



ឯកសារបញ្ជាក់ថា ប្រតិបត្តិការត្រឹមត្រូវតាមច្បាប់ដើម
CERTIFIED COPY/COPIE CERTIFIEE CONFORME A L'ORIGINAL
 ថ្ងៃ ខែ ឆ្នាំ ផ្សាយបញ្ជាក់ (Certified Date/Date de Certification) ២២ / ០៧ / ២០១០
 ប្រតិបត្តិការដោយ (Case File Officer/L'agent chargé) Ratanak
 Kingdom of Cambodia
 Nation Religion King
 Extraordinary Chambers in the Courts of Cambodia
 Chambres extraordinaires au sein des tribunaux cambodgiens
 Royaume du Cambodge
 Nation Religion Roi

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

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

D310/1/3

អង្គបុរេជំនុំជម្រះ
Pre-Trial Chamber
Chambre Préliminaire

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.

Criminal Case File N° 002/19-09-2007-ECCC-OCIJ (PTC52)

Before: Judge PRAK Kimsan, President
Judge Rowan DOWNING
Judge NEY Thol
Judge Catherine MARCHI-UHEL
Judge HUOT Vuthy

Date: 21 July 2010

ឯកសារដើម
ORIGINAL DOCUMENT/DOCUMENT ORIGINAL
 ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/Date de reception): ២៧ / ០៧ / ២០១០
 ម៉ោង (Time/Heure): 13:15
 ប្រតិបត្តិការដោយ (Case File Officer/L'agent chargé) du dossier: Ratanak

PUBLIC [REDACTED]

DECISION ON APPEAL OF CO-LAWYERS FOR CIVIL PARTIES AGAINST ORDER REJECTING REQUEST TO INTERVIEW PERSONS NAMED IN THE FORCED MARRIAGE AND ENFORCED DISAPPEARANCE REQUESTS FOR INVESTIGATIVE ACTION

Co-Prosecutors
CHEA Leang
Andrew CAYLEY

Charged Persons
NUON Chea
KHIEU Samphan
IENG Sary
IENG Thirith
KAING Guek Eav alias "Duch"

Lawyers for the Civil Parties
KIM Menghky
MOCH Sovannary
Martine JACQUIN
Philippe CANONNE
Fabienne TRUSSES-NAPROUS
Elizabeth-Joelle RABESANDRATANA
Annie DELAHIE
NY Chandy
LOR Chunty

Co-Lawyers for the Charged Persons
SON Arun
Michiel PESTMAN
Victor KOPPE
Andrew IANUZZI
SA Sovan
Jacques VERGÈS
Philippe Gréciano



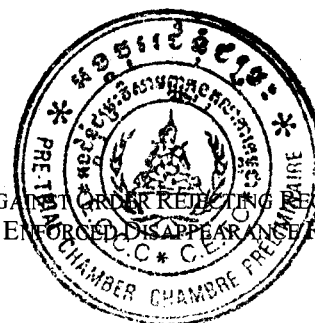
Silke STUDZINSKY
 KONG Pisey
 HONG Kim Suon
 Pierre-Olivier SUR
 YUNG Phanit
 SIN Soworn
 Mahdev MOHAN
 NGUYEN Lyma
 Marie GUIRAUD
 Patrick BAUDOIN
 Olivier BAHOUGNE
 Julien RIVET
 Emmanuel ALTIT
 Maria Stefania CATALETA
 KONG Heng
 SAM Sokong
 SOK Sam Ouen
 Charlotte PLANTIN
 Pascal AUBOIN
 Jan Ernest RASSEK
 CHET Vanly
 ANG Pich

PHAT Pouy Seang
 Diana ELLIS

ANG Udom
 Michael G. KARNAVAS

Co-Investigating Judges

Judge YOU Bunleng
 Judge Marcel LEMONDE



DECISION ON APPEAL OF CO-LAWYERS FOR CIVIL PARTIES AGAINST ORDER RELATING TO REQUEST TO INTERVIEW PERSONS NAMED IN THE FORCED MARRIAGE AND ENFORCED DISAPPEARANCE REQUESTS FOR INVESTIGATIVE ACTION

THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) is seized of the “Appeal of Co-Lawyers for Civil Parties Against Order Rejecting the Requests to Investigate Witnesses Named in the Forced Marriage and Enforced Disappearance Requests for Investigative Action”,¹ filed by the Civil Parties’ Co-Lawyers (“Appeal” and “Appellants”) on 25 February 2010 against the Co-Investigative Judges (“CIJs”) “Order on Request to Interview Persons Named in the Forced Marriage and Enforced Disappearance Requests for Investigative Action” of 13 January 2010 (“Impugned Order”).²

I. PROCEDURAL BACKGROUND

1. On 13 March 2009, the CIJs issued a Forwarding Order (“Forwarding Order”),³ forwarding the Case File to the Co-Prosecutors for (1) advice on the admissibility of four civil party applications from persons claiming that Angkar forced them to marry, in some cases along with dozens of others, and that they received open death threats if they refused to have sexual relations with their spouse,⁴ and (2) if necessary, any Supplementary Submissions. The CIJs noted that neither the Introductory Submission of 18 July 2007 (“Introductory Submission”),⁵ nor the Supplementary Submission of 26 March 2008 (“First Supplementary Submission”)⁶ make reference to this specific aspect of the regime’s policy and also stressed that many witnesses as well as four civil parties⁷ related that similar incidents had occurred.⁸

2. On 30 April 2009, the Co-Prosecutors filed the “Co-Prosecutors’ Response to the Forwarding Order of the Co-Investigating Judges and Supplementary Submission”

¹ Appeal of Co-Lawyers for Civil Parties Against Order Rejecting the Requests to Investigate Witnesses Named in the Forced Marriage and Enforced Disappearance Requests for Investigative Action, 25 February 2010, D310/1/1 (“Appeal”).

² Order on Request to Interview Persons Named in the Forced Marriage and Enforced Disappearance Requests for Investigative Action, 13 January 2010, D310 (“Impugned Order”).

³ Forwarding Order, 17 March 2009, D146 (“Forwarding Order”).

⁴ Forwarding Order, pp. 1-2, referring to civil party applications 08-[REDACTED]-01937; 08-[REDACTED]-01938; 08-[REDACTED]-01939 and 08-[REDACTED]-02059.

⁵ Introductory Submission, 18 July 2007, D3 (“Introductory Submission”).

⁶ Supplementary Submission, 26 March 2008, D83 (“First Supplementary Submission”).

⁷ Forwarding Order, p. 2, referring to D22/17; D22/31; D22/33 and 08-[REDACTED]-02207, p. 2/3.

⁸ Forwarding Order, p. 2.

