លេខ / N°: D87/2/1.7/1

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

ការិយាល័យសហចៅក្រមស៊ើបអង្កេត
Office of the Co-Investigating Judges
Bureau des co-juges d'instruction

Case File No: 003/07-09-2009-ECCC-OCIJ

Before:	**The Co-Investigating Judges**
Date:	**5 April 2016**
Language(s):	**English [Original]**
Classification:	**PUBLIC**

DECISION ON MEAS MUTH'S REQUEST FOR CLARIFICATION CONCERNING CRIMES AGAINST HUMANITY AND THE NEXUS WITH ARMED CONFLICT

Distribution:

Co-Prosecutors

CHEA Leang
Nicholas KOUMJIAN

Meas Muth Defence

ANG Udom
Michael G. KARNAVAS

Civil Party Lawyers

HONG Kimsuon
KIM Mengkhy
MOCH Sovannary
SAM Sokong
TY Srinna
VEN Pov
Philippe CANONNE
Laure DESFORGES
Ferdinand DJAMMEN-NZEPA
Nicole DUMAS
Isabelle DURAND
Françoise GAUTRY
Martine JACQUIN
Christine MARTINEAU
Barnabe NEKUI
Lyma NGUYEN
Nushin SARKARATI
Fabienne TRUSSES

I. PROCEDURAL HISTORY

1. Disagreements between the Co-Investigating Judges ("CIJs") in this case were registered on 7 and 22 February 2013.
2. In the judgement in Case 001, rendered on 26 July 2010, the Trial Chamber found that in the period between 1975 and 1979, the existence of a nexus between crimes against humanity and an armed conflict ("Nexus") was not a requirement under customary international law.[1]
3. On 16 September 2010, the CIJs indicted the charged persons in Case 002, *inter alia*, for crimes against humanity. The CIJs did not explicitly consider whether the Nexus was a requirement under customary international law between 1975 and 1979.[2]
4. The Defence for Case 002 accused Ieng Thirith appealed this finding,[3] and on 15 February 2011 the Pre-Trial Chamber ("PTC") granted the appeal, finding that it was unclear whether the Nexus requirement had been severed by 1975 and that the principle of *in dubio pro reo* required this ambiguity to be resolved in favour of the accused. Accordingly, the PTC held that between 1975 and 1979 the Nexus was part of the definition of crimes against humanity under customary international law ("PTC Nexus Decision").[4]
5. On 15 June 2011, the Co-Prosecutors moved the Trial Chamber to exclude the Nexus from the definition of crimes against humanity. All the accused in Case 002 opposed the motion.[5]
6. On 26 October 2011, the Trial Chamber granted the Co-Prosecutors' motion and concluded, based on a review of relevant state practice and *opinio juris* between 1945 and 1975, that "*[the] tendency to view crimes against humanity as grave international crimes not inherently connected to armed conflict gained momentum in the aftermath of the Nuremberg era and constituted settled law by 1975.*" The Trial Chamber therefore reaffirmed its earlier Case 001 finding that the Nexus was not part of the definition of crimes against humanity under customary international law between 1975 and 1979.[6]
7. On 17 October 2013, the Co-Lawyers for Meas Muth ("Defence") requested clarification as to whether the CIJs consider themselves bound by the PTC's finding that between 1975 and 1979 the Nexus was part of the definition of crimes against humanity in customary international law ("Nexus Request").[7]

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[1] Case File No. 001-E188, *Judgement,* 26 July 2010, paras 290-292.
[2] Case File No. 002-D427, *Closing Order*, dated 15 September 2010, filed 16 September 2010, paras 1350-1372.
[3] Case File No. 002-D427/2/1, *Ieng Thirith Defence Appeal from the Closing Order*, 18 October 2010, paras 61-62.
[4] Case File No. 002-D427/3/15, *Decision on Appeals by Nuon Chea and Ieng Thirith against the Closing Order*, 15 February 2011, para. 144. The PTC reiterated this finding in Case File No. 002-D427/1/30, *Decision on Ieng Sary's Appeal against the Closing Order*, 11 April 2011, para. 311.
[5] *See* Case File No. 002-E95/8, *Decision on Co-Prosecutors' Request to Exclude Armed Conflict Nexus Requirement from the Definition of Crimes against Humanity*, 26 October 2011, para. 2.
[6] *Ibid.*, para. 33.
[7] Case File No. 003-D87/2/1.7, *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.

II. SUBMISSIONS

8. The Defence submit that ECCC jurisprudence as to whether crimes against humanity include the Nexus among their *chapeau* elements is not settled, since the PTC found that between 1975 and 1979 such nexus was a requirement under customary international law, while the Trial Chamber found that no nexus was required.[8]

9. The Defence's position is that the conclusion of the PTC is the correct one and that the CIJs are bound by it.[9]

10. The Defence submit that in finding that the Nexus is required, the PTC considered both the findings of the Trial Chamber in Case 001 and extensive legal submissions of the parties on this issue.[10] The Trial Chamber in Case 002, however, failed to consider the PTC analysis and simply relied on the material it had previously considered in Case 001, without explaining why it considered the PTC's conclusions to be erroneous.[11] The Defence submit that the Trial Chamber had a "*vested interest*" in upholding the decision it had reached in Case 001 and that it adopted a "*result-oriented approach*" in the resolution of this legal question.[12]

11. The Defence request the CIJs to clarify whether they consider themselves bound by this jurisprudence and, should the CIJs not consider themselves bound, to provide a reasoned explanation.[13]

12. The Defence further request to be allowed to make legal submissions on whether the definition of crimes against humanity in customary international law between 1975 and 1979 required the Nexus.[14]

III. DISCUSSION

A. Whether the CIJs are bound by the PTC Nexus Decision

13. The PTC is the appellate body during the investigative stage of proceedings at the ECCC. In civil law systems, judges are bound only by the law; the common law principle of *stare decisis* does not apply. While the PTC can issue decisions and orders which are binding on the CIJs,[15] legal principles formulated by the PTC do not, as a rule, bind the CIJs in their interpretation of the law.

