**BEFORE THE TRIAL CHAMBER**

**EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**



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# 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

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**Before:**

**The Trial Chamber**

Judge NIL Nonn, President
Judge Silvia CARTWRIGHT
Judge YA Sakhan
Judge Jean-Marc LAVERGNE
Judge THOU Mony

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## I. BACKGROUND

1. On 16 June 2011, the Office of the Co-Prosecutors ("OCP") submitted a request to re-characterize the facts establishing the conduct of rape as a crime against humanity described, in its own right, as an offence of rape rather than as "other inhumane acts". The OCP requests the re-characterization of the conduct of rape adopted by the Pre-Trial Chamber ("PTC") and the application instead of the original characterization set out in the Closing Order, which more specifically reflects the nature of the harm done.[1]
2. On 7 July 2011, the Trial Chamber ("TC") invited the parties to respond to the OCP's request by 22 July 2011.[2]

## II. PRELIMINARY REMARK

3. Civil Party Lead Co-Lawyers and Co-Lawyers for Civil Parties fully join and incorporate the arguments of the OCP. It is accurate that rape had already crystallized in customary international law as a crime against humanity by 1975, at which time it was accessible and foreseeable to the Accused.
4. In addition, the Civil Party Lead Co-Lawyers and Co-Lawyers for Civil Parties add, in this submission a number of supplementary arguments in support of the assertion that rape had already been recognized as a listed crime under crimes against humanity at the relevant time. The principle of legality is not violated by the ECCC Law[3] and the subsequent characterization of rape as an underlying offence under Crimes against humanity.
5. Civil Party Lead Co-Lawyers and Co-Lawyers for Civil Parties will use the term "forced marriage" instead of the term "regulation of marriage" which is used in the Closing Order. Civil Party Lead Co-Lawyers and Co-Lawyers for Civil Parties find that the term "regulation of marriage" inadequately represents the unlawfulness, seriousness and gravity of the conduct that constituted the crime of forced marriage. The term "Regulation of Marriage", as used by the Co-Investigating Judges (CIJ) trivializes the harm to which the victims of this crime were subjected. The mere "regulation" does not

[1] Co-Prosecutors' Request for the Trial Chamber to Recharacterize the Facts Establishing the Conduct of Rape as the Crime Against Humanity of Rape as the Crime Against Humanity of Rape rather than the Crime against Humanity of other Inhumane Acts, 16 June 2011, E99.
[2] Decision on Extension of Time, 7 July 2011, E107.
[3] The Law on the Establishment of the Extraordinary Chambers, Article 5 states that, "Crimes against humanity, which have no statute of limitations, are any acts committed as part of a widespread or systematic attack directed against any civilian population...such as...rape."

even clearly indicate criminal conduct.

## III. ARGUMENT

***The development and purpose of the creation of Crimes against humanity***

6. The history of the laws and customs of war and their regulations can be traced back to the nineteenth century.[4] Breaches of international humanitarian law may be held as war crimes. Importantly, the *protected target groups* of war crimes are enemy combatants and civilians of the adverse party in occupied territories or persons in internment or concentration camps; and, in addition, specially protected persons such as medical personnel and personnel participating in humanitarian organizations.
7. The explicit prohibition of rape as a violation of the laws and customs of war can be found dating back to 1863 in the instructions provided to the Armies of the United States during the Civil War[5]. The prohibition of rape within the context of the laws and customs of war has been established ever since.
8. It is important to note that serious and grave crimes committed by the aggressor against its own civilian population were not covered by the regulations of war. The failure to protect the aggressor's own civilian population was first discussed in relation to the mass killings of Armenians by the Ottoman Empire. This resulted in the first mention of *new* crimes against humanity and *civilization* in the France, Britain and Russia Joint Declaration of 24 May 1915[6] addressing the crimes against Armenians.
9. In 1919, the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties[7] listed rape as a high ranking (*war*) crime[8]. The United States successfully objected to the Commission's position on the basis of the "precision and

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[4] *See* The Hague Peace Conferences of 1899 and 1907 resulted in thirteen international conventions. The Hague Conventions regulate the use of weapons and the methods of warfare. The Geneva Convention of 1864, revised in 1906 concern the protection of the individual against the abusive use of force. These two bodies were the primary regulations of codified humanitarian law in effect of the beginning of World War I. For an overview on the entire regulations see, http://www.icrc.org/ihl.nsf/INTRO?OpenView.

