

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

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**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**

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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”) make this submission to seek clarification of the portion of the Trial Chamber memo entitled “Further information regarding remaining preliminary objection” dated 25 April 2014 in light of the recent issues raised in court and in written submissions regarding the scope of the allegations concerning rape outside the context of Forced Marriage.¹ The Lead Co-Lawyers request confirmation that the Trial Chamber is seised of the factual allegations of rape within the scope of Case 002/02, namely at Tram Kok Cooperatives, S-21 and Kraing Ta Chan Security Centre.

II. APPLICABLE LAW

2. Article 125 of the Code of Criminal Procedure of the Kingdom of Cambodia states:

“The investigating judge is seized with the facts specified in the introductory submission. The investigating judge shall investigate only those facts.
If during a judicial investigation, new facts susceptible to be qualified as a criminal offense arise, the investigating judge shall inform the Prosecutor. The Prosecutor can ask the investigating judge to investigate the new facts by making a supplementary submission. If there is no such supplementary submission, the investigating judge has no power to investigate the new facts.
However, if the new facts only constitute aggravating circumstances of the facts already under judicial investigation, no supplementary submission is required.”
3. Internal Rule 55(2) provides that “[t]he Co-Investigating Judges shall only investigate the facts set out in an Introductory Submission or a Supplementary Submission.”
4. Internal Rule 55(3) provides that “[i]f, during an investigation, new facts come to the knowledge of the Co-Investigating Judges, they shall inform the Co-Prosecutors, unless the new facts are limited to aggravating circumstances relating to an existing submission. Where such new facts have been referred to the Co-Prosecutors, the Co-Investigating Judges shall not investigate them unless they receive a Supplementary Submission.”
5. Article 247 of the Code of Criminal Procedure of the Kingdom of Cambodia provides that a judicial investigation may conclude in either an indictment and/or a “non-suit order”. It states that a “non-suit order” may be issued if and when “[t]he facts do not

¹ For the purposes of the present submission, unless otherwise specified, the use of the term “rape” refers to rape outside the context of Forced Marriage. The Lead Co-Lawyers also make a distinction between the term “rape” (referring to the act and conduct) and “Rape” (referring to the legal qualification of such act and conduct as a criminal allegation).

- constitute a felony, misdemeanor or petty offense” or “[t]here is insufficient evidence for a conviction of the charged person.” As per Article 277, a “non-suit order” is amenable to appeal.
6. Similarly, Internal Rule 67(3) provides that a “Dismissal Order” must be issued by the Co-Investigating Judges if and when “[t]he acts in question do not amount to crimes within the jurisdiction of the ECCC” or “[t]here is not sufficient evidence against the Charged Person or persons of the charges”. Internal Rule 67(4) provides that “[t]he Closing Order shall state the reasons for the decision. A Closing Order may both send the case to trial for certain acts or against certain persons and dismiss the case for others.” Internal Rule 66*bis* (1) states that “the Co-Investigating Judges may, at the time of notification of conclusion of investigation, decide to reduce the scope of judicial investigation by excluding certain facts set out in an Introductory Submission or any Supplementary Submission(s)”. A decision made pursuant to this Rule is subject to appeal as provided in Rule 74 as per Internal Rule 66*bis* (4).
 7. The Co-Investigating Judges may make a decision in respect of all the facts that they are seised of and the related legal characterisations proposed by the Co-Prosecutors by either (i) indicting the charged person, after having charged them, or (ii) issuing a dismissal order in relation to all or part of those facts.² Internal Rule 67(5) provides that “[t]he order is subject to appeal as provided in Rule 74”.
 8. Internal Rule 98(2) states that “[t]he 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.” Internal Rule 98(3) further provides that “[t]he 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.”

