

**BEFORE THE TRIAL CHAMBER**

**EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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**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**

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**All Civil Parties**

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## LEAVE TO REPLY

Mr. IENG Sary, through his Co-Lawyers (“the Defence”), hereby seeks leave to 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 (“Civil Parties’ Response”).<sup>1</sup> A reply is made necessary because the Civil Parties make the following new submissions which were not raised by the OCP in its request:<sup>2</sup> a. “[W]ar crimes and crimes against humanity were treated as similar crimes by the [(“International Military Tribunal”)] IMT”;<sup>3</sup> b. “There are no doubts that rape was, at the time, an offence that all civilized nations held punishable in their national jurisdictions and considered to be a grave and serious crime”;<sup>4</sup> c. “[T]he list of ‘Members and Alternate Members of the Tribunal’ and the ‘Prosecution Counsel’ [of the IMT] contain no female participants ... which may have been a significant factor in the neglect and subsequent omission of rape as a crime listed as a crime against humanity”;<sup>5</sup> d. “During [the four months between the adoption of the IMT Charter and the inclusion of rape as an enumerated crime against humanity in Control Council Law No. 10 [(“CCL No. 10”)] there was no development in international criminal law that would explain this change and thus it can be concluded that the omission in the IMT Charter is not an expression that rape did not exist as a crime against humanity in August 1945”;<sup>6</sup> and e. Rape outside the context of forced marriage should be re-characterized to reflect the use of rape as part of an “enemy policy.”<sup>7</sup> In the interest of judicial economy and expeditiousness, the Defence has affixed hereto its Reply. Both the Request for Leave to Reply and the Reply are submitted within the 1 August 2011 deadline set by the Trial Chamber for the OCP to reply to the Civil Parties’ Response.<sup>8</sup> Should leave to reply be denied, the Defence respectfully requests a public, oral hearing to address these newly raised submissions by the Civil Parties and any other issues that the Trial Chamber may deem necessary concerning the

<sup>1</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>2</sup> Co-Prosecutors Request for the Trial Chamber to Re-Characterize the Facts Establishing the Conduct of Rape as the Crime Against Humanity of Rape Rather than the Crime Against Humanity of Other Inhumane Acts, 16 June 2011, E99 (“OCP Request”).

<sup>3</sup> Civil Parties’ Response, para. 14. *See also, id.*, para. 10: “War crimes and crimes against humanity have in common that they address the most serious and grave crimes”; *id.*, para. 26: “Rape was recognized as a war crime in many national jurisdictions by 1975.”

<sup>4</sup> *Id.*, para. 16. *See also id.*, para. 19: “Rape was recognized in national jurisdictions worldwide as a serious and horrendous crime and listed as a war crime since at least 1919”; *id.*, para. 20: “[T]he prosecution of rape as a Crime against Humanity had already occurred in national jurisdictions in the early 1900s”; *id.*, para. 26: “Rape was a crime virtually worldwide among national jurisdictions.”

<sup>5</sup> *Id.*, para. 17.

<sup>6</sup> *Id.*, paras. 18-19.

<sup>7</sup> *Id.*, paras. 32-41.

<sup>8</sup> Decision on Extension of Time, 7 July 2011, E107.



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issue of whether rape was an enumerated crime against humanity under customary international law during the temporal jurisdiction of the ECCC.

### Argument

1. The Civil Parties' submissions go beyond their assertion that they have added "a number of supplementary arguments in support of the assertion that rape had already been recognized as a listed crime under crimes against humanity at the relevant time."<sup>9</sup> These "supplementary arguments" are in effect submissions of first instance. The Defence should be afforded the opportunity to reply to these submissions.
2. Since the Civil Parties' Response contains submissions of first instance, they could not have been addressed in the Defence's Response to the OCP Request.<sup>10</sup> The Defence is entitled to address these submissions in order for Mr. IENG Sary's fundamental right to equality of arms to be respected. The European Court of Human Rights ("ECHR") found fair trial rights to have been violated when an applicant was denied an opportunity to reply to written submissions filed by State Counsel.<sup>11</sup> In *Ruiz-Mateos v. Spain*, the Applicants alleged a violation of the principle of equality of arms on the basis that Counsel for the Government of Spain, their opponent in civil proceedings, was able to submit to the Constitutional Court written observations on the lawfulness of a statute, whereas they were not allowed to do so because they were held to lack *locus standi*.<sup>12</sup> The ECHR held that "persons must as a rule be guaranteed free access to the observations of the other participants in these proceedings and a genuine opportunity to comment on those observations."<sup>13</sup> This case is analogous to the scenario faced by Mr. IENG Sary because if this Reply is not accepted, he will be denied an opportunity to reply to the submissions of first instance in the Civil Parties' Response.

