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EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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**KHIEU SAMPHAN'S DEFENCE RESPONSE TO CIVIL PARTY LEAD CO-LAWYERS' IMMEDIATE APPEAL CONCERNING THE CHARGES OF RAPE OUTSIDE THE CONTEXT OF MARRIAGE**

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**Before:**

**The Supreme Court Chamber**  
Judge KONG Srim  
Judge Agnieszka KLONOWIECKA-MILART  
Judge SOM Sereyvuth  
Judge Chandra Nihal JAYASINGHE  
Judge MONG Monichariya  
Judge Florence Ndepele MWACHANDE-MUMBA  
Judge YA Narin

**Co-Prosecutors:**

CHEA Leang  
Nicholas KOUMJIAN

**All Civil Party Lawyers**

**Defence for Mr NUON Chea**

**MAY IT PLEASE THE SUPREME COURT CHAMBER**

1. On 12 October 2016, the parties were notified of an immediate appeal by the Civil Party Lead Co-Lawyers (“the Civil Parties”) against the decision of the Trial Chamber (“the Chamber”) on their request for confirmation of the scope of the trial concerning the charges of rape outside the context of marriage (“Appeal”).<sup>1</sup>

2. The KHIEU Samphân Defence (“the Defence”) hereby requests the Supreme Court Chamber (“the Supreme Court”) to declare the Appeal inadmissible.

**I. PROCEDURAL BACKGROUND**

3. On 15 September 2010, the Co-Investigating Judges issued their Closing Order in Case 002, in which they decided to indict the charged persons on the vast majority of the factual allegations of which they were seised.<sup>2</sup> However, the Co-Investigating Judges found that the evidence against them was not sufficient to support the charge of rape outside the context of marriage (“rape outside the context of marriage”). Accordingly, they decided not to indict them for those factual allegations.<sup>3</sup>

4. The Prosecution did not appeal the Closing Order to challenge the decision of the Co-Investigating Judges on the charges of rape outside the context of marriage. The Accused appealed against other findings in the Closing Order.

5. On 13 January 2011, the Pre-Trial Chamber ruled on the appeals brought by the Accused against the Closing Order, without ever having been seised of the factual allegations of rape outside the context of marriage.<sup>4</sup> The Accused were therefore indicted and sent for trial before the Chamber on the basis of the factual allegations set out in the Closing Order and the decisions of the Pre-Trial Chamber.

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<sup>1</sup> *Civil Party Lead Co-Lawyers’ Immediate Appeal Against Trial Chamber Decision on Request For Confirmation of Scope of the Charges of Rape Outside the Context of Forced Marriage*, 28 September 2016, **E306/73/1/1** (“Appeal”)

<sup>2</sup> Closing Order, 15 September 2010, **D427**.

<sup>3</sup> Closing Order, paras 1524, 1545, 1548, 1551, 1554, 1559, as well as 1426-1429, 926-927 and 1181.

<sup>4</sup> Decision on KHIEU Samphân’s Appeal against the Closing Order, 13 January 2011, **D427/4/14**; Decision on Ieng Thirith’s and Nuon Chea’s Appeals against the Closing Order, 13 January 2011, **D427/2/12**; Decision on Ieng Sary’s Appeal against the Closing Order, 13 January 2011, **D427/1/26**.

6. On 21 July 2011,<sup>5</sup> in response to submissions by the Prosecution, the Civil Parties, “conclude[d] that the reasoning of the CIJ’s not to indict the Accused for the rapes outside the context of Forced Marriages [was] flawed”,<sup>6</sup> and requested the Chamber to “re-characterize” the facts. However, they acknowledged that “the OCIJ did not indict these cases.”<sup>7</sup>

7. On 25 April 2014, three weeks after setting out the scope of Case 002/02,<sup>8</sup> the Chamber rejected the request characterising it as a request to add charges, a request which had no legal basis.<sup>9</sup>

8. On 12 Jun 2015, the Chamber not only reiterated its 2014 decision but also re-stated that the Accused bore no criminal responsibility for rape committed at the Kraing Ta Chan Security Centre in particular.<sup>10</sup>