III. PROCEDURAL BACKGROUND

9. On 14 December 2009, “[f]ollowing a review of evidence of the co-operatives and worksites, security centers and execution sites”, the OCIJ confirmed the charges that Nuon Chea was notified of at his initial appearance and considering that “additional

² Order Concerning the Co-Prosecutors’ Request for Clarification of Charges, **D198**, 20 November 2009.

charges [were] warranted” accordingly charged him additionally, *inter alia*, with “rape” as a Crime Against Humanity as defined in Article 5 of the ECCC Law.³ On 18 December 2009, the Co-Investigating Judges similarly confirmed the charges that Khieu Samphan was notified of at his initial appearance, including “rape” as a Crime Against Humanity.⁴

10. On 15 September 2010, the Co-Investigating Judges issued the Closing Order containing factual allegations of occurrences of rape at Security Centres and Cooperatives.⁵ The Co-Investigating Judges concluded however that:

“the official CPK policy regarding rape was to prevent its occurrence and to punish the perpetrators. Despite the fact that this policy did not manage to prevent rape, it cannot be considered that rape was one of the crimes used by the CPK leaders to implement the common purpose”.⁶

11. In the dispositive, the Closing Order indicted the Co-Accused and seised the Trial Chamber with the criminal allegations of rape as a Crime against Humanity through commission, planning, instigating, ordering, aiding and abetting, or superior responsibility.⁷ However, as regards the Modes of Responsibility, the Co-Investigating Judges, following their conclusion mentioned above, did not propose joint criminal enterprise as a mode of liability for the criminal allegations of rape outside the context of forced marriage.⁸

³ Written Record of Interview of Charged Person, **D275**, 14 December 2009, para. 11. On 20 November 2009, the Co-Investigating Judges had reaffirmed their “obligation – as set forth in Rule 55(2) of the Internal Rules – to investigate *in rem* all the material facts (*faits*) set out in the Introductory Submission (and Supplementary Submissions) by which they are seised of such facts.” See Order Concerning the Co-Prosecutors’ Request for Clarification of Charges, **D198/1**, 20 November 2009, para. 6. They held that: “[t]he Co-Investigating Judges will make a decision in respect of all of these facts and the related legal characterisations proposed by the Co-Prosecutors (including Genocide and offences under the 1956 Penal Code), either by indicting the charged persons, after having charged them, or by issuing a dismissal order in relation to all or part of those facts.” (*ibid*, p. 6.)

⁴ Written Record of Interview of Charged Person, **E3/576**, 18 December 2009, para. 10.

⁵ Closing Order, **D427**, 15 September 2010 (“Closing Order”), paras 1426-1428.

⁶ *Ibid*, para. 1429.

⁷ *Ibid*, para. 1613.

⁸ See Closing Order, para. 1525. Concerning the other modes of liability, they proposed that the factual allegations of rape covered by the following legal characterisation of crimes: Crimes against Humanity of rape (Closing Order, para 1426), limited to Tram Kok Cooperatives, S-21 and Kraing Ta Chan Security Centre (List of paragraphs and portions of the Closing Order relevant to Case 002/02, **E301/9/1.1**, 4 April 2014, p. 4); Crimes against Humanity of torture (Closing Order, para. 1525 (Joint Criminal Enterprise), para. 1545 (Planning), para. 1548 (Instigating), para. 1551 (Aiding and Abetting), para. 1554 (Ordering), para. 1559 (Superior Responsibility), limited to Tram Kok Cooperatives, S-21, Kraing Ta Chan and Phnom Kraol Security Centres, and Treatment of Cham (List of paragraphs and portions of the Closing Order relevant to Case 002/02, **E301/9/1.1**, 4 April 2014, p. 3); and Other inhumane acts through attacks against human dignity (Closing Order,

