E99/3

BEFORE THE TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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RESPONSE TO THE CO-PROSECUTORS' REQUEST TO RE-CHARACTERISE THE FACTS ESTABLISHING THE CONDUCT OF RAPE

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Before:

The Trial Chamber

Judge NIL Nonn
Judge Silvia CARTWRIGHT
Judge THOU Mony
Judge Jean-Marc LAVERGNE
Judge YA Sokhan

Co-Prosecutors

CHEA Leang
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MAY IT PLEASE THE TRIAL CHAMBER

1. On 13 January 2011, the Pre-Trial Chamber amended the Closing Order[1], *inter alia*, by striking rape as a crime against humanity out of paragraph 1613(g), on the ground that "rape did not exist as a crime against humanity in its own right in 1975-1979", but considered that the facts could be characterised as "crimes against humanity of other inhumane acts."[2]

2. Pursuant to Internal Rule 89, the parties were invited to raise their preliminary objections concerning the jurisdiction of the Chamber "no later than thirty (30) days after the Closing Order becomes final". Mr KHIEU Samphan filed his preliminary objections on 14 February 2011.[3]

3. On 16 June 2011,[4] the Co-Prosecutors requested the Trial Chamber to re-characterise the facts establishing the conduct of rape as the crime against humanity of rape rather than the crime against humanity of other inhumane acts.[5] The Chamber granted the Defence teams and Civil Parties until 22 July 2011 to respond.[6]

4. On 24 June 2011, Mr IENG Sary requested the Trial Chamber to issue an expedited decision as to whether the Co-Prosecutors' Request (amongst others) could be raised at this stage of the proceedings.[7]

5. To date, the Chamber has not yet disposed of Mr IENG Sary's Request.

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[1] Closing Order, 16 September 2010, D427.
[2] Decision on Khieu Samphan's Appeal Against the Closing Order, 13 January 2011, D427/4/14, para. 2(2).
[3] Preliminary Objections Concerning Jurisdiction ("Preliminary Objections"), 14 February 2011, E46.
[4] Notification on 23 June 2011 in English and Khmer. As the French version was not yet notified, the Defence worked on the basis of a courtesy copy sent on 11 July 2011.
[5] Co-Prosecutors' Request for the Trial Chamber to Recharacterise 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 ("Co-Prosecutors' Request").
[6] Decision on Extension of Time, 7 July 2011, E107.
[7] Ieng Sary's Request for an Expedited Decision as to Whether the OCP May Raise Requests for Re-Characterization at this Stage in the Proceedings & Request for Extension of Time to Respond to Such Requests, Should Responses Be Necessary, 24 June 2011, E103. See procedural background to Mr IENG Sary's numerous requests to this effect.

I – Inadmissibility of the Co-Prosecutors' Request

6. The Co-Prosecutors' Request is inadmissible and should therefore be rejected *in limine*. The Request was filed "pursuant to Internal Rules 92 and 98(2)",[8] which are not applicable, unlike Rule 89, pursuant to which the Co-Prosecutors are estopped from proceeding.

7. Rule 98, entitled "The Judgment", provides no legal basis for the admissibility of the Co-Prosecutors' Request. Rule 98 states in relevant parts:

> "2. 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. (...)
>
> 3. The Chamber shall examine whether the acts amount to a crime falling within the jurisdiction of the ECCC, and whether the Accused has committed those acts.
>
> (...)
>
> 7. Where the Chamber considers that the crimes set out in the Indictment do not fall within the jurisdiction of the ECCC, it shall decide that it does not have jurisdiction in the case."

8. Paragraph 2 permits the Trial Chamber, and not the Co-Prosecutors, to change the legal characterisation of facts at the trial stage "as long as no new constitutive elements are introduced". In the Judgment in Case 001, the Trial Chamber considered that this proviso is a reiteration of "this well-established limitation, namely that any re-characterisation must not go beyond the facts set out in the charging document".[9] It added: "The ICC's Regulations of the Court similarly permit its Trial Chambers to change the legal characterisation of facts following the start of the trial proceedings.[10]

9. Regulation 55 of the ICC Regulations, which is cited in reference, states in relevant parts:

> "1. **In its decision under Article 74**, the Chamber may change the legal characterisation of facts to **accord** with the crimes **under** articles (...), without exceeding the facts and circumstances described in the charges and any amendments to the charges.
>
> 2. If, at any time during the **trial**, it appears to the Chamber that the legal characterisation of facts may be subject to change, the Chamber shall give notice to the participants of such a

[8] Co-Prosecutors' Request, para. 1.
[9] Duch Judgment, 26 July 2010, E188, para. 494.
[10] Duch Judgment, para. 495 (emphasis added).

