E95/4

BEFORE THE TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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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

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REQUEST FOR AN ORAL HEARING

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Mr. IENG Sary, through his Co-Lawyers ("the Defence"), hereby responds to the Co-Prosecutors' ("OCP") Request for the Trial Chamber to Exclude the Armed Conflict Nexus Requirement from the Definition of Crimes against Humanity ("Request").[1] The Request should be dismissed because it is an untimely preliminary objection to the Pre-Trial Chamber's jurisdictional decision that crimes against humanity requires a nexus between the underlying acts and armed conflict. In the alternative, the Request should be dismissed for lack of merit. The issue of whether the chapeau elements of crimes against humanity include a nexus between the underlying acts and armed conflict has been litigated comprehensively. The Request fails to show any discernible errors in the Pre-Trial Chamber's decision which would warrant a reversal by the Trial Chamber. The Defence incorporates by reference its previous legal submissions on matters relating to both the admissibility and the merits of the Request.[2] A public, oral hearing is requested.

I. BACKGROUND

1. On 23 June 2010, the Defence filed IENG Sary's Alternative Motion on the Limits of the Applicability of Crimes against Humanity at the ECCC ("Motion") before the OCIJ,[3] together with a supporting Annex.[4] The Motion sought to limit the definition of crimes against humanity at the ECCC to the crimes' definition in customary international law in 1975-79. It explained why the principle of legality requires that at the ECCC the underlying acts of crimes against humanity require a nexus with an international armed conflict (should the ECCC have jurisdiction to try crimes against humanity at all).[5] The Annex further explained the genesis of crimes against humanity and the progressive development of their chapeau elements (including the requirement of a nexus with international armed conflict) both prior to and after the period of the temporal jurisdiction of the ECCC.[6] The OCP did not respond to the Motion, nor did the OCIJ rule upon it.

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[1] 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.
[2] *See* Background.
[3] IENG Sary's Alternative Motion on the Limits of the Applicability of Crimes against Humanity at the ECCC, 23 June 2010, D378/2.
[4] IENG Sary's Alternative Motion on the Limits of the Applicability of Crimes against Humanity at the ECCC, Annex: An Overview of Crimes against Humanity and their Evolution in International Jurisprudence, 23 June 2010, D378/2.2 ("Motion Annex").
[5] Motion, paras. 8-9.
[6] Motion Annex, paras. 3-21.

2. On 1 September 2010, the Defence filed IENG Sary's Response to the Co-Prosecutors' Rule 66 Final Submission and Additional Observations.[7] The Defence reiterated its position that "a nexus between the underlying acts and international armed conflict is a requirement of crimes against humanity at the ECCC, although this requirement is not stated explicitly in the Establishment Law."[8]

3. On 15 September 2010, the OCIJ filed the initial Closing Order in Case 002.[9] The OCIJ did not refer to a requirement of a nexus between the underlying acts of crimes against humanity and armed conflict.

4. On 23 October 2010, the Defence filed IENG Sary's Appeal against the Closing Order.[10] The Defence submitted that the "OCIJ erred by failing to explain that a nexus between the underlying acts and international armed conflict is a requirement of crimes against humanity at the ECCC,"[11] and reasserted its reasons for adopting this position.[12]

5. On 19 November, the OCP filed its Joint Response to NUON Chea, IENG Sary and IENG Thirith's Appeals Against the Closing Order, arguing that the "prohibition of crimes against humanity under customary international law ... did not require a nexus with armed conflict between 1975 and 1979" ("OCP Response").[13] The Defence replied on 6 December 2010.[14]

6. On 13 January 2011, the Pre-Trial Chamber issued its Decision on IENG Sary's Appeal against the Closing Order, in which it partially granted certain Defence grounds of appeal:

> This ground of Appeal is granted in so far as the Co-Lawyers assert that the Co-Investigating Judges erred by failing to consider that during the temporal jurisdiction of the ECCC, international customary law required a nexus between the underlying acts of crimes against humanity and an armed conflict. The 'existence of a nexus between the underlying acts and the armed conflict' is added

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[7] IENG Sary's Response to the Co-Prosecutors' Rule 66 Final Submission and Additional Observations, 1 September 2010, D390/1/2/1.3.
[8] *Id.*, paras. 32-33.
[9] Closing Order, 15 September 2010, D427.
[10] IENG Sary's Appeal against the Closing Order, 25 October 2010, D427/1/6.
[11] *Id.*, para. 188.
[12] *Id.*, paras. 188-89.
[13] Co-Prosecutors' Joint Response to NUON Chea, IENG Sary and IENG Thirith's Appeals Against the Closing Order, 19 November 2010, D427/3/6, section I.2, paras. 175-85.
[14] 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 ("Reply"). The Defence refers the Trial Chamber to section VIII.A (paras. 86-93), which specifically addressed the question of whether the "prohibition of crimes against humanity under customary international law required a nexus with armed conflict between 1975 and 1979."

to the 'Chapeau' requirements in Chapter IV(A) of Part Three of the Closing Order.[15]

7. On 14 January 2011, the Trial Chamber became seized with the Case File. This started the time period for filing preliminary objections, making the original due date for such objections 15 February 2011.[16] The OCP filed no preliminary objections by that date.

