BEFORE THE TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

FILING DETAILS

Case No: 002/19-09-2007-ECCC/TC **Party Filing:** Co-Prosecutors

Filed to: Trial Chamber **Original Language:** English

Date of document: 15 June 2011

CLASSIFICATION

Classification of the document suggested by the filing party: PUBLIC

Classification by OCIJ or Chamber: សាធារណៈ/Public

Classification Status:

Review of Interim Classification:

Records Officer Name:

Signature:

CO-PROSECUTORS' REQUEST FOR THE TRIAL CHAMBER TO EXCLUDE THE ARMED CONFLICT NEXUS REQUIREMENT FROM THE DEFINITION OF CRIMES AGAINST HUMANITY

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I. INTRODUCTION

1. Pursuant to Rule 92 and Rule 98(2),[1] the Co-Prosecutors submit this brief in support of their request that the Trial Chamber correct the legal definition of crimes against humanity set out in the Indictment – as amended by the Pre-Trial Chamber – by removing the requirement of a nexus between crimes against humanity and an armed conflict.[2]

2. In Case 001, the Trial Chamber found that a nexus with armed conflict was not a requirement for crimes against humanity under customary international law during the temporal jurisdiction of the ECCC. The Trial Chamber's assessment of the law was correct and should be applied in Case 002 as well. As detailed below, the absence of any armed conflict nexus requirement is appropriate because (1) Article 5 of the ECCC Law, which sets out the applicable definition of crimes against humanity, contains no requirement of a nexus between the underlying acts and an armed conflict; (2) no armed conflict nexus requirement for crimes against humanity existed in customary international law during 1975-1979; and (3) it was foreseeable that the Accused could be held responsible for crimes against humanity committed within Cambodia outside of an armed conflict, and the information necessary to come to this conclusion was public and readily accessible.

3. The Co-Prosecutors further request that the Trial Chamber notify the parties prior to the start of the trial that the crimes against humanity charges in the Indictment may be proven without a showing of a link to an armed conflict. Although the Chamber has discretion to rule on this issue at a later stage, the Co-Prosecutors submit that advance notice would contribute to the efficiency of the proceedings since it would allow the Chamber and the parties to focus their time and attention on the most relevant issues in the case.

II. PROCEDURAL BACKGROUND

4. On 15 September 2010, the Co-Investigating Judges issued the Closing Order in Case 002, which included charges of crimes against humanity pursuant to Article 5 of the ECCC Law.[3] All four Accused appealed the Closing Order on various grounds. Two of the

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1 ECCC Internal Rules, rev. 7, 23 February 2011 [hereinafter "ECCC Rules"], rules 92, 98.

2 The Co-Prosecutors have previously indicated their intent to raise this issue at the Initial Hearing. *See* Co-Prosecutors' Notification of Legal Issues It Intends to Raise at the Initial Hearing, Case File No. 002/19-09-2007-ECCC/TC, E9/30, 19 April 2011, ¶ 1(9)(a).

3 Closing Order, Office of the Co-Investigating Judges, D427, 15 September 2010, ¶ 1613.

Accused specifically appealed against the definition of crimes against humanity applied in the Closing Order. Appellant Ieng Sary argued that "the OCIJ erred by failing to explain that a nexus between the underlying acts and international armed conflict is a requirement of crimes against humanity at the ECCC."[4] Appellant Ieng Thirith argued that the OCIJ erred by failing to find that "the existence of an armed conflict" was an element of the definition of crimes against humanity during the temporal jurisdiction of the ECCC.[5] The Co-Prosecutors filed their joint response to the Closing Order appeals of Nuon Chea, Ieng Sary, and Ieng Thirith on 19 November 2010.[6]

5. On 13 January 2011, the Pre-Trial Chamber issued initial decisions on the Closing Order appeals, in which they held that the Co-Investigating Judges should have considered that "during the temporal jurisdiction of the ECCC, international customary law required a nexus between the underlying acts of crimes against humanity and an armed conflict."[7] Accordingly, the Pre-Trial Chamber amended the Closing Order with respect to each of the Accused by adding the "existence of a nexus between the underlying acts and the armed conflict" to the "Chapeau" requirements in Chapter IV(A) of Part Three of the Closing Order.[8]

III. PRELIMINARY ISSUES

6. Pursuant to the principle of *iura novit curia* ("the judge knows the law"), enshrined in Rule 98(2) of the ECCC Rules, the Trial Chamber has the ultimate responsibility of

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4 Ieng Sary's Appeal Against the Closing Order, Case File No. 002/19-09-2007-ECCC/OCIJ (PTC75), D427/1/6, 25 October 2010, ¶ 188.