> possibility and **having heard the evidence**, shall, at an appropriate stage of the proceedings, give the participants the opportunity to make oral or written submissions (...)."[11]

10. It is abundantly clear from a reading of Internal Rule 98, Regulation 55 of the ICC Regulations and Article 74 of the ICC Statute that it is permissible for the Chamber to re-characterise facts during the trial on the merits. Legal re-characterisation of facts while evidence is being heard makes it possible to **accord** the facts with a more appropriate characterisation, it being understood, of course, that the more appropriate legal characterisation is provided by law and is within the jurisdiction of the court, otherwise the Chamber must purely and simply decline jurisdiction.

11. Legal re-characterisation of facts is the process by which the court re-categorises an act or a fact under its proper characterisation; it is not a process by which the court can change the legal definition of crimes, over which it has jurisdiction.

12. Yet, it is precisely this latter process that the Co-Prosecutors are asking the Trial Chamber to undertake in their Request. By asking the Chamber to determine whether rape existed as a discrete crime against humanity between 1975 and 1979, what they are actually seeking is for the Chamber to determine **the law applicable** before the ECCC.

13. According to the Co-Prosecutors, "the proposed re-characterization merely involves an adjustment of the framework employed by the Trial Chamber in assessing the facts already before the Court."[12] However, the assessment of the facts is undertaken solely within the framework of applicable rules, which the Co-Prosecutors are requesting the Chamber to adjust, and thus to change.

14. The Co-Prosecutors' confusion is further exposed by their assertion that "the characterization of the facts pertaining to rape has already been modified once, from the original Closing Order to the Amended Closing Order."[13] However, the Pre-Trial Chamber did not change the characterisation of the facts: in striking the sub-paragraph on rape out of

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[11] Article 74(2) of the Rome Statue ("Requirements for the Decision") provides: "The Trial Chamber's decision shall be based on its evaluation of the evidence and the entire proceedings. The decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges. The Court may base its decision only on evidence submitted and discussed before it at the trial."

[12] Co-Prosecutors' Request, para. 9 (emphasis added).

[13] Co-Prosecutors' Request, para. 11.

the paragraph on crimes against humanity, it altered the scope of the applicable law (or as the Co-Prosecutors put it, it "adjusted the framework").

15. Rule 98(2) is therefore not applicable in this instance, and neither is Rule 92.[14] However, there is a specific provision under which the parties may request the Chamber to change the legal definition of the crimes set out in the amended Indictment, in other words, the law applicable before the Chamber; that provision is Rule 89 which deals with preliminary objections concerning the jurisdiction of the Chamber. It is only on the basis of that rule and the principle of legality that the Chamber can determine whether or not the crimes set out in the Indictment are within its jurisdiction.

16. In fact, requesting the Chamber to rule on the existence of rape as a discrete crime against humanity between 1975 to 1979 is tantamount to requesting it to rule on the law applicable before the Chamber, and is thus properly within its jurisdiction.

17. In this instance, the Co-Prosecutors failed to discharge their Rule 89 obligation to raise their preliminary objections concerning the jurisdiction of the Chamber no later than 30 days after the Closing Order became final "failing which [the preliminary objections] shall be inadmissible". In fact, they filed their Request on 16 June 2011, i.e. more than four months after the prescribed time limit had expired. It is therefore inadmissible.

18. The fact of the matter is that the Co-Prosecutors are trying to lodge a disguised appeal against the Closing Order and the Pre-Trial Chamber's decision of 13 January 2011.

