

**BEFORE THE TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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**LEAD CO-LAWYERS' REPLY TO KHIEU SAMPHAN DEFENCE'S RESPONSE
TO REQUEST FOR CLARIFICATION ON RAPE OUTSIDE FORCED MARRIAGE**

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Before:

Trial Chamber

Judge NIL Nonn, President
Judge YA Sokhan
Judge Jean-Marc LAVERGNE
Judge YOU Ottara
Judge Claudia FENZ

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I. INTRODUCTION

1. The Lead Co-Lawyers for the Civil Parties (“Lead Co-Lawyers”) hereby reply to the “*Réponse de la Défense de M. KHIEU Samphân à la demande de clarification des Parties civiles concernant les accusations de viol*” (“Response”) filed on 28 March 2016¹ in response to the 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 (“Request”).²

II. REPLY

2. The Lead Co-Lawyers submit that the Trial Chamber is and remains to be seised of the factual allegations of rape and its potential characterisation as one or more of the following substantive crimes. The dispositive of the Closing Order seises the Trial Chamber of the potential characterisation of the substantive crimes and modes of liability based on the material facts contained in the Closing Order:³
 - (i) Crimes against Humanity of Other Inhumane Acts through Rape (Closing Order, paras 1426-1428), limited in Case 002/02 to Tram Kok Cooperatives, S-21 and Kraing Ta Chan Security Centre⁴ alleging the mode of liability of Joint Criminal Enterprise,⁵ planning,⁶ instigating,⁷ aiding and abetting,⁸ ordering,⁹ superior responsibility;¹⁰

¹ The Lead Co-Lawyers reply to the Response as per the chronology of the filings discussed therein and not in the sequence of the paragraphs contained in the Response.

² 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, **E306/7**, 18 March 2016.

³ See Decision on Defence Preliminary Objections (Statute of Limitations on Domestic Crimes, **E122**, 22 September 2011, paras 13, 15. The Lead Co-Lawyers acknowledge the differences in this decision and the current scenario. The decision dealt with the application domestic crimes for which the Closing Order (i) did not clearly identify the applicable law, (ii) did not set out the elements of the various domestic crimes contained therein; (iii) did not specify the factual basis of the charges; (iv) did not refer directly to other portions of the Closing Order setting out material facts in relation to similar crimes; (v) stated that each national crime required a material element that is not present in the international crimes and vice versa; (vi) portion of the Closing Order concerning the domestic crimes did not contain a description of the material facts giving rise to the charges or the nature of the accused’s criminal responsibility alleged.

⁴ List of paragraphs and portions of the Closing Order relevant to Case 002/02, **E301/9/1.1**, 4 April 2014, p. 4.

⁵ Closing Order, para. 1613: “Consequently, as a result of the judicial investigation, there is sufficient evidence (*charges suffisantes*) that Nuon Chea, Ieng Sary, Khieu Samphan, and Ieng Thirith, in Phnom Penh, within the territory of Cambodia, and during incursions into Vietnam, between 17 April 1975 and 6 January 1979, through their acts or omissions, committed (via a joint criminal enterprise), planned, instigated, ordered, or aided and abetted, or are responsible by virtue of superior responsibility, for the following crimes: (g) rape” read with

- (ii) Crimes against Humanity of Torture (Closing Order, paras 1408-1414)¹¹ limited in Case 002/02 to, *inter alia*, Tram Kok Cooperatives, S-21, and Kraing Ta Chan Security Centre¹² alleging the mode of liability of Joint Criminal Enterprise,¹³ planning,¹⁴ instigating,¹⁵ aiding and abetting,¹⁶ ordering,¹⁷ superior responsibility;¹⁸ and
- (iii) Other inhumane acts through “Attacks against human dignity” (Closing Order, paras 1434-1441)¹⁹ limited in Case 002/02 to, *inter alia*, Tram Kok Cooperatives, S-21, and Kraing Ta Chan Security Centre²⁰ alleging mode of liability of Joint Criminal Enterprise,²¹ planning,²² instigation,²³ aiding and abetting,²⁴ ordering,²⁵ superior responsibility.²⁶
3. Paragraphs 12-13 of the Response discuss two decisions from the Cour de Cassation as examples of implicit Dismissal Orders.²⁷ Neither of these two decisions justifies the waiver of the requirement to issue an explicit Dismissal Order under Article 177

Decision on Ieng Sary’s Appeal Against the Closing Order, **D427/1/26**, 13 January 2011, para. 7 whereby the Pre-Trial Chamber held that “the facts characterized as crimes against humanity in the form of rape can be categorized as crimes against humanity of other inhumane acts.”

