Trial Chamber granted the Co-Lawyers ten days to file the Application before the Chamber.¹¹ On 21 February 2017, the Defence filed the Application and, on 6 March 2017, the ICP filed a Response (“Response”).¹² On 7 March 2017, the Defence submitted a request to file their Reply in English with the Khmer translation to follow.¹³ The Defence filed the Reply on 13 March 2017 (“Reply”).¹⁴

III. ADMISSIBILITY

4. The Co-Lawyers submitted the Application “pursuant to [Internal] Rule[s] 21 and 76”¹⁵ and contend that the alleged procedural defects infringe upon the Applicant’s rights to know the case against him, to legal certainty, and to adequate time and facilities to prepare his defence.¹⁶

5. Internal Rule 76(4) directs that the Pre-Trial Chamber may declare an application for annulment inadmissible where the application: i) does not set out sufficient reasons; ii) relates to an order that is open to appeal; or iii) is manifestly unfounded. Accordingly, the Pre-Trial Chamber shall ascertain whether the application for annulment: (i) specified the parts of the proceedings which are prejudicial to the rights and interests of the appellant;¹⁷ (ii) clearly articulated the prejudice;¹⁸ and (iii) where necessary, adduced sufficient evidence to sustain the allegations.¹⁹

¹⁰ [REDACTED] Application to Seize the Pre-Trial Chamber with a View to Annulment of the Investigation into Forced Marriage in Sangkae District (Sector 1), 3 February 2017, D344.

¹¹ Case File Officer Notification, Pre-Trial Chamber’s Instructions to the Parties by Email in Case File No. 004/07-09-2009-ECCC/OCIJ (PTC38), 15 February 2017.

¹² International Co-Prosecutor’s Response to [REDACTED] Application to Annul the Investigation into Forced Marriage in Sangkae District, 6 March 2017, D344/1/3 (“Response”).

¹³ Request to File [REDACTED] Reply to the International Co-Prosecutor’s Response to [REDACTED] Application to Annul the Investigation into Forced Marriage in Sangkae District (Sector 1) in One Language, 7 March 2017, D344/1/4.

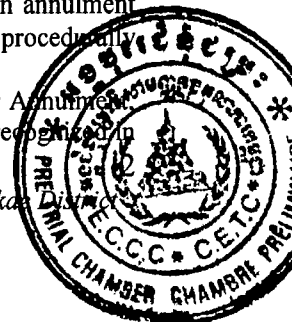
¹⁴ [REDACTED] Reply to the International Co-Prosecutor’s Response to [REDACTED] Application to Annul the Investigation into Forced Marriage in Sangkae District (Sector 1), 13 March 2017, D344/1/5 (“Reply”).

¹⁵ Application, introductory paragraph.

¹⁶ Application, paras 53-56.

¹⁷ See Case 002/19-09-2007-ECCC/OCIJ (“Case 002”) (PTC41), Decision on IENG Thirith’s Appeal against the Co-Investigating Judges’ Order Rejecting the Request to Seize the Pre-trial Chamber with a View to Annulment of all Investigations (D263/1), 25 June 2010, D263/2/6 (“IENG Thirith Decision”), para. 24 (“An annulment application therefore needs to be [...] specific as to which investigative or judicial actions are procedurally defective”).

¹⁸ See Case 002 (PTC06), Decision on NUON Chea’s Appeal against Order Refusing Request for Annulment of all Investigations (D55/1/8 (“NUON Chea Decision”), paras 40 (“a proven violation of a right [...], recognized in



6. The Pre-Trial Chamber is satisfied that the conditions of Internal Rule 76(4) are met. The contested investigative actions, the impugned Forwarding Order and Supplementary Submission and the charges²⁰ do not concern any order that is open to appeal. Nothing in the application suggests that it is evidently unfounded in fact or in law such as to deprive it of any prospect of success. The Chamber is of the further view that the reasoning set forth in the application is sufficient since it contains logically consistent submissions, underpinned by legal reasoning, whose grounds are set forth, or by factual material pinpointed in the case file. The Pre-Trial Chamber therefore finds the application admissible.

IV. APPLICABLE LAW

7. Annulment is foreseen under Internal Rule 48, which provides that “[i]nvestigative or judicial action may be annulled for procedural defect only where the defect infringes the rights of the party making the application”.

8. Accordingly, examination of an application for annulment requires: (1) consideration, in the first place, of procedural defect; and (2) subsequently, where such defect is established, the existence of prejudice to the applicant.²¹ A procedural irregularity which is not prejudicial to an applicant does not result in annulment.²²

V. CONSIDERATION OF THE MERITS

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

10. Therefore, while the decision of the Pre-Trial Chamber in respect of the admissibility of the Application is expressed in the preceding paragraphs, the separate opinions of the

the ICCPR, would qualify as a procedural defect [...]. In such cases, the investigative or judicial action may be annulled.”), 42 (“[W]here a procedural defect would not be prescribed void in the text of the relevant provision, and where there has been no violation of a right recognized in the ICCPR, the party making the application will have to demonstrate that its interests were harmed by the procedural defect.”).

¹⁹ See IENG Thirith Decision, para. 32.

²⁰ See Case 003/07-09-2009-ECCC/OCIJ (“Case 003”) (PTC29), Considerations on [REDACTED] Appeal against the International Co-Investigating Judge’s Decision to Charge [REDACTED] with Grave Breaches of the Geneva Conventions and National Crimes and to Apply JCE and Command Responsibility, 27 April 2016, D174/1/4.

²¹ Case 003 (PTC20), Decision on [REDACTED] Appeal against Co-Investigating Judge Harmon’s Decision on [REDACTED] Applications to Seize the Pre-Trial Chamber with Two Applications for Annulment of Investigative Action, 23 December 2015, D134/1/10 (“[REDACTED] Decision on Two Applications”), para. 34, referring to NUON Chea Decision, para. 34.

²² [REDACTED] Decision on Two Applications, para. 26 referring to IENG Thirith Decision, para. 21.



various Judges of the Pre-Trial Chamber in respect of the merits of the Application are appended, as required by Internal Rule 77(14).

DISPOSITION

FOR THESE REASONS, THE PRE-TRIAL CHAMBER UNANIMOUSLY HEREBY:


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

In accordance with Internal Rule 77(13), the present decision is not subject to appeal. The Pre-Trial Chamber having not been in a position to attain the requisite majority to reach a decision on the merits, the investigative action whose annulment was sought shall stand.

Phnom Penh, 25 July 2017

President

Pre-Trial Chamber


PRAK Kimsan


NEY Thol Kang Jin BAIK HUOT Vuthy

Olivier BEAUVALLET

Judges PRAK Kimsan, NEY Thol and HUOT Vuthy append their opinion with regard to the Merits of the Application.

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

OPINIONS OF JUDGES PRAK KIMSAN, NEY THOL AND HUOT VUTHY

11. The National Judges of the Pre-Trial Chamber (“PTC”) are presenting their opinions concerning ██████████ application to annul the investigation into forced marriage in SANGKAE district (Sector 1).

