



**អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា**

Extraordinary Chambers in the Courts of Cambodia

Chambres Extraordinaires au sein des Tribunaux Cambodgiens

**ព្រះរាជាណាចក្រកម្ពុជា  
ជាតិ សាសនា ព្រះមហាក្សត្រ**

Kingdom of Cambodia  
Nation Religion King

Royaume du Cambodge  
Nation Religion Roi

**អង្គជំនុំជម្រះតុលាការកំពូល**

Supreme Court Chamber

Chambre de la Cour suprême

**ឯកសារដើម**  
**ORIGINAL/ORIGINAL**  
ថ្ងៃ ខែ ឆ្នាំ (Date): 12-Jan-2017, 15:14  
CMS/CFO: Sann Rada

សំណុំរឿងលេខ: ០០២/១៩-កញ្ញា-២០០៧-អ.វ.ត.ក-អ.ជ.ស.ដ/អ.ជ.ត.ក(៣០)

Case File/Dossier N°. 002/19-09-2007-ECCC-TC/SC(30)

**Before:**

- Judge KONG Srim, President**
- Judge Chandra Nihal JAYASINGHE**
- Judge SOM Sereyvuth**
- Judge Agnieszka KLONOWIECKA-MILART**
- Judge MONG Monichariya**
- Judge Florence Ndepele MWACHANDE-MUMBA**
- Judge YA Narin**

**Date:**

**12 January 2017**

**Language(s):**

**Khmer/English**

**Classification:**

**PUBLIC**

**DECISION ON CIVIL PARTIES' IMMEDIATE APPEAL AGAINST THE TRIAL CHAMBER'S DECISION ON THE SCOPE OF CASE 002/02 IN RELATION TO THE CHARGES OF RAPE**

**Co-Prosecutors**

CHEA Leang  
Nicholas KOUMJIAN

**Co-Lawyers for NUON Chea**

SON Arun  
Victor KOPPE

**Accused**

KHIEU Samphân  
NUON Chea

**Co-Lawyers for KHIEU Samphân**

KONG Sam Onn  
Anta GUISSÉ

**Civil Party Lead Co-Lawyers**

PICH Ang  
Marie GUIRAUD

1. **THE SUPREME COURT CHAMBER** of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea between 17 April 1975 and 6 January 1979 (“Supreme Court Chamber” and “ECCC”, respectively) is seized of the “Civil Party Lead Co-Lawyers’ Immediate Appeal Against Trial Chamber Decision on Request for Confirmation of Scope of the Charges of Rape Outside the Context of Forced Marriage” filed on 28 September 2016 and notified on 12 October 2016 (“Appellants” and “Appeal”, respectively).<sup>1</sup>

## I. INTRODUCTION

2. The Appeal concerns a decision of the Trial Chamber issued on 30 August 2016 to confirm that the scope of the trial in Case 002/02, as far as the charges of rape are concerned, does not encompass the factual allegations of rape relating to incidents occurred outside the context of forced marriage, notwithstanding the inclusion of such incidents in the Case 002 Closing Order<sup>2</sup> (“Impugned Decision”).<sup>3</sup>

### a. Background

3. On 15 September 2010, the Co-Investigating Judges issued the Closing Order in Case 002. In its dispositive section, the Closing Order charged, among others, NUON Chea and KHIEU Samphân (“the Accused”, collectively) with the crime against humanity of rape.<sup>4</sup> In the sections wherein the Closing Order set out the legal findings concerning the crime of rape, the Co-Investigating Judges found that it was “clearly established” that, during the period of Democratic Kampuchea, rape had been committed in “diverse circumstances”, notably in a number of security centres and cooperatives as well as in the context of forced marriage.<sup>5</sup> In relation to the incidents of rape committed in security centres and cooperatives, nevertheless, the Closing Order stated that the official policy of the Communist Party of Kampuchea (“CPK”) was to prevent the occurrence of rape and to punish the perpetrators; therefore, “[d]espite the fact that this policy did not manage to prevent rape, it cannot be considered that rape was one of the crimes used by the CPK leaders to implement the

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<sup>1</sup> E306/7/3/1/1.

