

**BEFORE THE SUPREME COURT CHAMBER  
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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**CIVIL PARTY LEAD CO-LAWYERS' IMMEDIATE APPEAL AGAINST TRIAL  
CHAMBER DECISION ON REQUEST FOR CONFIRMATION OF SCOPE OF THE  
CHARGES OF RAPE OUTSIDE THE CONTEXT OF FORCED MARRIAGE**

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**Before:**

**Supreme Court Chamber**

Judge KONG Srim, President  
Judge A. KLONOWIECKA-MILART  
Judge SOM Sereyvuth  
Judge C.N. JAYASINGHE  
Judge MONG Monichariya  
Judge YA Narin  
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## I. INTRODUCTION

1. The Civil Party Lead Co-Lawyers (“Lead Co-Lawyers”) hereby file their immediate appeal against the Trial Chamber decision dated 30 August 2016 titled *Decision on 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* (“Immediate Appeal” and “Impugned Decision” respectively).
2. The Lead Co-Lawyers submit that the Impugned Decision amounts to termination of proceedings against the Co-Accused. The Lead Co-Lawyers allege that the rendering of the Impugned Decision amounts to an error of law that invalidates the decision. The Lead Co-Lawyers also argue that the Impugned Decision stems from a discernible error in the exercise of the Trial Chamber’s discretion, which resulted in prejudice to the Civil Parties.

## II. PROCEDURAL BACKGROUND

### (a) Pre-Trial Stage: charging and the Closing Order

3. On 19 September 2007, Nuon Chea was initially charged of Crimes Against Humanity including Murder, Torture, Enslavement, Imprisonment, Persecution, Extermination, Deportation and Forcible Transfer, and Other Inhuman Acts “defined in and punishable by Articles 5 [...] of the Law on the Establishment of the Extraordinary Chambers”.<sup>1</sup> On 19 November 2007, Khieu Samphan was put on notice of the charges of Crimes Against Humanity “defined in and punishable by Articles 5 [...] of the Law on the Establishment of the Extraordinary Chambers”.<sup>2</sup>
4. On 4 September 2009, the Co-Prosecutors noting the “potential uncertainty” created by the specification of “certain ‘charged’ offenses in the Initial Appearance”, requested that the OCIJ clarify the charges as well as to notify that:

“the ongoing investigation in Case No. 002/19-09-2007-ECCC/OCIJ extends to all acts imputed to them and all charges made against them by the Co-Prosecutors in the Introductory and Supplementary

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<sup>1</sup> Written Record of Adversarial Hearing, E3/558, 19 September 2007, p. 2. Internal Rule 57(1) providing for the Notification of Charges states that “[a]t the time of the initial appearance the Co-Investigating Judges shall record the identity of the Charged Person and inform him or her of the charges, the right to a lawyer and the right to remain silent.”

<sup>2</sup> Written Record of Adversarial Hearing, E3/557, 19 November 2007, p. 2.

Submissions, and (b) that the offences for which they may be indicted at the conclusion of the judicial investigation are not limited to the specific offenses with which they were charged at their Initial Appearances, but rather include all crimes within the jurisdiction of the ECCC (including Genocide and Violations of the 1956 Penal Code) for which the acts being investigated can be legally characterised”<sup>3</sup>

5. On 20 November 2009, the Co-Investigating Judges 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.”<sup>4</sup> 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.”<sup>5</sup>

6. 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 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.<sup>6</sup> 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.<sup>7</sup>

7. On 15 September 2010, the Co-Investigating Judges issued the Closing Order containing factual allegations of occurrences of rape at Security Centres and Cooperatives.<sup>8</sup>

457. In the Judgment in the Duch Case, the Trial Chamber found that one incident of rape occurred at S-21. An S-21 staff member inserted a stick into the vagina of a detainee during interrogation. According to Duch, when the rape incident was reported to him, he discussed it with Hor. He states that he ordered Hor to reprimand the offender. Duch added that he reported the incident to his superiors, but received no response. He therefore did not punish the perpetrator, but merely assigned him to interrogate someone else. He also subsequently gave instructions that interrogations of female prisoners were to be conducted by the wives of cadres. Although this measure was implemented, according to Prak Khan, the female interrogators were all ultimately arrested, and by 1977, female prisoners were again interrogated by men.

<sup>3</sup> Co-Prosecutors’ Request for Clarification of Charges, **D198**, 4 September 2009, para. 17.

<sup>4</sup> Order Concerning the Co-Prosecutors’ Request for Clarification of Charges, **D198/1**, 20 November 2009, para. 6.

<sup>5</sup> *Ibid*, p. 6 (emphasis added).

<sup>6</sup> Written Record of Interview of Charged Person, **D275**, 14 December 2009, para. 11.

<sup>7</sup> Written Record of Interview of Charged Person, **E3/576**, 18 December 2009, para. 10.

<sup>8</sup> Closing Order, **D427**, 15 September 2010 (“Closing Order”), paras 1426-1428.

458. Furthermore, civil party Nam Mon states that she was raped during her detention at S-21 in 1977 by a guard whom she recognised during the Duch trial before the ECCC. The rape took place in an individual cell while she was in chains, and led to vaginal bleeding which lasted for several days. The guard in question also threatened to kill her if she mentioned the rape to anyone. In its Judgment in the Duch case, the Trial Chamber rejected Nam Mon's Civil Party application, finding that the evidence she submitted was not sufficient to establish notably that she was detained at S-21. Following this rejection, the facts set out above, which are distinct from the ones put forward at the hearing, have now come to light, and led the Co-Investigating Judges to conduct a second interview in Case No.002. After this new investigative action, the Co-Investigative Judges consider that the clarification provided by this Civil Party appears credible and sufficient according to the requirements at this stage of the proceedings.

459. There is evidence indicating that other cases of rape occurred at S-21, in particular that of a female detainee by an interrogator named Touch. However, the Duch Judgment stated that the Trial Chamber is "not satisfied that this allegation has been proved to the required standard".

[...]

1426. Based on the facts set out in the "Factual Findings – Crimes" section, it is clearly established that under the Democratic Kampuchea regime crimes against humanity of rape were committed in diverse circumstances, notably in the security centres of Kraing Ta Chan, the North Zone security centre, Prey Damrei Srot, S-21, and Sang, as well as at the Tram Kok Cooperatives.

1427. At each of the sites listed above, the perpetrators purposefully committed physical invasions of a sexual nature against victims in coercive circumstances or otherwise without the consent of the victim, of which the perpetrators were aware, and the contextual elements of rape as a crime against humanity are linked.

1428. As set out in the "Factual Findings – Joint Criminal Enterprise" section, intimate relationships outside of marriage were considered to be against the collectivist approach of the CPK. Those people who were suspected of "immoral" behaviour, including rape, were categorized as "bad-elements" or "enemies", and were often either re-educated or killed. In this context, security centre cadre knew that rape was a crime for which they would be punished, for example at Kraing Ta Chan security centre. Security centre cadre who committed rape were punished when superiors became aware of the crime, as at Sang security centre. Further, CPK cadre were sometimes ordered by superiors to investigate instances of rape at security centres, for instance at Kraing Ta Chan security centre. Additionally, there is evidence that CPK cadres reported instances of rape to their superiors, describing the perpetrators as "enemies" or "traitors", as set out in the sections for Nuon Chea and Ieng Sary and the Tram Kok Cooperatives.

The Co-Investigating Judges concluded, however, that:

"1429. Based on these facts, the Co-Investigating Judges consider 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. That is not the case, however, in the context of forced marriage, which is described below."