[5] Instructions for the Government of Armies of the United States in the Field (Lieber Code), 24 April 1863, article 44.

[6] See Cassese, Antonio, International Criminal Law, Second Edition, Oxford (2008), p. 101, reference in fn 5. The Peace Treaty of Sèvres, 11 August 1920, at http://www.hri.org/docs/sevres/ which intended to set up a tribunal for to try the mass crimes was never adopted. The later adoption of the Peace Treaty of Lausanne, 24 July 1923 granted amnesty for the crimes committed between 1914 and 1922.

[7] Commission on the Responsibility of the Authors of War and on Enforcement of Penalties, report Presented to the Preliminary Peace Conference, Versailles, 29 March 1919, reprinted in American Journal of International Law [AJIL] 14, 95-154. The envisaged tribunal was never established. Instead the prosecution of war crimes was handed over to German Courts as a political compromise and due to conflicts of interests between the allied. See Kai Ambos, Internationales Strafrecht, p. 90, paras. 4-5.

uncertain term of *laws of humanity*".[9] It is likely that the hesitation was rooted in an unwillingness to intervene in the sovereignty of a state to deal with horrendous crimes against committed against its own population.

10. Civil Party Lead Co-Lawyers and Co-Lawyers for Civil Parties submit that the Commission expressed the overall consent and view of the international community. The crime of rape was listed fifth out of 32 crimes which were to be considered as the most serious and grave crimes. Despite the fact that, until 1919, the target groups were limited to protected groups during war (due to political considerations), there is no obstacle to adopting the same list of crimes for the later established crimes against humanity. War crimes and crimes against humanity have in common that they address the most serious and grave crimes. Therefore, the list of crimes against humanity must include the separate and individual crime of rape.
11. After World War II, for the first time in international criminal law, crimes against humanity were created and became part of the subject-matter jurisdiction of the Charter of the International Military Tribunal ("IMT")[10]. The creation of this new category of crimes arose from the Allies' realization became aware that the crimes of warfare protected only adversary and enemy populations, but did not cover the crimes committed by the (German) aggressor against its own population. Such a state of affairs would have precluded prosecution of Nazi crimes against German Jews and other persecuted groups within the German population, such as the Roma/Sinti, communists, trade union members, socialists, "bad and unworthy elements", members of the church and homosexuals. Additionally, it would have excluded crimes against nationals of foreign states who were not under formal occupation, but "annexed" like Austria and stateless Jews and the Roma/Sinti. This normative framework would have led to the absurd result that the killing of a Polish Jew would be considered a war crime, whereas the same act against a German Jew would go unpunished.
12. Accordingly, there originated a new crime against humanity, which had the purpose of filling the gap when "only" war crimes would be prosecuted and crimes against the

[8] See 14 AJIL, p.114.
[9] Banteakas, Ilias and Nash, Susan, International Criminal Law, Third Edition, Routledge Cavendish, (2007), at p. 126.
[10] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal. London, 8 August 1945, at ttp://www.icrc.org/ihl.nsf/FULL/350?OpenDocument.

population of the aggressor by the aggressor would not. However, the existing nexus between crimes against humanity and war crimes or crimes against peace was the result of a reluctance to prosecute crimes committed before the war started and to interfere with the sovereignty and the interests of third states.[11]