5 Ieng Thirith Defence Appeal from the Closing Order, Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 145), D427/2/1, 18 October 2010, ¶ 61.

6 Co-Prosecutors' Joint Response to Nuon Chea, Ieng Sary and Ieng Thirith's Appeals Against the Closing Order, Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 75 & 145 & 146), 19 November 2010 [hereinafter "OCP Joint Response"]. The Co-Prosecutors filed a separate response to Khieu Samphan's Closing Order appeal.

7 Pre-Trial Chamber Decision on Ieng Thirith's and Nuon Chea's Appeals Against the Closing Order, Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 145 & PTC 146), D427/2/12, 13 January 2011, ¶ 11(1); Pre-Trial Chamber Decision on Ieng Sary's Appeal Against the Closing Order, Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 75), D427/1/26, 13 January 2011, ¶ 7(1); Pre-Trial Chamber Decision on Khieu Samphan's Appeal Against the Closing Order, Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 104), 13 January 2011, ¶ 2(1).

8 *Id.* Subsequently, the Pre-Trial Chamber issued full decisions on the Closing Order appeals containing detailed reasons for its ruling on the armed conflict nexus issue. Pre-Trial Chamber Decision on Ieng Sary's Appeal Against the Closing Order, Case File No. 002/19-09-2007-ECCC/OCIJ (PTC75), D427/1/30, 11 April 2011 [hereinafter "11 April 2011 PTC Decision on Ieng Sary's Closing Order Appeal"], ¶¶ 300-313; Pre-Trial Chamber Decision on Appeals by Nuon Chea and Ieng Thirith Against the Closing Order, Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 145 & 146), 15 February 2011 [hereinafter "15 February 2011 PTC Decision on the Closing Order Appeals of Nuon Chea and Ieng Thirith"], ¶¶ 134-148; Pre-Trial Chamber Decision on Khieu Samphan's Appeal against the Closing Order, Case File 002/19-09-2007-ECCC/OCIJ (PTC 104), D427/4/15, 21 January 2011, ¶ 2(1).

ensuring the accuracy of the law applied at the ECCC. This responsibility extends to the statement of the legal elements of crimes under the jurisdiction of the ECCC, including crimes against humanity. Accordingly, the Trial Chamber has the power and obligation to correct the definition of crimes against humanity stated in the Amended Closing Order by excluding the armed conflict nexus requirement.

7. The Co-Prosecutors recognize that the manner in which this modification occurs must comply with the fair trial rights of the Accused set out in Article 35 of the ECCC Law, namely that the accused "be informed promptly and in detail in a language they understand of the nature and cause of the charge against them" and "have adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing."[9] In this context, the Co-Prosecutors submit that international jurisprudence pertaining to legal recharacterization may be instructive.

8. Pursuant to the jurisprudence of the European Court of Human Rights, recharacterization of the crimes charged in an indictment is permitted so long as the accused is apprised of the possibility that the legal characterization of facts may be subject to change and has the opportunity to prepare their defence accordingly, including by making oral or written submissions on the pertinent issues.[10] Applying this standard, a restatement of the legal elements of a crime, such as a crime against humanity, is clearly consistent with the fair trial rights of the accused if the accused is aware of the possibility that the Trial Chamber may interpret the applicable law differently than the Co-Investigating Judges or Pre-Trial Chamber and has the opportunity to make submissions on the relevant issues and craft his or her defence accordingly.

9. The Co-Prosecutors submit that the Accused are on notice of the possibility that the Trial Chamber may not consider the armed conflict nexus requirement to be one of the required elements of crimes against humanity at the ECCC. The Accused have been apprised of this possibility through the present submission of the Co-Prosecutors, the Co-Prosecutors' prior indication of their intent to seek recharacterization, the fact that the issue of the armed conflict nexus requirement has been litigated at the pre-trial stage and formed the basis of an amendment to the original Closing Order, and the fact that the Trial Chamber

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[9] Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006) [hereinafter "ECCC Law"], art. 35.

[10] *See, e.g. Pelissier and Sassi v France* [GC], 25444/94, 25 March 1999, paras. 42, 62; *Sipavicius v. Lithuania,* EctHR (no. 49094/99), 21 February 2002, paras. 26, 31-32; *I.H. and Others v Austria* ECHR (no. 42780/98), 20 April 2006, para. 34.

did not require an armed conflict nexus for crimes against humanity in its Judgement in Case 001. As far as the adequate preparation requirement, the Co-Prosecutors note that this issue has been raised prior to the commencement of the trial, and the Accused will have the opportunity to put forth their views on the armed conflict requirement in response to the present submission.