8. The dispositive of 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 (through Joint Criminal Enterprise), planning, instigating, ordering, aiding and abetting, or superior responsibility.<sup>9</sup>

9. The Defence teams (collectively, the “Defence”) did not request a dismissal for those factual allegations prior to the issuance of the Closing Order. Neither did they challenge the factual findings related to the alleged instances of rape as contained in the Closing Order as a Crime against Humanity upon the issuance of the Closing Order, nor did they plead procedural defects provided in Internal Rule 67(2).

10. In the appeals by the Defence of the Closing Order, the Nuon Chea Defence appealed, *inter alia*, the criminalization of the offences as set out in Articles 4-6 of the ECCC Law.<sup>10</sup> The Khieu Samphan Defence appealed on grounds relating to the violation of fair trial rights.<sup>11</sup> On 13 January 2011, the Pre-Trial Chamber ruled on the appeals against the Closing Order,<sup>12</sup> and held that rape did not exist as a Crime against Humanity in its own right in 1975-1979<sup>13</sup> but could be characterized additionally 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 of the Closing Order and to uphold the Co-Investigating Judges finding in paragraph 1433 of the Closing Order that the facts characterized

<sup>9</sup> *Ibid*, para. 1613.

<sup>10</sup> 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).

<sup>11</sup> 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).

<sup>12</sup> 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.

<sup>13</sup> 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.

as crimes against humanity in the form of rape can be categorized as crimes against humanity of other inhumane acts.”<sup>14</sup>

**(b) Trial Stage: re-characterisation as Crime against Humanity of Rape as a distinct crime**

11. 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.<sup>15</sup> In response, the Lead Co-Lawyers also requested the Trial Chamber to recharacterise rape as a Crime against Humanity “in its own right”.<sup>16</sup>

12. 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.<sup>17</sup> It also included charges of Other Inhumane Acts through “Attacks against human dignity” limited to Tram Kok Cooperatives, Trapeang Thma Dam, 1<sup>st</sup> January Dam, and Kampong Chhnang Airport Worksites, S-21, Kraing Ta Chan, Au Kanseng and Phnom Kraol Security Centre<sup>18</sup> as well as Torture limited to Tram Kok Cooperatives, S-21, Kraing Ta Chan, Phnom Kraol Security Centre, and the treatment of Cham.<sup>19</sup>

13. On 25 April 2014, the Trial Chamber addressed, *inter alia*, the preliminary objections raised by the Co-Prosecutors and the Lead Co-Lawyers on the potential re-characterisation of the conduct of rape outside the context of forced marriage as a Crime against Humanity of

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<sup>14</sup> 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).

<sup>15</sup> 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 (OCP Request for Recharacterisation”), para. 33.

<sup>16</sup> Civil Party Lead Co-Lawyers Response to the Co-Prosecutors [*sic*] Request to Re-characterize the facts establishing the conduct of rape as a crime against humanity, **E99/1**, 21 July 2011 (“LCL Response to OCP Request for Clarification”), para. 45 (i).

<sup>17</sup> List of paragraphs and portions of the Closing Order relevant to Case 002/02, **E301/9/1.1**, 4 April 2014, p. 4.

<sup>18</sup> *Id.*

<sup>19</sup> *Ibid*, p. 3.



Rape as a stand-alone crime. The Trial Chamber issued a memo on this potential characterisation holding 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”<sup>20</sup> specifically “rape as a *policy* in Security Centres”.<sup>21</sup> However, in the same decision, the Trial Chamber confirmed that 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*”.<sup>22</sup>

14. Similarly, on 12 June 2015, when addressing Khieu Samphan’s request for confrontation between a witness 2-TCW-944 and civil parties 2-TCCP-271 and 2-TCCP-304, the Trial Chamber cited to its previously issued Memorandum on Preliminary Objections,<sup>23</sup> which specifically dealt with the request for the conduct of rape to be characterised as a Crime against Humanity of Rape as a stand-alone crime. It noted that:

“The Chamber notes that the occurrence of rape may be relevant, among others, to the conditions in Kraing Ta Chan Security Centre. It further notes that on 25 April 2014 it rejected a request by the Lead Co-Lawyers for the Civil Parties to add charges of rape (outside the context of forced marriage) committed within Security Centres. In this respect, the Co-Investigating Judges found that rape occurred in Kraing Ta Chan Security Centre, among other places. However, the Co-Investigating Judges found that, outside the context of forced marriage, it could not be considered that rape was one of the crimes used by the CPK leaders to implement the alleged common purpose in the context of a joint criminal enterprise. Nor did the Closing Order allege that the Accused bear criminal responsibility for rape in Kraing Ta Chan Security Centre on the basis of any other mode of liability.”<sup>24</sup>

15. 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, stated that “the Accused are not charged here with that rape”.<sup>25</sup>

16. On 29 January 2016, the International Co-Prosecutor noted again that “he does not consider evidence that cadres were punished for rape outside the context of forced marriage

<sup>20</sup> Further information regarding remaining preliminary objections, E306, 25 April 2014 (“Memorandum on Preliminary Objections”), para. 3.

<sup>21</sup> *Ibid* (emphasis added).

<sup>22</sup> *Id.*

<sup>23</sup> See Decision on Confrontation, fn. 23 citing to Memorandum on Preliminary Objections, para. 3 that addressed

<sup>24</sup> Decision on Khieu Samphan’s Request for Confrontation among Witness Srey Than and Civil Parties SAY Sen and SAUT Saing and Disclosure of Audio Recordings of Interviews of SAY Sen, E348/4, 12 June 2015 (“Decision on Confrontation”), para. 11 (internal citations omitted).

<sup>25</sup> Transcripts dated 21 April 2015, E1/289.1, pp. 83-84.

to be exculpatory, as the *Closing Order did not charge the Accused with rapes committed outside the context of forced marriage*".<sup>26</sup>

**(c) Trial Stage: request for confirmation of the scope of the factual allegations**

17. Following this, on 18 March 2016, prior to the commencement of the trial segment on Security Centres and Internal Purges, the Lead Co-Lawyers filed a submission under Rule 92 requesting confirmation of the scope of Case 002/02 concerning the charges of rape outside the context of forced marriage.<sup>27</sup>

18. On 28 March 2016, the Khieu Samphan Defence responded to this request for clarification arguing that the Trial Chamber was never seised of the facts of rape outside the context of forced marriage.<sup>28</sup>

19. On 4 April 2016, the Lead Co-Lawyers replied that, "[t]he Memo on Preliminary Objections did not concern itself with the actual seizure of the factual allegations of the conduct of rape".<sup>29</sup> It was asserted that "the Trial Chamber has the discretion to 'change the legal characterization of a crime as set out in the Closing Order as long as no new constitutive elements are introduced'".<sup>30</sup> The Lead Co-Lawyers further noted that "the Closing Order did not allege that the Co-Accused 'bear responsibility for rape in Kraing Ta Chan Security Centre on the basis of any other mode of liability'" and submitted that "the Trial Chamber Decision on Confrontation does not render a reading contrary to what the Lead Co-Lawyers request."<sup>31</sup>

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<sup>26</sup> 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).

<sup>27</sup> Lead Co-Lawyers' Rule 92 Submission on the Confirmation of the Scope of Case 002/02 Concerning the Charges of Rape Outside the Context of Forced Marriage, **E306/7**, 18 March 2016 ("Request for Confirmation"), para. 28; the Lead Co-Lawyers respectfully requested that "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 take any such action permitted under the Internal Rules in furtherance of the resulting obligation".

<sup>28</sup> *Réponse de la Défense de M. KHIEU Samphân à la demande de clarification des Parties civiles concernant les accusations de viol*, **E306/7/1**, 28 March 2016 ("Response by Khieu Samphan on Confirmation"), paras 8-14.