13. The additional requirement of crimes against humanity was the 'widespread or systematic attack against any civilian population', which excluded single individual acts from falling within the scope of this crime or from being prosecuted in domestic courts.
14. Civil Party Lead Co-Lawyers and Co-Lawyers for Civil Parties note that war crimes and crimes against humanity were treated as similar crimes by the IMT. It can be observed that the IMT "avoided clearly identifying the distinction between the two classes [war crimes and crimes against humanity], preferring instead to find that in many cases the defendant was answerable for both"[12]
15. The crimes that were finally listed as crimes against humanity in the IMT Charter must be seen in the light of the development of "crimes against humanity" as crimes similar in nature to war crimes but targeted against a different group of people. Reviewing the historical context and discourse in the aftermath of World War II, Civil Party Lead Co-Lawyers and Co-Lawyers for Civil Parties submit that failure to list other crimes such as torture, imprisonment and rape is not an indication that these crimes were not included. The wording of the Charter, which states that, "[…] *namely*, murder, extermination, enslavement, deportation […]", (*emphasis added*) suggests that this list is not exhaustive and the listed crimes are merely examples of serious and grave crimes—as they are listed in the 1919 Commission's list.
16. Furthermore, the crime of rape should be included as a crime against humanity since the drafters wanted to include the most horrendous crimes against mankind, the crimes that are "[p]unishable under the penal codes of all civilized nations."[13] Interestingly, the Defense in the Nuremberg trials did not object to the retroactive application of crimes against humanity, only referring to the non-retroactivity of crimes against peace. There are no doubts that rape was, at that time, an offence that all civilized nations held punishable in their national jurisdictions and considered to be a grave and serious crime.

[11] See Cassese, at p. 103-104.
[12] See Cassese, at p. 106.
[13] See quotation in footnote 21 in, Cassese, at p. 106.

17. Civil Party Lead Co-Lawyers and Co-Lawyers for Civil Parties take note that the list of "Members and Alternate Members of the Tribunal" and the "Prosecution Counsel" contain no female participants. The "Roster of Representatives and Assistants" to the International Conference on Military Trials, London 1945, lists only two women - as secretaries.[14] This may be a significant factor in the neglect and subsequent omission of rape as a crime listed as a crime against humanity, as well as the precedence given to other listed crimes.
18. It is the view of Civil Party Lead Co-Lawyers and Co-Lawyers for Civil Parties that the well established list of war crimes, dated 1919, applies to the newly created Crimes against humanity. This is supported by the fact that four months after the Nuremberg Charter, the Control Council Law 10[15] ("CCL10") was adopted and included rape, torture and imprisonment as listed crimes under Crimes against humanity. During these four months there was no development in international criminal law that would explain this change and thus it can be concluded that the omission in the IMT Charter is not an expression that rape did not exist as a crime against humanity in August 1945. Nobody would seriously argue that torture and imprisonment are not to be considered listed offences in their own right under Crimes against humanity because they were not listed in the Nuremberg statute. Therefore, the same applies for rape.
19. The Co-Lawyers for Civil Parties submit that the omission of rape as a listed crime under Crimes against humanity in the IMT Charter is not an indication that rape was not considered as a Crime against Humanity but reflects an oversight. Rape was recognized in national jurisdictions worldwide as a serious and horrendous crime and listed as a war crime since at least 1919. The purpose of the newly created category of "Crimes against humanity" was to allow the prosecution of the same underlying crimes listed as war crimes committed against a different target group.

***Rape as an offence in its own right under crimes against humanity in national jurisdictions***

20. Co-Lawyers for Civil Parties submit that the prosecution of rape as a Crime against Humanity had already occurred in national jurisdictions in the early 1900s.

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[14] Quoted in Askin, Kelly, *War Crimes Against Women:Prosecution in International War Crimes Tribunals* Cambridge, Mass.: Kluwer Law International (1997), fn. 343.

[15] See Article 2 of the Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, December 20, 1945, 3 Official Gazette Control Council for Germany 50-55 (1946), at http://www1.umn.edu/humanrts/instree/ccno10.htm.