10. In light of the above, restatement of the definition of crimes against humanity at Judgement (so as to exclude the armed conflict nexus requirement) would be fully consistent with the fair trial rights of the Accused. However, for the avoidance of any possibility of uncertainty, the Co-Prosecutors request that the Trial Chamber either decide on the armed conflict nexus issue prior to the commencement of the trial proceedings or make a formal indication that it has taken the Co-Prosecutors' request under advisement.

IV. ARGUMENT

A. THE TRIAL CHAMBER CORRECTLY CONCLUDED IN CASE 001 THAT THE CUSTOMARY DEFINITION OF CRIMES AGAINST HUMANITY DURING 1975-1979 DID NOT INCLUDE AN ARMED CONFLICT NEXUS REQUIREMENT.

11. The Trial Chamber has previously assessed the law pertaining to the definition of crimes against humanity in the Case 001 Judgement.[11] Citing the ECCC Law, international instruments and the jurisprudence of other international courts, the Trial Chamber determined that the notion of crimes against humanity existed independently from that of armed conflict during the temporal jurisdiction of the ECCC.[12] Accordingly, the Trial Chamber held that "the lack of any nexus with armed conflict in Article 5 of the ECCC Law comports with the customary definition of crimes against humanity during the 1975 to 1979 period."[13]

12. The Trial Chamber's holding on the nexus issue in Case 001 was correct, and the Co-Prosecutors submit that the same legal definition of crimes against humanity should be applied in Case 002. While the Trial Chamber is not bound by its decision in Case 001, as would be the case in some legal systems, the Trial Chamber does have a general responsibility to develop a consistent body of jurisprudence that allows for legal certainty. By adopting a consistent position on the applicable definition of crimes against humanity in both Case 001 and Case 002, the Trial Chamber will promote legal stability, encourage judicial efficiency, and align the practice of the ECCC with the practice of other

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11 *Case of Kaing Guek Eav alias DUCH*, Judgement, Case File No. 001/18-07-2007/ECCC/TC, 26 July 2010, ERN 00572517-00572797, ¶¶ 281-296 [hereinafter "Case 001 Judgement"].

12 Case 001 Judgement, ¶¶ 291-293.

13 Case 001 Judgement, ¶ 292.

international courts, such as the International Court of Justice, which routinely apply their own previous jurisprudence.[14]

13. The Co-Prosecutors further submit that the Pre-Trial Chamber's assertion that the question of the armed conflict nexus requirement was not raised by the Defence in Case 001 and was therefore not "before the [Trial] Chamber" is unfounded.[15] Regardless of whether the Defence objected, the Trial Chamber had an independent responsibility to ensure that the ECCC Law's definition of crimes against humanity complied with the principle of legality,[16] and its detailed analysis of the status of the nexus requirement in the Case 001 Judgment reflects a conscientious fulfilment of that responsibility.

B. THE ECCC LAW DEFINITION OF CRIMES AGAINST HUMANITY CONFORMS WITH THE PRINCIPLE OF LEGALITY AND SHOULD BE APPLIED BY THE TRIAL CHAMBER.

14. Article 5 of the ECCC Law provides that crimes against humanity 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 based on political, racial and religious grounds; other inhumane acts."[17] Notably, there is no reference in Article 5 to an armed conflict, or to other crimes that are connected with armed conflict, such as war crimes or crimes against peace.

15. In order to be applied at the ECCC, the Article 5 definition of crimes against humanity must comply with international standards of fairness, including the principle of legality, which guards against the retroactive application of law. Compliance with this standard requires that crimes against humanity as defined in Article 5 were (1) "recognized under

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[14] Although Article 59 of the Statute of the International Court of Justice ("ICJ Statute") states that the court's prior jurisprudence "has no binding force except between the parties and in respect of that particular case," Article 38(1)(3) of the ICJ Statute establishes that the Court may consider its prior jurisprudence as "subsidiary means for the determination of rules of law." Statute of the International Court of Justice, 26 June 1945, 156 U.N.T.S. 77. In practice, the Court rarely departs from its own prior rulings on points of law. *See* MOHAMED SHAHABUDDEEN, PRECEDENT IN THE WORLD COURT, 2-3 (2007) (stating that "the fact is that the Court seeks guidance from its prior decisions, that it regards them as reliable expositions of the law, and that, though having the power to depart from them, it will not lightly exercise that power"). Similarly, the ICTY Appeals Chamber has held that "the normal rule is that previous decisions are to be followed, and departure from them is the exception." *Prosecutor v. Aleksovski*, Judgement, Case No. IT-95-14/1-A, ICTY Appeals Chamber, 24 March 2000, ¶ 109.