12. The National Judges of the PTC are of the view that the ECCC was established in accordance with the Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea (“Agreement”), and the Law on the Establishment of the ECCC (“ECCC Law”), and applies its Internal Rules.

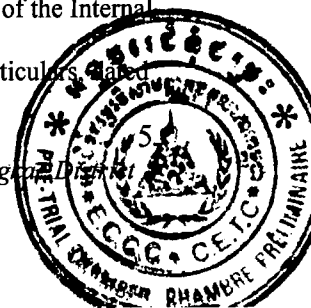
13. The ECCC is a special court that applies the procedures of prosecution and judicial investigation different from those of Cambodia’s national courts. Prosecution and judicial investigation under the national courts merely concern facts, not persons.²³ On the contrary, at the ECCC, prosecution and judicial investigation can proceed only where the two conditions - first, facts “the crimes and serious violations of Cambodian laws related to crimes, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979”, and second, persons “senior leaders of Democratic Kampuchea and those who were most responsible for the crimes” - are met.²⁴

14. The National and International Co-Prosecutors disagreed over the issuance of the Third Introductory Submission in Case 004. While the International Co-Prosecutor requested to submit the Third Introductory Submission, the National Co-Prosecutor rejected it on the ground that “the suspects are not senior leaders and/or those who were most responsible.”²⁵

²³ Articles 44 and 125 of the Cambodian Code of Criminal Procedure.

²⁴ Article 1 of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea; Article 1 of the Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea; and Rule 53 of the Internal Rules.

²⁵ National Co-Prosecutor’s Response to the Pre-Trial Chamber’s Direction to Provide Further Particulars, dated 24 April 2009, and National Co-Prosecutor’s Additional Observation, 22 May 2009, para. 86(a).

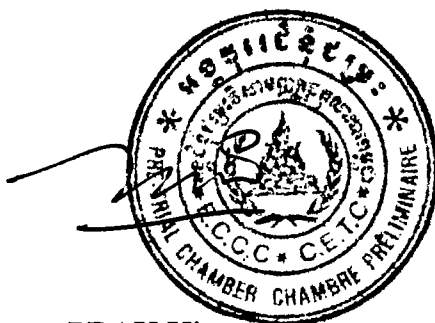


The National and International Judges of the PTC also disagreed over this matter. The National Judges of the PTC supported the National Co-Prosecutor's argument.²⁶

15. Therefore, even though the Co-Lawyers' arguments are incorrect, the National Judges of the Pre-Trial Chamber notice that the National and International Co-Prosecutors disagree with this Introductory Submission in Case 004 about the National and International Co-Prosecutors' request for sending the Third Introductory Submission. The National Co-Prosecutor dismisses the Third Introductory Submission based on all the suspects are not senior leaders and also the National and International Judges of the Pre-trial Chamber disagree on these matters. The National Judges of the Pre-trial Chamber agree with the National Co-Prosecutor's argument.

16. The National Judges of the PTC have previously decided that it is not necessary for the International Co-Investigating Judge to take any investigative action or any supplementary investigative action in Case 004.²⁷ Therefore, the National Judges find it unnecessary to consider any request or appeal whose subject is the same.

17. The National Judges of the Pre-Trial Chamber consider that no matter if the impugned investigative proceedings are procedurally correct or not, based on our consideration in the paragraph 15 above, all the impugned investigation proceedings, about forced marriage in SANGKAE district (Sector 1) shall be considered as invalid.



PRAK Kimsan

NEY Thol

HUOT Vuthy

Phnom Penh, 25 July 2017

²⁶ Opinions of Judges PRAK Kim, NEY Thol and HUOT Vuthy, 17 August 2009, "██████ is not a senior leader of Democratic Kampuchea or among those who were most responsible for the crimes."

²⁷ Considerations on Appeal against Decision on ████████ Fifth Request for Investigative Action, 16 June 2016, D260/1/1/3, para. 30.

**OPINION ON MERIT OF THE APPLICATION BY JUDGES
BEAUVALLET AND BAIK (THE “UNDERSIGNED JUDGES”)**

18. The Co-Lawyers ask the Pre-Trial Chamber to annul, “insofar as they relate to the allegations of forced marriage in Sangkae District (Sector 1)” the: 1. Investigative Actions set out in Annex A; 2. Forwarding Order; 3. Fourth Supplementary Submission; 4. Investigative Actions set out in Annex B; and 5. Order to charge ██████████ with the crime against humanity of other inhumane acts (forced marriage) at Crime Sites 27 and 28.²⁸

19. At the outset, the Undersigned Judges agree with the national Colleagues’ consideration that “the Co-Lawyers’ arguments are incorrect.”²⁹ The Undersigned Judges’ reasons, leading to such conclusion, are set out in the paragraphs that follow.

A. The Investigative Actions set out in Annex A

Submissions

20. The Co-Lawyers submit that the investigative actions, conducted by the ICIJ between the dates when the Second and Fourth Supplementary Submissions were filed, are procedurally defective because the locations,³⁰ where such investigations took place, “were not within the geographical scope of the investigation, as set out in the Second Supplementary Submission.”³¹ In the Co-Lawyers’ view, the investigative actions in question “were [...] ‘new facts’, since they concerned allegations of forced marriage at new locations not contained within the ICP’s Second Supplementary Submissions, which covered only Sangkae District of Sector 1 of the DK period and the northwest half of today’s Sangkae District, with only Reang Kesei Pagoda alleged as a specific site.”³²

21. The ICP responds that the Second Supplementary Submission “seised the CIJs with an investigation into forced marriages occurring in the *northeast* of today’s Sangkae District”³³ and that the “reference to the northwest [...] of the current Sangkae District in paragraph 6 of the Second Supplementary Submission was a typographical error”, which is

²⁸ Application, p. 15.

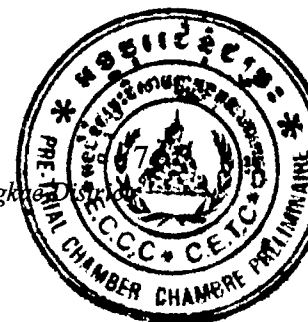
²⁹ See *supra* para. 15.

³⁰ See Application, para. 33 and Annex A.

³¹ Application, para. 34. See also Application, 26-41.

³² Application, paras 27, 35 referring to the Second Supplementary Submission, paras 4, 6.