DECISION ON APPEAL OF CO-LAWYERS FOR CIVIL PARTIES AGAINST ORDER REJECTING THE REQUESTS TO INTERVIEW PERSONS NAMED IN THE FORCED MARRIAGE AND ENFORCED DISAPPEARANCE REQUESTS FOR INVESTIGATIVE ACTION



("Second Supplementary Submission")⁹ requesting and authorizing the CIJs to investigate the facts brought by five complainants alleging that they were forced by Khmer Rouge officials to marry and have sexual relations respectively in Kampot¹⁰ and Takeo¹¹ Provinces.¹² The Co-Prosecutors also authorized the CIJs to investigate any other facts that would assist in determining, (a) the jurisdictional elements necessary to establish whether the factual matters referred in paragraph 2 of the Second Supplementary Submission constitute crimes within the jurisdiction of the ECCC, or (b) the mode of liability imputable to Nuon Chea, Ieng Sary, Kieu Samphan or Ieng Thirith with respect to such matters.¹³

3. On 5 November 2009, the Co-Prosecutors filed a "Further Authorisation Pursuant to Co-Prosecutors' 30 April 2009 Response to the Forwarding Order of the Co-Investigating Judges and Supplementary Submission" ("Third Supplementary Submission"),¹⁴ whereby it authorized the CIJs, where they determine it appropriate, to consider and investigate further alleged incidents of forced marriage and sexual relations other than those specified in paragraph 2 of the Second Supplementary Submission.¹⁵

4. On 26 November 2009, the Co-Prosecutors filed a "Further Statement of Co-Prosecutors' regarding 30 April 2009 'Response to the Forwarding Order of the Co-Investigating Judges and Supplementary Submission'" ("Fourth Supplementary

⁹ Co-Prosecutors' Response to the Forwarding Order of the Co-Investigating Judges and Supplementary Submission, 3 April 2009, D146/3 ("Second Supplementary Submission").

¹⁰ Second Supplementary Submission, para. 2 (a), referring to 08-[REDACTED]-01937; 08-[REDACTED]-01938 and D22/33.

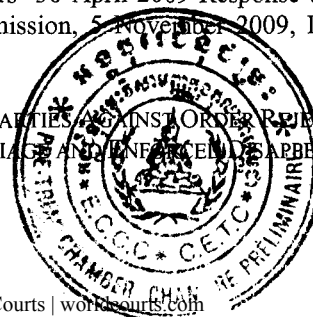
¹¹ Second Supplementary Submission, para. 2 (b), referring to 08-[REDACTED]-01939 and D22/31.

¹² The Co-Prosecutors further considered that in the case of three more complainants, their primary complaint is the disappearance and execution of a relative and that no investigation of forced marriage or forced sexual relations was warranted in relation to the first complainant (Second Supplementary Submission, para. 3, in relation to D22/170); the second complainant alleges forced marriage but not forced sexual relations, thus the CIJs should determine her application based on allegations regarding the execution of the applicant's father (Second Supplementary Submission, para. 4 in relation to 08-[REDACTED]-02059) and; the third complainant does not appear to allege forced sexual relations and it is unclear whether she participated in a forced marriage, thus her complaint falls outside the scope of investigations related to forced marriage and forced sexual relations (Second Supplementary Submission, para. 5 in relation to 08-[REDACTED]-02207).

¹³ Second Supplementary Submission, para. 6.

¹⁴ Further Authorisation Pursuant to Co-Prosecutors' 30 April 2009 Response to the Forwarding Order of the Co-Investigating Judges and Supplementary Submission, 5 November 2009, D146/4 ("Third Supplementary Submission").

¹⁵ Third Supplementary Submission, para. 3.



Submission”).¹⁶ The Fourth Supplementary Submission stated that pursuant to Internal Rule 53(1)(b)&(c) the alleged incidents of forced marriage and sexual relations that the CIJs were authorized to investigate in the Second Supplementary Submission may be legally characterized as crimes against humanity, being rape and other inhumane acts, punishable under Articles 5, 29 (new) and 39 (new) of the ECCC law. In order to establish these acts as crimes against humanity it is necessary to show they were committed as part of a widespread or systematic attack against a civilian population, on national, political, ethnical, racial or religious grounds.¹⁷

5. Between 2 July 2009 and 4 December 2009, the Appellants filed three requests for investigative actions:

(1) the “Co-Lawyers of Civil Parties’ Investigative Request Concerning the Crime of Enforced Disappearance”, dated 30 June 2009 and filed on 2 July 2009 (“First Request”).¹⁸ This request sought “further investigation on the facts specified in various witness statements submitted by the OCIJ” which fall within the scope of enforced disappearances. These requests included the identification and interview of former Khmer Rouge cadres who were involved or possess information about the arrest of victims who disappeared and persons whose relatives were missing;¹⁹

(2), the “Second Request for Investigative Actions Concerning Forced Marriages and Forced Sexual Relations”, dated 15 July and filed on 23 July 2009 (“Second Request”),²⁰ requested that the CIJs “(a) conduct a full investigation of the existence of the crimes of forced marriage, namely rape, enslavement and forced pregnancy;²¹ (b) investigate as requested by the Co-Prosecutors, into the allegations made by [REDACTED];”²² and identify and interview the civil

¹⁶ Further Statement of Co-Prosecutors’ Regarding 30 April 2009 Response to the Forwarding Order of the Co-Investigating Judges and Supplementary Submission, 26 November 2009, D146/5, (“Fourth Supplementary Submission”).

¹⁷ Fourth Supplementary Submission, para. 3.

¹⁸ Co-Lawyers of Civil Parties’ Investigative Request Concerning the Crime of Enforced Disappearance, 2 July 2009, D180 (“First Request”).

¹⁹ First Request, paras 1, 27.

²⁰ Second Request for Investigative Actions Concerning Forced Marriages and Forced Sexual Relations, 23 July 2009, D188 (“Second Request”).

²¹ Second Request, para. 31 (a).

²² Second Request, para. 31 (b).



party applicants “who were declared by the OCP as having an unclear background and investigate their allegations of forced marriage and if sexual intercourse was directly prescribed, the surveillance of the first night, the further conjugal relationship, and the mental effects”²³ of the above and; (c) identify and interview [REDACTED] named witnesses;²⁴

(3) the “Co-Lawyers for the Civil Parties’ Fourth Investigative Request Concerning Forced Marriages and Sexually Related Crimes” dated 4 December 2009 and filed on 9 December 2009 (“Third Request”).²⁵ This requested the CIJs to concentrate their questioning of witnesses on (a) the organisation of forced marriages and forced ‘mass’ marriages throughout the country and the orders given within the Khmer Rouge hierarchy concerning marriages; the punishments for refusing to follow such orders and the ‘direct order and insistence of the Khmer Rouge of having conjugal sex after the wedding’²⁶ and; (b) what was considered ‘immoral behaviour’ and whether it encompassed sexually related crimes, as well as their level of occurrence and whether inspections of virginity were generalised practice under the Khmer Rouge regime.²⁷ The Appellants also requested the assistance of three experts to conduct the investigative action.²⁸ The Appellants further requested gender trained female investigators to conduct the interviews of [REDACTED] named witnesses of events of forced marriages in Svay Rieng, Kampong Cham, Kandal, Battambang, Kompong Thom, Stung Treng as well as in other Provinces²⁹ and of [REDACTED] witnesses who recalled sexually related crimes.³⁰

6. On 13 January 2010, the CIJs issued the Impugned Order rejecting the request to interview one of the persons proposed to be interviewed in the Second Request and [REDACTED] of the persons proposed to be interviewed in the Third Request.³¹ Further, it (1) noted that all the remaining persons named in the Second and Third Requests had been interviewed by the Office of the CIJs and rejected the request for their further interview;³²

²³ *Ibid.*

²⁴ Second Request, para. 31 (c).

²⁵ Co-Lawyers for the Civil Parties’ Fourth Investigative Request Concerning Forced Marriages and Sexually Related Crimes, 9 December 2009, D268, (“Third Request”).

²⁶ Third Request, para.4.

²⁷ Third Request, para. 5.