8. On 19 April 2011, the OCP submitted a list of legal issues it intended to raise at the Initial Hearing.[17] In this list, it notified the Trial Chamber that it will "*Request to Recharacterize Charges in Indictment at Judgment to include:* (a) that an armed conflict is not required to prove a crime against humanity…"[18]

9. On 3 May 2011, the Defence filed observations on the OCP's list of legal issues ("Observations").[19] The Defence stated:

> [T]he OCP could have only properly raised these matters no later than 30 days after the Closing Order became final [pursuant to ECCC Internal Rule 89]. It did not do so and it is now time-barred from raising these jurisdictional issues. Even if these issues could still be raised, Rule 98 does not allow the Trial Chamber to make these re-characterizations. Should the Trial Chamber determine that the OCP may raise these issues at the Initial Hearing, the Defence respectfully invites the Trial Chamber to order the OCP to provide a detailed written submission in advance of the Initial Hearing setting out its arguments as to why these re-characterizations should be permitted and to allow the Defence to file a written response.[20]

10. On 18 May 2011, the OCP filed a "Response"[21] to the Defence's Observations of 3 May 2011.[22] It stated:

> [T]he Co-Prosecutors notify the Trial Chamber and the Parties that it [sic] will file submissions requesting the re-characterization of charges in the indictment at judgment…. The Co-Prosecutors intend to file these submissions prior to the Initial Hearing or at the latest prior to the Substantive Hearing. This will give all

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[15] On 11 April 2011, the Pre-Trial Chamber issued its reasons for its Decision on IENG Sary's Appeal against the Closing Order, 11 April 2011, D427/1/26 ("Decision on IENG Sary's Appeal against the Closing Order").
[16] *See* Order to File Materials in Preparation for Trial, 17 January 2011, E9.
[17] Co-Prosecutors' Indication of Legal Issues It Intends to Raise at the Initial Hearing, 19 April 2011, E9/30.
[18] *Id.*, para. 1(9).
[19] IENG Sary's Observations to the Co-Prosecutors' Notification of Legal Issues It Intends to Raise at the Initial Hearing, 3 May 2011, E9/30/1.
[20] *Id.*, opening (internal citations omitted).
[21] The Trial Chamber has informed the Defence that it considers such submissions to be Replies rather than Responses; therefore this filing should not have been accepted and placed on the Case File, since no leave from the Chamber to file a Reply had been previously granted. *See* email from Senior Legal Officer Susan Lamb to the IENG Sary Defence and other parties on 28 April 2011, where it was indicated that a Response to another Party's Observations to a Motion would be considered a Reply, not a Response.
[22] Co-Prosecutors' Response to "IENG Sary's Observations to the Co-Prosecutors' Notification of Legal Issues it Intends to Raise at the Initial Hearing", 18 May 2011, E9/30/2.

the Defence the opportunity to respond as to the admissibility and merits of such a request as requested by this Defence in their Motion.[23]

11. On 6 June 2011, the Defence alerted the Trial Chamber (through a letter which was distributed to all Parties) of certain concerns, including the status of the proposed OCP intentions to make submissions on crimes against humanity ("Letter").[24] In this letter, the Defence reiterated its position that the OCP may not submit requests to re-characterize the charges, as the matter is already time-barred. The Defence requested the Trial Chamber to issue an order to that effect. [25]

12. On 15 June 2011, the OCP filed the Request, which was notified on 16 June 2011. 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.[26] On 7 July 2011, the Trial Chamber issued an official Decision 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.[27]

13. On 24 June 2011, the Defence filed IENG Sary's Request for an Expedited Decision as to Whether the OCP May Raise Requests for Re-Characterization at this Stage in the Proceedings & Request for Extension of Time to Respond to Such Requests, Should Responses be Necessary ("Request for an Expedited Decision").[28] In the Request for an Expedited Decision, the Defence argued that: **a.** the OCP has raised Requests which concern the jurisdiction of the Chamber well beyond the deadline for such matters to be raised;[29] **b.** Rule 98 does not authorize the OCP to raise arguments at this stage that it failed to raise within 30 days of the date the Closing Order became finalized, as required

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[23] *Id.*, paras. 3-4. The OCP also argued that its "*Request to Recharacterize Charges*" cannot be considered a preliminary objection. *Id.*, paras. 5-6.

