

**BEFORE THE OFFICE OF THE CO-INVESTIGATING JUDGES  
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

**FILING DETAILS**

**Case No:** 003/07-09-2009-ECCC/OCIJ      **Party Filing:** The Defence for MEAS Muth

**Filed to:** Co-Investigating Judges      **Original language:** ENGLISH

**Date of document:** 17 October 2013

**CLASSIFICATION**

**Classification of the document  
suggested by the filing party:** PUBLIC

**Classification by OCIJ  
or Chamber:** សម្ងាត់/Confidential

**Classification Status:** Declassified to Public

**Review of Interim Classification:**

**Records Officer Name:**

**Signature:**

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**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**

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**All Civil Parties**

Mr. MEAS Muth, through his Co-Lawyers (“the Defence”), pursuant Rule 21 of the ECCC Internal Rules, hereby requests clarification of whether the OCIJ considers itself bound by and will adhere to Pre-Trial Chamber jurisprudence finding that crimes against humanity, as set out in Article 5 of the Establishment Law,<sup>1</sup> require a nexus with armed conflict. This Request is made necessary in the interest of legal certainty since this issue of law remains unsettled at the ECCC: in Case 002 the Pre-Trial and Trial Chambers have split. The Pre-Trial Chamber found that a nexus with armed conflict was a requirement of crimes against humanity in customary international law in 1975-79, while the Trial Chamber found that no nexus was required. The Supreme Court Chamber has yet to address the issue despite an invitation to do so by the IENG Sary Defence prior to the commencement of the trial in Case 002/01. The Defence submits that the Pre-Trial Chamber correctly concluded that a nexus with armed conflict was a requirement of customary international law in 1975-79. In contrast to the Pre-Trial Chamber’s treatment of the issue, the Trial Chamber failed to consider comprehensively all necessary and available sources, interpreting selective sources so as to achieve a desired result. The sources relied upon by the Trial Chamber do not indicate “extensive and virtually uniform” State practice and *opinio juris* demonstrating the lack of a nexus requirement under customary international law. Should the OCIJ consider that it is not bound by Pre-Trial Chamber jurisprudence, the Defence respectfully requests to be provided with reasons as to why the OCIJ does not consider itself so bound and to make submissions on this issue. This Request is admissible pursuant to Rule 21, which requires that “[t]he applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safeguard the interests of Suspects ... and so as to ensure legal certainty and transparency of proceedings...”<sup>2</sup> The Defence requests to file this Request in English with the Khmer translation to follow because the Interpretation and Translation Unit cannot timely complete the translation due to other priorities.<sup>3</sup>

## I. BACKGROUND

1. On 23 June 2010, the IENG Sary Defence filed a motion to the OCIJ concerning the limits of the applicability of crimes against humanity at the ECCC along with a

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<sup>1</sup> Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (“Establishment Law”).

<sup>2</sup> Emphasis added.

<sup>3</sup> See Email from Interpretation and Translation Unit to Defence, “RE: translation request,” 17 October 2013.

supporting Annex.<sup>4</sup> The IENG Sary Defence asserted that charges of crimes against humanity against the Accused at the ECCC must comport with the definition of crimes against humanity in customary international law during 1975-79 so as not to violate the principle of legality.<sup>5</sup> The IENG Sary Defence argued that a nexus between the underlying acts and armed conflict was a requirement of crimes against humanity during the temporal period of the ECCC's jurisdiction – should the ECCC have jurisdiction to try crimes against humanity at all.<sup>6</sup> The OCP and Civil Parties did not respond.

2. On 26 July 2010, the Trial Chamber rendered its Judgement in Case 001. The Trial Chamber, without being briefed on the issue by the parties, held, *sua sponte*, that a nexus with armed conflict was not required as an element of crimes against humanity in customary international law during 1975-79.<sup>7</sup> To make the determination that there was no armed nexus in customary law during 1975-79, the Trial Chamber relied on: **a.** the 1945 Control Council Law No. 10; **b.** the 1948 Convention on the Prevention and Punishment of the Crime of Genocide; **c.** the 1954 International Law Commission's ("ILC") Draft Code of Offenses against the Peace and Security of Mankind; **d.** the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity; **e.** the 1973 International Convention on the Suppression and Punishment of the Crimes of Apartheid; and **f.** contemporary tribunals.<sup>8</sup>
3. On 16 August 2010, the OCP filed its Rule 66 Final Submission in Case 002. The OCP did not include an armed conflict nexus in its review of the general requirements for crimes against humanity pursuant to Article 5 of the ECCC Law.<sup>9</sup>
4. On 1 September 2010, the IENG Sary Defence filed a Response to the OCP's Final Submission. The IENG Sary Defence reasserted that "State practice and *opinio juris* demonstrate that a nexus between the underlying acts and international armed conflict

