

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

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**DEFENCE RESPONSE TO 'CO-PROSECUTORS' REQUEST FOR THE TRIAL CHAMBER
TO RE-CHARACTERIZE THE FACTS ESTABLISHING THE CONDUCT OF RAPE AS THE
CRIME AGAINST HUMANITY OF RAPE RATHER THAN THE CRIME AGAINST HUMANITY
OF OTHER INHUMANE ACTS'**

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I INTRODUCTION

1. On 13 January 2011, the Pre-Trial Chamber rendered its 'Decision on Ieng Thirith's and Nuon Chea's Appeals against the Closing Order' in which the Pre-Trial Chamber decided that rape did not exist as a crime against humanity in its own right in 1975-1979 and decided to 'strike rape out of paragraph 1613 of the Closing Order and to uphold the Co-Investigating Judges finding in paragraph 1433 of the Closing Order that the facts characterized as crimes against humanity in the form of rape can be categorized as crimes against humanity of other inhumane acts'.¹ The Pre-Trial Chamber subsequently filed its reasoned decision (**PTC Decision**).²
2. On 17 January 2011, the Trial Chamber considered itself seized of Case 002.³ On 3 February 2011, the Trial Chamber informed the parties that the applicable deadline for filing preliminary objections fell on Monday 14 February pursuant to Internal Rules 80(1) and (2) and 89.⁴ In compliance with the Trial Chamber's Advance Notification, the defence for Madame Ieng Thirith (**defence**) filed its jurisdictional challenges before the Trial Chamber on 14 February 2011.⁵ The Co-Prosecutors did not file any preliminary objections during the time-frame imposed under Internal Rule 89(1), following the Pre-Trial Chamber findings on the defence's appeal against the Closing Order.
3. On 16 June 2011 the Co-Prosecutors filed their 'Co-Prosecutors' Request for the Trial Chamber to Re-characterise the Facts Establishing the Conduct of Rape as the Crime Against Humanity of Rape Rather Than the Crime Against Humanity

¹ PTC, Decision on Ieng Thirith's and Nuon Chea's Appeals Against the Closing Order, 13 January 2011, Document No. D427/2/12, p. 6.

² PTC, Decision on Appeals by Nuon Chea and Ieng Thirith Against the Closing Order, 15 February 2011, Document No. D427/2/15, paras. 149-154.

³ TC, Order to File Material in Preparation for Trial, 17 January 2011, Document No. E9.

⁴ TC, Advance notification of Chamber's disposition of Motions E14, E15, E9/2, E9/3, E24 and E27, 3 February 2011, Document No. E35.

⁵ Ieng Thirith Defence's Preliminary Objections, 14 February 2011, Document No. E44.

of Other Inhumane Acts' (**OCP Request**),⁶ requesting the Trial Chamber to 're-characterize the facts in the Indictment pertaining to the conduct of rape as the crime against humanity of rape rather than the crime against humanity of other inhumane acts'.⁷

4. At the Initial Hearing on 27 June 2011, the Trial Chamber informed the defence that the deadline for responding to the OCP Request was extended to 22 July 2011.⁸ The defence herewith files its response to the OCP Request.

II LEGAL PROVISIONS

5. The defence submits the following legal provisions are relevant in the determination of the underlying request:-

Internal Rule 89 – Preliminary Objections

1. A preliminary objection concerning:

- a) the jurisdiction of the Chamber,
- b) any issue which requires the termination of prosecution;
- c) nullity of procedural acts made after the indictment is filed

shall be raised no later than 30 (thirty) days after the Closing Order becomes final, failing which it shall be inadmissible.

2. The Chamber shall afford the other parties the opportunity to respond to the application.

3. The Chamber shall, as appropriate, issue its reasoned decision either immediately or at the same time as the judgment on the merits. The proceedings shall continue unless the Chamber issues immediately a decision which has the effect of terminating the proceedings.