<sup>29</sup> Lead Co-Lawyers' Reply to Khieu Samphan Defence's Response to Request for Clarification on Rape Outside Forced Marriage, **E306/7/2**, 4 April 2016 ("Reply on Confirmation of Scope"), para. 5.

<sup>30</sup> *Ibid.*

<sup>31</sup> Reply on Confirmation of Scope, para. 6 *citing* Response by Khieu Samphan on Confirmation, para. 11.

20. On 30 August 2016, the Trial Chamber, addressing the submission via the Impugned Decision, rejected, in their words, “the request to recharacterise the factual allegations of rape at Tram Kok Cooperatives, Kraing Ta Chan Security Centre and S-21”.<sup>32</sup>

21. On 5 September 2016, the Impugned Decision was cited in court by Nuon Chea Defence to limit the extent of evidence concerning rape outside the context of forced marriage:

As far as the Prosecution's request is concerned, we think that the documents that they've asked for are relevant insofar as they relate to the charges in our case, which the Chamber recently clarified in your decision of E306/7/3. So we're talking about the regulation of marriage and the charge of rape within this context. So to that end, we would say that only aspects of the documents that are directly relating to the charges should be admitted.<sup>33</sup>

### III. APPLICABLE LAW

#### (a) Standard of Appellate Review

22. Pursuant to Internal Rule 104(4), the following decisions of the Trial Chamber are subject to immediate appeal: (a) decisions which have the effect of terminating the proceedings; (b) decisions on detention and bail under Internal Rule 82; (c) decisions on protective measures under Internal Rule 29(4)(c); and (d) decisions on interference with the administration of justice under Internal Rule 35(6). Other decisions may only be appealed at the same time as an appeal against the judgement on merits.

23. The Supreme Court Chamber has confirmed that the right of appeal provided for in Internal Rule 104(4)(a) ensures that “an avenue of appeal exists where the proceedings are terminated without arriving at a judgement and therefore without an opportunity to appeal against it”.<sup>34</sup> The Supreme Court Chamber has further clarified that the term “effect of

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<sup>32</sup> Impugned Decision, p. 8.

<sup>33</sup> Draft Transcripts dated 5 September 2016, p. 12 at 09.24.10.

<sup>34</sup> Decision on the Co-Prosecutors' Immediate Appeal of the Trial Chamber's Decision Concerning the Scope of Case 002/01, **E163/5/1/13**, 8 February 2013, para. 22 *citing to* Decision on IENG Sary's Appeal against Trial Chamber's Decision on Co-Prosecutors' Request to Exclude Armed Conflict Nexus Requirement from the Definition of Crimes against Humanity, **E95/8/1/4**, 19 March 2012, para. 9.

terminating the proceedings” includes a decision to stay the proceedings where there is no prospect of resumption.<sup>35</sup>

### **(b) Grounds of Appeal**

24. Pursuant to Internal Rule 104(1) and 105(2), the Supreme Court Chamber shall decide immediate appeals on the following grounds: (a) specify an alleged error on a question of law and demonstrate how it invalidates the decision; or (b) specify a discernible error in the exercise of the Trial Chamber’s discretion which results in prejudice to the appellant; or (c) specify an alleged error of fact and demonstrate how it occasioned a miscarriage of justice. The Supreme Court Chamber has previously confirmed that an immediate appeal may be based on one or more of the above-mentioned grounds.

### **(c) Dismissal Orders**

25. 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 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.

26. 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”.<sup>36</sup>

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<sup>35</sup> Decision on Immediate Appeal against the Trial Chamber’s Order to Release the Accused IENG Thirith, **E138/1/7**, 13 December 2011, para. 15 cited with affirmation in Decision on IENG Sary’s Appeal against Trial Chamber’s Decision on Co-Prosecutors’ Request to Exclude Armed Conflict Nexus Requirement from the Definition of Crimes against Humanity, **E95/8/1/4**, 19 March 2012, para. 9.

<sup>36</sup> See further Hissein Habre *et al.*, *Ordonnance de non-lieu partiel, de mise en accusation et de renvoi devant la chambre africaine extraordinaire d’assises*, 13 February 2015, p. 185: “ 2. *Sur le non-lieu partiel* Considérant que dans la partie consacrée à l’analyse des infractions sous-jacentes constitutives de crimes de guerre, la Chambre avait conclu à l’absence de charges pouvant justifier le renvoi de Hissein Habré des crimes suivants: Privation d’un prisonnier ou de toute personne protégée de son droit d’être jugé régulièrement et impartialement, article 7 -1-e. Destruction ou appropriation de biens non justifiées par des nécessités militaires et exécutées sur une grande échelle de façon illicite et arbitraire, article 7 -1-c. *Qu’en conséquence, elle estime qu’il n’y a pas lieu à le suivre davantage de ces chefs.*”

27. 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.”

28. 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.<sup>37</sup> Internal Rule 67(5) provides that “[t]he order is subject to appeal as provided in Rule 74”.

29. Pursuant to Internal Rule 74(4)(f), the Civil Parties have a right to appeal against a Dismissal Order by the Co-Investigating Judges “where the Co-Prosecutors have appealed”.

**(d) *Saisine in rem***

30. 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.”<sup>38</sup> Internal Rule 98(3) adds 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.” The Trial Chamber in *Duch* Trial Judgement held that:

“493. The Parties do not dispute that Internal Rule 98(2) permits changes to the legal characterisation of both the crimes and the forms of responsibility included in the Amended Closing Order. While comparable provisions in the Cambodian legal system do not specifically address changes to a form of responsibility, the Chamber is satisfied that this type of change is permissible under Internal Rule 98(2).

494. Internal Rule 98(2) mandates, however, that any legal re-characterisation made by the Chamber be limited to the facts set out in the Amended Closing Order. This approach accords with the powers conferred upon Trial Chambers in the Cambodian legal system, as well as in French legal system upon which it was originally modelled. The Chamber considers that the proviso of Internal Rule 98(2) that no new constitutive elements be introduced 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.

495. 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. Before the international ad hoc tribunals, however, Trial Chambers have generally required a formal amendment to the charges against

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<sup>37</sup> Order Concerning the Co-Prosecutors’ Request for Clarification of Charges, **D198**, 20 November 2009.

<sup>38</sup> Emphasis added.

the accused where the facts establish that the accused has committed a different or more serious offence than that indicated in the indictment. It follows from the many structural differences between the international ad hoc tribunals and the ECCC that certain of the common law-inspired procedural mechanisms of the former have no counterpart in the civil law-oriented framework of the latter. In contrast to the ICTY and ICTR, no comparable mechanism exists within the ECCC that would allow either the Parties or the Chamber to formally amend a Closing Order. The basis for the re-characterisation of facts before the ECCC is instead Internal Rule 98(2), which expressly envisages this eventuality, subject to fair trial safeguards.

496. The Chamber thus considers that Internal Rule 98(2) enables it to change the legal characterisation of facts contained in the Amended Closing Order to accord with a new form of responsibility provided that it does not go beyond those facts. In doing so, the Chamber must also ensure that (i) no violation of the fair trial rights of the Accused is entailed and (ii) the form of responsibility in question is applicable before the ECCC.” (Internal citations omitted, emphasis added.)”

31. Internal Rule 98(6) provides that “[w]here the Chamber considers that the acts set out in the Indictment have not been proved, or that the Accused is not guilty of those acts, he or she shall be acquitted.” Internal Rule 98(7) state that “[w]here 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.”

32. The Supreme Court Chamber has ruled that the Trial Chamber must “dispose of matters pending before it so that the proceedings into a criminal charge are decided on the merits or dismissed.”<sup>39</sup> It has clarified further that this means that the Trial Chamber “must ‘vider sa saisine’”.<sup>40</sup>

#### **(e) Legal Characterisation of Substantive Crimes**

33. 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.” 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.”

