



ព្រះរាជាណាចក្រកម្ពុជា

ជាតិ សាសនា ព្រះមហាក្សត្រ

Royaume du Cambodge
Nation Religion Roi

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

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

Kingdom of Cambodia
Nation Religion King

ការិយាល័យសហចៅក្រមស៊ើបអង្កេត
Office of the Co-Investigating Judges
Bureau des Co-juges d'instruction

Case File No: 002/19-09-2007-ECCC-OCIJ

Before: Judge YOU Bunleng
Judge Marcel LEMONDE
Date: 18 December 2009
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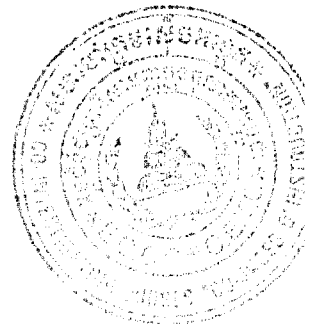
Order on Request for Investigative Action Concerning Forced Marriages and Forced Sexual Relations

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Mr. Andrew CAYLEY

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IENG Sary KAING Guek Eav
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We, **You Bunleng (ឃុំ ប៊ុនឡេង)** and **Marcel Lemonde**, Co-Investigating Judges of the Extraordinary Chambers in the Courts of Cambodia (the “ECCC”),

Noting the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia, dated 27 October 2004 (the “ECCC Law”);

Noting the ongoing judicial investigation against **NUON Chea (នួន ជា) and other Charged Persons**, relating to charges of **Crimes against humanity** and **Grave breaches of the Geneva Conventions dated 12 August 1949**, offences defined and punishable under Articles 5, 6, 29 (new) and 39 (new) of the ECCC Law;

Noting Rule 55(10) of the ECCC Internal Rules (the “Internal Rules”);

Noting the Forwarding Order of the Co-Investigating Judges of 13 March 2009 (D146) (the “Forwarding Order”);

Noting the Co-Prosecutors’ Request for Additional Time to Respond to the Forwarding Order of the Co-Investigating Judges of 10 April 2009 (D146/1);

Noting the Co-Investigating Judges’ Order on the Request for Extension of Time of 21 April 2009 (D146/2);

Considering the Co-Prosecutors’ Response to the Forwarding Order of the Co-Investigating Judges and Supplementary Submission of 30 April 2009 (D146/3);

Considering the Second Civil Parties’ Request for Investigative Actions Concerning Forced Marriages and Forced Sexual Relations of 15 July 2009 (D188) (the “Request”);

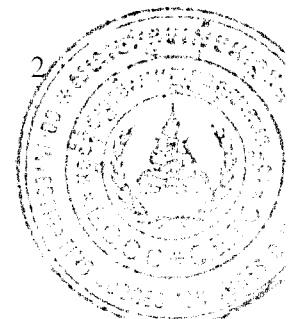
Considering the Response of the Defence for IENG Sary of 11 August 2009 (D188/3) (the “Defence Response of IENG Sary”);

Considering the filing of the Defence for IENG Thirith relating to the Defence Objection to Jurisdiction Argument in Civil Parties’ Second Investigative Request Concerning Forced Marriages of 16 September 2009 (D188/4) (“Defence Response of IENG Thirith”);

Considering the Further Authorization Pursuant to Co-Prosecutors’ 30 April 2009 Response to the Forwarding Order of the Co-Investigating Judges and Supplementary Submission of 5 November 2009 (D146/4);

Considering the Further Statement of Co-Prosecutors Regarding 30 April 2009 Response to the Forwarding Order of the Co-Investigating Judges and Supplementary Submission of 26 November 2009 (D146/5);

Considering the Fourth Civil Parties’ Request for Investigative Actions Concerning Forced Marriages and Sexually Related Crimes of 4 December 2009 (D268) (the “Further Request”);



PROCEDURAL HISTORY

1. On 13 March 2009, the Co-Investigating Judges submitted a Forwarding Order to the Office of the Co-Prosecutors (OCP) on the basis of civil party applications referring to facts that appeared to constitute new facts under Internal Rule 55(3), namely, the alleged occurrence of forced marriage and forced sexual relations.¹
2. In the filing dated 30 April 2009, the OCP requested the Co-Investigating Judges to investigate the allegations of forced marriage in some of the applicants² whereas for others the OCP stated that there did not appear to be allegations of forced sexual relations which the OCP considered to be constituent to forced marriage.³ The OCP also referred the Co-Investigating Judges to other instances of alleged forced marriage insofar as they would facilitate proving jurisdiction or the modes of liability.⁴ The OCP later clarified that the Co-Investigating Judges could investigate any other further incidences of forced marriage and sexual relations deemed appropriate.⁵
3. A civil party Request was filed on 15 July 2009 arguing that forced marriage is a crime under international criminal law and that forced marriage could be considered as a crime against humanity of other inhumane acts, rape, enslavement or forced pregnancy.⁶ The civil parties requested that these crime characterizations be investigated and provided a list of individuals for interview.⁷ In the Further Request dated 4 December 2009, the civil parties submitted further names for interview⁸ and nominated three persons for consideration as experts.⁹ The Further Request of the civil parties also requested the interviews be conducted by gender trained female investigators and gender trained interpreters.¹⁰
4. The Defence Response of IENG Sary of 11 August 2009 argued that the OCP filing of 30 April 2009 only referred the Co-Investigating Judges to the list of persons named in the Request¹¹ and that the OCP's reference to investigating matters to prove jurisdictional elements or the mode of liability was impermissibly vague.¹² Additionally, Defence Response of IENG Sary argued that there is no basis for finding forced marriage to be applicable law at the ECCC.¹³
5. The Defence Response of IENG Thirith of 16 September 2009 stated that there was no jurisdiction over the alleged crimes, however, that this was considered