12. Neither Defence teams (collectively, the “Defence”) challenged the *factual* findings related to the alleged instances of rape in the Closing Order as Crime against Humanity or plead procedural defects provided in Internal Rule 67(2). In the appeals by the Defence to the Closing Order, the Nuon Chea Defence appealed, *inter alia*, the criminalization of the offences set out in Articles 4-6 of the ECCC Law.⁹ The Khieu Samphan Defence appealed on grounds of violation of fair trial rights.¹⁰ On 13 January 2011, the Pre-Trial Chamber ruled on the appeals against the Closing Order,¹¹ and held that rape did not exist as a Crime against Humanity in its own right in 1975-1979¹² but could be characterized as a Crime against Humanity under other inhumane acts:

“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

para. 1434-1444, para. 1525 (Joint Criminal Enterprise), para. 1545 (Planning), para. 1551 (Aiding and Abetting), para. 1554 (Ordering), para. 1559 (Superior Responsibility) limited to Movement of Population (Phase Two) limited to the treatment of the Cham), Tram Kok Cooperatives, Trapeang Thma Dam, 1st January Dam and Kampong Chhnang Airport Worksites, and S-21, Kraing Ta Chan, Au Kanseng and Phnom Kraol Security Centres (List of paragraphs and portions of the Closing Order relevant to Case 002/02, **E301/9/1.1**, 4 April 2014, p. 4.).

⁹ Nuon Chea Appeal against the Closing Order, **D427/3/1**, 18 October 2010, paras 30-32. Nuon Chea Defence further challenged that the Closing Order erred in confirming the jurisdiction of the tribunal by concluding that the application of the international crimes and modes of liability referenced in the ECCC Law complies with the principle of legality (*ibid*, paras 24-26); the domestic criminal law at the time of the alleged events did not provide for the criminalization of Genocide, Crimes Against Humanity, or War Crimes (*ibid*, paras 27- 29); the international principle of legality does not provide for domestic criminality (*ibid*, paras 33-34); and retroactive criminalization violates the national principle of legality (*ibid*, paras 35-37).

¹⁰ Appeal Against Closing Order, **D427/4/3**, 18 October 2014, para. 31-37. The Khieu Samphan Defence also raised issues concerning the denial of the right to respond to the Final Submission (63-68), evidence being unavailable in French and Khmer (69-73), the lack of transparency of the Co-Investigating Judges’ course of action (74-84), and incomplete and partial investigation (85-116).

¹¹ Ieng Sary Defence and Ieng Thirith Defence teams challenged that rape did not exist as a discrete Crime against Humanity under customary international law between 1975-1979. *See* Ieng Sary Defence’s Appeal Against the Closing Order, **D427/1/6**, 25 October 2010; Ieng Thirith Defence Appeal from the Closing Order, **D427/2/1**, 18 October 2010.

¹² The Pre-Trial Chamber reasoned that “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.’” and “[r]ape as it is defined under domestic criminal codes does not contain such elements” and further that, “[a]s such, rape as a domestic crime cannot simply be imported into international law as a crime against humanity by recourse to the general principles of law recognised by civilised nations.” *See* Decision on Appeals by Nuon Chea and Ieng Thirith Against the Closing Order, **D427/3/15**, 15 February 2011, para. 153.

characterized as crimes against humanity in the form of rape can be categorized as crimes against humanity of other inhumane acts.”¹³

13. On 16 June 2011, the Co-Prosecutors submitted a 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.¹⁴ In response, the Lead Co-Lawyers also requested the Trial Chamber to recharacterise rape as a Crime against Humanity “in its own right”.¹⁵
14. On 4 April 2014, the Trial Chamber issuing its decision on additional severance of Case 002 and the Scope of Case 002/02 specifically included the charges of Crime against Humanity of Other Inhumane Acts through Rape limited to Tram Kok Cooperatives, S-21, and Kraing Ta Chan Security Centre; and in the context of Forced Marriage.¹⁶ It also included charges of Other Inhumane Acts through “Attacks against human dignity” limited to Tram Kok Cooperatives, Trapeang Thma Dam, 1st January Dam, and Kampong Chhnang Airport Worksites, S-21, Kraing Ta Chan, Au Kanseng and Phnom Kraol Security Centre¹⁷ as well as Torture limited to Tram Kok Cooperatives, S-21, Kraing Ta Chan, Phnom Kraol Security Centre, and the treatment of Cham.¹⁸
15. On 25 April 2014, the Trial Chamber held that it has no authority to “add new facts or charges to the Closing Order that were dismissed by the Co-Investigating Judges, a decision that was not disturbed by the Pre-Trial Chamber”¹⁹ specifically “rape as a *policy* in Security Centres”.²⁰ In the same decision, the Trial Chamber confirmed that