²⁸ Third Request, para. 7, referring to Ms. [REDACTED], Dr. [REDACTED] and Dr. [REDACTED].

²⁹ Third Request, para. 8 (a) and (d).

³⁰ Third Request, para. 8 (b).

³¹ Impugned Order, para. 19.

³² Impugned Order, para. 20.



(2) accepted in principle the request to interview one of the persons named in the First Request, but noted that it was not possible to implement the investigative action in relation to this person³³, and (3) rejected the remaining civil party applications and requests to interview the remaining persons listed in the First Request.³⁴

7. The Impugned Order was notified to the Co-Lawyers of the Civil Party Applicants in English on 14 January 2010 and in Khmer on 2 February 2010. The Appellants filed their Notice of Appeal on 22 January 2010 in accordance with Internal Rule 75(1), and the Submissions on Appeal were filed on 25 February 2010 within the limit set out in Internal Rule 75(3).

II. OVERVIEW OF THE APPEAL

8. The Appeal is filed on the basis of Internal Rule 74(4)(a).³⁵ It alleges that the Impugned Order made errors of law and was based on an incorrect interpretation of governing law when it rejected the requests. The Appeal lists four errors made by the CIJs which it claims were erroneous decisions, (1) that persons to be interviewed by the First, Second and Third Requests were already interviewed;³⁶ (2) the facts to be investigated did not fall within the scope of the investigations or that the requests did not explicitly show that they do;³⁷ (3) the CIJs were not able to identify and locate the persons to be interviewed;³⁸ and (4) interviewing the persons in question would not facilitate the evidence gathered.³⁹ The Appeal further alleges that the Impugned Order is based on a patently incorrect conclusion of fact concerning the rejection of one civil party applicant.⁴⁰ The Appellants seek that the Pre-Trial Chamber vacate the Impugned Order

³³ Impugned Order, para. 21.

³⁴ Impugned Order, para. 22.

³⁵ Appeal, para. 11.

³⁶ Appeal, paras. 12-29.

³⁷ Appeal, paras. 30-43.

³⁸ Appeal, paras. 44-49.

³⁹ Appeal, paras. 50-59.

⁴⁰ Appeal, paras. 60-62, referring to [REDACTED]



on the grounds that it made the above-mentioned errors of law and fact, and accordingly, instruct the CIJs to conduct the requested investigative actions.⁴¹

9. No responses were filed in the Appeal. The Pre-Trial Chamber notes that the Appellants have not asked that a public hearing be held and it finds it appropriate to deal with the Appeal on the basis of the written submissions of the Appellants alone.

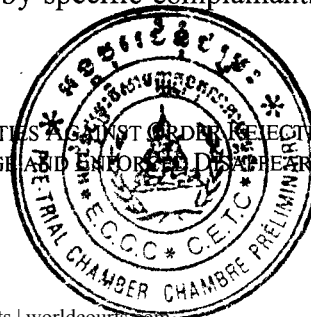
III. ADMISSIBILITY OF THE APPEAL

10. Internal Rule 74(4)(a) grants Civil Parties the right to appeal before the Pre-Trial Chamber orders made by the CIJs refusing requests for investigative action. According to Internal Rule 55(10), at any time during an investigation, a Civil Party may request the CIJs to make such orders or undertake such investigative action as he/she considers necessary for the conduct of the investigation. The Pre-Trial Chamber considers that both Internal Rules apply to civil party applicants as well as civil parties, unless their civil party application has been declared inadmissible by a final decision.

11. Further, Internal Rule 55(3) limits the CIJs to investigating new facts on aggravating circumstances which relate to an existing submission, or a Co-Prosecutors' Supplementary Submission. Taken together, Internal Rules 55(3) and 55(10) show that while Civil Parties and Civil Party Applicants may request the CIJs to make such orders or undertake such investigative action as they consider necessary for the conduct of the investigation, the scope of the investigation is defined by the Introductory and Supplementary Submissions. The Pre-Trial Chamber is of the view that the restriction imposed by Internal Rule 55(3) on the CIJs equally applies to Civil Parties and Civil Party Applicants, who can bring new facts to the attention of the CIJs or the Co-Prosecutors, but have no standing for requesting investigative actions of such facts unless these are included by the Co-Prosecutors in a Supplementary Submission.

12. In this respect, the Pre-Trial Chamber notes that, although in their Second Supplementary Submission, the Co-Prosecutors limited the extended scope of investigation related to forced marriages and forced sexual relations to the acts committed in Kampot and Takeo Provinces alleged by specific complainants named in paragraph 2

⁴¹ Appeal, para. 62.



of the said submission,⁴² in their Third Supplementary Submission, issued prior to the Impugned Order, they further authorized the CIJs, *where they determine it appropriate*, to consider and investigate further alleged incidents of forced marriage and sexual relations other than those specified in the above mentioned paragraph.

13. The Pre-Trial Chamber is of the view that the First, Second and Third Requests qualify as requests for investigative action pursuant to Internal Rule 55(10) and that the Impugned Order amounts to an order refusing requests for investigative action. The Appeal is therefore admissible under Internal Rule 74(4)(a).

IV. MERIT OF THE APPEAL

14. The Pre-Trial Chambers notes the following points in respect of the CIJs when they are considering requests for investigative action:

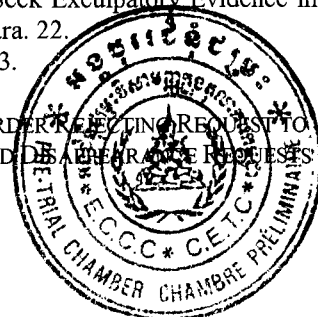
1. The CIJs have a broad discretion;
2. In the absence of any precise criteria in the Internal Rules, the CIJs have discretion to decide on the usefulness or the opportunity to accomplish any investigative action, even when requested by a party;⁴³
3. Even if an investigative action is denied during the judicial investigation, it remains possible that it may be ordered at a later stage by the Trial Chamber;⁴⁴
4. Unlike the Cambodian Code of Criminal Procedure (“CPC”), the Internal Rules do not grant the Pre-Trial Chamber the power to order additional investigative action but rather limit its role to determining appeals,⁴⁵

⁴² The Co-Prosecutors also authorized the CIJs to investigate any other facts that assist in determining either (a) the jurisdictional elements necessary to establish whether the factual matters referenced in paragraph 2 of the Second Supplementary Submission constitute crimes within the jurisdiction of the ECCC or (b) the mode of liability imputable to Nuon Chea, Ieng Sary, Kieu Samphan or Ieng Thirith with respect to such matters (Second Supplementary Submission, para. 6).

⁴³ Public Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, 18 November 2009, D164/4/13, (“SMD Decision”) para. 22.

⁴⁴ SMD Decision, para. 22 and footnote 35, referring to Internal Rule 93.

⁴⁵ SMD Decision, para. 25.