[24] Letter from IENG Sary Defence to the Trial Chamber: Request for Information as to Supplementary Submission on Certain Preliminary Objections, Agenda and Information Concerning Initial Hearing, and Status of Proposed OCP Submissions on JCE III and Crimes against Humanity, 6 June 2011.

[25] *Id.*, p. 3. The Defence further requested that if the Trial Chamber were inclined to permit the OCP to file such submissions, it indicate a deadline and allow an appropriate time for responses, considering the busy period prior to the Initial Hearing and prior to trial

[26] Email from Senior Legal Office Susan Lamb to the Parties, Trial Chamber's proposed modification of deadlines in relation to three recent Prosecution findings; advance notice of deadline for supplementary document/exhibit lists (for first phases of trial), 20 June 2011.

[27] Decision on Extension of Time, 7 July 2011, E107.

[28] IENG Sary's Request for an Expedited Decision as to Whether the OCP May Raise Requests for Re-Characterization at this Stage in the Proceedings & Request for Extension of Time to Respond to Such Requests, Should Responses be Necessary, 24 June 2011, E103.

[29] *Id.*, paras. 14-16.

by Rule 89;[30] and **c.** even if the OCP Requests are not considered preliminary objections, the OCP Requests are still inadmissible as the Trial Chamber may not change the applicable law in the manner the OCP requests.[31]

II. PROCEDURAL RESPONSE: THE REQUEST IS UNTIMELY AND SHOULD BE DISMISSED

14. The Trial Chamber is being requested to reverse the Pre-Trial Chamber's jurisdictional decision concerning the requirement that crimes against humanity must have a nexus with armed conflict.[32] This is a preliminary objection concerning the jurisdiction of the ECCC. The Trial Chamber cannot entertain the OCP's Rule 98 request without first determining the elements of crimes against humanity as they existed in customary international law in 1975-79.

15. The question of whether, during the temporal jurisdiction of the ECCC, customary international law required a nexus between the underlying acts of crimes against humanity and an armed conflict is a jurisdictional issue. It was raised as a Rule 74(3)(a) jurisdictional challenge at the pre-trial stage and the Pre-Trial Chamber found it admissible as a jurisdictional challenge. It stated: "appeals that: ... demonstrate that [a crime's] 'application would infringe upon the principle of legality' raise acceptable subject matter jurisdiction challenges that may be brought in the pre-trial phase of the proceedings."[33]

16. Jurisdictional challenges at the trial stage are envisaged by the Rules, which were specifically adopted for the ECCC[34] and have precedence over the Cambodian Criminal Procedure Code.[35] Rule 89(1) provides that a preliminary objection concerning the jurisdiction of the Trial Chamber "shall be raised no later than 30 (thirty) days after the Closing Order becomes final, failing which it shall be inadmissible." Since the Closing Order became final on 14 January 2011, the deadline for filing objections to the Pre-Trial

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[30] *Id.*, para. 17.
[31] *Id.*, paras. 18-21, 23.
[32] Decision on IENG Sary's Appeal against the Closing Order paras. 300-13.
[33] *Id.*, para. 45.
[34] The Rules were changed to shorten the time period for raising preliminary objections – these issues must now be resolved well in advance of trial. In this way, the ECCC is similar to the *ad hoc* tribunals, which all require jurisdictional issues – such as the jurisdiction of the tribunal over certain crimes and forms of liability – to be raised within a specified time period well in advance of the start of trial. *See* ICTY Rules of Procedure and Evidence, Rule 72(A); ICTR Rules of Procedure and Evidence, Rule 72(A).
[35] Decision on NUON Chea's Appeal against Order Refusing Request for Annulment, 26 August 2008, D55/I/8, para. 14.

Chamber's decision concerning the requirement that crimes against humanity must have a nexus with armed conflict was 15 February 2011.[36]

17. The OCP did not file any Rule 89 preliminary objections. The OCP *now* objects to this jurisdictional delimitation, approximately four months past the deadline for Rule 89 preliminary objections. Having opted – either for tactical reasons or due to its lack of due diligence – not to file a preliminary objection, the OCP *now* requests that the Trial Chamber "correct" the definition of crimes against humanity as set out in the Indictment by removing the requirement of a nexus between crimes against humanity and an armed conflict.[37] It frames this Request as a Rule 98 request.[38] Rule 98 is not a vehicle to circumvent Rule 89.