⁶ Closing Order, para. 1613.

⁷ Closing Order, para. 1613.

⁸ Closing Order, para. 1613.

⁹ Closing Order, para. 1613.

¹⁰ Closing Order, para. 1613.

¹¹ *See for e.g.* Closing Order, para. 1409: “As regards the *actus reus*, on numerous occasions, CPK cadres through their acts or omissions, deliberately inflicted severe harm and suffering, both physical and mental, during interrogations.”

¹² List of paragraphs and portions of the Closing Order relevant to Case 002/02, **E301/9/1.1**, 4 April 2014, p. 3.

¹³ Closing Order, paras 1525(iii) (e), para. 1613.

¹⁴ Closing Order, paras 1545, sub-para 3(f), 1613.

¹⁵ Closing Order, paras 1548, sub-para. 3(f), 1613.

¹⁶ Closing Order, paras 1551, sub-para. 3(f), 1613.

¹⁷ Closing Order, paras 1554, sub-para. 3(f), 1613.

¹⁸ Closing Order, paras 1559, sub-para. 3(f), 1613.

¹⁹ *See for e.g.* Closing Order, para. 1435: “Regarding the *actus reus*, by depriving the civilian population of adequate food, shelter, medical assistance, and minimum sanitary conditions, the CPK authorities inflicted on victims serious mental and physical suffering and injury, as well as a serious attack on human dignity of similar gravity to other crimes against humanity.”

²⁰ List of paragraphs and portions of the Closing Order relevant to Case 002/02, **E301/9/1.1**, 4 April 2014, p. 4.

²¹ Closing Order, paras 1525 (iii)(i), para. 1613.

²² Closing Order, paras 1545, sub-para. 3(l), 1613.

²³ Closing Order, paras 1548, sub-para. 3(l), 1613.

²⁴ Closing Order, paras 1551, sub-para. 3(l), 1613.

²⁵ Closing Order, paras 1554, sub-para. 3(l), 1613.

²⁶ Closing Order, paras 1559, sub-para. 3(l), 1613.

²⁷ Cour de Cassation, Chambre Criminelle, 29 avril 2009, pourvoi n. 08-85475. Cour de Cassation, Chambre Criminelle, 17 decembre 2002, pourvoi n. 01-86956.

- of the *code de procédure pénale* when there is clear prejudice to the Civil Parties.²⁸ Such an explicit dismissal would have allowed the Co-Prosecutors and *consequently* the Civil Parties to understand the underlying reasoning and determine the grounds and scope of their appeal. This did not happen in the present case. In fact, both of Khieu Samphan Defence's submissions E99/3 and E348 proceeded on the premise that the Closing Order included criminal allegations of the conduct of rape against the Co-Accused²⁹ – an understanding shared by all parties.
4. Paragraph 10 of the Response quotes the former International Co-Investigating Judge Lemonde but does not elaborate how the extra-judicial comments suffice and fulfill the requirements of an explicit Dismissal Order required under Internal Rule 67(3) and Article 247 of the Code of Criminal Procedure of the Kingdom of Cambodia. It also does not show how these comments are related to the factual allegations of rape.
 5. In paragraphs 2, 4-5, the Response qualifies the Request as a request for reconsideration of the Trial Chamber memo titled “Further information regarding remaining preliminary objections”.³⁰ The Lead Co-Lawyers submit that this is not the case. The Memo on Preliminary Objections concerned itself, *inter alia*, with the Lead Co-Lawyers' response limited to the conduct of rape as a Crime against Humanity “in

²⁸ If there was in fact an implicit dismissal, the lack of formality resulted in a prejudice to the Civil Parties, which goes to the core of the principle of procedural fairness. *See further*, Decision on the Co-Prosecutors' Immediate Appeal of the Trial Chamber's Decision Concerning the Scope of Case 002/01, **E163/5/1/13**, 8 February 2013 where the Supreme Court Chamber has ruled on the “lack of formality” in a judicial decision which creates “a level of uncertainty amounting to a discernible error”. It held that the prejudice to the party (in that case the Co-Prosecutors) would be the basis of adjudging the level of formality required.

²⁹ *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 de ses déclarations devant les co-Juges d'instruction*, **E348**, 23 April 2015, paras 6-10. Réponse à la demande des co-procureurs relative à la requalification des faits constitutifs de viol, E99/3, 22 July 2011, para. 14 : “the Pre-Trial Chamber did not change the characterisation of the facts: in striking the sub-paragraph on rape out of the paragraph on crimes against humanity, it altered the scope of the applicable law”.

