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EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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

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I. INTRODUCTION

1. Pursuant to Rules 92 and 98(2), the Co-Prosecutors submit this brief in support of their request that the Trial Chamber recharacterize the facts in the Indictment establishing the conduct of rape as the crime against humanity of rape rather than the crime against humanity of "other inhumane acts."[1]

II. PROCEDURAL BACKGROUND

2. Paragraph 1613 of the Closing Order, as issued by the Office of the Co-Investigating Judges ("OCIJ") on 15 September 2010, charged the Accused with various crimes against humanity, including the crime against humanity of rape.[2] On appeal, the Ieng Sary and Ieng Thirith Defence teams objected to the rape charges on the basis that rape did not exist as a discrete crime against humanity under customary international law in the period from 1975 to 1979.[3]

3. On 13 January 2011, the Pre-Trial Chamber ruled on the Defence appeals against the Closing Order and accepted the Defence argument that "rape did not exist as a crime against humanity in its own right in 1975-1979."[4] Accordingly, the Pre-Trial Chamber struck rape as a crime against humanity out of paragraph 1613(g) of the Indictment.[5] Nevertheless, the Pre-Trial Chamber went on to conclude that customary international law did not prohibit the prosecution of rape as the crime against humanity of other inhumane acts and that, therefore, the facts characterized as crimes against humanity in the form of rape could be categorized as "crimes against humanity of other inhumane acts."[6]

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1 ECCC Internal Rules, rev. 7, 23 February 2011 [hereinafter "ECCC Rules"], rules 92, 98(2). The Co-Prosecutors have previously indicated their intent to raise this issue at the Initial Hearing. *See* Co-Prosecutors' Notification of Legal Issues It Intends to Raise at the Initial Hearing, Case File No. 002/19-09-2007-ECCC/TC, E9/30, 19 April 2011, para. 1(9)(b).

2 Closing Order, Office of the Co-Investigating Judges, Case File No. 002/19-09-2007-ECCC-OCIJ, 15 September 2010 [hereinafter "Closing Order"], para. 1613.

3 Ieng Thirith Defence Appeal from the Closing Order, Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 145), D427/2/1, 18 October 2010; Ieng Sary's Appeal Against the Closing Order, Case File No. 002/19-09-2007-ECCC/OCIJ (PTC75), D427/1/6, 25 October 2010.

4 Pre-Trial Chamber Decision on Ieng Thirith's and Nuon Chea's Appeals Against the Closing Order, Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 145 & PTC 146), D427/2/12, 13 January 2011, para. 11(2); Pre-Trial Chamber Decision on Ieng Sary's Appeal Against the Closing Order, Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 75), D427/1/26, 13 January 2011, para. 7(2); Pre-Trial Chamber Decision on Khieu Samphan's Appeal Against the Closing Order, Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 104), D427/4/14, 13 January 2011, para 2(2).

5 *Id.*

6 *Id.*

4. The Pre-Trial Chamber elaborated on the above-mentioned findings with respect to rape as a crime against humanity in its full decisions on the Ieng Thirth, Nuon Chea and Ieng Sary appeals against the Closing Order[7]

III. SUMMARY OF ARGUMENT

5. The Co-Prosecutors submit that the Trial Chamber should reject the characterization of the conduct of rape adopted by the Pre-Trial Chamber and instead apply the characterization set out in the original Closing Order, which more specifically reflects the nature of the harm done. The Office of the Co-Investigating Judges' characterization of the relevant facts was correct and proper: Article 5 of the ECCC Law provides for the prosecution of rape as its own crime against humanity, and the characterization of the conduct of rape as a specific crime against humanity rather than as an "inhumane act" conforms with the principle of legality.

6. Prosecution of rape as an independent crime against humanity is consistent with the principle of legality because the concept of rape as a crime against humanity had crystallized in customary international law by 1975, and it was foreseeable and accessible to the Accused that acts of rape that occurred in Cambodia from 1975-1979 would be subject to sanction as a discrete crime against humanity.