Internal Rule 92 – Written Submissions

The parties may, up until the closing statements, make written submissions as provided in the Practice Direction on filing of documents. The Greffier of the Chamber shall sign such written submissions and indicate the date of receipt, and place them on the case file.

⁶ OCP, Co-Prosecutors' Request for the Trial Chamber to Re-characterise the Facts Establishing the Conduct of Rape as the Crime Against Humanity of Rape Rather Than the Crime Against Humanity of Other Inhumane Acts, 16 June 2011, Document No. E99.

⁷ OCP Request, para. 33.

⁸ Transcript of the Initial Hearing of 27 June 2011, Document No. E1/4.1, p. 31; Confirmed in TC, Decision on Extension of Time, 7 July 2011, Document No. E107.

Internal Rule 98(2)

The judgment shall be limited to the facts set out in the Indictment. The Chamber may, however, change the legal characterization of the crime as set out in the Indictment, as long as no new constitutive elements are introduced. The Chamber shall only pass judgment on the Accused. If another person, appearing as a witness during the trial is suspected of committing a crime or conspiring with someone to commit a crime, the Chamber shall only try such person after he or she has been charged and indicted in accordance with these IRs.

III INADMISSIBILITY OF THE OCP REQUEST**3.1 Inadmissible: Preliminary Objection**

6. The defence submits that the OCP Request is inadmissible. First, the OCP Request constitutes a preliminary objection; hence it is inadmissible at this stage of the proceedings. In its PTC Decision, the Pre-Trial Chamber followed the jurisprudence of the *ad hoc* tribunals in its definition of what constitutes a jurisdiction challenge. The Pre-Trial Chamber clearly stated that ‘contesting the substantive crimes charged under Articles 3 (new) – 8 of the ECCC Law’ constituted jurisdiction challenges ‘where there is a challenge to the very existence in law of a crime and its elements at the time relevant to the indictment’.⁹ The underlying request of the Co-Prosecutors forms a preliminary objection as defined by Internal Rule 89(1) (a), concerning the jurisdiction of the Chamber as delineated by the Amended Closing Order. The Co-Prosecutors request the Trial Chamber to alter the jurisdiction of the ECCC to make rape a crime against humanity *per se*, instead of including it under the umbrella of ‘other inhumane acts’ as a crime against humanity.

7. On 3 February 2011, the Trial Chamber, in its Advance notification, informed the parties that the applicable deadline for filing preliminary objections fell on Monday 14 February as, pursuant to the Chamber’s Order to File Materials in Preparation for Trial, the time limits set by Internal Rules 80(1) and (2) and 89

⁹ PTC Decision, para. 61.

started to run from Friday 14 January 2011.¹⁰ The Trial Chamber also made it clear that it would reject all requests to adopt a modified procedure to that presently envisaged by the Internal Rules.¹¹

8. The Co-Prosecutors did not file any preliminary objections before the 14 February 2011 and, as a result, did not raise any jurisdictional challenges on the applicability of the crime of rape as a crime against humanity *per se* before the ECCC. By their inaction they acquiesced in the Amended Closing Order's delineation of the Trial Chamber's jurisdiction over the alleged crimes. The Co-Prosecutors cannot now be permitted to change their position at this stage of the proceedings and seek to persuade the Chamber to expand its jurisdiction; they are time-barred from making this submission. The time limit for the filing of preliminary objections has long expired, and the OCP Request should be rejected on this basis alone. To allow the OCP Request to be considered at this late stage would make nonsense of the Trial Chamber's explicitly stated intention to reject applications which are not filed in accordance with the procedures set out.¹²
9. Further, and in spite of the fact that the Co-Prosecutors were put on notice of this defence position by 'Ieng Sary's Observations to the Co-Prosecutors' Notification of Legal Issues It Intends to Raise at the Initial Hearing',¹³ the Co-Prosecutors have failed to provide any explanation or justification for their filing of this preliminary objection out of time.¹⁴ In their OCP Request, the Co-Prosecutors merely assert in a footnote that their submission was not an objection to the jurisdiction of the ECCC and that the legal re-characterisation of facts was not an Internal Rule 89 preliminary objection by the Trial Chamber,¹⁵ without providing

¹⁰ TC, Advance notification of Chamber's disposition of Motions E14, E15, E9/2, E9/3, E24 and E27, 3 February 2011, Document No. E35.

