BEFORE THE TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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CO-PROSECUTORS' CONSOLIDATED REPLY TO DEFENCE RESPONSES TO CO-PROSECUTOR'S REQUESTS TO RECHARACTERISE CHARGES IN THE INDICTMENT AND TO EXCLUDE THE NEXUS REQUIREMENT FOR AN ARMED CONFLICT TO PROVE CRIMES AGAINST HUMANITY

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I. INTRODUCTION

1. The Co-Prosecutors hereby submit their consolidated reply to the responses filed by the four defence teams to three requests submitted by the Co-Prosecutors to the Trial Chamber in June 2011, namely the *Request for the Trial Chamber to exclude the armed conflict nexus requirement from the definition of crimes against humanity,* dated 15 June 2011 ("Armed Conflict Request"),[1] the *Request for the Trial Chamber to re-characterise the facts establishing the conduct of rape as the crime against humanity of rape rather than the crime against humanity of other inhumane acts*, dated 16 June 2011 ("Rape as a Crime against Humanity Request"),[2] and the *Request for the Trial Chamber to consider JCE III as an alternative mode of liability*, dated 17 June 2011 ("JCE III Request")[3] (collectively "the Requests").

2. The defence responses to the Requests raise common procedural and substantive legal arguments relating to the admissibility of the Requests, to the scope of the Trial Chamber's power to grant the Requests, to the status of customary international law rules relating to crimes against humanity and joint criminal enterprise III ("JCE III") during the temporal jurisdiction of the ECCC and to the scope and application of the legality principle. As such, and in the interests of judicial economy, these common issues are addressed by way of this consolidated reply.

3. In reply to the common procedural and substantive legal issues raised in the various defence responses, the Co-Prosecutors submit:

   (a) the Requests are not preliminary objections within the meaning of Rule 89(2) and as such are not time-barred;

   (b) the Trial Chamber has the power to grant the Requests in accordance with Rule 98(2) and the underlying principle of *iura novit curia*;

   (c) during the temporal jurisdiction of the ECCC, customary international law did not require a nexus between armed conflict and crimes against humanity;

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1 **E95** Armed Conflict Request, 15 June 2011, ERN 00716026-37.
2 **E99** Rape as a Crime against Humanity Request, 16 June 2011, ERN 00708301-15.
3 **E100** JCE III Request, 17 June 2011, ERN 00708242-56.

(d) during the temporal jurisdiction of the ECCC, customary international law recognised rape as a crime against humanity;

(e) during the temporal jurisdiction of the ECCC, customary international law recognised JCE III as a mode of liability for international crimes; and

(f) granting the Requests would not violate the principle of legality.

4. Accordingly, the Co-Prosecutors request that the Trial Chamber admit the Requests and grant them on their merits. Further, the Co-Prosecutors request that the Chamber determine the Requests on the basis of written submissions alone and notify the parties of its determination prior to the start of the trial. An oral hearing, as proposed by the Ieng Sary and Nuon Chea defence teams, is not required on this issue.

II. PROCEDURAL HISTORY

5. The description of the relevant procedural history is set out in the initial Requests.[4] Following these filings, the Trial Chamber notified the parties by email that it would grant the defence teams until 22 July 2011 to respond and the Co-Prosecutors ten days to reply.[5] This was reaffirmed in a formal decision issued on 7 July 2011, which stipulated that the Co-Prosecutors' reply should be filed by 1 August 2011.[6]

6. On 24 June 2011, Ieng Sary filed a motion for an expedited decision on the admissibility of the requests.[7] No decision has yet been issued on this motion. On 22 July 2011, responses to each of the Requests were filed on behalf of Ieng Thirith,[8] Ieng Sary[9] and Khieu Samphan[10]

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4 **E95** Armed Conflict Request, *supra* note 1 at paras. 4-5; **E99** Rape as a Crime against Humanity Request, *supra* note 2 at paras. 2-4; **E100** JCE III Request, *supra* note 3 at paras. 5-7.

5 Email from Senior Legal Officer 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.

6 **E107** Decision on Extension of Time, 7 July 2011, ERN 00711953-4.

7 **E103** Ieng Sary's request for an expedited decision as to whether the OCP may raise requests for re-characterisation at this stage in the proceedings & request for extension of time to respond to such requests, should responses be necessary, 24 June 2011, ERN 00710070-80.

8 **E95/2** Defence response to "Co-Prosecutors' request for the Trial Chamber to amend the definition of crimes against humanity", 22 July 2011, ERN 00714797-809 (notified in English and Khmer 25 July 2011) ("Ieng Thirith Armed Conflict Response"); **E99/2** Defence response to "Co-Prosecutors' request for the Trial Chamber to recharacterise the facts establishing the conduct of rape as the crime against humanity of rape rather than the crime against humanity of other inhumane acts", 22 July 2011, ERN 00716118-32 (notified in English 25 July 2011, Khmer 3 August 2011) ("Ieng Thirith Rape as a Crime against Humanity Response"); **E100/1** Defence response to "Co-Prosecutors' request for the Trial Chamber to consider JCE as an alternative

and responses to the Armed Conflict Request and the JCE III Request were filed on behalf of Nuon Chea.[11] The various responses were notified on 25 and 26 July 2011 although the Khmer versions of certain responses were not notified until later. The Co-Lead Civil Parties lawyers also filed responses in support of each of the three Requests.[12]

7. Due to the delay in notification of the defence Responses in both official languages, on 26 July 2011, the Co-Prosecutors requested that the deadline for submission of its Reply be extended to ten days after the date of notification of the last Defence response in English and Khmer.[13] The Trial Chamber notified the Co-Prosecutors by email on the same day that the request was approved.[14] The Trial Chamber issued a formal decision on 2 August 2011

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mode of liability", 22 July 2011, ERN 00714810-22 (notified in English and Khmer 25 July 2011) ("Ieng Thirith JCE III Response").

9 **E95/4** Ieng Sary's response to the Co-Prosecutors' request for the Trial Chamber to exclude the armed conflict nexus requirement from the definition of crimes against humanity & request for an oral hearing, 22 July 2011, ERN 00716010-25 (notified in English 26 July 2011, Khmer 28 July 2011) ("Ieng Sary Armed Conflict Response"); **E99/4** Ieng Sary's response to the Co-Prosecutors' request for the Trial Chamber to recharacterise the facts establishing the conduct of rape as the crime against humanity of other inhuman acts & request for an oral hearing, 22 July 2011, ERN 00716026-37 (notified in English 26 July 2011, Khmer 28 July 2011)) ("Ieng Sary Rape as a Crime against Humanity Response"); **E100/2** Ieng Sary's response to the Co-Prosecutors' request for the Trial Chamber to consider JCE III as an alternative mode of liability & request for an oral hearing, 22 July 2011, ERN 00719826-41 (notified in English 26 July 2011, Khmer 28 July 2011) ("Ieng Sary JCE III Response").

10 **E95/3** Réponse à la demande des co-procureurs par laquelle ils prient la chambre de première instance de supprimer le critère de rattachement avec un conflit armé dans la definition de crime contre l'humanité, 22 July 2011, ERN 00716550-60 (notified in French and Khmer 26 July 2011) ("Khieu Samphan Armed Conflict Response"); **E99/3** Réponse à la demande des co-procureurs relative à la requalification des faits constitutifs de viol, 22 July 2011, ERN 00718662-71 (notified in French and Khmer 26 July 2011) ("Khieu Samphan Rape as a Crime against Humanity Response"); **E100/3** Réponse à la demande des co-procureurs relative à la troisième catégorie d'entreprise criminelle commune, 22 July 2011, ERN 00716541-9 (notified in French and Khmer 26 July 2011) ("Khieu Samphan JCE III Response").

11 **E95/5** Defence response to the "Co-Prosecutors' request for the Trial Chamber to exclude the armed conflict nexus requirement from the definition of crimes against humanity", 22 July 2011, ERN 00717406-14 ("Nuon Chea Armed Conflict Response"); **E100/5** Defence response to "Co-Prosecutors' request for the Trial Chamber to consider JCE III as an alternative mode of liability", 22 July 2011, ERN 00717650-7("Nuon Chea JCE III Response").

12 **E95/1** Civil Party Lead Co-Lawyers' response in support of the Co-Prosecutors' request for the Trial Chamber to exclude the armed conflict nexus requirement from the definition of crimes against humanity, 17 June 2011, ERN 00707942-6; **E99/1** Civil Party Lead Co-Lawyers response to the Co-Prosecutors' request to recharacterise the facts establishing the conduct of rape as a crime against humanity, 21 July 2011, ERN 00716455-69; **E100/4** Mémoire en appui à la demande des co-procureurs visant à ce que la chamber de première instance dise que la responsabilité pénale d'un accusé peut également être engage en raison de sa participation à la troisième catégorie d'entreprise criminelle commune, 22 July 2011, ERN 00716981-5.

13 **E107/1** Co-Prosecutors' request for extension of time to reply to defence responses on JCE III, rape as a crime against humanity and exclusion of the armed conflict nexus for crimes against humanity, 26 July 2011, ERN 00720244-6.

14 Email Susan Lamb to William Smith and Chakriya Yet, cc Andrew Cayley, Leang Chea, Kolvuthy Se "Re: NEW DOCUMENT(S): Case File No. 002 – Ieng Sary – Ieng Sary's response to the Co-Prosecutors' request

granting an extension of time for submission of this Reply for ten calendar days from the date of notification of the last defence response in Khmer.[15] The last response in Khmer was notified on 3 August 2011,[16] setting the deadline for reply at 12 August 2011.

III. APPLICABLE LAW

8. The relevant applicable law includes provisions of the Agreement, the ECCC Law, the Internal Rules ("Rules") and Cambodian procedural law and practice. Article 9 of the Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea of 6 June 2003 ("Agreement") provides:

> *The subject-matter jurisdiction of the Extraordinary Chambers shall be the crime of genocide as defined in the 1948 Convention on the* Prevention *and Punishment of the Crime of Genocide, crimes against humanity as defined in the 1998 Rome Statute of the International Criminal Court and grave breaches of the 1949 Geneva Conventions and such other crimes as defined in Chapter II of the Law on the Establishment of the Extraordinary Chambers as promulgated on 10 August 2001.* (emphasis added)

9. Article 12 of the Agreement allows recourse to international procedural rules, providing in relevant part:

> *The procedure shall be in accordance with Cambodian law. Where Cambodian law does not deal with a particular matter, or where there is uncertainty regarding the interpretation or application of a relevant rule of Cambodian law, or where there is a question regarding the consistency of such a rule with international standards, guidance may also be sought in procedural rules established at the international level.*

10. Article 5 of the Law on the Establishment of the Extraordinary Chambers (as amended 24 October 2004) ("ECCC Law") defines and gives the Court jurisdiction over Crimes against Humanity:

> *The Extraordinary Chambers shall have the power to bring to trial all Suspects who committed crimes against humanity during the period 17 April 1975 to 6 January 1979.*

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for the Trial Chamber to consider JCE III as an alternative mode of liability and request for an oral hearing", 26 July 2011 3.59pm.