<sup>2</sup> Closing Order, dated 15 September 2010 and filed on 16 September 2010, D427 (“Closing Order”).

<sup>3</sup> Decision on Lead Co-Lawyers’ Rule 92 Submission on the Confirmation of the Scope of Case 002/02 Concerning the Charges of Rape Outside the Context of Forced Marriage, 30 August 2016, E306/7/3.

<sup>4</sup> Closing Order, para. 1613.

<sup>5</sup> Closing Order, paras 1426-1433.

common purpose. That is not the case, however, in the context of forced marriage”.<sup>6</sup> In the section concerning the Accused’s criminal liability, the Co-Investigating Judges considered the Accused responsible for rape under the doctrine of joint criminal enterprise only in connection with the policy of “[r]egulation of marriage”;<sup>7</sup> as for the other modes of liability, the Co-Investigating Judges specified that they were established to the requisite standard in relation to “rape in the context of forced marriage”.<sup>8</sup> In summing, the Co-Investigating Judges did not consider that the criminal responsibility of the Accused for the incidents of rape committed in the security centres and cooperatives – that is, outside the context of forced marriage – was established to the requisite standard under any mode of liability.

4. On 13 January 2011, the Pre-Trial Chamber, in disposing of the appeals lodged against the Closing Order, found that the crime against humanity of rape did not exist in its own right in the jurisdictional period of the ECCC and held that the underlying facts could be classified as the crime against humanity of other inhumane acts.<sup>9</sup>

5. On 4 April 2014, issuing its decision on the additional severance of the remaining proceedings in Case 002 (“Severance Decision”),<sup>10</sup> the Trial Chamber included within the scope of the trial in Case 002/02 the charges of “forced marriage and rape on a nationwide basis”.<sup>11</sup> In an annex that formed part of the Severance Decision (“Annex to Severance Decision”),<sup>12</sup> the Trial Chamber specified the list of paragraphs and portions of the Closing Order relevant to Case 002/02 and included in that list the paragraphs referring to the sections of the Closing Order titled “Rape in Security Centres and Cooperatives” and “Rape in the Context of Forced Marriage”.<sup>13</sup>

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<sup>6</sup> Closing Order, para. 1429.

<sup>7</sup> Closing Order, para. 1525(v).

<sup>8</sup> Closing Order, paras 1545 (letter (g) under sub-heading “Crimes Against Humanity”) (planning), 1548 (letter (g) under sub-heading “Crimes Against Humanity”) (instigating), 1551 (letter (g) under sub-heading “Crimes Against Humanity”) (aiding and abetting), 1554 (letter (g) under sub-heading “Crimes Against Humanity”) (ordering), 1559 (letter (g) under sub-heading “Crimes Against Humanity”) (superior responsibility).

<sup>9</sup> See e.g. Decision on IENG Thirith’s and NUON Chea’s Appeals Against the Closing Order, 13 January 2011, D427/2/12, para. 11(2) of the disposition; Decision on KHIEU Samphân’s Appeal Against the Closing Order, 21 January 2011, D427/4/15, para. 2(2)(2).

<sup>10</sup> Decision on Additional Severance of Case 002 and Scope of Case 002/02, 4 April 2014, E301/9/1.

<sup>11</sup> Severance Decision, para. 33 and third operative paragraph.

<sup>12</sup> Annex: List of Paragraphs and Portions of the Closing Order Relevant to Case 002/02, 4 April 2014, E301/9/1.1.

<sup>13</sup> Annex to Severance Decision, p. 4, section 5(ii)(b)(10), referring to Closing Order, paras 1426-1433.