¹ D146, p. 2.

² D146/3, para. 2.

³ D146/3, paras 3-5.

⁴ D146/3, para. 6.

⁵ D146/4, as elaborated with respect to the potential legal characterization of crimes against humanity of rape and other inhumane acts (D146/5, para. 3).

⁶ D188, paras 5-29.

⁷ D188, paras 30-31.

⁸ D268, paras 8 (a)-(b).

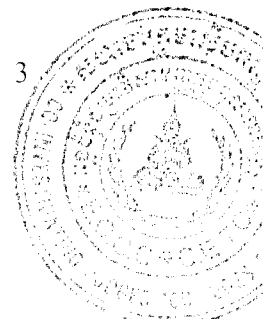
⁹ D268, paras 8 (c).

¹⁰ D268, paras 8 (d).

¹¹ D188/3, para. 3.

¹² D188/3, paras 4-5.

¹³ D188/3, paras 7-32.



“not the right time for the defence to respond on the issue”.¹⁴ The defence therefore seeks confirmation that they can reserve their right to raise this at the Initial Hearing or any other stage they consider appropriate.¹⁵

REASONS FOR THE DECISION

6. The Request relates to the new facts which came to the attention of the Co-Investigating Judges during their investigations following the OCP’s Introductory Submission. Rule 55(3) of the Internal Rules requires that, should the Co-Investigative Judges identify new facts, they must refer these facts to the OCP which is entitled to file a Supplementary Submission such that the investigation can proceed on these new facts. This procedure has been followed with respect to forced marriage through the Forwarding Order of the Co-Investigating Judges¹⁶ and the subsequent Supplementary Submissions of the OCP.¹⁷
7. Under Internal Rule 55(10), a Civil Party may request the Co-Investigating Judges to make “such orders or undertake such investigative action as they consider necessary for the conduct of the investigation”. Internal Rule 55(10) bestows a discretion on the relevant parties to determine the content of these requests, whereas the Co-Investigating Judges have the corresponding discretion in responding. The form of the response to any submission will vary depending on the nature of the submissions. For the current Order, the Co-Investigating Judges find the Request sufficiently clear and pertinent to assist in ascertaining the truth.¹⁸
8. The OCP has affirmed that the Co-Investigating Judges may investigate certain forced marriage allegations as set out by the OCP in their filing of 30 April 2009.¹⁹ The OCP subsequently clarified that the Co-Investigating Judges may investigate any further facts deemed appropriate related to forced marriage and sexual relations, effectively seizing them of forced marriage throughout Cambodia.²⁰ The Co-Investigating Judges therefore find that there is no need to address the Defence argument that the OCP initial Supplementary Submission was vague insofar as it referred the Co-Investigating Judges to facts which may support the jurisdiction or mode of liability aspects of the case.²¹ This argument is moot since the subsequent Supplementary Submission seized the Co-Investigating Judges of forced marriage throughout Cambodia.
9. The Co-Investigating Judges recall that they are not bound by the legal characterizations set out by the OCP.²² Furthermore, the Co-Investigating Judges

¹⁴ D188/4, para. 3

¹⁵ D188/4, para. 3.

¹⁶ D146, p. 2.

¹⁷ D146/3, D146/4, D146/5.

¹⁸ See ECCC, PTC24, D164/4/13 *Decision on Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Marterials Drive.*, 18 November 2009, paras 44-46.

¹⁹ D146/3, para. 2-5.

²⁰ D146/4, as elaborated with respect to the potential legal characterization of crimes against humanity of rape and other inhumane acts (D146/5, para. 3).

²¹ D188/3, paras 4-5, referring to OCP submissions in D146/3, para. 6.

²² See Case File 001/18-07-2007-ECCC/OCIJ (PTC 02), D99/3/42, *Decision on Appeal Against Closing Order Indicting KAING Guek Eav, alias "DUCH"*, 5 December 2008, 00249846-00249887, paras 35-39; D198/1, *Ordonnance sur le demande de clarification déposée par les co-procureurs*, 20 novembre 2009, 00403612-00403617, para. 10.



are not required to set out any legal characterisation of the facts until the Closing Order.²³ Therefore, it is not necessary at this stage to conduct a final analysis of the elements of forced marriage. The Co-Investigating Judges will take due consideration of the submissions of the parties relating to the elements of forced marriage in the drafting of the Closing Order.