¹¹ TC, Advance notification of Chamber's disposition of Motions E14, E15, E9/2, E9/3, E24 and E27, 3 February 2011, Document No. E35, p. 2.

¹² TC, Advance notification of Chamber's disposition of Motions E14, E15, E9/2, E9/3, E24 and E27, 3 February 2011, Document No. E35, p. 2.

¹³ Ieng Sary's Observations to the Co-Prosecutors' Notification of Legal Issues It Intends to Raise at the Initial Hearing, 3 May 2011, Document No. E9/30/1, paras. 3-6.

¹⁴ OCP, Co-Prosecutors' Response to "Ieng Sary's Observations to the Co-Prosecutors' Notification of Legal Issues it Intends to Raise at the Initial Hearing", 18 May 2011, Document No. E9/30/2.

¹⁵ OCP Request, footnote 13.

the parties with further justification. This failure suggests the Co-Prosecutors intentionally chose not to address this issue in a timely manner, which should result in the Request being declared inadmissible.

3.2 Inadmissible: No Legal Basis for OCP Request

10. Further, it is submitted by the OCP that its Request falls within the ambit of Internal Rule 98(2). The defence rejects this interpretation. The OCP requests that the Chamber changes the law and consequently the Chamber's jurisdiction over the alleged crimes. It is not merely a request for a change of the legal characterization of the facts, as provided for in Internal Rule 98(2). The Co-Prosecutors go further in that they ask the Trial Chamber to reject the crime of rape as another inhuman act constituting a crime against humanity, and instead define the act of rape as a crime against humanity *per se*,¹⁶ despite the fact that the Pre-Trial Chamber has found that rape as a crime against humanity in its own right did not exist in 1975-1979. The only mechanism for challenge provided by the Internal Rules is to file a preliminary objection on the jurisdiction of the ECCC pursuant to Internal Rule 89. Thus, the legal basis provided by the Co-Prosecutors for their request is invalid, and as such, the OCP Request should be rejected.

3.3 Inadmissible: No appeal against the PTC Decision before the Trial Chamber

11. The Co-Prosecutors, in their OCP Request, object to the PTC Decision regarding the non-criminalization of rape as a crime against humanity under customary international law in 1975-1979.¹⁷ The defence recalls, as the Co-Prosecutors submitted during the hearing of 31 January 2011, that it is not possible for the parties to subject Pre-Trial Chambers decisions to review and that the Trial Chamber was not established under the Rules as an appellate body.¹⁸ The only procedure open to the Co-Prosecutors to object to the definition of crimes against

¹⁶ OCP Request, para. 5.

¹⁷ OCP Request, para. 6 where the Co-Prosecutors asserted that 'the concept of rape as a crime against humanity has crystallized in customary international law by 1975 [...]'.
¹⁸ Transcript of the Initial Hearing of 31 January 2011, Document No. E1/1.1, p. 47-48.

humanity, as set out in the PTC Decision, was to file a preliminary objection before 14 February 2011, which they failed to do.

IV SUBMISSIONS

4.1 'Legal Re-Qualification of Facts' Is Not 'Re-Characterisation of the Crime'

12. With reference to Internal Rule 98(2), the OCP requests that the Chamber re-characterizes the facts in the Indictment so as to prosecute the Accused on the charge of rape as a crime against humanity, instead of under the head of other inhumane acts as a crime against humanity.¹⁹ The Co-Prosecutors in their Request rely on an incorrect interpretation of 'legal re-characterization' as set out in Internal Rule 98(2). This Rule pertains solely to a legal re-characterization of the facts, not of the charges for the purpose of adding a new crime to the Indictment.

