E99/4

BEFORE THE TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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IENG SARY'S RESPONSE TO THE CO-PROSECUTORS' REQUEST FOR THE TRIAL CHAMBER TO RECHARACTERIZE THE FACTS ESTABLISHING THE CONDUCT OF RAPE AS THE CRIME AGAINST HUMANITY OF OTHER INHUMANE ACTS

&

REQUEST FOR AN ORAL HEARING

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All Civil Parties

Mr. IENG Sary, through his Co-Lawyers ("the Defence"), hereby responds to the 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 ("Request").[1] The Request should be dismissed because it is an untimely preliminary objection to the Pre-Trial Chamber's Decision that rape is not an enumerated crime against humanity at the ECCC.[2] In the alternative, the Request should be dismissed for lack of merit. All of the OCP's assertions have been raised before the Pre-Trial Chamber.[3] The Request fails to show any discernible errors in the Pre-Trial Chamber's decision that rape is not an enumerated crime against humanity at the ECCC which would warrant a reversal by the Trial Chamber. The Defence incorporates all previous submissions related to both the admissibility and the merits of the Request.[4] A public, oral hearing is requested.

I. BACKGROUND

1. On 23 June 2010, the Defence filed IENG Sary's Alternative Motion on the Limits of the Applicability of Crimes against Humanity at the ECCC ("Motion"),[6] together with a supporting Annex.[7] The Motion sought to limit the definition of crimes against humanity at the ECCC to the crimes' definition in customary international law in 1975-79, and specifically argued that rape was not an enumerated crime against humanity in 1975-79.[8] The OCP did not respond to the Motion, nor did the OCIJ rule upon it.

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[1] 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, 16 June 2011, E99.

[2] Decision on IENG Sary's Appeal against the Closing Order paras. 300-13.

[3] *See* Annex 1 which lists the OCP's arguments in a chart format, demonstrating where each of these issues has been raised before the Pre-Trial Chamber.

[4] *See* Background

[6] IENG Sary's Alternative Motion on the Limits of the Applicability of Crimes against Humanity at the ECCC, 23 June 2010, D378/2.

[7] IENG Sary's Alternative Motion on the Limits of the Applicability of Crimes against Humanity at the ECCC, Annex: An Overview of Crimes against Humanity and their Evolution in International Jurisprudence, 23 June 2010, D378/2.2.

[8] The Motion explained that rape, "*as an enumerated crime against humanity*, is not listed in (a) the IMT Charter, (b) the 1946 Charter of the International Military Tribunal for the Far East, (c) the Nuremberg Principles, (d) the 1954 Draft Code of Offences Against the Peace and Security of Mankind, or (e) the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity. The exclusion from these instruments of rape as a crime against humanity demonstrates that it was not an enumerated crime against humanity in customary international law in 1975-79." Motion, para. 16. Further, the Motion submitted "that the enumeration of rape as a crime against humanity in Control Council Law No.10 [("CCL 10")] is not material. The Allied and German courts applying this law were 'local courts, administering primarily local (municipal) law, which, of course, includes provisions emanating from the occupation authorities.'" Motion, n. 52

2. On 1 September 2010, the Defence filed IENG Sary's Response to the Co-Prosecutors' Rule 66 Final Submission and Additional Observations.[9] The Defence reiterated its position that rape "was not an *enumerated crime against humanity* in customary international law in 1975-79."[10]

3. On 15 September 2010, the OCIJ filed the Closing Order in Case 002.[11] The Closing Order charged Mr. IENG Sary with "crimes against humanity, specifically ... (g) rape ... punishable under Article 5 ... of the ECCC Law."[12] Further, the Closing Order stated that the "definition of crimes against humanity under customary international law is the commission of one or more of the following acts, as part of a widespread or systematic attack against a civilian population: ... rape ..."[13]

4. On 23 October 2010, the Defence filed IENG Sary's Appeal against the Closing Order.[14] The Defence submitted that the OCIJ erred by holding rape to be an enumerated act constituting a crime against humanity,[15] and reasserted its reasons for this submission.[16]

