

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

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**CO-PROSECUTORS' RESPONSE TO CIVIL PARTY LEAD CO-LAWYERS'  
IMMEDIATE APPEAL AGAINST TRIAL CHAMBER DECISION REGARDING  
RAPE OUTSIDE THE CONTEXT OF FORCED MARRIAGE**

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## I. INTRODUCTION

1. The Co-Prosecutors hereby respond to the Civil Party Lead Co-Lawyers' ("LCLs") Immediate Appeal<sup>1</sup> against the Trial Chamber ("TC") Decision<sup>2</sup> on their Request<sup>3</sup> for confirmation of the scope of Case 002/02 concerning the charges of rape outside the context of forced marriage.
2. For the reasons set out below, the Trial Chamber correctly held that it had not been seised by the Case 002 Closing Order of the factual allegations pertaining to rape outside the context of forced marriage at the Tram Kok Cooperatives and the S-21 and Kraing Ta Chan Security Centres. The CIJs dismissed all such factual allegations in the Closing Order. The LCLs' assertions to the contrary are a result of a misreading of the Closing Order and a misapplication of the law. The LCLs' interpretation also overlooks the right of the Accused to be informed in the Closing Order of the nature of the charges against them, including any alleged mode of responsibility, and the requirement that the factual and legal findings in the Closing Order establish a link between the Accused persons' conduct and any crime charged.
3. As such, the Co-Prosecutors request the Supreme Court Chamber ("SCC") to dismiss the Appeal.

## II. PROCEDURAL HISTORY

4. On 15 September 2010, the Co-Investigating Judges ("CIJs") issued their Closing Order<sup>4</sup> in Case 002, indicting four individuals, including the two Accused, for crimes including rape as a crime against humanity (in the context of forced marriage). On 13 January 2011, the Pre-Trial Chamber ("PTC") issued decisions on three appeals against the Closing Order, which included substituting the characterisation of the factual

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<sup>1</sup> **E306/7/3/1/1** 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, 28 September 2016 (notified to the parties in English and Khmer on 12 October 2016) ("Appeal").

<sup>2</sup> **E306/7/3** 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, 30 August 2016 ("Decision").

<sup>3</sup> **E306/7** 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, 18 March 2016 ("Request").

<sup>4</sup> **D427** Closing Order, 15 September 2010 ("Closing Order").

allegations of rape within forced marriage as the discrete crime against humanity of rape with their characterisation as other inhumane acts.<sup>5</sup>

5. On 4 April 2014, the Trial Chamber issued a decision on the additional severance of Case 002 and the scope of Case 002/02,<sup>6</sup> appending a list of paragraphs and portions of the Closing Order relevant to Case 002/02.<sup>7</sup> Three weeks later, on 25 April 2014, in response to the LCLs' request "[t]o recharacterize the findings of liability for the rapes outside of the context of forced marriage"<sup>8</sup> on the grounds that "the reasoning of the [CIJs] not to indict the Accused for the rapes outside the context of Forced Marriages is flawed"<sup>9</sup>, the Trial Chamber issued Further Information regarding remaining Preliminary Objections.<sup>10</sup> In that decision, the Trial Chamber made it clear that it found that the Closing Order in Case 002 had not charged the two Accused with rape outside of the context of forced marriage under any mode of responsibility:

[T]he Chamber considers that there is no legal basis for the Lead Co-Lawyers for the Civil Parties' request to add charges of rape (outside the context of forced marriage) committed within Security Centres to the Closing Order (E99/1, paras 32-41, 43, 45). The Co-Investigating Judges specifically found that while rape did occur in security centres, these crimes could not be linked to the Accused as the evidence did not support a finding that the CPK leaders used rape as a policy in Security Centres (D427, paras 1426-1429). Although the Chamber may change the legal characterisation of a crime as set out in the Closing Order *as long as no new constitutive elements are introduced* (Internal Rule 98(2)), the Chamber has no authority to add new facts or charges to the Closing Order that were dismissed by the [CIJs], a decision that was not disturbed by the [PTC].<sup>11</sup>

No party filed an appeal of this decision.

6. On 12 June 2015, the Trial Chamber issued a further decision stating as follows:

In this respect, the [CIJs] found that rape occurred at Kraing Ta Chan Security Centre among other places. However, the [CIJs] found that, outside

<sup>5</sup> **D427/1/26** Decision on Ieng Sary's Appeal against the Closing Order, 13 January 2011, p. 4; **D427/2/12** Decision on Ieng Thirith's and Nuon Chea's Appeals against the Closing Order, 13 January 2011, p. 6; **D427/4/14** Decision on Khieu Samphan's Appeal against the Closing Order, 13 January 2011, p. 4.