¹³ Decision on Ieng Thirith’s and Nuon Chea’s Appeal Against the Closing Order, **D427/2/12**, 13 January 2011, para. 11(2); Decision on Ieng Sary’s Appeal Against the Closing Order, **D427/1/26**, 13 January 2011, para. 7(2); *see also* Pre-Trial Chamber Decision on Khieu Samphan’s Appeal Against the Closing Order, **D427/4/14**, 13 January 2011, para. 2(12).

¹⁴ 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, para. 33.

¹⁵ 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, para. 45 (i).

¹⁶ List of paragraphs and portions of the Closing Order relevant to Case 002/02, **E301/9/1.1**, 4 April 2014, p. 4.

¹⁷ *Id.*

¹⁸ *Ibid*, p. 3.

¹⁹ Further information regarding remaining preliminary objections, **E306**, 25 April 2014, para. 3.

²⁰ *Ibid* (emphasis added).

it retained the liberty to “change the legal characterisation of a crime as set out in the Closing Order *as long as no new constitutive elements are introduced*”.²¹

III. DISCUSSION

16. On 29 January 2016, the International Co-Prosecutor, relying on the Trial Chamber memo on further information regarding remaining preliminary objections, noted that “he does not consider evidence that cadres were punished for rape outside the context of forced marriage to be exculpatory, as the *Closing Order did not charge the Accused with rapes committed outside the context of forced marriage*”.²²
17. In light of the position taken by the Co-Prosecutors and the legal consequences it entails, the Lead Co-Lawyers seek clarification from the Trial Chamber concerning the scope of the criminal allegations concerning rape outside the context of Forced Marriage as outlined in the Closing Order.

(a) The Trial Chamber is and continues to remain seised of the factual allegations of rape

18. The Lead Co-Lawyers emphasise that the Co-Investigating Judge did not dismiss the factual allegations of rape. This is explicit for a variety of reasons. First, the Co-Investigating Judge did not use the precise terms that give rise to a Dismissal Order within the meaning of Internal Rule 67(3).
19. Second, the Co-Investigating Judge limited the language of the Closing Order to conclude that the factual allegations of rape and the related evidence at that stage did not amount to “one of the crimes used by the CPK leaders to implement the common

²¹ *Ibid.*

²² International Co-Prosecutor’s Disclosure of Case 004 Documents Relevant to Case 002 Pursuant to Case 004-D193/61, **E319/40**, 29 January 2016, para. 6 *citing* Further information regarding remaining preliminary objections, **E306**, 25 April 2014, para. 3 (emphasis added). Prior to this, on 21 April 2015, the Co-Prosecutors, responding to Nuon Chea Defence’s request for 15 additional witnesses for the segment on Tram Kok Cooperatives and Kraing Ta Chan Security Centre, had stated that: “The Defence have made much about a dispute that has arisen about whether one of these people was the victim of sexual violence. And I would just remind everyone that while this is a relevant issue, the Accused are not charged here with that rape. We’ve seen them spend a lot of time questioning witnesses on this, but they’re not charged with the rape. They are charged with murder. So I think in deciding whether we will hear witnesses, that’s something you should take into account.” See Transcripts dated 21 April 2015, **E1/289.1**, pp. 83-84.