13. The OCP Request, in footnote 12, refers to several cases emanating from the European Court of Human Rights (ECtHR). The re-characterization allowed by the ECtHR and referred to in paragraph 10 concerns the application of a specific legal provision to the facts; and not, as is the underlying case, to a legal re-interpretation of the law so as to add a new charge. The Co-Prosecutors misconstrue the ECtHR's case law when they state according to the jurisprudence of the ECtHR, 'recharacterization of the crimes charged is permitted',²⁰ when the jurisprudence cited concerns the legal re-characterization of the *facts*.²¹ The situation the European Court refers to, for example, in the case of *I.H. and others*

¹⁹ OCP Request, paras. 1 and 7.

²⁰ OCP Request, para. 10.

²¹ *Pélissier and Sassi v France*, Appl. No. 25444/94, 25 March 1999, para. 62, which states, insofar it is relevant: 'The Court accordingly considers that in using the right which it unquestionably had to recharacterise facts over which it properly had jurisdiction, the Aix-en-Provence Court of Appeal should have afforded the applicants the possibility of exercising their defence rights on that issue in a practical and effective manner and, in particular, in good time.' See further, *Sipavicius v Lithuania*, Appl. No. 49093/99, 21 February 2002, para. 31, which concerned the 'reclassification of the charge', in which case the complaint was directed against the review procedures which would be insufficient, not against the 'reclassification of the charge' itself. The third case mentioned in the OCP Request, footnote 10, *I.H. and Others v Austria*, Appl. No. 42780/98, 20 April 2006, again concerns the legal requalification of the facts, as indicated in paragraph 38 thereof.

*v Austria*²² is the re-characterization of rape to rape under threat of serious violence. The European Court jurisprudence cited by the Co-Prosecutors thus fails to support their submissions.

14. Requesting the re-characterization of the crime of rape, so as to add a new charge against the Accused, unequivocally violates her right of a fair trial. The conclusion drawn by the Co-Prosecutors that prosecuting rape as a specific crime against humanity rather than as the crime against humanity of other inhuman acts is not unfair²³ and complies with the fair trial rights of the Accused,²⁴ is unsubstantiated.

15. The Co-Prosecutors go further and contend that the above-cited ECtHR jurisprudence, supports the view that ‘any re-characterization that may take place at Judgement would be fully consistent with the fair trial rights of the Accused’,²⁵ thus ignoring the previously cited passage which prohibits the legal re-qualification of the facts at so late a stage, let alone the legal re-characterization of the law, which is at issue here. The European Court held in *Pélissier and Sassi v France*:²⁶

[T]he material before the Court indicates that the applicants were given no opportunity to prepare their defence to the new charge, as it was only through the Court of Appeal’s judgment that they learnt of the re-characterisation of the facts. Plainly, that was too late.

16. Similarly, the International Criminal Court’s Appeals Chamber held that the use of Regulation 55, dealing with the re-characterization of the facts, ‘must be limited to the facts and circumstances described in the charges or any amendments thereto’.²⁷

²² *I.H. and Others v Austria*, Appl. No. 42780/98, 20 April 2006, paras. 15-17.

²³ OCP Request, para. 7.

²⁴ OCP Request, paras. 10-11.

²⁵ OCP Request, para. 11.

²⁶ *Pélissier and Sassi v France*, Appl. No. 25444/94, 25 March 1999, para. 62.

²⁷ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06 **AO 15 AO 16**, Appeals Chamber, Judgment on the Appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled “Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court”, 8 December 2009, para. 91.

17. The defence submits that the Co-Prosecutors have erroneously mixed the concepts of legal re-qualification of the facts and re-qualification of crimes against humanity, in seeking to add a new charge. The latter concept is supported by arguments for the former concept, which thus fail to support their argument that crimes against humanity at this stage can be re-defined to allow for the prosecution of the Accused on a new charge, namely rape as a crime against humanity *per se*.