<sup>6</sup> **E301/9/1** Decision on Additional Severance of Case 002 and Scope of Case 002/02, 4 April 2014 ("Additional Severance Order").

<sup>7</sup> **E301/9/1.1** Annex: List of paragraphs and portions of the Closing Order relevant to Case 002/02, 4 April 2014 ("Annex on Case 002/02 Scope").

<sup>8</sup> **E99/1** Civil Party Lead Co-Lawyers' Response to the Co-Prosecutors' Request to Re-characterize the Facts Establishing the Conduct of Rape as a Crime Against Humanity, 21 July 2011 ("LCL Rape Response"), para. 45(ii). See also paras 40, 43.

<sup>9</sup> **E99/1** LCL Rape Response, para. 40.

<sup>10</sup> **E306** Further information regarding remaining preliminary objections, 25 April 2014 ("TC Preliminary Objections Decision").

<sup>11</sup> **E306** TC Preliminary Objections Decision, para. 3 (emphasis in original).

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>12</sup>

As with the 25 April 2014 decision, no Party filed any appeal of this decision.

7. On 18 March 2016, over a year after witness testimony in Case 002/02 had begun and almost two years after the Trial Chamber's 25 April 2014 decision confirming that rape outside of forced marriage was not charged against the Accused, the LCLs filed the Request. In the Request, the LCLs essentially asked the Trial Chamber to provide further clarification of the same issue that had already been clearly decided in prior decisions, and to find that it was seised by the Closing Order with the factual allegations of rape at the Tram Kok Cooperatives, and the S-21 and Kraing Ta Chan Security Centres in Case 002/02.<sup>13</sup> Khieu Samphan responded on 28 March 2016,<sup>14</sup> to which the LCLs replied on 4 April 2016.<sup>15</sup> The Trial Chamber dismissed the Request on 30 August 2016.<sup>16</sup>
8. On 28 September 2016, the Civil Parties filed the Appeal. On 11 October 2016, the SCC Senior Legal Officer, in an email to the Case File Officer,<sup>17</sup> noted that the Appeal had been erroneously filed to the SCC in contravention of Internal Rules<sup>18</sup> 106(1) and (2). Without prejudice to any future SCC decision associated with the circumstances of the filing, he requested the Case File Officer to forward the Appeal to the Trial Chamber for processing. The Trial Chamber notified the Appeal to the Case 002 Parties on 12 October 2016.
9. On 19 October 2016, the SCC granted the Co-Prosecutors' request to file their Response to the Appeal on 24 October 2016 in English only, with the Khmer

<sup>12</sup> **E348/4** 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, 12 June 2015 ("TC Confrontation Decision"), para. 11 (internal citations omitted).

<sup>13</sup> **E306/7** Request, paras 1, 28.

<sup>14</sup> **E306/7/1** Réponse de la Défense de M. Khieu Samphan à la demande de clarification des Parties civiles concernant les accusations de viol, 28 March 2016.

<sup>15</sup> **E306/7/2** Lead Co-Lawyers' Reply to Khieu Samphan Defence's Response to Request for Clarification on Rape Outside Forced Marriage, 4 April 2016 ("Reply").

<sup>16</sup> **E306/7/3** Decision.

<sup>17</sup> Email entitled "Recent Filing in Case 002/02" from SCC Senior Legal Officer Volker Nerlich to Case File Officer, 11 October 2016 at 2:24pm.

<sup>18</sup> Internal Rules of the Extraordinary Chambers in the Courts of Cambodia, Revision 9, 16 January 2015 ("Internal Rule(s)" or "Rule(s)").

translation to be filed no later than 27 October 2016.<sup>19</sup>

### III. APPLICABLE LAW

#### Admissibility

10. Internal Rule 104(4)(a) provides that decisions of the Trial Chamber “which have the effect of terminating the proceedings” are subject to immediate appeal.
11. Internal Rule 107(1) provides that any appeal of a Trial Chamber decision open to immediate appeal under Rules 104(4)(a) and (d) must be filed within 30 days of the notification of the decision.