18. This matter was timely raised and extensively litigated at the pre-trial stage.[39] The Pre-Trial Chamber pursuant to Rule 74(3)(a) made a legal determination to a jurisdictional challenge.[40] The OCP did not object. The Request should thus be denied.

IV. SUBSTANTIVE RESPONSE: CRIMES AGAINST HUMANITY REQUIRES A NEXUS WITH ARMED CONFLICT

A. The Trial Chamber is not bound by its determinations in Case 001

19. The Pre-Trial Chamber has found that "it is inherent to courts where several proceedings are pending that a decision in one case on a legal issue will guide the court in future similar cases where no new circumstances or arguments are raised."[41] The OCP disregards this guidance by asserting that the Trial Chamber has "a general responsibility to develop a consistent body of jurisprudence that allows for legal certainty,"[42] and that by "adopting a consistent position on the applicable definition of crimes against humanity in both Case 001 and Case 002, the Trial Chamber will promote legal stability, encourage judicial efficiency, and align the practice of the ECCC with the practice of other international courts..."[43] The Defence incorporates by reference its previous legal

[36] Order to File Materials in Preparation for Trial, 17 January 2011, E9.
[37] Request, para. 1.
[38] *Id.*
[39] *See* Background.
[40] Decision on IENG Sary's Appeal against the Closing Order paras. 300-13.
[41] *Case of Kaing Guek Eav alias "Duch"*, 001/18-07-2007-ECCC/OCIJ(PTC02), Decision on IENG Sary's Request to Make Submissions on the Application of the Theory of Joint Criminal Enterprise in the Co-Prosecutors' Appeal of the Closing Order against Kaing Guek Eav "Duch", 5 December 2008, D99/3/19, para. 14.
[42] Request, para. 12.
[43] *Id.*

submissions on this issue contained in the Reply, i.e. that *stare decisis* is not applicable and the Defence has raised new issues which apply *mutatis mutandis* before the Trial Chamber.[44]

B. The principle of legality requires application of the nexus requirement at the ECCC

20. The OCP asserts that "it is clear that the Article 5 definition of crimes against humanity, including the lack of a nexus requirement, is consistent with the principle of legality."[45] The express definition of crimes against humanity in Article 5 of the Establishment Law does not conform with the principle of legality, not least because it differs from the definition of crimes against humanity under customary international law in 1975-79.[46] Further, the definition stated in Article 5 would have been neither foreseeable nor accessible to Mr. IENG Sary during 1975-79.

1. The armed conflict nexus requirement existed in customary international law in 1975-79

i. The Charter of the International Tribunal at Nuremberg ("IMT Charter")

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[44] Reply, para. 91.
[45] Request, para. 16.
[46] *See* Summary of IENG Sary's Rule 89 Preliminary Objections & Notice of Intent of Noncompliance with Future Informal Memoranda Issued in Lieu of Reasoned Judicial Decisions Subject to Appellate Review, 25 February 2011, E51/4, para. 27 *incorporating* IENG Sary's Response to the Co-Lawyers of Civil Parties' Investigative Request Concerning the Crime of Enforced Disappearance & Request for Extension of Page Limitation, 6 August 2009, D180/4; IENG Sary's Response to the Co-Lawyers of Civil Parties' Investigative Request Concerning Forced Marriage and Forced Sexual Relations, 11 August 2009, D188/3; IENG Sary's Alternative Motion on the Limits of the Applicability of Crimes Against Humanity at the ECCC, 23 June 2010, D378/2; IENG Sary's Response to the Co-Prosecutors' Rule 66 Final Submission and Additional Observations, 1 September 2010, D390/1/2/1.3, paras. 29-64; IENG Sary's Appeal Against the Closing Order, 25 October 2010, D427/1/6, paras. 184-231. *See also* Reply, paras. 2-4, 6-7, 10, 86-105. Note also that as late as 1995, *opinio juris* had not necessarily crystallized to the point where it was clear that States considered that the nexus requirement had ceased to exist in customary international law. *See* Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, UN Doc. A/50/22, United Nations (New York 1995) ("Report of the Ad Hoc Committee"), para. 79: "There were different views as to whether crimes against humanity could be committed in peacetime in the light of the Nürnberg precedent, as well as the statute of the ad hoc Tribunal for the former Yugoslavia. Some delegations singled out, among the developments since the Nürnberg precedent which militated in favour of the exclusion of any requirement of an armed conflict, the precedent of the statute of the ad hoc Tribunal, for Rwanda and the recent decision of the ad hoc Tribunal for the former Yugoslavia in the Tadić case. However, the view was also expressed that the crimes in question were usually committed during an armed conflict and only exceptionally in peacetime, that the existence of customary law on this issue was questionable in view of the conflicting definitions contained in the various instruments and that the matter called for further consideration" (emphasis added). *But see Prosecutor v. Tadić*, IT-94-1/AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 141; *Prosecutor v. Blaškić*, IT-95-14, Judgement, 3 March 2000, para. 71.