15 **E107/3** Decision on the Co-Prosecutors' request for extension of time, 2 August 2011, ERN 00721799-801.

16 **D99/2** Ieng Thirith Rape as Crimes against Humanity Response, *supra* note 8.

Crimes against humanity, which have no statute of limitations, are any acts committed as part of a widespread or systematic attack directed against any civilian population, on national, political, ethnical, racial or religious grounds, such as:

murder;

extermination;

enslavement;

deportation;

imprisonment;

torture;

rape;

persecutions on political, racial, and religious grounds;

other inhumane acts.

11. Article 29 of the ECCC Law, which contains the provisions on criminal responsibility, provides:

> *Any Suspect who planned, instigated, ordered, aided and abetted, or committed the crimes referred to in article 3 new, 4, 5, 6, 7 and 8 of this law shall be individually responsible for the crime.*
>
> *The position or rank of any Suspect shall not relieve such person of criminal responsibility or mitigate punishment.*
>
> *The fact that any of the acts referred to in Articles 3 new, 4, 5, 6, 7 and 8 of this law were committed by a subordinate does not relieve the superior of personal criminal responsibility if the superior had effective command and control or authority and control over the subordinate, and the superior knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators.*
>
> *The fact that a Suspect acted pursuant to an order of the Government of Democratic Kampuchea or of a superior shall not relieve the Suspect of individual criminal responsibility.*

12. Article 33 new of the ECCC Law, which allows recourse to international procedural rules, provides in relevant part:

> *The Extraordinary Chambers of the trial court shall ensure that trials are fair and expeditious and are conducted in accordance with existing procedures in force, with full respect for the rights of the accused and for the protection of victims and witnesses. If these existing procedure do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application or if there is a question regarding their consistency with international standard,*

guidance may be sought in procedural rules established at the international level.

13. Internal Rule 89(1), which relates to preliminary objections, provides:

> *A preliminary objection concerning:*
>
> *a) the jurisdiction of the Chamber,*
>
> *b) any issue which requires the termination of prosecution;*
>
> *c) nullity of procedural acts made after the indictment is filed*
>
> *shall be raised no later than 30 (thirty) days after the Closing Order becomes final, failing which it shall be inadmissible.*

14. Internal Rule 98(2) allows for the recharacterisation of the crime detailed in the indictment. It provides in relevant part:

> *The judgment shall be limited to the facts set out in the Indictment. The Chamber may, however, change the legal characterisation of the crime as set out in the Indictment, as long as no new constitutive elements are introduced.*

15. Article 348 of the Cambodian Criminal Procedure Code 2007 ("CCPC") also contains a provision allowing for recharacterisation of crimes:

> *The court may only decide on acts stated in the indictment, the citation, or on the written record of immediate appearance. In case a court which sits en banc finds that the act charged is in fact a misdemeanor or a petty offense, the court shall remain competent to try that offense. In case a court which sits as a single judge finds that the act charged is in fact a felony, the court shall return the case file to the Royal Prosecutor to initiate a judicial investigation.*

IV. ARGUMENT

A. The Requests are admissible

i. OCP Requests do not concern "the jurisdiction of the Chamber" within the meaning of Rule 89

16. In their responses, Ieng Sary,[17] Ieng Thirith[18] and Khieu Samphan[19] object to the admissibility of the Requests on the grounds that they comprise "preliminary objections to jurisdiction" and, as such, should have been raised within 30 days of the Closing Order in accordance with Rule 89. The Co-Prosecutors disagree. Preliminary objections to jurisdiction within the meaning of Rule 89 refer to objections to the jurisdiction of the Trial Chamber as set out in the Indictment. Rule 89 does not limit the Trial Chamber's ability to consider jurisdictional issues in the broader sense within the context of recharacterisation.

17. In the present case, the Co-Prosecutors are not objecting to the jurisdiction as set out in the Indictment. The Indictment as it stands does not specifically include a charge of rape as a crime against humanity or JCE III as an alternative mode of liability. Accordingly, the Rape as a Crime against Humanity Request and the JCE III Request cannot be characterised as objections to jurisdiction as set out in the Indictment. Rather, these two requests demonstrate that certain facts established during the judicial investigation conform most closely to a legal characterisation of the crime of rape as a crime against humanity, and also that the form of participation of the Accused in certain crimes can also be described by the mode of liability of JCE III. Accordingly, what is being requested is the addition of a crime and mode of liability that are not provided for in the current version of the Indictment.

18. Likewise, the Armed Conflict Request is not an objection to the Indictment's provision for subject-matter jurisdiction over crimes against humanity as a whole. Rather, the Co-

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17 **E100/2** Ieng Sary JCE III Response, *supra* note 9 at paras.3- 4; **E99/4** Ieng Sary Rape as a Crime against Humanity Response, *supra* note 9 at paras. 9-10; **E95/4** Ieng Sary Armed Conflict Response, *supra* note 9 at paras. 16-17.

18 **E100/1** Ieng Thirith JCE III Response, *supra* note 8 at paras. 7-10; **E99/2** Ieng Thirith Rape as a Crime against Humanity Response, *supra* note 8 at paras. 6-9; **E95/2** Ieng Thirith Armed Conflict Response, *supra* note 8 at paras. 3-7.

19 **E100/3** Khieu Samphan JCE III Response, *supra* note 10 at paras. 10, 22; **E99/3** Khieu Samphan Rape as a Crime against Humanity Response, *supra* note 10 at paras. 6, 17; **E95/3** Khieu Samphan Armed Conflict Response, *supra* note 10 at paras. 14-15.

Prosecutors are requesting that the Trial Chamber amend the definition of the contextual elements of crimes against humanity as set out in the Indictment.

19. Finally, the Co-Prosecutors observe that during the Initial Hearing, the defence for Ieng Sary, while characterising "the application of crimes against humanity" as a "jurisdictional issue" within the scope of Rule 89, conceded that the question "to what extent they would apply" is "not necessarily" a jurisdictional issue.[20]

ii. The Rules distinguish between preliminary objections and recharacterisation

20. The Rules make specific provision for both recharacterisation and preliminary objections on jurisdiction. If all requests for recharacterisation were to be considered preliminary objections on jurisdiction, Rule 98(2) which allows for recharacterisation would have no meaning. The fact that the Rules provide for both recharacterisation and for preliminary objections on jurisdiction makes it clear that these are distinct procedural mechanisms.

21. The Trial Chamber has already ruled in *Duch*[21] that requests for recharacterisation are not "preliminary objections" under Rule 89. As stated in previous submissions, this ruling was a correct interpretation of the Rules and should be followed in the present case.[22]

22. Moreover, even if the Co-Prosecutors' Requests could have been submitted as preliminary objections under Rule 89(1), this does not preclude the Trial Chamber from considering the Requests. Unlike preliminary objections, which must be ruled on by the Trial Chamber in accordance with Rules 89(3) and 80*bis* (3), the Requests are submitted for the Trial Chamber's consideration and determination if the Trial Chamber sees fit to do so.

iii. The Requests do not amount to an appeal of Pre-Trial Chamber decisions

23. Another argument put forward by some of the defence responses is that the Requests essentially amount to an appeal by the Co-Prosecutors against the Pre-Trial Chamber's decisions on the appeals by the Accused against the Closing Order[23] and on the application of JCE III at the ECCC.[24] Khieu Samphan points to the Co-Prosecutors' request for the Trial

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20 **E1/7.1** Transcript at ERN 00713808, lines 14-18.
21 **E188** Judgment, 26 July 2010, at para. 14 ("*Duch*").
22 **E9/30/2** Co-Prosecutors Response to Ieng Sary's Observations, 18 May 2011, ERN 00694582-85 at para. 6.
23 **D427/2/15** Decision on appeals by Nuon Chea and Ieng Thirith against the Closing Order, 15 February 2011, ERN 00644462-571 ("Decision on Nuon Chea and Ieng Thirith appeals"); **D427/1/30** Decision on Ieng Sary's appeal against the Closing Order, 11 April 2011, ERN 00661785-994 ("Decision on Ieng Sary appeal").
24 **D97/14/15** Decision on the appeals against the Co-Investigating Judges' Order on joint criminal enterprise (JCE), 20 May 2010, ERN 00486521-89.

Chamber to "*correct*" the definition of crimes against humanity as set out in the Amended Closing Order and suggests that this language is indicative of a "disguised" attempt at an appeal.[25] The Ieng Thirith defence recalls the Co-Prosecutors' own previous submission during a hearing before the Pre-Trial Chamber in January 2011, that the Pre-Trial Chamber's decisions are final. From this it concludes that the only way the Co-Prosecutors could raise an objection to the definition of crimes adopted by the Pre-Trial Chamber in the Amended Closing Order was by way of preliminary objection.[26]

24. The Co-Prosecutors do not dispute that decisions of the Pre-Trial Chamber are final and not subject to appeal. However, the Co-Prosecutors reject the suggestion that by filing the Requests, they are attempting to circumvent the Rules and "appeal" prior decisions by the Pre-Trial Chamber. By filing the Requests, the Co-Prosecutors are simply inviting the Trial Chamber to consider legal issues which fall within the Trial Chamber's express or implied powers to determine. The lack of an appeal mechanism cannot be interpreted as limiting the Trial Chamber's ability to exercise its own powers to consider any legal issues that have previously been deliberated on by the Pre-Trial Chamber. Although the Pre-Trial Chamber's decisions may not be subject to an appeal, neither can those decisions bind the Trial Chamber.

B. The Trial Chamber has the power to grant the Requests

i. Rule 98(2) allows the Trial Chamber to change the legal characterisation of crimes (including modes of liability) as set out in the Indictment

25. Rule 98(2) explicitly refers to the power of the Trial Chamber to change the "legal characterisation of the crime as set out in the Indictment". While Rule 98(2) does not specifically refer to recharacterisation of facts appropriate to an alternate mode of liability, the Trial Chamber's inherent power, as expressed in Rule 98(2) clearly extends to changing

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25 **E95/3** Khieu Samphan Armed Conflict Response, *supra* note 10 at para. 17; **E95/3** Khieu Samphan Rape as Crime against Humanity Response, *supra* note 10 at para. 18 (referring to "un appel déguisé").