14. Nevertheless, applying the legal principles and interpretations formulated by the PTC allows for a uniform application of the law in similar cases, and is therefore in the interest of legal certainty and equality before the law. It further fosters judicial economy, because a decision of the CIJs in contrast with legal principles established by the PTC is likely to be reversed, thereby causing undue delays in the proceedings.[16]

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[8] Nexus Request, p. 1.
[9] *Ibid.*, paras 17-19, 24.
[10] *Ibid.*, paras 20-21.
[11] *Ibid.*, para. 22.
[12] *Ibid.*, para. 23.
[13] *Ibid.*, para. 17.
[14] *Ibid.*, p. 12.
[15] *See e.g.* Internal Rules 72(4)(d), 76(5), 77.
[16] *See* Case File No. 003-D11/3/4/2, *Considerations of the Pre-Trial Chamber regarding the Appeal against Order on the Admissibility of Civil Party Applicant Chum Neou*, 13 February 2013, para. 17.

15. However, as acknowledged by the Defence in another motion in this case,[17] the Trial Chamber also acts as an indirect appellate body for the Office of the Co-Investigating Judges, since the Internal Rules allow for certain issues determined at the investigative stage to be addressed again at trial. Should Meas Muth be indicted, it is ultimately the Trial Chamber, and not the PTC, which will decide whether the Nexus applies. The Trial Chamber has affirmed in both Case 001 and Case 002 that the Nexus was not part of the definition of crimes against humanity under customary international law between 1975 and 1979. In Case 002, it explicitly reversed the PTC Nexus Decision and excluded the Nexus from the definition of crimes against humanity to be applied in that case.[18]

16. Under these circumstances, therefore, following the PTC Nexus Decision would not necessarily foster legal certainty, equality before the law, and judicial economy.

17. In any event, as stated above the CIJs are bound by the law on this matter, not by judicial precedent. I will now review the PTC and Trial Chamber's rulings and the sources they relied upon to reach their different determinations. On that basis, I will decide whether to follow the PTC or the Trial Chamber on the Nexus requirement. Before proceeding with this analysis, I will address the Defence's request to make submissions on the Nexus.

B. Request to make legal submissions

18. The Nexus has been the subject of extensive litigation and legal analysis at the ECCC. In reaching my determination as to the existence of the Nexus between 1975 and 1979, in addition to the several sources reviewed below, I have considered the analysis of both the PTC and the Trial Chamber. I have also considered the submissions made by the Co-Lawyers for Meas Muth when representing Ieng Sary in Case 002 on 25 October 2010.[19] The materials relevant to establishing state practice and *opinio juris* on the Nexus requirement between 1975 and 1979 have not changed since that date. Nor does the resolution of this point of law require submissions specifically tailored to the facts alleged in Case 003. Finally, the matter is currently also under review by the Supreme Court Chamber.[20]

19. It is undeniable that the Defence's request for clarification had been left unanswered for two and a half years. In essence, however, the Defence was never prohibited from submitting such representations on the law *sua sponte*. Under these circumstances, and considering the civil law nature of the ECCC and Cambodia's penal systems, in application of the principle of *iura novit curia* I do not consider it necessary to receive submissions as to whether the Nexus was a

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[17] Case File No. 003-D87/2/1.15, *Meas Muth's Motion against the Application of JCE III*, 28 October 2013, para. 18.

[18] *See* Case No. 001-E188, *Judgement*, 26 July 2010, paras 290, 296; Case File No. 002-E95/8, *Decision on Co-Prosecutors' Request to Exclude Armed Conflict Nexus Requirement from the Definition of Crimes against Humanity*, 26 October 2011, para. 33.

[19] Case File No. 002-D427/1/6, *Ieng Sary's Appeal against the Closing Order*, 25 October 2010, paras 188-189.

[20] Case File No. 002-E313/1/1, *Nuon Chea's Notice of Appeal Against the Judgement in Case 002/01*, 29 September 2014, p. 9, Ground 45; Case File No. 002-E313/2/1, *Mr Khieu Samphan's Defence Notice of Appeal Against the Judgement in Case 002/01,* 29 September 2014, para. 42.

requirement under customary international law between 1975 and 1979.[21] The Defence will be able to address this issue in their submissions in response to the Co-Prosecutors' submissions pursuant to Internal rule 66(5), should they wish to do so. They will further be able to appeal my interpretation of the law in the Closing Order, should Meas Muth be indicted for crimes against humanity.

C. Analysis

i. Crimes against humanity before 1945

20. Before the adoption of the Nuremberg Charter in 1945 (*see infra* Section III(C)(ii)(a)), the term "laws of humanity" appeared in the preamble to the Declaration Renouncing the Use, in Time of War, of certain Explosive Projectiles, adopted in St. Petersburg in 1868. The term also appeared in the Martens clause, included in the preambles to the First and Fourth Hague Conventions on the Laws and Customs of War, adopted respectively in 1899 and 1907. The Martens clause was included to provide a form of residual protection against actions not explicitly prohibited by the Hague Conventions but nevertheless contrary to the usages established among civilized peoples, the *laws of humanity*, and the dictates of the public conscience.[22] While the *laws of humanity* were considered as a separate – and less defined – set of rules than the laws of war, violations of these *laws* were nevertheless considered specifically within the context of armed conflicts.[23]

21. In a joint declaration issued on 29 May 1915, France, Great Britain, and Russia qualified the killing and ill-treatment of Armenian civilians by Turkish authorities as "*crimes [...] against humanity and civilization*" and publicly announced that the perpetrators of these crimes would be held personally responsible.[24] At the Peace Conference held in Paris in 1919 after the end of World War I, the British Empire, Italy, the United States of America, France, and Japan decided to set up the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties. Aside from the Allied states, Romania, Serbia, Belgium, Greece, and Poland also formed part of the Commission. The Commission was tasked with inquiring into the breaches of the laws and customs of war committed by the German Empire and their allies.[25] In its report, the Commission referred both to violations of the laws and customs of war and of the *laws of humanity* and *dictates of humanity*.[26] However, the ensuing Treaty of Versailles made no reference to violations of the laws of humanity and only

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[21] The application of the principle of *iura novit curia* in international criminal proceedings was criticised in the *Kupreškić* case at the ICTY. However, the *Kupreškić* Chamber criticised the application of this principle when it had the effect of depriving the Defence of the opportunity to make submissions on a different or more serious legal characterisation of the crimes originally charged by the Prosecution: *see Prosecutor v. Kupreškić*, Case No. IT-95-16-T, *Judgement*, 14 January 2000, paras 739-743. The present instance is different, in that the Defence is requesting leave to make submissions on the interpretation of the applicable law.

[22] *See* M. Cherif Bassiouni, *Crimes against Humanity in International Criminal Law*, 1999, Kluwer Law International, The Netherlands, pp. 42, 61.

