ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia
Nation Religion King

Royaume du Cambodge
Nation Religion Roi

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia
Chambres extraordinaires au sein des tribunaux cambodgiens

អង្គបុរេជំនុំជម្រះ
Pre-Trial Chamber
Chambre Preliminaire

D87/2/1.7/1/1/7

In the name of the Cambodian people and the United Nations and pursuant to the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea

Case File No. **003/07-09-2009-ECCC/OCIJ (PTC30)**

THE PRE-TRIAL CHAMBER

Before: **Judge PRAK Kimsan, President**
Judge Olivier BEAUVALLET
Judge NEY Thol
Judge Kang Jin BAIK
Judge HUOT Vuthy

Date: **10 April 2017**

CONFIDENTIAL

DECISION ON MEAS MUTH'S APPEAL AGAINST THE INTERNATIONAL CO-INVESTIGATING JUDGE'S DECISION ON MEAS MUTH'S REQUEST FOR CLARIFICATION CONCERNING CRIMES AGAINST HUMANITY AND THE NEXUS WITH ARMED CONFLICT

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THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia ("ECCC") is seised of "MEAS Muth's Appeal Against the International Co-Investigating Judge's Decision on MEAS Muth's Request for Clarification Concerning Crimes Against Humanity and the Nexus with Armed Conflict"[1] of 1 July 2016 (the "Appeal") entered by the Co-Lawyers for MEAS Muth (respectively the "Co-Lawyers" and "Appellant") against the International Co-Investigating Judge's decision of 5 April 2016 holding that the nexus with an armed conflict (the "Nexus") was no longer a constitutive element of crimes against humanity under customary international law between 1975 and 1979 (the "Impugned Decision").[2]

I – INTRODUCTION

1. On 7 September 2009, the International Co-Prosecutor filed the Second Introductory Submission, whereby he moved the Co-Investigating Judges to investigate a number of crimes allegedly committed by the Appellant.[3]

2. On 17 October 2013, the Co-Lawyers asked the Office of the Co-Investigating Judges to clarify whether it considers itself bound by the Trial Chamber's jurisprudence of 26 July 2010[4] and 26 October 2011[5] in Cases 001 and 002, which did not require a Nexus, or by the Pre-Trial Chamber's decisions of 15 February 2011[6] and 11 April 2011[7] in Case 002, which required a Nexus (the "Request for Clarification").[8]

3. On 3 March 2015, the Co-Investigating Judge charged MEAS Muth *in absentia* and

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[1] MEAS Muth's Appeal Against the International Co-Investigating Judge's Decision on MEAS Muth's Request for Clarification Concerning Crimes Against Humanity and the Nexus with Armed Conflict, 1 July 2016, D87/2/1.7/1/1/2 ("Appeal").
[2] Decision on MEAS Muth's Request for Clarification Concerning Crimes Against Humanity and the Nexus with Armed Conflict, 5 April 2016, D87/2/1.7/1 ("Impugned Decision"), notified in English on 5 April 2016 and in Khmer on 2 June 2016.
[3] Second Introductory Submission (Revolutionary Army of Kampuchea), 20 November 2008, D1; Acting International Co-Prosecutor's Notice of Filing of the Second Introductory Submission, 7 September 2009, D1/1.
[4] Case 001/18-07-2007/ECCC/TC, Judgement, 26 July 2010, E188.
[5] Case 002/19-09-2007/ECCC/TC ("Case 002"), Decision on Co-Prosecutor's Request to Exclude Armed Conflict Nexus Requirement from the Definition of Crimes Against Humanity, 26 October 2011, E95/8 ("TC Decision of 26 October 2011").
[6] Case 002 (PTC145 & 146), Decision on Appeals by NUON Chea and IENG Thirith Against the Closing Order, 15 February 2011, D427/3/15 ("PTC Decision of 15 February 2011").
[7] Case 002 (PTC75), Decision on IENG Sary's Appeal Against the Closing Order, 11 April 2011, D427/1/30 ("PTC Decision of 11 April 2011").
[8] MEAS Muth's Request for Clarification of Whether the OCIJ Considers Itself Bound by Pre-Trial Chamber Jurisprudence that Crimes Against Humanity Requires a Nexus with Armed Conflict, 17 October 2013, D87/2/1.7.

gave him access to the case file.[9]

4. On 5 April 2016, the International Co-Investigating Judge issued the Impugned Decision,[10] in which he concluded that the Nexus was no longer a constitutive element of crimes against humanity under customary international law between 1975 and 1979.

5. On 2 June 2016, the Co-Lawyers filed a notice of appeal against the Impugned Decision.[11] On 21 June 2016, they filed a request for authorisation to file the Appeal in English first with the Khmer translation to follow.[12] On 1 July 2016, they filed the Appeal, which was notified in English on 5 July 2016 and in Khmer on 27 July 2016.

6. On 4 August 2016, the International Co-Prosecutor filed a request for authorisation to file his response in English first with the Khmer translation to follow.[13] On 8 August 2016, he filed his response to the Appeal, which was notified in English on 17 August 2016 and in Khmer on 18 August 2016 (the "Response").[14]

7. On 19 August 2016, the Co-Lawyers filed a request for authorisation to file a reply in English first with the Khmer translation to follow.[15] On 23 August, they filed their reply, which was notified in English on 30 August 2016 and in Khmer on 14 September 2016

[9] Decision to Charge MEAS Muth in Absentia, 3 March 2015, D128, para. 76.
[10] *See supra* footnote 2.
[11] MEAS Muth's Notice of Appeal Against the International Co-Investigating Judge's Decision on MEAS Muth's Request for Clarification Concerning Crimes Against Humanity and the Nexus with Armed Conflict, filed on 2 June 2016 and notified on 3 June 2016, D87/2/1.7/1/1.
[12] MEAS Muth's Request to File Appeal Against the International Co-Investigating Judge's Decision on MEAS Muth's Request for Clarification Concerning Crimes Against Humanity and the Nexus with Armed Conflict in English with the Khmer Translation to Be Filed at the First Opportunity, 21 June 2016, D87/2/1.7/1/1/1.
[13] International Co-Prosecutor's Request to File His Response to MEAS Muth's Appeal Against the International Co-Investigating Judge's Decision Concerning Crimes Against Humanity and the Nexus with Armed Conflict in English with Khmer to Follow, filed on 4 August 2016 and notified on 5 August 2016, D87/2/1.7/1/1/3.
[14] International Co-Prosecutor's Response to MEAS Muth's Appeal Against the International Co-Investigating Judge's Decision Regarding Crimes Against Humanity and the Nexus with Armed Conflict, filed on 8 August 2016, D87/2/1.7/1/1/4 ("Response"). The Response and its attachments were filed anew on 17 August 2016 following a notice of deficient filing issued by the Greffier of the Pre-Trial Chamber. Pursuant to Article 9 of the Practice Direction on Filing of Documents, the Pre-Trial Chamber has accepted the document despite its later filing.
[15] MEAS Muth's Request to Reply to *International Co-Prosecutor's Response to MEAS Muth's Appeal Against the International Co-Investigating Judge's Decision Regarding Crimes Against Humanity and the Nexus with Armed Conflict* in English with the Khmer Translation to Follow, 19 August 2016, D87/2/1.7/1/1/5.