26 **E95/2** Ieng Thirith Armed Conflict Response, *supra* note 8 at para. 17; **E100/1** Ieng Thirith JCE III Response, *supra* note 8 at para. 9, **E99/2** Ieng Thirith Rape as a Crime against Humanity Response, *supra* note 8 at para. 8.

the legal characterisation of the facts relevant to the Accused's form of participation in a given substantive offence. The Trial Chamber applied precisely this interpretation in *Duch*.[27]

26. Ieng Sary has in the past admitted that the Trial Chamber's authority to change the legal characterization of the crimes may include changes to the applicable mode of liability, specifically JCE.[28] At the same time, he has asserted that the applicable Cambodian law "does not allow" recharacterisation of modes of liability.[29] His most recent Responses are silent on this issue. Ieng Thirith asserts that recharacterisation of "the facts" is permitted, but that this is distinct from recharacterisation of "the charges".[30] With respect, these assertions misunderstand the proper role of the Trial Chamber within the ECCC system and in Cambodian law, which are based primarily on the civil law tradition.

27. The scope of the Trial Chamber's power of recharacterisation is set out clearly and correctly in the response by Khieu Samphan, which states:

> *Legal re-characterisation during the examination of the evidence makes it possible to accord the facts with a more appropriate characterisation, it being understood, of course, that the more appropriate legal characterisation is legal and is within the jurisdiction of the court. If such is not the case, the Chamber must purely and simply decline jurisdiction.*"[31]

This interpretation of Rule 98(2) is most consistent with Rule 67(2), which requires the Indictment to set out the "legal characterisation" of material facts and the "nature of the criminal responsibility". The Co-Prosecutors affirm that the most appropriate legal characterisation of the acts of an Accused should specify at least one substantive crime and at least one mode of liability. Without a full characteristation of the "nature of the criminal responsibility" of the Accused in this way, encompassing both crimes and modes of liability, the Indictment would have been void for procedural defect under Internal Rule 67(2) and would not have proceeded to trial. By the Rape as a Crime against Humanity and JCE III Requests, the Co-Prosecutors are requesting the Trial Chamber to add a crime and an

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27 **E188** *Duch*, *supra* note 21 at para 493.

28 **D74/14/14** Ieng Sary's reply to the Co-Prosecutors' response on Ieng Sary, Ieng Thirith and Khieu Samphan's appeals on joint criminal enterprise, 18 March 2010, ERN 00485345-75 at para. 12.

29 **E9/30/1** Ieng Sary's observations to the Co-Prosecutors' notification of legal issues it intends to raise at the initial hearing, 3 May 2011, ERN 00686131-38 at para. 10.

30 **E100/1** Ieng Thirith JCE III Response, *supra* note 8 at para. 12; **E99/2** Ieng Thirith Rape as a Crime against Humanity Response, *supra* note 8 at para. 12.

31 **E95/3** Khieu Samphan Armed Conflict Response, *supra* note 10 at para. 10 (original emphasis); *see also* **E99/3** Khieu Samphan Rape as a Crime as Humanity Response, *supra* note 10 at paras. 10-11; **E100/3** Khieu Samphan JCE III Response, *supra* note 10 at paras. 14-15.

alternative mode of liability properly within the jurisdiction of the Court that are not provided for in the current version of the Indictment.

28. As noted by the Trial Chamber in *Duch*, the CCPC does not specifically refer to recharacterisation of modes of liability.[32] In the absence of written commentaries that consolidate judicial practice under the CCPC, the Co-Prosecutors are aware that Cambodian courts *en banc* routinely modify the legal characterization of modes of liability applicable to felonies without referring the case file back to the Royal Prosecutor, and in doing so, rely on Article 348 of the CCPC. The Co-Prosecutors submit that the Trial Chamber may properly take judicial notice of a routine practice of the Cambodian courts as a "fact of common knowledge".[33]

29. The Co-Prosecutors ask the Trial Chamber to consider that unlike the common law approach to truth-seeking – which relies on an adversarial confrontation of facts and law proffered by State and defendant – the civil law system is characterised by judicial truth-seeking, and tends not to rely on mechanisms such as formal amendment of charges or recourse to lesser included offences to address disjunctions between the facts charged and the applicable law. As one commentator observes, with reference to the procedural law of eight representative civil law systems:

> *In these civil law jurisdictions, the judge is both entitled and required to establish the law...This active conception of the role of the judge has implications for the treatment of the legal ingredients of the offence charged. Civil law jurisdictions frequently enable the judge to qualify the facts submitted by the Prosecution in a legally different format than the document containing the charges, without requiring a previous amendment of the charges. This approach is based on the understanding that the Prosecution's legal classification of the crime is merely a recommendation, while the judge is in charge of determining the substantive content of the trial on the basis of the facts submitted by the parties.*[34]

30. Accordingly, the Co-Prosecutors respectfully submit that the Trial Chamber, which bears characteristics most comparable to a court *en banc* within the justice system of Cambodia,

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32 **E188** *Duch*, *supra* note 21 at para. 493, citing Regulation 55 of the *Regulations of the International Criminal Court*, ICC-BD/01-01-4 (entry into force: 26 May 2004).

33 The inherent power to take judicial notice of facts of common knowledge, while not expressly provided in the Rules, was invoked by the Pre-Trial Chamber in **C9/4/7** Decision on appeal against order on extension of provisional detention of Nuon Chea, 4 May 2009, ERN 00303454-70 at para. 42.

34 Carsten Stahn, "Modification of the legal characterization of facts in the ICC system: a portrayal of Regulation 55", 16 Criminal Law Forum 1-31 (2005) at p. 5.

may properly recharacterise the facts in the Indictment to reflect the crimes and modes of liability most appropriate to those facts.

ii. The Trial Chamber has the power to amend the legal definition of crimes set out in the Indictment

31. The Ieng Thirith, Ieng Sary, and Khieu Samphan defence teams argue in their responses that the Armed Conflict Request requests an amendment to the definition of the applicable law rather than a recharacterisation. As such, they assert that it does not fall within the ambit of Rule 98(2) and therefore cannot be granted by the Trial Chamber.[35] In reply, the Co-Prosecutors clarify that the Armed Conflict Request does not purport to be a request for recharacterisation based on Rule 98(2). Rather it is a request for the Trial Chamber to ensure the accuracy of the law applied at the ECCC in accordance with the broader *iura novit curia* principle.

32. Rule 98(2) enshrines one aspect of the *iura novit curia* principle, namely the power of a court to recharacterise crimes based on the facts presented to it. However, Rule 98(2) does not enshrine the entirety of the *iura novit curia* principle, which also includes the power to correctly define the applicable law.

33. As there is no guidance in ECCC or Cambodian legal sources, it is appropriate to look for guidance on the scope and application of the underlying *iura novit curia* principle in international jurisprudence. The International Court of Justice has confirmed on a number of occasions that it is the role of the Court to determine the applicable law in a given case. In the *Fisheries Jurisdiction* cases, the Court held:

> *The Court ... is deemed to take judicial notice of international law and is therefore required ... to consider on its own initiative all rules of international law which may be relevant to the settlement of the dispute. It being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed upon any of the parties, for the law lies within the judicial knowledge of the Court.*[36]

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35 **E95/2** Ieng Thirith Armed Conflict Response, *supra* note 8 at paras. 8 and 10-11; **E95/3** Khieu Samphan Armed Conflict Response, *supra* note 10 at paras. 11-13.

36 *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland),* Merits, Judgment, I.C.J. Reports 1974, p. 175 at p.181; *Fisheries Jurisdiction (United Kingdom v. Iceland)*, Merits, Judgment, I.C.J. Reports 1974, p. 3 at p.9; see also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, 27 June 1986, I.C.J. Reports 1986, p.14 at pp. 24-25.

34. The European Court of Justice has also made similar pronouncements concerning a court's responsibility to determine the correct meaning of applicable law, stating:

> *According to the principle iura novit curia, determining the meaning of the law does not fall within the scope of application of a principle which allows the parties a free hand to determine the scope of the case and the Community Court is therefore not obliged to inform the parties of the interpretation it intends to give in order to enable them to adopt a position on that subject.*[37]

35. Although not specifically provided for in the Rules, the Trial Chamber may have recourse to the broader principle *of iura novit curia* in order to ascertain and apply the correct law as part of the exercise of its inherent powers. Indeed, this is the approach that was taken by the Trial Chamber in *Duch* with regard to the charges for crimes against humanity. Although the definition of crimes set out in the ECCC Law was not contested by the defence, the Trial Chamber held that it had an independent responsibility to confirm that the crimes reflected customary international law during the relevant period, stating:

> *[R]egardless of the Chamber's subject matter jurisdiction over them, each of the charged crimes and forms of responsibility must also conform to the principle of legality.*[38]

36. It is also common practice at other international and internationalised criminal courts for the court to independently determine that it is applying the correct law. As emphasised by the International Tribunal for the Former Yugoslavia (ICTY) in the *Vasilijević* case, "each Trial Chamber is obliged to ensure that the law which it applies to a given criminal offence is indeed customary."[39]

37. In a different context, the *Tadić* case before the ICTY provides another useful illustration of the application of the inherent powers doctrine to determine a legal issue not specifically covered by a court's constitutive documents. In that case, the ICTY relied on the inherent powers doctrine to conclude that it had jurisdiction to question the legality of its own creation. It described its inherent power to do this as "deriv[ing] automatically from the

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37 *Commission v Roodhuijzen*, Case T-58/08 P, Judgment of the Court of First Instance, 5 October 2009.

38 **E188** *Duch, supra* note 21 at para. 26.

39 *Prosecutor v. Mitar Vasiljević*, IT-98-32-T, Judgment (ICTY Trial Chamber), 29 November 2002 at para. 198.

exercise of the judicial function'"[40] and found that such power "does not need to be expressly provided for in the constitutive documents of [any judicial or arbitral tribunal]."[41]

38. The Co-Prosecutors submit that the Trial Chamber clearly has the power, indeed the responsibility, to amend the definition of crimes against humanity as set out in the Indictment to ensure that it is an accurate reflection of the applicable law.

C. During the relevant period, customary international law did not require a nexus with armed conflict for crimes against humanity

39. The Armed Conflict Request proposes that the Trial Chamber remove the requirement in the Amended Closing Order of a nexus between crimes against humanity and an armed conflict. If granted, this amendment would have the effect of reinstating the definition of Crimes against Humanity set out in Article 5 of the ECCC Law, which excludes the armed conflict nexus. In addition to the procedural issues addressed above, the defence responses object to the Armed Conflict Request on the merits.