6. On 25 April 2014, the Trial Chamber, in its Decision on Preliminary Objections,<sup>14</sup> affirmed that there was no legal basis for the Civil Parties' request to add charges of rape (outside the context of forced marriage) committed within Security Centres to the Closing Order, since, pursuant to the Co-Investigating Judges' decision as reflected in the Closing Order, "these crimes could not be linked to the Accused",<sup>15</sup> whereas, as stipulated in Internal Rule<sup>16</sup> 98(2), the Trial Chamber had "no authority to add new facts or charges to the Closing Order that were dismissed by the Co-Investigating Judges, a decision that was not disturbed by the Pre-Trial Chamber".<sup>17</sup>

7. On 12 June 2015, the Trial Chamber reiterated that, even though the Co-Investigating Judges had found that incidents of rape had been committed, among other places, in the Kraing Ta Chan Security Centre, they had not imputed those incidents to the Accused through any mode of liability.<sup>18</sup> In this regard, the Trial Chamber recalled that the Appellants' request "to add charges of rape" had been rejected in its Decision on Preliminary Objections.<sup>19</sup> The Trial Chamber added, however, that "the occurrence of rape may be relevant, among others, to the conditions in Kraing Ta Chan Security Centre".<sup>20</sup>

8. On 18 March 2016, the Appellants filed a motion requesting, *inter alia*, that the Trial Chamber confirm that it is "formally sei[z]ed of the factual allegations of rape" relating to incidents occurred outside the context of forced marriage ("Request for Confirmation").<sup>21</sup>

9. On 30 August 2016, the Trial Chamber issued the Impugned Decision.

10. On 28 September 2016, the Appellants filed their Appeal before the Supreme Court Chamber. On 11 October 2016, the Greffier of the Supreme Court Chamber noted that there had been a procedural flaw in the filing process, since Internal Rule 106(2) mandates that "immediate appeals shall be filed with the Greffier of the Trial Chamber". The Greffier of the

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<sup>14</sup> Trial Chamber's Memorandum entitled "Further Information Regarding Remaining Preliminary Objections", 25 April 2014, E306 ("Decision on Preliminary Objections").

<sup>15</sup> Decision on Preliminary Objections, para. 3.

<sup>16</sup> Internal Rules of the ECCC, Revision 9, 16 January 2015 ("Internal Rules").

<sup>17</sup> Decision on Preliminary Objections, para. 3.

<sup>18</sup> Decision on KHIEU Samphân's Request for Confrontation among Witness SREY Than and Civil Parties SAY Sen and SAUT Saing and Disclosure of Audio Recordings of Interviews of SAY Sen, 12 June 2015, E348/4, para. 11 ("Decision on Witnesses Confrontation").

<sup>19</sup> Decision on Witnesses Confrontation, para. 11, referring to Decision on Preliminary Objections, para. 3.

<sup>20</sup> Decision on Witnesses Confrontation, para. 11.

<sup>21</sup> Lead Co-Lawyers' Rule 92 Submission on the Confirmation of the Scope of Case 002/02 Concerning the Charges of Rape Outside the Context of Forced Marriage, 18 March 2016, E306/7, para. 28(a).

Supreme Court Chamber instructed the Case File Officer to forward the Appeal to the Trial Chamber, which had the Appeal notified to all Parties in Case 002 on 12 October 2016.

11. On 24 October 2016, KHIEU Samphân filed his response to the Appeal (“KHIEU Samphân Response”).<sup>22</sup>

12. On the same date, having been so permitted by the Supreme Court Chamber,<sup>23</sup> the Co-Prosecutors filed their response in English only; the Khmer translation was filed on 27 October 2016 (“Co-Prosecutors Response”).<sup>24</sup>

### **b. The Impugned Decision**

13. Through the Impugned Decision, the Trial Chamber rejected the Appellants’ “request to recharacterise the factual allegations of rape” occurred at a number of locations, outside the context of forced marriage.<sup>25</sup> The Trial Chamber, making reference to the Closing Order as amended by the Pre-Trial Chamber, the Severance Decision, the Decision on Preliminary Objections and the Decision on Witnesses Confrontation, reasoned that acceding to the Civil Parties’ request “would have the effect of adding new charges or bringing new modes of responsibility against the Accused for factual allegations which were not formally charged in the Closing Order”, thereby violating Internal Rule 98(2).<sup>26</sup> This is because, in the Trial Chamber’s view, a holistic reading of the Closing Order makes it evident that the incidents of rape that took place outside the context of forced marriage were not comprised within the factual basis underlying the crimes with which the Accused had been formally charged.<sup>27</sup> The Trial Chamber finally clarified that the Impugned Decision did not dispose of a request for reconsideration of its previous rulings on the matter, but “merely provided clarification of the scope of charges of rape against the Accused in Case 002/02”.<sup>28</sup>

### **c. The Appeal**

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<sup>22</sup> KHIEU Samphân’s Defence Response to Civil Party Lead Co-Lawyers’ Immediate Appeal Concerning the Charges of Rape Outside the Context of Marriage, 24 October 2016, E306/7/3/1/2.