5. On 19 November 2010, the OCP filed its Joint Response to NUON Chea, IENG Sary and IENG Thirith's Appeals Against the Closing Order, arguing that as "confirmed by the Trial Chamber in *Duch*, rape was clearly as crime against humanity and part of customary international law between 1975 and 1979."[17] The Defence replied to this argument on 6 December 2010.[18]

6. On 13 January 2011, the Pre-Trial Chamber issued its Decision on IENG Sary's Appeal against the Closing Order, in which it partially granted certain Defence grounds of appeal:

> This ground of Appeal is granted in so far as the Co-Lawyers argue that rape did not exist as a crime against humanity in its own right in 1975-1979. Therefore, the Pre-Trial Chamber decides to strike rape out of paragraph 1613 (Crimes Against Humanity, paragraph (g) of the Closing Order and to uphold the Co-Investigating Judges finding in paragraph 1433 of the Closing Order that the facts characterized

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[9] IENG Sary's Response to the Co-Prosecutors' Rule 66 Final Submission and Additional Observations, 1 September 2010, D390/1/2/1.3.
[10] *Id.*, paras. 53.
[11] Closing Order, 15 September 2010, D427 ("Closing Order").
[12] *Id.*, para. 1613.
[13] *Id.*, para. 360.
[14] IENG Sary's Appeal against the Closing Order, 25 October 2010, D427/1/6.
[15] *Id.*, para. 218.
[16] *Id.*, paras. 188-89.
[17] Co-Prosecutors' Joint Response to NUON Chea, IENG Sary and IENG Thirith's Appeals Against the Closing Order, 19 November 2010, D427/3/6, section I.2, paras. 190.
[18] IENG Sary's Reply to Co-Prosecutors' Joint Response to NUON Chea, IENG Sary and IENG Thirith's Appeals Against the Closing Order, 6 December 2010, D427/1/23, para. 98.

as crimes against humanity in the form of rape can be categorized as crimes against humanity of other inhumane acts.[19]

7. On 14 January 2011, the Trial Chamber became seized with the Case File. This started the time period for filing preliminary objections, making the original due date for such objections 15 February 2011.[20] The OCP filed no preliminary objections by that date.[21]

II. PROCEDURAL RESPONSE: THE REQUEST IS UNTIMELY AND SHOULD BE DISMISSED

8. The Trial Chamber is being requested to reverse the Pre-Trial Chamber's jurisdictional decision that rape is not an enumerated crime against humanity at the ECCC.[22] This is a preliminary objection concerning the jurisdiction of the ECCC. The Trial Chamber cannot entertain the OCP's request for a re-characterization of the facts without first determining whether rape as an enumerated crime against humanity existed in customary international law in 1975-79. This question is a jurisdictional issue. It was raised as a Rule 74(3)(a) jurisdictional challenge at the pre-trial stage and the Pre-Trial Chamber found it admissible. The Pre-Trial Chamber stated that it: "observes that in a number of the sub-grounds of this Ground of Appeal, ... including: ... sub-ground 14 ('rape argument') ... the Co-Lawyers argue upon the very existence in law in 1975-79 of certain categories of the crimes against humanity, which represent arguments that go to the very essence of the test for compliance with the principle of legality and, as such, represent admissible jurisdictional challenges."[23]

9. Jurisdictional challenges at the trial stage are envisaged by the Rules, which were specifically adopted for the ECCC[24] and have precedence over the Cambodian Criminal Procedure Code.[25] Rule 89(1) provides that a preliminary objection concerning the jurisdiction of the Trial Chamber "shall be raised no later than 30 (thirty) days after the