³³ Response, para. 15.



clear if the paragraph 6 is read in good faith and in the context of the remainder of the Submission, including its footnotes and attached documents.³⁴ In the ICP's view, the Co-Lawyers also overstate the "specificity with which the Co-Prosecutors are required to summarise facts in their [...] submissions".³⁵

22. The Co-Lawyers submit, in reply, that the ICP misconstrues the scope of the judicial investigation.³⁶ In the Co-Lawyers' view, "[t]he facts under investigation must, irrespective of whether they extend into the footnotes, be *allegations*" and "[a]bsent these limitations on the CIJs investigation, certainty in the investigation would be impossible and [it] would last an absurdly long time."³⁷ According to the Co-Lawyers, ICP's proposition, that the scope of the judicial investigation includes not just principal facts but also surrounding circumstances, is a misinterpretation of the opinions of the PTC Judges and aims at "includ[ing] geographical areas that [were] not referred to in the Second Supplementary Submission" within its scope.³⁸ Accordingly, the Co-Lawyers submit, the CIJs duty to investigate must be interpreted with restraint.³⁹ The Co-Lawyers call on the Pre-Trial Chamber to annul defects, based on Rule 48, and to not "accept the ICP's attempts to retrospectively re-write the Second Supplementary Submission, claiming that by 'northwest' the ICP actually meant 'northeast'."⁴⁰ In the Co-Lawyers' view, the wording of the Second Supplementary Submission "is to be read literally",⁴¹ and "[i]t is not for the CIJs or the Defence to guess at the scope of the investigation set by the ICP."⁴²

Discussion

23. The Pre-Trial Chamber has stated that the scope of the Co-Investigating Judges' judicial investigation is defined by Internal Rules 53(1) and (2), and 55(1), (2) and (3).⁴³

³⁴ Response, paras 15-19.

³⁵ Response, paras 20-22.

³⁶ See Reply, paras 6-14.

³⁷ Reply, para. 11. See also Reply, para. 23.

³⁸ Reply, paras 12-14.

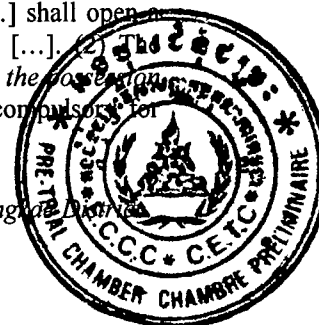
³⁹ Reply, para. 14.

⁴⁰ Reply, para. 19. See also Reply, paras 27-28.

⁴¹ Reply, para. 19.

⁴² Reply, para. 21 and footnote 32 referring to the Response, para. 16.

⁴³ NUON Chea Decision, para. 16; Case 001/18-07-2007-ECCC/OCIJ (PTC02), Decision on Appeal against Closing Order Indicting KAING Guek Eav alias "Duch", 5 December 2008, D99/3/42 ("Duch Decision"), para. 34. See also Internal Rules 53(1)-(2) (providing in relevant part: "(1) [T]he Co-Prosecutors [...] shall open a judicial investigation by sending an Introductory Submission to the Co-investigating Judges [...]. The Introductory submission shall be accompanied by the case file and any other material of evidentiary value in the possession of the Co-Prosecutors") (emphasis added); Internal Rule 55(1) ("A judicial investigation is compulsory for crimes within the jurisdiction of the ECCC.")



Internal Rule 55(2) states: “The Co-Investigating Judges shall only investigate the facts set out in an Introductory Submission or a Supplementary Submission.”⁴⁴ Internal Rule 55(3) provides:⁴⁵

“If, during an investigation, new facts come to the knowledge of the Co-Investigating Judges, they shall inform the Co-Prosecutors, unless the new facts are limited to aggravating circumstances relating to an existing submission. Where such new facts have been referred to the Co-Prosecutors, the Co-Investigating Judges shall not investigate them unless they receive a Supplementary Submission.”

24. The Pre-Trial Chamber has previously considered that “the Co-Investigating Judges have a duty to investigate all the facts alleged in the Introductory Submission or any Supplementary Submission”,⁴⁶ and that “the Co-Investigating Judges are also seized of the *circumstances surrounding the acts mentioned* in the Introductory or a Supplementary Submission”.⁴⁷ The Pre-Trial Chamber has defined such surrounding circumstances as “[t]he circumstances in which *the alleged crime was committed and that contribute to the determination of its legal characterisation*”.⁴⁸ The Pre-Trial Chamber has further stated that those circumstances are “not considered as being new facts and are thus part of the investigation.”⁴⁹

25. In the instant case, the Undersigned Judges observe that, for the acts described therein, the Second Supplementary Submission suggests, *inter alia*, the following legal characterizations: “the facts described above constitute crimes within the jurisdiction of the court, including but not limited to: [...] Other Inhumane Acts, which constitute CRIMES AGAINST HUMANITY [...]. The Co-Prosecutors have reason to believe that [REDACTED] [...] committed [...] the specific criminal acts described in this Supplementary Submission [...]. These acts were part of a common criminal plan or joint criminal enterprise, as described in paragraph 21 of the Supplementary Submission dated 18 July 2011 and paragraphs 16 to 17 of the [Third Introductory Submission].”⁵⁰ According to paragraph 17 of the Third Introductory Submission, “[t]he object of this JCE was to purge the Northwest Zone and

⁴⁴ See also Cambodian Code of Criminal Procedure, art. 124(3) (“An investigating judge may not conduct any investigative acts in the absence of an introductory submission.”).

⁴⁵ See also Cambodian Code of Criminal Procedure, art. 125; French Code of Criminal Procedure, art. 80 (“[TRANSLATION] The investigating judge may only investigate by virtue of a submission made by the Public Prosecutor.”).

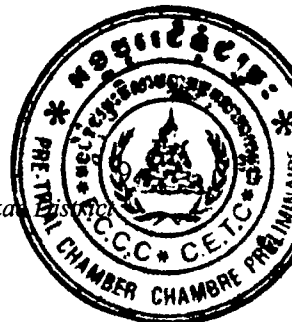
⁴⁶ Duch Decision, para. 35.

⁴⁷ *Ibid* (emphasis added).

⁴⁸ *Ibid* (emphasis added).

⁴⁹ *Ibid*.

⁵⁰ Second Supplementary Submission, paras 13-14.



execute all perceived enemies of the DK regime.”⁵¹ The Undersigned Judges lastly note that the Second Supplementary Submission was “intended to supplement and clarify the factual matters to be investigated by the Co Investigating Judges [...] in Case 004”⁵² and “present[ed] evidence of forced marriage and sexual or gender-based violence in districts under the control or authority of the Case 004 Suspects, based on evidence obtained since the filing of the Third Introductory Submission”.⁵³

26. The Co-Lawyers seek to impugn the investigative actions conducted by the ICIJ after the filing of the Second Supplementary Submission because, in their view, the locations where such investigations took place were not within the “geographical” scope of the investigation, as set out in the Second Supplementary Submission. The locations in question are listed under the Annex A, attached to the Application.

27. The Undersigned Judges acknowledge that it is not disputed that Kampong Preang, Kampong Preah and Reang Kesei are located in Sangkae District. Rather, the Defence allegations are based on their understanding that the ICP’s Second Supplementary Submission, specifically its paragraphs 4 and 6, covered only Sangkae District of Sector 1 of the DK period and the northwest half of today’s Sangkae District, with only Reang Kesei Pagoda alleged as a specific site.