<sup>23</sup> Electronic mail sent from Greffier of the Supreme Court Chamber to Case File Officer, entitled “Re: Request to File Response to Civil Party LCL’s Immediate Appeal regarding Rape outside Forced Marriage in One Language”, 19 October 2016, 2:13PM.

<sup>24</sup> Co-Prosecutors’ Response to Civil Party Lead Co-Lawyers’ Immediate Appeal against Trial Chamber Decision Regarding Rape Outside the Context of Forced Marriage, 24 October 2016, E306/7/3/1/3.

<sup>25</sup> Impugned Decision, disposition.

<sup>26</sup> Impugned Decision, para. 19.

<sup>27</sup> Impugned Decision, paras 12-15.

<sup>28</sup> Impugned Decision, para. 20.

14. The Appellants submit that the Appeal is admissible and that the Impugned Decision contains an error of law and a discernible error in the exercise of the Trial Chamber's discretion that caused prejudice to the Civil Parties, each of which invalidates the Impugned Decision.<sup>29</sup> They argue that the Trial Chamber misunderstood their Request for Confirmation, which did not seek re-characterisation of the factual allegations of rape, but confirmation that they fell (already) within the scope of Case 002/02 – an issue left erroneously unaddressed.<sup>30</sup> In essence, the Appellants maintain that the language used in the Closing Order does not force the conclusion that the Co-Investigating Judges dismissed the factual allegations of rape outside the context forced marriage; of those factual allegations is thus the Trial Chamber automatically seized by virtue of the forwarding of the Closing Order.<sup>31</sup> Accordingly, the Trial Chamber is at liberty to arrive at a different conclusion as to the possible attribution to the Accused of the said factual allegations of rape, based on the evidence before it at the end of the trial.<sup>32</sup>

15. In his response, KHIEU Samphân requests that the Supreme Court Chamber declare the Appeal inadmissible as the Impugned Decision did not have the effect of terminating the proceedings in relation to the charges of rape outside the context of forced marriage.<sup>33</sup> The Co-Prosecutors similarly respond by submitting that the Appeal is inadmissible, untimely and without merit.<sup>34</sup>

## II. STANDARD OF REVIEW

16. Pursuant to Internal Rule 104(4), only the following decisions of the Trial Chamber are subject to immediate appeal: (a) decisions which have the effect of terminating the proceedings; (b) decisions on detention and bail under Internal Rule 82; (c) decisions on protective measures under Internal Rule 29(4)(c); and (d) decisions on interference with the administration of justice under Internal Rule 35(6). Other decisions may only be appealed at the same time as an appeal against the judgment on the merits.

17. Pursuant to Internal Rules 104(1) and 105(4), the Supreme Court Chamber shall decide immediate appeals on the following grounds: (a) an error on a question of law

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<sup>29</sup> Appeal, paras 2, 49, 92.

<sup>30</sup> Appeal, paras 62, 65, 73-75.

<sup>31</sup> Appeal, paras 54-59, 78, 83.

<sup>32</sup> Appeal, paras 33-35, 56, 58, 78, 81, 90.

<sup>33</sup> KHIEU Samphân Response, paras 40-41.

<sup>34</sup> Co-Prosecutors Response, paras 19, 41.

invalidating the decision; (b) an error of fact which has occasioned a miscarriage of justice; or (c) a discernible error in the exercise of the Trial Chamber's discretion which resulted in prejudice to the appellant.