21. In China, a war crimes tribunal was established through the "Law Governing the Trial of War Criminals", dated 24 October 1946.[16] In the Law Reports of the War Crimes Commission[17] the scope of the subject matter jurisdiction was described as follows:

> *"The Offences included in Article II, paragraph 3, of the Chinese Law of 24 October 1946, correspond in spirit with the concept of* ***crimes against humanity*** *as it evolved in the definitions of Article 6 (c) of the Nuremberg Charter, Article 5 (c) of the Far Eastern Charter, and Article II (1) (c) of the Control Council Law No. 10. These provisions cover a field of acts which do not or may not constitute war crimes in the narrower sense, but are similar to them on account of their inhumane nature. They are generally understood to be acts committed systematically, repeatedly and on a vast scale against the civilian population, in pursuance of purposes ranging from the forcible denationalization of the population to its biological extermination."*

22. This example demonstrates that the category of Crimes against humanity was used in a national war crimes tribunal to cover crimes of an inhumane nature that would not exclusively fit under war crimes. Co-Lawyers for Civil Parties note that the statute of the Chinese war crimes tribunal combined the Nuremberg and Tokyo tribunals' statutes and the CCL No. 10 (and Chinese national law). The scope of crimes against humanity thus allowed for the prosecution of rape as a crime against humanity.

23. In the case of *Takashi,* crimes against humanity as defined in the CCL No. 10 were the legal basis for the conviction. Thus, Takashi Sakai was convicted and sentenced to the death penalty for Crime against Peace, war crimes and, among others, for rape as a (listed) Crime against Humanity. The Tribunals is quoted as follows:

> *"In inciting or permitting his subordinates to murder prisoners of war, wounded soldiers, nurses, doctors of the Red Cross and other non-combatants, and to commit acts of rape, plunder, deportation, torture and destruction of property, he had violated the Hague Convention concerning the Laws and Customs of War on Land and the Geneva Convention of 1929. These offences are war crimes and crimes against humanity."*[18]

24. The Tribunal seems to distinguish the relevant categories of law by target group: The Accused was convicted for those crimes committed against the group of protected persons under the Hague/Geneva Conventions as war crimes, while the other acts, such as rape, plunder, deportation and torture were convicted as Crimes against humanity.

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[16] Chinese War Crimes Tribunal of the Ministry of National Defence, Nanking 29 August 2946, in: Law reports of Trials of War Criminals selected and prepared by the United War Crimes Commission, London (1946), Volume XIV, ANNEX, at http://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-14.pdf.

[17] See *supra*, Law reports, at p. 154-155.

[18] *Ibid*, at p. 7.

This was possible because of the broad legal basis adopted by this Tribunal, including the CCL No. 10. However, the judgment also demonstrates that the Tribunal did not elaborate the distinct elements of war crimes and Crimes against humanity. This demonstrates how these interrelated categories overlapped at that time. [19]

25. In the Far East several thousands trials against war criminals were held, with about 600 in China alone.[20] The described case of *Takashi Sakai* shows the use of the broad and combined legal bases of the Chinese war crimes tribunal(s) as an additional and strong indication that rape, considered a Crime against Humanity, was customary international law at that time.

***National legislation on rape as war crime or otherwise prohibited in the context of war***

26. During the jurisdictional period of the ECCC, from 1975-1979, rape was a crime virtually worldwide among national jurisdictions. In addition, in the three decades following 1945, a number of national legislations and military manuals codified the crime of rape as a serious violation of international humanitarian law.[21] Rape was recognized as a war crime in many national jurisdictions by 1975.

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[19] See Askin, Kelly at p. 138: "There was significant overlap between charges of war crimes and crimes against humanity."

[20] See War Crimes Study Center, at http://socrates.berkley.edu/~warcrime/PT.htm. Only ca. 220 cases have been analyzed. The rest is still sealed. Sexual violence/rape is not a key-word within the analyzing process.