<sup>4</sup> *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ, IENG Sary's Alternative Motion on the Limits of the Applicability of Crimes against Humanity at the ECCC, 23 June 2010, D378/2 (Annex at D378/2.2. The Annex explained the genesis of crimes against humanity and chapeau elements prior to and after 1975-19 79).

<sup>5</sup> *Id.*, para. 5.

<sup>6</sup> *Id.*, paras. 8-9.

<sup>7</sup> *Case of KAINING Guek Eav*, 001/18-07-2007-ECCC/TC, Judgement, 26 June 2010, E188, para. 290.

<sup>8</sup> *Id.*, paras. 291-92.

<sup>9</sup> *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ, Co-Prosecutors' Rule 66 Final Submission, 16 August 2010, D390, paras. 1242-51.

was a requirement of crimes against humanity in customary international law in 1975-79.”<sup>10</sup>

5. On 15 September 2010, the OCIJ issued the Closing Order in Case 002, sending each of the Accused to trial for, *inter alia*, crimes against humanity. The OCIJ did not state whether a nexus with armed conflict was required to find that crimes against humanity had occurred.<sup>11</sup>
6. On 18 October 2010, the IENG Thirith Defence appealed the Case 002 Closing Order, arguing, *inter alia*, that crimes against humanity required a nexus with armed conflict in 1975-79.<sup>12</sup>
7. On 25 October 2010, the IENG Sary Defence appealed the Case 002 Closing Order, arguing, *inter alia*, that a nexus between the underlying acts and an international armed conflict is a requirement of crimes against humanity at the ECCC. The IENG Sary Defence argued that State practice and *opinio juris* demonstrate that a nexus between the underlying acts and international armed conflict was a requirement of crimes against humanity in customary international law in 1975-79.<sup>13</sup>
8. On 19 November 2011, the OCP filed a joint Response to the Appeals against the Closing Order. The OCP:

submit[ted] that in its judgement in Duch, the ECCC Trial Chamber correctly addressed the very same nexus issue.... Citing international instruments and the jurisprudence of other international tribunals, the Trial Chamber determined that prior to 1975 the notion of crimes against humanity existed independently from that of armed conflict. In addition, two international conventions enacted prior to 1975, defined crimes against humanity without a nexus to an armed conflict. This strongly indicates the status of crimes against humanity without the armed conflict nexus as customary international law during the Democratic Kampuchea period.<sup>14</sup>

<sup>10</sup> *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ, IENG Sary’s Response to the Co-Prosecutors’ Rule 66 Final Submission and Additional Observations, 1 September 2010, D390/1/2/1.3, paras. 32-33.

<sup>11</sup> *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ, Closing Order, 15 September 2010, D427, paras. 1313-15; 1350-72.

<sup>12</sup> *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ(PTC 145), IENG Thirith Defence Appeal from the Closing Order, 18 October 2010, D427/2/1, para. 61.

<sup>13</sup> *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ(PTC 75), IENG Sary’s Appeal Against the Closing Order, 25 October 2010, D427/1/6, paras. 188-89.

<sup>14</sup> *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ(PTC 75), Co-Prosecutors’ Joint Response to NUON Chea, IENG Sary and IENG Thirith’s Appeals Against the Closing Order, 19 November 2010, D427/1/17, para. 174.