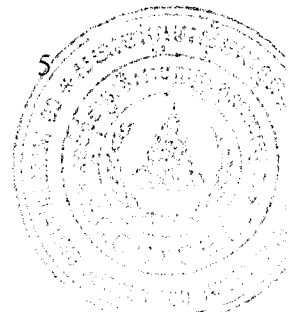
10. However, the Co-Investigative Judges find that due notice of the constitutive aspects of forced marriage can be derived from the *AFRC* Appeals Judgement of the Special Court of Sierra Leone.²⁴ It is notable that this decision found that proof of forced sexual relations was not required, although the occurrence of forced sexual relations could be evidence of the injury to the victim.
11. Although the Co-Investigating Judges cannot pre-judge the Closing Order by providing declaratory relief on how facts will be legally characterized, the Co-Investigating Judges note that the *AFRC* Appeals Judgement found forced marriage could constitute the crime against humanity of other inhumane acts. Depending on the facts, other crimes may be relevant such as the crimes against humanity of enslavement, imprisonment, torture, or rape. Crimes under Article 6 of the ECCC Law may also be relevant such as torture or inhumane treatment, wilfully causing great suffering or serious injury to body or health. The Co-Investigating Judges note that there are facts on the Case File suggesting that persons may have been forced to consummate the marriage, which could also amount to the crime against humanity of other inhumane acts on the basis of forced pregnancy, should the legal analysis in the Closing Order find a sufficient basis for such a conclusion.
12. With respect to the persons named for interview in the Request²⁵ and the Further Request²⁶, the Co-Investigating Judges are continuing their assessment of the evidence and will interview the named persons as may be necessary or issue a supplementary order before the close of the investigation.
13. With respect to the request that the Co-Investigating Judges appoint duly qualified experts under Internal Rule 31(1) relating to allegations of forced marriage under the jurisdiction of the ECCC, the Co-Investigating Judges do not find it necessary to their investigations at this stage.
14. Notwithstanding this, the Co-Investigating Judges have no objection to receiving *amici curiae* briefs as indicated in Rule 33 of the Internal Rules. The briefs, where possible, are to refer to the original sources of their research, including the names and locations of individuals who were interviewed, and provide any contemporaneous notes. Given the date of the filing of the Further Request, and given the public announcement of the intention to close the investigation the briefs should be filed before 31 December 2009.
15. With respect to the request that gender trained female investigators and interpreters be assigned to conduct interviews relating to forced marriage allegations, the Co-Investigating Judges affirm the need for gender sensitive

²³ Internal Rules (Rev. 4), 11 September 2009, Rule 67(2).

²⁴ Case No. SCSL-2004-16-A, *Brima et al.* ("*AFRC* Case"), Appeals Judgment, para. 196.

²⁵ D188, paras 30-31.

²⁶ D268, paras 8 (a)-(b).



techniques in cases concerning sexual and gender-based violence testimony. Although the current staffing of OCIJ does not include female investigators, all efforts are being made to ensure best practices are fully implemented.

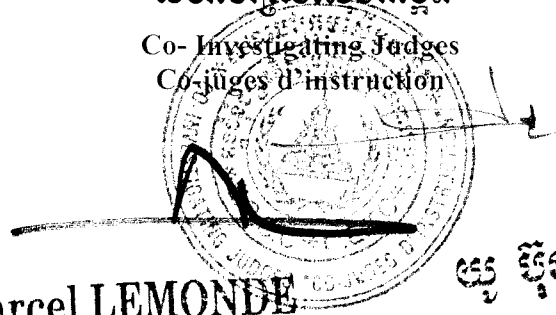
- 16. With respect to the Defence for IENG Thirith’s request for confirmation that they can raise this issue at the Initial Hearing, the Co-Investigating Judges emphasize the Internal Rules do not permit the parties to make pronouncements on the procedures to be applied at the trial stage.

FOR THESE REASONS, THE CO-INVESTIGATING JUDGES HEREBY:

- 17. **FIND** the Request by the Civil Parties dated 30 June 2009 admissible;
- 18. **GRANT** the request to conduct investigations into forced marriage throughout Cambodia;
- 19. **NOTE** that the legal characterisations will be set out at the Closing Order upon an assessment of the evidence;
- 20. **MAINTAIN** that the assessment of the list of persons for interview is on-going and if necessary, a supplementary order may be issued at the close of the investigation.

Done in Phnom Penh, on 18 December 2009

សហចៅក្រមស៊ើបអង្កេត
Co- Investigating Judges
Co-juges d’instruction



Marcel LEMONDE

ឃុំ ប៉ុល ពត