(the "Reply").[16]

8. On 23 November 2016, the Supreme Court Chamber issued its judgement in Case 002/1, in which it concluded that the Nexus was not part of the definition of crimes against humanity by 1975 (the "Appeal Judgement").[17]

II – ADMISSIBILITY

9. The Co-Lawyers submit that the Appeal is admissible under Internal Rule 74(3)(a) as a jurisdictional challenge, since it concerns the very existence in law of a necessary element of crimes against humanity,[18] or under a broad interpretation of Internal Rule 21.[19] The Co-Lawyers rely on the precedent regarding joint criminal enterprise in Case 002[20] and make a distinction with a previous appeal in Case 004 concerning crimes and modes of liability, which was found inadmissible by the International Judges of the Pre-Trial Chamber.[21] They stress that, in the present case, the issue of the Nexus was duly considered by the International Co-Investigating Judge and therefore there is no reason to await a closing order to decide on it.[22] The Co-Lawyers insist that considering the issue now will ensure that the correct law will be applied to any closing order, thus saving time and promoting efficiency.[23]

10. The International Co-Prosecutor responds that an appeal seeking declaratory relief before the closing order is inadmissible. [24] While the International Co-Prosecutor acknowledges the precedent regarding joint criminal enterprise in Case 002 and the Pre-Trial

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[16] MEAS Muth's Reply to International Co-Prosecutor's Response to MEAS Muth's Appeal Against the International Co-Investigating Judge's Decision Regarding Crimes Against Humanity and the Nexus with Armed Conflict, 23 August 2016, D87/2/1.7/1/1/6 ("Reply").
[17] Case 002/19-09-2007/ECCC/SC, Appeal Judgement, 23 November 2016, F36 ("Appeal Judgement"), paras 711-721.
[18] Appeal, para. 7.
[19] Appeal, para. 10.
[20] Appeal, para. 9 *referring to* Case 002 (PTC35), Decision on the Appeals against the Co-Investigating Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, D97/14/15 ("Decision on JCE"), paras 18, 24-25.
[21] Appeal, para. 8 *referring to* (PTC29), Considerations on MEAS Muth's Appeal Against the International Co-Investigating Judge's Decision to Charge MEAS Muth with Grave Breaches of the Geneva Conventions and National Crimes and to Apply JCE and Command Responsibility, 27 April 2016, D174/1/4 ("Considerations on Grave Breaches"), Opinion of Judges Beauvallet and Baik, para. 23.
[22] Appeal, paras 8-9.
[23] Appeal, para. 9.
[24] Response, para. 12 *referring to* Considerations on Grave Breaches, Opinion of Judges Beauvallet and Baik, paras 22-23; Case 002 (PTC60), Decision on IENG Sary's Appeal Against Co-Investigating Judges' Order on IENG Sary's Motion Against the Application of Command Responsibility, 9 June 2010, D345/5/11, para. 11; Decision on MEAS Muth's Appeal Against the International Co-Investigating Judge's Order on Suspect's Request Concerning Summons Signed by One Co-Investigating Judge (PTC13), 3 December 2014, D117/1/1/2, para. 15.

Chamber's position that the Nexus issue is a jurisdictional matter within the meaning of Internal Rule 74(3)(a),[25] he maintains that appeals of this type are premature, hypothetical and not admissible.[26] Although the International Co-Investigating Judge has exercised his discretion to set out his opinion on the issue, the charges laid against the Appellant, including crimes against humanity, are provisional and the legal characterization of facts can be modified up to the closing order.[27]

11. The Co-Lawyers reiterate in the Reply that the Appeal does not seek declaratory relief but appeals a concrete decision.[28] They underline that, by contrast with the appeal in Case 004 concerning crimes and modes of liability, the International Co-Investigating Judge in this case provided a detailed reasoning.[29] The Appeal is therefore analogous to the appeal concerning joint criminal enterprise in Case 002 and constitutes a proper jurisdictional challenge to a concrete decision.[30]

12. The Pre-Trial Chamber recalls that, pursuant to Internal Rule 74(3)(a), a charged person may appeal against orders or decisions of the Co-Investigating Judges "confirming the jurisdiction of the ECCC". Challenges to the very existence in law of a crime and its elements at the time relevant to the indictment, which if applied would result in a violation of the principle of legality, raise admissible subject matter jurisdiction challenges.[31] In order to determine the admissibility of the Appeal, the Pre-Trial Chamber will, firstly, ascertain whether the Impugned Decision constitute an appealable "decision" within the meaning of Internal Rule 74(3) and, secondly, assess whether it is admissible under Internal Rule 74(3)(a) as an order confirming the jurisdiction of the ECCC or, alternatively, under a broad interpretation in light of Internal Rule 21.

13. The Pre-Trial Chamber considers that the form and substance of the Impugned Decision indicate that it amounts to an order or decision appealable under Internal Rule 74(3)(a), and not to a simple opinion from which declaratory relief is sought. In

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[25] Response, para. 13 *referring to* Decision on JCE, paras 24-25; PTC Decision of 11 April 2011, para. 84.
[26] Response, para. 14.
[27] *Ibid.*
[28] Reply, para. 7.
[29] Reply, para. 9.
[30] Reply, paras 10-11.
[31] PTC Decision of 11 April 2011, para. 117 *referring to* ICTY, *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-AR72.1, Decision on Ante Gotovina's Interlocutory Appeal Against Decision on Several Motions Challenging Jurisdiction, Appeals Chamber, 6 June 2007, paras 15, 18.

particular, while the International Co-Investigating Judge "inform[ed] the Defence" that he is satisfied that the Nexus was no longer a constitutive element of crimes against humanity in 1975-1979, he explicitly decided that he "will [...] not follow the PTC Nexus Decision nor require proof of the Nexus in making [his] determinations on the allegations against Meas Muth",[32] hence confirming the ECCC's jurisdiction over crimes against humanity as an ordinary law crime by opposition to a war crime.

14. In addition, the Pre-Trial Chamber has previously held that arguments related to the existence in law in 1975-1979 of a Nexus are "arguments that go to the very essence of the test for compliance with the principle of legality and, as such, represent admissible jurisdictional challenges."[33] Bearing in mind that Internal Rule 74(3)(a) does not limit jurisdictional challenges to appeals from closing orders, the Pre-Trial Chamber finds that deciding the issue at this stage is appropriate in order to narrow the scope of any future appeal against a closing order.

15. Accordingly, the Pre-Trial Chamber finds the Appeal admissible.

III – STANDARD OF REVIEW

16. Pursuant to the Pre-Trial Chamber's jurisprudence, Co-Investigating Judges' decisions may be overturned if they are a) based on an error of law invalidating the decision; b) based on an error of fact occasioning a miscarriage of justice; or c) so unfair or unreasonable as to constitute an abuse of the judges' discretion.[34]

IV – MERITS

17. The Appellant presents two grounds of appeal, contending that the International Co-Investigative Judge erred in law and in fact: (A) in finding that crimes against humanity did not require a Nexus under customary international law in 1975-1979, while there is no sufficient State practice and *opinio juris*;[35] and (B) in failing to apply the principle *in dubio pro reo*, since the absence of Nexus was allegedly neither foreseeable nor accessible to the

[32] Impugned Decision, para. 78.
[33] PTC Decision of 11 April 2011, para. 84.
[34] *See, e.g.*, Case 002 (PTC64), Decision on IENG Sary's Appeal Against Co-Investigating Judges' Order Denying Request to Allow Audio/Video Recording of Meetings with IENG Sary at the Detention Facility, 11 June 2010, A371/2/12, para. 22.
[35] Appeal, paras 1-6, 21-63.

Appellant in 1975-1979.[36]

A. First Ground of Appeal

1. Submissions of the parties

18. The Co-Lawyers submit that the International Co-Investigative Judge erred in finding that crimes against humanity did not require a Nexus under customary international law in 1975-1979 while the relevant jurisprudence and instruments do not demonstrate sufficient State practice and *opinio juris*.[37]

19. In particular, relying on the International Military Tribunal (the "IMT") Charter and Judgment (respectively the "Nuremberg Charter" and "Nuremberg Judgement") and on the Nuremberg Principles of 1950, the Co-Lawyers contend that the post-World War II's customary international law included a Nexus.[38] They argue that the International Co-Investigative Judge misinterpreted the Nuremberg Judgement when he found it ambiguous[39] and failed to consider that the IMT dealing with pre-war crimes was concerned not with whether the Nexus was jurisdictional or constitutive but whether the evidentiary burden had been met.[40] They also underline that, despite referring to Julius Streicher's pre-war conduct, the IMT ultimately convicted him only for acts committed during the war, thereby confirming that the Nexus was a constitutive element.[41] They further challenge the International Criminal Tribunal for the former Yugoslavia (the "ICTY") Appeals Chamber's lack of citation to legal authority in the *Tadić* case to support the assertion that the Nexus was peculiar to the IMT's jurisdiction[42] and stress that the drafters of the ICTY Statute considered that the customary definition of crimes against humanity included a Nexus.[43]

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[36] Appeal, paras 7, 64-70.
[37] Appeal, ~~p. 1 and~~ paras 1-6, 21-63.
[38] Appeal, paras 2, 21-26.
[39] Appeal, para. 21.
[40] Appeal, para. 24 *referring to* Impugned Decision, para. 31; *Trial of the Major War Criminals Before the International Military Tribunal*, Nuremberg, 14 November 1945-1 October 1946 ("Nuremberg Judgement"), p. 254 ("it has not been satisfactorily proved that [the crimes] were done in execution of, or in connection with, any such crime [within the IMT's jurisdiction]"); International Law Commission, Summary Record of the 48th Meeting, UN Doc. A/CN.4/SR/48, 16 June 1950, p. 56, para. 100.
[41] Appeal, para. 25 *referring to* Nuremberg Judgement, p. 302-304.
[42] Appeal, para. 26 *referring to* ICTY, *Prosecutor v. Tadić*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction 2 October 1995, para. 140.
[43] Appeal, para. 26 *referring to* art. 5 of the Statute of the International Criminal Tribunal for the former Yugoslavia.