9. On 6 December 2010, the IENG Sary Defence filed its Reply to the OCP's Joint Response. The IENG Sary Defence directly addressed whether crimes against humanity required a nexus with armed conflict during the 1975-79 period, again concluding that customary international law included a nexus requirement at this time.<sup>15</sup>
10. On 15 February 2011, the Pre-Trial Chamber issued its Decision on Appeals by NUON Chea and IENG Thirith Against the Closing Order. In this Decision, the Pre-Trial Chamber considered, *inter alia*, whether crimes against humanity required a nexus with armed conflict in 1975-79 and determined that it was not clear as a matter of customary international law whether the requirement of a nexus with armed conflict was severed prior to or during the temporal jurisdiction of the ECCC. In the absence of clear State practice and *opinio juris* evidencing that no nexus was required by 1975, the Pre-Trial Chamber found that a nexus with armed conflict must be considered part of the definition of crimes against humanity at the ECCC.<sup>16</sup> The Pre-Trial Chamber acknowledged that the Trial Chamber in Case 001 did not reach the same conclusion, but noted that the issue of the existence of a nexus was not specifically challenged by *Duch* and was therefore not before the Chamber.<sup>17</sup>
11. On 11 April 2011,<sup>18</sup> the Pre-Trial Chamber issued its Decision on the IENG Sary Defence's Appeal of the Closing Order, examining, *inter alia*, the status of crimes against humanity in customary international law in 1975-79, and finding:
- the definition of crimes against humanity in the Nuremberg Charter and Nuremberg Principles continued to apply in the period 1975 to 1979, such 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.<sup>19</sup>

The Pre-Trial Chamber made the following specific findings:

<sup>15</sup> *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ(PTC 75), IENG Sary's Reply to Co-Prosecutors' Joint Response to NUON Chea, IENG Sary and IENG Thirith's Appeals Against the Closing Order, 6 December 2010, D427/1/23, paras. 86-93.

<sup>16</sup> *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ(PTC 145 & 146), Decision on Appeals by NUON Chea and IENG Thirith Against the Closing Order, 15 February 2011, D427/3/15, paras. 134-48.

<sup>17</sup> *Id.*, para. 144.

<sup>18</sup> On 13 January 2011, the Pre-Trial Chamber issued its Decision on IENG Sary's Appeal Against the Closing Order (D427/1/26) and its Decision on IENG Thirith's and NUON Chea's Appeals Against the Closing Order (D427/2/12) with reasons to "follow in due course."

<sup>19</sup> *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ(PTC 75), Decision on IENG Sary's Appeal Against the Closing Order, 11 April 2011, D427/1/30, paras. 304-13. Quote at para. 311.

- a. The International Military Tribunal (“IMT”) Charter and the Nuremberg Principles included the armed conflict nexus requirement.<sup>20</sup>
- b. The International Criminal Tribunal for the former Yugoslavia (“ICTY”) *Tadić* Appeals Chamber, holding that the nexus requirement existed within the Nuremberg context only, has limited value because the cases before the ICTY “relate to a different point in time from that which is within ECCC’s jurisdiction.”<sup>21</sup>
- c. The ICTY *Tadić* Trial Chamber, in its Decision on the Defence Motion on Jurisdiction, quoted the *Einsatzgruppen* case in support of the position that Control Council Law No. 10 removed the nexus with armed conflict, but does “not mention later jurisprudence of the Nuremberg Military Tribunal that reaffirmed the war nexus.”<sup>22</sup>
- d. The predecessors to crimes against humanity were firmly based in the law and customs of war, including the preamble of the Declaration of St. Petersburg in 1868, and the Martens Clause in Hague Convention (II) and (IV); thus, the drafters of the IMT Charter included a nexus to ensure that the definition of crimes against humanity was within the bounds of customary international law.<sup>23</sup>
- e. It is unclear whether the nexus was severed prior to, or during, the temporal jurisdiction of the ECCC:
  - i. Control Council Law No. 10 was “essentially domestic legislation...”<sup>24</sup>
  - ii. The 1948 Genocide Convention did not include an armed conflict nexus requirement for genocide, and was unanimously adopted by the UN General Assembly.<sup>25</sup> However, genocide differs from crimes against humanity because it has a “specific intent” element; also, the Convention did not change the nexus requirement for other crimes against humanity.<sup>26</sup>
  - iii. The 1954 ILC’s Draft Code of Offences Against the Peace and Security of Mankind, which defined crimes against humanity without an armed conflict nexus, was not accepted by the United Nations General Assembly.<sup>27</sup>

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<sup>20</sup> *Id.*, para. 306.

<sup>21</sup> *Id.*, para. 307.