21. The Pre-Trial Chamber found that the drafters of the Nuremberg Charter ensured a connection between crimes against humanity and armed conflict "in order to avoid allegations that the resulting convictions went beyond that provided for under customary and conventional law."[47] The OCP ignores this finding and asserts that "the IMT Charter nexus requirement was merely a jurisdictional limitation, not an inherent restriction on the scope of crimes against humanity under international law."[48] The Defence incorporates by reference its previous legal submissions on this issue contained in the Reply.[49]

22. The OCP asserts that the reference to "before or during the war" in Article 6(c) of the IMT Charter "suggests that the notion of crimes against humanity was not inherently circumscribed to times of war."[50] This assertion is flawed. It miscomprehends the nature of what constitutes a *nexus* as well as the IMT Judgement itself. The question of whether crimes against humanity were "inherently circumscribed to *times* of war" is distinct from the question of whether crimes against humanity were inherently *connected* to war crimes or crimes against peace. The OCP asserts that the reference in the IMT Judgement to crimes against humanity "within the meaning of the Charter" supports the "notion" that the nexus requirement "was a jurisdictional one."[51] This statement is unsupported by authority and misinterprets the quotation from the IMT Judgement cited by the OCP; it does not follow from the words "within the meaning of the Charter" that the nexus requirement under the IMT Charter was merely jurisdictional.

ii. Control Council Law No. 10 ("CCL 10") and the Nuremberg Principles

23. The Pre-Trial Chamber noted that CCL 10 jurisprudence reaffirmed the armed conflict nexus.[52] The OCP cites CCL 10 as an example demonstrating that crimes against humanity existed as a "concept distinct from armed conflict under customary international law prior to 1975." While the nexus requirement was removed from the express language of CCL 10, the OCP's analysis of CCL 10 jurisprudence and associated commentary is flawed and unpersuasive. The OCP relies upon *obiter dicta* in the *Justice*

[47] Decision on IENG Sary's Appeal against the Closing Order, para. 308. *See also* Decision on Appeals by NUON Chea and IENG Thirith against the Closing Order, 15 February 2011, D427/2/15, para. 139.
[48] Request, para. 19.
[49] Reply, para. 87.
[50] Request, para. 19.
[51] *Id.*
[52] *See* Decision on IENG Sary's Appeal against the Closing Order, para. 308, n. 569.

case and the *Einsatzgruppen* case to support its assertion that the "absence of the nexus requirement in CCL 10 allowed for prosecutions of crimes not committed in war." Meanwhile, it relegates the *ratio decidendi* of the *Flick* case to a footnote.[53] In the *Justice* case, only one count (conspiracy) was for offenses committed before the outbreak of World War II, i.e. was not necessarily connected with the armed conflict.[54] The tribunal ruled that it had no jurisdiction to try conspiracy as a separate substantive offense.[55] The Tribunal left open the question whether it would have considered evidence of offenses committed before 1939 had they been charged in other counts.[56] The Tribunal's observation (cited by the OCP) that the nexus requirement was "deliberately omitted from the definition" of crimes against humanity in CCL 10 thus was made *obiter*.

24. In the *Einsatzgruppen* case, the Indictment charged crimes against humanity committed between May 1941 and July 1943, i.e. during World War II.[57] The Tribunal's *dictum* that CCL 10 allowed for prosecution of crimes not committed in war was also *obiter*. In the *Flick* case, on the other hand, the Tribunal held that there was "no support" for the argument that "the omission of the [nexus language] from Control Council Law No. 10 evidences an intent to broaden the jurisdiction of [the] Tribunal." This holding was material to the *ratio decidendi*. In *Flick*, the Indictment charged crimes against humanity from before World War II and the Tribunal had to come to a decision regarding the criminality of four transactions which were completed before the outbreak of war.[58] The *Flick* case should therefore be considered authoritative when considering whether CCL 10 jurisprudence supports the proposition that the nexus requirement was removed by that law.