- purpose” presumably for the purpose of proposing Joint Criminal Enterprise as a *mode* of liability rather than its qualification as a substantive crime.²³
20. Third, had there been an explicit Dismissal Order on these accounts, it would have triggered the right of the Co-Prosecutors and thereby the Civil Parties to appeal those dismissals,²⁴ which did not happen in this particular instance.
21. The Lead Co-Lawyers submit that the Closing Order, therefore, seises the Trial Chamber of the factual allegations of the conduct amounting to rape, *inter alia*, at Tram Kok Cooperatives, Kraing Ta Chan Security Centre and S-21.²⁵ It proposes a legal characterisation of Rape as Other Inhumane Acts through Rape,²⁶ Other Inhumane Acts through ‘Attacks against human dignity’²⁷ and potential characterisation as Crimes against Humanity of Torture.²⁸ As stated above, these have been explicitly included in the Decision on Additional Severance of Case 002 and Scope of Case 002/02.²⁹
22. The Lead Co-Lawyers submit that both the Co-Accused were duly notified of the charges of rape and have been on definitive notice as such since 2009.³⁰ Subsequently, the Co-Investigating Judges, having investigated the material facts *in rem* of the conduct of rape during the Democratic Kampuchea, included them in the Closing Order. These facts and charges withstood the appeals before the Pre-Trial Chamber save for the *qualification* of the charge of Crime against Humanity of Rape as a stand-alone crime.³¹

²³ Closing Order, para. 1429.

²⁴ Internal Rule 67(3), 74; Articles 247, 277 of the Code of Criminal Procedure of the Kingdom of Cambodia.

²⁵ Closing Order, paras 1426-1433 *read with* List of paragraphs and portions of the Closing Order relevant to Case 002/02, **E301/9/1.1**, 4 April 2014, p. 4.

²⁶ Closing Order, paras 1426-1433, limited to Tram Kok Cooperatives, S-21 and Kraing Ta Chan Security Centres.

²⁷ Closing Order, paras 1434-1441, limited to movement of population (phase two) (limited to treatment of the Cham), Tram Kok Cooperatives, Trapeang Thma Dam, 1st January Dam and Kampong Chhnang Airport Worksites, S-21, Kraing Ta Chan, Au Kanseng and Phnom Kraol Security Centres.

²⁸ Closing Order, paras 1408-1414, limited to Tram Kok Cooperatives, S-21, Kraing Ta Chan, Phnom Kraol Security Centres, and treatment of Cham.

²⁹ List of paragraphs and portions of the Closing Order relevant to Case 002/02, **E301/9/1.1**, 4 April 2014, pp. 3-4.

³⁰ Written Record of Interview of Charged Person, **D275**, 14 December 2009, para. 11; Written Record of Interview of Charged Person, **E3/576**, 18 December 2009, para. 10.

³¹ Decision on Ieng Thirith’s and Nuon Chea’s Appeal Against the Closing Order, **D427/2/12**, 13 January 2011, para. 11(2); Decision on Ieng Sary’s Appeal Against the Closing Order, **D427/1/26**, 13 January 2011, para.

(b) The Trial Chamber is under obligation to make a legal determination of the factual allegations of rape

23. The Lead Co-Lawyers submit that the Trial Chamber is under a positive obligation to consider the factual allegations of rape that are indicted, duly notified to the Co-Accused, and decide, if established, on the respective elements of the individual criminal responsibility of the Co-Accused. Pursuant to Internal Rule 98(2)-(3), the Closing Order and the Decision on Additional Severance of Case 002 and Scope of Case 002/02³² read together make it imperative for the Trial Chamber to make findings as to the culpability of the Co-Accused on counts at least of Crime Against Humanity of Other Inhumane Acts through Rape.³³
24. Furthermore, the Lead Co-Lawyers submit that the Trial Chamber is not bound by the legal characterisation proposed by the Co-Investigating Judges.³⁴ It *may* choose to consider it when arriving at a conclusion based on the evidence before it. Therefore, for the remaining legal qualifications of the substantive crime of rape, the Closing Order leaves the Trial Chamber with the additional discretion to consider including it within the ambit of “Other Inhumane Acts through ‘Attacks against human dignity’” and/or “Crimes against Humanity of Torture”.
25. This discretion also extends to the choice and assignment of a mode of liability to the findings of the concerned substantive offence.³⁵ The only definitive proscription in this exercise is that the Trial Chamber may not adopt a legal characterization of a crime that involves introducing a new constitutive element.³⁶
26. The Lead Co-Lawyers submit that whether or not such factual allegations are established through the evidence put before the Chamber and whether or not such