9. On 18 March 2016, the Civil Parties filed a request for “confirmation of the scope of [Case 002/02] concerning the charges of rape outside the scope of Forced Marriage”. They argued that the Chamber was seised of the factual allegations concerning rape outside the context of marriage and was under obligation to make a legal determination of those allegations without being bound by the legal characterizations made by the Co-Investigating Judges (“Request for Confirmation”).<sup>11</sup>

10. On 28 March 2016, the Defence responded that the Chamber had never been seised of those allegations and therefore could not possibly make a legal determination of them.<sup>12</sup>

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<sup>5</sup> Civil Party Lead Co-Lawyers’ Response to the Co-Prosecutors’ Request to Re-characterize the Facts establishing the Conduct of Rape as a Crime against Humanity, 21 July 2011, **E99/1**.

<sup>6</sup> *Ibidem*, para. 40 (emphasis added).

<sup>7</sup> *Ibid.*, para. 32 (emphasis added).

<sup>8</sup> Decision on Additional Severance of Case 002 and Scope of Case 002/2, 4 April 2014, **E301/9/1** with Annex **E301/9/1.1**.

<sup>9</sup> Further Information regarding remaining preliminary objections, 25 April 2014, **E306**, para. 3.

<sup>10</sup> Decision on KHIEU Samphân’s Request for Confrontation among Witness Srey Than and Civil Parties Say Sen and Saut Saing and Disclosure of Audio Recordings of Interviews of Say Sen, 12 June 2015, **E348/4**, para. 11.

<sup>11</sup> Lead Co-Lawyers’ Rule 92 Submission on the Confirmation of the Scope of Case 002/02 Concerning the Charges of Rape Outside the Context of Forced Marriage, 18 March 2016, **E306/7** (“Request for Confirmation”)

<sup>12</sup> *Réponse de la Défense de M. KHIEU Samphân à la demande de clarification des Parties civiles concernant les accusations de viol*, 28 March 2016, **E306/7/1** (“Response to Request for Confirmation”).

11. On 4 April 2016, the Civil Parties replied to the Defence and reiterated the arguments raised in their Request for Confirmation.<sup>13</sup>

12. On 30 August 2016, the Chamber confirmed that it was not seised of the factual allegations of rape outside the context of marriage and that it was not empowered to expand the charges against the accused (“impugned Decision”).<sup>14</sup>

## II. INADMISSIBILITY OF THE APPEAL

13. The Civil Parties appeal from the impugned Decision under Internal Rule 104(4)(a),<sup>15</sup> according to which “*decisions which have the effect of terminating the proceedings*” are subject to immediate appeal.

14. Insofar as the proceedings concerning the charges of rape outside the context of marriage were terminated before the Chamber was seised of the case, the Chamber simply noted, as a matter of logic, that such proceedings were not pending before it. As the impugned Decision does not have the effect of terminating the proceedings, it is consequently not subject to immediate appeal.

15. Contrary to what is argued in the Appeal,<sup>16</sup> the Chamber is not seised of factual allegations of rape outside the context of marriage (1) and the impugned Decision does not have the effect of terminating the proceedings concerning such allegations (2).

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<sup>13</sup> Lead Co-Lawyers’ Reply to KHIEU Samphân’s Defence’s Response to Request for Clarification on Rape Outside Forced Marriage, 4 April 2016, **E306/7/2**.

<sup>14</sup> Decision on Lead Co-Lawyers’ Rule 92 Submission on the Confirmation of the Scope of Case 002/02 concerning the Charges of Rape Outside the Context of Forced Marriage, 30 August 2016, **E306/7/3** (“impugned Decision”).

<sup>15</sup> Appeal, paras 2, 22-23, 49, 50-66

<sup>16</sup> Appeal, paras 50-66

**1. THE CHAMBER HAS NEVER BEEN SEISED OF CHARGES OF RAPE OUTSIDE THE CONTEXT OF MARRIAGE**

16. The Chamber has never been seised of the charges of rape outside the context of marriage because the Co-Investigating Judges disposed of the matters pending before them by issuing a dismissal order concerning these allegations (A). Their decision was subject to appeal but was not appealed (B). The Civil Parties are the only ones – today – arguing that these charges were not dismissed (C).