<sup>22</sup> *Id.*, para. 308.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*, para. 309.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

- iv. The 1968 Statute of Limitations Convention, which defined crimes against humanity without an armed conflict nexus, was signed, ratified, or acceded to by only 18 of 134 Member States by 17 April 1975, rendering it unrepresentative of general State practice.<sup>28</sup>
- v. The Apartheid Convention, which defined crimes against humanity without an armed conflict nexus, was signed, ratified or acceded to by only 25 of 134 UN Member States by 17 April 1975, and by 32 more States of 148 UN Member States by 1979. Further, the removal of the armed conflict nexus for apartheid did not affect the nexus requirement in other crimes against humanity.<sup>29</sup>
- f. It remained unclear exactly when the nexus requirement was severed and “[a]ccording to the principle of *in dubio pro reo*, any ambiguity such as this must be resolved in the favour of the accused.”<sup>30</sup>

12. On 15 June 2011, the OCP requested the Trial Chamber to remove the requirement of a nexus between crimes against humanity and an armed conflict.<sup>31</sup> The OCP argued that the Trial Chamber’s decision in Case 001 was correct, and submitted that: **a.** Article 5 of the ECCC Law contains no nexus requirement; **b.** the armed conflict nexus requirement did not exist in customary international law during 1975-79; and **c.** “it was foreseeable that the Accused could be held responsible for crimes against humanity committed within Cambodia outside of an armed conflict...”<sup>32</sup>

13. On 22 July 2011, all four Defence teams opposed the OCP’s Request.<sup>33</sup> The IENG Sary Defence responded that the Request should be dismissed because it is an untimely

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*, para. 310.

<sup>31</sup> *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-TC, Co-Prosecutors’ Request for the Trial Chamber to Exclude the Armed Conflict Nexus Requirement from the Definition of Crimes Against Humanity, 15 June 2011, E95, para. 1.

<sup>32</sup> *Id.*, para. 2. Following the Request, on 20 June 2011, the Trial Chamber Senior Legal Officer sent an email to all Parties, which stated that the Defence teams may have until 22 July 2011 to respond to the Request, and that the OCP and Civil Parties may have 10 days to reply. On 7 July 2011, the Trial Chamber issued an official Decision (Decision on Extension of Time, E107), which corrected this email by stating that the Defence teams and Civil Parties have until 22 July 2011 to respond and the OCP may reply by 1 August 2011.

<sup>33</sup> *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-TC, Defence Response to Co-Prosecutors’ Request for the Trial Chamber to Amend the Definition of Crimes Against Humanity, E95/2, 22 July 2011; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-TC, Response to the Co-Prosecutors’ Request for the Trial Chamber to Exclude the Armed Conflict Nexus Requirement from the Definition of Crimes Against Humanity, E95/5, 22 July 2011; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-TC, Réponse à la demande des co-procureurs par laquelle ils prient la chambre de première instance de supprimer de critère de rattachement avec un conflit armé dans la définition de crime contre l’humanité, E95/3, 22 July 2011; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-TC, IENG Sary’s Response to the Co-Prosecutors’ Request for the Trial Chamber to Exclude the MEAS MUTH’S REQUEST FOR CLARIFICATION OF WHETHER THE OCIJ IS BOUND BY PRE-TRIAL CHAMBER JURISPRUDENCE THAT CRIMES AGAINST HUMANITY REQUIRES A NEXUS WITH ARMED CONFLICT

preliminary objection concerning the jurisdiction of the Trial Chamber.<sup>34</sup> Alternatively, the IENG Sary Defence asserted the Request had no merit because the issue of an armed conflict was comprehensively litigated and the Request failed to show any discernible errors in the Pre-Trial Chamber's decision (that the definition of crimes against humanity in the Closing Order requires an armed conflict nexus) that would warrant a reversal.<sup>35</sup> Further, the IENG Sary Defence reiterated that the armed conflict nexus requirement existed in customary international law in 1975-79.<sup>36</sup>