#### Standard of Review on Appeal

12. Pursuant to Internal Rule 104(1) and 105(2), an immediate appeal may be based on one or more of the following three grounds:
  - An error on a question of law invalidating the decision;
  - An error of fact which has occasioned a miscarriage of justice; or
  - A discernible error in the exercise of the Trial Chamber’s discretion which results in prejudice to the appellant.<sup>20</sup>

#### Merits

13. Internal Rule 67, regarding Closing Orders issued by the CIJs, states in relevant part:
  1. The [CIJs] shall conclude the investigation by issuing a Closing Order, either indicting a Charged Person and sending him or her to trial, or dismissing the case. [...]
  2. The 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 [CIJs], including the relevant criminal provisions and *the nature of the criminal responsibility* (emphasis added).
  3. The [CIJs] shall issue a Dismissal Order in the following circumstances:
    - a) The acts in question do not amount to crimes within the jurisdiction of the ECCC;
    - ...
    - c) There is not sufficient evidence against the Charged Person or persons of the charges.

<sup>19</sup> Email from SCC Senior Legal Officer Volker Nerlich entitled “Re: Request to File Response to Civil Party LCL’s Immediate Appeal regarding Rape outside Forced Marriage in One Language”, 19 October 2016 at 2:13pm.

<sup>20</sup> See further **E50/1/1/4** Decision on Immediate Appeals by Nuon Chea and Ieng Thirith on Urgent Applications for Immediate Release, 3 June 2011, para. 27.

4. The 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.
14. Internal Rule 79(1) provides that “[t]he Trial Chamber shall be seised by an Indictment from the Co-Investigating Judges or the Pre-Trial Chamber.”
15. Internal Rule 98(2) provides 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. [...]”

#### IV. SUBMISSIONS

##### Admissibility

16. The LCLs submit that the Appeal is admissible under Rule 104(4)(a) as a decision which has the effect of terminating the proceedings<sup>21</sup> on the basis that the issuance of the Decision had the effect of terminating proceedings as regards the factual allegations of rape outside the context of forced marriage.<sup>22</sup> The LCLs point to Trial Chamber’s finding that “the crime of rape for which the Accused was 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 forced marriage.”<sup>23</sup> The LCLs contend that this finding “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>24</sup> Because, in the LCLs’ view, the CIJs did not dismiss the factual allegations of rape outside forced marriage, these remained within the *saisine* of the Trial Chamber<sup>25</sup> until the point at which the Decision dismissed them by way of this finding.
17. For the reasons set out below, the merits of this argument are based upon a misinterpretation of both the law and the relevant provisions of the Closing Order. On a correct interpretation of both, it is patently evident that the CIJs did not charge the Accused with rape outside the context of forced marriage, and that the factual allegations in that respect were dismissed. The Trial Chamber was therefore never

<sup>21</sup> E306/7/3/1/1 Appeal, paras 22-23, 50-66.

<sup>22</sup> E306/7/3/1/1 Appeal, para. 50.

<sup>23</sup> E306/7/3/1/1 Appeal, para. 63, *citing* E306/7/3 Decision, para. 15.

<sup>24</sup> E306/7/3/1/1 Appeal, para. 64.

<sup>25</sup> E306/7/3/1/1 Appeal, paras 51-62.

seised with these facts, and the April 2014, June 2015 and August 2016 decisions merely confirmed this. The Decision did not therefore have the effect of “terminating the proceedings” as there remained no live “proceedings” to terminate.

18. Moreover, by filing its Request on which the Trial Chamber has already twice ruled, and then appealing the Trial Chamber’s identical finding, the LCLs are effectively circumventing the 30-day deadline<sup>26</sup> for filing appeals against those previous decisions.
19. The Co-Prosecutors therefore submit that the Appeal is without merit, not admissible under Internal Rule 104(4), and untimely under Rule 107(1), and should be dismissed.

### Merits

*The Trial Chamber correctly held that it was not seised with factual allegations of rape outside the context of forced marriage in Case 002*

20. The Appeal is founded on two grounds. First, the LCLs assert that the Trial Chamber failed to provide a reasoned opinion on the question of *saisine* of the factual allegations of rape at the Tram Kok Cooperatives and the S-21 and Kraing Ta Chan Security Centres, and instead provided a determination on the question of recharacterisation of these factual allegations, which the LCLs assert did not form part of their Request.<sup>27</sup> They aver that this constitutes a discernible error in the exercise of the Trial Chamber’s discretion that prejudices the Civil Parties.<sup>28</sup> Second, they submit that the Trial Chamber committed an error of law when concluding, in the absence of an explicit dismissal order, that the factual allegations of rape were not included in the Closing Order seising the Trial Chamber.<sup>29</sup>
21. As the Co-Prosecutors’ submissions on these two grounds of appeal arise out of the same analysis of the contents of the Case 002 Closing Order and Trial Chamber’s Decision, they will be addressed together.
22. Turning first to the express terms of the Closing Order, as the Trial Chamber noted,<sup>30</sup> the CIJs found that crimes of rape outside forced marriage had been committed at sites including S-21, Kraing Ta Chan and the Tram Kok Cooperatives.<sup>31</sup> However, on a plain reading of the Closing Order, the CIJs made no factual or legal findings that linked

<sup>26</sup> Internal Rule 107(1).