20. The Co-Lawyers add that the Tokyo Charter of the International Military Tribunal for the Far East (the "Tokyo Charter") mirrors this customary definition of crimes against humanity in the 1940s and that it was an error to find its value "rather limited".[44] The International Co-Investigating Judge further erred in considering the *Eichmann* case as evidence of the customary status of the Nexus since one national law and its jurisprudence do not indicate any "constant and uniform usage".[45]

21. By contrast with the Nuremberg Charter and Judgment, which clearly required a Nexus, the Co-Lawyers submit that the 1945 Control Council Law No. 10 cases are inconsistent and, being mere domestic cases, do not constitute persuasive authority for customary international law.[46] They claim that the International Co-Investigating Judge misinterpreted the findings of the *Flick*, *Ministries*, *Einsatzgruppen* and *Justice* cases, the first two having found the Nexus to be constitutive and the two others cases' rulings being limited to the tribunal's jurisdiction under Control Council Law No. 10.[47] According to them, and as noted by the Trial Chamber, these cases do not reveal a consensus position and are of little use in determining the customary status of crimes against humanity.[48]

22. The Co-Lawyers further take the view that the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (the "Genocide Convention") does not impact customary international law regarding the Nexus since it concerns genocide only.[49] They submit that it has to be read restrictively and point to the United Nations War Crimes Commission's observation that "genocide is different from crimes against humanity in that, to prove it, no connection with war need to be shown".[50] The International Co-Investigating Judge thus erred in questioning the Pre-Trial Chamber's dismissal of the relevance of the Genocide Convention to the customary status of the Nexus.[51] For the same reasons, the International Co-Investigating Judge erred in relying on statements made during the negotiation of the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (the "Statutory Limitations Convention") and by the

[44] Appeal, para. 35 *referring to* Impugned Decision, para. 28.
[45] Appeal, para. 36.
[46] Appeal, paras 2, 27-34 *referring to* Impugned Decision, paras 33-42.
[47] Appeal, paras 28-33.
[48] Appeal, para. 34 *referring to* TC Decision of 26 October 2011, para. 20
[49] Appeal, paras 4, 37-41.
[50] Appeal, para. 38 *referring to* Law Reports of Trials of War Criminals, United Nations War Crimes Commission, Vol. XV, Digest of Laws and Cases, 1949, p. 138.
[51] Appeal, para. 40 *referring to* Impugned Decision, para. 47

Independent Commission of Experts investigating Rwanda, since they are irrelevant to the subject matter.[52]

23. Similarly, the Co-Lawyers argue that the 1954 Draft Code of Offences against the Peace and Security of Mankind (the "1954 Draft Code") cannot be relied upon as it gave rise to significant debate regarding the Nexus.[53] According to them, the International Co-Investigating Judge inadequately considered the role of the International Law Commission (the "ILC") in preparing the 1954 Draft Code and its predecessor in 1951, despite the utility of its reports in determining State practice and *opinio juris*, and he misconstrued or oversimplified the States' comments.[54] Actually few States expressed any position and the removal of the Nexus from the 1954 Draft Code only reflects the ILC's proposition, and not the acceptance of the States,[55] which allegedly regretted their vote to remove the Nexus when debating on the 1951 Draft Code.[56]

24. The Co-Lawyers finally underline that neither the Statutory Limitations Convention nor the 1973 International Convention on the Suppression and Punishment of the Crimes of Apartheid (the "Apartheid Convention") provide conclusive evidence of State practice and *opinio juris*, since they are political documents whose specific focus is not crimes against humanity.[57] They underline the minimal State support and low approval rate for the Statutory Limitations Convention, which do not evince an emerging *opinio juris*.[58]

25. The International Co-Prosecutor responds that the lack of Nexus requirement in Article 5 of the ECCC Law reflects the customary international law applicable in 1975-1979 and was sufficiently foreseeable and accessible, as agreed by the Co-Investigating Judges and the Trial Chamber in decisions undisturbed on appeal.[59] According to the International Co-Prosecutor, the rights and values protected by crimes against humanity have never been inextricably linked to war; rather, the focus on protecting human rights of a State's nationals against *all* widespread or systematic brutality reflects common sense and had pervaded

[52] Appeal, para. 41 *referring to* Impugned Decision, para. 48.
[53] Appeal, paras 3, 42-50.
[54] Appeal, paras 43-45, 47.
[55] Appeal, paras 44-45. The Co-Lawyers detail the position of the 14 States which submitted observations on the 1951 Draft Code. *See* Appeal, para. 46.
[56] Appeal, para. 48.
[57] Appeal, paras 5, 51-63.
[58] Appeal, paras 53-54.
[59] Response, para. 17.

international relations before 1975.[60] Considering otherwise would lead to the "absurd result" that atrocities reaching the scale and severity of a widespread or systematic attack against a civilian population would not be a crime in times of peace.[61]

26. The International Co-Prosecutor contends, in particular, that the Nexus requirement was peculiar to the context of the Nuremberg Trial and thus just a jurisdictional limitation in the Nuremberg Charter rather than a constitutive element of crimes against humanity.[62] He points to the reference to "before or during the war" in Article 6(c) of the Nuremberg Charter, which suggests that the notion of crimes against humanity was not inherently circumscribed to times of war.[63] The International Co-Prosecutor contests the Co-Lawyers' interpretation with regards to the Streicher case and stresses that the IMT did not elaborate on the Nexus requirement, thus suggesting that it did not consider it to be one requiring proof to the full criminal standard.[64] Contrary to the Appellant, the International Co-Prosecutor submits that the ICTY Appeals Chamber in the *Tadić* case, which considered the Nexus requirement in the Nuremberg Charter only jurisdictional, built on the reasoning of the Trial Chamber and did support its conclusions "with authority and reasoning".[65] The International Co-Prosecutor emphasises that, in any case, the status of the Nexus requirement in the Nuremberg Charter was not critical to the ultimate conclusion of the International Co-Investigating Judge and that any ambiguity was resolved in the following years.[66] The International Co-Prosecutor finally considers the weight placed by the Appellant on the 1950 Nuremberg Principles as "undue", as they are only reflective of the law applied by the IMT and as the Nexus requirement subsequently disappeared.[67]

27. The International Co-Prosecutor then underlines that the Control Council Law No. 10 provided for a definition of crimes against humanity that deliberately deleted the wording of Article 6(c) of the Nuremberg Charter and contained no Nexus requirement,[68] as recognised

[60] Response, paras 18-22.
[61] Response, para. 22.
[62] Response, para. 24.
[63] Response, para. 25. The International Co-Prosecutor further submits that the Nuremberg Judgement read as a whole confirms this interpretation, since it makes reference to crimes against humanity "within the meaning of the Charter". *See* Response, para. 25, *referring to* Nuremberg Judgement, p. 254.
[64] Response, para. 26.
[65] Response, para. 27.
[66] Response, para. 29.
[67] Response, para. 40.
[68] Response, para. 30.

in the *Justice* and *Einsatzgruppen* cases, as well as in a majority of subsequent trials.[69] The Appellant failed to demonstrate how minor ambiguities arising from the Control Council Law No. 10 jurisprudence, which were acknowledged by the International Co-Investigating Judge, undermine the conclusions drawn in the Impugned Decision.[70] The International Co-Prosecutor further points to ordinances issued by the British and French authorities, in accordance with Control Council Law No. 10, supporting the absence of Nexus requirement.[71] He also contends that Control Council Law No. 10 and its jurisprudence reflect an international agreement among the Allied Powers, and are thus direct evidence of international customary law.[72] Even if it contained elements of domestic law, the Appellant erred in contending that domestic judgments are of minimal utility since "decisions of the national courts of a State are of value as evidence of State's practice".[73]