40. The Khieu Samphan Armed Conflict Response introduces the novel argument that even if the armed conflict nexus is not expressly included in Article 5 of the ECCC Law it is still a requirement. This interpretation is based on the requirement, set out in the chapeau, that an attack be targeted against a "civilian population". Khieu Samphan submits that in the absence of an armed conflict, the reference to a civilian population would be "extraneous".[42] This argument is without merit. Firstly, even in times of peace, military personnel are distinct from civilians and could be the target of an attack. Secondly, the reference to civilian population has been used in other international instruments, including the *Statute of the International Criminal Tribunal for Rwanda* ("ICTR Statute")[43] and the *Rome Statute of the*

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40 *Prosecutor v. Duško Tadić*, IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (ICTY Appeals Chamber), 2 October 1995 at para. 14.

41 *Ibid.* at para. 18.

42 **E95/3** Khieu Samphan Armed Conflict Response, *supra* note 10 at para. 23.

43 ICTR Statute, Annex to S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994), art. 3; see also *Prosecutor v. Akayesu*, Judgment, Case No. ICTR-96-4-T (ICTR Trial Chamber), 2 September 1998 at para. 565 (finding that "[c]rimes against humanity are . . . prohibited regardless of whether they are committed in an armed conflict, international or internal in character").

International Criminal Court ("ICC Statute")[44] where there is indisputably no requirement that the attack be linked to an armed conflict.

41. Apart from the above, the common underpinning to the defence teams' opposition to the Armed Conflict Request is that customary international law either positively required a nexus with armed conflict during the relevant period or was insufficiently clear on this point to justify the exclusion of the armed conflict nexus in the ECCC Law.

42. The status of customary international law with respect to the nexus requirement has already been considered by the Trial Chamber, in *Duch*,[45] and by the Pre-Trial Chamber in its decisions on the appeals by the Accused persons against the Closing Order.[46] It has also been the subject of extensive written submissions by all parties. In particular, the Co-Prosecutors point to, and adopt by reference, their prior submissions in support of the argument that during the relevant time period customary international law did not require a nexus with armed conflict.[47]

43. In view of the extensive nature of prior submissions, this reply only addresses arguments directly raised by the defence teams in their most recent responses or other issues requiring further clarification.

i. The IMT Charter and Nuremberg Principles do not necessarily reflect customary international law with respect to the armed conflict nexus requirement.

44. In his Armed Conflict Response, Ieng Sary reiterates his previous contention that the IMT Charter and the Nuremberg Principles, both of which required a nexus with armed conflict, should be read as providing the authoritative definition of crimes against humanity during the 1975-79 period.[48] The response states that the Pre-Trial Chamber found that the drafters

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44 ICC Statute, U.N. Doc. A/CONF.183/9, 17 July 1998, art. 7; see also Elements of the Crimes (ICC 2011) at p. 5 (stating that an attack on a civilian population "need not constitute a military attack").

45 The Trial Chamber concluded that the exclusion of the armed conflict nexus in the definition of crimes against humanity in art. 5 of the ECCC Law accords with customary international law during the relevant time. This decision was based on a review of contemporary state practice, subsequent jurisprudence at the international and regional levels, and the report of the Group of Experts underpinning the establishment of the ECCC. **E188** *Duch Judgment, supra* note 21 at paras. 291-296.

46 The Pre-Trial Chamber came to a contrary conclusion to the Trial Chamber finding that there was an "*absence of clear state practice and* opinio juris" regarding the armed conflict nexus requirement during the relevant period. **D427/1/30** Decision on Ieng Sary's appeal, *supra* note 9 at para.310; **D427/2/15** Decision on Nuon Chea and Ieng Thirith appeals, *supra* note 23 at para. 144. The Pre-Trial Chamber's decision was based on a review of most, but not all of the same sources, as the Trial Chamber relied on in *Duch*.

47 **D427/1/17** Co-Prosecutors' joint response to Nuon Chea, Ieng Sary and Ieng Thirith's appeals against the Closing Order, 19 November 2010, ERN 00626531-623 at paras. 172-185; and **E95** Armed Conflict Request, *supra* note 1 at paras. 14-23.

of the IMT Charter ensured a connection to armed conflict "in order to avoid allegations that the resulting convictions went beyond what was provided for under customary international law" and that the Co-Prosecutors had "ignored this finding".[49] The Ieng Thirith Armed Conflict Response goes even further, stating that in practice "crimes against humanity and war crimes were practically merged" before the IMT.[50] To the extent that Ieng Thirith is suggesting that crimes against humanity may not have existed as a separate category of crimes in 1945, the Co-Prosecutors reply that this assertion is unfounded and unsupported by authority.

45. In reply to Ieng Sary, the Co-Prosecutors clarify that they have not "ignored" the finding of the Pre-Trial Chamber. Rather, they do not consider it to be conclusive as to the status of customary international law at the relevant time. The Co-Prosecutors note that the Pre-Trial Chamber's statement is based on statements made in Professor Cherif Bassiouni's treatise *Crimes against Humanity in International Criminal Law*.[51] When looked at in context, it is apparent that that Bassiouni's statements are seeking to explain what may have motivated the inclusion of the nexus in the IMT Charter. Bassiouni does not at any point conclude that at the time of the IMT Charter customary international law necessarily required the nexus. In fact, later in his treatise he describes the approach taken by the IMT drafters as a "precaution … to avoid the argument that [they] violated the 'principles of legality'."[52]

46. The Co-Prosecutors find more persuasive the comments of the United Nations War Crimes Commission (UNWCC), which, writing in 1948 stated that international law may sanction individuals for crimes against humanity committed "not only during war but also, in certain circumstances, during peace" and that the inclusion of the nexus in the IMT Charter "limited the scope of the concept of crimes against humanity".[53]

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48 **E95/4** Ieng Sary Armed Conflict Response, *supra* note 9 at paras. 21-22, 25 (referring to **D427/1/23** Ieng Sary's reply to the Co-Prosecutors' joint response to Nuon Chea, Ieng Sary and Ieng Thirith's appeals against the Closing Order, 6 December 2010, ERN 00629968-3043 at para. 87).

49 **E95/4** Ieng Sary Armed Conflict Response, *supra* note 9 at para. 21.

50 **E95/2** Ieng Thirith Armed Conflict Response, *supra* note 8 at para. 27

51 M. Cherif Bassiouni, *Crimes Against Humanity in International Law,* Kluwer Law International (1999) at pp. 23-25, 29-30, 43 (cited in **D427/2/15,** Decision on Nuon Chea and Ieng Thirith appeals, *supra* note 23 at para. 139 and **D427/1/30** Decision on Ieng Sary's appeal, *supra* note 23 at para. 308).

52 Bassiouni, *ibid.* at p. 80.

53 United National War Crimes Commission, History of the United National War Crimes Commission and the Development of the Laws of War (1948) at p192-193.

47. With regard to the Nuremberg Principles, the Co-Prosecutors submit that it is unsurprising that they reiterate the definition of crimes against humanity, including the nexus, as set out in the IMT Charter. The Nuremberg Principles were never intended to be declaratory of customary international law on individual and superior criminal responsibility for core international crimes as at the date of their adoption. Rather they were intended to be, and are, declaratory of the law applied by the IMT. This is clear from the wording of UN General Assembly Resolution 177 (II) which directed the International Law Commission ("ILC") to "formulate the principles of international law recognized in the Charter of the Nuremberg Tribunal and the judgment of the Tribunal."[54] This mandate was strictly followed by the ILC, which at the outset of its work determined that its task "was not …to examine whether these principles were or were not principles of international law … [but] merely to formulate them."[55] As such, the Nuremberg Principles cannot be relied on as additional support for the proposition that a nexus with armed conflict was required for crimes against humanity under customary international law in 1945.

ii. Developments subsequent to the IMT Charter demonstrate conclusively that there was no armed conflict nexus requirement by 1975

48. In the Armed Conflict Request, the Co-Prosecutors argue that significant developments at the international and national levels following the IMT Charter demonstrate conclusively that there was no armed conflict nexus for crimes against humanity by 1975.[56] The defence responses reject this argument and maintain that the armed conflict nexus was still required during the temporal jurisdiction of the ECCC.

49. The Khieu Samphan and Ieng Sary responses both suggest that the armed conflict nexus may not have been severed under customary international law until after the adoption of the ICC Statute. In support of this argument, they reference certain records relating to the negotiation of the ICC Statute which show that the issue of the nexus was the subject of some debate.[57] In reply the Co-Prosecutors submit that the fact that the nexus was discussed during the negotiation of the ICC Statute and that some delegations may even have expressed differing views is not itself sufficient to cast doubt on the status of customary international law on this

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54 UN General Assembly Resolution 177 (II), 21 November 1947.

55 Yearbook of the International Law Commission: 1950, vol. II (A/CN.4/22) at para. 36.

56 **E95** Armed Conflict Request, *supra* note 1 at paras. 20-23

57 **E95/3** Khieu Samphan Armed Conflict Response, *supra* note 10 at paras. 21-22; **E95/4** Ieng Sary Armed Conflict Response, *supra* note 9 at note 46.

issue. Customary international law depends on consistency, rather than absolute uniformity, of state practice for its development. The defence submission is also contrary to the jurisprudence of the Trial Chamber and of the ICTY both of which have concluded that, to the extent the nexus requirement previously existed in customary international law, it was severed well in advance of the adoption of the ICC Statute.[58]

50. The defence responses also challenge the authority of a number of the individual sources the Co-Prosecutors rely on in the Armed Conflict Request in identifying customary international law in place as of 1975.

Control Council Law No. 10

51. Ieng Thirith and Ieng Sary challenge the Co-Prosecutors' reliance on Control Council Law No. 10 ("CCL 10")[59] and subsequent jurisprudence of the military courts established thereunder.

52. Citing an article by Egon Schwelb, Ieng Thirith argues that the exclusion of the words "*before or during the war*" has no practical importance because other provisions of CCL 10 make clear that it applies to crimes committed both before and during the war. On its face, Ieng Thirith's reliance on this part of the Schwelb article seems misplaced and does not address the Co-Prosecutors' argument that CCL 10 excluded the nexus with armed conflict for crimes against humanity. The Co-Prosecutors' argument does not turn on the exclusion of the words "*before or during the war*" but rather on the exclusion in the CCL 10 of the link to other crimes that were within the jurisdiction of the IMT, being war crimes and crimes

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58 **E188** *Duch*, *supra* note 21 at para. 292 *Prosecutor v. Tadić, supra* note 40 at para. 140. The Pre-Trial Chamber has also suggested that the armed conflict nexus may not have been required under customary international law prior to the ICC Statute. *See* **D427/1/30** Decision on Ieng Sary's appeal, *supra* note 23 at para. 310 (stating that there was a "*crucial tipping point*" in state practice and *opinio juris* between 1968-1984); and **D427/2/15,** Decision on Nuon Chea and Ieng Thirith appeals, *supra* note 23 at para. 137 (citing the ICTY Tadić case and stating that customary international law "may" not have required the nexus as of 1995). *But see* Decision on appeals by Nuon Chea and Ieng Thirith against the Closing Order, *supra* note 23 at para. 143 (stating that "*disagreement on the requirement of an armed conflict nexus persisted until the conference for the establishment of the International Criminal Court*").