[21] *See* http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule93. See, e.g.,
**Military Manuals -** Argentina (1969): Argentina's Law of War Manual (1969) stipulates: "Women will be especially protected against attempts on their honour, particularly against rape, enforced prostitution and indecent assault."
* Argentina, *Leyes de Guerra*, RC-46-1, Publico, II Edición 1969, Ejercito Argentino, Edición original aprobado por el Comandante en Jefe del Ejercito, 9 May 1967, Section 4.010. China (1947): China, PLA Rules of Discipline: The PLA Rules of Discipline (1947) provides that women are not to be assailed with obscenities. * China, *Order on Re-Promulgation of the Three Main Rules of Discipline and the Eight Points for Attention by the Headquarters of the PLA*, 10 October 1974, in *Selected Works of Mao Zedong*, Vol. 4, The People's Press, p. 1241, Point 8. Nigeria (1967): Nigeria's Operational Code of Conduct (1967) provides: "Women will be protected against any attack on their person, honor and in particular against rape or any form of indecent assault." * Nigeria, *Operational Code of Conduct for Nigerian Armed Forces*, Federal Military Government of Nigeria, July 1967, Section 4(i). United Kingdom of Great Britain and Northern Ireland (1958): The UK Military Manual (1958) states: "Women must be specially protected against any attack on their honour, in particular against rape, enforced prostitution or any form of indecent assault." According to the manual, the rule also applies in occupied territories. The manual further specifies that forcing women into prostitution, even if it is not considered as a grave breach of the 1949 Geneva Conventions, qualifies as a war crime. * United Kingdom, *The Law of War on Land Being Part III of the Manual of Military Law*, The War Office, HMSO, 1958, Sections 39, 547 and 626. United States of America (1956): The US Field Manual (1956) restates Article 27 of the 1949 Geneva Convention IV. United States, *Field Manual 27-10, The Law of Land Warfare*, US Department of the Army, 18 July 1956, as modified by Change No. 1, 15 July 1976, Section 266.
**National Legislation on War Crimes -** Australia (1945): Australia's War Crimes Act (1945) provides that rape and "abduction of girls and women for the purpose of enforced prostitution" are war crimes. * Australia, *War Crimes Act*, 1945, Section 3. Bangladesh (1973): Bangladesh's International Crimes (Tribunal) Act (1973) states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is

***Requirement of a conviction under CCL No. 10***

27. The Pre-Trial Chamber found that the fact that no conviction for rape followed under CCL No.10 is an argument that the codification of rape as a Crime against Humanity in the CCL No. 10 is not sufficient.[22]

28. Co-Lawyers for Civil Parties object to this argument on the basis of its merits. The codification of rape as a listed crime under Crime against Humanity *alone* expresses the view of the international community that rape was considered a Crime against Humanity. The fact that there were no convictions can be explained by various factors including the fact that those responsible for the prosecution's strategy were all males, that there was a general reluctance to deal with rape cases at that time, and the common view that it was