25. The OCP notes the Pre-Trial Chamber's apparent inconsistency in describing CCL 10 as "essentially domestic legislation" when determining this issue, *vis-á-vis* its assessment (when considering whether joint criminal enterprise existed as a form of liability under customary international law in 1975-79) that CCL 10 reflected "international agreement

[53] Request, para. 20, n. 30 and 31.
[54] Law Reports Of Trials Of War Criminals, Selected and prepared by the United Nations War Crimes Commission Volume IX London *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-9.pdf, p. 46.
[55] *Id.*
[56] *Id.*
[57] *Id.*, p. 47.
[58] *Id.*

among the Great Powers on the law applicable to international crimes."[59] Although the Defence agrees with the OCP that there does appear to be an inconsistency in the Pre-Trial Chamber's finding on the status of CCL 10, it maintains that the Allied and German courts applying CCL 10 were considered to be "local courts, administering primarily local (municipal) law,"[60] and "in the immediate aftermath of WWII the [International Military Tribunal's] definition of crimes against humanity was viewed as the most accepted statement of international law"[61] The Nuremberg Principles (whose definition of crimes against humanity mirrors that of the IMT Charter) reflect this understanding.[62]

iii. The Genocide Convention and the Apartheid Convention

26. The Pre-Trial Chamber observed that the definition of genocide in the 1948 Genocide Convention "unequivocally departed from its crimes against humanity origins by requiring a 'specific intent,' an element that was not articulated in the Nuremberg Charter."[63] The Pre-Trial Chamber added that the 1973 Apartheid Convention "was signed, ratified or acceded to by only 25 United Nations member States of a total of 134 by 17 April 1975, and by 32 further States during the ECCC's temporal jurisdiction by the close of which the total number of member States had increased to 148."[64] The OCP ignores these observations and asserts that the fact that the 1948 Genocide Convention and the 1973 Apartheid Convention "defined individual crimes against humanity without a nexus to armed conflict strongly suggests that crimes against humanity were not inextricably linked with armed conflict during the DK period."[65] The Defence incorporates by reference its previous legal submissions on this issue contained in the Reply.[66]

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[59] Request, para. 21.
[60] Egon Schwelb, *Crimes Against Humanity* 23 B.Y.B. INT'L L. 178, 218-19 (1946). *See also* Attila Bogdan, *Individual Criminal Responsibility in the Execution of a "Joint Criminal Enterprise" in the Jurisprudence of the* ad hoc *International Tribunal for the Former Yugoslavia*, 6 INT'L CRIM. L. REV. 63, 110 (2006). CCL 10 "cannot be deemed part of international law, since it was passed by the legislative authority over Germany (the Allied Control Council). As a result, the judgments rendered in accordance with CCL No.10 do not constitute valid international precedent,...." (Emphasis added).
[61] *See* Stuart Ford, *Crimes Against Humanity at The Extraordinary Chambers in the Courts of Cambodia: Is a Connection with Armed Conflict Required?*, 24 UCLA PAC. BASIN L.J. 125, 148, 151 (2006-2007).
[62] Nuremberg Principles, Principle VI(c).
[63] Decision on IENG Sary's Appeal against the Closing Order, para. 309.
[64] *Id.*
[65] Request, para. 23.
[66] Reply, para. 88.

iv. 1954 International Law Commission Draft Code of Offenses Against the Peace and Security of Mankind ("1954 Draft Code of Offenses")

27. The Pre-Trial Chamber observed that the 1954 Draft Code of Offenses was "not accepted by the United Nations General Assembly."[67] The OCP ignores this observation and asserts that the definition of "genocide and 'inhuman acts ... against any civilian population'" in the 1954 Draft Code of Offenses is "evidence of state practice and *opinio juris* prior to 1975 further [supporting] the notion that crimes against humanity could be committed outside of an armed conflict."[68] The Defence incorporates by reference its previous legal submissions on this issue contained in the Reply.[69]

v. The 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity

28. The Pre-Trial Chamber's observed that the 1968 Convention on the Non-Applicability of Statutes of Limitations to War Crimes and Crimes Against Humanity "was signed, ratified or acceded to by only 18 United Nations Member States of a total of 134 by 17 April 1975, while one additional State ratified it during the ECCC's temporal jurisdiction ... [I]t cannot be said that the 1968 Statute of Limitations Convention had passed a threshold level of acceptance to qualify as general practice."[70] The OCP ignores this observation and cites the absence of a nexus requirement from the 1968 Convention on the Non-Applicability of Statutes of Limitations to War Crimes and Crimes against Humanity as further evidence that crimes against humanity could be committed outside armed conflict in 1975-79.[71] The Defence incorporates by reference its previous legal submissions on this question contained in the Reply.[72]

vi. The 1950 Israeli Nazi and Nazi Collaborators (Punishment) Law

29. The Pre-Trial Chamber observed that "there are few examples of national legislation defining crimes against humanity without this nexus requirement. The lone example

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[67] Decision on IENG Sary's Appeal against the Closing Order, para. 309.
[68] Request, para. 23.
[69] Reply, para. 90. *See also* Report of the Ad Hoc Committee, para. 80: "With regard to the relationship between crimes against humanity and genocide, the view was expressed that any overlap between the two categories of crimes should be avoided and that the same standard of proof should be required for both, notwithstanding any differences in the intent requirements."
[70] Decision on IENG Sary's Appeal against the Closing Order, para. 309.
[71] Request, para. 23.
[72] Reply, para. 90.