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[19] On 11 April 2011, the Pre-Trial Chamber issued its reasons for its Decision on IENG Sary's Appeal against the Closing Order, 11 April 2011, D427/1/30 ("Decision on IENG Sary's Appeal against the Closing Order").
[20] *See* Order to File Materials in Preparation for Trial, 17 January 2011, E9.
[21] *See* 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 & Request for an Oral Hearing, 22 July 2011, for the procedural Background concerning the admissibility of the Request.
[22] Decision on IENG Sary's Appeal against the Closing Order paras. 300-13.
[23] *Id.*, para. 84 (emphasis added).
[24] The Rules were changed to shorten the time period for raising preliminary objections – these issues must now be resolved well in advance of trial. In this way, the ECCC is similar to the *ad hoc* tribunals, which all require jurisdictional issues – such as the jurisdiction of the tribunal over certain crimes and forms of liability – to be raised within a specified time period well in advance of the start of trial. *See* ICTY Rules of Procedure and Evidence, Rule 72(A); ICTR Rules of Procedure and Evidence, Rule 72(A).
[25] Decision on NUON Chea's Appeal against Order Refusing Request for Annulment, 26 August 2008, D55/I/8, para. 14.

Closing Order becomes final, failing which it shall be inadmissible." Since the Closing Order became final on 14 January 2011, the deadline for filing objections to the Pre-Trial Chamber's decision that rape was not an enumerated crime against humanity was 15 February 2011.[26]

10. The OCP did not file any Rule 89 preliminary objections. The OCP *now* objects to this jurisdictional delimitation, approximately four months past the deadline for Rule 89 preliminary objections. Having opted – either for tactical reasons or due to its lack of due diligence – not to file a preliminary objection, the OCP *now* requests that the Trial Chamber "recharacterize the facts in the Indictment establishing the conduct of rape as the crime against humanity of rape rather than the crime against humanity of 'other inhumane acts.'"[27] It frames this Request as a Rule 98 request for re-characterization.[28] Re-characterization under Rule 98 is not a vehicle to circumvent Rule 89.

11. This matter was timely raised and extensively litigated at the pre-trial stage.[29] The Pre-Trial Chamber pursuant to Rule 74(3)(a) made a legal determination to a jurisdictional challenge.[30] The OCP did not object. The Request should thus be denied.

III. SUBSTANTIVE RESPONSE: RAPE IS NOT AN ENUMERATED CRIME AGAINST HUMANITY AT THE ECCC

A. Rape was not an enumerated crime against humanity under customary international law in 1975-79

12. The Pre-Trial Chamber found that the 1863 Lieber Code, the 1907 Hague Conventions (read in conjunction with the Martens clause from the preamble to the 1899 Hague Convention (II)), the 1919 Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, the 1949 Geneva Conventions and the 1977 Additional Protocols I and II were not sufficiently indicative of the customary criminalization of rape as a crime against humanity in its own right to find that by 1975 rape existed as an enumerated crime against humanity under customary international law.[31] The OCP failed

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[26] Order to File Materials in Preparation for Trial, 17 January 2011, E9.
[27] Request, para. 1.
[28] *Id.*
[29] *See* Background.
[30] Decision on IENG Sary's Appeal against the Closing Order paras. 357-72..
[31] Decision on IENG Sary's Appeal against the Closing Order, para. 367-71. *See also* Rhonda Copelon, *Gender Crimes as War Crimes: Integrating Crimes Against Women Into International Criminal Law*, MCGILL L.J., 217 (2000) ("Copelon"): "The Leiber [sic] Code, drafted to regulate the Union army during the American Civil War, identified rape as a capital offence. Otherwise, if condemned, as rape was in the Hague Convention of

to address this finding when it asserted that these instruments evidence the crystallization of rape's prohibition as an "autonomous" crime against humanity since the nineteenth century.[32] International humanitarian law instruments cannot be applied wholesale by analogy to determine whether rape was an enumerated crime against humanity in 1975-79.[33]

13. The Pre-Trial Chamber found that although rape was enumerated as a crime against humanity in CCL 10, it could not identify examples of any convictions for rape pursuant to this law.[34] The OCP relies upon the enumeration of rape as a crime against humanity in CCL 10.[35] The Allied and German courts applying CCL 10 were considered to be "local courts, administering primarily local (municipal) law,"[36] and "in the immediate aftermath of WWII the [International Military Tribunal's] definition of crimes against humanity was viewed as the most accepted statement of international law"[37] The Nuremberg Principles (which did not enumerate rape as a crime against humanity) reflect this understanding.[38]