7. Furthermore, there is nothing fundamentally unfair about prosecuting rape as a specific crime against humanity rather than as the crime against humanity of "other inhumane acts." The principle of legality does not require that a crime have been proscribed in the exact and precise terms in which it is later prosecuted, as long as it was reasonably foreseeable and accessible to the Accused that certain acts or omissions would entail international criminal liability. Thus, there is no bar to applying Article 5 of the ECCC Law and characterising the facts in this case, where appropriate, as the crime against humanity of rape.

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[7] Pre-Trial Chamber Decision on Ieng Thirith's and Nuon Chea's Appeals Against the Closing Order, Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 145 & PTC 146), D427/2/12, D427/3/15, 15 February 2011, paras. 149-154; Pre-Trial Chamber Decision on Ieng Sary's Appeal Against the Closing Order, Case File No. 002/19-09-2007-ECCC/OCIJ (PTC75), D427/1/30, 11 April 2011, paras. 359-372.

8. Finally, the Co-Prosecutors submit that the facts in the Closing Order provide a sufficient basis for the Trial Chamber to find that the crime against humanity of rape occurred. In particular, it is not necessary to look outside the scope of the Indictment as the facts pertaining to rape as a crime against humanity are the same as those pertaining to the conduct of rape as it is presently classified, i.e. as the crime against humanity of other inhumane acts.

IV. PRELIMINARY ISSUES

9. As a preliminary matter, the Co-Prosecutors note that their request is proper pursuant to Rule 98(2), which permits the Trial Chamber, in its judgement, to "change the legal characterization of the crime as set out in the Indictment, as long as no new constitutive elements are introduced."[8] The Trial Chamber in Case 001 clarified that the phrase "no new constitutive elements" was a reiteration of the "well-established limitation [] that any re-characterization must not go beyond the facts set out in the charging document."[9] The Co-Prosecutors' request pertaining to the crime of humanity of rape does not contemplate the addition of new factual information to the Indictment. To the contrary, the proposed re-characterization merely involves an adjustment of the framework employed by the Trial Chamber in assessing the facts already before the court.

10. The Co-Prosecutors recognize that the manner in which recharacterization takes place must comply with the fair trial rights of the Accused set out in Rule 35, namely that the accused "be informed promptly and in detail in a language they understand of the nature and cause of the charge against them" and "have adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing."[10] The jurisprudence of the European Court of

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8 ECCC Rules, rule 98(2).

9 Judgement, Case File No. 001/18-07-2007-ECCC/TC, Trial Chamber, E188, 26 July 2010 [hereinafter "Case 001 Judgement"], para. 494. The Ieng Sary Defence has suggested that the restriction on the addition of new "constitutive elements" extends not only to factual elements, but also to legal elements. *See* Ieng Sary's Observations to the Co-Prosecutors' Notification of Legal Issues It Intends to Raise at the Intial [sic] Hearing, Trial Chamber, Case File No. 002/19-09-2007-ECCC/TC, E9/30/1, 3 May 2011 [hereinafter "Ieng Sary's Observations"], para. 10. This position is plainly unsustainable. The process of changing the legal characterization of crimes, by its very nature, involves a modification of legal elements. Any other interpretation of rule 98(2) would render the provision superfluous.

10 Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006) [hereinafter "ECCC Law"], art. 35.

Human Rights, applying a similar standard,[11] indicates that recharacterization of the crimes charged is permitted so long as the accused is apprised of the possibility that the legal characterization of facts may be subject to change and has the opportunity to prepare their defence accordingly, including by making oral or written submissions on the pertinent issues.[12]

11. The Co-Prosecutors submit that the Accused are on notice of the possibility that the legal characterization of the facts pertaining to rape may change from that set out in the Amended Indictment. The Accused have been apprised through the present submission of the Co-Prosecutors, the Co-Prosecutors' prior indication of their intent to seek recharacterization,[13] and the fact that the characterization of the facts pertaining to rape has already been modified once, from the original Closing Order to the Amended Closing Order. Furthermore, the Accused will have the opportunity to put forth their views in response to this proposed re-characterization when responding to the present submission. Therefore, any recharacterization that may take place at Judgement would be fully consistent with the fair trial rights of

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11 *See* European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, art. 6(3).