14. On 26 October 2011, the Trial Chamber issued its Decision on the Co-Prosecutors' Request to Exclude Armed Conflict Nexus Requirement from the Definition of Crimes Against Humanity.<sup>37</sup> The Trial Chamber found that the OCP's Request was admissible,<sup>38</sup> and "affirmed its earlier finding in Case 001 that the armed conflict nexus was not part of the definition of crimes against humanity within customary international law between 1975-79,"<sup>39</sup> granting the Request and excluding the armed conflict nexus requirement from the definition of crimes against humanity in Case 002.<sup>40</sup> The Trial Chamber did not address the Pre-Trial Chamber's legal findings in its Decision on IENG Sary's Appeal Against the Closing Order or its Decision on Appeals by NUON Chea and IENG Thirith Against the Closing Order. The Trial Chamber reiterated its arguments from Case 001 and relied on: **a.** the 1945 Control Council Law No. 10;<sup>41</sup> **b.** the 1948 Convention on the Prevention and Punishment of the Crime of Genocide;<sup>42</sup> **c.** the 1954 ILC's Draft Code of Offenses against the Peace and Security of Mankind;<sup>43</sup> **d.** the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity;<sup>44</sup> **e.** the 1973 International Convention on the Suppression and Punishment of

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Armed Conflict Nexus Requirement from the Definition of Crimes Against Humanity and Request for an Oral Hearing, E95/4, 22 July 2011.

<sup>34</sup> *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-TC, IENG Sary's Response to the Co-Prosecutors' Request for the Trial Chamber to Exclude the Armed Conflict Nexus Requirement from the Definition of Crimes Against Humanity & Request for an Oral Hearing, 22 July 2011, E95/4, para. 14.

<sup>35</sup> *Id.*, intro.

<sup>36</sup> *Id.*, paras. 21-22.

<sup>37</sup> *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-TC, Decision on Co-Prosecutors' Request to Exclude Armed Conflict Nexus Requirement from the Definition of Crimes Against Humanity, 26 October 2011, E95/8.

<sup>38</sup> *Id.*, para. 9.

<sup>39</sup> *Id.*, para. 33.

<sup>40</sup> *Id.*, p.15.

<sup>41</sup> *Id.*, para. 15.

<sup>42</sup> *Id.*, paras. 24-25.

<sup>43</sup> *Id.*, paras. 21-23.

<sup>44</sup> *Id.*, paras. 26-29.



the Crimes of Apartheid;<sup>45</sup> and f. contemporary tribunals.<sup>46</sup> In addition, the Trial Chamber relied on jurisprudence pursuant to Control Council Law No. 10.<sup>47</sup>

15. On 25 November 2011, the IENG Sary Defence appealed the Trial Chamber's Decision. The IENG Sary Defence analyzed each of the international instruments and other materials cited by the Trial Chamber and argued, *inter alia*, that they are not declarative of State practice and *opinio juris* from 1975-79.<sup>48</sup> The IENG Sary Defence asserted:

- a. The Trial Chamber erred in its interpretation of the Nuremberg Charter and Control Council Law No. 10;<sup>49</sup>
- b. The Trial Chamber *inaccurately* and *selectively* quoted certain authorities in interpreting the armed conflict nexus requirement in the Nuremberg Charter;<sup>50</sup>
- c. The Trial Chamber erred in failing to consider the Nuremberg Principles as a material statement of customary international law and erred in finding that the 1954 ILC Draft Code of Offences is conclusive evidence of State practice and *opinio juris*;<sup>51</sup>
- d. The Trial Chamber erred in finding that the 1948 Genocide Convention constitutes evidence of State practice and *opinio juris* regarding the nexus requirement;<sup>52</sup>
- e. The Trial Chamber erred in finding that the 1968 Statute of Limitations Convention was significant evidence of State practice and *opinio juris* in 1968;<sup>53</sup>
- f. The Trial Chamber erred in finding that the 1973 Apartheid Convention is indicative of State practice and *opinio juris* regarding the armed conflict nexus;<sup>54</sup>
- g. The Trial Chamber erred in considering post-1979 developments in customary international law as material to the status of the armed conflict nexus from 1975-79;<sup>55</sup> and

<sup>45</sup> *Id.*, para. 30.

<sup>46</sup> *Id.*, paras. 31-32.

<sup>47</sup> *Id.*, paras. 15-20.

<sup>48</sup> *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-TC (SC10), IENG Sary's Appeal against the Trial Chamber's Decision on Co-Prosecutors' Request to Exclude Armed Conflict Nexus Requirement from the Definition of Crimes Against Humanity, 25 November 2011, E95/8/1/1.

<sup>49</sup> *Id.*, paras. 27-34.

<sup>50</sup> *Id.*, paras. 35-36.

<sup>51</sup> *Id.*, paras. 37-41.

<sup>52</sup> *Id.*, paras. 42-43.

<sup>53</sup> *Id.*, paras. 44-47.