14. The OCP acknowledges that the charters of the International Military Tribunal at Nuremberg and the International Military Tribunal for the Far East did not enumerate rape as a crime against humanity.[39] The significance of these exclusions, together with rape's exclusion from the Nuremberg Principles, must not be downplayed. Acts of sexual

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1907 and the Geneva Conventions, it was implicitly so, categorized as an offence against 'family honour and rights' or as 'outrages against personal dignity' or 'humiliating and degrading treatment.' The Fourth Geneva Convention called for 'protect[ion] against [rape as an] ... attack on their honour,' but rape was not treated as violence, and was therefore not named in the list of 'grave breaches' subject to the universal obligation to prosecute. In 1977 the Protocols to the Geneva Conventions mentioned 'rape, forced prostitution and any other form of indecent assault,' but only as 'humiliating and degrading treatment,' a characterization that reinforced the secondary importance as well as the shame and stigma of the victimized women. The offence was against male dignity and honour, or national or ethnic honour. In this scenario, women were the object of a shaming attack, the property or objects of others, needing protection perhaps, but not the subjects of rights." (internal citations omitted).

[32] Request, para. 12.

[33] *See* IENG Sary's Appeal against the Closing Order, paras. 186-87.

[34] *See* Decision on IENG Sary's Appeal against the Closing Order, para. 368.

[35] Request, paras. 14-15.

[36] 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 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).

[37] *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).

[38] Nuremberg Principles, Principle VI(c).

[39] Request, para. 15.

violence committed against thousands of girls and young women of non-Japanese origin from Japanese occupied territories during World War II were "ignored" by the International Military Tribunal for the Far East.[40] The exclusion of these crimes from prosecution after World War II has led one commentator to note that "[b]efore the 1990s, sexual violence in war was, with rare exception, largely invisible. If not invisible, it was trivialized; if not trivialized, it was considered a private matter or justified as an inevitable by-product of war, the necessary reward for the fighting men."[41] This further suggests that by 1975-79 customary international law had not crystallized to the extent that rape existed as an enumerated crime against humanity.

15. The OCP asserts that the enumeration of rape as a crime against humanity in the statutes of the International Criminal Tribunal for the former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR") "was based on an understanding of customary international law *prior to* the adoption of those statutes."[42] The OCP relies upon paragraph 34 the Report of the Secretary General pursuant to paragraph 2 of Security Council Resolution 808 dated 3 May 1993 in support of this assertion ("Report").[43] Paragraph 34 of the Report states that the "the application of *nullum crimen sine lege* requires that the international tribunal should apply rules of customary international law that were beyond doubt part of customary international law."[44] This does not mean that the international crimes and forms of liability enumerated in the ICTY Statute were "beyond doubt" part of customary international before (or even at the time of) its promulgation. Rather, it means that the ICTY was to proceed with caution to ensure that only those rules which were in fact "beyond doubt" part of customary international law were *applied* by the tribunal. This is made clear by paragraph 35 of the Report, which specifies that the customary international law which is "beyond doubt" applicable in armed conflict is that embodied in: **a.** the 1949 Geneva Conventions; **b.** the 1907 Hague Convention (IV); **d.** the 1949 Genocide Conventions; and **e.** the 1945 Charter of the International Military Tribunal. Considering that rape is not enumerated as a crime against humanity in any of these instruments, the OCP's reliance on the Report is misplaced.

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[40] Copelon, at 219-21.
[41] *Id.*
[42] Request, para. 16.
[43] *Id.*, n. 31 *citing* Report of the Secretary General pursuant to paragraph 2 of Security Council Resolution 808, 3 May 1993 (S/25704), para. 34.
[44] Underlined emphasis is added.