12 *See, e.g. Pelissier and Sassi v France* [GC], 25444/94, 25 March 1999, paras. 42, 62 (finding a fair trial violation where the addition of a new charge of aiding and abetting was unknown to the Accused until the appeal judgement and where the Accused had no opportunity to make written or oral submissions on the relevant issues while the Court of Appeal was in deliberation); *Sipavicius v. Lithuania,* EctHR (no. 49094/99), 21 February 2002, paras. 26, 31-32 (finding no violation of the accused's fair trial rights, even though the accused did not find out until judgement that the charge against him had been recharacterized, since the accused had the opportunity in the course of appeal hearings to respond to the relevant legal and factual matters and advance his defence); *I.H. and Others v Austria* ECHR (no. 42780/98), 20 April 2006, para. 34 (finding a fair trial violation where the accused had no indication that the trial court might arrive at a different conclusion than the prosecution as regards the qualification of an offence and stating that "in order that the right to defence be exercised in an effective manner, the defence must have at its disposal full, detailed information concerning the charges made, including the legal characterization that the court might adopt in the matter. This information must either be given before the trial in the bill of indictment or at least in the course of the trial by other means such as formal or implicit extension of the charges").

13 The Ieng Sary Defence recently argued that the Co-Prosecutors' recharacterisation requests are Rule 89 "preliminary objections" as they purportedly constitute objections to the ECCC's jurisdiction. *See* Ieng Sary's Observations to the Co-Prosecutors' Notification of Legal Issues It Intends to Raise at the Intial [sic] Hearing, Trial Chamber, Case File No. 002/19-09-2007-ECCC/TC, E9/30/1, 3 May 2011, para. 6. This is incorrect. First, the Co-Prosecutors have no "objection" to the jurisdiction of the ECCC, as set out in the ECCC Agreement and Law, which constitute the relevant points of reference. Second, the Trial Chamber did not treat this type of request as a Rule 89 preliminary objection previously. *See* Case 001 Judgement, para. 14, 489 (where it can be inferred that the Co-Prosecutors' request at the initial hearing for the application of joint criminal enterprise pursuant to Rule 98(2) was not considered a preliminary objection since the Trial Chamber stated that "no preliminary objection to the jurisdiction of the ECCC" was raised at the initial hearing).

the Accused. However, for the avoidance of any uncertainty, the Co-Prosecutors request that the Trial Chamber either decide on this issue prior to the commencement of the trial proceedings or make a formal indication that it has taken the Co-Prosecutors' request under advisement.

V. ARGUMENT

A. RAPE WAS ESTABLISHED IN CUSTOMARY INTERNATIONAL LAW AS A DISCRETE CRIME AGAINST HUMANITY BY 1975.

12. The Co-Prosecutors submit that the prohibition of rape as an autonomous crime against humanity gradually crystallized out of the prohibition of rape in authorities dating back at least as far as the nineteenth century. These authorities include the international humanitarian law sources cited by the Pre-Trial Chamber,[14] namely Article 44 of the Lieber Code of 1863,[15] the regulations annexed to the 1907 Hague Conventions;[16] read in conjunction with the Martens clause laid down in the preamble to that Convention,[17] the Geneva Conventions of 1949,[18] Additional Protocol I of 1977,[19] and Additional Protocol II of 1977.[20]

13. Other sources further evidence the gradual prohibition of rape in customary international law. In 1919, the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, which was formed by the Allied governments, called for the establishment of a tribunal that would try persons suspected of offences against the laws and customs of war or the laws of humanity,

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14 *See* Pre-Trial Chamber Decision on Appeal by Nuon Chea and Ieng Thirith Against the Closing Order, 15 February 2011, para. 151.