28. The paragraphs 4 to 6 of the Second Supplementary Submission read as follows:

“Sangkae District (Sector 1)

4. Numerous sources complain of forced marriages conducted in Sangkae District, Battambang province in 1978. Marriages were organized and conducted by local CPK cadres such as unit or cooperative chiefs, including cadres from the Southwest Zone. Large mass marriages, in which as many as 80 couples were forced to marry at the same time, were conducted at the Reang Kesei pagoda. In a December 1978 marriage of 80 couples at this site, a participant was forced to marry at gunpoint. During a marriage of 75 couples at the same location in 1978, a man who refused to marry was executed.

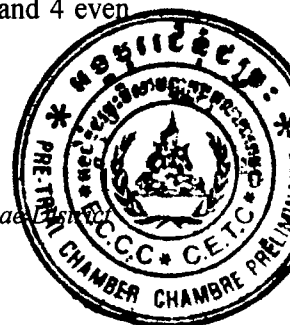
5. Sangkae District (which during the DK regime included the eastern part of what is now Banan District) was part of Sector 1 of the Northwest Zone. ██████████ became the Secretary of Sector 1 in 1978. ██████████ primary location during that period was Sangkae District, as the Sector 1 office was then located in that district, and ██████████ at times stayed at the Kang Hat dam and chaired meetings held at the Sangkae District office.

6. Moreover, the evidence from OCIJ’s investigation to date establishes that ██████████ area of responsibility upon his arrival in the Northwest Zone also included Sectors 3 and 4 even

⁵¹ Introductory Submission, para. 17.

⁵² Second Supplementary Submission, para. 1.

⁵³ *Ibid.*



during the period preceding his appointment as Zone Secretary. [REDACTED] thus had authority relating to any forced marriages or other crimes that occurred during that period in the northwest half of current Sangkae District (which during the DK regime was part of Sector 4).”

29. The Undersigned Judges note that, in the Forwarding Order, the ICIJ has also sought clarification of these paragraphs of the Second Supplementary Submission concerning “the intended geographical scope of the investigation into forced marriages in Sangkae District.”⁵⁴ The ICIJ firstly noted that Sangkae District was administered by both Sectors 1 and 4 during the DK regime.⁵⁵ Secondly, the ICIJ stated that Reang Kesei Pagoda was located in Reang Kesei commune in Sangkae District and was administered by Sector 4.⁵⁶ He thirdly indicated that “[t]he area of Sangkae District encompassed within the current Kampong Preang commune [...] was also administered by Sector 4”.⁵⁷ Lastly, the ICIJ pointed to his finding that Reang Kesei Pagoda and the area encompassed within the current Kampong Preang commune “are not, however, located within the ‘northwest half of current Sangkae District’.”⁵⁸ In other words, although it was clear to the ICIJ that both Reang Kesei Pagoda and the current Kampong Preang commune were located in the Sangkae District administered by Sector 4, the coordinates of these sites did not point to the ‘northwest half’ of the ‘current’ Sangkae District, as alleged in the Second Supplementary Submission. Therefore, the ICIJ was looking; first, for confirmation whether Reang Kesei Pagoda and the area encompassed within the current Kampong Preang commune “fall within the scope of the aforementioned judicial investigation into forced marriage”.⁵⁹ Second, the ICIJ sought clarification of “[t]he exact locations during the DK regime that are intended to be encompassed by ‘the northwest half of current Sangkae District’ in paragraph 6 of the Second Supplementary Submission”.⁶⁰

30. In their Application, the Defence put forward two arguments. First, they sustain that the scope of the investigation includes only the part of Sangkae District of Sector 1 of the DK period.⁶¹ Second, they argue that the scope of the investigation includes the ‘northwest half of today’s Sangkae District.’⁶² The Undersigned Judges shall consider these arguments in turn.

⁵⁴ Forwarding Order, Section ‘A’.

⁵⁵ Forwarding Order, para. 2(a).

⁵⁶ Forwarding Order, para. 2(b).

⁵⁷ Forwarding Order, para. 2(c).

⁵⁸ Forwarding Order, para. 2(d).

⁵⁹ Forwarding Order, para. 3(a).

⁶⁰ Forwarding Order, para. 3(b).

⁶¹ Application, paras 27(a), 35.

⁶² Application, paras 27(b), 35.



i. The scope of investigation as regards Sangkae District of the DK period

31. The Undersigned Judges observe that the criminal allegations, set out at paragraphs 4 to 6 of the Second Supplementary Submission, are placed under the title “Sangkae District (Sector 1).”

32. The Undersigned Judges are however not convinced by the argument that the scope of the investigation was limited only to the part of Sangkae District of Sector 1. To start with, it is noted from the relevant part of the Second Supplementary Submission that the ICP seized the OCIJ because “[n]umerous sources complain[ed] of forced marriages conducted in Sangkae District, Battambang province in 1978.”⁶³ The Undersigned Judges find that, the ICP’s explicit intention was to seize the OCIJ with allegations of forced marriages in the whole district. This is clear by the general mention of Sangkae as a district “in the Battambang province.” ICP’s allegations, hence, concern what may have occurred in the Sangkae District of the DK period. This reading of paragraph 4 of the Second Supplementary Submission is in concert with ICP’s explicit statement at the introductory paragraph of the same Submission that it “presents evidence of forced marriage and sexual or gender-based violence in districts under the control or authority of the Case 004 Suspects”.⁶⁴

33. It appears as though the ICP has seized the OCIJ with allegations of forced marriages in Reang Kesei Pagoda specifically.⁶⁵ In this regard, the Undersigned Judges acknowledge that it is not disputed that this site was located in the Sangkae District administered by Sector 4.⁶⁶ The Undersigned Judges consider that the fact that Reang Kesei Pagoda is singled out at paragraph 4 of the Second Supplementary Submission is not an indication that the ICP intended to limit the geographical scope of the investigation to that particular site. Rather, the specific mention of Reang Kesei Pagoda, in the third sentence of paragraph 4 of the Second Supplementary Submission, consist in the ICP providing an example to illustrate his general allegations, already made at the introductory sentence of the same paragraph which, in turn, are supported by ‘*numerous complains*’. It is noted that the witness statements used by the ICP to support the allegations concerning forced marriages at the Reang Kesei Pagoda site, are initially enumerated amongst the larger number of statements supporting the general

⁶³ Second Supplementary Submission, para. 4.

⁶⁴ Second Supplementary Submission, para. 1.

⁶⁵ Second Supplementary Submission, para. 4. *See also* Application, para. 35.

⁶⁶ Application, para. 33(k) (“Reang Kesei Village in Reang Kesei commune of Sector 4.”).



allegation that “[n]umerous sources complain[ed] of forced marriages conducted in Sangkae District, Battambang Province in 1978.”⁶⁷

34. The Undersigned Judges consider that, the fact, also pointed out by the ICIJ,⁶⁸ that “Sangkae District was administered by both Sectors 1 and 4 during the DK regime,” does not mean that the geographical scope of the investigation is limited any further than the borders of the district, but rather is an elucidation of the circumstances in which the alleged forced marriages may have taken place in the Sangkae District of the DK time.⁶⁹

35. It is indeed noted that the ICP seized the ICIJ with investigations of forced marriages in “Sangkae District (which during the DK regime included the eastern part of what is now Banan District)”.⁷⁰ Clearly, the ICP had no intention of splitting the geographical scope of the investigation in between two districts. Rather the ICP kept explaining his allegations about instances of forced marriages in the Sangkae District “during the DK time.” Accordingly, there is no reason to create any distinction in Sangkae District not foreseen by the ICP at the time of his filing of the Second Supplementary Submission.