4.2 Substantive Arguments

18. For the reasons set out herein, the defence submits that the OCP Request is inadmissible and should be rejected for lack of legal basis. The defence now turns to the substance of the argument in response to paragraphs 12-32 of the OCP Request.

4.2.1 *Whether Rape was Established in Customary International Law by 1975*

19. The Co-Prosecutors first argue that rape was established in customary international law as a discrete crime against humanity by 1975.²⁸ In support of this contention, the Co-Prosecutors referred to the international humanitarian law sources already cited by the Pre-Trial Chamber,²⁹ the 1919 Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties,³⁰ the Control Council Law No. 10,³¹ the Charters of the International Military Tribunal at Nuremberg and the International Military Tribunal for the Far East (IMTs),³² the Statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY) and Rwanda (ICTR)³³ and the jurisprudence of the ICTY, ICTR and the Special Court for Sierra Leone (SCSL).³⁴ The defence contends that the Co-Prosecutors have failed to prove that the criminalization of rape existed as a crime

²⁸ OCP Request, paras. 12-21.

²⁹ OCP Request, para. 12 referring to Article 44 of the Lieber Code of 1863, the regulations annexed to the 1907 Hague Conventions read in conjunction with the Martens Clause, the Geneva Conventions of 1949 and the Additional Protocols I and II of 1977.

³⁰ OCP Request, para. 13.

³¹ OCP Request, para. 14.

³² OCP Request, para. 15.

³³ OCP Request, para. 16.

³⁴ OCP Request, paras. 17-19.

against humanity before 1975 or during 1975-1979. Significantly, the Co-Prosecutors have not relied on any new sources of law other than those relied upon before the Pre-Trial Chamber.

20. The Pre-Trial Chamber rightly decided that international humanitarian law instruments proclaimed before 1945, as well as the Geneva Conventions of 1949 and their Additional Protocols of 1977, were relevant sources that demonstrated that rape existed as a war crime before 1975,³⁵ but not as a crime against humanity.
21. The defence recalls that there 'are no clear examples of convictions for rape pursuant to this law before the IMTs'.³⁶ As correctly underlined by the Co-Prosecutors in their OCP Request, neither the IMTs nor their Charters included rape as a crime against humanity *per se*.³⁷ The IMT Judgement does not mention rape and no defendants were convicted of rape as a crime against humanity.³⁸ In addition, the United Nations General Assembly did not uphold rape as a crime against humanity in the Nuremberg Principles. As rightly decided by the Pre-Trial Chamber, the IMTs do not demonstrate that rape was a distinct crime against humanity before 1975 under customary international law.³⁹
22. The Co-Prosecutors further argue that rape was codified as a crime against humanity in the 1990s with the adoption of the Statutes of both the ICTR and the ICTY and that 'the enumeration of crimes in those statutes was based on an understanding of customary international law *prior to* the adoption of those statutes'.⁴⁰ The Co-Prosecutors fail to cite authorities that could demonstrate that rape existed as a crime against humanity in its own rights before 1975 or during 1975-1979, which is the issue at hand. Instead, the Co-Prosecutors refer to

³⁵ PTC Decision, para. 151.

³⁶ PTC Decision, para. 152.

³⁷ OCP Request, para. 15

³⁸ See Kelly D. Askin, 'Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles' (2003) 21 *Berkeley Journal of International Law* 288, 301.

³⁹ PTC Decision, para. 152.

⁴⁰ OCP Request, para. 16.

statutes adopted some 20 years after the beginning of the temporal jurisdiction of the ECCC. The Co-Prosecutors encourage the Trial Chamber to follow the jurisprudence of the ICTR, ICTY and SCSL,⁴¹ which has recognized rape as a crime against humanity *per se* in the end of the 1990s-early 2000s. Again, the defence recalls that their Statutes were drafted some 35 years after the time of the commission of the alleged crimes and do not reflect the state of law during the temporal jurisdiction of the ECCC.