15 Instructions for the Government of Armies of the United States in the Field (Lieber Code), 24 April 1863, article 44 ("All wanton violence committed against persons in the invaded country [...] all *rape*, wounding, maiming or killing of such inhabitants, are prohibited under the penalty of detah, or such severe punishment as may seem adequate for the gravity of the offense.").

16 Hague Regulations concerning the Laws and Customs of War on Land, annexed to Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, 12 August 1949, Art. 46 ("Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.").

17 Hague Convention II, Preamble.

18 Geneva Convention IV, Art. 27(2) ("Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.").

19 Additional Protocol I of 1977, Art. 76(1) (adopted by consensus) ("Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault.").

20 Additional Protocol II, Art. 4(2)(e) (adopted by consensus) ("... the following acts against [all persons who have ceased to take part in hostilities] are and shall remain prohibited at any time and in any place whatsoever...(e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form or indecent assault.").

including rape.[21] In fact, rape was listed fifth among the thirty-two enumerated charges proposed by the Commission.[22] Although the Tribunal envisaged by the Commission never came into existence, the inclusion of rape among the proposed charges provides evidence of its gradual crystallization as a crime against humanity.

14. Subsequently, in 1945, rape was specifically enumerated as a crime against humanity in Control Council Law No. 10 ("CCL 10").[23] CCL 10 was the law promulgated by the Allies to try Axis war criminals other than the small number of major war criminals tried by the International Military Tribunal; it has been described by the Pre-Trial Chamber as a legislative act "reflecting international agreement among the Great Powers on the law applicable to international crimes and the jurisdiction of the military courts called upon to rule on such crimes."[24] Article II of CCL 10 specifically refers to the crime against humanity of rape, defining crimes against humanity as: "[a]trocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated."[25]

15. While Control Council Law 10 expressly prohibited rape as a crime against humanity, the Co-Prosecutors acknowledge that the charters of the two tribunals set up after the Second World War to try the most serious perpetrators of international crimes – the International Military Tribunal at Nuremberg and the International Military Tribunal for the Far East – did not contain a specific

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21 Report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, 29 March 1919, at p. 17. The envisioned tribunal never came into existence as a result of a lack of political will for prosecution.

22 *Id.*

23 Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace, and Against Humanity, 20 December 1945, Article II(1)(c), *reprinted in Trials of War Criminal Before the Nuremberg Military Tribunals Under Control Council Law No. 10* (Vol. I) [hereinafter "CCL 10"], p. 16-17.

24 *See* Pre-Trial Chamber Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 38), D97/15/9, 20 May 2010, para. 57; *Prosecutor v. Kupreskic*, Judgement, IT-95-16-A, ICTY Trial Chamber, 14 January 2000, para. 541 (indicating that CCL 10 was one of the international instruments "laying down provisions that were either declaratory of existing law or which had been gradually transformed into customary international law").

25 CCL 10, pp. 16-17 (emphasis added).

reference to rape as an autonomous crime against humanity.[26] Instead, as the Trial Chamber has recognized, the Charters of those Tribunals encompassed rape under the rubric of the crime against humanity of "other inhumane acts."[27] Nevertheless, evidence of rape *was* presented by prosecutors at Nuremberg,[28] and while the Nuremberg Judgment did not give any express consideration to this evidence and, in turn, none of the defendants were convicted of rape in specific terms, it seems that this was a consequence of the practical constraints attending the Nuremberg Tribunal, rather than the existence of legal impediments to such convictions.[29]

16. After Control Council Law No. 10, the next codification of rape as a crime against humanity came with the adoption of the statutes for the International Criminal Tribunals for the former Yugoslavia ("ICTY") and Rwanda ("ICTR"). Both the ICTY and ICTR Statutes provided for the prosecution of rape as an autonomous crime against humanity. [30] Although these instruments were each developed in the early 1990s, the enumeration of crimes in those statutes was based on an understanding of customary international law *prior to* the adoption of those statutes.[31]