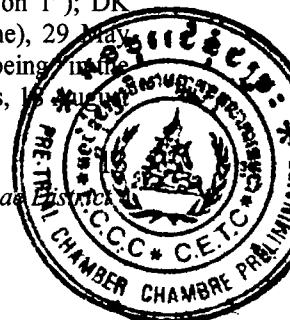
36. The Undersigned Judges find that, at that stage, when the ICP filed the Second Supplementary Submission the title, of the criminal allegations summarized in paragraphs 4 to 6, had to be read together with the contents of all these paragraphs which actually describe the scope of the investigations he seized the OCIJ with. The scope of the investigations also

⁶⁷ Second Supplementary Submission, para. 4, first sentence. *See also* Second Supplementary Submission, footnotes 11, 14. *Note that* documents D191.1.7, D191.1.81 and D191.1.87 mentioned at footnote 14 of the Second Supplementary Submission are actually extracted from the list of documents already enumerated at preceding footnote 11 of the Second Supplementary Submission.

⁶⁸ Forwarding Order, para. 2(a).

⁶⁹ *See* Second Supplementary Submission, paras 1 (“districts under the control or authority of the Case 004 Suspects”), 6 (“[redacted] area of responsibility upon his arrival in the Northwest Zone also included Sectors 3 and 4”). *See also* Introductory Submission, paras 12-15 (under “CPK Zone, Sector and District Structure” of the “Summary of Facts” section) and footnotes 13 (*referring to* DK Government Map of Democratic Kampuchea by Ministry of Education dated 1976, D1.3.27.1), 16-17 (*referring to* Written Record of Analysis by Craig Etcheson, 18 July 2007, D1.3.15.1, paras 8-10 (“Zones contained from as few as two Sectors (the new North Zone) to as many as seven Sectors (the Northwest Zone)” and “Sectors were subdivided into Districts”) (emphasis added)).

⁷⁰ Second Supplementary Submission, para. 5 and footnote 17 *referring to* S-21 Notebook (DC-Cam Khmer Rouge Black Journal), 17 April 1975, D6.1.963, p. 15 (showing that Sector 1 covered the Battambang District, Samlot District, Sangke District and Koas Krolor District); [redacted] Interview (Excerpt of Interview 14, [redacted]), 19 November 1980, D1.3.11.63 (referencing the “Sangkae district of Northwest Zone Sector 1”); DK Report from Sector 1 (Report of Sector 1 re Enemy Situation and the People’s Standard of Living), 28 May 1977, D1.3.10.2, ERN (En) 00143567 (mentioning Bay Dam Roam in a report regarding “Region 1”); DK Report from M-560 (DK-Government Report by Mo-560 on the Situation in the Northwest Zone), 29 May 1977, D1.3.27.3, ERN (En) 00183010 (describing the administrative office of Sangkae District as being in the vicinity” of Bay Dam Roam). *See also* Annex 1: Map, D272/1.1; Cambodian Route Network Maps, 1999, D347/2.1.44.



concerned “any forced marriages [...] that occurred during that period in the northwest half of current Sangkae District (which during the DK regime was part of Sector 4).”⁷¹

ii. The scope of investigation as regards the ‘northwest half’ of today’s Sangkae District

1. The intended scope of investigation

37. The Defence submits that, in addition to the Sangkae District of the DK period, only the northwest half of today’s Sangkae District was included in the geographical scope of the investigation, as set out by the ICP in the Second Supplementary Submission.⁷² In making this argument, the Defence refers to the last sentence of paragraph 6 of the Second Supplementary Submission which reads: “██████████ thus had authority relating to any forced marriages [...] that occurred during that period in the northwest half of current Sangkae District (which during the DK regime was part of Sector 4).”

38. The Undersigned Judges consider that the phrase “current Sangkae District”, at paragraph 6 of the Second Supplementary Submission, has to be read within the context of the whole sentence it appertains, where the ICP unambiguously and explicitly continues “(which during the DK time was part of Sector 4).”⁷³ Clearly the phrase “today’s Sangkae District” is mentioned in function of explaining ICP’s suspicions which only concern what may have happened in Sangkae District “during the DK time”. It is also noted that the sentence in question comes right after ICP’s preceding statements which explain that he had reason to believe that aside from Sector 1,⁷⁴ ██████████ areas of responsibility also included Sectors 3 and 4.⁷⁵ All these sentences read together, explain the circumstances under which the alleged forced marriages in the Sangkae District of the DK time may have happened, which is allegedly “under the control of Case 004 Suspects,”⁷⁶ and obviously do not aim at limiting the geographical scope of the investigation. Indeed, at the time of the filing of the Second Supplementary Submission, existent witnesses’ statements had already raised ICP’s

⁷¹ Second Supplementary Submission, para. 6, last sentence “Sector 4” (emphasis added).

⁷² Application, para. 27(b) referring to the Second Supplementary Submission, para. 6.

⁷³ Second Supplementary Submission, para. 6 (“northwest half of current Sangkae District (which during the DK regime was part of Sector 4).”). See also Second Supplementary Submission, para. 1.

⁷⁴ Second Supplementary Submission, para. 5 and footnote 18.

⁷⁵ Second Supplementary Submission, para. 6 and footnote 21.

⁷⁶ Second Supplementary Submission, para. 1.



suspicions that, apart from Sector 1, the District may have also been administered by other Sectors.⁷⁷

39. It is clear to the Undersigned Judges that when he filed the Second Supplementary Submission, the ICP: i) explicitly seized the OCIJ with investigations into actions of forced marriages in the “Sangkae District, Battambang province in 1978”;⁷⁸ and ii) as far as the circumstances in which those actions may have happened, on the basis of available evidence, the ICP already had reason to believe that the Sangkae District was not only administered by Sector 1, but also by other Sectors.⁷⁹ After the filing of the Second Supplementary Submission, it rested with the OCIJ to collect evidence for the purpose of ascertaining the truth about ICP’s allegations. As long as judicial investigations are carried out in areas within the boundaries of the Sangkae District of Battambang province in 1978, they are within the geographical scope of the investigation.

2. *The typographical mistake in the Second Supplementary Submission*

40. The Undersigned Judges note that the ICP did confirm the existence of typographical error at paragraph 6 of the Second Supplementary Submission.⁸⁰ Manifest typographical mistake in the text of the Second Supplementary Submission having been established, the Undersigned Judges shall now consider what effect it may have on the regularity of OCIJ’s investigative actions post the date of the filing of the Second Supplementary Submission and those leading to the Forwarding Order. In other words, the Chamber shall examine whether the typographical mistake in question lead the OCIJ to carry out investigative actions into facts that may fall out with the scope of investigations.