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<sup>39</sup> Decision on Immediate Appeals against Trial Chamber’s Second Decision on Severance of Case 002, **E284/4/8**, 25 November 2013 (“Decision on Second Severance”), para. 62.

<sup>40</sup> Decision on Second Severance, fn. 176.

34. On 23 December 2015, the majority opinion of the bench at the Pre-Trial Chamber has confirmed a distinction between “legal characterization of the facts” and “the scope of the investigations”.<sup>41</sup>

35. The Trial Chamber has further confirmed that it retains 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”.<sup>42</sup> The Supreme Court Chamber has confirmed that the Trial Chamber is “is not bound by the legal characterisation of the charges provided by the Pre-Trial Chamber.”<sup>43</sup>

**(f) Characterisation of conduct of rape as Crimes against Humanity of Rape**

36. On 26 July 2010, in Case 001, the Trial Chamber characterised the one instance of rape found to have occurred at S-21 Security Centre<sup>44</sup> as Crime against Humanity of Torture:

“While rape comprises a separate and recognized offence both within the ECCC Law and international criminal law, it is undisputed that rape may also constitute torture where all other elements of torture are established (Section 2.5.3.7). The Chamber considers that the conduct alleged in the Amended Closing Order to constitute rape clearly satisfy the legal ingredients of both rape and also of torture. It has further evaluated the evidence in support of this charge to be credible (Section 2.4.4.1.1). The Chamber considers this instance of rape to have comprised, in the present case, an egregious component of the prolonged and brutal torture inflicted upon the victim prior to her execution and has characterized this conduct accordingly.”<sup>45</sup>

37. On 3 February 2012, in Case 001, the Supreme Court Chamber did not disturb such a characterisation:

“The Supreme Court Chamber finds that the Trial Chamber erred in holding that rape was a distinct crime against humanity under customary international law from 1975-1979. Accordingly, the Trial Chamber erred in subsuming rape as a distinct crime against humanity under the crime against humanity of torture. However, the Trial Chamber did not err in concluding that an instance of rape was

<sup>41</sup> Decision on [REDACTED] Appeal Against Co-Investigating Judge Harmon’s Decision on [REDACTED] on Applications to Seise the Pre-Trial Chamber with Two Applications for Annulment of Investigative Action, **D134/1/10**, 23 December 2015, paras 44-45, 47.

<sup>42</sup> Further information regarding remaining preliminary objections, **E306**, 25 April 2014, para. 3.

<sup>43</sup> Decision on IENG Sary’s Appeal against Trial Chamber’s Decision on Co-Prosecutors’ Request to Exclude Armed Conflict Nexus Requirement from the Definition of Crimes against Humanity, **E95/8/1/4**, 19 March 2012, para. 10. *See further*, Cour de Cassation, Cass. Crim., 22 April 1986, Bulletin Criminel, No. 136: “[I]l appartient aux juridictions correctionnelles de modifier la qualification des faits et de substituer une qualification nouvelle à celle sous laquelle ils leur étaient déférés [...] à la condition qu’il ne soit rien changé ni ajouté aux faits de la prévention et que ceux-ci restent tels qu’ils ont été retenus dans l’acte de saisine.” (Annex A)

<sup>44</sup> *Duch* Trial Judgement, para. 246.

<sup>45</sup> *Ibid*, 366.

covered by the definition of torture that existed under customary international law by 1975, as articulated in the 1975 Declaration Against Torture. Furthermore, given that rape as a crime against humanity had not yet crystallised at the time, the Trial Chamber did not err when it did not cumulatively convict the Accused for torture and rape as separate crimes against humanity.”<sup>46</sup>

38. On 15 February 2011, in Case 002, the Pre-Trial Chamber, when deciding on the characterisation of rape as a distinct Crime against Humanity of Rape, held that:

“The Pre-Trial Chamber therefore finds that the OCIJ erred in charging rape as an enumerated crime against humanity from 1975-1979 under customary international law. As such, the Chamber strikes ‘rape’ from paragraph 1613 of the Closing Order (Crimes Against Humanity, paragraph (g)). However, the Pre-Trial Chamber agrees with the OCIJ that ‘[t]he facts characterized as crimes against humanity in the form of rape can additionally be categorized as crimes against humanity of other inhumane acts’ and, therefore, are to be charged as such.”<sup>47</sup>

39. In the same decision, the Pre-Trial Chamber clarified that:

“To require that each sub-category of ‘other inhumane acts’ entails individual criminal responsibility under international law is to render the category of ‘other inhumane acts’ meaningless. That is, the conduct would have to amount to an international crime in its own right, regardless of whether or not it also amounts to a crime as an ‘other inhumane act.’ For this reason, the Pre-Trial Chamber finds that the requirements of criminalisation solely attach to the category of ‘other inhumane acts’ and not the underlying conduct constituting other inhumane acts.”<sup>48</sup>

#### **(g) Notice to the Defence**

40. Internal Rule 67(2) provides that “[t]he Indictment shall be void for procedural defect unless it sets out the identity of the Accused, a description of the material facts and their legal characterisation by the Co-Investigating Judges, including the relevant criminal provisions and the nature of the criminal responsibility.” Internal Rule 67(4) states 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.” The Trial Chamber has held that:

“the primary purpose of the indictment, aside from being the basis of the case against the Accused is to provide the Accused with adequate notice of the case against him and to safeguard his or her fair trial rights (in particular, the right of an Accused to be informed of the nature and cause of the charges against him and to have adequate time and facilities for the preparation of his defence). This right translates into an obligation for the material facts underpinning the charges to be included in the

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<sup>46</sup> *Duch* Appeal Judgement, para. 213.

<sup>47</sup> Decision on Appeals by Nuon Chea and Ieng Thirith Against the Closing Order, **D427/3/15**, 15 February 2011, para. 154.

<sup>48</sup> *Ibid*, para. 156.



indictment with sufficient particularity to inform an Accused clearly of the nature and cause of the charges against him, enabling him to prepare a defence effectively and efficiently.”<sup>49</sup>

41. On 29 September 2014, the Trial Chamber issued a decision on the Preliminary Objection filed by the Khieu Samphan Defence concerning jurisdiction over the Crime against Humanity of Deportation. The Trial Chamber determination of the sufficiency of notice to the Co-Accused is as follows:

“The Chamber notes that the KHIEU Samphan Defence had access to the whole case-file and received notification of both the Introductory Submission and the Closing Order in Case 002. From the very beginning of the case and in particular since the beginning of the judicial investigation, the Introductory Submission authorised the Co-Investigating Judges to investigate deportation as a crime against humanity. At the time of the respective initial appearances of KHIEU Samphan and NUON Chea before the Co-Investigating Judges, both of them were officially informed that the acts set out in the Introductory Submission were open to legal characterisation as, inter alia, ‘crimes against humanity [of] deportation [ ... ]’.

The Chamber notes that the OCP clearly referred in its Final Submission to the deportation of Vietnamese. Further, a review of the Closing Order shows that the Accused are charged with the crime against humanity of deportation in relation to three identified locations: Prey Veng, Svay Rieng as well as the Tram Kok Cooperatives. The Closing Order specifically states that “a large number of Vietnamese living in Cambodia were forced to leave the place where they had been residing legally and to cross the Vietnamese border”. The Chamber is therefore satisfied that the Accused had notice of the scope of the judicial investigation and specifically that the crime of deportation of Vietnamese people to Vietnam was within this scope.”<sup>50</sup>

#### **(h) *Locus standi* of the consolidated group of Civil Parties**

42. Internal Rule 21(1) states that “[t]he applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims and so as to ensure legal certainty and transparency of proceedings, in light of the inherent specificity of the ECCC, as set out in the ECCC Law and the Agreement.”