### III. ADMISSIBILITY

#### a. Submissions

18. The Appellants aver that their Appeal is admissible pursuant to Internal Rule 104(4)(a), arguing that the Impugned Decision had the effect of terminating the proceedings in relation to the factual allegations of rape outside the context of forced marriage, of which the Trial Chamber had been seized upon the issuance of the Closing Order.<sup>35</sup> They further contend that the Civil Parties' right to appeal the Impugned Decision derives from their standing as a party to the present proceedings, given that Internal Rule 105(2) grants the right to file an immediate appeal to a "party", that such a right is not functionally party-specific but "neutral", and that Civil Parties have a legal interest to challenge the Impugned Decision.<sup>36</sup> The Appellants contend that the Decision on Preliminary Objections addressed their request to re-characterise the facts as rape as a stand-alone crime against humanity, which is an issue distinct from that concerning the *saisine* of the Trial Chamber in Case 002/02.<sup>37</sup> Their Request for Confirmation as well as the Appeal, they maintain, seek resolution of only the latter legal question.<sup>38</sup>

19. KHIEU Samphân posits that the Appeal is inadmissible because the Impugned Decision did not result in termination of proceedings. Since the Closing Order did not indict the Accused for the incidents of rape committed outside the context of marriage – a decision that, uncontested before the Pre-Trial Chamber, has become *res judicata*<sup>39</sup> – the Trial Chamber has never been seized of them and cannot therefore terminate any related proceedings, which are not pending before it.<sup>40</sup> KHIEU Samphân further notes that, in 2011,

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<sup>35</sup> Appeal, paras 50-66, 78.

<sup>36</sup> Appeal, paras 43, 45, 50, 67-72.

<sup>37</sup> Appeal, paras 11, 13, 61, 75.

<sup>38</sup> Appeal, paras 75, 94.

<sup>39</sup> KHIEU Samphân Response, paras 20, 25.

<sup>40</sup> KHIEU Samphân Response, para. 14.

the Appellants acknowledged that, in their view erroneously, the Co-Investigating Judges had not indicted the Accused for the said allegations.<sup>41</sup>

20. The Co-Prosecutors respond that the Appeal is inadmissible on the following two grounds: (i) the Trial Chamber was never seized of the factual allegations in question, thus the Impugned Decision had no proceedings to terminate;<sup>42</sup> (ii) because the Trial Chamber had already ruled twice on the same issue, the Appeal is untimely under Internal Rule 107(1).<sup>43</sup>

21. The Supreme Court Chamber will address these arguments in turn.

### **b. Discussion**

22. The admissibility of the Appeal hinges on three distinct legal issues, namely, (i) whether the Impugned Decision had the effect of terminating the proceedings within the meaning of Internal Rule 104(4)(a), (ii) whether the Appeal is timely under Internal Rule 107(1), and (iii) whether the Civil Parties have *locus standi* to lodge an immediate appeal against the Impugned Decision pursuant to Internal Rule 104(4)(a).

23. With respect to the first issue, the Supreme Court Chamber notes that its resolution is closely intertwined with the merits of the Appeal, in the sense that a finding that the Impugned Decision had or had not the effect of terminating the proceedings for the purposes of Internal Rule 104(4)(a) would answer the key point presently in dispute, that is, whether the Trial Chamber was seized of the factual allegations of rape occurred outside the context of forced marriage. The Supreme Court Chamber, therefore, finds it appropriate to join this question to the merits of the Appeal, so that the question will only be determined in the case that the Appeal is declared admissible on all other aforementioned grounds, which are procedural in nature and whose examination therefore takes precedence.

24. Turning to the issue of timeliness of the Appeal, which was raised by the Co-Prosecutors, Internal Rule 107 reads, in relevant part, as follows:

1. In the case of a decision of the Trial Chamber, which is open to immediate appeal as provided for in Rule 104(4) paragraphs (a) and (d), the appeal shall be filed within 30 (thirty) days of the date of the decision or its notification.

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<sup>41</sup> KHIEU Samphân Response, para. 6, quoting 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, 22 July 2011, E99/1 (“Civil Parties 2011 Submission”), paras 32, 40. *See also* KHIEU Samphân Response, para. 29.