[15] *See* 15 February 2011 PTC Decision on the Closing Order Appeals of Nuon Chea and Ieng Thirith, ¶ 144.

[16] The Trial Chamber acknowledged this responsibility in the Case 001 Judgement, noting that "regardless 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." Case 001 Judgement, ¶ 26 (citing Article 33(new) of the ECCC Law). *See also* ECCC Rules, rule 98; *Prosecutor v. Vasilijevic*, Trial Judgement, IT-98-32-T, 29 November 2002, ¶ 198 (noting that "[e]ach Trial Chamber [] is obliged to ensure that the law which it applies to a given criminal offence is indeed customary").

[17] ECCC Law, art. 5.

Cambodian or international law between 17 April 1975 and 6 January 1979"; and (2) were "sufficiently foreseeable and that the law providing for such liability was sufficiently accessible to the accused at the relevant time."[18]

16. Applying this test, it is clear that the Article 5 definition of crimes against humanity, including the lack of a nexus requirement, is consistent with the principle of legality. As discussed below, (a) no armed conflict nexus requirement existed in customary international law during the temporal jurisdiction of the ECCC; and (b) it was foreseeable and accessible to the Accused that they could be held liable for crimes against humanity committed in Cambodia outside of an armed conflict.

a. No Armed Conflict Nexus Requirement Existed in Customary International Law During the Temporal Jurisdiction of the ECCC.

17. It is widely recognized that current customary international law does not require that the underlying acts of crimes against humanity have a nexus with an armed conflict. This is reflected in the jurisprudence of the ad hoc tribunals as well as the Rome Statute of the International Criminal Court.[19] Thus, the relevant question here is not whether a nexus requirement presently exists but whether such a nexus requirement existed during the time period relevant to this case, *i.e.* from 1975-1979.

18. The Pre-Trial Chamber determined that the prevailing definition of crimes against humanity during 1975-1979 was the one reflected in the 1945 Charter of the International Tribunal at Nuremberg ("IMT Charter") and the 1946 UN General Assembly Resolution that affirmed the principles recognized by the IMT Charter.[20] Article 6(c) of the IMT Charter provided for individual criminal liability over crimes against humanity, "namely murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the law of the country where

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[18] *See, e.g.* Case 001 Judgement, ¶¶ 28-29; 15 February 2011 PTC Decision on the Closing Order Appeals of Nuon Chea and Ieng Thirith, ¶¶ 105-106.

[19] *See* Case 001 Judgement, ¶¶ 291, 292 ("The notion of armed conflict . . . does not form part of the current-day customary definition of crimes against humanity."); Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, 17 July 1998, art. 7(1)(a)-(k) (no nexus required for crimes against humanity); *Prosecutor v. Akayesu*, Judgement, Case No. ICTR-96-4-T, ICTR Trial Chamber, 2 September 1998, ¶ 565 ("Crimes against humanity are . . . prohibited regardless of whether they are committed in an armed conflict, international or internal in character.").

[20] 15 February 2011 PTC Decision on the Closing Order Appeals of Nuon Chea and Ieng Thirith, ¶ 144.

perpetrated."[21] The inclusion of the phrase "in connection with any crime within the jurisdiction of the Tribunal" was understood as meaning that Article 6(c) crimes had to be committed in the context of an armed conflict or military occupation, since the other "crimes within the jurisdiction of the Tribunal" – war crimes and crimes against peace – were *de facto* linked to the war.[22]

19. However, as the Co-Prosecutors have argued in prior submissions, the IMT Charter nexus requirement was merely a jurisdictional limitation, not an inherent restriction on the scope of crimes against humanity under international law.[23] International courts have recognized that "the nexus in the Nuremberg Charter between crimes against humanity and the other two categories, crimes against peace and war crimes, was *peculiar* to the context of the Nuremberg Trial established specifically 'for the just and prompt trial and punishment of the major war criminals of the European Axis countries.'"[24] Notably, the reference to "before or during the war" in Article 6(c) suggests that the notion of crimes against humanity was not inherently circumscribed to times of war.[25] Furthermore, language in the Nuremberg Judgement itself supports the notion that the requirement for a nexus between crimes against humanity and war crimes or crimes against peace was a jurisdictional one specific to the IMT Charter, as it makes reference to "crimes against humanity *within the meaning of the Charter*."[26]