41. The Undersigned Judges first observe that, notwithstanding the ICIJ’s implicit observation of the typographical mistake,⁸¹ the investigative actions leading to the filing of the Forwarding Order were carried out in the areas of Sangkae District administered by either

⁷⁷ Second Supplementary Submission, para. 6 and footnote 22 referring to ‘[REDACTED] OCIJ Statement’ (Written Record of Witness Interview of [REDACTED]), 10 September 2013, D118/102, p. 7 (A27) (indicating that Sector 4 was believed to be located “inside Aek Phnum District, half of Sangkae District and half of Moung District. It covered the area north of National Road 5 and Battambang provincial town to the Tonle Sap Lake.”).

⁷⁸ Second Supplementary Submission, para. 4, first sentence.

⁷⁹ Second Supplementary Submission, paras 5-6 and footnotes 17, 22.

⁸⁰ Fourth Supplementary Submission, para. 5.

⁸¹ Forwarding Order, para. 2(d) (“Reang Kesei Pagoda and the area encompassed within the current Kompong Preang commune are not, however, located within the ‘northwest half of current Sangkae District’.”).



Sector 1 or Sector 4.⁸² Hence, they fall within the geographical scope of the investigation, as set out at paragraphs 4-6 of the Second Supplementary Submission.

42. The Undersigned Judges second turn to each impugned investigative action, set out in Annex A of the Application. The Undersigned Judges find that the Defence does not contend that the investigative actions listed under **Entries 1-5, 10 – 15, 17 – 22 and 24 – 35** have been conducted in areas found within the Sangkae District.⁸³ As regards the investigative actions listed under **Entries 6 – 9**, which refer to instances of forced marriages in Kampong Kol Commune and at the sugar factory therein,⁸⁴ the Undersigned Judges are satisfied by the details provided in ICP in his Response to the Application.⁸⁵ It is also noted that the investigative action listed under **Entry 16** does refer to “Krahat Village, Krahat Commune, Sangkae District”.⁸⁶ Therefore, the Undersigned Judges find that all these investigative actions refer to sites found within the boundaries of Sangkae District of the DK time, hence, they fall within the geographical scope of the investigation, as set out at paragraphs 4-6 of the Second Supplementary Submission.

43. With regards to the investigative action listed under **Entry 23**,⁸⁷ of Annex A of the Application, the Undersigned Judges observe that the civil party applicant [REDACTED] exposes in what conditions she has been forced to marry. After having moved between different locations, she has been working in ‘Aus Tuk’ assigned to transplant rice at Worksite 6, in September 1978.⁸⁸ It is only after she has been married that she was assigned to

⁸² Forwarding Order, paras 2(a)-(c).

⁸³ See D118/271, D118/298, D219/25, D219/42, D219/137, D219/167, D219/207, D219/238, D219/261, D219/259, D219/299, D219/300, D219/301, D219/302, D219/304, D219/303, D219/307, D219/312, D219/314, D219/356, D219/371, D219/393, D219/420, D219/424, D219/446, D219/528.

⁸⁴ Written Record of Witness Interview of [REDACTED], 23 November 2014, D219/88, pp 2 (indicating the place of birth as Saing Reang Village in Banan District), 3 (A2) (“Kampong Kol Sugar Factory”), 8 (A25) (“marriages occurred at that time in my village and at the factory.”). See also Written Record of Civil Party Interview of [REDACTED], 25 November 2014, D219/89, pp 9 (“Q: In which village was the factory located? A39: I did not know. I only knew that I lived in Battambang.”), 23-24 (A151-A156) (referring to events before 1977 and to Northwest Zone); Written Record of Investigation Action, 10 December 2014, D219/118, p. 2 (“23 Nov. 2014 [...] Banan district [...] Kampong Kul sugar factory [...] forced marriage.”).

⁸⁵ See Response, footnote 34 (“Although [...] *Kampong Kol Sugar Factory* [was] not expressly referred to in paras 4 to 6 of the Second Supplementary Submission, they were located in Sangkae District as it was known during the DK regime. [REDACTED] acknowledges that the area known as Sangkae District during the DK period falls within the CIJs’ seisin as set out in the Second Supplementary Submission (see D344/1/2 Application, para. 27). [...] For the location of Kampong Kol Sugar Factory, see: D191 Second Supplementary Submission, para. 8; D219/274 OCIJ Site Identification Report for Kampong Kul Sugar Factory, 24 April 2015, EN 01088905 [“located in Sangkae district during the DK regime”]; D118/271 [REDACTED] Written Record of Interview, 7 July 2014, A61 [“This refinery was really located in Sangkae District”].”) (emphasis added).

⁸⁶ See Written Record of Civil Party Interview of [REDACTED], 9 April 2015, D219/268, pp 3-4 (A10), 9 (A11).

⁸⁷ Written Record of Witness Interview of [REDACTED], 7 May 2015, D219/305 (“[REDACTED] Interview”).

⁸⁸ [REDACTED] Interview, p. 3 (A6). See also [REDACTED] Interview, pp 4 (A12-A13), 5 (A17).



transplant rice in Areak Bak Dai Village near Kauk Paun Village.⁸⁹ Coming to the exact location where the wedding was celebrated, the civil party applicant [REDACTED] has made it clear that “[i]t was held at Worksite 6 in Aus Touk.”⁹⁰ Further the civil party applicant stated that “[a]fter that we just went back home. My house was made from hay. My husband moved to live with me in that house.”⁹¹ Aus Touk is included in Sangkae District.⁹²

44. The application to annul the Investigative actions set out in Annex A would consequently be denied by the Undersigned Judges.

B. The Forwarding Order

Submissions

45. The Co-Lawyers submit that “[t]he ICIJ’s so-called ‘request for clarification’ in the [...] Forwarding Order was not procedurally correct [because] it concerned *new facts*”⁹³ and “[t]he correct procedure under Rule 55(3) was to immediately inform the CPs of the ‘new facts’ by way of a forwarding order and to ‘not investigate them unless [the CIJs] receive a Supplementary Submission’.”⁹⁴ The Co-Lawyers add that the Order, dated 5 November 2015, was also not issued in a timely manner pursuant to Internal Rule 55(3), because the ICIJ conducted the investigations “at least as early as 7 July 2014, uncovering new facts regarding forced marriage in Sangkae District (Sector 1)”⁹⁵

46. The ICP responds that the applicable law does not cast any timeline within which the CIJs have to issue a forwarding order.⁹⁶

47. The Co-Lawyers suggest, in reply, that Internal Rule 55(3), when read in light of Internal Rule 21(4) which requires expediency of proceedings, clearly envisages the CIJs informing the CPs *at the moment in the investigation* when new facts come to their knowledge.⁹⁷

⁸⁹ See [REDACTED] Interview, p. 5 (A18).

⁹⁰ Written Record of Witness Interview of [REDACTED], 20 July 2016, D219/798 (“[REDACTED] Interview2”), p. 4 (A16).