[23] *See* Stuart Ford, *Crimes against Humanity at the Extraordinary Chambers in the Courts of Cambodia: Is a Connection with Armed Conflict Required?*, in Pacific Basin Law Journal, 24(2), 2007, pp. 134- 135.

[24] A copy of the original declaration can be found at http://www.armenian-genocide.org/popup/affirmation_window.html?Affirmation=160.

[25] Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, in American Journal of International Law, Vol. 14, No. 1/2 (Jan. - Apr., 1920), pp. 95- 96.

[26] *Ibid.*, pp. 113, 115, 117.

recognised the right of the Allied and Associated Powers to try persons accused of violations of the laws and customs of war.[27]

22. I therefore concur with the PTC that crimes against humanity were first developed in the context of armed conflicts.[28] However, as the following analysis will demonstrate, starting with the adoption of Control Council Law No. 10 in 1945, crimes against humanity progressively became a discrete category of crimes, distinct from war crimes.

ii. Crimes against humanity in the Nuremberg Charter, Control Council Law No. 10, and the Tokyo Charter

23. It was only in 1945 that crimes against humanity were first codified as an autonomous category of crimes in the charters of tribunals set up by the Allied powers at the end of World War II. While the Nuremberg and Tokyo Charters included the Nexus among the elements of this crime, Control Council Law No. 10 did not.

a. Nuremberg Charter

24. Article 6(c) of the Charter of the International Military Tribunal ("Nuremberg Charter"), appended to the London Agreement signed on 9 August 1945 ("London Agreement"), is the first instance of the concept of crimes against humanity being turned into positive law.[29] Crimes against humanity were defined therein as:

> "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds 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. [...]"[30] (Emphasis added)

25. In addition to crimes against humanity, crimes within the jurisdiction of the Tribunal were war crimes and crimes against peace.[31]

b. Control Council Law No. 10

26. On 20 December 1945, the Allied Powers issued Control Council Law No. 10 to give effect to the Moscow Declaration of 30 October 1943 and to the London

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[27] *See* Article 228 of the Treaty of Versailles of 28 June 1919. *See also* M. Cherif Bassiouni, *Crimes against Humanity in International Criminal Law*, 1999, Kluwer Law International, The Netherlands, pp. 62-69 and Stuart Ford, *Crimes against Humanity at the Extraordinary Chambers in the Courts of Cambodia: Is a Connection with Armed Conflict Required?*, in Pacific Basin Law Journal, 24(2), 2007, pp. 135-138.

[28] Case File 002-D427/1/30, *Decision on Ieng Sary's Appeal against the Closing Order*, 11 April 2011, para. 308.

[29] *See* M. Cherif Bassiouni, *Crimes against Humanity in International Criminal Law*, 1999, Kluwer Law International, The Netherlands, p. 1.

[30] This version of Article 6(c) is the result of amendments to the original text adopted in October 1945, which made it clear that the connection with the other crimes within the jurisdiction of the International Military Tribunal was an element common to all the crimes listed under Article 6(c), *see See* M. Cherif Bassiouni, *Crimes against Humanity in International Criminal Law*, 1999, Kluwer Law International, The Netherlands, pp. 25-32; *see also* 1948 History of the United Nations War Crimes Commission and the Developments of the Laws of War, Chapter IX, pp. 191-195, available at: http://www.cisd.soas.ac.uk/substrand/history-of-the-united-nations-war-crimes-commission-and-the-development-of-the-laws-of-war,77444094.

[31] Articles 6(a) and (b) of the Nuremberg Charter.

Agreement. The purpose of this law was to establish a uniform legal basis in Germany for the prosecution of persons other than those dealt with by the International Military Tribunal.[32]

27. Article 2(1)(c) of Control Council Law No. 10 removed the Nexus requirement for crimes against humanity set forth in Article 6(c) of the Nuremberg Charter, and defined them as:

> "[a]trocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated."

c. Tokyo Charter

28. The Nexus was included in the definition of crimes against humanity set forth in Article 5(c) of the Charter of the International Military Tribunal for the Far East, ("Tokyo Charter"), enacted on 19 January 1946. The Tokyo Charter, however, was issued through a proclamation of General MacArthur as the Supreme Commander of the Allied Powers in the Far East, and was not part of a treaty or agreement between the Allied Powers, notwithstanding the possible assumption that there may have been a prior tacit agreement. Its value in assessing the state of customary international law in relation to the Nexus is therefore rather limited.

iii. Post World War II jurisprudence on crimes against humanity

29. I will now proceed to a review of cases tried under the Nuremberg Charter and Control Council Law No. 10, which may provide evidence of the customary status of the Nexus in the immediate aftermath of the Second World War.

a. Application of the Nuremberg Charter

30. In the *Tadić* case, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia ("ICTY") observed that the Nexus required by the Nuremberg Charter was peculiar to the jurisdiction of the Nuremberg Tribunal.[33] The same view was held by the Jerusalem District Court in the *Eichmann* trial.[34] However, from the reasoning in the Judgement of the International Military Tribunal ("IMT"), there is some ambiguity as to whether the IMT considered the Nexus merely as a jurisdictional requirement or rather as a constitutive element of the crime.

31. The IMT considered the definition of the crimes under its jurisdiction to be "*the expression of international law existing at the time of its creation.*"[35] In discussing whether the atrocities committed before the outbreak of the war against Jews amounted to crimes against humanity, the IMT first stated that "***[t]o constitute*** *crimes against humanity, the acts relied on before the outbreak of the war must have been in execution of, or in connection with, any crime within the jurisdiction*

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[32] Preamble to Control Council Law No. 10.

[33] *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, 2 October 1995, para. 140.

[34] *See Prosecution v. Adolf Eichmann*, Case No. 40/61, Judgement, 11 December 1961, para. 29.

[35] International Military Tribunal, *Judgement*, 1 October 1946, reprinted in *Trial of the Major War Criminals before the International Military Tribunal*, Vol. I, p. 218.

of the Tribunal" (Emphasis added).[36] These statements suggest that the IMT viewed the element as a constitutive element. However, the IMT also stated that it could not make "*a general statement that the acts before 1939 were crimes against humanity within the meaning of the charter*".[37] The words "*within the meaning of the charter*" suggest that the IMT viewed the Nexus as a requirement specific to the Nuremberg Charter, and therefore an express jurisdictional requirement akin to the one set forth in Article 5 of the Statute of the ICTY.[38]

32. While the IMT was ambiguous in the characterisation of the Nexus, as evidenced below, the majority of the Courts in charge of subsequent trials under Control Council Law No. 10 clearly interpreted the Nexus in the Nuremberg Charter only as a jurisdictional limitation.

b. Application of Control Council Law No. 10

33. As seen in Section III(C)(ii)(b) above, the drafters of Control Council Law No. 10 removed the Nexus from the definition of crimes against humanity contained in its Article 2(1)(c). However, Article 1 of Control Council Law No. 10 also incorporated the Nuremberg Charter, which contained the Nexus.