<sup>42</sup> Co-Prosecutors Response, para. 17.

<sup>43</sup> Co-Prosecutors Response, paras 3(b), 7, 11.



25. At the outset, the Supreme Court Chamber emphasises that the date of introduction of an immediate appeal for the purposes of Internal Rule 107(1) is the date on which an appeal satisfying any formal requirements provided for by the applicable regulations is filed. In the present case, the Appellants filed the Appeal with the Supreme Court Chamber, thereby violating Internal Rule 106(2), which stipulates that “immediate appeals shall be filed with the Greffier of the Trial Chamber”. On 11 October 2016, i.e. the date on which, at the request of the Greffier of the Supreme Court Chamber, the Appeal was forwarded to the Greffier of the Trial Chamber, the 30-day deadline envisaged under Internal Rule 107(1) had already expired. Nevertheless, the Supreme Court Chamber considers that exceptional circumstances determined that the Appeal could be examined and processed by the Greffier of the Supreme Court Chamber only from 10 October 2016.<sup>44</sup> In the habitual scenario, the Appellants would most likely have been notified of their deficient filing no later than 3 October 2016, when they would have had the opportunity to re-file the Appeal with the proper Greffier within the deadline imposed by Internal Rule 107(1) read in conjunction with Internal Rule 39(3). For these reasons, the Supreme Court Chamber decides on its own motion to condone the procedural defect affecting the filing of the Appeal, to the extent that the Appeal was received by the Greffier of the Trial Chamber after the expiration of the deadline under Internal Rule 107(1).

26. It remains to be determined whether there is merit in the Co-Prosecutors’ averment that the Appeal is untimely, given that the Impugned Decision is “identical” to previous decisions of the Trial Chamber, which the Appellants failed to appeal against at the relevant time.<sup>45</sup> The Co-Prosecutors point to the Decision on Procedural Objections, filed in April 2014, and the Decision on Witnesses Confrontation, issued in June 2015. The Appellants contend that their Appeal as well as the Impugned Decision – which disposed of their Request for Confirmation – concern the scope of Case 002/02 (in other words, the *saisine* of the Trial Chamber). The Appellants make an effort to distinguish this issue from the one that was addressed in the two Trial Chamber’s decisions recalled by the Co-Prosecutors, decisions which, in the Appellants’ view, focused on the existence of rape as a stand-alone crime

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<sup>44</sup> From 29-30 September 2016, there was a period of Cambodian public holidays. Thereafter, the ECCC compound remained closed until 9 October 2016 due to exceptional flooding.

<sup>45</sup> Co-Prosecutors Response, para. 18.

against humanity in 1975, rather than on the Trial Chamber's *saisine* in relation to the allegations of rape occurred outside the context of forced marriage.<sup>46</sup>

27. The Supreme Court Chamber notes that the Appellants' motion that was addressed in the Decision on Preliminary Objections ("Civil Parties 2011 Submission") contains two main arguments: that rape had already crystallised in customary international law as a crime against humanity in its own right in 1975<sup>47</sup> and that, in their Closing Order, the Co-Investigating Judges had erred in declining to indict the Accused for the incidents of rape occurred outside the context of forced marriage<sup>48</sup> – an alleged error that called, in the Appellants' opinion, for "a re-characterization of the facts".<sup>49</sup> Since, as the Appellants and the Co-Prosecutors concur, "*saisine* precedes legal characterisation",<sup>50</sup> the request for re-characterisation contained in the Civil Parties 2011 Submission must have been necessarily advanced on the assumption that the Trial Chamber, despite the Co-Investigating Judges' admitted dismissal of the charges of rape outside forced marriage, was indeed seized of such factual allegations, which the Appellants moved the Trial Chamber to re-characterise.