17. The first international criminal prosecution for rape as a crime against humanity was in the *Akayesu* case at the ICTR, where the Trial Chamber recognized that rape was established in customary international law as an autonomous crime

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[26] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal, 8 August 1945, 82 U.N.T.S. 279, art. 6(c); Charter of the International Military Tribunal for the Far East, annexed to the Special Proclamation of 19 January 1946 by the Supreme Commander of the Allied Powers in the Far East, art 5(c).

[27] Judgement, Case File No. 001/18-07-2007-ECCC/TC, Trial Chamber, E188 ["Case 001 Judgement"],, para. 293.

[28] *See* Pre-Trial Chamber Decision on Appeal by Nuon Chea and Ieng Thirith Against the Closing Order, 15 February 2011, para. 152, Pre-Trial Chamber Decision on Ieng Sary's Appeal Against the Closing Order, Case File No. 002/19-09-2007-ECCC/OCIJ (PTC75), D427/1/30, 11 April 2011, para. 368.

[29] As Judge Parker noted, the evidence presented at Nuremberg was "overwhelming in its volume and its detail" and "it [was] impossible for this Judgment adequately to review it, or to record the mass of documentary and oral evidence that has been presented." Judgement of the International Military Tribunal (Nuremberg), 1 October 1946, p. 449.

[30] Statute of the International Criminal Tribunal for the Former Yugoslavia, 25 May 1993, *amended* 7 July 2009, art. 5(g); Statute of the International Tribunal for Rwanda, 8 November 1994, *amended* 31 January 2010, art. 3(g).

[31] *See* Secretary-General Report to the U.N. General Assembly, presented 3 May 1993 (S/25704), para. 34 (stating that the ICTY should only apply rules that were "beyond any doubt part of customary international law").

against humanity.[32] Subsequently, the findings of the ICTR with respect to the status of rape as a crime against humanity were affirmed by the ICTY in the *Kunarac* case and the Special Court for Sierra Leone ("SCSL") in the *Semanza* case.[33]

18. The Co-Prosecutors submit that it is appropriate for this Court to follow the settled body of international criminal jurisprudence on this issue. Although neither the ICTY, ICTR, or SCSL identified the precise point at which rape as a crime against humanity crystallized in customary international law, it must have occurred in the immediate wake of World War II, at the latest, as there were no significant conventional or jurisprudential developments related to the crimes against humanity of rape in the years between 1945 and 1993.

19. Reliance on decisions of international tribunals that post-date January 1979 does not contravene the principle of legality. Rather, as the Trial Chamber has recognized, "these decisions provide interpretative guidance as regards the evolving status of certain offences and forms of responsibility under international law."[34] Similarly, the ICTY Trial Chamber in *Hadžihasanović* noted that the principle of legality jurisprudence in the European Court of Human Rights allows for the "gradual clarification" of the rules of criminal liability through judicial interpretation and reflects the understanding that "[i]t is not necessary that the elements of an offence are defined, but rather that general description of the prohibited conduct be provided."[35]

20. It makes sense to allow a process of gradual elucidation of norms through judicial interpretation, considering the nature of the international legal system where legal

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32 *Prosecutor v. Akayesu,* Judgement, ICTR-96-4-T, ICTR Trial Chamber, 2 September 1998, paras. 686-688

33 *Prosecutor v. Kunarac*, Judgement, IT-96-23-T & IT-96-23/1-T, ICTY Trial Chamber, 22 February 2001, paras. 436-464; *Prosecutor v. Semanza*, Judgement and Sentence, ICTR-97-20-T, ICTR Trial Chamber, 15 May 2003, para. 479.

34 Case 001 Judgement para. 34. *See also id.*, para. 290 ("The principle of legality prevents neither a reliance on unwritten custom nor a determination through a process of interpretation and clarification as to the elements of a particular crime.").