⁹¹ [REDACTED] Interview, p. 6 (A24).

⁹² [REDACTED] Interview2, p. 10 (A94).

⁹³ Application, para. 38.

⁹⁴ *Ibid.*

⁹⁵ Application, paras 42-45.

⁹⁶ Response, paras 10, 23 referring to the opinions of the Pre-Trial Chamber Judges.

⁹⁷ Reply, paras 15-17.



Discussion

i. Whether the Forwarding Order was based on new facts

48. The Defence argues that, because he sought clarification whether Reang Kesei Pagoda and the area encompassed within the current Kampong Preang commune fall within the scope of investigations into forced marriage, the ICIJ should not have carried out the investigations in those sites and instead, pursuant to Rule 55(3), the ICIJ should have immediately informed the CPs and awaited a Supplementary Submission.

49. At the outset, the Undersigned Judges observe that the Forwarding Order does not use the phrase ‘new fact’.

50. As regards the Reang Kesei Pagoda, the ICIJ noted that it “is specifically named [in the Second Supplementary Submission] as a location where forced marriage is alleged to have occurred.”⁹⁸ The Undersigned Judges also noted above that Reang Kesei Pagoda is explicitly mentioned in the Second Supplementary Submission as a place where “[l]arge mass marriages, in which as many as 80 couples were forced to marry at the same time, were conducted.”⁹⁹ It is also established, and not challenged, that Reang Kesei Pagoda was located in Sangkae District.¹⁰⁰ The Defence itself admitted that the Second Supplementary Submission covered “Reang Kesei Pagoda alleged as a specific site.”¹⁰¹ The Undersigned Judges, therefore, find that there are no doubts or contentions that the Reang Kesei Pagoda was *ab initio* and explicitly included in the scope of investigations, as framed by the Second Supplementary Submission. Thus, no issue arises as regards this specific site.

51. The Undersigned Judges recall that the ICIJ does state that Kampong Preang Commune is an “area of Sangkae District.”¹⁰² The Defence did not challenge the fact that Kampong Preang Commune is located in Sangkae District either.¹⁰³ The ICIJ’s reservations about this Commune rather appear to have been generated from the fact that it was “not,

⁹⁸ Forwarding Order, para. 1.

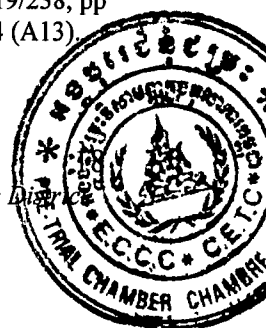
⁹⁹ See *supra* para. 33. See also Second Supplementary Submission, para. 4.

¹⁰⁰ Forwarding Order, para. 2(b). See Written Record of Civil Party Interview of [REDACTED], 17 October 2014, D219/46, pp 5 (A9), 12 (A56); Written Record of Witness Interview of [REDACTED], 2 April 2015, D219/257, p. 5 (A25); Written Record of Civil Party Interview of [REDACTED], 25 March 2015, D219/238, pp 6 (A36), 9 (A50); Written Record of Civil Party Interview of [REDACTED], 10 May 2015, D219/311, p. 4 (A13).

¹⁰¹ Application, paras 27, 35 referring to the Second Supplementary Submission, paras 4, 6.

¹⁰² Forwarding Order, para. 2(c).

¹⁰³ Application, paras 26-27.



however, located within the ‘northwest half of current Sangkae District’.”¹⁰⁴ The ICIJ’s clarification sought is triggered by the existence of the typographical mistake at paragraph 6 of the Second Supplementary Submission.¹⁰⁵ The Undersigned Judges find that the ICIJ was correct to seek clarification in this particular regard.

52. The Undersigned Judges recall that they have found that, through the Second Supplementary Submission, the OCIJ was properly seized of forced marriages allegations in Sangkae District.¹⁰⁶ Therefore, the evidence on which the Forwarding Order is based has been validly collected.

ii. Whether the Forwarding Order was timely

53. Internal Rule 55(3) reads: “[i]f, during an investigation, new facts come to the knowledge of the Co-Investigating Judges, they shall inform the Co-Prosecutors, unless the new facts are limited to aggravating circumstances relating to an existing submission”. This disposition does not explicitly cast any timeline within which the Co-Investigating Judges have to issue a forwarding order when faced with new facts.

54. The Cambodian Code of Criminal Procedure deals with the scope of the complaint at Article 125 as follows: “[i]f during a judicial investigation, new facts susceptible to be qualified as a criminal offense arise, the investigating judge shall inform the prosecutor”. Similarly to Internal Rule 55(3), this disposition does not stipulate any deadline binding the Co-Investigating Judges to issue their forwarding order, nor does it provide any guidance on how to assess its timeliness.

55. The Undersigned Judges thus find that there is no time limit set in the applicable law setting a clear deadline beyond which forwarding orders would be considered procedurally defective.

56. Furthermore, the French Code of Criminal Procedure reads in its Article 80 that: “[w]here an offence not covered by the prosecution submissions is brought to the knowledge of the investigating judge, he must immediately communicate forthwith to the district prosecutor the complaints or the official records which establish its existence”. In the French procedural system, the criterion of an immediate transmission is broadly interpreted by the

¹⁰⁴ Forwarding Order, para. 2(d).

¹⁰⁵ Forwarding Order, para. 3(b). *See also supra* para. 40.

¹⁰⁶ *See supra* para. 38.



Court of Cassation. Indeed, in a recent decision on a case where the Investigating Judge had investigated facts, over several months without any supplementary submission, the French Court of Cassation upheld the Investigation Chamber's decision to deny a related annulment request. It found that the Investigating Judge could not be blamed for having taken investigative actions of criminal surveillance to determinate the involvement of the person concerned in the alleged crimes, which, incidentally, revealed the commission of other offences.¹⁰⁷

57. Lastly, with regards to Defence's argument that Internal Rule 21(4), which requires expediency of proceedings, "clearly envisages the CIJs informing the CPs at the moment in the investigation when new facts came to their knowledge", the Undersigned Judges consider that Internal Rule 21 sets principles for proceedings before the ECCC, as regards fairness and fundamental rights of parties, and it cannot be utilised to also interpret the strict requirements of the procedural Rules as regards validity of investigative actions.

58. Therefore, the Undersigned Judges consider, annulment is not warranted because the ICIJ's investigative actions that led to the Forwarding Order are found to have taken place in the Sangkhae District and, therefore, are within the geographical scope of the investigation, as set out in the Second Supplementary Submission.¹⁰⁸

59. In conclusion, the arguments concerning procedural regularity of the Forwarding Order would be denied by the Undersigned Judges.

C. The Fourth Supplementary Submission and the Investigative Actions set out in Annex B

Submissions

60. The Co-Lawyers submit that, in accordance with Internal Rule 76(5), if the Pre-Trial Chamber decides to annul, either the Investigative Actions set out in Annex A or the Forwarding Order, then it is also "required to consider the effect on the Fourth

¹⁰⁷ Cass. Crim., 24 June 2015, Case No. 14-86817.