28. For the same reasons, the International Co-Prosecutor submits that the International Co-Investigating Judge properly relied on the 1950 Israeli Nazis and Nazi Collaborators Law, used for the prosecution of Adolf Eichmann, among a number of examples of post-World War II state practice and *opinio juris* demonstrating the absence of Nexus.[74] He further points to other national and regional examples such as the *Barbie* and *Touvier* cases before the French Cour de Cassation, or the *Korbely v. Hungary* case before the European Court of Human Rights, as indicative that there was no Nexus requirement.[75]

29. The International Co-Prosecutor also relies on the Genocide Convention as further evidence that no Nexus was required in 1975.[76] He contends that the Genocide Convention is relevant as genocide has been recognised by States and international tribunals as "the gravest type" or "one of the most egregious manifestations" of crimes against humanity.[77] The International Co-Prosecutor further challenges the Appellant's arguments regarding the relevance of the 1954 Draft Code and recalls the significance of the role of the ILC in

[69] Response, paras 31-33.
[70] Response, paras 33-34.
[71] Response, para. 35.
[72] Response, para. 36.
[73] Response, para. 37, *referring to* "Article 24 of the Statute of the International Law Commission", Working paper by Manley O. Hudson, Special Rapporteur, 3 March 1950, UN Doc. A/CN.4/16, p. 25, para. 9.
[74] Response, para. 41.
[75] Response, para. 42.
[76] Response, para. 38.
[77] Response, para. 39.

codifying international law.[78] He underlines that the International Co-Investigating Judge was aware of the potential limitations of the 1954 Draft Code and still demonstrated that a vast majority of States acquiesced in the removal of the Nexus and that it was rejected for factors unconnected with any disagreement on this matter.[79]

30. The International Co-Prosecutor finally contends that the limited ratification of the Statutory Limitations Convention cannot be interpreted as a reflection of a lack of *opinio juris*.[80] On the contrary, the Working Group drafts show a consensus that the Nexus was not part of international law and nothing in the Appeal undermines the conclusion that the abstention and contrary votes were not motivated by this removal.[81] Similarly, the Apartheid Convention is relevant as one of many sources supporting the International Co-Investigating Judge's conclusion and the Appellant presents no evidence that its lack of widespread ratification was due to concerns over the removal of the Nexus.[82]

31. The Co-Lawyers reply that the sources relied upon by the International Co-Investigating Judge do not individually nor as a whole support the removal of the Nexus requirement by 1975.[83] They maintain that crimes against humanity originated as an extension of war crimes[84] and that, at the very last, the status of the Nexus requirement was ambiguous in 1975-1979.[85] According to them, no "absurdity" results from holding that atrocities reaching the scale and severity of a widespread and systematic attack against a civilian population could have constituted, in 1975-1979, crimes under national law or genocide rather than crimes against humanity.[86]

32. The Co-Lawyers reiterate in reply their arguments with regards to the Nuremberg Charter and Nuremberg Judgement.[87] In their view, the references in the Nuremberg Judgement to acts constituting crimes against humanity "within the meaning of the Charter" indicate that they must have been committed in connection with war crimes or crimes against

[78] Response, para. 43.
[79] Response, para. 44.
[80] Response, para. 45.
[81] Response, paras 46-47.
[82] Response, para. 49.
[83] Reply, para. 4.
[84] Reply, para. 17.
[85] Reply, para. 4.
[86] Reply, para. 20.
[87] Reply, paras 21-29.

peace, in accordance with the definition of crimes against humanity as it existed in 1945.[88] They also consider that it was unnecessary to expressly include a Nexus requirement in the Control Council Law No. 10, since the Nuremberg Charter was already an "integral part" of it.[89] They reiterate the inconstancy of the jurisprudence of tribunals applying Control Council Law No. 10,[90] stress that *dicta* are not legal holdings,[91] and maintain that this law and its related jurisprudence do not demonstrate the level of State practice or *opinio juris* to establish customary international law.[92]

33. The Co-Lawyers also reply to the International Co-Prosecutor that the national Israeli law and the *Eichmann* case are not demonstrative of constant and uniform State practice.[93] Similarly, they underline that the *Barbie* and *Touvier* decisions, relied upon by the International Co-Prosecutor, were issued under French law No. 64-1326, which prohibited crimes against humanity as defined in the Nuremberg Charter, and do not directly address the Nexus requirement perhaps because it was presumed.[94] The *Korbely v. Hungary* case before the European Court of Human Rights is also evidence of one court's position and not of a common understanding among States.[95] The Co-Lawyers finally repeat their arguments regarding the relevance of the Genocide Convention,[96] of the 1954 Draft Code,[97] of the Statutory Limitations Convention[98] and of the Apartheid Convention.[99]

2. Discussion

34. The Co-Lawyers challenge the International Co-Investigating Judge's finding that the Nexus was no longer a constitutive element of crimes against humanity under customary international law in 1975-1979.[100] This conclusion is based on the analysis of several documents, cases and conventions in part III(c) of the Impugned Decision, which the Pre-Trial Chamber will examine in turn in light of the Appeal Judgement's findings.

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[88] Reply, para. 22.
[89] Reply, para. 30.
[90] Reply, paras 31-35.
[91] Reply, paras 32-33.
[92] Reply, paras 37-38.
[93] Reply, para. 41.
[94] Reply, para. 42.
[95] Reply, para. 42.
[96] Reply, para. 39.
[97] Reply, paras 43-44.
[98] Reply, paras 45-47.
[99] Reply, paras 48-49.
[100] Impugned Decision, paras 78, 80.

35. At the outset, the Pre-Trial Chamber notes that crimes against humanity were first developed as an extension of war crimes in the context of armed conflicts. The Pre-Trial Chamber recalls its finding that the "laws of humanity" were firmly based in the laws and customs of war and that the drafters of the Nuremberg Charter, which codified crimes against humanity, ensured a connection to an armed conflict in order to avoid allegations that the resulting convictions went beyond that provided for under international customary and conventional law.[101]

Nuremberg Charter and Judgment

36. The International Co-Investigating Judge found some ambiguity in the Nuremberg Judgement as to whether the Nexus set forth in the Nuremberg Charter was a jurisdictional requirement or a constitutive element.[102] The Supreme Court Chamber reached similar conclusions.[103]

37. The Pre-Trial Chamber recalls that the definition of crimes against humanity was first codified in international law under Article 6(c) of the Nuremberg Charter, which, while incriminating acts committed "before or during the war", imported the requirement that there be a connection between crimes against humanity and crimes against peace or war crimes.[104] The Nexus requirement was also included in the Nuremberg Principles.[105] The Pre-Trial Chamber agrees that a cursory reading of the Nuremberg Charter[106] and of its negotiating history,[107] can lead to interpretations in both ways as to the nature, either jurisdictional or

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[101] PTC Decision of 15 February 2011, para. 139 *referring to* Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, adopted at Saint Petersburg, 29 November / 11 December 1868, *reprinted in* D. Schindler and J. Toman (eds), *The Laws of Armed Conflicts*, Martinus Nijhoff Publisher, 1998, p. 102; Hague Convention (II) with Respect to the Laws and Customs of War on Land, 29 July 1899, Preamble; Hague Convention (IV) Respecting the Laws and Customs of War on Land, 18 October 1907, Preamble; C. Bassiouni, *Crimes Against Humanity in International Criminal Law*, Kluwer Law International, 1999, pp. 23-25, 29-30, 43. *See also* PTC Decision of 11 April 2011, para. 308.

[102] Impugned Decision, paras 30-32. *See also* Impugned Decision, para. 72.

[103] Appeal Judgement, para. 713.

[104] PTC Decision of 15 February 2011, para. 135.

[105] PTC Decision of 15 February 2011, para. 135, *referring to* Nuremberg Principles, Principle 6(c).

[106] The Nexus was unique to the jurisdiction of the Nuremberg Tribunal established specifically "for the just and prompt trial and punishment of the major *war criminals*". *See* Charter of the International Military Tribunal for the Trial of the Major War Criminals, appended to the London Agreement, 8 August 1945, 82 U.N.T.S. 280 ("Nuremberg Charter"), art. 1 [emphasis added]. However, the Nuremberg Charter also explicitly included in its definition of crimes against humanity a category of acts perpetrated "*in execution of or in connection with any crime within the jurisdiction of the Tribunal,* whether or not in violation of the domestic law of the country where perpetrated". *See* Nuremberg Charter, art. 6 [emphasis added].