35 *Prosecutor v Hadžihasanović et al*, Decision on Joint Challenge to Jurisdiction, ICTY Trial Chamber, Case No. IT-01-47-PT, 25 July 2003 [hereinafter "*Hadžihasanović* Trial Judgement"], para. 58.

norms often have not been codified explicitly in precise terms and elements.[36] Indeed, international law is not the product of statute for the simple reason that there is yet no world authority empowered to enact statutes of universal application. Thus, it is necessarily elucidated through sources such as judicial decisions.

21. Given 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 the 1975-1979 necessarily implies that the findings of the ad-hoc tribunals with respect to rape as a crime against humanity were incorrect. The ECCC is, of course, not bound by the decisions of other tribunals. Nevertheless, the Co-Prosecutors submit that, in light of the consistency of the findings of the other international tribunals and the absence of a compelling rationale for departure from them, the decisions cited above should be adhered to with a view to promoting fairness and avoiding unnecessary uncertainty in the law.[37]

B. THE PROSECUTION OF THE CONDUCT OF RAPE AS A DISCRETE CRIME AGAINST HUMANITY WAS FORSEEABLE AND ACCESSIBLE TO THE ACCUSED.

22. The principle of legality has been interpreted to require that the law providing for prosecution of an individual for a crime be "sufficiently foreseeable and that the law providing for such liability was sufficiently accessible to the accused at the

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[36] Telford Taylor has analogized the status of international law today to the status of the common law centuries ago and warned that "[i]f we reject international law unless it is embodied in codes and statues, with all the paraphernalia of modern national judicial systems, we shall never find it at all, for it cannot exist in this form without a correspondingly highly developed world political organization. And it is, indeed, from the very process of enforcing law that political institutions develop." TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUERNBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10, at p. 221 (1997). *See also Prosecutor v. Delalic*, Judgement, Case No. IT-96-21-T, ICTY Trial Chamber, 16 November 1998, para. 405 (noting that the application and standard for the principle of legality may be different in international criminal law than in domestic systems and that the objective of the principle of legality as applied in the international system "appear[s] to be distinctive, in the obvious objective of maintaining a balance between the preservation of justice and fairness towards the accused and taking into account the preservation of world order").

[37] Other international tribunals consider prior international jurisprudence on matters of customary international law as persuasive authority. *See, e.g. Prosecutor v Brima et al*, Decision and Order on Defence Preliminary Motion on Defects in the Form of the Indictment, 1 April 2004, SCSL Case No. 04-16-PT, para. 24.

relevant time."[38] The Co-Prosecutors submit that both the foreseeability and accessibility prongs of this standard are satisfied with respect to the prosecution of rape as an autonomous crime against humanity pursuant to Article 5 of the ECCC Law.

23. With respect to the requirement of foreseeability, the ECCC Pre-Trial Chamber has found that "a charged person must be able to appreciate that the conduct is criminal in the sense generally understood, without reference to any specific provision."[39] Applying this standard to the present facts, the Co-Prosecutors submit 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. The fact that the crime might have been charged in a less specific fashion during 1975-1979 is irrelevant for the legality analysis since the conduct that is the subject of prohibition is the same.

24. With respect to the accessibility prong of the principle of legality test, the ECCC Pre-Trial Chamber has found that "reliance can be placed on a law which is based on custom."[40] Here, while no universal codification of rape as a crime against humanity existed during 1975-1979, the information necessary to come to the conclusion that rape was punishable as a crime against humanity in customary international law (for example, Control Council Law No. 10) was publicly available and readily accessible.

25. Furthermore, to the extent that there was any uncertainty as to whether rape was a discrete crime against humanity between 1975 and 1979, the resolution of that uncertainty by judicial determination was readily foreseeable.[41] Thus, a competent legal advisor, assessing the state of international law during 1975-1979, would have apprised the accused that rape could be punished as a crime against humanity.