**A. The Co-Investigating Judges dismissed the charges of rape outside the context of marriage**

17. The Civil Parties submit that a reading of the findings of the Closing Order regarding the charges of rape outside the context of marriage shows that the Co-Investigating Judges left the Chamber free to reach another conclusion.<sup>17</sup> According to the Civil Parties, any factual allegations contained in the Closing Order are automatically referred to the Trial Chamber, which must deal with them and may re-characterise them as it sees fit without necessarily following the “opinion” or “proposal” that was “offered” to it by the Co-Investigating Judges in the Closing Order.<sup>18</sup> They submit that the mere existence of charges of rape outside the context of marriage in the Closing Order means that the Accused were indicted for these charges and that, had the Co-Investigating Judges dismissed them, they would have done so explicitly in an order separate from the Closing Order.<sup>19</sup>

18. The Civil Parties are completely mistaken. By concluding in the Closing Order that the charges of rape outside the context of marriage were not crimes attributable to the Accused,<sup>20</sup> the Co-Investigating Judges dismissed the charges after stating their reasons.<sup>21</sup> Pursuant to Internal Rule 67(4), the Co-Investigating Judges were not formally obliged to issue a separate dismissal order for the purposes of disposing of the matters pending before them:

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<sup>17</sup> Appeal, paras 52-58, 89-90

<sup>18</sup> Appeal, para. 78, 80-81, 91

<sup>19</sup> Appeal, para. 59, 83,85

<sup>20</sup> See *supra*, para. 3 and footnote 3 (see in particular part of Closing Order on Legal Findings on Modes of Responsibility, para. 1521 and following, in which the Co-Investigating Judges did not consider the Accused responsible for these facts).

<sup>21</sup> Pursuant to Internal Rule 67(3), according to which the Co-Investigating Judges will issue a Dismissal Order when they consider that “[t]here is not sufficient evidence against the Charged Person or persons of the charges.” See also article 247 of the Cambodian Code of Criminal Procedure.

*The Closing Order shall state the reasons for the decision. A Closing Order may both send the case to trial for certain acts or against certain persons and dismiss the case for others.*<sup>22</sup>

19. Hence a Closing Order (issued at the end of a judicial investigation) is not necessarily an indictment (committing a charged person to trial). A Closing Order may indict for certain charges and dismiss the case for others.

20. Accordingly, the dismissal of the charges of rape outside the context of marriage by the Co-Investigating Judges in the Closing Order is valid.<sup>23</sup> It is much more than a simple “opinion” or “proposal”. It is a judicial decision subject to appeal and has the force of *res judicata*.

**B. The dismissal of the charges was subject to appeal and has the force of *res judicata***

21. Pursuant to Internal Rule 67.5, the Closing Order (which may both send the case to trial for certain acts and dismiss the case for others) “[...] *is subject to appeal as provided in Rule 74.*” Pursuant to Internal Rule 74, while the Co-Prosecutors may appeal against “all” decisions by the Co-Investigating Judges, the Civil Parties may appeal against “*a Dismissal Order where the Co-Prosecutors have appealed.*”<sup>24</sup>

22. Contrary to what the Civil Parties submit,<sup>25</sup> it is not the absence of a separate dismissal order from the Closing Order, but the fact the Prosecution did not appeal that prevented the Civil Parties from appealing the decision of the Co-Investigating Judges contained in the Closing Order.

23. They submit that an explicit dismissal order is crucial in a civil law context.<sup>26</sup> That is completely false. Indeed, in French law, for example, implicit dismissal decisions are not only well known, they are also perfectly subject to appeal.<sup>27</sup> It should also be noted that in this

<sup>22</sup> See also article 247 of the CCP, with identical terms.

<sup>23</sup> It presents indeed all of the characteristics of *res judicata* which has authority. It “[...] *resolves the substantive and/or procedural issue by creating, altering, dissolving or confirming a law-based relation concerning the parties*” (Decision on the Co-Prosecutors’ Immediate Appeal of the Trial Chamber’s Decision Concerning the Scope of Case 002/01, 8 February 2013, **E165/5/1/13**, para. 30).