16. The OCP asserts that it is appropriate for the ECCC to follow ICTY, ICTR and Special Court for Sierra Leone ("SCSL") jurisprudence on this issue.[45] The OCP adds that rape's crystallization as an enumerated crime against humanity "must have occurred in the immediate aftermath of World War II, at the latest, as there were no significant conventional or jurisprudential developments related to the crimes [sic] against humanity of rape in the years between 1945 and 1993."[46] First, the ICTY, ICTR or SCSL have not been called upon to rule on the customary status of rape as an enumerated crime against humanity in 1975-79. Second, the OCP's assertion that there were no material developments between 1945 and 1993 is without merit. The OCP ignores rape's omission as an enumerated crime against humanity from the Nuremberg Principles. The OCP also fails to recognize, in the context of the hastened development of gender integration in international criminal law after the end of the Cold War,[47] the 1993 Vienna Conference on Human Rights and the resulting Vienna Declaration and Programme of Action.[48]

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[45] Request, para. 18.

[46] *Id.*

[47] *See* Copelon. For further reflections on the impact of the end of the Cold War upon the development of international criminal law and international human rights norms more generally, *see, e.g.*, Randall Lesaffer, *The End of the Cold War: An Epochal Event in the History of International Law?*, Tilburg University and Catholic University of Leuven *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1663871. *See also* W. Michael Reisman, *International Law after the Cold War*, 84 AM. J. INT'L L. 859, 861 (1990).

[48] "On 25 June 1993, representatives of 171 States adopted by consensus the Vienna Declaration and Programme of Action of the World Conference on Human Rights, thus successfully closing the two-week World conference and presenting to the international community a common plan for the strengthening of human rights work around the world. The conference was marked by an unprecedented degree of participation by government delegates and the international human rights community. Some 7,000 participants, including academics, treaty bodies, national institutions and representatives of more than 800 non-governmental organizations (NGOs) -- two thirds of them at the grass-roots level -- gathered in Vienna to review and profit from their shared experiences ... The Vienna Declaration and Program of Action mark[ed] the culmination of a long process of review and debate over the current status of human rights machinery in the world. It also mark[ed] the beginning of a renewed effort to strengthen and further implement the body of human rights instruments that have been painstakingly constructed on the foundation of the Universal Declaration of Human Rights since 1948.... [T]he Conference took historic new steps to promote and protect the rights of women, children and indigenous peoples." World Conference on Human Rights, 14-25 June 1993, *available at* http://www.ohchr.org/EN/ABOUTUS/Pages/ViennaWC.aspx. Notably, the Vienna Declaration and Programme of Action stressed the need for an effective response to systematic rape: "Violations of the human rights of women in situations of armed conflict are violations of the fundamental principles of international human rights and humanitarian law. All violations of this kind, including in particular murder, systematic rape, sexual slavery, and forced pregnancy, require a particularly effective response" (emphasis added). Vienna Declaration and Programme of Action, A/CONF.157/23, 12 July 1993, Part II, para. 38. *See also* Copelon, at 220: "This last decade [1990-2000] has indeed been historic in that there has been significant progress in transforming the discourse on a policy level. In the arena of international criminal law, there has been significant progress in eliminating the privatization of, and impunity for, gender crimes. For the first time, there have been steps to recognize women as full subjects of human rights and international criminal justice" (emphasis added).

17. The OCP asserts that reliance on decisions of international tribunals that post-date January 1979 does not contravene the principle of legality. Rather, "these decisions provide interpretative guidance as regards the evolving status of certain offences and forms of responsibility under international law."[49] Although the Defence agrees with this assertion in principle, to find that rape existed as an enumerated crime against humanity under customary international law in 1975-79 based on decisions of the *ad hoc* tribunals goes beyond the subsidiary role envisaged for judicial determinations as a guide to interpretation, and thus would violate the principle of legality.[50]

18. The OCP asserts that a finding by the ECCC that rape was not an enumerated crime against humanity in 1975-79 implies that the findings of the *ad hoc* tribunals (with respect to rape as a crime against humanity) were incorrect.[51] As noted above, the end of the Cold War created political space in the international community for the development of international human rights and international criminal law, particularly in the sphere of gender integration. The effects of this paradigm shift must be fully considered, not least when considering the ECCC's jurisdiction over, and the contours of, crimes against humanity, which (unlike Genocide and Grave Breaches of the Geneva Conventions)[52] have never been codified.

