



អគ្គនៅខ្ពស់ពិសោធន៍កម្មការអគ្គនៅ

Extraordinary Chambers in the Courts of Cambodia

Chambres Extraordinaires au sein des Tribunaux Cambodgiens

ព្រះរាជាណាចក្រកម្ពុជា  
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Kingdom of Cambodia  
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Nation Religion Roi

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Trial Chamber

Chambre de première instance

លំណែងលេខ: ០០២/១៩ កញ្ញា ៧០០៣/អគគ/អដសអ

Case File/Dossier No. 002/19-09-2007/ECCC/TC

Before:

Judge YA Sokhan, for President  
Judge Jean-Marc LAVERGNE  
Judge YOU Ottara  
Judge Claudia FENZ  
Judge THOU Mony

Date:

30 August 2016

Original language(s):

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**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**

**Co-Prosecutors**

CHEA Leang  
Nicolas KOUMJIAN

**Accused**

NUON Chea  
KHIEU Samphan

**Civil Party Lead Co-Lawyers**

PICH Ang  
Marie GUIRAUD

**Lawyers for the Defence**

SON Arun  
Victor KOPPE  
KONG Sam Onn  
Anta GUILLE

## **1. INTRODUCTION**

1. The Trial Chamber is seised of a Rule 92 submission by the Lead Co-Lawyers for the Civil Parties on the confirmation of the scope of Case 002/02 concerning the charges of rape outside the context of forced marriage.<sup>1</sup> The Lead Co-Lawyers seek clarification from the Trial Chamber of the portion of the decision entitled “Further information regarding remaining preliminary objections” dated 25 April 2014 regarding the scope of the criminal allegations concerning rape outside the context of forced marriage.<sup>2</sup> In particular, the Lead Co-Lawyers request the Trial Chamber 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 and that it will take any such action permitted under the Internal Rules in furtherance of the resulting obligation.<sup>3</sup> On 28 March 2016, the KHIEU Samphan Defence responded that the Request should be rejected.<sup>4</sup> The Lead Co-Lawyers submitted a reply on 4 April 2016.<sup>5</sup> No submissions were made by the Office of the Co-Prosecutors or the NUON Chea Defence.

## **2. SUBMISSIONS**

2. The Lead Co-Lawyers submit that the Closing Order seises the Trial Chamber of the factual allegations of the conduct amounting to rape at Tram Kok Cooperatives, Kraing Ta Chan Security Centre and S-21. They propose that the conduct be categorized as Crimes Against Humanity under the subcategories of Other Inhumane Acts through Rape, Other Inhumane Acts through Attacks against Human Dignity, and Torture, all of which have been explicitly included in the Decision on Additional Severance of Case 002 and Scope of Case 002/02. Further, the Lead Co-Lawyers note that, save for the qualification of the charge of Crime against Humanity of Rape as a stand-alone crime, the Co-Accused have been on

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<sup>1</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 (“Request”).

<sup>2</sup> Request, para. 1.

<sup>3</sup> Request, paras 16-17, 28.

<sup>4</sup> *Réponse de la Défense de M. KHIEU Samphan à la demande de clarification des Parties civiles concernant les accusations de viol*, E306/7/1, paras. 2-3, 7-13 (“KHIEU Samphan Response”).

<sup>5</sup> Lead Co-Lawyers’ Reply to KHIEU Samphan Defence’s Response to Request for Clarification on Rape outside Forced Marriage, E306/7/2 (“Reply”). In e-mails of 31 March and 1 April 2016, the Lead Co-Lawyers sought leave to reply and to do so in English only. Both requests were granted by the Chamber in an e-mail sent by the Trial Chamber Senior Legal Officer on 4 April 2016.

notice of the charges of rape since 2009 and the facts and allegations in question subsequently included in the Closing Order.<sup>6</sup>

3. The Lead Co-Lawyers specifically allege that the Co-Investigating Judge did not dismiss the factual allegations of rape in the Closing Order and that the language therein was confined to concluding that the factual allegations of rape and the related evidence at that stage did not amount to “one of the crimes used by the CPK leaders to implement the common purpose”. They submit that there was no explicit Dismissal Order as required under Article 177 of the *code de procédure pénale*.<sup>7</sup>

4. The Lead Co-Lawyers further contend that the Chamber is under a positive obligation to consider the factual allegations of rape that are indicted and duly notified, and to decide pursuant to Internal Rule 98 on the international criminal responsibility of the Co-Accused. They assert that the Trial Chamber possesses discretion not only to legally characterise those factual allegations but also to choose and assign a mode of liability to the findings of the concerned substantive offence, and that the only limit to the Chamber’s powers in this respect is that the new legal characterisation cannot introduce new constitutive elements. The Lead Co-Lawyers finally submit that whether the factual allegations are established through the evidence and these constitute rape as a substantive crime is to be determined by the Chamber when assessing the totality of evidence at the Judgement stage. Until said time, the Trial Chamber is vested with the discretion to hear evidence on the conduct of rape outside the context of Forced Marriage falling within the scope of Case 002/02 and is under obligation to determine the related factual and legal findings.<sup>8</sup>