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38 *See, e.g.* Case 001 Judgement, paras. 28-29; 15 February 2011 PTC Decision on the Closing Order Appeals of Nuon Chea and Ieng Thirith, paras. 105-106.

39 Pre-Trial Chamber, Decision on the Appeals Against the Co-Investigating Judges Order on Joint Criminal Enterprise, 20 May 2010, D97/14/15, para. 45.

40 Pre-Trial Chamber, Decision on the Appeals Against the Co-Investigating Judges Order on Joint Criminal Enterprise, 20 May 2010, D97/14/15, para. 45. *See also Prosecutor v. Milutinović et al.*, Decision on Ojdanic's Motion Challenging Jurisdiction – Joint Criminal Enterprise, ICTY Appeals Chamber, 21 May 2003 [hereinafter "*Milutinović* JCE Decision], paras. 37-39.

41 *See SW v United Kingdom*, ECHR, 22 November 1995, Ser A 335-B, paras. 32-43 (finding that the removal of a husband's immunity from prosecution for rape of his wife was "reasonably foreseeable with appropriate legal advice").

This is particularly true in light of the egregious nature of the acts of rape committed in Cambodia during the period from 1975 to 1979. It is inconceivable that a reasonable person could have believed that these acts did not violate universal dictates of law and decency such as to warrant criminalization by way of a discrete offence.[42] Similarly, while rape under Cambodian domestic law does not include the *chapeau* elements common to crimes against humanity, the existence of rape as a crime under the 1956 Penal Code of Cambodia[43] supports the view that a reasonable person would have appreciated the possibility that international criminal liability might attach to the acts of rape committed during the DK period.

C. THE PROSECUTION OF RAPE AS A DISCRETE CRIME AGAINST HUMANITY IS CONSISTENT WITH THE GOALS OF THE PRINCIPLE OF LEGALITY.

26. The principle of legality seeks to prevent retroactive criminalization of offenses and prosecutions that are fundamentally unfair to the Accused. However, the principle of legality does not require a crime to have been proscribed in the exact and precise terms in which it is later prosecuted. Instead, as stated by the ICTY in *Prosecutor v. Hadzihasanovic*, the principle of legality "is satisfied if the underlying criminal conduct as such was punishable, regardless of how the concrete charges in a specific law would have been formulated."[44]

27. Accordingly, the relevant question at the ECCC is whether *conduct amounting to rape* was punishable as a crime against humanity during 1975-1979 such that it was foreseeable that the accused could be prosecuted for crimes against humanity based on that conduct. In short, it is the substance that matters, not the nomenclature.

28. In the present instance, there is no unfairness associated with prosecuting rape as such, rather than as a subset of an "other inhumane acts" category. Indeed, if

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42 *Milutinović* JCE Decision para. 42 (stating that "although the immorality or appalling character of an act is not a sufficient factor to warrant its criminalization under customary international law, it may in fact play a role in that respect, insofar as it may refute any claim by the Defence that it did not know of the criminal nature of the acts.").

43 1956 Penal Code of Cambodia, Art. 443.

44 *Hadžihasanović* Jurisdiction Decision, para. 165; *see also Milutinović* JCE Decision, para. 38 (recognising that the principle of legality does not prevent the progressive development of the law, so long as that development falls within the "reasonable limits of acceptable clarification").

anything, the increased certainty associated with charges of rape as a specifically enumerated crime against humanity allows the Accused to be more comprehensively apprised of the case they have to answer and, in turn, to respond with greater specificity than would otherwise be the case. Furthermore, charging the Accused with rape as a stand-alone crime against humanity rather than as a subsidiary "inhumane act" has 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.

D. THE FACTS IN THE CLOSING ORDER PROVIDE A SUFFICIENT BASIS FOR THE FINDING THAT THE CRIME AGAINST HUMANITY OF RAPE OCCURRED.

29. The Closing Order sets out facts demonstrating that the accused are responsible for crimes against humanity of rape that occurred during the relevant time period.