34. In the case of *Flick and Others*, the Court[39] noted that Article 1 of Control Council Law No. 10 incorporated the Nuremberg Charter, thereby making the Nexus applicable also to cases tried under this law. The Court stressed that the purpose of the London Agreement and of the Nuremberg Charter was to bring to trial major war criminals. On this basis, the Court considered its jurisdiction limited to crimes committed during the Second World War or in connection with the war.[40]

35. In the *Einsatzgruppen* case, the Court stated, in relation to crimes against humanity, that:

> "[...] an evaluation of international right and wrong, which heretofore existed only in the heart of mankind, has now been written into the books of men as the law of humanity. **This law is not restricted to events of war. It envisages the protection of humanity at all times**. The crimes against which this law is directed are not unique. They have unfortunately been occurring since the world began, but not until now were they listed as international offenses. The first count of the indictment in this case charges the defendants with crimes against humanity. Not crimes against any specified country, but against humanity."[41] (Emphasis added).

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[36] *Ibid.*, p. 254.
[37] *Id.*
[38] *Prosecutor v. Tadić*, Case No. IT-94-1-A, *Judgement*, 15 July 1999, para. 249; *Prosecutor v. Šešelj*, Case No. IT-03-67-AR72.1, *Decision on the Interlocutory Appeal concerning Jurisdiction*, 31 August 2004, paras 12-13.
[39] Trials under Control Council Law No. 10 were tried by different benches of judges. However, in discussing the cases tried under this law, a general reference to "the Court" will be used.
[40] Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Nuernberg, October 1946-April 1949, Vol. VI, *Flick and Others*, pp. 1212-1213.
[41] Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Nuernberg, October 1946-April 1949, Vol. IV, *United States of America v. Otto Ohlendorf et al.*, p. 497.

36. The Court also defined crimes against humanity as "*acts committed in the course of wholesale and systematic violation of life and liberty*", making no reference to any requirement that they be perpetrated in the context of an armed conflict.[42]

37. On the issue of jurisdiction, the Court first noted that the Nuremberg Charter limited its jurisdiction to "*those crimes against humanity which were committed in the execution of or in connection with crimes against peace and war crimes.*" It then noted that Control Council Law No. 10 removed this jurisdictional requirement so that "*the present Tribunal has jurisdiction to try all crimes against humanity as long known and understood under the general principles of criminal law*".[43]

38. It is therefore clear from the *Flick and Others case*, and even more so from the language used by the Court in *Einsatzgruppen*, that in these two cases the Courts considered the Nexus in Article 6(c) of the Nuremberg Charter as a jurisdictional requirement, and not as a constitutive element of crimes against humanity.

39. Consistent with this view, in *Alstötter and Others*, the Court found that certain charged inhumane acts had been committed in execution of and in connection with aggressive war and were therefore crimes against humanity "*even under the provisions of the IMT Charter*". The Court, however, also noted that Control Council Law No. 10 differed materially from the Charter and did not require proof of the Nexus.[44] The Court added that Control Council Law No. 10 provided for the punishment of crimes committed against German nationals where there was proof of "*conscious participation in systematic government organized or approved procedures amounting to atrocities and offences of the kind specified in the act and committed against populations or amounting to persecutions on political, racial, or religious grounds.*"[45] I consider this definition of crimes against humanity a further indication that the Court did not consider the Nexus as a constitutive element of the crime.

40. In *Ernst von Weizsaecker et al.* the Court found that the Nexus was a jurisdictional requirement under Control Council Law No. 10.[46] In addition however, but this time only by majority, the Court considered that the Nexus was also a constitutive element of crimes against humanity under international law.[47] After reaching this conclusion, the Court stressed "*the urgent need of a comprehensive legislation by the family of nations, with respect to individual human rights*", noting that some steps in that direction had been taken since "*the late war*", but considered that such steps needed to be further advanced and implemented.[48]

41. Therefore, all but one of the Control Council Law No. 10 cases reviewed above considered the armed conflict nexus simply as a jurisdictional requirement, and

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[42] Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Nuernberg, October 1946-April 1949, Vol. IV, *United States of America v. Otto Ohlendorf et al.*, p. 498.
[43] *Ibid.*, p. 499.
[44] Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Nuernberg, October 1946-April 1949, Vol. III, *United States of America v. Josef Alstotter and others*, p. 974.
[45] *Ibid.*, p. 982.
[46] Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Nuernberg, October 1946-April 1949, Vol. XIII, *Ernst von Weizsaecker et al.*, pp. 114-115.
[47] *Ibid.*, pp. 115-117.
[48] *Ibid.*, p.117.

not as a constitutive element of crimes against humanity under customary international law. Even the Court in *Ernst von Weizsaecker*, which considered the Nexus as a constitutive element, was not unanimous on this finding and highlighted the need for legislative action on the definition of this crime.

42. Finally, according to the History of the Development of the Laws of War, published in 1948 by the United Nations War Crimes Commission, the British and French authorities, in their respective areas of control in German territory, issued ordinances in accordance with Control Council Law No. 10 which authorised ordinary courts to prosecute crimes against humanity without a requirement that they be connected to war crimes or crimes against peace.[49]

c. The Trial of Adolf Eichmann

43. In 1950, Israel issued the Nazi and Nazi Collaborators (Punishment) Law. Under Article 1(b)(7) of this law, crimes against humanity did not require proof of the Nexus. This law constituted the legal basis for the trial of Adolf Eichmann in 1961. In assessing the legality of the prosecution of Eichmann for crimes against humanity, the District Court of Jerusalem did not consider the Nexus included in Article 6 of the Nuremberg Charter as being a constitutive element of that crime. After noting that the Nexus had been removed from Control Council Law No. 10, the District Court considered it as a jurisdictional requirement.[50] In the *Eichmann* Appeal Judgement, the Supreme Court of Israel found it unnecessary to pronounce itself on this matter, on account that "*the outrages attributed to the Appellant in the Counts on which he was convicted were perpetrated, for the most part, during the War and in connection with the War.*"[51]

iv. Other relevant international instruments adopted between 1945 and 1975

a. Genocide Convention

44. Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention"), adopted by the United Nations General Assembly ("UNGA") on 9 December 1948, and which Cambodia acceded to in 1950, does not include the Nexus among the constitutive elements of genocide. In fact, Article 1 explicitly provides that genocide can be committed in times of peace.