<sup>24</sup> Internal Rule 74(2) and 74(4)(f)

<sup>25</sup> Appeal, para. 84

<sup>26</sup> Appeal, para. 87

<sup>27</sup> For example: French Court of Cassation, Criminal Division, 7 April 1994, Appeal No. 93-82613; French Court of Cassation, Criminal Division, 17 December 2002, Appeal No. 01-86956, **E306/7/2.1.2**

specific case the Co-Investigating Judges explicitly dismissed the charges in the Closing Order by stating the reasons for their decision.

24. Nothing prevented the Prosecution from appealing the decision dismissing the charges of rape outside the context of marriage contained in the Closing Order. They chose not to. The Civil Parties insist that the Accused did not appeal that decision.<sup>28</sup> Naturally. It was not at all in the interest of the Accused to appeal a partial dismissal decision.

25. Since this decision was not appealed within the prescribed time, it became *res judicata* as soon as the time limit was reached. Indeed, contrary to an indictment which is not *res judicata* in substance (since an indictment simply notes that there are sufficient charges to send to trial),<sup>29</sup> in fact, a reasoned dismissal order carries the authority of *res judicata*. This authority of *res judicata* does not allow further prosecution for the same facts, whatever the criminal characterization, unless the judicial investigation is re-opened owing to new charges.<sup>30</sup> Re-opening a judicial investigation that ended with a dismissal order is the only way to reverse the authority of the *res judicata* attached to that decision, which therefore excludes resuming prosecution by directly seising the trial chamber.<sup>31</sup>

26. In this case, the decision to dismiss the charges of rape outside the context of marriage listed in the Closing Order became finale once the time to appeal was exhausted, that is to say even before the Pre-Trial Chamber's decisions on the appeals against the Closing Order and, hence, before the Chamber was seised.

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<sup>28</sup> Appeal, paras 9-10, 59, 85

<sup>29</sup> For example: French Court of Cassation, Criminal Division, 13 November 1996, Appeals No. 96-82087 and 96-83708.

<sup>30</sup> Internal Rule 70 (“When new evidence becomes available after a Dismissal Order by the Co-Investigating Judges comes into force, the judicial investigation may be re-opened by the Co-Investigating Judges at the initiative of the Co-Prosecutors.”); Article 251 of the CCP (“When there is new evidence, even after a non-suit order or a dismissal order of the Investigation Chamber has become final, the investigating judge may re-open the investigation at the initiative of the Prosecutor of the Kingdom”. Article 188 of the French Code of Criminal Procedure (“The person under judicial examination in respect of whom the investigating judge has ruled there was no cause to proceed may not be investigated in relation to the same facts unless new charges are made.”) and Article 190 of the same code (“It is for the public prosecutor alone to decide whether there is a case for the resumption of the investigation on new charges.”) See as well: French Court of Cassation, Criminal Division, 11 February 2009, Appeal No.08-84.321; French Chamber of Cassation, Criminal Division, 24 January 2001, Appeal No. 00-84.408

<sup>31</sup> French Court of Cassation, Criminal Division, 10 November 1980, Appeal No. 79-84.326. French Court of Cassation, Criminal Division, 18 June 1997, Appeal No. 96-81.375

27. Consequently, proceedings regarding charges of rape outside the context of marriage were terminated several weeks before the Accused were indicted. Although these charges are part of the Closing Order, they are not part of the indictment the Chamber is seised of and must determine.<sup>32</sup>

**C. All Parties have understood that a dismissal order was issued**

28. From the time the Chamber was seised in 2011 until the Request for Confirmation brought by the Civil Parties in 2016 which led to the impugned Decision, no party has ever maintained that charges of rape outside of the context of marriage had not been dismissed and that the Chamber was seised of them. Quite the opposite.

29. The Civil Parties were indeed the first to state (in 2011) that these charges were not part of the proceedings against the accused and that the Co-Investigating Judges had not referred them for trial.<sup>33</sup> The fact that they explain in their appeal that, at the time, they “did not argue that the factual allegations of the conduct of rape were not included in the Closing Order”<sup>34</sup> in no way changes the fact that their 2011 submissions show that they had, then, clearly understood that the accused were not being prosecuted by the Court for these charges (which the Defence for IENG Sary had raised in 2011, as did the Defence for KHIEU Samphân in 2016).<sup>35</sup> In fact, they were therein expressing their frustration at not having been able to appeal the “*reasoning*” of the Co-Investigating Judges, which they deemed “*flawed*”.<sup>36</sup>

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<sup>32</sup> Internal Rule 79 (“*The Trial Chamber shall be seised by an Indictment from the Co-Investigating Judges or the Pre-Trial Chamber*”); Internal Rule 98-2 (“*The judgment shall be limited to the facts set out in the Indictment*”)

<sup>33</sup> See *supra*, para. 6.