59 Control Council Law No. 10 on the Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 December 1945, art. II(1)(c), *reprinted in Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10* (Vol. I) pp. 16-17 ("CCL 10").

against the peace. Moreover, as noted in the Armed Conflict Request, Schwelb has elsewhere confirmed that CCL No. 10 excluded the armed conflict nexus.[60]

53. Ieng Sary challenges the Co-Prosecutors' reliance on statements made by the US Military Tribunal in the *Einsatzgruppen* case and the *Justice* case arguing that these statements were made *obiter*.[61] Ieng Sary claims that the *Flick* case, in which the Tribunal rejected the argument that the armed conflict nexus was not required in CCL 10, should be considered more authoritative than the *Einsatzgruppen* case and the *Justice* case as this issue was material to the *ratio decidendi*. Ieng Sary also claims that the tribunals set up under CCL 10 should be considered as administering domestic rather than international law.

54. The Co-Prosecutors do not dispute that the statements in the *Einsatzgruppen* case and the *Justice* case were *obiter dicta*, or that the lack of an armed conflict nexus was material to the dismissal of the charges in *Flick*. However, this does not reduce the significance of the statements made in the *Einsatzgruppen* and *Justice* cases as authoritative interpretations of the Tribunal's own constituting document. The Tribunal states explicitly in *Einsatzgruppen* and implies in *Justice* that no nexus to armed conflict is required for crimes against humanity. The Trial Chamber may properly have regard to these cases in its assessment.

55. With regard to the law applied by the CCL 10 tribunals, the Co-Prosecutors refer to their earlier submissions on this point and maintain that the law applied was international.[62] It is also noted that in *Flick* the Tribunal called itself an "international tribunal" that "administers international law".[63]

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60 **E95** Armed Conflict Request, *supra* note 1 at para. 20 (quoting Egon Schwelb's statement in *Crimes against Humanity*, 23 British Yearbook of International Law 178 (1946) at 218 that "the whole jurisprudence evolved in the Nuremberg proceedings with a view to restricting crimes against humanity to those connected with the war becomes irrelevant for the courts which are dealing or will be dealing with crimes against humanity [under CCL 10]").

61 **E95/4** Ieng Sary Armed Conflict Response, *supra* note 9 at para. 23.

62 **E95** Armed Conflict Request, *supra* note 1 at para.21.

63 *United States v. Flick*, Case No. 48, 20 April-22 December 1947 in Law Reports of Trials of War Criminals, vol. XII (UNWCC 1949) at p. 14.

1954 Draft of the Code of Offenses against the Peace and Security of Mankind

56. Ieng Sary claims that the Co-Prosecutors "ignored" the Pre-Trial Chamber's finding that the 1954 Draft of the Code of Offenses against the Peace and Security of Mankind ("Draft Code") was not accepted by the UN General Assembly. [64]

57. The Co-Prosecutors confirm that they have taken into account the Pre-Trial Chamber's finding but maintain that, despite its non-acceptance, the Draft Code provides valuable evidence of the considered collective view of highly-qualified publicists as to state practice and *opinio juris* with regard to the armed conflict nexus issue. It is clear from UN records that the reason the Draft Code of 1954 was not adopted had nothing to do with the lack of the armed conflict nexus for crimes against humanity but rather related to the definition of aggression.[65]

58. In addition, although it was never adopted, the Draft Code is regularly referred to as an important material source of customary international law, including customary international law relating to the armed conflict nexus for crimes against humanity. For example, in a 1989 report on the development of another version of the draft Code of Crimes against the Peace and Security of Mankind the ILC Special Rapporteur relied on the 1954 Draft Code (in addition to the Apartheid Convention and the Genocide Convention) to support the assertion that crimes against humanity did not require an armed conflict nexus, stating:

> *[T]he concept of crimes against humanity gradually came to be viewed as autonomous and is today quite separate from that of war crimes. Thus, not only the 1954 draft code but even conventions which have entered into force (on genocide and apartheid) no longer link that concept to a state of war.* [66]

59. The Co-Prosecutors maintain that the Trial Chamber may properly have regard to the Draft Code in its assessment.

1948 Genocide Convention and 1973 Apartheid Convention

60. Khieu Samphan and Ieng Sary both challenge the Co-Prosecutors' reliance on the 1948 Genocide Convention and 1973 Apartheid Convention. Khieu Samphan asserts that the ILC "came to the conclusion in 1993 that only the crimes of apartheid and genocide constitute

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64 **E95/4** Ieng Sary Armed Conflict Response, *supra* note 9 at para. 27.
65 General Assembly, Ninth Session, 504th Plenary Meeting, 4 December 1954, at para. 897.
66 Yearbook of the International Law Commission 1989, Vol. II, Part One, at p. 86, para. 38.

crimes against humanity under international law" and that as a result "only these two crimes against humanity constitute international crimes, and not that crimes against humanity may be committed during peacetime."[67]

61. This argument is misguided and profoundly inaccurate. Contrary to Khieu Samphan's assertion the ILC did not conclude in 1993 (or ever) that "only the crimes of apartheid and genocide constitute crimes against humanity under international law". Khieu Samphan bases this assertion on a preliminary working draft of the ICC Statute prepared by an ILC working group between May and July 1993. This draft listed, amongst other crimes, genocide (as defined by the Genocide Convention) and apartheid (as defined by the Apartheid Convention) as crimes within the jurisdiction of the future court. As the Working Group's commentary on the draft makes clear, the draft included only crimes which were defined by treaties and for which the treaty set out enforcement mechanisms.[68] The ILC Working Group's draft and commentary cannot lead to a conclusion that only genocide and apartheid constituted crimes against humanity under customary international law.

62. Ieng Sary's objections are based on the Pre-Trial Chamber's findings that the Genocide Convention "unequivocally departed from its crimes against humanity origins by requiring a 'specific intent'" and that the Apartheid Convention was "signed, ratified or acceded to by only 25 United Nations member States … by 17 April 1975 and by 32 further States during the ECCC's temporal jurisdiction".[69]

63. The Co-Prosecutors submit, with all due respect to the Pre-Trial Chamber, that these findings are simply not persuasive. Neither the Pre-Trial Chamber nor Ieng Sary have satisfactorily explained why adding the specific intent element to the definition of genocide in the Genocide Convention means that genocide is no longer a crime against humanity. Despite the relatively small number of state parties to the Apartheid Convention during the temporal jurisdiction of the ECCC - for the purposes of identifying customary international law - the number of state parties to a Convention at any point in time is not the only or even

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67 **E95/3** Khieu Samphan Armed Conflict Response, *supra* note 10 at para. 22.

68 Revised report of the Working Group on a draft statute for international criminal court, reproduced in document A/48/10 annex, at p. 107 (cited in **E95/3** Khieu Samphan Armed Conflict Response, *supra* note 10 at para. 22).

69 **D427/1/30** Decision on Ieng Sary appeal, *supra* note 23 at para 309; **D427/2/12** Decision on Nuon Chea and Ieng Thirith appeals, *supra* note 23 at 142.

most significant factor. State practice during negotiations, votes on adoption by the General Assembly and the reasons for votes must all be taken into account.

1968 Statute of Limitations Convention

64. Relying on the findings of the Pre-Trial Chamber, Ieng Sary contends that the 1968 Statute of Limitations Convention[70] is not illustrative of customary international law because it was only ratified by 18 countries during the ECCC's temporal jurisdiction.[71] The number of state parties to a convention during the temporal jurisdiction of the ECCC alone does not undermine its value as a material source of customary international law. In particular, it is significant to note that there is no suggestion that the lack of support for the convention was based for the purposes on the lack of an armed conflict nexus. In fact, the records of its negotiation and adoption would suggest that the primary objection was that the convention was not the appropriate vehicle through which to extend the categories of crimes against humanity rather than deletion of the nexus requirement.[72]

Domestic legislation and jurisprudence

65. Ieng Sary notes the Pre-Trial Chamber's finding that there are "few examples of national legislation defining crimes against humanity without the nexus requirement" and goes on to state that the "lone" example apart from Germany through CCL 10 is the 1950 Israeli Nazi and Nazi Collaborators (Punishment) Law.[73] While the Co-Prosecutors do not dispute that there is little domestic legislation regarding crimes against humanity, Ieng Sary's statement is inaccurate. As noted in the Armed Conflict Request, the *International Crimes (Tribunals) Act* 1973 of Bangladesh defines crimes against humanity without any reference to the IMT Charter or any armed conflict nexus.[74]

66. Moreover, it is not correct to infer from the scarcity of domestic legislation defining crimes against humanity without the armed conflict nexus that such a definition was not supported

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70 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Annex to G.A. Res. 2391 (XXIII), 26 November 1968, art. I(b).

71 **E95/4,** Ieng Sary Armed Conflict Response, *supra* note 9 at para. 28 (citing **D427/1/30** Decision on Ieng Sary appeal, *supra* note 23 at para. 309.

72 Robert H. Miller, *The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, 65 American Journal of International Law 476, 491 (1971).

73 **E95/4** Ieng Sary's Armed Conflict Response, *supra* note 9 at para. 29 (citing **D427/1/30** Decision on Ieng Sary Appeal, *supra* note 23 at para. 309).

74 Act No. XIX of 1973 ("*International Crimes Act (Tribunals) Act* 1973"); see **E95** Armed Conflict Request, *supra* note 1 at para. 23, note 42.

by states. In fact, prior to 1975 very few states enacted any domestic legislation regarding crimes against humanity. This did not affect the existence of crimes against humanity in customary international law, nor did it prevent domestic courts from relying on customary international criminal law to exercise jurisdiction over crimes against humanity. However as the majority of domestic prosecutions for crimes against humanity during the 20th century related to crimes associated with WWII, the issue of a whether a nexus with armed conflict was a requirement under customary international law simply did not arise in these cases.

Agreement and ECCC law

67. Neither the defence responses nor the earlier decisions of the Pre-Trial Chamber have taken into account the status of the Agreement and ECCC Law itself in their assessment of customary international law during the relevant time period.