5. In so far as a decision on a request for investigative action involves questions of fact, the CIJs are in the best position to assess the request in light of their familiarity with the case files. It is inappropriate for the Pre-Trial Chamber to substitute the exercise of its discretion for that of the CIJs.⁴⁶

15. Against this background and having sought guidance in the jurisprudence of international tribunals, this Chamber has previously articulated the following standard of review applicable to appeals related to discretionary decisions.⁴⁷ It established that such decisions may only be overturned if the Appellant demonstrates that the challenged decision was:

- (1) based on an incorrect interpretation of governing law;
- (2) based on a patently incorrect conclusion of fact; or
- (3) so unfair or unreasonable as to constitute an abuse of the CIJs' discretion.⁴⁸

16. These three grounds form the only basis upon which the Pre-Trial Chamber can remit a decision back to the CIJs for re-consideration. The Pre-Trial Chamber notes that not every error of law or fact will invalidate the exercise of a discretion and lead to the reversal of an order. The onus is upon the Appellant to demonstrate that the error of law or fact actually invalidated the decision or led to a miscarriage of justice.

17. The Pre-Trial Chamber turns to the first ground of appeal.

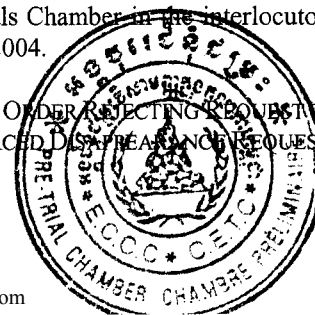
**A. First Ground of Appeal : Erroneous Rejection of the Requests
Because the Persons it Sought to be Interviewed Had Already Been
Interviewed**

18. The Appellants submit that the Impugned Order is based on a misinterpretation of governing law as the CIJs rejected the requests to interview one witness of enforced

⁴⁶ *Ibid.*

⁴⁷ SMD Decision, adopting the test developed by the ICTY Appeals Chamber in the interlocutory appeal case Slobodan Milošević v. Prosecutor, IT-02-54-AR73.7, 1 November 2004.

⁴⁸ SMD Decision paras 25-27.



disappearances⁴⁹ and ■ witnesses of forced marriage and sexual violence⁵⁰ on the basis that these persons had already been interviewed.⁵¹ The Appellants argue that in light of the CIJs duty to investigate the facts contained in the Introductory and Supplementary Submissions⁵² and to include in the indictment the material facts underpinning the legal characterization of the crimes charged,⁵³ the rejection can only be justified if the existing interviews established such material facts. The Appellants assert the existing interviews do not establish these facts.⁵⁴ In support of this argument, the Appellants state that witnesses were interviewed prior to the issue of the Second Supplementary Submission and were either not asked specific questions relating to forced marriages and sexually related crimes, or when asked, the interview was inadequate to establish the elements of the relevant crimes.

19. In relation to enforced disappearance, the Appellants refer to the interview of ■ ■ which was undertaken for the trial in case 001. They claim the CIJs have erroneously rejected their request for investigation as they are obliged to investigate and identify the facts subsumed under the specific crime of enforced disappearance.⁵⁵ Under the subject of forced marriage and sexually related crimes, the Appellants review the prior interviews of ■ persons they request be re-interviewed in relation to allegations of occurrences of forced marriage in Svay Rieng and Kampong Cham.⁵⁶ The Appellants assert that a number of witnesses spontaneously mentioned instances of sexually related crimes, but

⁴⁹ Appeal, para. 12 and footnote 9, mistakenly referring to ■, while the First Request and the Impugned Order both refer to ■. See also, First Request, footnote 69 referring to his DC CAM interview, ERN (English) 00324282, 'stating that he was involved in the capture of Vietnamese in 1978.' The Appellants further stress that the Impugned Order indicates that ■ appeared at Trial in Case 001 and that a further interview was unnecessary (Appeal, para. 12).

⁵⁰ Appeal, para. 12 and footnote 9, referring to ■

(Second Request) and to

(Third Request).

⁵¹ Appeal, paras 12-29.

⁵² Article 125 of the CPC and Internal Rule 55(2).

⁵³ Appeal, para. 13.

⁵⁴ Appeal, para. 14.

⁵⁵ Appeal, para. 29.

⁵⁶ Appeal, paras 18-25.



that they were never questioned about the circumstances and details of these crimes. Consequently, the testimonies are only a fraction of the whole picture.⁵⁷

20. The Pre-Trial Chamber notes that the Appellant is required to show that the evidence of the witnesses, in its totality, does not provide enough information to satisfactorily substantiate the elements of enforced disappearance, forced marriage and sexually related crimes. Only then can the Appellant prove that there is insufficient evidence for the crimes to be included in the Closing Order. It is further noted that for these crimes to form the basis of any indictment in the Closing Order in respect of crimes against humanity, proof is required that they formed part of a widespread and systematic attack upon the civilian population by the Charged Persons.

(i) Enforced Disappearance

1. *Witness Mr. [REDACTED]*

21. The Pre-Trial Chamber first considers the appeal against the CIJs refusal to re-interview Mr. [REDACTED] to obtain specific evidence about the crime of enforced disappearance.

22. In their First Request, the Co-Lawyers for Civil Parties address at some length the severity of the crime of enforced disappearance⁵⁸ and state the principle of international law that the widespread and systematic commission of enforced disappearances of persons will constitute a crime against humanity.⁵⁹ They assert there is a duty upon the court to investigate such crimes⁶⁰ and that such crime is within the jurisdiction of the ECCC.⁶¹ The First Request briefly mentions that in the present case there is evidence of a widespread or systematic commission of enforced disappearances during the Khmer Rouge period.⁶² In their Appeal the Appellants state that Mr. [REDACTED] did not testify in the trial and he was removed from the witness list. They argue that in the prior interview

⁵⁷ Third Request, para. 3.

⁵⁸ First Request, paras 2-4.

⁵⁹ First Request, para. 5.

⁶⁰ First Request, paras 6-7.

⁶¹ First Request, paras 10-14, 19-22.

⁶² First Request, paras 23-25.



he was not specifically asked about enforced disappearances and “their specificities”.⁶³ Thus, they conclude, the CIJs have not fulfilled their mandate to investigate and identify the facts that must be proven for enforced disappearance.

23. The Pre-Trial Chamber reiterates that the onus is upon the Appellant to show how the re-interview of the requested witness would assist in proving the elements of the crime so that it can be included in the Closing Order. Given the Appellants’ assertion that the crime falls within the ambit of a crime against humanity,⁶⁴ it is necessary to demonstrate that it formed part of a systematic and widespread attack against the civilian population.⁶⁵ Neither the First Request nor the Appeal give any indication of the substantive material contained in Mr. [REDACTED] prior evidence that might indicate he has further information of assistance to the investigation of the crime of enforced disappearance. Without any analysis of what his evidence contains, or what further information the Appellants would like to ascertain from him as a witness, it is impossible to claim that the CIJs have erred in refusing to re-interview him. The Pre-Trial Chamber does not find for the Appellants on this ground.

(ii) Forced Marriage and Sexually Related Crimes

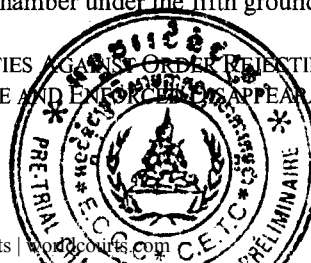
24. The Third Request deals with forced marriage and sexually related crimes. It suggests that the interviews should concentrate on the organization of the forced marriages and the orders given within the Khmer Rouge hierarchy concerning marriages, the punishments for refusing to follow such orders and the direct order and insistence of the Khmer Rouge of having conjugal sex after the wedding.⁶⁶ In reference to sexually related crimes, the Third Request submits that the investigation should explore what was considered “immoral behaviour” to identify if this also encompassed sexually related crimes. It also requests that the CIJs examine the details and level of occurrence of such crimes and if

⁶³ Appeal, para. 29.

