



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

Extraordinary Chambers in the Courts of Cambodia
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

**ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ**

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

អង្គជំនុំជម្រះសាលាដំបូង

Trial Chamber
Chambre de première instance

សំណុំរឿងលេខ: ០០១/១៨ កក្កដា ២០០៧/អវតក/អជសដ

Case File/Dossier No. 001/18-07-2007/ECCC/TC

Before: Judge NIL Nonn, President
 Judge Silvia CARTWRIGHT
 Judge YA Sokhan
 Judge Jean-Marc LAVERGNE
 Judge THOU Mony

Greffiers: LIM Suy-Hong, Matteo CRIPPA, SE Kolvuthy,
 Natacha WEXELS-RISER, DUCH Phary

Duration of hearing: 30 March 2009 until 27 November 2009

Date: 26 July 2010

Classification: PUBLIC

JUDGEMENT

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358. The pain and suffering amounting to torture must be inflicted intentionally.⁶⁶⁴

2.5.3.8 Findings on torture

359. The Chamber finds that staff at S-21 and S-24 used interrogation techniques on detainees, with the intention of causing severe pain and suffering (Section 2.4.4.1.1). These techniques were applied in an environment of extreme fear where threats were routinely put into practice and caused detainees severe pain and suffering, both physical and mental. Given their position in the State apparatus, the Chamber finds that the S-21 interrogators and S-24 staff who perpetrated acts of torture acted in an official capacity.

360. The Chamber finds that the following interrogation techniques, as applied at S-21, inflicted severe physical pain or mental suffering for the purpose of obtaining a confession or of punishment, and constituted torture: severe beating, electrocution, suffocation with plastic bags, water-boarding, puncturing, inserting needles under or removing finger and toe nails, cigarette burns, forcing detainees to pay homage to images of dogs or objects, forced feeding of excrement and urine, direct or indirect threats to torture or kill the detainees or members of their family, the use of humiliating language, plunging detainees' heads in a water jar and lifting by the hands tied in the back, and one proven instance of rape. The Chamber further finds that this list is not exhaustive and that other torture techniques may have been carried out.

2.5.3.9 Rape

361. Rape has long been prohibited in customary international law and has been described as "one of the worst suffering a human being can inflict upon another."⁶⁶⁵

362. Rape is the sexual penetration, however slight of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or the mouth of

⁶⁶⁴ *Krnjelac* Trial Judgement, para. 130; *Furundzija* Trial Judgement, para. 162.

⁶⁶⁵ *Kunarac* Trial Judgement, para. 655; *Sesay* Trial Judgement, para. 144; Article II(1)(c) of Control Council Law No. 10 (1945), reprinted in *Trials of War Criminal Before the Nuremberg Military Tribunals Under Control Council Law No. 10, Vol. I*, p. 7; Article 44 of the Instructions for the Government of Armies of the United States in the Field (Lieber Code), 24 April 1863; Article 27 of Geneva Convention IV.

the victim by the penis of the perpetrator, where such sexual penetration occurs without the consent of the victim.⁶⁶⁶

363. Most cases of rape as a crime against humanity will be committed in coercive circumstances in which true consent will not be possible.⁶⁶⁷ Absence of consent may be evidenced by the use of force. Neither force nor threat of force by the perpetrator is an element *per se* of rape, as there are factors other than force which would render an act of sexual penetration non-consensual, and there is no requirement of resistance on the part of the victim.⁶⁶⁸

364. The social stigma attaching to rape victims in certain societies might render any proof of this crime difficult. The international jurisprudence has therefore accepted that circumstantial evidence may be used to demonstrate rape.⁶⁶⁹

365. The requisite intention for rape is that the perpetrator acted with the intent to “effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.”⁶⁷⁰

2.5.3.10 Findings on rape as torture

366. While rape comprises a separate and recognized offence both within the ECCC Law and international criminal law, it is undisputed that rape may also constitute torture where all other elements of torture are established (Section 2.5.3.7). The Chamber considers that the conduct alleged in the Amended Closing Order to constitute rape clearly satisfy