<sup>27</sup> **E306/7/3/1/1** Appeal, paras 73-81.

<sup>28</sup> **E306/7/3/1/1** Appeal, paras 73, 75.

<sup>29</sup> **E306/7/3/1/1** Appeal, paras 82-91.

<sup>30</sup> **E306/7/3** Decision, paras 13-14 *citing* **D427** Closing Order, paras 1426-1427.

<sup>31</sup> **D427** Closing Order, paras 1426-1428.

these crimes to the Accused. The CIJs therefore dismissed, in accordance with Rule 67(3)<sup>32</sup> and by reasoned argument, the *factual allegations* of rape, because they did not consider the Accused responsible for them under any mode of responsibility found in article 29<sup>new</sup> of the ECCC Law.<sup>33</sup>

23. The LCLs concede<sup>34</sup> that, in paragraphs 1428-1429 of the Closing Order, the CIJs provide reasons for dismissing the possibility that the Accused could be charged with the commission of rape outside forced marriage on the basis of commission through a joint criminal enterprise (“JCE”): in the CIJs’ view, “the official CPK policy regarding rape was to prevent its occurrence and to punish the perpetrators”,<sup>35</sup> and “it cannot be considered that rape was one of the crimes used by the CPK to implement the common purpose”.<sup>36</sup> These findings also demonstrate that the CIJs did not consider that the Accused planned, ordered, instigated or aided and abetted the commission of rape outside forced marriage. By finding an official CPK policy to prevent and punish rape outside the context of forced marriage, the CIJs adequately reasoned their conclusion that they did not find the Accused responsible as superiors for these crimes. The finding that on occasions “[CPK] policy did not manage to prevent rape” is not inconsistent with that conclusion. Moreover, the Closing Order contains no factual or legal findings that could *support* a finding that the Accused could be held liable for rapes outside of forced marriage under the doctrine of superior responsibility. There are no findings that the Accused knew or had reason to know of these rapes and failed to take necessary and reasonable measures to prevent or punish these crimes.
24. As the Trial Chamber reasoned,<sup>37</sup> the conclusion that the CIJs did not find the Accused responsible under *any* mode of responsibility for rape outside forced marriage is demonstrated by reference to their “Legal Findings on Modes of Responsibility”. In respect of participation through a JCE, the Accused are charged with rape only in connection with the CPK’s regulation of marriage.<sup>38</sup> For every other mode of responsibility, the CIJs clearly state that the Accused are charged with the crime against

<sup>32</sup> Internal Rule 67(3)(c) (“The [CIJs] shall issue a Dismissal Order in the following circumstances: [...] c) There is not sufficient evidence against the Charged Person or persons of the charges.”)

<sup>33</sup> Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea *as amended on 27 October 2004*.

<sup>34</sup> **E306/7/3/1/1** Appeal, para. 55.

<sup>35</sup> **D427** Closing Order, para. 1429.

<sup>36</sup> *Ibid.*

<sup>37</sup> **E306/7/3** Decision, para. 15.

<sup>38</sup> **D427** Closing Order, para. 1525.

humanity of “rape *in the context of forced marriage*”.<sup>39</sup> Since the only charge of rape raised against the Accused in the substantive sections of the Closing Order pertains to rape in the context of forced marriage, the reference in the Disposition to the charge against the Accused of “Crimes against Humanity, specifically [...] (g) rape”<sup>40</sup> must be read as equally limited.

25. Before its recent Decision, this interpretation of the Closing Order had previously been confirmed twice by the Trial Chamber<sup>41</sup> and has always been the Co-Prosecutors’ understanding of the Closing Order.<sup>42</sup> When considering appeals against the Closing Order, the PTC also only referred to the CIJs having established the crime against humanity of rape in the context of forced marriage.<sup>43</sup> Indeed, the LCLs themselves have previously espoused the view that the CIJs had dismissed allegations of rape outside the context of forced marriage.<sup>44</sup> The Co-Prosecutors note further that the *merits* of the CIJs’ conclusions are not the subject of this Appeal. The time and place for making such arguments was by way of appeal from the Closing Order to the PTC.
26. The LCLs’ Appeal and earlier Request appear to be based on a misunderstanding of the requirements for the Trial Chamber to be seised with factual allegations. The LCLs argue that, in the absence of an order expressly dismissing them in the Closing Order, the Trial Chamber is seised with any factual allegations which the CIJs have found in the Closing Order to have been confirmed by the evidence collected during the investigation.<sup>45</sup> As a result, they assert that while “the Trial Chamber retains the discretion to characterise the evidence in the manner it deems fit towards findings of