[107] The negotiating history reveals the opposition of the French and Soviet delegations, which contended that the Nuremberg Charter should merely be a jurisdictional document and not lay out principles of international law,

material, of the Nexus.

38. However, the Pre-Trial Chamber notes that the apparent contradiction in Article 6(c) of the Nuremberg Charter may be resolved if the temporal (before or during "the" war of 1939) and Nexus requirements are seen as a delimitation of the jurisdiction of the Nuremberg Tribunal[108] or, as held by contemporary observers, a "question of jurisdictional opportunity".[109] The Pre-Trial Chamber indeed considers that a number of elements support the finding that the Nexus in the Nuremberg Charter was only jurisdictional in nature, such as the use of terms "within the meaning of the Charter" or "as defined by the Charter"[110] in the Nuremberg Judgement. In addition, while it may be argued that the Nuremberg Judgement treated it as a material element and that Julius Streicher was convicted only for acts committed during the war,[111] the Pre-Trial Chamber finds significant that at least one of the four judges of the Nuremberg Tribunal made clear that no Nexus was required in the definition of crimes against humanity. Judge Henri Donnedieu de Vabres expressly considered in 1947 that crimes against humanity form a broad category, of which war crimes are only a subset, and apply both in times of war and in times of peace:[112]

> "The basic idea is that crimes against humanity form the broadest category, of which war crimes are only a subset. The purpose of this charge [...] is to bridle the arbitrariness of rulers who oppress a national, racial or religious minority. There is a limit to such interventions: respect for the human being, and it is the duty of the international community, freed from local passions, to impose the limit. It imposes it in times of peace and in times of war [...]. A war crime is nothing other than a crime against humanity adapted, in its manifestations, to circumstances in times of war. The theory of crimes

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and of the American and British delegations, which did not want the Nuremberg Charter only to confer jurisdiction but also to codify substantive international law that the International Military Tribunal was to apply. *See* The Avalon Project, "Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials: London, 1945: Minutes of Conference Session of July 23, 1945", February 1949. The negotiating history also reveals that previous drafts on definition of crimes of the American, French and British delegates did not include any war Nexus. *See* Report of Robert H. Jackson, United States Representative to the International Conference on Military Tribunals, at 55, 57, doc. IX (Revision of American Draft of Proposed Agreement, 14 June 1945), at 293, doc. XXXV (Draft Article on Definition of Crimes submitted by French Delegation, 19 July 1945), and at 312, doc. XXXIX (Proposed Revision of Definition of Crimes [Article 6] submitted by British Delegation, 20 July 1945).

[108] *See* H. Meyrowitz, *La répression par les tribunaux allemands des crimes contre l'humanité et de l'appartenance à une organisation criminelle en application de la loi n° 10 du Conseil de Contrôle Allié*, Librairie Générale de Droit et de Jurisprudence, 1960, p. 220.

[109] *See* J. Graven, *Les crimes contre l'humanité*, Recueil des Cours de l'Académie de droit international, 1950, vol. I, p. 544.

[110] *See, e.g.*, Nuremberg Judgement, pp. 254-255, 305.

[111] *See, e.g.*, Nuremberg Judgement, pp. 254, 318-319.

[112] H. Donnedieu de Vabres, *Le Procès de Nuremberg. Cours de Doctorat professé à la Faculté de Droit de Paris*, Domat Montchrestien (ed.), 1947, p. 241 [unofficial translation].

> against humanity ultimately occupies the most advanced position in new public international law."

Donnedieu de Vabres explained that it was because they were "troubled by some scruples" that the drafters finally included a jurisdictional limitation in the Nuremberg Charter through the requirement of a Nexus, even though the idea of an universal repression was recognised both in the broad definition of crimes against humanity retained in Article 6(c) of the Nuremberg Charter and in the "new international public law".[113]

39. This being said, the Pre-Trial Chamber does not find that the Impugned Decision erred in refraining from drawing any firm conclusion as to whether a Nexus was still required post-World War II. It was, in particular, not improper for the International Co-Investigating Judge to make references to other courts' interpretation of the Nexus in the Nuremberg Charter, such as in the *Tadić* and *Eichmann* cases, without questioning their merits,[114] to support his findings.[115]

Control Council Law No. 10

40. The International Co-Investigating Judge found "significant" the removal of the Nexus requirement in the definition of crimes against humanity at Article 2(1)(c) of the Control Council Law No. 10, although noting that its Article 1 still incorporated the Nuremberg Charter[116] The International Co-Investigating Judge further examined the relevant jurisprudence of the courts that applied that law and concluded that "a vast majority" of them considered the Nexus simply as a jurisdictional requirement.[117]

41. The Pre-Trial Chamber recalls that Control Council Law No. 10 omitted the Nexus in its definition of crimes against humanity, but that some of the cases heard and decided under this law in 1946-1949 before the Nuremberg Military Tribunals continued to apply it.[118] The Pre-Trial Chamber concurs to find this removal of the Nexus requirement in Control Council

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[113] *Ibid.*, pp. 127-128.
[114] The Pre-Trial Chamber recalls the caution it applies regarding the reliance on ICTY findings when addressing the ECCC's jurisdiction. *See* PTC Decision of 11 April 2011, para. 307.
[115] Impugned Decision, para. 30.
[116] Impugned Decision, paras 27, 33, 72.
[117] Impugned Decision, paras 41, 72.
[118] PTC Decision of 15 February 2011, para. 140 *referring to* Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10, United States Government Printing Office ("NMT Trials"), *United States v. Flick et al.*, Vol. VI, p. 1213; NMT Trials, *United States v. Weizsaecker et al.*, Vol. XIV, p. 558. *See also* Appeal Judgement, para. 714.

Law No. 10 substantial. If the drafters of Control Council Law No. 10 had wanted to limit the definition of crimes against humanity to acts committed before or during the war, or in connexion with an armed conflict, they would have written it.

42. The Pre-Trial Chamber is not convinced by the Co-Lawyers' interpretation of the *Flick* case.[119] The Tribunal, in this case, took into account the fact that the Nuremberg Charter was an integral part of Control Council Law No. 10 and considered its jurisdiction limited to crimes committed during World War II or in connection with the war.[120] While it found that the Nexus requirement had to be proved, as correctly pointed out by the Appellant,[121] it discussed it in jurisdictional rather than material terms and found that it lacked jurisdiction if not proved.[122] In that sense, the Tribunal stated that it "can see no purpose nor mandate in the chartering legislation of this Tribunal requiring it to take jurisdiction of such [crimes committed before and wholly unconnected with the war]".[123]

43. Furthermore, while the Appellant correctly noted that the *Einsatzgruppen* and *Alstötter and al.* indictments charged the defendants only with crimes perpetrated during the war,[124] the Pre-Trial Chamber finds that it was reasonable to infer from the removal of the Nexus, combined with the Tribunal's findings in those cases, that the notion of crimes against humanity existed independently from that of armed conflict in the Nuremberg Charter. In particular, the Tribunal clearly stated that "[t]his law is not restricted to events of war. It envisages the protection of humanity at all times",[125] that it "has jurisdiction to try all crimes against humanity as long known and understood under the general principles of criminal law"[126] and that Control Council Law No. 10 provided for the punishment of crimes where there is proof of "conscious participation in systematic government organized or approved procedures amounting to atrocities [...] against populations [...]".[127] Similarly, the Pre-Trial Chamber rejects the Appellant's argument that, because no dissent opinion was appended, it was an error to find that the Tribunal in the *von Weizsaecker* case found the Nexus to be a

[119] Appeal, para. 28.
[120] NMT Trials, *United States v. Flick et al.*, Vol. VI, pp. 1212-1213. *See also* Impugned Decision, para. 34.
[121] Appeal, para. 28.
[122] NMT Trials, *United States v. Flick et al.*, Vol. VI, p. 1213. *See also* Appeal Judgement, para. 715.
[123] NMT Trials, *United States v. Flick et al.*, Vol. VI, p. 1213.
[124] Appeal, paras 29-30.
[125] NMT Trials, *United States v. Ohlendorf et al.*, Vol. IV, p. 497. *See also* Impugned Decision, para. 35.
[126] NMT Trials, *United States v. Ohlendorf et al.*, Vol. IV, p. 499. *See also* Impugned Decision, para. 37.
[127] NMT Trials, *United States v. Alstötter and al.*, Vol. III, p. 982. *See also* Impugned Decision, para. 39.