**WHEREFORE**, for all the reasons stated herein, the Defence respectfully requests the Trial Chamber to:

- a. GRANT the Defence leave to Reply to the Civil Parties' Response; or in the alternative
- b. GRANT the Defence request for public oral argument.

<sup>9</sup> Civil Parties' Response, para. 4.

<sup>10</sup> IENG Sary's Response to the Co-Prosecutors' Request for the Trial Chamber to Re-Characterize the Facts Establishing the Conduct of Rape as the Crime Against Humanity of Other Inhumane Acts, 22 July 2011.

<sup>11</sup> *Ruiz-Mateos v. Spain*, Eur. Ct. H.R., 16 E.H.R.R. 505, Judgement, 23 June 1993, Application No. 12952/87, paras. 63-68.

<sup>12</sup> *Id.*, para. 61.

<sup>13</sup> *Id.* (emphasis added), para. 63.

## REPLY

## A. The Civil Parties conflate war crimes and crimes against humanity

3. The Pre-Trial Chamber “concluded that rape was a war crime well before 1975.”<sup>14</sup> The Pre-Trial Chamber also found “that by 1975 rape did not exist under international law in its own right as an enumerated crime against humanity.”<sup>15</sup> The Civil Parties assert that as war crimes and crimes against humanity are similar crimes, a crime which fits into one category must also fit into the other.<sup>16</sup> This is incorrect. First, the Civil Parties’ attempt to analogize war crimes and crimes against humanity violates the ban on analogy in both Civil Law and in international criminal law.<sup>17</sup> Second, as stated by the Pre-Trial Chamber, “rape as a crime against humanity is necessarily composed of *chapeau* elements common to all crimes against humanity, such as the requirement that the act form part of a ‘widespread or systematic attack.’ Rape as it is defined under domestic criminal codes does not contain such an element.”<sup>18</sup> Likewise, rape as defined under war crimes does not contain such an element. The Pre-Trial Chamber concludes by finding that “where the constitutive elements are not identical, domestic and international crimes are to be treated as distinct crimes.”<sup>19</sup> Equally, where the constitutive elements of crimes against humanity and war crimes are not identical, they are to be treated as distinct crimes. If the Civil Parties’ assertion is to have any traction – which the Defence submits it does not – then their assertion simply supports the fact that in 1975-79 a nexus was required between crimes against humanity and an armed conflict.<sup>20</sup>
4. The Civil Parties assert that “[t]he crimes that were finally listed as crimes against humanity in the IMT Charter must be seen in the light of the development of ‘crimes against humanity’ as crimes similar in nature to war crimes but targeted against a different group of people.”<sup>21</sup> The IMT Charter did not enumerate rape as a crime against humanity. The IMT Charter states that it has jurisdiction over “Crimes against humanity: namely, murder, extermination,

<sup>14</sup> Decision on IENG Sary’s Appeal Against the Closing Order, 11 April 2011; D427/1/30 (“PTC Closing Order Decision”), para. 367.

<sup>15</sup> *Id.*, para. 370.

<sup>16</sup> Civil Parties’ Response, paras. 10, 14.

<sup>17</sup> See ICC Statute, Art. 22(2), which states in pertinent part: “The definition of a crime shall be strictly construed and shall not be extended by analogy.” Moreover, “[n]ational courts (particularly in civil law countries) as well as international courts normally refrain from applying [international criminal law] by analogy. In national law the prohibition on the application of criminal rules by analogy ... is rooted in the need to safeguard citizens and in particular to prevent their being punished for actions that were not considered illegal when they were performed... The same principle applies in international law. Its rationale is the need to protect individuals from arbitrary behaviour of states or courts...” CASSESE, INTERNATIONAL CRIMINAL LAW 48 (2<sup>ND</sup> ED).