⁶⁴ First Request, para. 5.

⁶⁵ Not necessarily that it was committed in a widespread and systematic manner as stated in First Request, para. 7. This legal distinction is addressed by the Pre-Trial Chamber under the fifth ground of the appeal.

⁶⁶ Third Request, para. 4.



practices such as inspections of virginity, mentioned by another witness, were general in the Khmer Rouge regime.⁶⁷

25. The Impugned Order states that most of the persons named in the Third Request have been interviewed by the Office of the Co-Investigating Judges (“OCIJ”), “addressing the issue of forced marriage and therefore no further re-interviews of these persons are deemed necessary”.⁶⁸ As for most of the persons sought to be interviewed with respect to sexually related crimes, the Impugned Order states that they have been interviewed by the OCIJ and therefore no re-interviews are deemed necessary.⁶⁹

2. *Witness Mr. [REDACTED]*

26. The Appellants refer to the interview of Mr. [REDACTED] on 5 May 2008 and his statement that he was married in 1978 at a time when five other couples also married.⁷⁰ The Appellants argue this statement is insufficient to establish a crime and in particular the elements of the crime of rape, (attempted) forced pregnancy, (sexual) enslavement and forced marriage. They submit that no questions were asked about the circumstances, the kind of force, the absence of consent, the possibly prescribed sexual intercourse, the surveillance of the sexual and conjugal relationship, whether children resulted from this marriage, who ordered the marriage (in order to establish the chain of command in this region) and about the specific suffering of the victim.⁷¹

27. The Pre-Trial Chamber notes that Mr. [REDACTED] is not one of the people referred to at paragraphs 15 and 16 of the Impugned Order. Therefore the Impugned Order’s finding relevant to his situation is in paragraph 14, which simply states that “most of the named persons have been interviewed by the Office of the Co-Investigating Judges addressing the issue of forced marriage and therefore no further re-interviews of these persons are

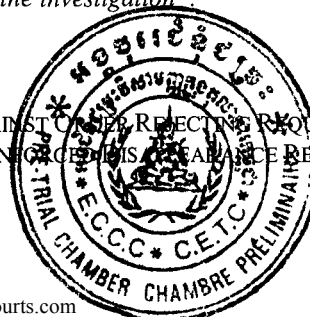
⁶⁷ Third Request, para. 6.

⁶⁸ Impugned Order, para. 14. See also Impugned Order, para. 15 related to [REDACTED] named persons for whom the CIJs were unable to uncover sufficient details to facilitate their identification, location and preliminary assessment of their potential evidence; as well as Impugned Order, para. 16, related to three named persons also in the process of being considered civil parties for whom the CIJs found that although they allege forced marriage and therefore fall within the *in rem* scope of the investigation “*there is insufficient basis to conclude that their evidence would facilitate the evidence gathered at this stage of the investigation*”.

⁶⁹ Impugned Order, para. 17.

⁷⁰ Appeal, para. 18, referring to D125/16 at p. 5.

⁷¹ Appeal, para. 19.



deemed necessary”.⁷² Whilst the Impugned Order is not fully reasoned in respect of this matter, in this instance it is immaterial. The Pre-Trial Chamber finds the witness does not raise the issue of forced marriage in his original interview and merely states that four other couples were married at the same time as he was in 1978. The Pre-Trial Chamber finds that the Appellants have failed to provide the CIJs with a basis to believe that the witness in question was forced to marry or possessed information about other persons being forced to do so, as alleged in the Second, Third and Fourth Supplementary Submissions. No error of fact or law or an abuse of discretion is demonstrated.

28. There are [REDACTED] additional people requested to be re-interviewed in the Second and Third Requests who have not been mentioned in the Appeal. The Pre-Trial Chamber has not considered these individuals in respect of the first ground of appeal, but notes that it has reviewed the relevant statements and/or reports from the Victims’ Unit in respect of each of these people for the purpose of getting a better understanding of the information the CIJs had at their disposal when considering the investigative requests. This review reveals that a large number of witnesses allege that they were forced to marry with a person they had not chosen.⁷³ Some specifically allege that in case of refusal they were told there would be adverse consequences for them.⁷⁴ A more limited number of witnesses described how they were required to seek the approval of the chief of the unit if they wished to marry and the marriage would be arranged.⁷⁵ Two witnesses mentioned the existence of both systems of marriage.⁷⁶ Witness Mr. [REDACTED], unlike many other

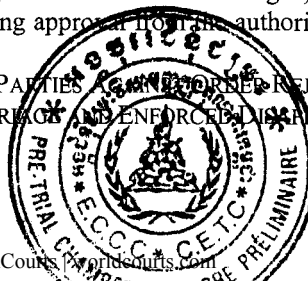
⁷² Impugned Order, para. 14.

⁷³ See, D166/100, p. 3; D166/101, p. 5; D166/36, p.4; D125/23, p. 5; D125/18, p. 7; D125/45, p. 6; D125/46, p.6; D125/48, p. 3; D125/61, p. 2; D125/117, p. 2; D125/127, p. 3; D22/146, p.4; D108/6/11, p. 3.

⁷⁴ For examples of such adverse consequences mentioned by the witnesses sought to be re-interviewed, see D166/100, p. 3, according to which they would be forced to work far away as part of a mobile group; D166/36, p.4, according to which they would be sent to reeducation; D125/46, p.6, according to which a woman would be threaten to be married with a disabled soldier if she refused the choice of Angkar; D125/117, p. 2, according to which there would be consequences and she knew of a case of arrest and killing of a woman who refused to marry; D108/6/11, p. 3; D22/146, p.4 who was 15 at the time and threatened with an AK rifle by a militiaman who told her that if she did not marry the chief of the village militia they would kill her.

⁷⁵ See D166/65, p. 5; D125/25, p. 5, according to which in his unit it was possible to choose the person one wanted to marry and after having obtained approval, Angkor would arrange the marriage; D166/94, p. 5, according to which he expressed the willingness to marry and his chief contacted the women’s unit to arrange it; D166/123, p. 7, according to which going ahead without such approval would be punished by death.

⁷⁶ D125/169, p.6, according to which one form marriage involved a request from a man to the chief of the men’s unit who made the proposal to the chief of the women’s unit and another form of marriage was marriage arranged by Angkar, which one could not refuse, that is a “forced marriage”; D125/184, pp.6-7, according to which series of marriages were consented following approval from the authorities, but that the army marriages only occurred upon order of the hierarchy.



potential witnesses requested to be re-interviewed but not mentioned in the Appeal, does not claim that his marriage was arranged. In this context, the Appellants fail to show that the error invalidated the decision to deny the request to re-interview the person in question, or that it lead to a miscarriage of justice. This sub ground of appeal is dismissed.