45. In assessing the effects of the Genocide Convention on the customary status of the Nexus, the PTC stated that the definition of genocide contained therein "*unequivocally departs from genocide's crimes against humanity origins by requiring a very specific intent that was not articulated in the IMT Charter.*" It therefore concluded that the Genocide Convention omitted the Nexus only in respect of genocide, a conclusion that the PTC considered reinforced by the fact that the Nuremberg Principles, adopted in 1950, still included the Nexus in the

[49] *See* 1948 History of the United Nations War Crimes Commission and the Developments of the Laws of War, Chapter IX, p. 214, available at: http://www.cisd.soas.ac.uk/substrand/history-of-the-united-nations-war-crimes-commission-and-the-development-of-the-laws-of-war,77444094.
[50] *Prosecution v. Adolf Eichmann*, Case No. 40/61, *Judgement*, 11 December 1961, para. 29.
[51] *Attorney General v. Adolf Eichmann*, Criminal Appeal 336/61, *Appeal Judgement*, 29 May 1962, pp. 11-12.

definition of crimes against humanity. [52] I have some reservations with regard to the PTC's reasoning on this point.

46. First, I am not convinced that the special intent requirement of genocide renders the Genocide Convention irrelevant to assessing the customary status of the Nexus in relation to other crimes against humanity. Special intent, albeit a different one, is also required for the crime against humanity of persecution. In my view, the significance of the Genocide Convention in relation to the Nexus is that the international community recognised that international crimes can be committed against civilians in times of peace and war alike. It was a significant step, and the first in a series of consistent steps taken by the international community in the years to follow.[53]

47. Second, in drafting the Nuremberg Principles – which were never adopted formally by the UNGA –, the International Law Commission ("ILC") was operating under the UNGA's mandate "*to formulate the principles of international law recognised in the Charter of the Nuremberg Tribunal and in the Judgement of the Tribunal.*"[54] Any effect that the Genocide Convention may have had on the customary status of the Nexus, therefore, was outside the scope of the ILC's work. It is thus questionable, in my view, to dismiss the relevance of the Genocide Convention to the customary status of the Nexus based on the formulation of the Nuremberg Principles.

48. In fact, the role played by the Genocide Convention in relation to the elimination of the Nexus was recognised in 1967 by members of the United Nations' Economic and Social Forum's Commission on Human Rights during the negotiations that led to the adoption of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (*see infra* Section III(iv)(c)).[55] It was also explicitly acknowledged by the Independent Commission of Experts tasked by the United Nations Security Council to review information on possible grave violations of international humanitarian law in Rwanda.[56]

b. 1954 Draft Code

49. On 21 November 1947, the UNGA gave mandate to the ILC:

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[52] Case File No. 002-D427/3/15, *Decision on Appeals by Nuon Chea and Ieng Thirith against the Closing Order*, 15 February 2011, para. 140.
[53] *See infra* Sections III(iv)(b) and III(iv)(c).
[54] United Nations General Assembly Resolution No. 177(II), 21 November 1947.
[55] *See* Economic and Social Forum, Commission on Human Rights, Report on the Twenty-Third Session (20 February-23 March 1967), E/CN.4/940, para. 145, where it is reported that some representatives "*felt that the concept of crimes against humanity had already been developed, since the adoption of the Charter of the International Tribunal of Nüremberg, to make punishable offences that were not connected with crimes against peace or war crimes. They referred in that connexion to the [Genocide Convention] and to some of the Geneva Conventions of 1949.*" *See also* Economic and Social Forum, Commission on Human Rights, Summary Record of the Nine Hundred and Twenty-First Meeting, E/CN.4/SR.921, 2 October 1967, p. 5, where the representative of the French government, after noting that crimes against humanity had required proof of the Nexus under the Nuremberg Charter, cited, *inter alia*, the Genocide Convention among the post-Nuremberg international instruments that had "*provided hypothetical cases of mass murder unconnected with military operations*" and added that "*the concept of crimes against humanity had thus been developed since the adoption of the [Nuremberg Charter]*"
[56] Preliminary report of the Independent Commission of Experts established in accordance with Security Council resolution 935 (1994), S/1994/1125, 4 October 1994, para. 116.

a. to formulate the principles of international law recognised in the Charter of the Nuremberg Tribunal and in the Judgement of the Tribunal, and

b. to prepare a draft code of offences against the peace and security of mankind.[57]

50. On 29 July 1950, the ILC formulated seven principles of international law drawn from the Nuremberg experience, otherwise known as the Nuremberg Principles. The second part of Principle VI, which defined crime against humanity, included the Nexus. It defined crimes against humanity as:

> Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connexion with any crime against peace or any war crime.[58]

51. On 12 December 1950, the UNGA invited the governments of Member States to express their observations on the Nuremberg Principles and requested the ILC to take such observations into account in drafting the draft code of offences against the peace and security of mankind.[59] The ILC adopted a first version of the Draft Code in 1951 ("1951 Draft Code") which took into account the observations received by the governments of Member States. The definition of crimes against humanity, codified in Article 2(10), differed from the one set forth in the Nuremberg Principles in that it did no longer require the crime to have been committed *"in execution of or in connexion with any crime against peace or any war crime"*, but only "*in execution or connexion with other offences defined in this article.*"[60]

52. On 17 December 1951, the United Nations Secretary-General invited all Member States to submit comments on the 1951 Draft Code.[61] Thirteen governments submitted their observations ("1951 Draft Code Observations").[62] Most governments did not have specific comments on Article 2(10) of the 1951 Draft Code. The government of the Netherlands, however, proposed the elimination from Article 2(10) of the requirement of a connection between crimes against humanity and the "other offences" listed under Article 2.[63] The government of Yugoslavia also requested the removal of this requirement, stating that "*crimes against humanity, when committed in an organized manner, are in themselves offences against the peace and security of mankind, regardless of whether they have or not been committed in connexion with other offences against the peace*