<sup>18</sup> PTC Closing Order Decision, para. 370.

<sup>19</sup> *Id.*

<sup>20</sup> See, e.g., IENG Sary’s Response to the Co-Prosecutors’ Request for the Trial Chamber to Exclude the Armed Conflict Nexus Requirement from the Definition of Crimes Against Humanity, 22 July 2011, E95/4.

<sup>21</sup> Civil Parties’ Response, para. 15.

enslavement, deportation, and other inhumane acts....”<sup>22</sup> The Civil Parties assert that the use of the term “namely” suggests that this list is not exhaustive.<sup>23</sup> This is incorrect. “Namely,” as defined by Black’s Law Dictionary, “indicates what is to be included by name. By contrast, *including* implies a partial list and indicates that something is not listed.”<sup>24</sup>

5. The Civil Parties assert that a number of domestic laws and military manuals codified the crime of rape and rape was recognized as a war crime in many national jurisdictions by 1975.<sup>25</sup> None of the military manuals cited by the Civil Parties explicitly codify rape as a crime against humanity. As explained *supra*, war crimes and national crimes do not have the same elements as crimes against humanity, and therefore have to be treated as distinct crimes.

**B. The Civil Parties cannot rely on national jurisdictions’ criminalization of rape to prove rape existed as an enumerated crime against humanity**

6. The Pre-Trial Chamber found that the criminalization of rape in domestic criminal codes does not demonstrate that rape was a crime against humanity.<sup>26</sup> The Civil Parties cite the Chinese “Law Governing the Trial of War Criminals” (“Chinese Law”)<sup>27</sup> and the case of *Takashi*<sup>28</sup> as evidence that “the prosecution of rape as a Crime against Humanity had already occurred in national jurisdictions in the early 1900s.”<sup>29</sup> First, the Chinese Law did not set out crimes against humanity *per se*. Instead, the commentary relied upon by the Civil Parties states that the Chinese Law includes in its subject matter jurisdiction offenses which “correspond in spirit with the concept of crimes against humanity.”<sup>30</sup> By contrast, the commentary states that that the Chinese Law applied crimes against the peace and war crimes *per se*.<sup>31</sup>
7. Second, in the case of *Takashi*,<sup>32</sup> Takashi Sakai was charged, tried and found guilty of, *inter alia*, inciting or permitting his subordinates to commit acts including the rape of two women.<sup>33</sup> The Tribunal is quoted as finding that Takashi, “in inciting or permitting his subordinates to ... commit acts of rape ... had violated the Hague Conventions on the Laws

<sup>22</sup> IMT Charter, Art. 6(c) (emphasis added).

<sup>23</sup> Civil Parties’ Response, para. 15.

<sup>24</sup> BLACK’S LAW DICTIONARY 1044 (7<sup>th</sup> ed. 1999).

<sup>25</sup> Civil Parties’ Response, para. 26.

<sup>26</sup> PTC Closing Order Decision, para. 370.

<sup>27</sup> Civil Parties’ Response, para. 20.

<sup>28</sup> *Id.*, para. 23.

<sup>29</sup> *Id.*, para. 20.

<sup>30</sup> Law governing the Trial of War Criminals, 24 October 1946, in Trials of War Criminals selected and prepared by the United War Crimes Commission, London (1946), Volume XIV, Annex, available at: [http://www.loc.gov/rr/frd/Military\\_Law/pdf/Law-Reports\\_Vol-14.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-14.pdf).

<sup>31</sup> *Id.*

<sup>32</sup> Trial of Takashi Sakai, Chinese War Crimes Tribunal of the Ministry of National Defence, Nanking, 29 August 1946, in Trials of War Criminals selected and prepared by the United War Crimes Commission, London (1946), Volume XIV, Annex, available at: [http://www.loc.gov/rr/frd/Military\\_Law/pdf/Law-Reports\\_Vol-14.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-14.pdf).

<sup>33</sup> *Id.*, p. 1-2.

and Customs of War on Land and the Geneva Conventions of 1929. These offences are war crimes and crimes against humanity.”<sup>34</sup> The Civil Parties concede that the *Takashi* Tribunal does not elaborate upon the distinct elements of war crimes and crimes against humanity.<sup>35</sup> In the absence of a reasoned judgement, it cannot be assumed that Takashi was convicted of crimes against humanity as applied at the ECCC. Further, the Tribunal based its convictions on the Hague Conventions on the Laws and Customs of War on Land and the Geneva Conventions of 1929. These laws do not criminalize crimes against humanity.