[apart from Germany through CCL 10] of domestic severance of a nexus requirement found in the 1950 Israeli law serves only to demonstrate its exceptional nature."[73] The OCP ignored this observation and cites the 1950 Israeli Nazi and Nazi Collaborators (Punishment) Law as evidence that crimes against humanity could be committed outside armed conflict in 1975-79.[74] The Defence incorporates by reference its previous legal submissions on this question contained in the Motion.[75]

2. It was neither foreseeable nor accessible to Mr. IENG Sary that he could be held liable for crimes against humanity committed outside of an armed conflict

30. The OCP asserts that "it was undoubtedly foreseeable that the Accused could be held responsible for crimes against humanity committed within Cambodia whether or not an armed conflict existed at the relevant time."[76] Although the OCP identified the standard of foreseeability articulated by ECCC jurisprudence, i.e. that an Accused "must be able to appreciate that conduct is criminal in the sense generally understood, without reference to any specific provision,"[77] it failed to apply this standard correctly. The OCP asserts that "to the extent that there was any uncertainty as to the existence of the nexus requirement between 1975 and 1979, the resolution of that uncertainty by judicial determination was readily foreseeable."[78] First, customary international law derives from State practice and *opinio juris*.[79] Judicial determinations are, at most, subsidiary means for the determination of rules of customary international law.[80] Second, to gauge whether prosecution for crimes against humanity absent a nexus with armed conflict was foreseeable in 1975-79 does not require, as the OCP suggests, an assessment of whether it was foreseeable that a customary rule may crystallize in the future. Put another way, even if there was uncertainty regarding the removal of the nexus requirement between 1975 and 1979, that very uncertainty would itself render it impossible for it to be

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[73] Decision on IENG Sary's Appeal against the Closing Order, para. 309 (emphasis added).
[74] Request, para. 23.
[75] Motion, n. 27.
[76] Request, para. 24.
[77] *Id.*
[78] *Id.*, para. 25
[79] *See* IENG Sary's Appeal Against the OCIJ's Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, 22 January 2010, D97/14/5, Annex A, Section II F for an in-depth discussion of the creation of customary international law.
[80] *See* ICJ Statute, Art. 38(1)(3) which establishes that the Court may consider its prior jurisprudence as "subsidiary means for the determination of rules of law."

"generally understood" that prosecution for crimes against humanity (absent the nexus requirement) would be foreseeable.

31. As to accessibility, the Defence notes the Pre-Trial Chamber's finding that "reliance can be placed on a law which is based on custom."[81] Thus, the Trial Chamber's determination of whether the definition of crimes against humanity, absent the nexus requirement would have been accessible to Mr. IENG Sary in 1975-79, is subject to and contingent upon its determination of whether the nexus requirement existed under customary international law during that period. The Defence incorporates by reference its previous legal submissions on foreseeability and accessibility contained in IENG Sary's Appeal against the Closing Order.[82]

B. The principle of *in dubio pro reo* can serve as a proper basis for resolution of disputes relating to the status of customary international law

32. The OCP asserts on the one hand that the *in dubio pro reo* 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."[83] On the other, it asserts that "any sort of practice of deciding difficult or 'uncertain' issues of customary international law in favor of the accused should be limited to exceptional circumstances where no other rules of interpretation can assist in resolution of the issue and where grave fairness issues outweigh the countervailing need to preserve a functioning system of international criminal justice."[84] Not only are these assertions inconsistent, they are also not supported by the international and ECCC jurisprudence the OCP relies on to support them.