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[57] United Nations General Assembly Resolution No. 177(II), 21 November 1947.
[58] Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, 1950, *Report of the International Law Commission covering its Second Session*, 5 June - 29 July 1950, Document A/1316.
[59] United Nations General Assembly resolution 488(5), 12 December 1950.
[60] Yearbook of the International Law Commission, 1951, Volume II, *Documents on the third session including the report of the Commission to the General Assembly*, p. 136.
[61] Yearbook of the International Law Commission, 1954, Volume II, *Documents on the sixth session including the report of the Commission to the General Assembly*, p. 149.
[62] United Nations, General Assembly, *Comments Received from Governments regarding the Draft Code of Offences against the Peace and Security of Mankind and the Question of Defining Aggression*, A/2162 (27 August 1952).
[63] 1951 Draft Code Observations, p. 29.

and security of mankind."[64] The government of Belgium, too, advocated for the removal of the connection with other crimes listed under Article 2.[65]

53. The government of the United Kingdom submitted observations which were filed as an addendum to the 1951 Draft Code Observations. In relation to Article 2(10), the United Kingdom first observed that its formulation made it clear that "*the limitation to connexion with acts of war contained in the Nuremberg Charter is not to apply*".[66] However, it expressed reservations on the limitation introduced by the required link with the other crimes listed under Article 2 of the 1951 Draft Code on the basis that it would enable the authorities of a State to behave in an inhumane fashion towards its own population so long as they could show that such behaviour had no connection with the other crimes specified under Article 2.[67]

54. The ILC debated at length the inclusion of the connection requirement in the formulation of Article 2(10) of the 1951 Draft Code. The requirement was eliminated by the ILC during their 267th meeting on 13 July 1954 with the favourable vote of six members of the ILC, one abstention, and five contrary. The members contrary to the elimination of the connection requirement were mainly concerned that its deletion would create confusion as to whether the conduct prohibited under Article 2(10) amounted to a national or international crime, and in turn would create uncertainty as to whether national or international courts had jurisdictions over those crimes.[68] On the basis of these concerns, the ILC decided to refer the reformulation of Article 2(10) to a sub-committee.[69] Discussions continued during the 269th session, and in the end Article 2(10) was adopted without the connection requirement.[70] In the final version of the Draft Code of Offenses against Peace and Security of Mankind ("1954 Draft Code") crimes against humanity no longer required a nexus with an armed conflict, nor did they require a nexus with other crimes included in the 1954 Draft Code.[71]

55. In the PTC Nexus Decision, the PTC noted that the 1954 Draft Code was rejected by the UNGA in its Resolution 897 (IX), which is one of the factors the PTC relied on to find that by 1975 there was no clear state practice and *opinio juris* evidencing severance of the Nexus from crimes against humanity.[72]

56. In this regard, I first note that the UNGA only decided to postpone further consideration of the 1954 Draft Code because it was awaiting the submission of a

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[64] 1951 Draft Code Observations, pp. 33-34.
[65] While it was not possible to consult the submissions of the Belgian government, its position is reported in the Yearbook of the International Law Commission, 1954, Volume I, *Summary records of the sixth session* (3 June – 28 July 1954), p. 132, para. 41.
[66] This is the case because Article 2(9) of the 1951 Draft Code prohibited the crime of genocide, as defined in the Genocide Convention, which could also be committed during peacetime.
[67] United Nations, General Assembly, *Comments Received from Governments regarding the Draft Code of Offences against the Peace and Security of Mankind and the Question of Defining Aggression*, A/2162/Add.1 (16 September 1952), pp. 10-11.
[68] Yearbook of the International Law Commission, 1954, Volume I, *Summary records of the sixth session* (3 June – 28 July 1954), pp. 131-133. *See also* p. 142.
[69] Yearbook of the International Law Commission, 1954, Volume I, *Summary records of the sixth session* (3 June – 28 July 1954), pp. 135-136.
[70] Yearbook of the International Law Commission, 1954, Volume I, *Summary records of the sixth session* (3 June – 28 July 1954), pp. 147-148. See *Draft Code of Offenses against Peace and Security of Mankind*, 1954, Art. 2(11).
[71] *Draft Code of Offenses against Peace and Security of Mankind*, 1954, Art. 2(11).
[72] PTC Nexus Decision, paras 141, 144.

report on the definition of aggression.[73] The UNGA did not reject the adoption of the Draft Code because of a disagreement on the constitutive elements of crimes against humanity. In this sense, the effect of the mere non-adoption becomes less relevant and the de facto superseding effect of the legal views espoused by the 1954 Draft Code vis-à-vis the equally non-adopted Nuremberg Principles gains more prominence.

57. Secondly, I am of the view that the PTC did not give sufficient weight to the stance taken by Member States in the negotiations that led to the drafting of the 1954 Draft Code and its adoption by the ILC. While some Member States simply raised no objections when submitting their observations on the 1951 Draft Code, others explicitly requested the removal of any requirement of a connection between crimes against humanity and the other crimes listed under Article 2. The lack of objections to the removal of the nexus requirement and the explicit requests for its removal by some Member States are relevant indicators of state practice and *opinio juris* in relation to the Nexus requirement.[74]

58. Finally, while never adopted by the UNGA, the 1954 Draft Code remains a significant step forward in the definition of crimes against humanity, which paved the way to the further development and definition of this crime. Notably, its significance was acknowledged and supported by the UNGA in its resolution 51/160 of 1968, in which the Assembly "*dr[ew] the attention of the States participating in the Preparatory Committee on the Establishment of an International Criminal Court to the relevance of the draft Code to their work.*"[75]

c. Apartheid and Statutory Limitations Conventions

59. On 16 December 1966, the UNGA condemned the policies of apartheid practised by the Government of South Africa as a crime against humanity.[76] On 30 November 1973, the UNGA adopted with a large majority the Convention on the Suppression and Punishment of the Crime of Apartheid ("Apartheid Convention"). Article 1 of the Apartheid Convention defines the *actus reus* of the crime of apartheid without requiring a nexus with an armed conflict.