¹⁰⁸ See *supra* para. 38.



Supplementary Submission and any investigations that took place [there]after.”¹⁰⁹ In the Co-Lawyers’ view, the latter are procedurally defective due to being the product of the former.¹¹⁰

61. The ICP submits that the Co-Lawyers “cite[] no law or jurisprudence in support of [their] argument.”¹¹¹ The ICP avers that “[t]here are no rules prohibiting [him] from clarifying or correcting his submissions made pursuant to Internal Rules 53 and 55(2), particularly when such acts are aimed at facilitating an understanding of the boundaries of a named district with which the CIJs were clearly seised.”¹¹² In the ICP’s view, “[a]ll subsequent investigative actions, as identified in Annexes A and B [...], were lawfully taken pursuant to the Second Supplementary Submission and are therefore valid.”¹¹³

62. The Co-Lawyers reply that “the ICP misconstrues [...] the Defence submission as to Annex B. The Defence submitted that ‘the Investigative Actions listed in Annex B that were conducted after the Fourth Supplementary Submission [...] were a consequence of procedural defects in the [...] Forwarding Order and the Fourth Supplementary Submission’.”¹¹⁴

Discussion

63. The provisions of Internal Rule 76(5) state that:

“[w]here the Chamber decides to annul an investigative action, it shall decide whether the annulment affects other actions or orders.”

64. The Pre-Trial Chamber has stated that “[w]hen a violation of the Charged Person’s rights under the ICCPR or Internal Rules is proven, the procedural defect creates a harmed interest and will *lead to annulment of that specific investigative or judicial action*, although the Pre-Trial Chamber has the *discretion to appreciate the consequences of this annulment on the entirety of the case*”¹¹⁵ and that “[i]t is indeed for the Pre-Trial Chamber to appreciate the consequences on the entirety of the case *of a particular procedural defect*, in accordance with Internal Rule 76(5)”.¹¹⁶

¹⁰⁹ Application, paras 46-50.

¹¹⁰ Application, paras 49-50.

¹¹¹ Response, para. 24.

¹¹² *Ibid.*

¹¹³ Response, para. 25.

¹¹⁴ Reply, footnote 26 referring to Response, para. 13 and Application, para. 50.

¹¹⁵ IENG Thirith Decision, para. 24 (emphasis added).

¹¹⁶ IENG Thirith Decision, para. 25 (emphasis added).



65. The Undersigned Judges recall that neither the investigative actions set out in Annex A, nor the Forwarding Order have been found as procedurally defective, therefore no annulment is warranted for these parts of the investigation. The remaining grief against the Fourth Supplementary Submission and the investigative actions set out in Annex B is based on the Co-Lawyers' sole suggestion that they are defective due to being the product of allegedly defective Annex A actions and Forwarding Order.¹¹⁷ Since the annulment of the latter is not warranted, the Undersigned Judges find that the precondition under Internal Rule 76(5) for annulment of 'other actions or orders' is not met.

66. Therefore, the Undersigned Judges would dismiss this ground for annulment.

D. The Order to charge ██████████ for forced marriage at Sites 27 and 28

Submissions

67. The Co-Lawyers submit that the order to charge "falls within the scope [of] an action or order open to annulment."¹¹⁸ The Co-Lawyers invite the Pre-Trial Chamber to annul the charges in question,¹¹⁹ on the grounds that they are supported by the allegedly defective investigative actions, Forwarding Order and Fourth Supplementary Submission, and "pursuant to [Internal] Rule 76(5), [ask the Pre-Trial Chamber] to cancel the relevant parts of the Record of Initial Appearance."¹²⁰

68. In Response, apart from objecting in general to the Application, the ICP does not submit any specific arguments in this regard. In their Reply, the Co-Lawyers do not submit any further arguments on this issue either.

Discussion

69. The Undersigned Judges first make reference to the provisions of Internal Rule 76(5) and to the jurisprudence of the Pre-Trial Chamber referred to in paragraph 63 above.

¹¹⁷ Application, paras 49-50.

¹¹⁸ Application, para. 51 referring to Case 004 (PTC27), Considerations on ██████████ Application to Seize the Pre-Trial Chamber with a View to Annulment of Investigation of Tuol Beng and Wat Angkuonh Dei and Charges Relating to Tuol Beng, 15 December 2016, D299/3/2, para. 17.

¹¹⁹ Application, paras 51-52 referring to Record of Initial Appearance, p. 11 ("Crime Site 27: Kampong ██████████ commune [and] Crime Site 28: Reang Kesei commune").

¹²⁰ Application, para. 52.



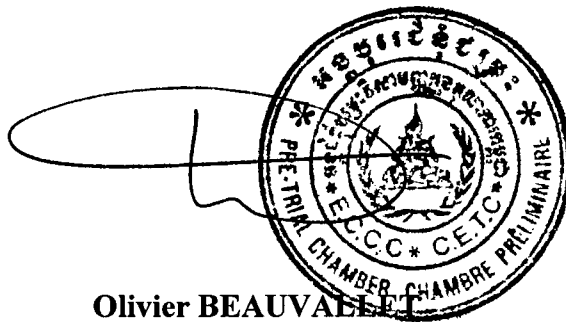
70. The Undersigned Judges recall that neither the impugned investigative actions, nor the Forwarding Order or Fourth Supplementary Submission have been found as procedurally defective, therefore no annulment is warranted for these parts of the investigation. The remaining grief against the Charges is based on the Co-Lawyers' sole suggestion that they are defective because they are supported by the allegedly defective investigative actions, Forwarding Order and Fourth Supplementary Submission. Since the annulment of the latter is not warranted, the Undersigned Judges find that the precondition under Internal Rule 76(5) for annulment of 'other actions or orders' is not met.

71. As for charges on account of forced marriages at crime site 27,¹²¹ relating to facts having occurred in Kampong Preang, the Undersigned Judges have concluded above that the scope of the investigations included the Sangkae District of the DK time¹²² and has also acknowledged that the Defence does not contend that Kampong Preang is included in Sangkae District.¹²³ Since the order to charge concerns facts included in the scope of the investigation, it is consequently valid.

72. Crime site 28 relates to forced marriages in Reang Kesei commune. This site is not only explicitly quoted in the Second Supplementary Submission,¹²⁴ but it is also found¹²⁵ and not disputed,¹²⁶ that it is included in Sangkae District. It, therefore, manifestly relates to areas included in the scope of the investigation. The order to charge on account of forced marriages at site 28 is consequently valid.

73. Therefore, the Undersigned Judges would dismiss this ground for annulment.

74. In Conclusion, the Undersigned Judges would dismiss the Application.



Olivier BEAUVALET

Phnom Penh, 25 July 2017

Kang Jin BAIK

¹²¹ Record of Initial Appearance, p. 11.

¹²² See *supra* para. 39.

¹²³ See *supra* para. 27.

¹²⁴ Second Supplementary Submission, para. 4.

¹²⁵ Forwarding Order, para. 2(b).

¹²⁶ See Application.