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a crime. * Bangladesh, *International Crimes (Tribunal) Act*, 1973, Section 3(2)(e). China (1946): China's Law Governing the Trial of War Criminals (1946) provides that rape and "kidnapping females and forcing them to become prostitutes" is a war crime. * China, *Law Governing the Trial of War Criminals*, 1946, Article 3(3) and (17). Denmark (1977): Any person who uses war instruments or procedures the application of which violates an international agreement entered into by Denmark or the general rules of international law, shall be liable to the same penalty [i.e. a fine, lenient imprisonment or up to 12 years' imprisonment]. * Denmark, Military Criminal Code (1973), as amended in 1978, Section 25(1). Ethiopia (1957): Under Ethiopia's Penal Code (1957) "compulsion to acts of prostitution, debauchery and rape" are war crimes against the civilian population. * Ethiopia, *Penal Code*, 1957, Article 282(f). Hungary (1978): Under Hungary's Criminal Code (1978), as amended in 1998, taking measures aiming at the prevention of births within a national, ethnic, racial or religious group, as a part of a genocide campaign, constitutes a "crime against the freedom of peoples". * Hungary, *Criminal Co*de, 1978, as amended in 1998, Section 155(1)(d). Ireland (1962): Ireland's Geneva Conventions Act (1962), as amended in 1998, provides that any "minor breach" of the 1949 Geneva Conventions, including violations of common Articles 3 and 27 of the Geneva Convention IV, and of the 1977 Additional Protocol I, including violations of Articles 75(2), 76(1) and 77(1), as well as any "contravention" of the 1977 Additional Protocol II, including violations of Article 4(2)(e), are punishable offences. * Ireland, *Geneva Conventions Act*, 1962, as amended in 1998, Section 4(1) and (4). Israel (1950): Israel's Nazis and Nazi Collaborators (Punishment) Law (1950) includes "imposing measures intended to prevent births among Jews" in its definition of genocide. * Israel, Nazis and Nazi Collaborators (Punishment) Law, 1950, Section 1(b). Lithuania (1967): Under Lithuania's Criminal Code (1961), as amended in 1998, "rape of women or forcing them to engage in prostitution" constitutes a war crime. * Lithuania, Criminal Code, 1961, as amended in 1998, Article 336. Myanmar (1959): Myanmar's Defence Service Act (1959) provides: Any person subject to this law who commits an offence … of rape in relation to [any person not subject to military law] shall not be deemed to be guilty of an offence against this act and shall not be tried by a court-martial unless he commits any of the said offences … while n active service. * Myanmar, *Defence Service Act*, 1959, Section 1972. Netherlands (1946): The Definition of War Crimes Decree (1946) of the Netherlands includes "rape" and "abduction of girls and women for the purpose of enforced prostitution" in its list of war crimes. * Netherlands, *Definition of War Crimes Decree*, 1946, Article 1. Niger (1961): According to Niger's Penal Code (1961), as amended in 2003, it is a crime of genocide to adopt "measures aimed at preventing birth" within a group, with the intent to destroy partially or totally a national, ethnic, racial or religious group or a group defined on the basis of any other arbitrary criterion. * Niger, Penal Code, 1961, as amended in 2003, Article 208.1. Republic of Korea (1962): The Republic of Korea's Military Criminal Code (1962) provides that the rape of women in combat or in an occupied zone is punishable by the death penalty. * Republic of Korea, Military Criminal Code, 1962, Article 84(1). Yugoslavia (1945): The Socialist Federal Republic of Yugoslavia's Criminal Offences against the Nation and State Act (1945) considers that, during war or enemy occupation, "any person who ordered, assisted or otherwise was the direct executor of … abduction for prostitution, or raping" committed war crimes. * Yugoslavia, Socialist Federal Republic of, Criminal Offences Against the National and State Act, 1945, Article 3(3).

[22] Decision on IENG Sary's Appeal Against the Closing Order, 11 April 2011, D427/1/30, at para. 368.

more important to prosecute crimes such as mass killings than rape which was "only" committed against female persons. In addition, the shame and silence surrounding sexual crimes was a factor that made the prosecution of sexual crimes unlikely. There were many prejudices linked to sexual crimes and which contributed to the neglect of this category of crimes at the time.[23] Askin further notes that "the Allies wanted to limit the prosecution of the Nazis and Japanese from crimes which were not likewise committed by the Allied troops, namely, mass extermination and crimes against peace, and not for crimes which were regularly committed by Axis and Allied troops alike- most notably rape crimes"[24].

29. In the case against *Gaertner*, the defendant was charged among others with rape committed in the Nazi concentration camp Sachsenhausen as a war crime under CCL No. 10. In this case, the *Tribunal Supérieur de la Haute Commission Alliée en Allemagne à Rastatt* upheld the decision that the Defendant was not convicted for rape, on the grounds that no direct evidence from the victims of rape was available and thus there was insufficient evidence for a conviction.[25]
30. It can be deduced from the Case against *Gaertner* that, in cases of sexual violence, the lack of live testimony of victims was common. As a result, even if prosecuted, there were no convictions.
31. Regardless of the reasons for the lack of convictions, it is still the case that rape was listed under Crimes against humanity in the CCL No.10 reflecting international understanding at the time of the seriousness and gravity of the crime of rape and its appropriate characterization.