68. The subject matter jurisdiction of the ECCC was first set out in the Agreement, a binding treaty between the United Nations and the Royal Government of Cambodia, as *inter alia* "crimes against humanity as defined in the 1998 Rome Statute of the International Criminal Court". It is common ground between the parties that the Rome Statute does not include an armed conflict nexus for crimes against humanity. The terms of the Agreement with respect to subject matter jurisdiction were based to a large extent on the work of the Group of Experts for Cambodia appointed pursuant to General Assembly Resolution 52/135 which concluded that "the bond between crimes against humanity and armed conflict appears to have been severed by 1975."[75] The Agreement was approved by the United Nations General Assembly in May 2003[76] and signed by both parties on 6 June 2003. The ECCC Law, which was first promulgated in 2001 and amended in 2004 to give effect to the Agreement, excludes the armed conflict nexus from the definition of crimes against humanity.

69. The Report of the Group of Experts, the text of the Agreement and the text of the ECCC Law are not of course conclusive as to the law in place during the relevant period and it is incumbent upon the Trial Chamber to itself determine that the international crimes over which it has jurisdiction in fact amounted to crimes under international law at that time. These documents and instruments do, however, provide very relevant evidence of the current

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75 **D366/7.1.556** Report of the Group of Experts for Cambodia established pursuant to General Assembly Resolution 52/135, 19 February 1999, ERN 00078333-428 at para 71.

76 General Assembly Resolution 57/228B, adopted 13 May 2003 (without vote).

views of United Nations member states, including Cambodia, and of distinguished scholars dedicated to studying the issue of the armed conflict nexus for crimes against humanity under customary international law at the relevant time.

iii. Recourse to the favor rei principle is not required in the present circumstances

70. The defence responses contest the Co-Prosecutors' argument that the principle of *in dubio pro reo* cannot justify the inclusion of the armed conflict nexus.[77] The Co-Prosecutors emphasise that when used in its formal sense, *in dubio pro reo* applies solely to uncertainties arising in the assessment of the probative value of evidence.[78] The Co-Prosecutors clarify that, whilst accepting that the broader principle of *favor rei* can be applied to uncertainties in the law, their position is that the present circumstances do not warrant such application. As the previous sections have demonstrated, customary international law is sufficiently certain to allow the Trial Chamber to conclude that the armed conflict nexus was not required for crimes against humanity during the relevant period. In the absence of demonstrable uncertainty, recourse to the principle of *favor rei* is not required.

D. During the relevant period, customary international law recognised rape as a crime against humanity

71. The Pre-Trial Chamber has recognised that rape has been punishable in international criminal law since the 19th Century.[79] This is, for the most part, common ground between the Defence and the Co-Prosecutors.[80]

72. Only Ieng Sary contends that rape was not illegal, but rather regarded as "the necessary reward for the fighting men" under international criminal law until the 1990s.[81] He asserts that the criminalisation of rape as a crime against humanity did not occur until the decade

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77 **E95/2** Ieng Thirith Armed Conflict Response, *supra* note 8 at paras. 18-24; **E95/4** Ieng Sary, Armed Conflict Response, *supra* note 9 at paras. 32-34; **E95/5** Nuon Chea, Armed Conflict Response, *supra* note 11 at paras. 6-21.

78 Antonio Cassese, *International Criminal Law* (2003) at p. 157.

79 **D427/2/15** Decision on Nuon Chea and Ieng Thirith appeals, *supra* note 23 at para. 151.

80 **E99/2** Ieng Thirith Rape as a Crime against Humanity Response, *supra* note 8 at paras. 19-20; **E99/3** Khieu Samphan Rape as a Crime against Humanity Response, *supra* note 10 at paras. 21-34 (not contesting).

81 **E99/4** Ieng Sary Rape as a Crime against Humanity Response, *supra* note 9 at para. 14.

following the Cold War, when "[f]or the first time, there [were] steps to recognise women as full subjects of human rights and international criminal justice."[82]

73. This puts the recognition of the criminal nature of rape in international law far too late. In support of this proposition, Ieng Sary cites:

> *...the violence committed against thousands of girls and young women of non-Japanese origin from Japanese occupied territories during World War II [which was] 'ignored' by the International Military Tribunal for the Far East.*[83]

74. However, this overstates the position taken in the post-WWII tribunals towards rape. In convicting Japanese Foreign Minister Koki Hirota, for example, the IMTFE acknowledged that acts constituting rape were criminal:

> *The Tribunal is of the opinion that Hirota was derelict in his duty in not insisting before the Cabinet that immediate action be taken to put an end to the atrocities, failing any other action open to him to bring about the same result. He was content to rely on assurances which he knew were not being implemented while hundreds of murders, violations of women, and other atrocities were being committed daily. His inaction amounted to criminal negligence.*[84]

75. As has already been recognised by the Pre-Trial Chamber and not disputed by the Defence, "evidence of rape was read into the record by the French and Soviet prosecutors before the IMT" even if no conviction was ultimately entered on such a charge.[85] In any event, the contention that rape was not recognised as a criminal act in international criminal law until the establishment of the *ad hoc* tribunals disregards a long line of established authority.[86] Whatever "steps to recognise women as full subjects of human rights" were left until the 1990s, the illegality of rape was not one of them.

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82 *Ibid.*, para. 16, note 47.

83 *Ibid.*, para. 14.

84 The Complete Transcripts of the Proceedings of the International Military Tribunal for the Far East, reprinted in R. John Pritchard and Sonia Magbanua Zaide (eds) *The Tokyo War Crimes Trial*, Vol. 20 (1981) at pp. 49,791.

85 **D427/2/15** Decision on Nuon Chea and Ieng Thirith appeals, *supra* note 23, para. 152.

86 Instructions for the Government of Armies of the United States in the Field (Lieber Code), 24 April 1863, art. 44; *The Laws of War on Land*, adopted by the Institute of International Law, Oxford, 9 September 1880, art. 49; *Hague Regulation concerning the Laws and Customs of War on Land, annexed to Convention (II) with Respect to the Laws and Customs of War on Land*, 29 July 1899, art. 46; *Hague Regulations concerning the Laws and Customs of War on Land, annexed to Convention (IV) respecting the Laws and Customs of War on Land*, 18 October 1907, art. 46. For example, see *Prosecutor v. Zejnil Delalić*, Case No. IT-96-21-T, Judgment (ICTY Trial Chamber) 16 November 1998 at para. 476 (where the ICTY Trial Chamber reviewed these authorities in addition to the Geneva Conventions and Additional Protocols, concluding that "[t]here can be no doubt that rape and other forms of sexual assault are expressly prohibited under international humanitarian law").

76. The Responses for Ieng Thirith and Khieu Samphan take the more moderate position that these pre-WWII sources of law are indicative of the inclusion of rape as a war crime, not as a crime against humanity.[87] However, the category of crimes against humanity was not expressly formulated until the IMT Charter on 8 August 1945.[88] On 20 December 1945, rape was included as a discrete, enumerated crime against humanity in CCL 10.[89] That is, rape was included as a crime against humanity within months of the coherent formulation of the legal principle, and in the most recent constituting document of an internationalised criminal tribunal before the DK period.

77. Despite the observation of Khieu Samphan that State practice and *opinio juris* cannot derive solely from CCL 10,[90] subsequent jurisprudence and state practice indicate that rape is considered to have crystallised in customary international law as a crime against humanity at or soon after that point. There are two key factors which point to this conclusion.

78. First, there were no significant developments in norms of international criminal law relevant to criminalisation of rape as a crime against humanity between the start of the DK period and the establishment of the *ad hoc* tribunals. Professor Gerhard Werle states that although "the legal basis of international criminal law was largely secure" by the early 1990s, "states and the community of nations lacked the will and ability to apply these principles" prior to the 1990s.[91] This supports his conclusion as to why the prosecution of core international crimes was limited until the end of the Cold War:

> *[d]uring the Cold War ... a lack of political will prevented the use of penal sanctions against state-sponsored atrocities. Not until the end of the Cold War did the United Nations, spurred by the terrible crimes in the former Yugoslavia and Rwanda, demonstrate renewed political will...*[92]

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87 **E99/2** Ieng Thirith Rape as a Crime against Humanity Response, *supra* note 8 at para. 20; **E99/3** Khieu Samphan Rape as a Crime against Humanity Response, *supra* note 10 at para. 22.

88 Gerhard Werle, *Principles of International Criminal Law* (2005) at p. 216: "Crimes against humanity were first explicitly formulated as a category of crimes in art. 6(c) of the Nuremberg Charter" ("Werle").

89 CCL 10, *supra* note 59: "Atrocities 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".

90 **E99/3** Khieu Samphan Rape as a Crime against Humanity Response, *supra* note 10 at para. 25: "une pratique générale des Etats et une *opinio juris* ne peuvent se dégager ... de la seule Loi no 10 du Conseil du contrôle..."

d91 Werle, *supra* note 88 at p.15.

92 Werle, *supra* note 88 at p. 3.

79. The existence of a rule of customary international law criminalising rape is conceptually distinct from the political will necessary to prosecute core international crimes or to give the necessary priority to the prosecution of crimes for which women are the principal target. It is not surprising, given the long-standing criminalization of rape as a crime against humanity under customary international law, that demonstrating "renewed political will", the States consenting to the Statutes of the ICTY and ICTR listed rape as a crime against humanity without controversy or objection, and that these tribunals have independently entered convictions for rape as a crime against humanity under customary international law.[93]

80. Contrary to the position of Ieng Sary, rape as a crime against humanity was not criminalised after the end of the Cold War as part of the "sphere of gender integration."[94] Ieng Sary's reference to the 1993 Vienna Declaration and Programme of Action as a material development relevant to the criminalisation of rape as a crime against humanity is misplaced:[95] the World Conference on Human Rights failed to adopt a binding treaty, opting instead for a non-binding declaration, and in any case, the Conference took place subsequent to the period during which the ICTY found that rape was "beyond doubt" criminalised as a crime against humanity.