19. However, decisions of the Pre-Trial Chamber are not subject to appeal (Internal Rule 77(13). Indeed, the Co-Prosecutors acknowledged this on 31 January 2011 at the hearing on the application for release, when they stated that:

> "(...) this request is inadmissible before this Court. It is inadmissible because it seeks this Trial Chamber to review a decision of the Pre-Trial Chamber. In effect, it seeks for you to determine the validity of that decision of the 13th of January 2011. And the rules of this Court are very clear. Rule 77(13), that Pre-Trial Chambers are not subject to review. And indeed I hardly need to point out, and I do so most respectfully, that the Trial Chamber was not established under the rules as an appellate body. So our submission is this: even if you find

[14] Rule 92 permits the parties to file written submissions up until the closing statements, but does not specify the nature of such submissions. It is therefore a general provision which only applies in the absence of a special provision.

> merit in the arguments of Nuon Chea, simply put, this decision of the Pre-Trial Chamber cannot be reviewed by you, and you have no authority to review it."[15]

20. Since the Co-Prosecutors' Request is patently inadmissible, Mr KHIEU Samphan will not respond in detail to the arguments it raises.

II – Rape as a discrete crime against humanity

21. The Co-Prosecutors are requesting the Chamber to set aside the Pre-Trial Chamber's finding that rape did not exist as a discrete crime against humanity between 1975 and 1979, on the ground that rape was criminalised under customary international law during that period.[16]

22. Mr KHIEU Samphan concurs with the arguments articulated by the Pre-Trial Chamber.[17] He notes that the authorities cited by the Co-Prosecutors lead to the conclusion that rape could be considered as a war crime prior to 1975, but not as a crime against humanity.[18]

23. Being unable to cite any authorities to the effect that rape was criminalised as a crime against humanity under customary law before or during the period from 1975 to 1979, the Co-Prosecutors resort to conjecture and speculation.

24. The Co-Prosecutors contend that the fact that evidence concerning rape presented by prosecutors at Nuremberg was not given "express" consideration "*seems that this was a consequence of* (...) practical constraints".[19] This is pure speculation, which does not alter the fact that rape was not mentioned in the Tribunal's Charter, and that the United Nations General Assembly did not recognize it as a crime against humanity when it affirmed the Nuremberg Principles of International Law.[20]

25. The Co-Prosecutors further contend that although the international criminal tribunals have not identified the precise point at which rape as a crime against humanity crystallized in

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[15] Transcript of Hearing on Application for Release: NUON Chea, KHIEU Samphan, IENG Thirith, 31 January 2011, E1/1.1, pp. 47-48 (emphasis added).
[16] Co-Prosecutors' Request, para. 12-21.
[17] Decision on Ieng Sary's Appeal Against the Closing Order, 11 April 2011, D427/1/30, paras. 364-370.
[18] Co-Prosecutors' Request, paras. 12 and 13.
[19] Co-Prosecutors' Request, para. 15 (emphasis added).
[20] Decision on Ieng Sary's Appeal against the Closing Order, 11 April 2011, D427/1/30, para. 368.

customary international law, "*it must have occurred* in the immediate wake* of World War II, at the latest, as there was no significant conventional or jurisprudential developments related to the crimes against humanity of rape in the years between 1945 and 1993".[21] Not only is this hypothesis pure speculation, but also its justification further reinforces the notion that rape was not criminalised as a crime against humanity during this period. In fact, general State practice and *opinio juris* cannot emerge from the absence of conventional and jurisprudential developments and solely from Control Council Law No. 10.[22]

26. The fact of the matter is that rape was not criminalised as a crime against humanity prior to the adoption of the Statutes of the International Criminal Tribunals for the former Yugoslavia and for Rwanda. This is because it was deemed necessary to adapt the normative content of crimes against humanity to the **changing nature of conflicts**, which had undergone drastic change.

27. As the United Nations Secretary-General stated in 1994: "If the normative content of "crimes against humanity" had remained frozen in its Nuremberg form, then it could not possibly apply to the situation in Rwanda that existed between 6 April and 15 July 1994".[23]

28. In fact, in the same letter addressed to the President of the Security Council, the Secretary General enumerated the acts which the Commission of Experts on Rwanda considered as crimes against humanity at the time. Rape was not one of them.[24]

29. That rape was only very recently criminalised as a crime against humanity is evidenced by a review of the proceedings of the International Law Commission (ILC) on the Draft Code of Crimes against the Peace and Security of Mankind. The fact is that rape was

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* Mistakenly referred to in the original as "la veille".