60. Article 1(b) of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, adopted by the UNGA on 26 November 1968 ("Statutory Limitations Convention"), explicitly states that no statutory limitation shall apply, *inter alia*, to "*crimes against humanity whether committed in time of war or in time of peace*".[77]

61. The PTC noted that by 17 April 1975, the 1968 Statute of Limitations Convention was signed, ratified, or acceded to by only 18 Member States, and only 25 Member States had signed, ratified, or acceded to the 1973 Apartheid Convention. On this basis, it concluded that neither of these conventions "*had passed a threshold level of acceptance in order to qualify as general practice*".[78]

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[73] United Nations General Assembly Resolution 897 (IX), Draft Code of Offences against the Peace and Security of Mankind, 4 December 1954.
[74] *See infra* Section III(C)(iv)(c) for the relevance of the States' verbal acts in the formation of custom.
[75] United Nations General Assembly resolution 51/160, 16 December 1996, A/RES/51/160, para. 2.
[76] United Nations General Assembly resolution 2202 (XXI), 16 December 1966.
[77] Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, United Nations General Assembly resolution 2391 (XXIII), 26 November 1968, Art. 1(b).
[78] Case File No. 002-D427/1/30, *Decision on IENG Sary's appeal against the Closing Order*, para. 309.

62. Irrespective of the number of signatures, ratifications, or accessions, the positions expressed by the governments of Member States in relation to the Statutory Limitations and Apartheid Convention, which can be characterised as verbal acts of a State, are evidence of state practice.[79] Further, as expressed by the International Court of Justice ("ICJ") in the *Nicaragua* case, UNGA resolutions, especially when adopted with the affirmative vote of a high number of Member States, can provide evidence of *opinio juris* in the form of acceptance, by the Member States, of the validity of the rule declared by a resolution.[80]

63. In the *Nuclear Weapons* case, however, the ICJ also stated that resolutions approved with a substantial number of abstentions and negative votes, while amounting to clear signs of deep concerns in the international community in relation to the use of nuclear weapons, fell short of establishing the existence of an *opinio juris* on the illegality of the use of such weapons.[81]

64. The Statutory Limitations Convention was adopted with 58 votes in favour, 7 against, and 36 abstentions.[82] However, the text of the Statutory Limitations Convention involved several distinct issues of international law, some of which, like the inclusion of apartheid among crimes against humanity, were politically charged and controversial. Looking at the drafting history of the Statutory Limitations Convention is therefore necessary to understand whether the abstaining and contrary states' stance was motivated by their disagreement with the removal of the Nexus or by different reasons.

65. The first draft of the Convention was prepared in 1966 by the United Nations' Secretary General ("UNSG").[83] The UNSG's draft was discussed by the United Nations Social and Economic Forum's Commission on Human Rights in February 1967.[84] While it was not possible to find a copy of the UNSG's draft, from the discussion within the Commission it can be inferred that crimes against humanity were defined therein by reference to the Nuremberg Charter, thereby including the Nexus in the definition of the crime.[85] Some states' representatives noted that, with the adoption of the Genocide Convention and some of the Geneva Conventions of 1949, crimes against humanity had developed since the Nuremberg Charter. They therefore proposed that the definition of crimes against humanity be broadened to make such crimes punishable irrespective of their

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[79] International jurisprudence offers several examples of verbal acts of a State being treated as state practice: *see Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion, I.C.J. Reports 1996 ("*Nuclear Weapons*"), paras 86, 88; *Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986 ("*Nicaragua*"), 27 June 1986, paras 183-207; ICTY, *Prosecutor v. Tadić*, Case No. IT-94-AR72, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, 2 October 1995, para. 99. *See also* International Law Association, *Final Report of the Committee – Statement of Principles Applicable to the Formation of General Customary International Law,* London, 2000, p. 14.

[80] *Nicaragua*, para. 188.

[81] *Nuclear Weapons*, paras 70-71.

[82] *See* U.N. General Assembly, 25th session, 1st Committee [*Provisional Verbatim Record*], *1727th Plenary Meeting*, 26 November 1968 (A/PV. 1727), Official Record, New York, 1968, p. 6.

[83] The procedural history of the adoption of the Statutory Limitation Convention is available here: http://legal.un.org/avl/ha/cnslwcch/cnslwcch.html

[84] *See* Economic and Social Forum, Commission on Human Rights, Report on the Twenty-Third Session (20 February-23 March 1967), E/CN.4/940, para. 139.

[85] *Ibid.*, para. 144.

connection with any war.[86] From available records, it does not seem that the proposal encountered the objections of the other states' representatives.[87]

66. In March 1967, the Commission on Human Rights established a Working Group composed of representatives of the states of Dahomey, France, Israel, Nigeria, Peru, Philippines, Poland, Senegal, USSR, the United Kingdom, and the United States of America. The Working Group prepared a new draft, based on the UNSG's draft and on the observations submitted by some states.[88] The Working Group reported back to the Commission providing three possible definitions of against humanity. While these definitions featured substantial differences, all of them provided that crimes against humanity could be committed both in times of war and during peacetime.[89] This demonstrates that, while the members of the Working Group had different views on the definition of the crime, they all agreed that the Nexus was not among its constitutive elements.

67. A Joint Working Group established by the UNGA produced a new draft of the Statutory Limitations Convention which was then transmitted to the United Nations' Member States for comments.[90] Article I(b) of the draft provided that crimes against humanity could be committed in peacetime.[91] Twenty-five Member States submitted observations, mostly concerned with the retroactive application of the Convention or with the inclusion of apartheid among crimes against humanity, but none of them objected to the absence of the Nexus from Article I(b).[92] While the United States' representative commented that the draft "*redefine[ed] crimes against humanity*", the objection did not relate to the exclusion of the Nexus. This is evident from the fact that the definition of the crime proposed by the United States as a member of the Working Group in 1967 (*see supra* paragraph 66) provided that certain conduct could amount to crimes against humanity "*whether or not committed in time of war.*"[93]

68. Finally, after the adoption of the Statutory Limitations Convention, some of the states' representatives who abstained or were against its adoption explained the reasons for their vote. The majority of the objections concerned the retroactive application of the Convention to crimes against humanity committed before its adoption. Other objections concerned the undefined nature of certain crimes, as well the broadening of crimes against humanity as to include offences connected to the policy of apartheid. None of the states' representatives who abstained or voted against the Statutory Limitations Convention explicitly took issue with the exclusion of the Nexus from its Article 1.[94]

69. In conclusion, the drafting history of the Statutory Limitations Convention shows that there was consensus among a number of Member States that crimes against

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[86] *Ibid.*, paras 144-145.
[87] *Ibid.*, paras 139-152.
[88] *Ibid.*, paras 153-154.
[89] *Ibid.*, pp. 45-46.
[90] *See* U.N. General Assembly, 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), paras 1-6.
[91] *Ibid.*, Annex, p. 3.
[92] *See ibid.*, pp. 7-47.
[93] *See* Economic and Social Forum, Commission on Human Rights, Report on the Twenty-Third Session (20 February-23 March 1967), E/CN.4/940, p. 46.
[94] *See* U.N. General Assembly, 25th session, 1st Committee [*Provisional Verbatim Record*], *1727th Plenary Meeting*, 26 November 1968 (A/PV. 1727), Official Record, New York, 1968, pp. 2-6.

humanity had developed as a separate category of crimes which no longer required proof of the Nexus. It further shows that the abstentions and contrary votes were not motivated by the removal of the Nexus from the definition of the crime.