3. *Witness, Mr. [REDACTED]*

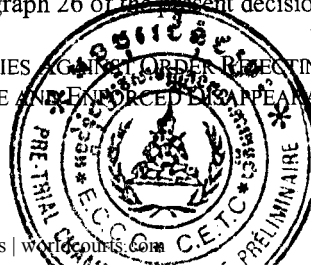
29. Similarly for Mr. [REDACTED], the Appellants submit that the interviewers should have asked about the circumstances of the forced marriages and explain the difference between the term “arranged” asked in a question about forced marriage, and the term “response” used in the reply to the question.⁷⁷ Whilst the Pre-Trial Chamber notes that the English and French versions of the transcript differ on this issue, it sees no need to address the matter further as the Appellants have failed to analyse the evidence already gathered and provide details of how it establishes the specific elements of the crimes relevant for the Closing Order, were such crimes to be the subject of indictment. They have not met the threshold requirement, that by refusing to re-interview the witnesses, the CIJs will not be in a position to include in the Closing Order the material facts underpinning the legal characterisation of the charged crimes. In this instance the CIJs have declared it unnecessary to re-interview the witness. This does not amount to a demonstrable error of law. This sub-ground of appeal is therefore dismissed.

4. *Witness, Mr. [REDACTED]*

30. The Appellants refer to the fact that when Mr. [REDACTED] was asked to describe the living and working conditions during the Khmer Rouge period of 1975 through 1979, he spontaneously stated that as for marriage, “they married 200 couples, or 100 couples or 50 couples at a time. The subjects had no right to choose their own spouses. Angkar selected their spouses for them. They just had a little party that’s all.”⁷⁸ The Appellants stress that in this instance, as in the initial CIJ interviews, if a witness mentioned the subject matter on his/her own initiative, no further questioning occurred in order to establish the elements of the crimes. They claim that the witnesses should have been at a

⁷⁷ Appeal, para. 21, listing the same questions raised at para. 19, in relation to the previous witness as to the circumstances of the marriages and reproduced at paragraph 26 of the present decision.

⁷⁸ Appeal, para. 22, referring to D125/29, p. 4.



minimum, asked about the time and place of the mentioned marriages in order for a charge to be brought. In this specific instance they assert the witness should have been asked what he meant by “they” and “Angkar”.⁷⁹

31. The Pre-Trial Chamber notes that the line of questioning by the investigators was more minimal than in the previous instance of Mr. [REDACTED]. It agrees that the investigators could have further questioned the marriages and asked follow-up questions of the witness. However, the fact that certain witnesses have not been asked such questions and that the CIJs do not find it necessary to re-interview them does not amount to an error of law. As previously stated, the CIJs have a broad discretion when deciding on requests for investigative actions and are in the best position to assess whether to proceed or not in light of their overall duties and their familiarity with the case files. Thus, in these circumstances, it would be inappropriate for the Pre-Trial Chamber to substitute the exercise of its discretion for that of the CIJs.

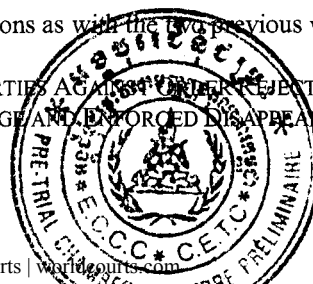
32. To demonstrate that the CIJs erred in finding that it was not necessary to re-interview the witness the Appellants must show that by refusing to re-interview the witness in question, the CIJs will not be in a position to include the material facts underpinning the legal characterization of the crimes charged in a closing order. This requires analysing the existing evidence in the case file in relation to the elements that must be established for the charged crimes. The Appellants assert that the existing interviews do not establish the relevant material facts and allow their legal qualification.⁸⁰ They fail to demonstrate their assertion as they do not analyse the evidence already gathered and identify specific elements of the crimes that are not yet covered and then propose how re-interviewing the specific witnesses would assist in establishing the relevant material facts. Thus, the Appellants fail to demonstrate that the CIJs erred in considering that re-interviewing this witness was not necessary. This sub-ground of appeal is therefore dismissed.

5. *Witness, Mr. [REDACTED]*

33. The Appellants refer to the spontaneous mention by Mr [REDACTED] of a case of rape during his interview on 2 June 2008 enquiring about the conditions of his detention

⁷⁹ Appeal, para. 23 referring to the same line of questions as with the two previous witnesses.

⁸⁰ Appeal, para. 14.



by the Khmer Rouge in the Security Office of the North Zone. He described the facts in the following terms: “[o]ne girl who was a cook was raped by the guards. Her clothes were taken off. Naked, she was killed by having her chest split open, her liver taken out and fried as food.”⁸¹ The Appellants stress that the investigators did not ask any questions about the rape, despite the fact that in the Appellants’ view, ‘it seems’ he was an eyewitness.⁸² The Appellants claim that as the witness is not a jurist, further information is needed about the exact facts and the circumstances to support a charge of rape. The Appellants provide a list of relevant questions which could have been put to the witness to clarify these circumstances.⁸³

34. The Pre-Trial Chamber has reviewed the relevant statement. It is not sufficiently satisfied that the person interviewed was an eyewitness of the incident. Indeed, he stated that he and other prisoners who had technical skills were assigned to work on the basis of these skills and that he was in charge of repairing [REDACTED] and [REDACTED] while two female prisoners were assigned [REDACTED].⁸⁴ There is nothing to suggest that he would have been present in the location of the rape and whether the statement is hearsay or not. Regardless, it is unnecessary to conclude this point, as the Appellants have failed to show that by refusing to re-interview the witness the CIJs will not be in a position to include the material facts underpinning the legal characterization of the crime of rape, as a crime against humanity in the Closing Order. Further, their refusal to re-interview the witness on the grounds that he has already been interviewed must be viewed while taking into account the amount of other evidence the CIJs have that specifically addresses the crime of rape.⁸⁵ For this, the Pre-Trial Chamber refers to statements made by the Appellants in support of their Second and Third Requests. The Pre-Trial Chamber observes that two of the persons interviewed describe having personally experienced rape or other forms of sexual violence,⁸⁶ one of whom provides details about the form of sexual violence alleged and the circumstances surrounding its commission,⁸⁷ while the other refers to being cruelly raped and beaten at a place where all the women were raped in turn by the Khmer

⁸¹ Appeal, para. 24.

⁸² Appeal, para. 25.

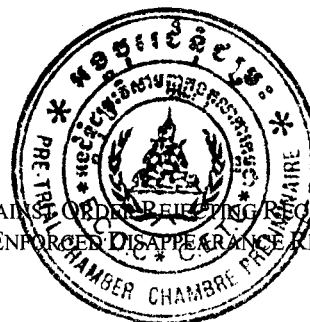
⁸³ Appeal, paras 25-26.

⁸⁴ D125/33, p. 5.

⁸⁵ See Impugned Order, para. 17.

⁸⁶ D125/87, p. 7 (French Version); D22/30/1, p. 1.

⁸⁷ D125/87, p. 7 (French Version).



Rouge soldiers and were killed, even pregnant women. The witness explains how she was able to escape, thus avoiding being killed.⁸⁸ Other persons interviewed reported rapes being committed in places of detention and made it clear that their testimony is hearsay.⁸⁹ One of the witnesses appears to have been an eye witness,⁹⁰ whilst others do not specify upon what they base their knowledge.⁹¹ A number of other statements refer to acts of immoral conduct involving guards and female prisoners, as well as workers in units, and to punishments incurred for such acts.⁹² In light of this review, the Pre-Trial Chamber is not satisfied that the CIJs erred in refusing to re-interview the witness in question. This sub-ground of appeal is therefore dismissed.