81. The Responses of Ieng Thirith and Khieu Samphan in particular dismiss any reference to the *ad hoc* tribunals on the basis that their temporal jurisdiction is later than that of this Court.[96] However, this misses the point. The Co-Prosecutors do not, as suggested by these two Responses, invoke jurisprudence whose temporal jurisdiction is in the 1990s as a source of law to be applied to the 1970s.[97] Rather, that jurisprudence itself is useful to determine the context and status of rape as a crime against humanity in the immediate wake of World War II.[98] Khieu Samphan does not address this issue, while Ieng Thirith does so only by stating that "[t]he defence contends that this assertion is wrong" and "should be rejected as without logic or merit".[99] The only objection to this argument raised by Ieng Sary is based on "the

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93 **E99** Rape as a Crime against Humanity Request, *supra* note 2 at paras. 16-17.
94 **E99/4** Ieng Sary Rape as a Crime against Humanity Response, *supra* note 9 at para. 18.
95 *Ibid.* at para. 16.
96 **E99/2** Ieng Thirith Rape as a Crime against Humanity Response, *supra* note 8 at paras. 22-24; **E99/3** Khieu Samphan Rape as a Crime against Humanity Response, *supra* note 10 at paras. 31-32.
97 **E99/2** Ieng Thirith Rape as a Crime against Humanity Response, *ibid.* at para. 24; **E99/3** Khieu Samphan Rape as a Crime against Humanity Response, *ibid.* at para. 31.
98 **E99** Rape as a Crime against Humanity Request, *supra* note 2 at paras. 18-21.
99 **E99/2** Ieng Thirith Rape as a Crime against Humanity Response, *supra* note 8 at para. 23.

subsidiary role envisaged for judicial determinations" under art 38(1)(d) of the ICJ Statute;[100] however, this provision concerns the status of judicial decisions before the ICJ and is not directly relevant to the use of ICTY decisions by the ECCC, nor indeed reference to the jurisprudence of international and internationalised criminal tribunals more generally.[101]

82. The laws under which the ICTY operates were not the product of some recent adjustment to international criminal law relating to crimes against humanity. Instead, they were carefully crafted to include only those which were "beyond any doubt part of customary international law".[102]

83. Ieng Sary claims that this statement should be taken to mean not that "the international crimes…enumerated in the ICTY Statute were "beyond doubt" part of customary international law" but "[r]ather … that the ICTY was to proceed with caution to ensure that only those rules which were in fact "beyond doubt" part of customary international law were *applied* by the tribunal".[103] This distinction has little practical impact: those convicted of rape as a crime against humanity at the ICTY were convicted on the basis of *verbatim* definitions spelt out in the Statute of the ICTY.[104] Although Khieu Samphan cites divergences in ICTY jurisprudence on the definition of rape to support the assertion that rape has been criminalised only recently,[105] the decisions cited vary only in their definition of certain elements of rape not now in dispute and are resoundingly consistent in their recognition of its status as a separate crime against humanity.[106]

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100 **E99/4** Ieng Sary Rape as a Crime against Humanity Response, *supra* note 9 at para. 17.

101 *Ibid.*

102 Secretary-General's Report to the General Assembly, UN Doc S/25704, 3 May 1993 at para. 34; *see also Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Opinion and Judgment (ICTY Trial Chamber), 7 May 1997 at para. 662; *Prosecutor v. Milan Milutinović*, Case No. IT-05-87-PT, Decision on Ojdanić's Motion Challenging Jurisdiction: Indirect Co-Perpetration (ICTY Trial Chamber), 22 March 2006 at para. 15.

103 **E99/4** Ieng Sary Rape as a Crime against Humanity Response, *supra* note 9 at para. 15.

104 See e.g. the conviction for rape in *Prosecutor v. Kunarac*, Case Nos. IT-96-23-T & IT-96-23/1-T, Judgment (ICTY Trial Chamber), 22 February 2001 at paras. 436-464.

105 **E99/3** Khieu Samphan Rape as a Crime against Humanity Response, *supra* note 10 at para. 30: "…divergences entre les premières jurisprudences des TPI sur l'étendue de la notion…toute récence de l'incrimination du viol…"

106 *Prosecutor v. Akayesu*, Case No. IT-95-17/1-T, Judgment (ICTR Trial Chamber), 2 September 1998; *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgment (ICTY Trial Chamber), 10 December 1998; *Prosecutor v. Kunarac*, Case Nos. IT-96-23-T & IT-96-23/1-T, Judgment (ICTY Trial Chamber), 22 February 2001.

84. Ieng Thirith has asserted that "[t]he Co-Prosecutors fail to cite authorities that could demonstrate that rape existed as a crime against humanity in its own right before 1975".[107] Khieu Samphan maintains that the Co-Prosecutors must rely on sources that "tend to support" the customary law criminalisation of rape as a crime against humanity before or during the period 1975-79.[108]

85. The Co-Prosecutors submit that the responses largely overstate the requirements for the formation of customary international law applicable to the crime against humanity of rape, where the practice of a few States, absent objections from other States, can establish a customary rule. In an article published in 1977 on the formation of customary international law, Professor Michael Akehurst observes:

> *All of the judicial dicta requiring practice by a large number of States have been uttered in cases where practice conflicted [...] A very small number of acts, involving very few States and of very limited duration, is sufficient to create a rule of customary law, provided that there is no conflicting practice.*[109]

86. Similarly, Professor Malcolm Shaw supports the proposition that customary international law can be created by only a few states :

> *'……custom may be created by a few states, provided those states are intimately connected with the issue at hand, whether because of their wealth and power or because of their special relationship with the subject-matter of the practice…..'*
> [110]

87. Available state practice indeed supports the proposition that rape was established as a crime against humanity prior to and during the DK period. Following the Liberation War in which East Pakistan seceded from West Pakistan in 1971, the newly-formed Bangladeshi legislature enacted the *International Crimes (Tribunals) Act 1973* to prosecute perpetrators of mass rape. The definition of crimes against humanity in the Bangladeshi legislation reflects that in CCL 10 and includes rape as an enumerated crime against humanity.[111]

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107 **E99/2** Ieng Thirith Rape as a Crime against Humanity Response, *supra* note 8 at para. 22.

108 **E99/3** Khieu Samphan Rape as a Crime against Humanity Response, *supra* note 10 at para. 23: "à défaut de pouvoir fournir des sources tendant à attester l'incrimination coutumière du viol constitutive de crime contre l'humanité avant ou pendant la période allant de 1975 à 1979, les co-procureurs se perdent en conjectures."

109 Michael Akehurst, "Custom as a source of international law" (1974-5) *British Yearbook of International Law* 1 at pp. 18-19.

110 Malcolm Shaw, "International Law" (Sixth Edition, 2008), at page 79.

111 *International Crimes (Tribunals) Act* 1973, *supra* note 74, s. 3(2)(a).

88. The same conclusion can be reached by reviewing the evolution of the scope of the definition of crimes against humanity. Each of the definitions has been given in near identical terms. The Nuremberg Charter of August 1945 provided the first articulation of crimes against humanity:

> *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 ...*[112]

89. Within months, CCL 10 expanded the definition to include "imprisonment, torture and rape":

> *Atrocities 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…*[113]

90. 18 years later, and immediately prior to the DK period, the Bangladeshi legislation included the very same list with the addition of "abduction, confinement":

> *...murder, extermination, enslavement, deportation, imprisonment, abduction, confinement, torture, rape or other inhumane acts committed against any civilian population or persecutions on political, racial, ethnic or religious grounds...*[114]

91. The ICTY Statute includes the identical set of crimes against humanity as CCL 10:

> *...(a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; (i) other inhumane acts* [115]

92. Considering that CCL 10 had included rape as a crime against humanity as early as 1945; the striking similarity in language across all instances of available practice; the absence of substantial contrary developments in customary international law; and the fact that rape as a crime against humanity was judicially confirmed to be part of customary international law "beyond doubt" by the 1990s, the Co-Prosecutors respectfully submit that rape was established *lex lata* as a crime against humanity prior to and during the DK period.

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112 Charter of the International Military Tribunal (1945), art. 6(c).
113 CCL 10, *supra* note 59.
114 International Crimes (Tribunals) Act 1973, *supra* note 74, s 3(2)(a).
115 ICTY Statute, art. 5 (emphasis added).

E. During the relevant period, customary international law recognised JCE III as a mode of liability

93. The settled jurisprudence of the ICTY and ICTR clearly establishes that JCE III was a recognised mode of liability under customary international law by 1992, the starting point of the conduct prosecuted and punished by the ICTY. Three defence responses attempt to advance an argument that the third form of the mode of liability of JCE did not form part of customary international law during the DK period.[116] Similar claims have been advanced at the ICTY and the ICTR concerning the state of customary international law in the early 1990s. For example, in Joseph Nzirorera's case, the Appellant alleged that:

> *...the Tribunal lacks jurisdiction to impose third category JCE liability for crimes committed by participants in a vast JCE – particularly those structurally or geographically remote from the accused – because the Appellant sees no evidence specifically showing that customary international law permits imposition of third category JCE liability for their crime.*[117]

94. The ICTR Appeals Chamber dismissed this ground of appeal outright on the basis of clear ICTY jurisprudence, stating, "…there can be no question that third-category JCE liability is firmly accepted in customary international law;"[118] and later, "it is clear that there is a basis in customary international law for both JCE liability in general, and for the third category of JCE liability in particular."[119]

95. The Co-Prosecutors respectfully submit that they can find no evidence of substantial developments in customary international law between 1974 and 1991 that would support any modification in the state of the law on joint criminal enterprise as a form of co-perpetration. Were the Trial Chamber to find that JCE III was not part of customary law during the DK period, this would strongly suggest that the Chambers of the ICTY and ICTR were in error to enter convictions on the basis of JCE III.

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116 **E100/5** Nuon Chea JCE III Response, *supra* note 11 at para. 8; **E100/1** Ieng Thirith JCE III Response, *supra* note 8 at paras. 18-19, 24; **E100/2** Ieng Sary JCE III Response, *supra* note 9, paras. 9-18.

117 *Prosecutor v. Édouard Karemera et al.*, ICTR-98-44-AR72.5, ICTR-98-44-AR72.6, Decision on Jurisdictional Appeals: Joint Criminal Enterprise (ICTR Appeals Chamber), 12 April 2006 at para. 14.

118 *Ibid.* at para. 13.

119 *Ibid.* at para. 16.

96. Both Ieng Thirith[120] and Ieng Sary[121] object to the Co-Prosecutors' references to the compatibility of JCE III with the objects and purpose of international criminal law. Specifically, Ieng Sary asserts that the international public policy served by the mode of liability of JCE III "does not justify" its application where it would conflict with the "fundamental precept that an accused should only held liable for conduct [for] which he is personally culpable."[122] The Co-Prosecutors respectfully refer the Trial Chamber to the following assessment in the very recent analysis of the legality of the application of JCE III by the Appeals Chamber of the Special Tribunal for Lebanon:

> *This third category of JCE has been objected to, for fear that it might breach the principle of culpability (nullum crimen sine culpa). The contention has been made that under this category of JCE the culpability of the "secondary offender" (who joined the criminal plan or agreement, acted upon it, and foresaw the additional, but un-concerted offence) is wrongly equated with that of the "primary offender" (who commits the agreed upon crime plus the additional, un-concerted offence). In this way, it is argued, one could find guilty of murder somebody (the "secondary offender") who did not have the intent to kill, an intent that was instead entertained by the "primary offender", who perpetrated the murder [...]*
>
> *(i) As for the degree of culpability, the "secondary offender", although he did not have the intention (dolus) to commit the un-concerted crime, was nonetheless a willing party to an enterprise to commit an agreed upon crime, and the extra crime was rendered possible both by his participation in the criminal enterprise (which must include a significant contribution to the achievements of the enterprise's criminal plan) and by his failure to drop out or stop the extra crime once he was able to foresee it.*
>
> *(ii) With regard to the need to modulate or graduate punishment, admittedly the culpability and blameworthiness of the "secondary offender" is less than that of the "primary offender"; this lesser degree should, however, be taken into account at the sentencing stage.*
>
> *(iii) With regard to the very raison d'être of JCE III, this mode of responsibility is founded on considerations of public policy: that is, the need to protect society against persons who band together to take part in criminal enterprises and, whilst not sharing the criminal intent of those participants who intend to commit more serious crimes outside the common enterprise, nevertheless are aware that such objectively foreseeable crimes may be committed and do nothing to oppose*

120 **E100/1** Ieng Thirith JCE III Response, supra note 8 at para. 22.
121 **E100/2** Ieng Sary JCE III Response, supra note 9 at paras. 25-28.
122 *Ibid.*, para. 25.