5. The KHIEU Samphan Defence responds that the Trial Chamber has twice ruled that the Accused are not charged with rape outside the context of forced marriage, and that the Request effectively asks for reconsideration of those decisions.<sup>9</sup> The KHIEU Samphan Defence submits that the Trial Chamber is seised only of factual allegations for which the accused has been charged, and not of other factual allegations simply because they are mentioned in the Closing Order. The Defence submits that the Co-Investigating Judges concluded in the Closing Order that the Co-Accused hold no criminal responsibility for rape outside the context of forced marriage. The KHIEU Samphan Defence further submits that,

<sup>6</sup> Request, paras 21-22; Reply, para. 2.

<sup>7</sup> Request, paras 18-20; Reply, paras. 2-4.

<sup>8</sup> Request, paras 23-26; Reply, para. 2.

<sup>9</sup> KHIEU Samphan Response, paras 2-3

despite the absence of an explicit Dismissal Order, the Co-Investigating Judges have clearly ruled on the matter with an implicit Dismissal Order contained in the Closing Order.<sup>10</sup>

6. The KHIEU Samphan Defence contends that the Trial Chamber is prevented from changing the legal re-characterisation of the factual allegations of which it has not been seized by the amended Closing Order.. The KHIEU Samphan Defence emphasises that, contrary to the Lead Co-Lawyers' arguments, the Chamber has clearly defined the scope of Case 002/02 as attested not only in the Severance Order of Case 002 but in prior and subsequent decisions delimiting the scope of the case.<sup>11</sup>

### **3. APPLICABLE LAW**

7. Internal Rule 98(2) states in relevant part:

The judgment shall be limited to the facts set out in the Indictment. The Chamber may, however, change the legal characterisation of the crime as set out in the Indictment, as long as no new constitutive elements are introduced.

8. Internal Rule 98(3) states 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 these acts.”

### **4. FINDINGS**

9. The Chamber considers that the scope of Case 002/02 concerning the charges of rape outside the context of forced marriage has been clearly established by the Closing Order, as amended by the Pre-Trial Chamber, the Additional Severance Order, the Trial Chamber decision on “Further information regarding remaining preliminary objections”, and the “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”. The Chamber will examine each of these decisions in the following paragraphs in order to provide the clarification sought by the Lead Co-Lawyers for the Civil Parties.

10. As previously established, Internal Rule 98(2) permits the Trial Chamber to make changes to the legal characterisation of both crimes and forms of responsibility while

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<sup>10</sup> KHIEU Samphan Response, paras 7-13.

<sup>11</sup> KHIEU Samphan Response, paras. 15-18

mandating that any such legal re-characterisation be limited to the facts set out in the Amended Closing Order. This well-established limitation on re-characterisation is reiterated in the proviso of Internal Rule 98(2) that no new constitutive elements be introduced.<sup>12</sup> The Chamber must ensure that the power of legal re-characterisation is exercised in accordance with a number of fair trial safeguards: (i) no violation of the fair trial rights of the Accused may be entailed; (ii) the crime in question must fall within the jurisdiction of the ECCC, and (iii) the form responsibility in question must be applicable before the ECCC.<sup>13</sup>

11. The Request relies on facts described in the Closing Order as rape which occurred outside the context of forced marriage. The Lead Co-Lawyers seek recharacterisation of those facts as crimes against humanity of torture, other inhumane acts through rape, or other inhumane acts through attacks against human dignity. While torture and other inhumane acts constitute separate and recognized offences both within the ECCC Law and under customary international law, 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.<sup>14</sup>

12. The Chamber recalls that the dispositive section of the Closing Order finds that there is sufficient evidence that the Accused committed crimes against humanity of rape, among other crimes.<sup>15</sup> While no indication is given as to whether the crime of rape as charged therein covers all instances of rape both within and outside the context of forced marriage, the Chamber finds that the dispositive shall be read in light of the relevant paragraphs of the Closing Order in which legal findings on rape are made.

13. The Chamber recalls that the Closing Order states in the section regarding rape that it was “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>16</sup>. The Closing Order further finds that “[a]t 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

<sup>12</sup> *KAING Guek Eav Trial Judgement*, E188, paras. 493-494.

<sup>13</sup> *Ibid*, paras. 492-496

<sup>14</sup> Case 002/01 Judgment, E313, paras 176- 177, 435-437; see also *KAING Guek Eav Trial Judgement*, E188, paras 367-371.

<sup>15</sup> Closing Order, Case 002, D427, pp. 397-398.