43. Pursuant to Internal Rule 105(2) read with 104(4)(a), a right to file an Immediate Appeal is granted to a “party” wishing to appeal a decision of the Trial Chamber on the grounds specified therein. The Supreme Court Chamber has further elaborated on the nature of Internal Rule 104(4)(a) stating that it is “neutral on its face and grants a right of appeal to

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<sup>49</sup> Decision on Defence Preliminary Objections (Statute of Limitations on Domestic Crimes), E122, 22 September 2011 (“Decision on Domestic Crimes”), para. 18.

<sup>50</sup> Decision on Defence Preliminary Objection Regarding Jurisdiction over the crime against humanity of deportation, E306/5, 29 September 2014, paras .7-8.

any party who would have a legal interest in appealing a decision of the Trial Chamber which has the effect of terminating the proceedings.”<sup>51</sup>

44. Pursuant to Internal Rule 105(1)(c), the right of the Civil Parties to appeal the Trial Chamber judgement is limited: “[a]n appeal against the Trial Chamber judgment may be filed by[...] the Civil Parties [who] may appeal the decision on reparations. Where the Co-Prosecutors have appealed, the Civil Parties may appeal the verdict. They may not appeal the sentence.”

45. Participatory rights of Civil Parties on appeal against a judgement have been recognised by the Supreme Court Chamber.<sup>52</sup> The Supreme Court Chamber has previously considered that “where the applicable regulations generically entrust the ‘parties’ with a procedural prerogative, such prerogative should be presumed available to all parties to the trial, provided that it is not functionally party-specific and has not been explicitly limited”.<sup>53</sup>

46. Further, Internal Rule 23 *quinquies* states that “[i]f an Accused is convicted, the Chambers may award only collective and moral reparations to Civil Parties. Collective and moral reparations for the purpose of these Rules are measures that: a) acknowledge the harm suffered by Civil Parties as a result of the commission of the crimes for which an Accused is convicted”.

47. The Trial Chamber has confirmed that within the specific ECCC context, the specification of the charges in the Indictment is further relevant to the ultimate determination

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<sup>51</sup> Decision on IENG Sary’s Appeal against Trial Chamber’s Decision on Co-Prosecutors’ Request to Exclude Armed Conflict Nexus Requirement from the Definition of Crimes against Humanity, **E95/8/1/4**, 19 March 2012, para. 9.

<sup>52</sup> Decision on Civil Party Lead Co-Lawyers’ Requests Relating to the Appeals in Case 002/01, **F10/2**, 26 December 2014, paras 15-16. *See further*, Situation in the Democratic Republic of the Congo, In the case of the *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2958, 21 December 2012, para. 10. *See also* Situation in the Democratic Republic of the Congo, In the case of the *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2951, 13 December 2012, para. 5: “Pursuant to rule 91 (1) of the Rules of Procedure and Evidence, and having regard to rules 91 (2), 92 (5) and (6) of the Rules of Procedure and Evidence, the Appeals Chamber determines that the victims may participate in the present appeals in the following manner: the Legal Representatives of Victims VOI and V02 may present the victims’ views and concerns with respect to their personal interests in the issues on appeal by filing consolidated observations on the three Documents in Support of the Appeals.”

<sup>53</sup> Decision on Civil Party Lead Co-Lawyers’ Requests Relating to the Appeals in Case 002/01, **F10/2**, 26 December 2014, para. 14.

of Civil Party claims and serves to inform the Trial Chamber of the scope of the case with which it is seised and the precise crimes to be adjudicated.<sup>54</sup>

48. The Supreme Court Chamber has confirmed “the purpose of victim participation in the ECCC proceedings as [being] twofold: in general, it is ‘supporting the prosecution’, but it is also ‘inextricably linked with the civil action’.”<sup>55</sup>

#### IV. SUMMARY OF THE ARGUMENTS

49. The Lead Co-Lawyers allege that the Impugned Decision amounted to a termination of proceedings in Case 002/02 concerning the factual allegations of the conduct of rape at Tram Kok Cooperatives, Kraing Ta Chan Security Centres, and S-21 Security Centre. The Lead Co-Lawyers allege two grounds of appeal: (i) discernible error in the exercise of the Trial Chamber’s decision that caused prejudice to the Civil Parties; and (ii) error of law resulting from the misapplication of the law within the ECCC context.

#### V. ADMISSIBILITY OF THE APPEAL

50. The Lead Co-Lawyers assert that the issuance of the Impugned Decision had the effect of termination of proceedings as regards the factual allegations of rape outside the context of forced marriage that triggered the right of the Civil Parties to file the present Immediate Appeal as a party to the criminal proceedings. The Lead Co-Lawyers elaborate as follows.

##### (a) Termination of Proceedings

(i) The Lead Co-Lawyers consider that the Trial Chamber is seised of the factual allegations

51. As outlined in the procedural background, the Defence has been on notice of the potential charge of “rape” as a Crime against Humanity at least since December 2009<sup>56</sup> and

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<sup>54</sup> Decision on Domestic Crimes, fn. 35.

<sup>55</sup> Decision on Civil Party Lead Co-Lawyers’ Requests Relating to the Appeals in Case 002/01, **F10/2**, 26 December 2014, para. 12.

<sup>56</sup> 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.

of the factual allegations of the instances of rape outside the context of forced marriage since the Introductory Submissions in July 2007.<sup>57</sup>

52. Certain factual allegations of rape that emerged during the investigative stage were included in the Closing Order, *inter alia*, for S-21,<sup>58</sup> Sang Security Centre,<sup>59</sup> Kraing Ta Chan Security Centre,<sup>60</sup> North Zone Security Centre,<sup>61</sup> and Kroch Chhmar District Security Centre<sup>62</sup>. The conclusion reached in the Closing Order in respect of these factual allegations is as follows:

“Based on the facts set out in the “Factual Findings – Crimes” section, it is clearly established that under the Democratic Kampuchea regime crimes against humanity of rape were committed in diverse circumstances, notably in the security centres of Kraing Ta Chan, the North Zone security centre, Prey Damrei Srot, S-21, and Sang, as well as at the Tram Kok Cooperatives.”<sup>63</sup>

“At each of the sites listed above, the perpetrators purposefully committed physical invasions of a sexual nature against victims in coercive circumstances or otherwise without the consent of the victim, of which the perpetrators were aware, and the contextual elements of rape as a crime against humanity are linked.”<sup>64</sup>

53. An assessment of these factual allegations in relation to the alleged existence of the “CPK policy regarding rape”<sup>65</sup> lead the Co-Investigating Judges to conclude that “[d]espite 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*”.<sup>66</sup>

54. The Lead Co-Lawyers submit that a reading of the Co-Investigating Judges’ “consider[ation]” that the official CPK policy regarding rape was to prevent its occurrence and to punish its perpetrators does not amount to a dismissal of the factual allegations. The guided consideration that “rape was [not] one of the crimes used by the CPK leaders to implement the common purpose” also does not amount to a dismissal of such factual allegations, especially since the declaration itself qualifies this conclusion by stating that “the policy did not manage to prevent rape”.

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<sup>57</sup> Introductory Submission, **D3**, 18 July 2007, para. 56.

<sup>58</sup> Closing Order, paras 457-459.

<sup>59</sup> *Ibid*, para. 482.

<sup>60</sup> *Ibid*, para. 504.

<sup>61</sup> *Ibid*, para. 578.

<sup>62</sup> *Ibid*, paras 785-786.

<sup>63</sup> *Ibid*, para. 1426.

<sup>64</sup> *Ibid*, para. 1427.