⁶⁶⁶ *Kunarac* Appeal Judgement, para. 127; *Semanza* Trial Judgement, paras 344-345. *Sesay* Trial Judgement, paras 145-146. An alternative conceptual definition was propounded by the ICTR Trial Chamber in *Akayesu*, being “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive”: *Akayesu* Trial Judgement, para. 598. However, the ICTY Trial Chamber in *Furundžija* decided a more precise definition would better accord with the “criminal law principle of specificity” and so adopted the more technical definition also employed above: *Furundžija* Trial Judgement, para. 177. The *Furundžija* formulation has been applied frequently and adopted by the ICTY Appeals Chamber. The ICTR Trial Chamber in *Muhimana* found the two formulations were “not incompatible or substantially different in their application”: *Prosecutor v. Muhimana*, Judgement and Sentence, ICTR Trial Chamber (ICTR-95-1B-T), 28 April 2005, para. 550.

⁶⁶⁷ *Kunarac* Appeal Judgement, para. 130; *Kvočka* Trial Judgement, para 178.

⁶⁶⁸ *Kunarac* Appeal Judgement, paras 128-129.

⁶⁶⁹ *Prosecutor v. Muhimana*, Judgement, ICTR Appeals Chamber, (ICTR-95-1B-A), 21 May 2007, para. 49; *Sesay* Trial Judgement, para. 149.

⁶⁷⁰ *Kunarac* Appeal Judgement, paras 127-129; *Bagosora* Trial Judgement, para. 2200.

the legal ingredients of both rape and also of torture.⁶⁷¹ It has further evaluated the evidence in support of this charge to be credible (Section 2.4.4.1.1). The Chamber considers this instance of rape to have comprised, in the present case, an egregious component of the prolonged and brutal torture inflicted upon the victim prior to her execution and has characterized this conduct accordingly.

2.5.3.11 *Other inhumane acts*

367. Other inhumane acts comprise a residual offence which is intended to criminalise conduct which meets the criteria of a crime against humanity but does not fit within one of the other specified underlying crimes.⁶⁷² The act or omission must be “sufficiently similar in gravity to the other enumerated crimes” to constitute an inhumane act.⁶⁷³ The customary status of this crime is also well established.⁶⁷⁴

368. For an inhumane act to be established, it must be proved that the victim suffered serious harm to body or mind, and that the suffering was the result of an act or omission of the perpetrator.⁶⁷⁵

369. The seriousness of the act is to be assessed on a case-by-case basis, taking account of individual circumstances.⁶⁷⁶ These circumstances may include “the nature of the act or omission, the context in which it occurred, the personal circumstances of the victim including age, sex and health, as well as the physical, mental and moral effects of the act upon the victim.”⁶⁷⁷ There is no requirement that the suffering have long term effects, although this may be relevant to the determination of the seriousness of the act.⁶⁷⁸

⁶⁷¹ Amended Closing Order, paras 136, 137.

⁶⁷² *Kordić* Appeal Judgement, para. 117; *Bagosora* Trial Judgement, para. 2218.

⁶⁷³ *Naletilić* Trial Judgement, para. 247; *Prosecutor v. Niyitegeka*, Judgement, ICTR Trial Chamber (ICTR-96-14-T), 16 May 2003 (“*Niyitegeka* Trial Judgement”), para. 460.

⁶⁷⁴ *Čelebići* Trial Judgement, para. 517; *Prosecutor v. Brima et al.*, Judgement, SCSL Appeals Chamber (SCSL-04-16-A), 22 February 2008 (“*Brima* Appeal Judgement”), para. 183.

⁶⁷⁵ *Kordić* Appeal Judgement, para. 117.

⁶⁷⁶ *Kordić* Appeal Judgement, para. 117; *Kayishema et al.* Trial Judgement, paras 148-151.

⁶⁷⁷ *Prosecutor v. Vasiljević*, Judgement, ICTY Appeals Chamber (IT-98-32-A), 25 February 2004 (“*Vasiljević* Appeal Judgement”), para. 165.

⁶⁷⁸ *Vasiljević* Appeal Judgement, para. 165; *Blagojević* Trial Judgement, para. 627.