33. First, the finding made by the *Stakić* Trial Chamber that the *in dubio pro reo* principle "is applicable to findings of fact not law"[85] was unsupported by any authority and has been subject to judicial critique.[86] The *Galić* Trial Chamber stated that the *in dubio pro reo*

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[81] Decision on the Appeals Against the Co-Investigating Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, D97/14/15, para. 45.
[82] *See* IENG Sary's Appeal against the Closing Order, paras. 130-35.
[83] Request, para. 27 (emphasis added).
[84] *Id.*, para. 32 (emphasis added).
[85] *Prosecutor v. Stakić*, Judgement, IT-97-24-T, 31 July 2003, para. 416 *cited in* Request, n.51.
[86] *See Prosecutor v. Limaj*, Declaration of Judge Shahabuddeen, IT-03-66-A, 27 September 2007, para. 4: "[I]n *Stakić*, the Trial Chamber, referring to the principle of *in dubio pro reo*, said that 'this principle is applicable to findings of fact and not of law'. The circumstance that no authorities were given possibly signified that the statement needed none, presumably being well established in the practice of the law. Nevertheless, such material as I have seen encourages a doubt as to whether the principle is restricted to questions of fact. Probably more often than not the principle is invoked in respect of questions of fact, but I am not satisfied that it cannot apply to questions of law. However selfsufficient are rules for the interpretation of provisions of a conventional

principle "encompasses" doubts as to "whether an offence has been proved."[87] This allows for the possibility that *in dubio pro reo* may also encompass whether a certain legal principle exists (or existed) in customary international law.[88] The jurisprudence from the *ad hoc* tribunals cited by the OCP is not determinative. Second, the ECCC Supreme Court Chamber has held, subject to Civil Law rules of interpretation, that the *in dubio pro reo* principle is applicable to doubts regarding the meaning of the law.[89]

34. Application of the *in dubio pro reo* principle is not necessary in this case; the submissions made herein together with the Defence's prior pleadings show that the nexus requirement still existed in customary international law in 1975-79. Yet if the Trial Chamber is inclined to rule on this issue, the Defence submits that it should follow the Pre-Trial Chamber and the Supreme Court Chamber by finding that in certain circumstances the *in dubio pro reo* principle is applicable to questions of law at the ECCC.

IV. CONCLUSION AND RELIEF REQUESTED

35. The issues before the Trial Chamber are Rule 89(1) preliminary objections; issues of pure law. The Pre-Trial Chamber addressed all issues related to whether the chapeau elements of crimes against humanity include a nexus between the underlying acts and armed conflict. It held that a nexus is required. The OCP ignored Rule 89(1) and filed no objections. It can not now seek relief in the form of recharacterization of facts as a means of circumventing the rules or curing its lack of due diligence. Even if the Trial Chamber should decide to consider the Request pursuant to Rule 98, the Request should be dismissed for lack of merit.

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nature, the principle has to be borne in mind in the course of applying those rules; also, outside of such provisions, there can exist questions of law."

[87] *Prosecutor v. Galić*, Judgement, IT-98-29-A, 30 November 2006, para. 77 *cited in* Request, n. 52.

[88] The same analysis can be applied *mutatis mutandis* to the quotations from the *Renzahu* Appeals Judgement and *Halilović* Appeals Judgement cited in the Request, para. 28. *See Prosecutor v. Renzahu*, Judgement, ICTR-97-31-A, 16 October 2007, paras. 472-75; *Prosecutor v. Halilović*, Judgement, IT-01-48-A, 16 October 2007, para. 109.

[89] Decision on Immediate Appeal by KHIEU Samphan on Application for Release, E50/3/1/4, para. 31: "The Supreme Court Chamber must stress that the *in dubio pro reo* rule, which results from the presumption of innocence, is guaranteed by the Constitution of Cambodia and has as its primary function to denote a default finding in the event where factual doubts are not removed by the evidence. In so far as *in dubio pro reo* is applicable to dilemmas about the meaning of the law, it must be limited to doubts that remain after interpretation. Therefore, *in dubio pro reo* is properly applied to doubts about the content of a legal norm that remain after the application of civil law rules of interpretation... As such, as a practical matter, *in dubio pro reo* will usually be unnecessary on the occasion of addressing legal *lacunae*, but may come into play in the far rarer event of a collision of norms."

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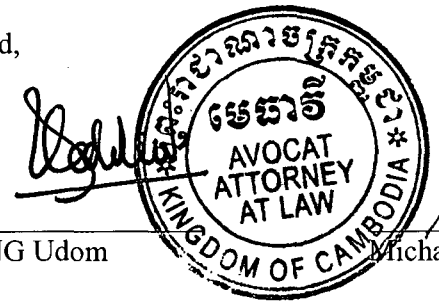
WHEREFORE, for all the reasons stated herein, the Trial Chamber should:

a. REJECT the Request as untimely; or in the alternative

b. HOLD a public, oral hearing; and

c. DISMISS the Request on the merits.

Respectfully submitted,



ANG Udom Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this **22nd** day of **July, 2011**