<sup>65</sup> *Ibid*, para. 1429.

<sup>66</sup> *Id.*

55. The language used in this paragraph lends a reading that the Co-Investigating Judges were inclined to believe that the conduct of rape (whether or not it amounts to one or more of the crimes under Crimes against Humanity) could not be potentially attributed to the Co-Accused through the mode of liability of Joint Criminal Enterprise, where common purpose is one of the constituent elements. This is but a reading. The terminology of the conclusion containing the use of the words “prevent” and “punish” (akin to those used for Superior Responsibility) and an indication as to the inadequacy of the policy thereof i.e. “this policy did not manage to prevent rape” is telling.

56. The Co-Investigating Judges left the Trial Chamber with the liberty to consider this conclusion and to arrive at a different conclusion as to the mode of liability, if need be, upon the examination of the seised factual allegations.<sup>67</sup> The dispositive of the Closing Order continues to seise the Trial Chamber of commission through Joint Criminal Enterprise, absent the dismissal of the factual allegations – either by the Co-Investigating Judges themselves or by the Pre-Trial Chamber upon request by the parties.

57. Furthermore, the facts “[w]ith respect to ‘immorality’”,<sup>68</sup> or concerning “violation of moral codes”<sup>69</sup> or “CPK Revolutionary Moral Code”<sup>70</sup> were discussed in addition to Nuon Chea’s conduct and knowledge<sup>71</sup> as well as that of Khieu Samphan.<sup>72</sup>

58. Such a *saisine* does not preclude the Trial Chamber from (i) characterisation of the conduct of rape as other charged substantive crimes of Crimes against Humanity (except Crimes against Humanity of Rape as a distinct crime)<sup>73</sup> nor (ii) the consideration of the

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<sup>67</sup> See further *Duch* Trial Judgement, para. 493: “While comparable provisions in the Cambodian legal system do not specifically address changes to a form of responsibility, the Chamber is satisfied that this type of change is permissible under Internal Rule 98(2).”

<sup>68</sup> Closing Order, para. 926.

<sup>69</sup> *Id.*

<sup>70</sup> *Ibid*, para. 927.

<sup>71</sup> *Ibid*, paras 926-927, 969.

<sup>72</sup> *Ibid*, para. 1181.

<sup>73</sup> Further, the Closing Order has proposed many legal characterisations of the conduct of rape as substantive crime(s). It has also suggested modes of liabilities for those substantive crimes. The Co-Investigating Judge has also not issued a Dismissal Order as required under Internal Rule 67(3) in respect of these substantive crimes or modes of liability. Therefore, the factual allegations containing details as to the conduct of rape in the respective locations continue to be part of the Closing Order and therefore, the *saisine* of the Trial Chamber.

totality of the evidence to arrive at a conclusion that the CPK policy regarding rape and morality was not directed to “punish the perpetrators” and/or to “prevent its occurrence”.<sup>74</sup>

59. When the Closing Order was issued, the Co-Investigating Judges had been categorical that they would make a decision in respect of “all these facts and the related legal characterisations proposed by the Co-Prosecutors” either by “indicting the charged person” or “by issuing a dismissal order in relation to all or part of those facts”.<sup>75</sup> The dismissal did not take place in the case of the factual allegations of rape and they were thus included in the Closing Order. The Defence did not appeal such inclusion. Therefore, absent a Dismissal Order in that respect, the Lead Co-Lawyers submit that the factual allegations exist within the broader scheme of allegations that form part of Case 002/02 at Tram Kok Cooperatives, S-21 and Kraing Ta Chan Security Centre.<sup>76</sup>

60. The Lead Co-Lawyers further submit that the import of the Pre-Trial Chamber Decision on Qualification of Rape is limited to a qualification of the charges of the Crimes against Humanity of Rape as Crimes against Humanity of Other Inhumane Acts. It does not limit either *scope* of the factual allegations in Case 002/02 or the possibility of those facts being characterised in the judgement as Crimes against Humanity of Other Inhumane Acts.

61. Similarly, the OCP Request for Clarification as well as the LCL Response to OCP Request for Clarification are centred around the discussion on the conduct of rape amounting to Crime against Humanity of Rape as a distinct crime in 1975. The Lead Co-Lawyers concede that the LCL Response to OCP Request for Clarification contains discussion of evidence outside the context of forced marriage<sup>77</sup> with a supposed conclusion that the Co-Investigating Judges had not “indict[ed] the Accused for the rapes outside the context of Forced Marriage”.<sup>78</sup> However, this response and its dispositive were limited to the

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<sup>74</sup> Closing Order, para. 1429.

<sup>75</sup> Order Concerning the Co-Prosecutors’ Request for Clarification of Charges, **D198/1**, 20 November 2009, para. 6

<sup>76</sup> List of paragraphs and portions of the Closing Order relevant to Case 002/02, **E301/9/1.1**, 4 April 2014, p. 4.

<sup>77</sup> LCL Response to OCP Request for Clarification, paras 32-41.

<sup>78</sup> *Ibid*, para. 40.

consideration of rape as a Crime against Humanity in its own right and did not argue that the factual allegations of the conduct of rape were not included in the Closing Order.<sup>79</sup>

62. The Memorandum on Preliminary Objections addressed the arguments of the parties on the legal characterisation without deciding on the *saisine* of the Trial Chamber. This memorandum has since then become the basis of the Decision on Confrontation<sup>80</sup> as well as the Impugned Decision.<sup>81</sup>

(ii) The Impugned Decision amounts to termination of proceedings

63. The Impugned Decision states:

“Based on these findings, it follows that the crime of rape for which the Accused were charged in the dispositive section of the Closing Order is to be interpreted as excluding rape committed in security centres and cooperatives outside the context of forced marriage. No other charged crime relies upon the factual basis of rape outside of forced marriage. This interpretation is further corroborated by the modes of responsibility retained in the Closing Order, which only consider rape within the context of forced marriage.”<sup>82</sup>

64. The reading of the Impugned Decision by the parties led to the impression, erroneous or otherwise, that it is the factual allegations that did not form part of the *saisine* of the Trial Chamber.<sup>83</sup>

65. The Lead Co-Lawyers submit that the Impugned Decision does not state or reason that there was a Dismissal Order in respect of the charges, implicit or otherwise. Whilst it continues to reaffirm its discretion to recharacterise the factual allegations, it neither confirms nor rejects the *saisine* of the Trial Chamber. It rules on the re-characterisation of those factual allegations as *one* of the substantive crimes through *one* mode of liability – a request that was neither made nor pleaded in the Request for Confirmation.

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<sup>79</sup> *Ibid*, para. 45.

<sup>80</sup> Decision on Confrontation, para. 11.

<sup>81</sup> Impugned Decision, para. 23.

<sup>82</sup> *Ibid*, para. 15.

<sup>83</sup> This either assumes either that (i) the Dismissal Order was expressly issued in respect of all the factual allegations under question; (ii) the Dismissal Order was issued implicitly; or (iii) the Dismissal Order was not issued and the Trial Chamber has terminated the proceedings against such factual allegations and all the resulting charges.