<sup>34</sup> Appeal, para. 61.

<sup>35</sup> IENG Sary’s Request for Leave to Reply or in the Alternative an Oral Hearing & Reply to the Civil Party Lead Co-Lawyers Response to the Co-Prosecutors Request to Re-Characterize the Facts Establishing the Conduct of Rape as a Crime Against Humanity, 1 August 2011, **E99/1/1**, para. 16 (“The Civil Parties acknowledge that these ‘facts’ have been omitted from the Closing Order”); Response to the Request for Confirmation, paras 4 and 13.

<sup>36</sup> A reasoning that they had, therefore, clearly understood and even contested in 2011, although they are now saying they could not have understood it without an explicit dismissal order (Appeal, para. 84) while recognizing that the Co-Investigating Judges “did offer their opinion and considerations” (Appeal, para. 80).



30. The Prosecution (which could have appealed this reasoning to the Pre-Trial Chamber but did not do so), has stated several times during the course of the trial, as the Civil Parties recall, that the Accused are not being prosecuted for acts of rape outside the context of marriage.<sup>37</sup> What is more, the Prosecution did not bother to respond to their Request for Confirmation.

31. As for the Defence, the Civil Parties cannot reasonably maintain that its submissions E99/3 and E348 “proceeded on the premise that the Closing Order was seised of the factual allegations of the conduct of rape”.<sup>38</sup> To begin with, the Defence never proceeded on the premise that the Closing Order could be “seised”, unlike the Chamber. Next, the Defence did proceed on the premise that the Chamber was seised of charges of rape, but solely in the context of marriage. Finally, there is nothing in submissions E99/3 and E348 to suggest that the Defence proceeded on the premise that KHIEU Samphân had been indicted for rape outside the context of marriage. The first (E99/3) simply maintains that the Pre-Trial Chamber dealt with a question of the applicable law and not with the re-characterisation of acts of rape, to show that the Prosecution’s request for re-characterisation was inadmissible (because, in fact, it concerned jurisdiction and was, therefore, a disguised preliminary objection). In the second submission (E348), the Defence merely highlights the contradictions between the statements of various people on various issues (including rapes) affecting their credibility, to justify its request to confront these people.

32. In conclusion, the Co-Investigating Judges issued the dismissal order for charges of rape outside of the context of marriage. This dismissal became final before by the Chamber was seised. The Chamber clearly understood that, as did the parties.

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<sup>37</sup> Appeal, paras 15-16 ; See also Response of the co-Prosecutors to KHEIU Samphân’s « *Requête aux fins de confrontation de la partie civile SAY Sen avec le témoin SREY Than et la partie civile SAUT Saing et de communication de l’enregistrement audio des auditions de SAY Sen devant les co-Juges d’instruction* », 30 April 2015, **E348/1**, para. 4, fn 14 (See pars. 926-927, 1181, 1428 and 1429 of the Closing Order).

<sup>38</sup> Appeal, para. 86.

**2. THE IMPUGNED DECISION DOES NOT HAVE THE EFFECT OF TERMINATING THE PROCEEDINGS**

33. According to the Civil Parties, the impugned decision has the effect of terminating the proceedings because the Chamber therein gives the impression that it is the factual allegations that are not part of its *saisine*, that it is silent on the question of its *saisine* and that it makes a determination on matters of re-characterization that are *hors sujet*.<sup>39</sup>

34. While the Defence does not see how these arguments could demonstrate that the impugned Decision operates to terminate the proceedings regarding these factual allegations, the arguments are, in any case, flawed. The Chamber does much more than give the impression that charges of rape outside the context of marriage are not within its *saisine*. It makes a clear determination by noting (once again) that it is not seised of these allegations. If it makes a determination on matters of re-characterization that are *hors sujet*, it is in response to the *hors sujet* arguments raised in the Request for Confirmation (which are also reiterated in the Appeal).