<sup>39</sup> **D427** Closing Order, paras 1545 (Planning), 1548 (Instigating), 1551 (Aiding and Abetting), 1554 (Ordering), 1559 (Superior Responsibility). The fact that the conduct constituting rape may be amenable to other legal characterisations, such as torture or attacks against human dignity as an other inhumane act does not alter this conclusion. The CIJs had already found that the *facts* amounted to the crime of rape as a crime against humanity. Had they considered these facts attributable to the Accused, they would have included them *as rape* in the list of crimes with which they charged the Accused pursuant to one or more of the modes of responsibility listed in the Closing Order. That they did not demonstrates that they dismissed the factual allegations of rape outside the context of forced marriage.

<sup>40</sup> **D427** Closing Order, para. 1613.

<sup>41</sup> **E306** TC Preliminary Objections Decision, para. 3 (see *supra*, para. 5); **E348/4** TC Confrontation Decision, para. 11 (see *supra*, para. 6).

<sup>42</sup> See e.g. **E319/40** International Co-Prosecutor’s Disclosure of Case 004 Documents Relevant to Case 002 Pursuant to Case 004-D193/61, 29 January 2016, para. 6; **E1/289.1** Transcript 21 April 2015, pp. 83-84.

<sup>43</sup> **D427/1/30** Decision on Ieng Sary’s Appeal against the Closing Order, 11 April 2011, para. 361.

<sup>44</sup> **E99/1** LCL Rape Response, para. 40.

<sup>45</sup> See e.g. **E306/7/3/1/1** Appeal, paras 51-52, 59, 78-79; **E306/7** Request, paras 10, 12, 18, 22, 23, 25; **E306/7/2** Reply, para. 6.

crimes charged [...], *saisine in rem* of the factual allegations flows automatically from the forwarding of the Closing Order to the Trial Chamber.”<sup>46</sup>

27. However, pursuant to Rule 79(1), the Trial Chamber is seised only by an Indictment from the CIJs or the PTC.<sup>47</sup> Put another way, the Trial Chamber is only seised with those facts with which *the Accused* have been *charged* in the Closing Order. It is in this context that requirements in Internal Rule 67(2) as to the contents of any Closing Order should be read. These provide that an Indictment must describe the material facts *and their legal characterisation* by the OCIJ, including the relevant criminal provisions and *the nature of the criminal responsibility*.<sup>48</sup> The Cambodian Code of Criminal Procedure (“CPC”) contains a similar provision in Article 247.<sup>49</sup> Indeed, a Closing Order must contain all the elements necessary to ensure the right of the Accused to be informed of the nature and cause of the charges against them,<sup>50</sup> which must also be considered in the light of the right of the Accused to prepare their defence.<sup>51</sup>
28. The Closing Order must therefore inform the Accused *fully and in detail* not only of the acts they are alleged to have committed and on which the accusation is based, but also the legal characterisation given to those acts.<sup>52</sup> The “legal characterisation” includes both the classification of the crime *and* of the mode of responsibility under which the

<sup>46</sup> E306/7/3/1/1 Appeal, para. 78.

<sup>47</sup> This is also reflected in Internal Rule 67(1) which states that “[t]he Co-Investigating Judges shall conclude the investigation by issuing a Closing Order, either indicting a Charged Person and sending him or her to trial, or dismissing the case.”

<sup>48</sup> Internal Rule 67(2).

<sup>49</sup> CPC, art. 247 (“If the judge considers that the facts constitute a felony, a misdemeanor or a petty offense, he shall decide to indict the charged person before the trial court. The order shall state the facts being charged and their legal qualification.”)

<sup>50</sup> ECCC Law, art. 35<sup>new</sup>; International Covenant on Civil and Political Rights (“ICCPR”), art. 14(3)(a); European Convention on Human Rights (“ECHR”), art. 6(3)(a); Case 001-D99/3/42 Decision on Appeal against Closing Order indicting Kaing Guek Eav alias “Duch”, 5 December 2008 (“Case 001 Closing Order Appeal Decision”), paras 47, 50; D97/15/9 Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010 (“JCE Decision”), paras 31-32.