B. Prosecution of rape as a "discrete" crime against humanity was not foreseeable or accessible to Mr. IENG Sary in 1975-79

19. The OCP asserts that Mr. IENG Sary could have foreseen that acts of rape constituted a crime against humanity.[53] There is a distinction between the "prohibition" of rape in customary international law, and its *criminalization* as an enumerated crime against humanity. Further, a crime which did not exist in customary international law in 1975-79 would hardly have been accessible to Mr. IENG Sary at that time. The Defence

[49] Request, para. 19.
[50] *See* ICJ Statute, Art. 38(1)(3) which establishes that the Court may consider its prior jurisprudence as "subsidiary means for the determination of rules of law."
[51] Request, para. 21.
[52] *Cf. id.*: "Indeed, international law is not the product of statute for the simple reason that there is yet no world authority empowered to enact statutes of universal application." The Defence submits that this assertion is misconceived. Organs of the United Nations as well as the International Committee of the Red Cross have promulgated Conventions and other statutory acts that have codified, *inter alia*, the law of war and genocide and which have attained customary status.
[53] *Id.*, para. 23.

incorporates the arguments regarding foreseeability and accessibility made in IENG Sary's Appeal against the Closing Order.[54]

20. The OCP asserts that to the extent that there was any uncertainty as to whether rape was an enumerated crime against humanity between 1975 and 1979, "the resolution of that uncertainty by judicial determination was readily foreseeable."[55] First, customary international law derives from State practice and *opinio juris*.[56] Judicial determinations are, at most, subsidiary means for the determination of rules of customary international law.[57] Second, to gauge whether prosecution for rape was foreseeable in 1975-79 does not require, as the OCP suggests, an assessment of whether it was foreseeable that a customary rule may crystallize in the future.[58]

21. The OCP asserts that "the egregious nature of the acts of rape committed in Cambodia during the period of 1975-79" render it "inconceivable that a reasonable person could have believed that these acts did not violate universal dictates of law and decency such as to warrant criminalization by way of a discrete offence."[59] Commenting on the jurisprudence of the *ad hoc* tribunals, the Trial Chamber's Senior Legal Officer, Ms. Susan Lamb, provides insightful guidance on assertions of this type:

> The dearth of State practice to guide the *ad hoc* Tribunals has ensured that the definition of international crimes by the *ad hoc* Tribunals has had a somewhat *de lege ferenda* quality. As one writer has noted, the 'tribunals have [thus] been guided, and are likely to continue to be guided, by the degree of offensiveness of certain acts to human dignity; the more heinous the act, the more the tribunal will assume that it violates not only a moral principle of humanity but also a positive norm of customary law.' This reality of an ever evolving and mutable international criminal order co-exists uncomfortably beside, and at time appears scarcely compatible with, the notion of *nullum crimen* as envisaged in the Report of the Secretary-General and its underlying values of predictability and certainty.[60]

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[54] *See* IENG Sary's Appeal against the Closing Order, paras. 130-35.
[55] Request, para. 25.
[56] *See* IENG Sary's Appeal Against the OCIJ's Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, 22 January 2010, D97/14/5, Annex A, Section II F for an in-depth discussion of the creation of customary international law.
[57] *See* ICJ Statute, Art. 38(1)(3).
[58] The Pre-Trial Chamber has found that the foreseeability limb of the principle of legality requires that an Accused "must be able to appreciate that conduct is criminal in the sense generally understood, without reference to any specific provision." Decision on Appeals by NUON Chea and IENG Thirith against the Closing Order, 15 February 2011, D427/2/15, para. 106.
[59] Request, para. 25.
[60] Susan Lamb, Nullum crimen, nulla poena sine lege *in International Criminal Law* in Cassese, Gaeta and Jones (eds.), THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT – A COMMENTARY: VOLUME 1 733-66, 746 (Oxford 2002).