23. The Co-Prosecutors further state that '[g]iven the lack of relevant developments in customary international law pertaining to rape during the period between the temporal jurisdiction of the ECCC and that of the ad-hoc tribunals, a finding by the ECCC that rape was not a discrete crime against humanity in 1975-1979 necessarily implies that the findings of the *ad-hoc* tribunals with respect to rape as a crime against humanity were incorrect'.⁴² The defence contends that this assertion is wrong. The *ad hoc* tribunals have found that rape was a crime against humanity during their respective temporal jurisdictions, that is during the 1990s. Declaring that rape did not exist in 1975-1979 as a crime against humanity *per se* does not imply that the *ad hoc* tribunals were wrong when ruling on that point at the end of the 1990s. The Co-Prosecutors argument should be rejected as without logic or merit.

24. The Co-Prosecutors argue that in order to promote fairness and avoid uncertainty in the law, the Trial Chamber should follow the decisions of the *ad hoc* and international tribunals.⁴³ The defence again notes that the temporal jurisdiction of these tribunals varies and commenced in each case at a significantly later period in history than the time covered by the ECCC jurisdiction. The jurisprudence emanating from these international and internationalized courts reflects their particular circumstances. As the defence submitted in its 'Defence Reply to Prosecution Joint Response to Ieng Thirith Defence Appeal against the Closing

⁴¹ OCP Request, para. 18.

⁴² OCP Request, para. 21.

⁴³ OCP Request, para. 21.

Order’, ‘[r]eliance on decisions rendered more than 20 years after the start of the temporal jurisdiction of the ECCC may not reflect the state of the law as of 1975 and, as a result, threatens the principle of *nullum crimen sine lege*’.⁴⁴ The ECCC has competence over crimes that were allegedly committed in 1975-79 whereas the *ad hoc* tribunals, as well as the SCSL, have jurisdiction over crimes committed much more recently. As a result, the state of customary international law in the 1990s cannot be deemed the same as in the 1970s and, as a result, the Trial Chamber should not decide the present issue on the basis, only, of the jurisprudence of international tribunals, which do not reflect the state of law at the time of the alleged crimes. Further, the Co-Prosecutors do not explain the basis of their assertion that ‘other international tribunals consider prior international jurisprudence on matters of customary international law as persuasive authority’,⁴⁵ yet now request that the Trial Chamber considers *post* international jurisprudence.

25. M. Cherif Bassiouni argued in his book published in 1999 that rape was not a crime against humanity, *per se*, but instead constituted ‘other inhumane acts’ under general principles of law.⁴⁶ Accordingly, the European Commission on Human Rights decided in 1976 that widespread rape during an international conflict constituted inhuman treatment under Article 3 of the European Human Rights Convention.⁴⁷ Thus Bassiouni provides further support for rejection of the Co-Prosecutors’ Request.

4.2.2 *Whether the Prosecution of Rape as a Crime Against Humanity was Foreseeable and Accessible to the Accused*

26. The Co-Prosecutors first argued that ‘the prohibition of rape in international customary law was sufficiently developed by 1975 such that the Accused could have foreseen that acts of rape constituted a crime against humanity’ and that ‘the

⁴⁴ Ieng Thirith Defence Reply to Prosecution Joint Response to Ieng Thirith Defence Appeal against the Closing Order, 6 December 2010, Document No. D427/2/11 (Ieng Thirith Defence Reply), para. 43.

⁴⁵ OCP Request, footnote 37.

⁴⁶ M. Cherif Bassiouni *Crimes Against Humanity in International Criminal Law* (1999), p. 344.