<sup>51</sup> ECCC Law, art. 35<sup>new</sup>; ICCPR, art. 14(3)(b); ECHR, art. 6(3)(b); Case 001-D99/3/42 Case 001 Closing Order Appeal Decision, para. 47; D97/15/9 JCE Decision, paras 31-32; *Pélissier and Sassi v. France*, no. 25444/94, Judgment, 25 March 1999 (“*Pélissier*”), para. 54; *Sipavičius v. Lithuania*, no. 49093/99, Judgment, 10 July 2002 (“*Sipavičius*”), para. 28.

<sup>52</sup> Internal Rule 67(2); *Pélissier*, paras 51-52, 54 (“Particulars of the offence play a crucial role in the criminal process, in that it is from the moment of their service that the suspect is formally put on notice of the *factual and legal basis* of the charges against him. [...] Article 6§3(a) of the Convention affords the defendant the right to be informed not only of the cause of the accusation, that is to say the acts he is alleged to have committed and on which the accusation is based, but also the *legal characterisation* given to those acts. That information should [...] be detailed.[...] The Court considers that in criminal matters the provision of full, detailed information concerning the charges against a defendant, and consequently the legal characterisation that the court might adopt in the matter, is an essential prerequisite for ensuring that the proceedings are fair.” (emphasis added)); *Dallos v. Hungary*, no. 29082/95, Judgment, 1 March 2001, para. 47; *Sipavičius*, paras 27-28.

accused has been charged.<sup>53</sup> As the PTC concluded:

Where it is alleged that the accused planned, instigated, ordered, or aided and abetted in the commission of the alleged crimes, the “particular acts” or the “particular course of conduct” on the part of the accused which forms the basis for the charges in question must be identified. An allegation of superior responsibility requires that not only what is alleged to have been the superior’s own conduct, but also what is alleged to have been the conduct of those persons for whom the superior bears responsibility be specified with as many particulars as possible.<sup>54</sup>

29. It is therefore not possible to charge by omission, and factual allegations cannot survive in a Closing Order in a vacuum, without any characterisation as a particular crime or any link to the Accused through a mode of responsibility. Nor does informing the Accused of the legal characterisation of the crimes committed by the principal perpetrators constitute complete notification of the charge against them. As set out above, by failing to link the Accused to the crime of rape outside forced marriage through factual and legal findings pertaining to any mode of responsibility, the Closing Order contains *no positive charges*, or reasoning that could support a charge, against either of the Accused in that regard. It does *not* suffice that there might be an “indication as to the inadequacy of the policy [to prevent and punish rape]”<sup>55</sup> or for the CIJs to “[leave] the Trial Chamber with the liberty to consider” whether the Accused are responsible for these crimes under JCE or superior responsibility (or presumably any other mode of responsibility).<sup>56</sup>
30. The same flaw underpins the LCLs’ approach to recharacterisation. As a matter of principle, the LCLs correctly assert that “the charges in the Closing Order including the substantive crimes and the modes of liability serve as a proposal by the [CIJs] 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>57</sup> However, elsewhere in the substance of the Appeal and in the Request, the LCLs apparently attribute a power to the Trial

<sup>53</sup> Internal Rule 67(2); Case 001-**D99/3/42** Case 001 Closing Order Appeal Decision, paras 47-49; *Pélissier*, paras 55-61.

<sup>54</sup> Case 001-**D99/3/42** Case 001 Closing Order Appeal Decision, para. 49.

<sup>55</sup> **E306/7/3/1/1** Appeal, para. 55.

<sup>56</sup> **E306/7/3/1/1** Appeal, paras 54-56.

<sup>57</sup> **E306/7/3/1/1** Appeal, para. 91 *citing* Internal Rule 98. The Co-Prosecutors note that the Trial Chamber may change the legal characterisation of the crime as set out in the Indictment, as long as no new constitutive elements are introduced.

Chamber, not only to recharacterise rape<sup>58</sup> as “Other Inhumane Acts through attacks against human dignity” and/or “crimes against humanity of torture”,<sup>59</sup> but also the discretion as to the “choice *and assignment* of a mode of liability *to the findings of the concerned substantive offence*.”<sup>60</sup> This confuses the Trial Chamber’s legitimate power under Internal Rule 98(2) to *recharacterise* or *change the legal characterisation* of crimes and modes of liability from those set out by the CIJs in the Indictment with a non-existent power to *characterise facts* that the CIJs never characterised in the Closing Order. As is inherent in the term ‘recharacterise’, there must be a crime or mode of responsibility assigned to the facts, i.e. they must have a “character” before they can be “recharacterised”. In this case, although the CIJs gave the factual allegations a legal characterisation as rape as a crime against humanity, they assigned no character to the Accused’s means of participation in those crimes through any mode of responsibility.