70. The Apartheid Convention received greater support than the Statutory Limitations Convention, and was adopted with 91 votes in favour, 4 against, and 26 abstentions.[95] From the records of the negotiations that led to its adoption, there is no indication of any reservation due to the absence of the Nexus in the definition of apartheid.[96]

71. I also note that the relevance of the Apartheid Convention for the expansion of the content and legal status of crimes against humanity was explicitly acknowledged by the Independent Commission of Experts tasked by the United Nations Security Council to review information on possible grave violations of international humanitarian law in Rwanda.[97]

D. Conclusion on the customary status of the Nexus between 1975 and 1979

72. The Nexus, while present in the definition of crimes against humanity in the Nuremberg Charter and possibly viewed as a constitutive element of the crime by the IMT, was removed from the definition of the crime set forth in Control Council Law No. 10. Although the Nexus was still applicable by virtue of incorporation of the Nuremberg Charter in Control Council Law No. 10, I find it significant that it no longer appeared in the definition of the crime. The vast majority of the Courts that applied that law viewed it merely as a jurisdictional requirement. The Jerusalem District Court in the *Eichmann* case reached the same conclusion. Notably, the Court in the *Einsatzgruppen* case, discussing crimes against humanity, stated that "*[t]his law is not restricted to events of war. It envisages the protection of humanity at all times.*"[98]

73. Starting from 1948 with the adoption of the Genocide Convention, and continuing with the Statutory Limitations Convention of 1968 and the Apartheid Convention of 1973, the international community recognised the possibility that crimes against humanity could be committed in times of peace. According to the ICJ, a series of similar resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule.[99]

74. Finally, the definition of crimes against humanity set forth in the 1954 Draft Code, on which the United Nations' Member States had the opportunity to comment upon, does not contain the Nexus as a constitutive element of the crime.

75. I am therefore satisfied that, by 1975, there had been a progressive and consistent evolution of the definition of crimes against humanity which had severed the Nexus from their constitutive elements.

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[95] *See* U.N. General Assembly, 28th session, *2185th Plenary Meeting*, 30 November 1973 (A/PV. 2185), Official Record, New York, 1973, p. 4.
[96] *Ibid.*, pp. 1-5.
[97] Preliminary report of the Independent Commission of Experts established in accordance with United Nations Security Council resolution 935 (1994), S/1994/1125, 4 October 1994, para. 116.
[98] *See supra* Section III(iii)(b).
[99] *Nicaragua Case*, para. 188; *Nuclear Weapons Case*, paras 70-71.

76. I am also satisfied that, between 1975 and 1979, it was sufficiently foreseeable[100] 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. All the jurisprudence and international instruments reviewed above were accessible and available in 1975, if necessary by seeking legal advice.[101]

77. Finally, while the immorality or appalling character of an act is not a sufficient factor to warrant its criminalisation under customary international law, I concur with the ICTY Appeals Chamber in *Ojdanić* that it may in fact play a role in that respect, insofar as it may refute any claim that a person did not know of the criminal nature of certain acts.[102] In this regard, I wish to highlight the holding of the ICTY Trial Chamber in the *Čelebići* case, which was fully endorsed by the ICTY Appeals Chamber and with which I myself am in agreement. In discussing crimes against humanity, the *Čelebići* Chamber stated that:

> It is undeniable that acts such as murder, torture, rape and inhuman treatment are criminal according to "general principles of law" recognised by all legal systems. Hence the caveat contained in Article 15, paragraph 2, of the ICCPR should be taken into account when considering the application of the principle of *nullum crimen sine lege* in the present case. The purpose of this principle is to prevent the prosecution and punishment of an individual for acts which he reasonably believed to be lawful at the time of their commission. It strains credibility to contend that the accused would not recognise the criminal nature of the acts alleged in the Indictment. The fact that they could not foresee the creation of an International Tribunal which would be the forum for prosecution is of no consequence.[103]

IV. CONCLUSION

78. On the basis of the analysis in Section III(C) above, I find that crimes against humanity under the jurisdiction of the ECCC do not require proof of the Nexus. Based on the considerations in Section III(A) above, I am not bound by the previous PTC case law qua *stare decisis* and will therefore not follow the PTC Nexus Decision nor require proof of the Nexus in making my determinations on the allegations against Meas Muth.

79. This decision is filed in English, with a Khmer translation to follow.

FOR THE FOREGOING REASONS, I:

80. **INFORM** the Defence that I am satisfied that the Nexus was no longer a constitutive element of crimes against humanity under customary international law between 1975 and 1979.

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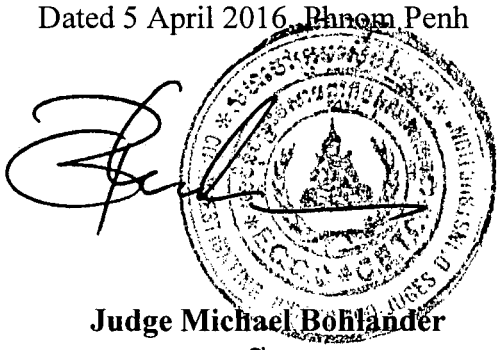
[100] According to the European Court of Human Rights, reasonable foreseeability – as opposed to absolute certainty – sufficiently safeguards the principle of legality, *see* European Court of Human Rights, *Chauvy and Others v. France*, Application No. 64915/01, 29 June 2004, para. 43.

[101] European Court of Human Rights, *Chauvy and Others v. France*, Application No. 64915/01, 29 June 2004, para. 44..

[102] *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. 42.

[103] *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, *Judgement*, 16 November 1998, para. 313; *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, *Judgement*, 20 February 2001, para. 180.

Dated 5 April 2016, Phnom Penh



Judge Michael Bohlander

សហចៅក្រមស៊ើបអង្កេតអន្តរជាតិ

International Co-Investigating Judge
Co-juge d'instruction international