constitutive element "only" by majority.[128] The wording of the judgement in the *von Weizsaecker* case is clear[129] and the alleged error would have no impact on the conclusion that "*all but one* of the Control Council Law No. 10 cases reviewed [...] considered the armed conflict nexus simply as a jurisdictional requirement".[130]

44. Finally, the Pre-Trial Chamber notes that the International Co-Investigating Judge acknowledged the lack of consensus position in the Control Council Law No. 10 jurisprudence[131] and relied on it only among other elements to reach a conclusion on the "progressive and consistent evolution of the definition of crimes against humanity".[132] Therefore, and while the Appellant rightly observed that the Control Council Law No. 10 tribunals were local courts[133], the Pre-Trial Chamber finds that the International Co-Investigating Judge did not place an undue weight on the removal of the Nexus nor improperly concluded that sufficient State practice had been demonstrated at that stage. He rather expressly stated that it is only "[s]tarting from 1948 with the adoption of the Genocide Convention" that the international community accepted the absence of Nexus.[134]

45. Taken together, this jurisprudence represents the beginning of a tendency in national and international practice to attempt to distinguish crimes against humanity from ordinary crimes by requiring, instead of the war nexus, a link to some kind of authority.[135]

Tokyo Charter

46. The International Co-Investigating Judge found the value of the Charter of the International Military Tribunal for the Far East ("Tokyo Charter"), which included the Nexus in its Article 5(c), "rather limited" considering that it was not part of a treaty or agreement between the Allied Powers.[136]

47. The Pre-Trial Chamber notes that the Co-Lawyers do not dispute that the Tokyo

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[128] Appeal, para. 32.
[129] NMT Trials, *United States v. von Weizsaecker et al.*, Vol. XIII, p. 115.
[130] Impugned Decision, para. 41 [emphasis added].
[131] Impugned Decision, paras 41, 72.
[132] Impugned Decision, para. 75.
[133] Appeal, para. 34. *See also* PTC Decision of 11 April 2011, para. 309.
[134] Impugned Decision, para. 73.
[135] K. Ambos, *Treatise on International Criminal Law. Vol. II: The Crimes and Sentencing*, Oxford University Press, 2014, p. 51.
[136] Impugned Decision, para. 28.

Charter was enacted by a proclamation from General MacArthur and that it was not part of a treaty or agreement between the Allied Powers.[137] They merely assert that the International Co-Investigating Judge should have given it more weight, without substantiating the alleged error or demonstrating how it would invalidate the decision.

Trial of Adolf Eichmann

48. The International Co-Investigating Judge observed that the definition of crimes against humanity under Article 1(b)(7) of the 1950 Israeli Nazis and Nazi Collaborators Law did not require a Nexus and that the District Court of Jerusalem in the *Eichmann* case considered the Nexus in the Nuremberg Charter to be jurisdictional.[138]

49. The Pre-Trial Chamber notes that the International Co-Investigating Judge noted the absence of Nexus requirement in the Israeli Nazis and Nazi Collaborators Law and properly referred to the Jerusalem District Court's interpretation in 1961 of the nature of the Nexus in the Nuremberg Charter.[139] The International Co-Investigating Judge did not conclude, as contended by the Appellant, that the national Israeli law and accompanying jurisprudence indicate a "constant and uniform usage, accepted as law".[140] He rather relied on it as part of a "progressive and consistent evolution of the definition of crimes against humanity which has severed the Nexus from their constitutive elements".[141] The Pre-Trial Chamber thus finds no merit in the Appellant's contentions regarding the *Eichmann* case.

Genocide Convention

50. The International Co-Investigating Judge, noting that Article 2 of the Genocide Convention does not include a Nexus,[142] found that it constituted the "first" and "significant step", among a "series of consistent steps" taken by the international community, towards the recognition that crimes against humanity could be committed in times of peace.[143] The International Co-Investigating Judge expressly departed from the Pre-Trial Chamber's finding in Case 002 that the special intent requirement of genocide renders the Convention

[137] Appeal, para. 35. *See also* Impugned Decision, para. 28.
[138] Impugned Decision, para. 43.
[139] *See supra*, para. 39. *See also* Impugned Decision, paras 43, 72.
[140] *See* Appeal, para. 36.
[141] Impugned Decision, para. 75.
[142] Impugned Decision, para. 44.
[143] Impugned Decision, paras 46, 73.

irrelevant to assessing the customary status of the Nexus.

51. The Pre-Trial Chamber recalls that genocide was a subset of crimes against humanity in 1948.[144] The Supreme Court Chamber also confirmed that genocide is a notion that derived from the notion of crimes against humanity and thus considered the Genocide Convention relevant to assess the Nexus.[145] Contrary to the Appellant's contention,[146] the Pre-Trial Chamber does not find the Genocide Convention irrelevant to the determination of the Nexus. Although the Genocide Convention did not by itself change the general requirement of a connection to armed conflict other than genocide,[147] the Pre-Trial Chamber concurs with the finding that it constituted a significant step in the recognition by the international community that in general "international crimes can be committed against civilians in times of peace and war alike".[148] The Pre-Trial Chamber notes, in particular, that the Impugned Decision relied on the Genocide Convention not as a determining element but among "a series of similar resolutions [which] may show the gradual evolution of the *opinio juris* required for the establishment of a new rule",[149] including the Statutory Limitations Convention and the Apartheid Convention. The Pre-Trial Chamber finds that the Appellant has not demonstrated any error in this approach.

1954 Draft Code

52. The International Co-Investigating Judge found the 1954 Draft Code to be a "significant step forward" in the definition of crimes against humanity with no Nexus requirement.[150] He relied on the stance taken by Member States during the negotiations and considered that the lack of objections to the removal of the Nexus, added to the explicit requests for its removal by some Member States, were relevant indicators of State practice and *opinio juris*.[151] He further considered that the Pre-Trial Chamber's past decisions gave too much weight to the rejection of the Draft Code, stressing the absence of any disagreement on the constitutive elements of crimes against humanity and that its consideration was only

[144] PTC Decision of 15 February 2011, para. 140; PTC Decision of 11 April 2011, para. 309.
[145] Appeal Judgement, para. 716 and footnote 1858.
[146] Appeal, para. 40.
[147] PTC Decision of 11 April 2011, para. 309.
[148] Impugned Decision, para. 46.
[149] Impugned Decision, para. 73 *referring to* ICJ, *Nicaragua v. United States of America*, Case Concerning the Military and Paramilitary Activities in and against Nicaragua, Judgement, 27 June 1986, para. 188; ICJ, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 8 July 1996, paras 70-71.
[150] Impugned Decision, para. 58.
[151] Impugned Decision, paras 51-54, 57.

postponed by the United Nations General Assembly ("UNGA").[152]

53. The Pre-Trial Chamber notes the conclusive weight accorded by the International Co-Investigating Judge[153] and the Supreme Court Chamber[154] to the 1954 Draft Code. It observes that the ILC was given mandate by the UNGA to codify and promote the progressive development of international law,[155] as acknowledged by the Appellant,[156] and that all States were invited to submit comments.[157] The Pre-Trial Chamber thus rejects the argument that the ILC work should be narrowly assessed[158] and admits that it is indicative of State practice and *opinio juris*. In particular, the fact that most governments did not submit observations or make specific comments on the definition of crimes against humanity in the 1951 Draft Code, or expressly supported the removal of the Nexus,[159] are relevant factors indicating that the issue was not contentious. The Pre-Trial Chamber also observes that the International Co-Investigating Judge was well aware of the limitations of the 1954 Draft Code, including its negotiating history and the fact that it was never adopted by the UNGA.[160] In particular, he took into account the alleged reversal[161] of members during the 267th meeting of the ILC regarding the definition of crimes against humanity in the 1951 Draft Code, but correctly noted that their concerns were linked to the uncertainty on the nature of crimes against humanity and the competent jurisdiction.[162] Article 2(11) was then adopted at the 269th meeting of the ILC without the Nexus requirement[163] and the postponement of its consideration at the UNGA was not due to any related disagreement.[164] The UNGA further