⁴⁷ *Cyprus v. Turkey*, Application Nos. 6780/74 and 6950/75, 10 July 1976, para. 374.

fact that the crime might have been charged in a less specific fashion during 1975-1979 is irrelevant to the legality analysis since the conduct that is the subject of prohibition is the same'.⁴⁸ The Co-Prosecutors' statement is incorrect. In order for the prosecution of rape as a crime against humanity to be foreseeable for the Accused, rape must have been criminalized before 1975 or during 1975-1979 as an act of a crime against humanity. If the crime of rape was 'charged in a less specific fashion during 1975-1979', for instance the act of rape was criminalized under the 1956 Cambodian Penal Code, then the Accused could have only foreseen the prosecution in this 'less specific fashion'. The defence respectfully concurs with the Pre-Trial Chamber's finding that 'where the constitutive elements are not identical, domestic and international crimes are to be treated as distinct crimes'.⁴⁹ Rape as a crime against humanity 'is necessarily composed of chapeau elements common to all crimes against humanity, such as the requirement that the act form part of a "widespread or systematic attack"' and, as a result, '[r]ape as it is defined under domestic criminal codes does not contain such elements'.⁵⁰

27. The Co-Prosecutors further contend that the 'accessibility' requirement is fulfilled as 'the information necessary to come to the conclusion that rape was punishable as a crime against humanity in customary international law [...] was publicly available and readily accessible'.⁵¹ The Co-Prosecutors have not shown how the prosecution of rape as a crime against humanity could have been publicly available and readily accessible to the Accused, particularly as they have failed to provide any authorities demonstrating that rape existed as a distinct crime against humanity before 1975 or during the period 1975-1979. Thus, the argument on accessibility is not made out.

⁴⁸ OCP Request, para. 23.

⁴⁹ PTC Decision, para. 153.

⁵⁰ PTC Decision, para. 153.

⁵¹ OCP Request, para. 24.

28. The Co-Prosecutors alternatively submit that if there was uncertainty as to whether rape was a discrete crime against humanity in 1975-79, 'the resolution of that uncertainty by judicial determination was readily foreseeable'.⁵² The Co-Prosecutors refer to the ECtHR case of *SW v. the United Kingdom* in which the ECtHR held that a husband's immunity from prosecution for the rape of his wife was foreseeable to him having regard to the 'progressive development' of the law in question,⁵³ the 'strong indications' that wider interpretations by the Courts of the change in the law,⁵⁴ and the 'evident evolution [...] of the criminal law through judicial interpretation'.⁵⁵ The Co-Prosecutors have failed to demonstrate that such developments, indications and evolution were present before 1975 or during 1975-1979 so as to make the act of rape understood to be a distinct crime against humanity. No judicial determination was or could have been foreseeable to the Accused during that period.

29. In asserting that information that liability for rape as a crime against humanity was accessible to the Accused, the Co-Prosecutors merely refer to the 'egregious nature of the acts of rape committed in Cambodia during the period from 1975 to 1979'.⁵⁶ The defence rejects the Co-Prosecutors' reliance on the nature of the acts as support for its Request. Justice Robertson, in his dissenting opinion before the Appeals Chamber of the STL, pointed out that

'[...] it is precisely when the acts are abhorrent and deeply shocking that the principle of legality must be most stringently applied, to ensure that a defendant is not convicted out of disgust rather than evidence, or of a non-existent crime'.⁵⁷

30. In addition, the Co-Prosecutors argue that rape as a crime against humanity was also accessible to the Accused as rape was criminalized under Cambodian law and, therefore, the Accused would have appreciated the possibility that international criminal liability might attach to the acts of rape committed during

⁵² OCP Request, para. 25.

⁵³ *S.W. v. United Kingdom*, Application No. 20166/92, 22 November 1995, para. 40.

⁵⁴ *S.W. v. United Kingdom*, Application No. 20166/92, 22 November 1995, para. 40.

⁵⁵ *S.W. v. United Kingdom*, Application No. 20166/92, 22 November 1995, para. 43.

⁵⁶ OCP Request, para. 25.