<sup>16</sup> Closing Order, Case 002, D427, para. 1426.

victim, of which the perpetrators were aware, and the contextual elements of rape as a crime against humanity are linked.”<sup>17</sup>

14. Despite these clear factual findings of rape outside forced marriage, the Closing Order concluded that rape outside the context of forced marriage could not be considered as “one of the crimes used by the CPK leaders to implement the common purpose.”<sup>18</sup> The Closing Order accordingly found that the legal elements of the crime against humanity of rape had only been established for rape within the context of forced marriage.<sup>19</sup>

15. 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>20</sup>

16. On appeal, the Pre-Trial Chamber found that the facts charged in the Closing Order as crimes against humanity in the form of rape could be categorized as “crimes against humanity of other inhumane acts”.<sup>21</sup> However, this ruling was clearly limited to the allegations of rape actually charged in the Closing Order, that is, rape within the context of forced marriage.

17. At the trial stage, contrary to the submission of the Lead Co-Lawyers, the Additional Severance Order did not incorporate allegations of rape outside forced marriage which were not charged in the Closing Order.<sup>22</sup> This has been the consistent understanding of the Trial Chamber, recently reiterated in two decisions. First, on 25 April 2014, the Trial Chamber found that “there was 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

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<sup>17</sup> *Ibid* para. 1427.

<sup>18</sup> *Ibid*, para. 1429.

<sup>19</sup> *Ibid*, para. 1430.

<sup>20</sup> See section regarding Legal Findings on Modes of Responsibility, D427, paras 1521 *et seq.*

<sup>21</sup> Decision on Ieng Sary’s Defence’s Appeal Against the Closing Order, D427/1/26, 13 January 2011, para 7(2); see also Decision on Khieu Samphan Defence Appeal from the Closing Order, D427/4/14, 13 January 2011, para. 2(12) and Decision on Ieng Thirith and NUON Chea’s Appeal against the Closing Order, D427/4/14, 13 January 2011, para. 2(12).

<sup>22</sup> Decision on Additional Severance of Case 002 and Scope of Case 002/02, E301/9/1, 4 April 2014; see also List of paragraphs and portions of the Closing Order relevant to case 002/02, E301/9/1.1, 4 April 2014, p. 4.

Centres to the Closing Order...”<sup>23</sup> The Chamber recalled that the “Co-Investigating Judges specifically found that while rape did occur in security centres, these crimes could not be linked to the Accused as evidence did not support a finding that the CPK leaders used rape as a policy in security centres” and “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 Co-Investigating Judges, a decision that was not disturbed by the Pre-Trial Chamber.”<sup>24</sup>

18. On 12 June 2015, the Trial Chamber reiterated that charges of rape outside forced marriage were excluded from the Closing Order. Referring to decision E306, the Chamber recalled that it had 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 and Cooperatives as set out in the Closing Order, and noted, in the specific case of Kraing Ta Chan Security Centre, that no allegation was made that the Accused bore criminal responsibility for those acts on the basis of any other mode of liability. The Chamber noted, however, that the occurrence of rape in Kraing Ta Chan Security Centre may be relevant to, among other topics, the conditions in that Security Centre.<sup>25</sup>

19. The Chamber finds that the Request, if granted, would have the effect of adding new charges or bringing new modes of responsibility against the Accused for factual allegations which were not formally charged in the Closing Order. In so doing, the Chamber would go beyond the powers entrusted upon it under Rule 98 (2).

20. Finally, the Chamber finds that, contrary to the submission of the KHIEU Samphan Defence, it has not been asked to reconsider its prior rulings on this subject. Accordingly, the Chamber has merely provided clarification of the scope of charges of rape against the Accused in Case 002/02, as established by the relevant rulings examined above.

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<sup>23</sup> Further information regarding remaining preliminary objections, E306, para. 3.

<sup>24</sup> *Ibid*

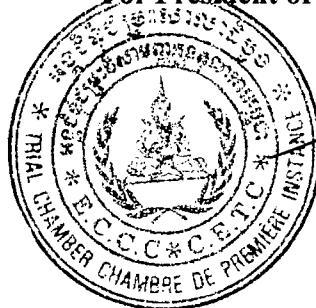
<sup>25</sup> Decision on KHIEU Samphan’s Request for Confrontation among Witness Srey Than and Civil Parties SAY Sen and SAUT Saing and Disclosure of Audio Recordings of Interviews of Say Sen, E348/4, para. 11.

**FOR THE FOREGOING REASONS, THE TRIAL CHAMBER HEREBY**

**REJECTS** the request to recharacterise the factual allegations of rape at Tram Kok Cooperatives, Kraing Ta Chan Security Centre and S-21.

Phnom Penh, 29 August 2016

For President of the Trial Chamber



YA Sokhan