28. In response, the Decision on Preliminary Objections affirmed that the Trial Chamber had no authority to grant the Appellants' "request to add charges of rape".<sup>51</sup> In keeping with the same logic, the Trial Chamber further held that it cannot "add new facts or charges to the Closing Order that were dismissed by the Co-Investigating Judges".<sup>52</sup> The Supreme Court Chamber notes that the Trial Chamber did not reject a request for re-characterisation, but one to "add charges". It follows that the Trial Chamber had clearly considered itself to be not seized of the factual allegations of rape outside the context of forced marriage, and provided an unambiguous answer to the question of *saisine*. Another remark that transpires from the Decision on Preliminary Objections<sup>53</sup> is that should the Appellants have intended to contest the "flawed"<sup>54</sup> reasoning of the Closing Order, the proper avenue to do so would have been through an appeal to the Pre-Trial Chamber.

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<sup>46</sup> Appeal, para. 61.

<sup>47</sup> Civil Parties 2011 Submission, paras 6-31.

<sup>48</sup> Civil Parties 2011 Submission, paras 32, 40.

<sup>49</sup> Civil Parties 2011 Submission, para. 40. *See also* Civil Parties 2011 Submission, paras 43, 45(ii).

<sup>50</sup> Appeal, para. 76. *See also* Co-Prosecutors Response, para. 31.

<sup>51</sup> Decision on Preliminary Objections, para. 3.

<sup>52</sup> Decision on Preliminary Objections, para. 3.

<sup>53</sup> Decision on Preliminary Objections, para. 3 ("facts or charges [...] that were dismissed by the Co-Investigating Judges, *a decision that was not disturbed by the Pre-Trial Chamber*", emphasis added).

<sup>54</sup> Civil Parties 2011 Submission, para. 40.

29. The Supreme Court Chamber shall now assess whether the legal issues disposed of through the Decision on Preliminary Objections and the Impugned Decision are substantially the same. In the former, the Trial Chamber provided a reasoned argument as to its *saisine* vis-à-vis the factual allegations of rape outside the context of forced marriage. The Impugned Decision is no different. Contrary to the Appellants' submission,<sup>55</sup> the Impugned Decision dealt with the issue of the "scope of charges of rape against the Accused in Case 002/02",<sup>56</sup> by offering a reasoned recapitulation of the decisions issued by the Co-Investigating Judges, Pre-Trial Chamber and Trial Chamber on that matter.<sup>57</sup> Whilst it marginally expanded on the reasoning already contained in its previous decisions,<sup>58</sup> it stopped short of adding *new* substantive arguments. Rather, the Trial Chamber merely reaffirmed its constant position that granting the Appellants' request would be tantamount to adding new facts or charges to the indictment, thus occasioning a contravention of Internal Rule 98(2). In sum, the Impugned Decision limited itself to reiterating, in substance, the same arguments already put forward in the Decision on Preliminary Objections of over two years prior. If the Appellants intended to challenge on appeal the findings of the Trial Chamber concerning its *saisine* in relation to rape outside the context of forced marriage, they could have acted at that time. Their present Appeal, therefore, falls to be dismissed as untimely under Internal Rule 107(1).

30. In view of the foregoing, the Supreme Court Chamber finds it unnecessary to entertain the remaining issues.

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<sup>55</sup> Appeal, paras 73-75.

<sup>56</sup> Impugned Decision, para. 20.

<sup>57</sup> Impugned Decision, paras 12-14, 16-18.

<sup>58</sup> Impugned Decision, paras 15, 19.

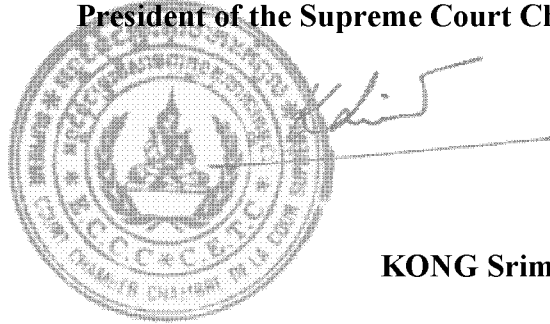
**IV. DISPOSITION**

31. For the foregoing reasons, the Supreme Court Chamber:

**DISMISSES** the Appeal as inadmissible pursuant to Internal Rule 107(1).

**Phnom Penh, 12 January 2017**

**President of the Supreme Court Chamber**



**KONG Srim**