35. In regard to the remaining challenges raised under this ground of appeal, the Pre-Trial Chamber makes the following observations. The Appellants are incorrect in their assertion that the footnotes contained in the Second and Fourth Request⁹³ lay down complete statements on the subject matter.⁹⁴ To the contrary, the footnotes in the Second Request contain quotations or paraphrases from only [REDACTED] out of the [REDACTED] witnesses sought to be re-interviewed. Similarly, the Third Request, with the exception of the witnesses described above, does not lay down the “complete statements on the subject matter” since the footnotes of the Appeal only provide a very brief paraphrase of the witnesses’ statement in relation to forced marriage or sexually related crimes. Nowhere have the Appellants attempted to demonstrate how the CIJs may have erred in denying the request to re-interview each of these witnesses. They assert that “the current statements on the case file for all witnesses and victims whose re-interview was

⁸⁸ D22/30/1, p. 1.

⁸⁹ D25/17, p. 3, the witness having heard about rapes being committed by the warden of a prison (now dead) and others against female prisoners; D125/187, p. 5, the witness having heard from a deceased person and from another named and living one that Khmer Rouge troops raped young women, [REDACTED] under a *krasaing* tree and kill them.

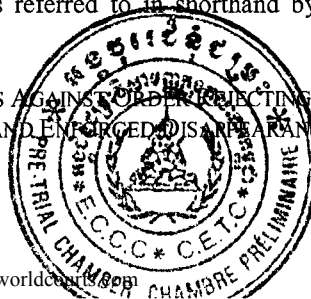
⁹⁰ D125/23, p. 11, the witness reporting that a number of prisoners were raped and killed by the guards, including a named one, that he (the witness) was afterwards asked by that guard to go look and bury them and that he saw that some prisoners were unclothed and had M79 [REDACTED].

⁹¹ D125/108 and D108/3/3.

⁹² D125/134, p.6, referring to the arrest of the warden of a prison on that ground; D166/34, p. 3, referring to several incidents including a male and female worker of her unit being executed for immoral conduct. See also, D166/37, p. 6 and D166/39, p. 4, in relation to female workers accused of immoral conduct without more precision, as well as D125/118, who attended the trial of persons accused of immoral conduct. Although the witness is interviewed in details about the trial, no question is put to him about the facts underlying the charge of immoral conduct.

⁹³ The Appellants refer to the Fourth Request which is referred to in shorthand by this judgment as Third Request.

⁹⁴ Appeal, para. 27.



requested, are flawed with respect to forced marriage and sexually related crimes”, because they do not “sufficiently contain the information required to establish the elements of the crimes of forced marriage, (attempted) rape, (sexual) enslavement and (attempted) forced pregnancy, nor do they establish that these crimes were committed in a widespread and systematic (sic) manner”.⁹⁵ This is short of what an appellant must show when alleging that the CIJs erred in law, fact, or abused their discretion when denying a request for investigative action. The Pre-Trial Chamber therefore dismisses this part of the first ground of appeal without further consideration of its merit, and will turn to the second ground of appeal.

B. Second Ground of Appeal: Erroneous Rejection of the Requests Because the Facts it Sought to be Investigated Did Not Fall Within the Scope of Investigation

36. Under the second ground of appeal the Appellants allege the Impugned Order is based on an incorrect interpretation of governing law as it rejected the requests on the erroneous basis that the facts to be investigated did not fall within the scope of the investigations or that the requests did not explicitly show that they do.⁹⁶ More specifically, referring to the Impugned Order’s findings that facts reported by some of the people sought to be re-interviewed are outside of the scope of investigation,⁹⁷ or that they do not clearly indicate that they fall within the [*in rem* of the] scope of the investigation,⁹⁸ the Appellants argue that Article 125 of the Cambodian Code of Criminal Procedure (“CPC”) and Internal Rule 55(2) according to which the CIJs shall only investigate the facts set out in the Introductory Submission refers to the facts as a whole, and that no other provision of these instruments limits the scope of the investigations to merely the facts or a part or section of the Introductory Submission.⁹⁹ The Appellants further refer to Article 44 of the CPC and Internal Rule 53(1) according to which the Introductory Submission shall contain a summary of the facts, and argue that all the witnesses whose interviews have been rejected concern facts that are contained in the section of the Introductory

⁹⁵ *Ibid.*

⁹⁶ Appeal, paras 30-43.

⁹⁷ Appeal, para 30, referring indirectly to Impugned Order, paras 9, 11.

⁹⁸ Appeal, para. 30, referring indirectly to Impugned Order, paras 7, 10, 16.

⁹⁹ Appeal, para. 31.



Submissions entitled ‘Summary of the facts’ and are thus part of the scope of the investigation.¹⁰⁰

37. The Co-Prosecutors have previously clarified the terms of paragraph 122 of the Introductory Submission. They have stated that “the judicial investigation requested is not limited to the facts specified in paragraphs 37 to 72 of the Introductory Submission and paragraphs 5 to 20 of the Supplementary Submission but extends to all facts, referred to in these two Submissions, *provided* that these facts assist in investigating (a) the jurisdictional elements necessary to establish whether the factual situation specified in paragraphs 37 to 72 and 5 to 20 respectively, constitute crimes within the jurisdiction of the ECCC or (b) the mode of liability of the Suspects named in the Introductory Submission”.¹⁰¹ This was a response to a Forwarding Order from the CIJs on 8 August 2008.¹⁰² The Appellants claim that the limitation imposed by the Co-Prosecutors is not supported by the CPC and the Internal Rules.¹⁰³

38. The Pre-Trial Chamber draws attention to the procedural system in place at the ECCC, whereby the ECCC Law¹⁰⁴ and the Internal Rules both provide that the Co-Prosecutors are solely responsible for exercising the public action for crimes within the jurisdiction of the ECCC, either at their own discretion or in response to a complaint.¹⁰⁵ They are endowed with the responsibility to conduct preliminary investigations¹⁰⁶ and open a judicial investigation by sending an Introductory Submission to the CIJs if they have reasons to believe that crimes within the jurisdiction of the ECCC have been committed.¹⁰⁷ The CIJs are responsible for conducting the judicial investigation. The investigation is restricted to crimes for which the ECCC has jurisdiction and further limited to the facts as set out in the Introductory and/or Supplementary Submissions.¹⁰⁸ In

¹⁰⁰ Appeal, para. 37.

¹⁰¹ Co-Prosecutors’ Response to the Co-Investigating Judges Request to Clarify the Scope of the Judicial Investigation Requested in its Introductory and Supplementary Submission, 13 August 2008, D98/I, para. 2.

¹⁰² Forwarding Order, 8 August 2008, D98.

¹⁰³ Appeal, para. 39.

¹⁰⁴ Law on the Establishment of the Extraordinary Chambers, 27 October 2004 (NS/RKM/1004/006) (“ECCC Law”).

¹⁰⁵ Internal Rule 49(1). See also Article 16 of the ECCC Law, recognizing the responsibility of the two Prosecutors for indictments.

¹⁰⁶ Internal Rule 50.

¹⁰⁷ Internal Rule 53(1).