66. This has led to a scenario whereby the Trial Chamber considers itself to have the liberty to consider the conduct of rape when ruling on “the conditions in that Security Centres” but not when it could amount to one of the charged crimes, like Crimes against Humanity of torture, Other Inhumane Acts through attacks against human dignity, or Crimes against Humanity of Other Inhumane Acts “on the basis of any other mode of liability”.<sup>84</sup>

**(b) Right of the Civil Parties to file an Immediate Appeal**

67. The Lead Co-Lawyers submit that the Civil Parties have the right to file the present appeal because this right has been previously adjudged as “neutral” and has been granted to “any party who would have a legal interest in appealing a decision of the Trial Chamber which has the effect of terminating the proceedings”.<sup>85</sup> The Lead Co-Lawyers urge that the exercise of this right is not party-specific and has not been expressly limited by the provisions in the Internal Rules.<sup>86</sup>

68. The Lead Co-Lawyers submit that a termination of proceedings in respect of the relevant factual allegations would inevitably lead to a non-determination of the guilt of the Co-Accused in respect of the substantive crimes in the trial judgement. The Lead Co-Lawyers submit that this non-determination of the guilt of the Co-Accused would not be amenable to appeal once the trial judgement is rendered as there would neither be a conviction nor an acquittal on these accounts. The Lead Co-Lawyers concede that the Civil Parties do not have an automatic right of appeal in this case; it is contingent on the Co-Prosecutors’ decision to file an appeal.<sup>87</sup> However, in the present case, even that contingent right would not be triggered.<sup>88</sup>

69. Consequently, as mentioned above, since there would be no conviction or acquittal in this regard, the Civil Parties would not have the possibility of an acknowledgement from the

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<sup>84</sup> Impugned Decision, para. 18.

<sup>85</sup> Decision on IENG Sary’s Appeal against Trial Chamber’s Decision on Co-Prosecutors’ Request to Exclude Armed Conflict Nexus Requirement from the Definition of Crimes against Humanity, E95/8/1/4, 19 March 2012, para. 9.

<sup>86</sup> See Decision on Civil Party Lead Co-Lawyers’ Requests Relating to the Appeals in Case 002/01, F10/2, 26 December 2014, para. 12.

<sup>87</sup> See Internal Rule 105(1)(c).

<sup>88</sup> Conversely, however, if the decision on the Request for Clarification was granted, the Co-Prosecutors and the Defence would retain their right to appeal the factual and legal findings in relation to the conduct of rape at the Judgement stage.



Trial Chamber of the harm suffered “as a result of the commission of the crimes” for which the Co-Accused may be convicted. This is the fundamental purpose of the collective and moral reparations that will be lost to the Civil Parties on account of an error of law alleged below.

70. Further, the Lead Co-Lawyers submit that, at the judgement stage, the award of the civil claim of reparations may only be granted in relation to the harm suffered “as a result of the commission of the crimes for which an Accused is convicted”.<sup>89</sup>

71. Furthermore, the right to appeal the reparations at the judgement stage on this particular aspect – a right, which is autonomous<sup>90</sup> – would not accrue to the Civil Parties. Therefore, should the present appeal be adjudged as inadmissible, it would restrict the Civil Parties’ ability to appeal the civil claim contained in the trial judgement corresponding to the specific harm suffered by the Civil Parties on account of rapes outside the context of forced marriage.

72. As a consequence, the Lead Co-Lawyers submit that the exercise of this right to Immediate Appeal is imperative in the present case in the interest of the consolidated group of civil parties.

## VI. MERITS

### (a) GROUND 1

73. The Lead Co-Lawyers submit that the lack of reasoned opinion on the actual question of *saisine* prevents the Civil Parties from understanding the basis of such decision. The Lead Co-Lawyers submit that the lack of reasoned opinion and the determination of a matter *hors sujet* results in a discernible error in the exercise of the Trial Chamber’s discretion that prejudices the Civil Parties.

74. The Lead Co-Lawyers submit that the Impugned Decision is premised on the fundamental misunderstanding of the nature of the Request for Confirmation. The Request for Confirmation urged the Trial Chamber to confirm the scope of the factual allegations of

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<sup>89</sup> Internal Rule 23 *quinquies* (1)(a).

<sup>90</sup> Internal Rule 105 (1)(c).

rape within Case 002/02 to facts concerning the conduct of rape at Tram Kok Cooperatives, Kraing Ta Chan Security Centre, and S-21 Security Centre.

75. The Trial Chamber misconstrued the request and issued a decision on re-characterisation of the factual allegations of rape instead.<sup>91</sup> The Lead Co-Lawyers were not requesting for the said re-characterisation but for the confirmation (or not) of the factual allegations. The Impugned Decision bases itself on the Memorandum on Preliminary Objection, the lack of formality of which continues to be a part of the Impugned Decision. It creates a level of uncertainty that amounts to a discernible error in the Trial Chamber's discretion causing prejudice to the Civil Parties.<sup>92</sup>

76. Insofar as the Impugned Decision leaves the question of *saisine* silent, the Lead Co-Lawyers can only opine as to the basis for such a decision. Simply put, *saisine* precedes legal characterisation. The Trial Chamber does not have the liberty to recharacterise a factual allegation of which it is not first properly seised.

77. Therefore, the Lead Co-Lawyers submit that the Impugned Decision cannot be reasoned or interpreted to exclude the consideration of the evidence on the conduct of rape by the Trial Chamber because the decision itself is derived from the very seisure that it seeks to remove.

78. The Lead Co-Lawyers submit that whether the Trial Chamber favours one legal characterisation over the other is a determination that depends on the consideration of the evidence and its evaluation in light of the elements of crimes at the deliberation stage.<sup>93</sup> In the ECCC context, it may or may *not* depend on how the evidence is pleaded by the parties; the Trial Chamber retains the discretion to characterise the evidence in the manner it deems

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<sup>91</sup> Request for Confirmation, para. 27: "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"; compare with Impugned Decision, p.8: "REJECTS the request to recharacterise the factual allegations of rape at Tram Kok Cooperatives, Kraing Ta Chan Security Centre and S-21".

<sup>92</sup> Decision on the Co-Prosecutors' Immediate Appeal of the Trial Chamber Decision Concerning the Scope of Case 002/01, **E163/5/1/13**, para. 30.

<sup>93</sup> Internal Rule 98. *See further Duch Trial Judgement*, para. 496: "The Chamber thus considers that Internal Rule 98(2) enables it to change the legal characterisation of facts contained in the Amended Closing Order to accord with a new form of responsibility provided that it does not go beyond those facts. In doing so, the Chamber must also ensure that (i) no violation of the fair trial rights of the Accused is entailed and (ii) the form of responsibility in question is applicable before the ECCC."

fit towards findings of crimes charged as long as no constitutive elements are added. However, on the other hand, *saisine in rem* of the factual allegations flows automatically from the forwarding of the Closing Order to the Trial Chamber. At the trial stage, the Trial Chamber can only convict or acquit the accused of such allegations; it does not enjoy the liberty to divest itself of them prematurely.

79. The Lead Co-Lawyers concede that, in the case of domestic crimes, the Trial Chamber has previously considered itself “improperly seised” of certain “offences” and has removed them from the scope of the trial.<sup>94</sup> In that case, the alleged crimes under question had not been properly charged to the “clear detriment to the defence of the Accused”.<sup>95</sup> In the present case, as demonstrated in the procedural history, the charges of rape and the constituting material facts had been included in Case 002 as early as 2009.<sup>96</sup>

80. The Lead Co-Lawyers also concede that the Pre-Trial Chamber has removed the Crime against Humanity of Rape as a distinct crime from the temporal jurisdiction of the ECCC. They further concede that the Co-Investigating Judges did offer their opinion and considerations on rape being used as a matter of policy in furtherance of the common purpose.

81. However, the Lead Co-Lawyers submit the final assessment of whether the evidence heard on the conduct of rape within the concerned crimes sites amounts to Crime against Humanity of Other Inhumane Acts through rape, Crime against Humanity of Torture, or Crime against Humanity of Other Inhumane Acts through attacks against human dignity is a determination for the final stages of the judgment when the totality of evidence is before the Trial Chamber.