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[152] Impugned Decision, para. 56.
[153] Impugned Decision, paras 58, 74.
[154] Appeal Judgement, paras 717-718.
[155] Statute of the International Law Commission, adopted by the UNGA in Resolution 174 (II) of 21 November 1947, articles 1(1) ("The International Law Commission shall have for its object the promotion of the progressive development of international law and its codification.") and 15 ("[...] the expression "codification of international law is used for convenience as meaning the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine.")
[156] Appeal, para. 43.
[157] Yearbook of the International Law Commission, 1954, Vol. II, *Documents on the sixth session including the report of the Commission to the General Assembly*, p. 149.
[158] Appeal, para. 44.
[159] Impugned Decision, paras 52-53, 57.
[160] Impugned Decision, paras 51-54, 58.
[161] Appeal, para. 48.
[162] Impugned Decision, para. 54. *See also* Yearbook of the International Law Commission, 1954, Vol. I, *Summary records of the sixth session* (3 June – 28 July 1954), pp. 135-136.
[163] Draft Code of Offenses against Peace and Security of Mankind, 1954, Art. 2(11).
[164] UNGA Resolution 897 (IX). *See also* Appeal Judgement, footnote 1860.

acknowledged in 1968 the significance of the 1954 Draft Code in its Resolution 51/160.[165]

54. Therefore, although the 1954 Draft Code was ultimately not accepted by the UNGA,[166] the Pre-Trial Chamber accepts that the negotiating history of the Draft Code allows the conclusion that it constituted a significant step towards the removal of the Nexus requirement. The Pre-Trial Chamber further adopts the view of the Supreme Court Chamber in Case 002, which relied *inter alia* on the ILC subsequent work in 1984 and on the European Court of Human Rights *Korbely v. Hungary* case recognising the legacy of the 1954 Draft Code.[167]

Statutory Limitations Convention and Apartheid Convention

55. The International Co-Investigating Judge observed that the Statutory Limitations Convention, adopted by the UNGA in 1968, referred to crimes against humanity "whether committed in time of war or in time of peace".[168] Similarly, the Apartheid Convention, adopted by the UNGA in 1973, defines the crime against humanity of apartheid,[169] without the Nexus requirement.[170] The International Co-Investigating Judge considered these instruments as evidence of the gradual evolution of the definition of crimes against humanity.[171]

56. The Pre-Trial Chamber notes that, notwithstanding the rather low approval rate of both conventions at the UNGA,[172] the position expressed by the governments and verbal acts during the negotiations can provide evidence of State practice. In particular, the Pre-Trial Chamber finds that it is proper to rely on the drafting history of the Statutory Limitations Convention to understand the abstaining and contrary States' stances motivations. Indeed, having conducted a thorough review of the preparatory works of the Economic and Social

[165] Impugned Decision, para. 75.
[166] PTC Decision of 15 February 2011, para. 141; PTC Decision of 11 April 2011, para. 309.
[167] Appeal Judgement, paras 717-718.
[168] Impugned Decision, para. 60 *referring to* Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, UNGA Resolution 2391 (XXIII), Art. 1(b).
[169] Impugned Decision, para. 59 *referring to* UNGA Resolution 2202 (XXI).
[170] Impugned Decision, para. 59. *See* International Convention on the Suppression and Punishment of the Crime of Apartheid, UNGA Resolution 3068 (XXVIII), Art. 1.
[171] Impugned Decision, paras. 69, 71, 73, 75.
[172] *See* PTC Decision of 15 February 2011, paras 141-142; PTC Decision of 11 April 2011, para. 309. The Statutory Limitations Convention was adopted at the UNGA by 58 votes in favour, 7 against, and 36 abstentions, while the Apartheid Convention received greater support and was adopted by 91 votes in favour, 4 against and 26 abstentions. By 17 April 1975, the Statutory Limitations Convention had been signed, ratified, or acceded to by 18 Member States and the Apartheid Convention by 25 Member States.

Forum's Commission on Human Rights and of the UNGA Joint Working Group, the Pre-Trial Chamber admits that they show significant support to broadening the definition of crimes against humanity by including genocide and apartheid and by removing the Nexus.[173] On this basis, the Pre-Trial Chamber finds that the Appellant failed to demonstrate that the finding that "the abstentions and contrary votes were not motivated by the removal of the Nexus"[174] was erroneous.

57. Furthermore, the Pre-Trial Chamber reiterates that, while the Statutory Limitations Convention and the Apartheid Convention may not have by themselves change the Nexus requirement for all crimes against humanity,[175] they can be considered together relevant to the "expansion of the content and legal status of crimes against humanity"[176] and evidence of the "continuing"[177] "progressive and consistent evolution of the definition of crimes against humanity which had severed the Nexus from their constitutive elements".[178] In that sense, the Pre-Trial Chamber endorses the Supreme Court Chamber's conclusion that these instruments constitute "further evidence of the exclusion of the Nexus in customary international law" and that this "gradual exclusion accords with the evolving view that the prohibition of crimes against humanity aims to protect humanity from the commission of atrocities, thus warranting a definition that does not require a nexus to a war crime or a crime against peace".[179]

Conclusion

58. The Pre-Trial Chamber has not identified any error in the Impugned Decision with regards to the analysis of individual documents, cases and conventions relied upon. It also agrees that a series of similar resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule.[180] Finally, the Pre-Trial Chamber endorses the Supreme Court Chamber's finding that the jurisprudence of the European Court of Human

[173] Impugned Decision, paras 65-68 *referring to* Economic and Social Forum, Commission on Human Rights, Report of the Twenty-Third Session, 20 February – 23 March 1967, E/CN.4/940; UNGA, 23rd session, Report of the Secretary General on the Question of Punishment of War Criminals and of Persons Who Have Committed Crimes against Humanity, 21 August 1968, A/7174; UNGA, 25th session, First Committee, 1727th Plenary Meeting, 26 November 1968, A/PV.1727, Official Record, New York, 1968.
[174] Impugned Decision, para. 69.
[175] PTC Decision of 15 February 2011, para. 142; PTC Decision of 11 April 2011, para. 309.
[176] Impugned Decision, para. 71.
[177] Impugned Decision, para. 73.
[178] Impugned Decision, para. 75.
[179] Appeal Judgement, para. 716.
[180] Impugned Decision, para. 73.

Rights,[181] as well as national legislation enacted prior to 1975 and a number of national court decisions,[182] defined crimes against humanity with respect to conduct occurring prior to 1975 absent a Nexus.

59. In sum, the Pre-Trial Chamber finds that the International Co-Investigating Judge did not err in finding that the Nexus was not a constitutive element of crimes against humanity under customary international law in 1975-1979. The First Ground of Appeal is therefore dismissed in its entirety.

B. Second Ground of Appeal

1. Submissions of the parties

60. The Co-Lawyers submit that, even if the Pre-Trial Chamber found that the customary definition of crimes against humanity did not require a Nexus in 1975-1979, the absence of Nexus was neither foreseeable nor accessible to the Appellant.[183] The Co-Lawyers underline that there is no support for the finding of foreseeability in the Impugned Decision.[184] They point out that the alleged unclear body of jurisprudence raises uncertainty and, relying on the ICTY jurisprudence, that the finding of foreseeability is not supported here by a "long and consistent stream" of instruments and decisions or by an "extensive, uniform State practice".[185] The Co-Lawyers further contend that the mere "immorality or appalling" nature of the acts by itself does not satisfy the principle of legality.[186] Therefore, in their view, the

[181] Appeal Judgement, para. 718 *referring to* the *Korbely v. Hungary* case, Application no. 9174/02, Grand Chamber Judgement, 19 September 2008; and to the *Kolk and Kislyiy v. Estonia* case, Applications nos. 23052/04 and 23052/04, Admissibility Decision, 17 January 2006.
[182] Appeal Judgement, para. 719 *referring inter alia*, in addition to the Israeli Act on Bringing the Nazis and their Collaborators to Justice and to the *Eichmann* case, to the Hungarian Law-Decree No. 1 of 1971; the International Crimes Act of Bangladesh; the *Barbie* case of the French Cour of Cassation; the *R. v. Finta* case of the Canadian Supreme Court; and the *Arancibia Clavel* case of the Argentinian Supreme Court. *See also* Penal Code of Ethiopia of 1957, art. 281 (providing that genocide and crimes against humanity can be committed "in time of war or in time of peace"); Inter-American Court of Human Rights, *Almonacid-Arellano et al. v. Chile*, Judgement, 26 September 2006, para. 96 (finding that, at the time of the murder of the victim in 1973, the conception of crimes against humanity had evolved since the Nuremberg Charter such as those crimes could be committed "during both peaceful and war times"); International Crimes Tribunal-1 of Bangladesh, *The Chief Prosecutor v. Delowar Hossain Sayeedi*, Judgement, 28 February 2013, para. 30 (finding that, according to the law before the International Crimes Tribunal, the "existence of armed conflict is not necessary though it is admitted that there was an armed conflict in 1971").
[183] Appeal, p. 1 and paras 7, 64-70.
[184] Appeal, para. 65.
[185] Appeal, paras 65-67, *referring to* ICTY, *Prosecutor v. Milutinović et al.*, IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – *Joint Criminal Enterprise*, 21 May 2003, paras 41, 43.
[186] Appeal, para. 68.