³⁰ Response, para. 2, 4-5 *citing* to Trial Chamber memorandum entitled “Further information regarding remaining preliminary objections” as stated in the Response”, **E306**, 25 April 2014 (“Memo on Preliminary Objections”) that ruled, *inter alia*, on 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, **E99/1**, 21 July 2011 (“Lead Co-Lawyers Submission on Rape as a Stand-alone Crime”). The Lead Co-Lawyers Submission on Rape as a Stand-alone Crime was filed in response to the Co-Prosecutors' request to the Trial Chamber to recharacterise the facts establishing the conduct of rape as a Crime against Humanity of Rape rather than the Crime against Humanity of Other Inhumane Acts. *See* Co-Prosecutors' Request for the Trial Chamber to Recharacterize the Facts Establishing the Conduct of Rape as The Crime Against Humanity of Rape Rather than the Crime Against Humanity of Other Inhumane Acts, **E99**, 16 June 2011.

its own right”³¹ and the related findings of liability to “reflect the use of rape as a part of the ‘enemy policy’”.³² The context of the Co-Prosecutors’ filing E99 and the explicit request made in the response by the Lead Co-Lawyers was limited to the conduct of rape being sought to be requalified/recharacterised as a stand-alone crime under Crimes against Humanity and to include such charge of rape as part of the “enemy policy”.³³ The Memo on Preliminary Objections did not concern itself with the actual seizure of the factual allegations of the *conduct* of rape.³⁴ This, as stated above, was presumably because none of the parties challenged it. Rather it stated that the Trial Chamber has the discretion to “change the legal characterisation of a crime as set out in the Closing Order as long as no new constitutive elements are introduced”.³⁵

6. In paragraph 6, the Response mentions the Trial Chamber’s decision in which the Trial Chamber noted that “the Co-Investigating Judges found that rape occurred in Kraing Ta Chan Security Centre, among other places. However, the Co-Investigating Judges found that, outside the context of forced marriage, it could not be considered that rape was one of the crimes used by the CPK leaders to *implement the alleged common purpose in the context of a joint criminal enterprise*.”³⁶ It further noted that the Closing Order did not allege that the Co-Accused “bear criminal responsibility for rape in Kraing Ta Chan Security Centre on the basis of *any other mode of liability*”³⁷ but stated that “the occurrence of rape may be relevant, among others, to the conditions in Kraing Ta Chan Security Centre.”³⁸ The Lead Co-Lawyers submit that the Trial Chamber Decision on Confrontation does not render a reading contrary to

³¹ Lead Co-Lawyers Submission on Rape as a Stand-alone Crime, para. 45.

³² *Ibid.*, paras 43, 45.

³³ As stated in the Request and conceded as such, the Lead Co-Lawyers Submission on Rape as a Stand-alone Crime also contains detailed discussion of the evidence in the Case File on the conduct of rape outside the context of Forced Marriage. *See* Lead Co-Lawyers Submission on Rape as a Stand-alone Crime, paras 32-41.

³⁴ Memo on Preliminary Objections, para. 3.

³⁵ *Id.*


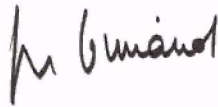
³⁶ Decision on Khieu Samphan’s Request for Confrontation Among Witness Srey Than and Civil Parties Say Sen and Saut Saing and Disclosure of Audio Recordings of Interviews of Say Sen, E348/4, 12 June 2015 (“Trial Chamber Decision on Confrontation”), para. 11 (emphasis added).

³⁷ *Ibid.* (emphasis added)

³⁸ *Ibid.*

- what the Lead Co-Lawyers request. Rather, in this decision, the Trial Chamber has considered itself seised of the material facts of the “occurrence of rape”.³⁹
7. In reply to paragraph 9, the Lead Co-Lawyers submit that there is nothing that relieves the Trial Chamber from making the appropriate factual and legal findings of the substantive crime and the factual allegations *in rem* at Tram Kok Cooperatives, S-21 and Kraing Ta Chan Security Centre.
 8. In reply to paragraph 15-17, the Lead Co-Lawyers reiterate that the continued seisure of the Trial Chamber of the material facts of rape does not amount to adding of new facts or new charges other than those already mentioned in the Closing Order. In reply to paragraph 11 and 18, the Lead Co-Lawyers refer to the paragraph 2 *supra*.

Respectfully submitted,

Date	Name	Place	Signature
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³⁹ Trial Chamber Decision on Confrontation, para. 11.