<sup>54</sup> *Id.*, paras. 48-50.

<sup>55</sup> *Id.*, paras. 51-56.

- h. The Trial Chamber erred in failing to consider whether liability for crimes against humanity as it claims they were defined at the relevant time would have been foreseeable and accessible to Mr. IENG Sary in 1975-79.<sup>56</sup>

16. On 19 March 2012, the Supreme Court Chamber found the IENG Sary Defence Appeal inadmissible because it was outside the scope of immediate appeals permitted by Rule 104(4).<sup>57</sup> The Supreme Court Chamber indicated that the matter could be appealed as part of an appeal against the Judgement in Case 002.<sup>58</sup>

## II. LAW AND ARGUMENT

17. The International Co-Investigating Judge has publicly confirmed that Mr. MEAS Muth is being investigated, *inter alia*, for crimes against humanity.<sup>59</sup> The Pre-Trial Chamber and Trial Chamber are split on the issue of whether the underlying acts of crimes against humanity charged at the ECCC require a nexus with armed conflict. The Defence requests clarification of whether the OCIJ considers itself bound by Pre-Trial Chamber jurisprudence holding that such a requirement exists. The Defence submits for the reasons that follow, and in particular due to the procedural system in place at the ECCC, that the Pre-Trial Chamber's jurisprudence on the nexus issue is binding on the OCIJ. Should the OCIJ consider that it is not bound by the Pre-Trial Chamber's jurisprudence, the Defence respectfully requests a reasoned decision as to why it is not bound, in general and in this specific instance.

18. According to Pre-Trial Chamber Judges Downing and Chung:

With regard to the binding character of the Pre-Trial Chamber's decisions on the Co-Investigating Judges, we consider that the principles of legal certainty and equality before the law, enshrined in the Internal Rules and forming part of international standards, require the Co-Investigating Judges to follow, as a matter of principle, the *ratio decidendi* of decisions of the Pre-Trial Chamber, that is the legal principle on which a decision is based and which shall apply in similar or substantially similar cases. This is supported by the jurisdictional hierarchy of the Pre-Trial Chamber over the Co-Investigating Judges under the ECCC legal system and is also in the interest of judicial economy and expediency in the proceedings given that decisions of the Co-Investigating Judges are subject to appeal before the Pre-Trial Chamber which, in principle, follows its previous

<sup>56</sup> *Id.*, paras. 57-61.

<sup>57</sup> *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-TC (SC10), Decision on IENG Sary's Appeal against Trial Chamber's Decision on Co-Prosecutors' Request to Exclude Armed Conflict Nexus Requirement from the Definition of Crimes Against Humanity, 19 March 2012, E95/8/1/4.

<sup>58</sup> *Id.*, para. 9.

<sup>59</sup> OCIJ Press Release, *Statement by the Co-Investigating Judges Regarding Case 003*, 28 February 2013.

decisions according to the standard set out above and will therefore overturn decisions of the Co-Investigating Judges departing from its existing jurisprudence.<sup>60</sup>

19. The procedural system established at the ECCC provides that the Pre-Trial Chamber, and not the Trial Chamber, may review decisions of the OCIJ.<sup>61</sup> It would be in the interests of justice, judicial economy, and expediency for the OCIJ to consider itself bound by Pre-Trial Chamber jurisprudence on the definition of crimes against humanity.
20. In Case 001, the Trial Chamber issued a decision *sua sponte* concerning whether crimes against humanity required a nexus with armed conflict. It did not seek or consider the views of the parties before reaching its decision that no nexus with armed conflict was required.
21. In issuing its decision in Case 002, the Pre-Trial Chamber was aware of the Trial Chamber's findings in Case 001. The Pre-Trial Chamber also had the benefit of extensive legal submissions from the parties on the nexus issue. The Pre-Trial Chamber considered the material relied upon by the Trial Chamber (the Nuremberg Charter, Control Council Law No. 10 and its related jurisprudence, the 1954 ILC Draft Code, the Genocide Convention, the Statute of Limitations Convention, the Apartheid Convention, and the ICTY, International Criminal Tribunal for Rwanda, and Special Court for Sierra Leone) and found it insufficient to reach the conclusion that a nexus with armed conflict was no longer part of customary international law by 1975.
22. In Case 002, curiously, the Trial Chamber failed to acknowledge or consider the Pre-Trial Chamber's detailed legal analysis of the nexus issue. Instead, it reviewed the same material that it relied upon in Case 001 when it found that no nexus with armed conflict was required and it reached the same conclusion. This was the same material already considered by the Pre-Trial Chamber, which found it to be insufficient to conclude that no nexus with armed conflict was required. The Trial Chamber offered no reasoning for its refusal to examine the Pre-Trial Chamber's findings. The Trial Chamber's failure to provide legal reasoning as to why the Trial Chamber considered that the Pre-Trial