***Rapes outside of the context of forced marriages***

32. Both the OCP in its Final Submission and the OCIJ in its Closing Order found that several incidents of rape had been committed in Security Centers and Cooperatives outside of the context of forced marriage.[26] However, the OCIJ did not indict these

[23] Askin, Kelly, War Crimes against Women, The Hague (1997), fn. 314.
[24] Askin, at p. 163.
[25] Case against *Gaertner, Johann*, Haut Commissaireat de la Republique Français en Allemagne, Tribunal Supérieur de la Haute Commission Alliée en Allemagne, Jugement en Matière d'Appel, 5 September 1950, No. 332/904, p.5.
[26] *See* OCP Rule 66 Final Submission, 16 August 2010, D390, paras. 382, 410, 470, 485, 506, 580, 656 & 768. *See* also Closing Order, 15 September 2010, D427, paras. 1426.

cases, noting that the official CPK policy regarding rape was to "[p]revent its occurrence and to punish the perpetrator" and that "it cannot be considered that rape was one of the crimes used by the CPK leaders to implement the common purpose"[27].

33. However, there is evidence[28] to suggest that perpetrators were not punished for rape if they were considered to be good revolutionaries. There is at least one case when either the alternate member of the Standing Committee, SON Sen, or the permanent member of the Standing Committee, NUON Chea, was informed about a rape committed at S-21, but did not order any sanction against the perpetrator.[29] Further, Co-Lawyers for Civil Parties observe that the Closing Order notes that the common purpose of the CPK was *inter alia* to "defend the Party against internal and external enemies, by *whatever means necessary*"[30] (emphasis added).

34. Co-Lawyers for Civil Parties recall that facts relating to only a few cases of sexual violence, rapes in particular, are mentioned in the Closing Order. These cases are reported from S-21, Kraing Ta Chan, North Zone security center, Prey Damrei Srot, Sang prison and Tram Kak cooperative.[31] Out of these cases, only one woman, a victim of a rape in S-21[32], survived. She is currently an admitted as a civil party in Case 002, although her civil claims were rejected in Case 001.[33] Co-Lawyers for Civil Parties submitted new statements[34] on her behalf, which are intended to contribute to the Trial Chamber's assessment of the findings of liability in the Closing Order. The statements demonstrate that those females who were already considered as an "enemy" and/or "bad element" were often raped before they were killed. In all cases the rapes were not hidden, were part of the common knowledge of the surrounding community and were known by the respective superiors.

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[27] Ibid. para 1429.
[28] *See* Civil Parties' Request for Submission to Case File Document Concerning Rape in Democratic Kampuchea, 20 July 2009, D190 and five Annexes; OCIJ Witness statement of Iep Duch, 30 October 2007, D25/28 (at p.10) and Fifth Investigative Request of Co-Lawyers for Civil Parties Concerning the Interview of a Witness and a Civil Party in Relation to Forced Marriage and Rape, 29 January 2010, D348 at paras. 15-19 referring to case 001.
See also E9/32, paras.
[29] *See Case against Kaing Guek Eav*, Judgment, E188, para. 246.
[30] *Ibid* , para. 158.
[31] *See* Closing Order, 15 September 2010, Doc.No. D427, para. 1426.
[32] *Ibid.*, para. 458.
[33] The case is pending before the Supreme Court Chamber.
[34] Civil Party Lead Co-Lawyers Lists of Documents and Exhibit (ANNEX 7 and 8), 19 April 2011, E9/32.