30. Of particular note, rape in the context of forced marriage was committed under the Democratic Kampuchea regime. As stated in the Closing Order sections entitled "Regulation of Marriage" under the Chapters "Factual Findings of Joint Criminal Enterprise"[45] and "Factual Findings of Crimes"[46], one of the CPK objectives of forcing couples to marry in mass ceremonies throughout the country was "to control the interaction between individuals, such that they were only permitted to marry and have sexual relations in accordance with CPK policy". The CPK also had "the objective of increasing population growth", forced marriages being part of a procreation and revolutionary family building policy disseminated by senior CPK officials.[47] The policy of group marriages was pronounced at the highest level[48] but the ceremonies were concretely arranged by local administrative authorities under coercive circumstances.[49] In many instances couples of the same standing were arbitrarily matched by the authorities, although there is evidence that when the army wanted their soldiers – including disabled soldiers – to marry, they would

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45 Closing Order, paras. 216-220.
46 Closing Order, paras. 842-861.
47 Closing Order, para. 217; *see also* Co-Prosecutors' Rule 66 Final Submission, 16 August 2010, D390, para. 307-309, 312-315 ["Final Submission"].
48 Closing Order, para. 845.
49 Closing Order, para. 846, 849-850; *see also* Final Submission, paras. 310-311, 320.

pick women from the villages.[50] More specifically, as mentioned in the Co-Prosecutors' Final Submission, there is evidence in the Case File that within military units, subject to the approval of Angkar, CPK soldiers were often rewarded for their contribution to the revolution by selecting a forced marriage partner.[51] Additionally, Cham women were also forced to marry non-Cham partners.[52]

31. Following the marriage ceremony, there is evidence that couples had to stay together to ensure consummation of the marriage or meet later on a regular basis. Those first forced sexual encounters, against the will of at least one of the parties, were sometimes monitored or eavesdropped by CPK militia.[53] Couples who refused to consummate the marriage would be arrested, beaten or executed.[54] It is in this context that thousands of rapes were encouraged and committed as part of the forced marriage and procreation policies throughout the country and as part of the systematic or widespread attack against the civilian population.[55] Forced pregnancies resulted from those rapes.[56] As recalled by the Co-Investigating Judges in their Closing Order, the crime of rape in the context of forced marriage was one of the crimes used by the CPK leaders to implement their common purpose.[57]

32. The material facts described in the Closing Order also establish that crimes against humanity of rape took place under the Democratic Kampuchea regime in various other circumstances outside the context of forced marriages, notably in some security centres and cooperatives.[58] Unlike rape in the context of forced marriage, those particular crimes were committed without the explicit sanction of the CPK. Nevertheless, the Co-Prosecutors submit that such crimes were a foreseeable

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50 Closing Order, para. 848; Final Submission, para. 309.
51 Final Submission, para.309.
52 Final Submission , paras. 317, 1451.
53 Closing Order, paras. 220, 858-860 ; Final Submission, paras. 321-322.
54 Closing Order, para.1432; Final Submission, paras. 321, 1447.
55 Closing Order, paras. 1430-1433; Final Submission, para. 1445.
56 Final Submission, para. 322; *see also* Closing Order, para. 860.
57 Closing Order, para. 1432.
58 Closing Order, paras. 457-459 (S-21), 482 (Sang), 504 (Kraing Ta Chan), 549 (Prey Damrei Srot), 578 (North Zone), 662 (Wat Tlork), 785 (Cham women in Kroch Chhmar) and 1426; *see also* Final Submission, paras. 382, 470, 485, 580, 628, 656, 768, and 1449.

consequence of the JCE insofar as it involved the dehumanization, torture and deliberate mistreatment of so-called "bad elements."

VI. CONCLUSION

33. For the reasons set forth above, the Co-Prosecutors respectfully request that the Trial Chamber recharacterize 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.

Respectfully submitted,

Date	Name	Place	Signature
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