[21] Co-Prosecutors' Request, para.18 (emphasis added).

[22] Decision on Ieng Sary's Appeal against the Closing Order, 11 April 2011, D427/1/30, para. 368. Further, in para. 309, the Pre-Trial Chamber states that Control Council Law No. 10 was essentially domestic legislation.

[23] Letter dated 1 October 1994 from the Secretary-General addressed to the President of the Security Council, S/1994/1125, 4 October 1994, para. 113.

[24] Letter dated 1 October 1994 from the Secretary-General addressed to the President of the Security Council, S/1994/1125, 4 October 1994, para. 118. Later on, the Secretary General noted: "[...] the Security council has elected to take a more expansive approach to the choice of the applicable law than the one underlying the statute of the Yugoslav tribunal, and included within the subject-matter jurisdiction of the Rwanda Tribunal international instruments **regardless of whether they were considered part of customary international law** [...]," Report of the Secretary-General pursuant to Paragraph 5 of Security Council Resolution 955 (1994), S/1995/134, 13 February 1995, para. 12.

not mentioned as a crime against humanity in the draft code **until 1996**, when the ILC noted **reports** that rape was being committed in a systematic manner during recent conflicts.[25]

30. The fact that the criminalisation of rape as a crime against humanity is quite recent is further evidenced by the divergence of findings in the first cases before the international criminal tribunals which dealt with the scope of the notion[26] (and not the "consistency of findings" as asserted by the Co-Prosecutors).[27]

31. Lastly, the Co-Prosecutors request the Chamber to take into account the decisions issued by international criminal tribunals as of 1998[28] onwards in order to establish the existence of rape as a crime against humanity under customary international law from 1975 to 1979.[29]

32. Now, the reason why a Chamber may rely on subsequent decisions of the international tribunals without contravening the principle of legality is that such decisions "interpret particular ingredients of an offence"[30] or enable a "determination (...) as to the elements of a particular crime"[31] to be made.

33. In other words, any principles deriving from subsequent jurisprudence of international tribunals can provide clarification of the *mens rea* and *actus reus* of a crime. They cannot be relied upon to determine whether or not a crime falls within the jurisdiction of the Chamber.

34. In conclusion, the Co-Prosecutors have not established that rape was criminalised as a discrete crime against humanity under customary international law between 1975 and 1979.

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[25] Draft Code of Crimes Against the Peace and Security of Mankind adopted by the Commission at its forty-eighth session, in 1996, p. 50: "There have been numerous **reports** of rape committed in a systematic manner or on a large scale in the former Yugoslavia (...) Furthermore, the National Commission for Truth and Justice **concluded**, in 1994, that sexual violence committed against women in a systematic manner for political reasons in Haiti constituted a crime against humanity." The ILC further referred to the Statutes of the ICTR and ICTY.
[26] See, for example, the differences between the following: ICTR, *The Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, 2 September 1998, para. 130, ICTY, *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment, 10 December 1998, para.127, and ICTY, *Prosecutor v. Kunarac et al.*, Case No. IT-93-23 & IT-96-23/1-A, Judgment, 12 June 2002, para.130.
[27] Co-Prosecutors' Request, para. 21.
[28] ICTR, *The Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, 2 September 1998, the first international criminal prosecution for rape as a crime against humanity. See Co-Prosecutors' Request, para. 17.
[29] Co-Prosecutors' Request, paras. 19-21.
[30] Duch Judgment, para. 34.
[31] *Ibid.*, para. 290.

FOR THESE REASONS

35. The Trial Chamber is requested:

- TO DECLARE the Co-Prosecutors' Request inadmissible;
- In the alternative, TO DISMISS the Co-Prosecutors' Request.

WITHOUT PREJUDICE,
AND IT WILL BE JUSTICE

	SA Sovan Jacques VERGÈS	Phnom Penh Paris	
Date	Name	Place	Signature