35. The rapes can be attributed to the Accused because of the failure to effectively control their subordinates and the failure to take necessary and reasonable measures. Although the superiors of the perpetrators were aware of the existence of the rapes, they did not punish the perpetrators. Neither the killings nor the rapes were punished because both crimes were part of the enemy policy. The Accused would have known that these rapes were committed by their subordinates and still failed to punish them. The new statements will contribute to contradict the conclusion of the OCIJ in the Closing Order[35] that rape outside the context of Forced Marriage cannot be linked to the Accused because the policy was to punish rape and sexual violence.
36. Further, the Closing Order states, that :

> "[S]ecurity 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,"[36]

37. This statement is incorrect. The approach of the Khmer Rouge to sexual crimes, as depicted in this statement, is not an accurate representation of the policy which was applicable throughout all of Cambodia between 1975 and 1979. Subsequently, the conclusion drawn by OCIJ that there was a policy of prosecuting and punishing sexual violence is simply untrue.
38. The Co-Investigating Judges (CIJs) omitted the fact that, at Sang Security Center, the perpetrators were arrested for only one week and then released.[37] This cannot be considered a "punishment" commensurate with the crime committed or intended to reflect state policy towards the conduct of rape. Furthermore, according to the Civil Parties' statements[38], these perpetrators resumed their positions after release and, using their authority, ordered that the rape victim be deprived of food. As a result, the victim starved, and was effectively punished twice.
39. In the Closing Order, it is correctly stated that a rape charge was investigated at Kraing Ta Chan security centre.[39] However, the Closing Order does not outline that the,

[35] Closing Order, D427, para.1428.
[36] Closing Order, D427, para. 1428.
[37] *See* OCIJ Interview of Civil Party KHEN Sok, Doc.No. D277/3 at p.8 and OCIJ Interview of Civil Party CHHUM Naut, Doc.no, D277/4, p.8-9.
[38] *Ibid.*
[39] See OCIJ Witness Interview of IEP Duch, Doc.no. D25/28.

following investigation, the prison chief against whom the investigations were conducted was pardoned because of his revolutionary deeds.[40] No punishment followed.

40. The omission of available facts leads the CIJs to wrongly conclude that punishment for rape was a policy of the Khmer Rouge. Co-Lawyers for Civil Parties conclude that the reasoning of the CIJ's not to indict the Accused for the rapes outside the context of Forced Marriages is flawed and, therefore, a re-characterization of the facts in the Closing Order is necessary.

41. In addition the Co-Lawyers for Civil Parties concur with the assessment of the OCP that "such crimes were a foreseeable consequence of the JCE insofar as it involved the dehumanization, torture and deliberate mistreatment of so-called "bad elements"".[41]

***Conclusion***

42. In conclusion, under the temporal jurisdiction of the ECCC, rape should properly be categorized as a separate, enumerated sub-crime when prosecuted as a Crime against Humanity.

43. Findings for liability of rape outside of the context of Forced Marriage should be recharacterized to reflect the use of rape as part of the "enemy policy".

## III. REQUEST

45. Co-Lawyers for Civil Parties respectfully request,

(i) To recharacterize rape as a crime against humanity in its own right;

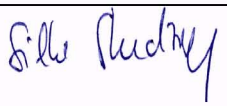
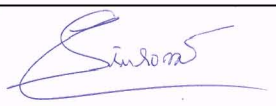
(ii) To recharacterize the findings of liability for the rapes outside of the context of forced marriage;

(iii) To give notice to the Accused on the recharacterizations.

Respectfully submitted,

[40] *Ibid.*

[41] Co-Prosecutors' Request for the Trial Chamber to Recharacterize the Facts Establishing the Conduct of Rape as the Crime Against Humanity of Rape as the Crime Against Humanity of Rape rather than the Crime against Humanity of other Inhumane Acts, 16 June 2011, E99, para. 32.

| Date | Name | Location | Signatures |
|---|---|---|---|
| July 21, 2011 | **PICH Ang**<br>National Lead co-Lawyer | Phnom Penh |  |
| | **Elisabeth SIMONNEAU FORT**<br>International Lead co-Lawyer | Phnom Penh |  |
| | **Silke STUDZINSKI**<br>International Co-Lawyer | Phnom Penh |  |
| | **SIN Soworn**<br>National Co-Lawyer | Phnom Penh |  |