8. Finally, one law (in addition to CCL No. 10), with one conviction of rape as a crime against humanity based on unknown elements does not demonstrate widespread State practice and *opinio juris*. Rape as an enumerated crime against humanity did not exist in 1975-79.

**C. The Civil Parties speculate when considering the customary international law status of rape as an enumerated crime against humanity**

9. The Civil Parties assert that neither the list of “Members and Alternate Members of the Tribunal” nor the list of “Prosecution Counsel” at the IMT contained any female participants and that this may have been a significant factor in the neglect and subsequent omission of rape as an enumerated crime against humanity.<sup>36</sup> The Civil Parties’ assertion is based on pure speculation. Such speculation is irrelevant when considering the customary international law status of rape as an enumerated crime against humanity.

**D. CCL No. 10 does not make rape an enumerated crime against humanity under customary international law in 1975-79**

10. The Pre-Trial Chamber found that “by 1975 rape did not exist under international law in its own right as an enumerated crime against humanity.”<sup>37</sup> It did so following an examination of the Lieber Code, The Oxford Manual, The Hague Regulations, the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties: Report Presented to the Preliminary Peace Conference; CCL No. 10, the IMT Charter, the IMT Judgement, the International Military Tribunal for the Far East (“IMTFE”) Indictment, the IMTFE Judgement and the case of *Cyprus v. Turkey*.<sup>38</sup>
11. The Civil Parties assert that since there was no development in international criminal law between the IMT Charter, which did not enumerate rape as a crime against humanity, and

<sup>34</sup> *Id.*, p. 7.

<sup>35</sup> Civil Parties’ Response, para. 24.

<sup>36</sup> *Id.*, para. 17. The authority relied on by the Civil Parties does not mention “The Roster of Representatives and Assistants, to the International Conference on Military Trials, London 1945” (which the Civil Parties assert only lists two female secretaries), nor does it mention women at all.

<sup>37</sup> PTC Closing Order Decision, para. 371.

<sup>38</sup> *Cyprus v. Turkey*, European Commission of Human Rights Applications 6780/74 and 9650/75 (1982) 4 E.H.R.R. p. 482-83.

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CCL No. 10, which did enumerate rape as a crime against humanity, rape existed as an enumerated crime against humanity in August 1945.<sup>39</sup> Customary international law is created through widespread State practice and *opinio juris*, not through determining the present or future status of customary international law then applying it retroactively.

12. The Pre-Trial Chamber found that even though CCL No. 10 criminalized rape as a crime against humanity, this constituted insufficient evidence of State practice and *opinio juris* for rape as an enumerated crime against humanity to be customary international law in 1975-79.<sup>40</sup> The Civil Parties assert that “[t]he codification of rape as a listed Crime against Humanity *alone* expresses the view of the international community that rape was considered a Crime against Humanity.”<sup>41</sup> CCL No. 10 cannot be relied upon to demonstrate customary international law because the Allied and German courts applying CCL No. 10 were considered to be “local courts, administering primarily local (municipal) law,”<sup>42</sup> and “in the immediate aftermath of WWII the [IMT’s] definition of crimes against humanity was viewed as the most accepted statement of international law.”<sup>43</sup> The Nuremberg Principles (which did not enumerate rape as a crime against humanity) reflect this understanding.<sup>44</sup>
13. The Civil Parties object on the merits to the Pre-Trial Chamber’s finding that a lack of any conviction for rape as a crime against humanity under CCL No. 10 is an argument against its existence in customary international law in 1975-79.<sup>45</sup> The Civil Parties err in their objection. The fact that rape was never prosecuted as a crime against humanity under CCL No. 10 demonstrates that there was no widespread State practice sufficient to establish a rule of customary international law.

**E. The Trial Chamber cannot “re-characterize” rape outside the context of forced marriage to reflect the use of rape as part of an “enemy policy”**

14. The Civil Parties request the Trial Chamber to charge the Accused with rape outside the context of regulation of marriage.<sup>46</sup> The Closing Order found that rape was not a crime used

<sup>39</sup> Civil Parties’ Response, para. 18.