C. Prosecution of rape as an enumerated crime against humanity is inconsistent with the "goals" of the principle of legality

22. The OCP asserts that "the relevant question at the ECCC is whether *conduct amounting to rape* was punishable as a crime against humanity during 1975-79 such that it was foreseeable that the accused could be prosecuted for crimes against humanity based on that conduct. In short, it is the substance that matters, not the nomenclature."[61] The question framed in this assertion is inconsistent with the relief the OCP seeks, i.e. for the Trial Chamber to "recharacterize the facts in the Indictment pertaining to the conduct of rape as the crime against humanity of rape rather than the crime against humanity of other inhumane acts."[62] By making the first assertion, the OCP appears to acknowledge that rape was not an *enumerated* crime against humanity in 1975-79. The relief requested is predicated on the presumption that it was.

23. The OCP's assertions that the enumeration of rape as a crime against humanity provides increased certainty to Mr. IENG Sary and the public are not relevant to the relief sought.[63] The relevant questions for the Trial Chamber, consistent with the "goals" of the principle of legality, are: **a.** whether rape existed as an enumerated crime against humanity in 1975-79 and; **b.** whether prosecution for rape as an enumerated crime against humanity would have been foreseeable and accessible to Mr. IENG Sary in 1975-79.[64]

D. The question of whether the facts in the Closing Order provide a sufficient basis for finding that rape occurred is not relevant to the analysis

24. The OCP asserts that the "Closing Order sets out facts demonstrating that the accused are responsible for crimes against humanity of rape that occurred during the relevant time period."[65] In the following three paragraphs, the OCP repeats allegations made the Closing Order relating to an alleged policy of "forced marriage" in Democratic Kampuchea,[66] alleged rapes in the context of "forced marriages,"[67] and alleged rapes outside the context of "forced marriages," which the OCP submits were a "foreseeable

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[61] Request, para. 27.
[62] *Id.*, para. 33.
[63] *Id.*, para. 28.
[64] *See* Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise, 20 May 2010, D97/17/6, para. 43.
[65] Request, para. 29.
[66] *Id.*, para. 30.
[67] *Id.*, para. 31.

consequence of the JCE."[68] The Defence submits that the Trial Chamber must disregard these four paragraphs.[69] First, (as shown above) the Trial Chamber has no jurisdiction to consider whether the facts in this case amount to rape as an enumerated crime against humanity. Second, even if the Trial Chamber were to find that it did have such jurisdiction, consideration of whether "the facts in the Closing Order provide a sufficient basis for the finding that the crime against humanity of rape occurred" can only take place after the Trial Chamber has heard all of the evidence on this issue and is capable of ascertaining the truth of these allegations; it is a question that can only be considered at trial.

IV. CONCLUSION AND RELIEF REQUESTED

25. The issues before the Trial Chamber are Rule 89(1) preliminary objections; issues of pure law. The Pre-Trial Chamber addressed all issues related to whether rape as an enumerated crime against humanity existed in customary international law in 1975-79. It held that it was not and thus inapplicable at the ECCC. The OCP ignored Rule 89(1) and filed no objections. It can not now seek relief in the form of recharacterization of facts as a means of circumventing the rules or curing it lack of due diligence. Even if the Trial Chamber should decide to consider the Request pursuant to Rule 98, the Request should be dismissed for lack of merit.

WHEREFORE, for all the reasons stated herein, the Trial Chamber should:

a. REJECT the Request as untimely; or in the alternative

b. HOLD a public, oral hearing; and

c. DISMISS the Request on the merits.

Respectfully submitted,

AVOCAT ATTORNEY AT LAW KINGDOM OF CAMBODIA

ANG Udom Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this **22nd** day of **July, 2011**

[68] *Id.*, para. 32.

[69] The Defence's submissions herein are made without prejudice to its position that whether a crime was a "foreseeable consequence of the JCE" is irrelevant to assessing whether it can be attributed to members of a joint criminal enterprise at the ECCC. *See* Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise, 20 May 2010, D97/17/6.