7(2); *see also* Pre-Trial Chamber Decision on Khieu Samphan’s Appeal Against the Closing Order, **D427/4/14**, 13 January 2011, para. 2(12).

³² Decision on Additional Severance of Case 002 and Scope of Case 002/02, **E301/9/1**, 4 April 2014 (“Decision on Additional Severance of Case 002 and Scope of Case 002/02”); *see also* List of paragraphs and portions of the Closing Order relevant to Case 002/02, **E301/9/1.1**, 4 April 2014.

³³ Closing Order, paras 1426-1433 *read with* List of paragraphs and portions of the Closing Order relevant to Case 002/02, **E301/9/1.1**, 4 April 2014, p. 4.

³⁴ Further information regarding remaining preliminary objections, **E306**, 25 April 2014, para. 3.

³⁵ *See e.g.* Closing Order, paras 1521-1560.

³⁶ *Ibid.*

facts amount to rape as a substantive crime is an exercise reserved for the Trial Chamber when assessing the totality of evidence at the stage of the judgement. Until said time, regardless of the position taken by the parties, the Trial Chamber is vested with the discretion to hear evidence on the conduct of rape outside the context of Forced Marriage falling within the scope of Case 002/02 and is under obligation to determine the related factual and legal findings.

(c) Conclusion

27. Therefore, through this submission, the Lead Co-Lawyers seek confirmation from the Trial Chamber that it is and continues to remain seised of the facts (*faits*) of rape and the corresponding duly indicted crimes within the scope of Case 002/02, albeit not as a stand-alone crime of Crime against Humanity of Rape.³⁷

IV. REQUEST

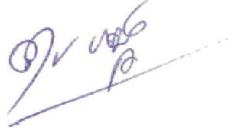
28. Taking note that (i) the Co-Accused were formally charged with the factual allegations of the rape and the proposed legal characterisation; (ii) there was no dismissal of the charges of rape in the Closing Order; (iii) the dispositive of the Closing Order included Rape as a Crime against Humanity;³⁸ and (iv) the Annex contained in the Decision on Additional Severance of Case 002 and Scope of Case 002/02 includes those factual allegations, the Lead Co-Lawyers respectfully request that:

- a. the Trial Chamber confirms to be formally seised of the factual allegations of rape at Tram Kok Cooperatives, S-21 and Kraing Ta Chan Security Centre in Case 002/02; and
- b. take any such action permitted under the Internal Rules in furtherance of the resulting obligation.

³⁷ Decision on Ieng Thirith's and Nuon Chea's Appeal Against the Closing Order, **D427/2/12**, 13 January 2011, para. 11(2); Decision on Ieng Sary's Appeal Against the Closing Order, **D427/1/26**, 13 January 2011, para. 7(2); *see also* Pre-Trial Chamber Decision on Khieu Samphan's Appeal Against the Closing Order, **D427/4/14**, 13 January 2011, para. 2(12). *See also* List of paragraphs and portions of the Closing Order relevant to Case 002/02, **E301/9/1.1**, 4 April 2014, footnote 15.

³⁸ This was later struck down by the Pre-Trial Chamber as a stand-alone crime but left it open to the Trial Chamber to recharacterise "rape" as a Crime against Humanity of Other Inhuman Acts, Attacks against Human Dignity, and Torture.

Respectfully submitted,

Date	Name	Place	Signature
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