> *or prevent them, but rather continue in the pursuit of the enterprise's other criminal goals.*[123]

97. There is no doubt that theories of individual criminal responsibility under international law, including modes of liability, developed significantly *after* the establishment of the *ad hoc* Tribunals. The Co-Prosecutors do not contest that current trends in customary international law are shifting away from theories that adopt a subjective approach to the distinction between principal and accessorial liability (such as JCE) towards an objective "control of the crime" approach, nor indeed that this trend – the "current darling of the professoriate"[124] – meets with the approval of the International Criminal Court[125] and respected scholars.[126] But such considerations are simply not relevant to the facts at issue: JCE, in all three forms, has been unequivocally upheld as part of customary international law by multiple Chambers at the international Tribunals which stand closest in terms of temporal jurisdiction to the DK period. Sound reasons of international public policy underpin its application. The Defence would have the Chambers indulge in retrospection in light of current and evolving theories of international criminal liability. To do so would be inconsistent with the principle of legality and the integrity of the system of international criminal justice.

F. Granting the OCP Requests would not violate the legality principle

98. At the outset, the Co-Prosecutors note that fully upholding the principle of legality does not prevent a court from clarifying and interpreting the elements of a crime. As determined by the ICTY Appeals Chamber, and affirmed by the ECCC Trial Chamber:

> *The principle of nullum crimen sine lege…does not prevent a court, either at the national or international level, from determining an issue through a process of interpretation and clarification as to the elements of a particular crime, nor does it prevent a court from relying on previous decisions which reflect an*

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123 Interlocutory decision on the applicable law: terrorism, conspiracy, homicide, perpetration, cumulative charging (Appeals Chamber), STL-11-01/1, 16 February 2011 at paras. 244-45.

124 Jens David Ohlin, "Joint intentions to commit international crimes," (2011) 11(2) *Chicago Journal of International Law* 693 at 693.

125 See *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06, Decision on the Confirmation of Charges (27 January 2007) at paras. 317-367; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, Decision on Confirmation of Charges, 30 September 2008 at para. 489.

126 This issue is surveyed thoroughly in Héctor Olásolo, The criminal responsibility of senior political and military leaders as principals to international crimes (2009), esp. chs. 4-5.

interpretation as to the meaning to be ascribed to particular ingredients of a crime.[127]

99. The previous sections have sufficiently demonstrated that the amendments and recharacterisations requested by the Co-Prosecutors accord with customary international law in place during the temporal jurisdiction of the ECCC and would not violate the prohibition on retrospective application of the law.

100. The principle of legality upheld at the ECCC also of course requires that the law providing for the prosecution of an individual for a crime be "sufficiently foreseeable and that the law providing for such liability was sufficiently accessible to the accused at the relevant time."[128] With regard to foreseeability, the Accused "must be able to appreciate that the conduct is criminal in the sense generally understood, without reference to any specific provision."[129]

101. With regard to accessibility, both the Pre-Trial and Trial Chambers of the ECCC have consistently affirmed that a law which is "based on custom" will be *ipso facto* "sufficiently available" to the Accused.[130] Should the Trial Chamber determine that there is no armed conflict nexus for crimes against humanity, that the relevant facts in the Indictment would most appropriately conform to the definition of rape as a crime against humanity, and that the form of participation of the Accused in certain crimes may be most appropriately described by the mode of liability of JCE III, these crimes and modes of liability, all of which were recognised under customary international law at the relevant time, will be "sufficiently available" to the Accused.

102. Concerning foreseeability, while the Cambodian law clearly enshrines the principle of *nullum crimen sine lege*,[131] no relevant jurisprudential treatment of the principle is available at the domestic level. Accordingly, the Trial Chamber may seek guidance from rules of procedure established at the international level.[132]

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127 *Prosecutor v. Zlatko Aleksovski*, IT-95-14/1-A, 24 March 2000, para. 127; **E188** *Duch, supra* note 21 at para. 34.

128 **E188** *Duch, supra* note 21, paras. 28-29; **D427/2/15** Decision on Nuon Chea and Ieng Tirith appeals, *supra* note 23, para. 106.

129 *Ibid.*

130 *Ibid.*

131 ECCC Law, art. 33 new; Constitution of the Kingdom of Cambodia, art. 31(1).

132 Agreement, art. 12; ECCC Law, art. 33 new.

103. In the recent case of *Jorgić v. Germany*, the European Court of Human Rights assessed the scope of the legal protection afforded by the principle *nullum crimen sine lege* under Article 7(1) of the European Convention on Human Rights, specifically in the context of German domestic legislation which prescribed a wider interpretation of the specific intent requirement for genocide than that applicable under general international law.[133] To meet the forseeability arm of the legality test, the Court applied international standards requiring that the "essence of the offence" (which was taken to include unwritten law) could have "reasonably been foreseen" by the Accused, "if necessary after having taken legal advice."[134] The Co-Prosecutors submit that this standard of foreseeability, applied specifically to a conduct amounting to core international crimes, is most relevant to the Trial Chamber's determination of the proper scope of the foreseeability arm of the legality test.

104. Ieng Thirith contests both the foreseeability of prosecution for rape as a crime against humanity, and the accessibility of the law to the Accused during the DK Period.[135]

105. Khieu Samphan argues that as the constitutive acts of crimes against humanity were prohibited under domestic penal law, it was not foreseeable that he could be tried under a different legal characterisation.[136] On the contrary, the fact that the constitutive acts of crimes against humanity were penalised under domestic law would have made it more foreseeable that commission of those acts on a mass scale could lead to individual criminal responsibility.

106. Ieng Sary introduces the conceptual distinction between the "prohibition" of rape under customary international law and its "criminalization" as an "enumerated crime against humanity", to suggest that the law was not accessible to or foreseeable for Ieng Sary during the DK period.[137] However, with respect, the Defence misapplies this distinction in its Response. The Co-Prosecutors do not contest that the principle of legality requires the Accused to be charged with conduct prohibited by international law *to which individual criminal responsibility or superior responsibility attaches.* Conduct that might have given

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133 *Jorgić v. Germany*, Application no. 74613/01, 12 July 2007.

134 *Ibid.*, paras. 100, 101, 110.

135 **E99/2** Ieng Thirith Rape as a Crime against Humanity Response, *supra* note 8 at paras. 26-27.

136 **E95/3** Khieu Samphan Armed Conflict Response, *supra* note 10 at para. 24 (referring to **E46** Preliminary Objections Concerning Jurisdiction, 14 February 2011 at para. 16).

137 **E99/4** Ieng Sary Rape as a Crime against Humanity Response, *supra* note 9 at para. 19.

rise to State responsibility alone, for example, cannot be considered to meet the principle of legality applicable to criminal proceedings. However, each instance of practice set out above unequivocally concerns the application of individual criminal responsibility or superior responsibility to rape as a crime against humanity.

107. The Accused comprised part of the senior leadership of the DK regime. Each had access to the entire machinery of the state, including legal advice if necessary, access to diplomatic resources, and the means to communicate widely on the international level.[138] All are not only literate, but studied at higher educational institutions.[139] All were on notice of worldwide condemnation of DK government action in multiple submissions by States and non-governmental organisations to the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1978. A submission by the United Kingdom, for example, refers to "evidence that the most fundamental elements of the Universal Declaration of Human Rights have been grossly violated" and that "the Kampuchean leaders…have not attempted to deny the many specific charges that have been levelled against them."[140] These submissions do not refer to a state of war or to war crimes, and focus mainly on the widespread and systematic mistreatment of the civilian population by the DK government. Responding in his official capacity to these submissions, Ieng Sary was quick to characterise alleged mass killing of Cambodians and destruction of Cambodian territory by other parties as "immeasurable crimes".[141]

108. In view of the common knowledge of the proceedings against high-ranking State officials before the IMT and IMTFE, as well as proceedings under CCL 10, it is the Co-Prosecutors' respectful submission that a person in the respective position of each Accused, with legal advice if necessary, could reasonably have foreseen that:

    (a) he or she could be tried for crimes against humanity regardless of the existence of a state of war;

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138 **D427** Closing Order, 15 September 2010, ERN 00604508-909 at paras. 876, 890, 894 (Nuon Chea); paras. 1137, 1152 (Khieu Samphan); paras. 1090-1093, 1122-1125 (Ieng Sary); and paras. 1222-23, 1226 (Ieng Thirith) ("Closing Order").

139 *Ibid.*, paras. 1597 (Nuon Chea); 1587-88 (Ieng Sary); 1599 (Khieu Samphan); 1606 (Ieng Thirith).

140 **D366/7.1.11** Submission from the Government of Great Britain, ERN00075967-84.

141 **D366/7.1.821** Telegram from the Minister of Foreign Affairs dated 16 September 1978, ERN 00076042-44.

(b) the conduct set out in the Closing Order, comprising rape in the context of a CPK policy of forced marriage,[142] would amount to the essence of the crime against humanity of rape – that is, rape as part of a widespread or systematic attack directed against a civilian population; and

(c) that criminal liability would attach to their participation in a common purpose or joint criminal enterprise to commit genocide, crimes against humanity and grave breaches, extending to those crimes which were not initially part of the common purpose but amounted to a natural and foreseeable consequence thereof.

V. RELIEF REQUESTED

109. Based on the foregoing, the Co-Prosecutors submit that the Trial Chamber has the power to grant the Requests and that granting the Requests would not violate the legality principle. Accordingly the Co-Prosecutors request that the Trial Chamber:

(a) admit the Requests; and

(b) grant the Requests on their merits.

Respectfully submitted,

Date	Name	Place	Signature
11 August 2011	CHEA Leang Co-Prosecutor	Phnom Penh	
	Andrew CAYLEY Co-Prosecutor		

142 **D427** Closing Order, *supra* note 138, esp., paras. 216-220, 842-861