35. In fact, as indicated by the Civil Parties,<sup>40</sup> the Chamber cannot re-characterize facts of which it is not seised. That is exactly what the Chamber recalled in its impugned Decision,<sup>41</sup> before referring to the relevant provisions of the Closing Order, then stating:

*Based on these findings, it follows that the crime of rape for which the Accused were charged in the dispositive section of the Closing Order is to be interpreted as excluding rape committed in security centres and cooperatives outside the context of forced marriage. No other charged crime relies upon the factual basis of rape outside of forced marriage. This interpretation is further corroborated by the modes of responsibility retained in the Closing Order, which only consider rape within the context of forced marriage.*<sup>42</sup>

36. Clearly, the Chamber notes the dismissal by the Co-Investigating Judges of the charges of rape outside the context of marriage and that it had not been seised of those allegations, which it expressly states just afterwards:

*At the trial stage, contrary to the submission of the Lead Co-Lawyers, the Additional Severance Order did not incorporate allegations of rape outside forced marriage which were not charged in*

<sup>39</sup> Appeal, paras 62-65. See also paras 73-76.

<sup>40</sup> Appeal, para. 76.

<sup>41</sup> Impugned Decision, para. 11 (“the Chamber, prior to making any finding on recharacterisation, must determine the precise facts that constitute the basis for which the Accused were formally charged”).

<sup>42</sup> Impugned Decision, para. 15.

*the Closing Order. This has been the consistent understanding of the Trial Chamber, recently reiterated in two decisions. (emphasis added).*<sup>43</sup>

(...)

*On 12 June 2015, the Trial Chamber reiterated that charges of rape outside forced marriage were excluded from the Closing Order.*<sup>44</sup>

37. Similarly, when the Chamber considers that to grant the request of the Civil Parties would amount to expanding the scope of the prosecution,<sup>45</sup> it notes that the charges in question are not part of its *saisine*. Moreover, the Chamber recalls that it cannot go beyond the powers entrusted upon it under Internal Rule 98.2,<sup>46</sup> which defines the scope of its *saisine*: “*The judgment shall be limited to the facts set out in the Indictment.*”

38. Accordingly, it is impossible to consider that the Chamber remained silent about its *saisine*. It is clear that the Chamber is merely stating that it is not seised of the facts for which the proceedings ended earlier. It makes this statement following a Co-Investigating Judges' dismissal order, which has the authority of *res judicata*.

39. While the Defence agrees with the Civil Parties that a problem arises when the Chamber considers that facts of which it is not seised may be relevant,<sup>47</sup> this problem (which is recurrent with the Chamber, even though it has not always been a problem for the Civil Parties),<sup>48</sup> unfortunately, cannot be raised in an immediate appeal since it does not concern an issue that has the effect of terminating the proceedings.

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<sup>43</sup> Impugned Decision, para. 17.

<sup>44</sup> Impugned Decision, para. 18.

<sup>45</sup> Impugned Decision, paras 17, 18 and 19.

<sup>46</sup> Impugned Decision, para. 19.

<sup>47</sup> Appeal, paras 66 and 77.

<sup>48</sup> See, for example, Ms. GUIRAUD's statements on the facts related to Prey Sar, excluded from the scope of case 002/02 and therefore from the *saisine* of the Chamber: Transcript of Trial Proceedings of 2 June 2016, **E1/430.1**, p. 46 L. 23 à p. 47 L. 3, before [11.28.25]: “[...] as far as we understand it, none of the Accused persons is being indicted for the crimes that were committed at Prey Sar. This is what we understand from your decision from your Severance Order, however, Prey Sar may be brought up in the proceedings in the general discussions related to S-21.”

**CONCLUSION**

40. The impugned Decision does not have the effect of terminating the proceedings concerning charges of rape outside the context of marriage. It merely finds that these proceedings ended at the time of the judicial investigation and that it is not seised of these charges. Accordingly, the Appeal is inadmissible.

41. **FOR THESE REASONS**, the Defence requests that the Supreme Court DECLARE the Appeal inadmissible.

KONG Sam Onn	Phnom Penh	[signed]
Anta GUISSÉ	Phnom Penh	[signed]