31. The LCLs’ assertions that the Trial Chamber erred either by dealing with the question of recharacterisation, rather than the factual scope of Case 002/02, and thereby failing to provide a reasoned decision on the question of *saisine*,<sup>61</sup> or by concluding that the Accused were not charged in the Closing Order with rape outside the context of forced marriage,<sup>62</sup> must therefore both fail. The Co-Prosecutors agree with the LCL that the question of “*saisine* precedes [the Trial Chamber’s] legal characterisation”,<sup>63</sup> and that “[t]he Trial Chamber does not have the liberty to recharacterise a factual allegation of which it is not first properly seised”.<sup>64</sup> In the Decision, the Trial Chamber did not overlook this logical sequence, and expressly acknowledged the LCLs’ request for it to confirm that it is “formally seised of the factual allegations of rape at Tram Kok Cooperatives, S-21 and Kraing Ta Chan Security Centre in Case 002/02.”<sup>65</sup> Pursuant to that Request, it provided a correct and reasoned decision dealing with both its *saisine* and its power to recharacterise crimes, in that order.<sup>66</sup>

<sup>58</sup> In the Closing Order, the CIJs had characterised these factual allegations – and those of rape within forced marriage – as rape as a distinct crime against humanity. On appeal against the Closing Order, the PTC had amended the characterisation to “other inhumane acts” through rape. See *supra*, para. 4.

<sup>59</sup> E306/7/3/1/1 Appeal, para. 58; E306/7 Request, para. 24.

<sup>60</sup> E306/7 Request, para. 25; E306/7/3/1/1 Appeal, paras 58, 90.

<sup>61</sup> E306/7/3/1/1 Appeal, paras 74-75.

<sup>62</sup> E306/7/3/1/1 Appeal, paras 82-91.

<sup>63</sup> E306/7/3/1/1 Appeal, para. 76.

<sup>64</sup> E306/7/3/1/1 Appeal, para. 76.

<sup>65</sup> E306/7/3 Decision, para. 1 *citing* E306/7 Request, paras 16-17, 28.

<sup>66</sup> See in particular E306/7/3 Decision, para. 11 (“the Chamber, prior to making any finding on recharacterisation, must determine the precise facts that constitute the basis for which the Accused were formally charged.”)

32. The Trial Chamber first correctly found that in the Closing Order there were “clear factual findings of rape outside forced marriage” at locations including the Tram Kok Cooperatives and the S-21 and Kraing Ta Chan security centres, and that these were characterised as the crime against humanity of rape.<sup>67</sup> It then moved on to hold that the CIJs did not link these crimes to the Accused.<sup>68</sup> It concluded that these facts were therefore “dismissed by the [CIJs], a decision that was not disturbed by the [PTC],”<sup>69</sup> and were not charged in the Closing Order,<sup>70</sup> i.e. the Trial Chamber was not seised with them.<sup>71</sup> Only then did it determine that it was not within its power to recharacterise those facts with which it was not seised.<sup>72</sup> The Trial Chamber did not err; it took every step required of it and correctly concluded that it was not seised of the factual allegations of rape outside the context of forced marriage.

*Effect of Additional Severance Order*

33. The LCLs have placed reliance<sup>73</sup> on the fact that paragraphs 1426-1429 (rape outside the context of forced marriage) were included within the scope of the Trial Chamber’s list of paragraphs and portions of the Closing Order included within the scope of Case 002/02 in relation to S-21, Kraing Ta Chan and the Tram Kok Cooperatives.<sup>74</sup> However, this was quite apparently an error. As the Trial Chamber confirmed in the Decision, “the Additional Severance Order did not incorporate allegations of rape outside forced marriage which were not charged in the Closing Order.”<sup>75</sup> Indeed, on 25 April 2014, only three weeks later, the Trial Chamber itself issued a decision clarifying that it did not consider that the Accused were charged with the crime of rape outside the context of forced marriage.<sup>76</sup> It reiterated this in June 2015.<sup>77</sup>
34. In any event, for all of the reasons outlined above, the Trial Chamber has no power – through this list of facts or otherwise - to add facts for which the Accused can be found

<sup>67</sup> **E306/7/3** Decision, paras 13-14.

<sup>68</sup> **E306/7/3** Decision, paras 14-15. See also para. 17.

<sup>69</sup> **E306/7/3** Decision, para. 17 referring to its previous decision on the point, **E306** TC Preliminary Objections Decision, para. 3.