¹⁰⁸ Internal Rule 55(2).



contrast to Cambodian Law, a victim who wishes to be joined as a Civil Party before the ECCC may only do so by way of intervention, joining ongoing proceedings that fall within the scope of the Introductory and Supplementary Submissions. This is the current framework under which all investigations must operate. Therefore, whilst paragraphs (2), (3) and (10) of Internal Rule 55 grant a Civil Party Applicant the right to request the CIJs to make orders or undertake investigative action for the conduct of the investigation, the right is restricted to the aforementioned scope. Given this framework the Pre-Trial Chamber finds the Appellants can not successfully claim that the Prosecutors' response is not supported by the CPC or the Internal Rules. The Co-Prosecutors are clearly the party responsible for determining the scope of the investigation. The investigation itself must formulate the elements of the crimes alleged and the liability of the Charged Persons so they are able to be included within the Closing Order. The CIJs have operated within the correct framework in making their decision that the facts alleged did not fall within the scope of investigation. They have not committed an error of law. The Pre-Trial Chamber further notes that if the Appellants had sufficiently demonstrated that the requested evidence would prove the "jurisdictional elements necessary to establish whether the factual situations, specified on paragraphs 37-72 constitute crimes within the jurisdiction of the ECCC" rather than just stating it would, the Pre-Trial Chamber may have been in a position to decide otherwise.

**C. Third Ground of Appeal: Erroneous Rejection of the Requests
Because the CIJs Were Not Able to Identify and Locate the Persons to be
Interviewed**

39. Under this ground of appeal, the Appellants allege the Impugned Order is based on an incorrect interpretation of governing law as the CIJs rejected the request to re-interview a number of witnesses of forced marriages and sexually related crimes on the basis that they were unable to find sufficient details to facilitate their identification and location.¹⁰⁹ The Appellants submit that the Impugned Order does not comply with Article 134 of the CPC and Internal Rule 55(10) which require a 'reasoned decision' and implies the reasons be comprehensible and traceable, as well as Internal Rule 21(1)(a) and (c) in

¹⁰⁹ Appeal, paras 44-49.



relation to the rights of civil parties.¹¹⁰ The Appellants assert that the Impugned Order does not elaborate upon the efforts undertaken to locate the witnesses the subject of the requests. The Appellants conducted a ‘test’ and emailed Mr. [REDACTED], director of DC-CAM, and claim they easily acquired information on the location of two of the listed witnesses.¹¹¹

40. The Pre-Trial Chamber finds that the Appellants’ argument is flawed on two grounds: (a) it is disingenuous to conclude the CIJs did not attempt to locate the witnesses because the Appellants managed to find two of them easily. An equal yet less accusatory conclusion is that the CIJs did conduct a search but it was insufficient; and (b) paragraphs 16-18 of the Impugned Order do provide reasons as to why the CIJs have refused to interview these witnesses. One of these reasons in fact forms the basis of the Appellants second ground of appeal. The Pre-Trial Chamber rejects this ground of appeal but notes that the Appellants have not provided evidence of the location of the witnesses they claim to have received from the Director of DC-CAM.

**D. Fourth Ground of Appeal: Erroneous Rejection of the Requests
Because Interviewing the Persons in Question Would Not Facilitate the
Investigation**

41. Under the fourth ground of appeal, the Appellants submit the Impugned Order was based on an incorrect interpretation of governing law when the CIJs rejected the requests to interview witnesses of forced marriage on the erroneous basis that interviewing the persons in question would not facilitate the investigation, given information already available on the case file.¹¹² The Appellants contend that the CIJs are not bound by the legal qualification stated by the Co-Prosecutors in their Fourth Supplementary Submission as they must first determine the appropriate legal qualification of their closing order. The Appellants state that the CIJs are yet to indicate under which crime they “intend to subsume the multiple facts of a (typical) forced marriage”.¹¹³ The Appellants state, they had suggested the Charged Persons be charged cumulatively for the crime of

¹¹⁰ Appeal, para. 45.

¹¹¹ Appeal, para 47.

¹¹² Appeal, paras 50-59 and footnote 35, referring to Impugned Order, para. 18.

¹¹³ Appeal, para. 54.



(attempted) rape, (sexual) enslavement, (attempted) forced pregnancy and forced marriage as a specific crime and that it “could either be part of a widespread or systematic attack as a single act or be itself a widespread or systematic attack”.¹¹⁴ They submit that only through the interview of further witnesses and victims can it be established that forced marriages were not single isolated crimes, organised by individual cadres, but rather that they formed part of a pattern throughout the country.¹¹⁵

42. The Pre-Trial Chamber is of the view that the Appellant’s allegation under this ground of appeal lacks clarity. First, it reiterates that the Co-Prosecutors have the sole right to determine the scope of the investigation. Second, the Appellant seems to mix the legal requirements of crimes against humanity with the facts that are needed to prove the elements of this umbrella crime. Therefore, the Appellants are wrong to claim that the CIJs have erred in not investigating “if forced marriage was **as such** a widespread or systematic attack against the civilian population”.¹¹⁶ The Pre-Trial Chamber dismisses this ground of appeal.

E. Fifth Ground of Appeal: Erroneous Rejection of One Civil Party

Applicant

43. Under the fifth ground of appeal, the Appellants allege the Impugned Order is based on a patently incorrect conclusion of fact as it rejected one civil party applicant¹¹⁷ on the ground that the Appellants failed to indicate explicitly how the allegation might fall within the scope of the investigation.¹¹⁸ The Appellants argue that in the DC-CAM statement the witness stated where she was living with her parents in Prey Veng province, that her father was Vietnamese, that he had been taken away and never returned, and that she heard he had been arrested and killed. According to the Appellants, these facts clearly fall under paragraph 69 of the Introductory Submission, which refers to Prey Veng



¹¹⁴ Appeal, paras 54-55.

¹¹⁵ Appeal, para. 57.

¹¹⁶ Appeal, para. 59.

¹¹⁷ Appeal, paras 60-62, referring to [REDACTED].

¹¹⁸ Appeal, para. 60 and footnote 44 referring to Impugned Order, para. 7.

province as one of the two provinces where the CPK implemented a policy of eliminating the Vietnamese population.¹¹⁹

44. The First Request refers to a 3 page excerpt from a translated, Khmer to English DC-CAM statement to support its request to re-interview the applicant. It states the person sought to be re-interviewed said that her father was taken away and “not seen to come back”.¹²⁰ The Pre-Trial Chamber notes the document does not mention the father of the applicant was Vietnamese (although the Chamber considers his name on the document may indicate that he was Vietnamese), neither does it indicate when and where the arrest took place. The Pre-Trial Chamber notes that on appeal, the Appellants refer to two DC – CAM statements¹²¹ which differ from those provided to the CIJs in support of the First Request. The Pre-Trial Chamber finds the Appellants did not claim in the First Request that the disappearance fell under paragraph 69 of the Introductory Submission. They Appellants fail to demonstrate that the CIJs erred in fact by concluding the information on file did not explicitly demonstrate how the allegations fell within the scope of the investigation. The fifth and last ground of the appeal is thus dismissed.

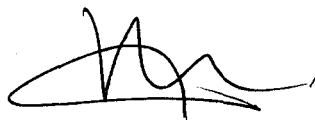
THEREFORE, THE PRE-TRIAL CHAMBER HEREBY UNANIMOUSLY:

1. **Declares** the Appeal admissible and;
2. **Dismisses** it on the merits.

Phnom Penh, 21 July 2010 *Ch*

Pre-Trial Chamber






Rowan DOWNING NEY Thol Catherine MARCHI-UHEL HUOT *Ch* PRAK Kimsan

¹¹⁹ Appeal, para. 62.

¹²⁰ First Request, footnote 73, referring to DC Cam statement of 13 March 2000, ERN (English) 00332650.

¹²¹ Appeal, footnote 45, referring to DC-CAM statement of 13 March 2000, ERN (KH) 00033536 and ERN (KH) 0003540.