## **(b) GROUND II**

82. The Lead Co-Lawyers submit that despite the lack of reasoning in the Impugned Decision, the Trial Chamber could not have reached the conclusion that they did if they had

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<sup>94</sup> Decision on Defence Preliminary Objections, **E122**, 22 September 2011, para. 22.

<sup>95</sup> *Ibid.*

<sup>96</sup> 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.

applied the law correctly. Therefore, the Lead Co-Lawyers allege that the Trial Chamber committed an error of law that invalidates the decision.

83. The Lead Co-Lawyers submit that the factual allegations of rape remain included in the body of the Closing Order without an express dismissal of the factual allegations and/or the related substantive crimes.

84. The Lead Co-Lawyers submit that an explicit Dismissal Order would have triggered the right of the Co-Prosecutors' (and thereby the Civil Parties') right to appeal against such dismissal. Such an explicit dismissal would allow the Co-Prosecutors and *consequently* the Civil Parties to understand the underlying reasoning and determine the grounds and scope of their appeal. This did not happen in the present case.

85. The Lead Co-Lawyers submit that at that stage the party that *did* have a right to appeal was the Defence,<sup>97</sup> who could have reasoned and appealed to have excluded the relevant factual allegations from the Closing Order. This was especially the case since the rape outside the context of forced marriage was contested at the investigative stage. However, neither Defence teams exercised this avenue.

86. The Defence teams did not challenge the inclusion of the paragraphs containing the factual allegations as they did with the alleged crimes of deportation.<sup>98</sup> In fact, both of Khieu Samphan Defence's submissions E99/3 and E348 proceeded on the premise that the Closing Order was seised of the factual allegations of the conduct of rape.<sup>99</sup>

87. As opposed to an indictment in common law which is a product of prosecutorial discretion, the Closing Order in the ECCC civil law context is derived from the principle of legalism.<sup>100</sup> Therefore, an explicit Dismissal Order of the factual allegation is crucial.<sup>101</sup>

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<sup>97</sup> See Internal Rule 74(3), 76.

<sup>98</sup> *Conclusions de la Défense de M. KHIEU Samphân sur les exceptions préliminaires sur lesquelles la Chambre n'a pas encore statué*, E306/2, 20 May 2014.

<sup>99</sup> *Requête aux fins de confrontation de la partie civile SAY Sen avec le témoin SREY Than et la partie civile SAUT Saing et de communication de l'enregistrement audio de ses déclarations devant les co-Juges d'instruction*, E348, 23 April 2015, paras 6-10. Réponse à la demande des co-procureurs relative à la requalification des faits constitutifs de viol, E99/3, 22 July 2011, para. 14: "the Pre-Trial Chamber did not change the characterisation of the facts: in striking the sub-paragraph on rape out of the paragraph on crimes against humanity, it altered the scope of the applicable law".

<sup>100</sup> Decision on Immediate Appeal against the Trial Chamber's Order to Unconditionally Release the Accused IENG Thirith, E318/1/10/1/5/7, 14 December 2012, para. 37: "Traditionally, most civil law jurisdictions have

88. In respect of an arguable implicit Dismissal Order,<sup>102</sup> the Lead Co-Lawyers have previously submitted that such a dismissal ought to have been explicit.<sup>103</sup> The issue of an implicit Dismissal Order was not discussed in the Impugned Decision. The Lead Co-Lawyers' reply in this respect was also not considered.<sup>104</sup>

89. The Lead Co-Lawyers add that the Trial Chamber also has the discretion to disagree with the assessment of the Co-Investigating Judges, whether it involves conclusions as to the elements of crime or modes of liability, as long as no new constitutive elements are added.<sup>105</sup>

90. The Lead Co-Lawyers submit that the conclusion of the Co-Investigating Judges with regard to rape vis-à-vis policy are not binding on the Trial Chamber. The Trial Chamber, upon consideration of the evidence, may arrive at a different conclusion as to the existence of policy (or otherwise) concerning rape outside the context of forced marriage. The Impugned Decision not only has the effect of removing that discretion from the Trial Chamber without sufficient reasons, it is based on the misapplication of the law.

91. The Lead Co-Lawyers reiterate that the charges in the Closing Order including the substantive crimes and the modes of liability serve as a proposal by the Co-Investigating Judges to the Trial Chamber; as long as the accused are indicted and duly notified of such charges, the various substantive crimes and the related modes of liability can be recharacterised as per the discretion of the Trial Chamber.<sup>106</sup>

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adopted the principle of legalism (or, otherwise, mandatory prosecution), pursuant to which the prosecution has no discretion to discontinue or ask for the discontinuation of a criminal action once it has been initiated and the court, which has sole authority to terminate proceedings, can only do it for a reason specifically expressed in the law. Applicability of the legalism principle to international criminal proceedings might be disputable, especially concerning the decision whether to prosecute or not; moreover, even in continental Europe it is subject to gradual erosion by the introduction of different instruments of diversion. Still, the expression of this principle can be found in the trial phase, *inter alia* in the manner in which the civil law system approaches obstacles to the continuation of proceedings, such as unfitness to stand trial.”

<sup>101</sup> Compare Closing Order, para. 1429 with Hissein Habre *et al.*, *Ordonnance de non-lieu partiel, de mise en accusation et de renvoi devant la chambre africaine extraordinaire d'assises*, 13 February 2015, p. 185.

<sup>102</sup> Response by Khieu Samphan on Confirmation, para. 12.

<sup>103</sup> Reply on Confirmation of Scope, para. 3.

<sup>104</sup> The Impugned Decision references the Reply on Confirmation on Scope in the section on the “Submission” (Impugned Decision, para. 3-4) but the arguments raised therein on the requirement of an explicit Dismissal Order are not addressed in the body of the decision.

<sup>105</sup> Internal Rule 98(2).

<sup>106</sup> Internal Rule 98.

**(c) CONCLUSION**

92. In conclusion, the Lead Co-Lawyers allege a discernible error in the exercise of the Trial Chamber's discretion that prejudiced the parties and an error of law in the misapplication of the law in rendering the Impugned Decision. The Lead Co-Lawyers submit that each of these alleged errors invalidates the decision.

93. The Lead Co-Lawyers also note that the Impugned Decision was issued over five months after the Request for Confirmation was made. The Request for Confirmation specifically concerned S-21 Security Centre, upon which the Lead Co-Lawyers spent the majority of their lines of questioning centred on the conduct of rape and moral offences at S-21 Security Centre.<sup>107</sup> If the Trial Chamber considered itself divested of the factual allegations of the conduct of rape, the delayed rendering of the Impugned Decision at the near conclusion of the trial topic added to the prejudice to the Civil Parties.

94. For all the reasons mentioned above, the Lead Co-Lawyers request that the Impugned Decision be rescinded. It is further urged that the Supreme Court Chamber clarify the *saisine* of the Trial Chamber in respect of the factual allegations of the conduct of rape in Case 002/02.

**VII. REQUEST**

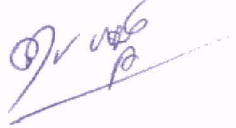
**WHEREFORE**, the Civil Party Lead Co-Lawyers respectfully request that the Supreme Court Chamber:

- (1) **ADMIT** the present Immediate Appeal;
- (2) **RESCIND** the Impugned Decision;
- (3) **FIND** that the Trial Chamber erred in law in issuing the Impugned Decision;
- (4) **CONFIRM** that the Trial Chamber is seised of the factual allegations of rape at Tram Kok Cooperatives, S-21, and Kraing Ta Chan Security Centre in Case 002/02; and

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<sup>107</sup> See Annex B.

Respectfully submitted,

Date	Name	Place	Signature
28 September 2015	PICH ANG Lead Co-Lawyer	Phnom Penh	
	Marie GUIRAUD International Lead Co-Lawyer	Phnom Penh	