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<sup>60</sup> Considerations of the Pre-Trial Chamber Regarding the Appeal Against Order on the Admissibility of Civil Party Applicant [REDACTED], 13 February 2013, D11/3/4/2, para. 17.

<sup>61</sup> See Rules 73 – 77bis.

Chamber erred is inapposite of ECCC jurisprudence requiring reasoned decisions.<sup>62</sup> The Trial Chamber had an obligation to explain why it considered that the Pre-Trial Chamber erred.

23. Presumably, the Trial Chamber declined to consider the legal reasoning and analysis of the Pre-Trial Chamber because of the Trial Chamber's vested interest in upholding the decision it had reached in Case 001 – a decision which was made without briefing from the parties. Had the Trial Chamber considered the Pre-Trial Chamber's analysis, it would have assuredly reached the same conclusion as the Pre-Trial Chamber. To do so, however, would have amounted to a confession of legal error on the Trial Chamber's part; hence, the result-oriented approach adopted by the Trial Chamber on this matter.

### III. CONCLUSION AND RELIEF SOUGHT

24. Because of the ECCC's procedural system, the OCIJ is bound to follow the jurisprudence set out by the Pre-Trial Chamber. The Pre-Trial Chamber decided correctly that crimes against humanity requires a nexus with armed conflict. The Trial Chamber's contrary conclusion was flawed in Case 001 and remains flawed in Case 002.
25. Were the OCIJ to decide that it is not bound by the Pre-Trial Chamber's decision and were it apply crimes against humanity without finding a nexus between the underlying acts of crimes against humanity and an armed conflict, this decision would certainly be overturned on appeal, wasting time and judicial resources.

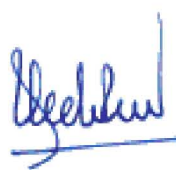


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<sup>62</sup> See *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/TC (SC 15), Decision on NUON Chea's Appeal Against the Trial Chamber's Decision on Rule 35 Applications for Summary Action, 14 September 2012, E176/2/1/4, para. 25; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC 06), Decision on NUON Chea's Appeal Against Order Refusing Request for Annulment, 26 August 2008, D55/1/8, para. 21; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC 62), Decision on Ieng Thirith's Appeal Against the Co-Investigating Judges' Order on Request for Investigative Action by the Defence for Ieng Thirith of 15 March 2010, 14 June 2010, D353/2/3, paras. 22-28; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC 67), Decision on Co-Prosecutors' Appeal Against the Co-Investigating Judges Order on Request to Place Additional Evidentiary Material on the Case File which Assists in Proving the Charged Persons' Knowledge of the Crimes, 15 June 2010, D365/2/10, paras. 22-27; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/TC, Decision on the Urgent Applications for Immediate Release of Nuon Chea, Khieu Samphan and Ieng Thirith, 16 February 2011, E50, paras. 23-27.

**WHEREFORE**, for all the reasons stated herein, the Defence respectfully requests the Co-Investigating Judges to:

- A. CLARIFY whether they consider themselves bound by Pre-Trial Chamber jurisprudence holding that crimes against humanity punishable through Article 5 of the Establishment Law require a nexus with armed conflict; and, should the Co-Investigating Judges not consider themselves bound:
- B. PROVIDE reasoning as to why the Co-Investigating Judges do not consider themselves bound by Pre-Trial Chamber jurisprudence; and
- C. PERMIT the Defence to make legal submissions on the issue of whether the definition of crimes against humanity in customary international law in 1975-79 required a nexus with armed conflict.

Respectfully submitted,

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 ANG Udom  
 Co-Lawyers for Mr. MEAS Muth

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 Michael G. KARNAVAS

Signed in Phnom Penh, Kingdom of Cambodia on this 17<sup>th</sup> day of **October, 2013**