<sup>70</sup> **E306/7/3** Decision, paras 15, 16, 17, 19.

<sup>71</sup> Internal Rule 79(1).

<sup>72</sup> **E306/7/3** Decision, para. 19, p. 8.

<sup>73</sup> **E306/7/3/1/1** Appeal, paras 12, 59; **E306/7** Request, paras 14, 21, 23, 28.

<sup>74</sup> **E301/9/1.1** Annex on Case 002/02 Scope, para. 5(ii)(10).

<sup>75</sup> **E306/7/3** Decision, para. 17.

<sup>76</sup> **E306** TC Preliminary Objections Decision, para. 3.

<sup>77</sup> **E348/4** TC Confrontation Decision, para. 11.

criminally responsible to the scope of Case 002/02 (or Case 002 generally) with which it was not seized by the CIJs in the Closing Order.

*The Request and Appeal risk substantial delay to the Case 002/02 trial*

35. As set out above, in Case 002/02, the Trial Chamber has twice, on 25 April 2014<sup>78</sup> (eight months before testimony began) and again on 12 June 2015,<sup>79</sup> confirmed that it did not consider itself seized with the factual allegations of rape outside the context of forced marriage in Case 002. On neither occasion did the LCLs seek to appeal that finding. The filing of this Request so late in the Case 002/02 proceedings for clarification of an issue on which the Trial Chamber has already ruled, creates substantial risk of significant delay in the completion of the Case 002/02 trial.
36. To briefly summarise the reasons for that risk, the SCC is required to issue a decision on this matter within three (or, in exceptional circumstances, four) months of the forwarding of the Case File by the Trial Chamber.<sup>80</sup> A decision could therefore be expected any time up to mid-February 2017 (assuming the Chamber is duly constituted). Clearly, the Trial Chamber could not declare the evidence closed until receiving the SCC decision on whether it needs to adjudicate these alleged additional charges. Thus, even if denied, the Appeal is likely to delay the completion of the trial in Case 002/02.
37. On the other hand, were this Appeal to be successful, a scenario the Co-Prosecutors envision as extremely unlikely given the lack of legal merit in the Appeal arguments, a much more substantial delay in the proceedings is certain to result. A ruling that changed the scope of Case 002/02 to include new charges would trigger an obligation on the Co-Prosecutors to re-review all material not yet disclosed to the Parties in Case 002 for relevance to rapes outside of forced marriage.
38. The International Co-Prosecutor (“ICP”) estimates that there are currently more than 3600 written records of interview, written records of investigative action, civil party applications and supplementary information, and DC-Cam statements on the Cases 003 and 004 case files that will need to be reviewed in order to fulfil that obligation. Once that review is complete, permission will be required from the CIJs to disclose all relevant documents to the Case 002 Parties and the Trial Chamber. Around 14 of the

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<sup>78</sup> E306 TC Preliminary Objections Decision, para. 3.

<sup>79</sup> E348/4 TC Confrontation Decision, para. 11.

<sup>80</sup> Internal Rule 108(4bis)(b).

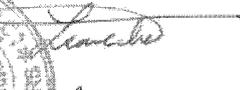
ICP's recent requests for permission to disclose documents have been litigated by the Case 003 and 004 parties - including a number of appeals to the PTC - resulting in substantial delays to the ICP's ability to provide disclosure to the Case 002 parties. As a result, the additional disclosure process alone would certainly delay the completion of the evidence in Case 002/02 by at least several months.

39. Based on past disclosures, the Accused will then likely request time to review this new documentation and to make any associated requests for the admission of evidence pursuant to Internal Rule 87(4). In view of their burden of proving the 'new' charges, the Co-Prosecutors also anticipate filing requests to the Trial Chamber for the admission of evidence pertaining to rape outside the context of forced marriage. Parties may also seek to call (or re-call) witnesses, civil parties, and/or experts regarding this additional aspect of the S-21, Kraing Ta Chan and Tram Kok Cooperatives segments.
40. The delay resulting from the addition of rape outside the context of forced marriage at this late stage in the Case 002/02 trial is therefore certain to be very substantial, and will further postpone the justice for which victims have been waiting for over four decades.

#### V. RELIEF REQUESTED

41. For the reasons set out above, the Co-Prosecutors respectfully request the SCC to dismiss the Appeal.

Respectfully submitted,

Date	Name	Place	Signature
24 October 2016	CHEA Leang Co-Prosecutor	Phnom Penh	
	Nicholas KOUMJIAN Co-Prosecutor		