<sup>40</sup> PTC Closing Order Decision, paras. 368, 371.

<sup>41</sup> Civil Parties’ Response, para. 28.

<sup>42</sup> Egon Schwelb, *Crimes Against Humanity* 23 B.Y.B. INT’L L. 178, 218-19 (1946). See also Attila Bogdan, *Individual Criminal Responsibility in the Execution of a “Joint Criminal Enterprise” in the Jurisprudence of the ad hoc International Tribunal for the Former Yugoslavia*, 6 INT’L CRIM. L. REV. 63, 110 (2006). CCL No. 10 “cannot be deemed part of international law, since it was passed by the legislative authority over Germany (the Allied Control Council). As a result, the judgments rendered in accordance with CCL No.10 do not constitute valid international precedent....” (Emphasis added).

<sup>43</sup> See Stuart Ford, *Crimes Against Humanity at The Extraordinary Chambers in the Courts of Cambodia: Is a Connection with Armed Conflict Required?*, 24 UCLA PAC. BASIN L.J. 125, 148, 151 (2006-2007).

<sup>44</sup> Nuremberg Principles, Principle VI(c).

<sup>45</sup> Civil Parties’ Response, paras. 27-28.

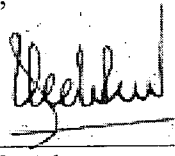
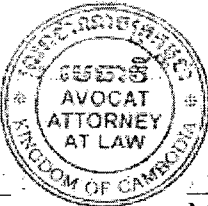
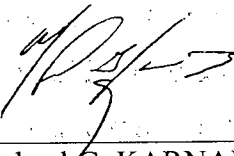
<sup>46</sup> *Id.*, 32-41.

by the Communist Party of Kampuchea leaders to implement the alleged common purpose.<sup>47</sup> The Closing Order only charges rape in the context of a policy of regulation of marriage. In effect, the Civil Parties are requesting the Trial Chamber to try the Accused for crimes for which they have not been indicted. This is in contravention of the Rules. Rule 98(2) states: "The judgment shall be limited to the facts set out in the Indictment. The Chamber may, however, change the legal characterisation of the crime as set out in the Indictment, as long as no new constitutive elements are introduced." First, alleging a policy of rape outside the context of regulation of marriage is extending the "facts" beyond what is set out in the Closing Order. Second, the Trial Chamber cannot amend the Closing Order to include a policy of rape outside the context of the regulation of marriage as it is not a crime set out in the Closing Order.

15. Furthermore, the Civil Parties request the Trial Chamber to add facts and accept evidence they claim proves: **a.** "perpetrators were not punished for rape if they were considered to be good revolutionaries";<sup>48</sup> **b.** "females who were already considered as an 'enemy' and/or 'bad element' were often raped before being killed";<sup>49</sup> and **c.** perpetrators at Sang Security Center were arrested only for a week and then released. These perpetrators resumed their positions after being released and, using their authority, ordered the rape victim be deprived of food.<sup>50</sup>
16. The Civil Parties' request must be rejected. These "facts" did not form part of the Closing Order. The Civil Parties acknowledge that these "facts" have been omitted from the Closing Order.<sup>51</sup> Acceptance of the Civil Parties' request is in violation of Rule 98(2). It is not a matter of re-characterizing facts, but of adding new ones.

**WHEREFORE**, for all the reasons stated herein, the Defence respectfully requests the Trial Chamber to REJECT the Civil Parties' Response and the OCP Request to re-characterize the facts establishing the conduct of rape as an enumerated crime against humanity.

Respectfully submitted,

ANG Udom

Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this 1<sup>st</sup> day of August, 2011

<sup>47</sup> Closing Order, 15 September 2010, E427, para. 1428 states: "[t]hose people who were suspected of 'immoral' behaviour, including rape, were categorized as 'bad-elements' or 'enemies', and were often either re-educated or killed."

<sup>48</sup> Civil Parties' Response, para. 33.

<sup>49</sup> *Id.*, para. 34.

<sup>50</sup> *Id.*, para. 38.

<sup>51</sup> *Id.*, para. 40.