principle of *in dubio pro reo* should have been applied as a fundamental principle recognised by the Cambodian Constitution, the ECCC and international law.[187]

61. The International Co-Prosecutor responds, based on international tribunals' jurisprudence and on the Pre-Trial Chamber's decisions, that "there is no requirement to show that the prohibition was actually known to the accused".[188] The International Co-Prosecutor asserts that the ICIJ acted in conformity with the Pre-Trial Chamber's standard for foreseeability which requires 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".[189] As to the application of the principle of *in dubio pro reo*, the International Co-Prosecutor considers that this principle "cannot serve as a basis for resolution of disputes about pure legal issues, in particular disputes about the proper interpretation of [customary international law]"[190], adding the fact that the benefit of the doubt should be given to the accused only when "there is uncertainty as to whether the evidence is sufficient to support a conviction".[191]

62. The Co-Lawyers reply that only acts related to an armed conflict could constitute a crime against humanity and therefore be considered as foreseeable during the time of 1975-1979. It cannot be asserted that the acts committed at this time were already criminal at this time since they are only investigated now.[192]

2. Discussion

63. The International Co-Investigating Judge, noting that all relevant jurisprudence and international instruments were accessible and available in 1975, concluded that it was sufficiently foreseeable in 1975-1979 that the conduct described in Article 5 of the ECCC Law could have amounted to crimes against humanity and that a person engaging in such conduct could have been criminally prosecuted.[193]

64. The Pre-Trial Chamber finds no error in this approach. The Pre-Trial Chamber recalls

[187] Appeal, para. 70.
[188] Response, para. 51.
[189] Case 002 (PTC145 & 146), Decision on Appeals by NUON Chea and IENG Thirith Against the Closing Order, 15 February 2011, D427/3/15, para. 106.
[190] Response, para. 57.
[191] *Ibid.*
[192] Reply, para. 53.
[193] Impugned Decision, para. 76.

that the principle of legality requires to examine whether there was a sufficiently specific definition of crimes against humanity under customary international law in 1975-1979 such that it was both foreseeable and accessible to the Appellant that he could be prosecuted for such crime absent a Nexus. Contrary to the Appellant's contention, there is no general requirement of a "long and consistent stream of judicial decisions, international instruments and domestic legislation"[194] to establish foreseeability.

65. Having concluded that a series of public international instruments and decisions clearly showed the gradual exclusion of the Nexus in customary international law starting from 1945, the Pre-Trial Chamber considers that the International Co-Investigating Judge properly found that it was foreseeable to the Appellant, if necessary by seeking legal advice, that he could be prosecuted for such crimes. The Pre-Trial Chamber further considers that the definition of crimes against humanity in 1975-1979 was sufficiently specific in the sense "generally understood" which, combined with the appalling nature of such crimes, leaves no room for entertaining claims that an accused would not know of the criminal nature of the acts or of criminal responsibility for such acts.[195] The Pre-Trial Chamber refers, in that sense, to the Supreme Court Chamber's finding that the removal of the Nexus after 1945 "accords with the evolving view that the prohibition of crimes against humanity aims to protect humanity from the commission of atrocities".[196] In light of the foregoing, the Pre-Trial Chamber considers that there is no need to examine further the Appellant's arguments relating to the principle of *in dubio pro reo* which, as underlined by the International Co-Prosecutor and the Supreme Court Chamber, is primarily a rule of proof and not of legal interpretation.[197]

66. Accordingly, the Second Ground of Appeal is dismissed.

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[194] Appeal, para. 66 *referring to* ICTY, *Prosecutor v. Milutinović et al.*, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, 21 May 2003, para. 41.
[195] *See, e.g.*, PTC Decision of 11 April 2011, paras 332, 355.
[196] Appeal Judgement, para. 716.
[197] Case 002/19-09-2007/ECCC/SC (04), Decision on Immediate Appeal by KHIEU Samphan on Application for Release, 6 June 2011, E50/3/1/4, para. 31. *See also* Response, paras 57-61.

V – DISPOSITION

FOR THESE REASONS, THE PRE-TRIAL CHAMBER UNANIMOUSLY:

- **DISMISSES** the Appeal

Phnom Penh, 10 April 2017

President **Pre-Trial Chamber**

PRAK Kimsan Olivier BEAUVALLET NEY Thol Kang Jin ~~BAIK~~ HUOT Vuthy

Judges PRAK Kimsan, NEY Thol and HUOT Vuthy append an additional opinion.

OPINIONS OF JUDGES PRAK KIMSAN, NEY THOL AND HUOT VUTHY

67. The National Judges of the Pre-Trial Chamber ("PTC") will present their views on Mr MEAS Muth's appeal regarding his request for clarification concerning crimes against humanity and the nexus with armed conflict.

68. The PTC has previously ruled that the definition of crimes against humanity in the Nuremberg Charter and Nuremberg Principles continued to apply during the period 1975-1979, and that a connection to crimes against peace or war crimes remained a necessary element. It is pertinent to note, however, that as war crimes are prohibited under customary international law both in international and internal contexts, the necessary nexus to armed conflict need not be international in character. [198]

69. The Trial Chamber has previously found that the armed conflict nexus is not part of the definition of crimes against humanity in customary international law between 1975 and 1979[199] and therefore excluded the armed conflict nexus from the definition of crimes against humanity in Case 002.[200]

70. The PTC National Judges recall that the ECCC was established in accordance with the Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea ("Agreement"), and the Law on the Establishment of the ECCC ("ECCC Law"), and applies its Internal Rules.

71. The ECCC is a special court that applies the procedures of prosecution and judicial investigation different from those of Cambodia's national courts. Prosecution and judicial investigation under the national courts merely concern facts, not persons.[201] On the contrary, at the ECCC, prosecution and judicial investigation can proceed only where the two conditions—first, ***facts*** "the crimes and serious violations of Cambodian laws related to crimes, international humanitarian law and custom, and international conventions recognized

[198] Decision on IENG Sary's Appeal against the Closing Order, 11 April 2011, D427/1/30.
[199] Decision on Co-Prosecutors' Request to Exclude Armed Conflict Nexus Requirement from the Definition of Crimes against Humanity, 26 October 2011, E95/8.
[200] *Ibid*, para. 15.
[201] Articles 44 and 125 of the Cambodian Code of Criminal Procedure.

by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979", and second, ***persons*** "senior leaders of Democratic Kampuchea and those who were most responsible for the crimes"— are met.[202]

72. The National and International Co-Prosecutors disagreed over the issuance of the Introductory Submission in Case 003. While the International Co-Prosecutor requested to submit the Second Introductory Submission, the National Co-Prosecutor rejected it on the ground that "the suspects are not senior leaders and/or those who were most responsible."[203] Their disagreement was subsequently brought for settlement before the PTC. The PTC National and International Judges also disagreed over this matter. The PTC National and International Judges respectively supported the National and International Co-Prosecutors' arguments.[204]

73. In light of the foregoing, the National Judges find it unnecessary for the Counsel to appeal against a decision by the Co-Investigating Judges, whether the appeal does not amount to a declaratory request or it challenges a particular decision as their client does not fall into the ECCC jurisdiction. The National Judges therefore reject this appeal.

Phnom Penh, 10 April 2017

President PRAK Kimsan **Judge NEY Thol** **Judge HUOT Vuthy**

[202] Article 1 of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea; Article 1 of the Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea; and Rule 53 of the Internal Rules.
[203] National Co-Prosecutor's Response to the Pre-Trial Chamber's Direction to Provide Further Particulars, dated 24 April 2009, and National Co-Prosecutor's Additional Observation, 22 May 2009, para. 86(a).
[204] Opinions of Judges PRAK Kim, NEY Thol and HUOT Vuthy, 17 August 2009.