⁵⁷ *Prosecutor against Sam Hinga Norman*, SCSL-04-14-AR72(E), Appeals Chamber, Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), Dissenting Opinion of Justice Robertson, 31 May 2004, para. 12.

1975-1979⁵⁸ The Co-Prosecutors further state that the principle of legality is satisfied as the underlying criminal conduct was punishable, regardless of how the actual charges would have been formulated.⁵⁹ As submitted above, the criminalization of rape in the 1956 Cambodian Code as a national crime is irrelevant when assessing whether the Accused could have foreseen and had knowledge of liability for rape as a crime against humanity.⁶⁰ Rape as a national crime and rape as a crime against humanity are distinct offences, the Co-Prosecutors cannot simply import rape as a domestic crime into the category of a crimes against humanity. Doing so would violate the principle of *nullem crimen sine lege*, as rape as a crime against humanity did not exist in 1975-1979.

31. Lastly, the Co-Prosecutors state that charging the Accused with rape as a crime against humanity will have ‘the collateral benefit of contributing to the historical record of the case by setting out the charges in a manner that is clearer and more intelligible to members of the general public’.⁶¹ The defence submits that the Accused cannot be charged with a crime that was non-existent at the time of its alleged commission, merely for the benefit of historical record. This argument is made out of a flagrant disregard for the rule of law and the fair trial provisions and should be rejected.

4.2.3 *Whether the Facts in the Closing Order provide a Sufficient Basis for the Finding that Crime Against Humanity of Rape Occurred*

32. The Co-Prosecutors request the Trial Chamber, in light of the facts presented in the Closing Order and their Final Submission, to charge the Accused with rape as a crime against humanity and not rape within forced marriage as another inhuman act in a crime against humanity.⁶²

⁵⁸ OCP Request, para. 25.

⁵⁹ OCP Request, para. 26.

⁶⁰ See Ieng Thirith Defence Reply, para. 48.

⁶¹ OCP Request, para. 28.

⁶² OCP Request, paras. 29-33.

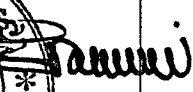
33. The defence contends that the facts are irrelevant when deciding whether the Accused should be charged with rape as a crime against humanity or rape as another inhumane act as a crime against humanity. In issue is respect for the fundamental principle of legality. No matter what facts are contained in the Closing Order, prosecuting the Accused for a crime against humanity which crime did not exist during the relevant time would violate that principle.

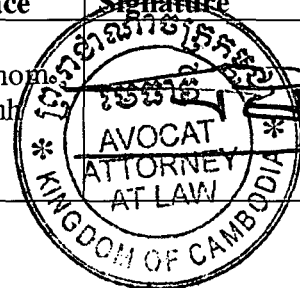
34. In the Amended Closing Order, the Accused has been charged with rape within forced marriage as another inhumane act. The defence challenged the jurisdiction of the ECCC on this particular crime before the Trial Chamber on the 14 February 2011. Accordingly, the defence refers to its previous submissions, in which it argued that the crime of rape within forced marriage as another inhuman act as a crime against humanity has been insufficiently specified in the Closing Order and that a prosecution for this crime was not feasible.⁶³ The defence hereby adopts the same arguments in respect of the facts founding the allegation of rape as a crime against humanity. Again, the defence submits that the Co-Prosecutors' submissions should have been advanced before the Trial Chamber as a jurisdictional challenge and are now out of time and should be ignored.

V CONCLUSION

35. For the reasons stated above, the defence respectfully requests the Trial Chamber:

- (i) to find the OCP Request inadmissible;
- (ii) or, alternatively, to reject the OCP Request in its entirety.

Party	Date	Name Lawyers	Place	Signature
Co-Lawyers for Ieng Thirith	22 July 2011	PHAT Pou Seang Diana ELLIS, QC	Phnom Penh	



⁶³ Ieng Thirith Preliminary Objections, paras. 29-30.