20. The treatment of the concept of crimes against humanity in the years following the IMT Charter further demonstrates that crimes against humanity existed as a concept distinct from armed conflict under customary international law prior to 1975.[27] For example, the

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21 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal, 8 August 1945, 82 U.N.T.S. 279, art. 6(c) [hereinafter "IMT Charter"] (stating that crimes against humanity must be carried out "in execution of or in connection with a crime within the jurisdiction of the Tribunal]"); U.N. G.A. Res. 95(1), 11 December 1946.

22 *See* METTRAUX, INTERNATIONAL CRIMES AND THE AD HOC TRIBUNALS (2005), at p. 149.

23 *See* OCP Joint Response, ¶ 181.

24 *Prosecution v. Tadić*, Decision on the Defence Motion on Jurisdiction, Case No. IT-94-I-T, ICTY Trial Chamber II, 10 August 1995, ¶ 78 (quoting IMT Charter, art. 1) (emphasis added); *Prosecution v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-I-T, ICTY Appeals Chamber, 2 October 1995 [hereinafter "*Tadić* Appeal Decision on Jurisdiction"], ¶ 140 (agreeing that the IMT Charter's nexus requirement was peculiar to the jurisdiction of the Nuremberg Tribunal and stating that "there is no logical or legal basis for this requirement and it has been abandoned in subsequent State Practice with respect to crimes against humanity").

25 IMT Charter, art. 6(c).

26 *United States v. Hermann Goering*, Indictment & Judgement, *reprinted in* Trial of the Major War Criminals before the International Military Tribunal, 1948 (emphasis added).

27 *See* Case 001 Judgement, ¶ 291. The Co-Prosecutors submit that the Nuremberg Principles, adopted by the UN General Assembly in 1946, represented a general affirmation of the IMT Charter and the prosecution of individuals for crimes against humanity at the Nuremberg Tribunal but did not definitively determine the question of whether a nexus requirement was required under customary international law at the time,

1945 Control Council Law No. 10 ("CCL 10"), enacted by the Allied Powers almost immediately after the promulgation of the IMT Charter, provided for prosecution of crimes against humanity pursuant to a definition that contained no link to armed conflict.[28] The absence of the nexus requirement in CCL 10 allowed for a broader class of crimes against humanity prosecutions than Article 6(c) of the IMT Charter allowed.[29] For example, in *United States v. Ohlendorf et. al.*, the U.S. Military Tribunal stated that the absence of the nexus requirement in CCL 10 allowed for prosecutions of crimes not committed in war, including "all crimes against humanity as long known and understood under the general principles of criminal law."[30] In *United States v. Alstoetter*, the U.S. Military Tribunal explained that the drafters of CCL 10 had deliberately excluded the clause "in execution of, or in connection with, any clause within the jurisdiction of the tribunal," as found in Art. 6(c) of the IMT Charter.[31] Similarly, a prominent legal commentator, writing in 1946, stated 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]."[32]

21. In respect of the persuasive value of CCL 10, the Co-Prosecutors note that in the Pre-Trial Chamber Decision on Ieng Sary's Appeal against the Closing Order, the Chamber appears to have given limited weight to the lack of a nexus requirement in CCL 10 on the basis

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particularly in light of contemporaneous events such as the development of a body of jurisprudence enforcing Control Council Law 10. *See* UN General Assembly Res. 95(1), UN GAOR, U.N. Doc. A/64/Add.1 (1946), p. 188.

28 Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace, and Against Humanity, 20 December 1945 [hereinafter "CCL 10"].

29 The fact that the CCL 10 provision on crimes against humanity was less restrictive than the IMT Charter makes sense in light of the fact that the Nuremberg Tribunal was established to try to a limited number of the most serious perpetrators while the military tribunals applying CCL 10 were expected to try a much larger class of perpetrators.

30 *United States v. Ohlendorf et al. ("Einsatzgruppen Case")*, in 4 Trials of War Criminal Before the Nuernberg Military Tribunals Under Control Council Law No. 10, at 499 (1950).

31 *United States v. Alstoetter ("Justice Case"),* in 3 Trials of War Criminal Before the Nuernberg Military Tribunals Under Control Council Law No. 10, at 974 (1951) (explaining that "C. C. Law 10 differs materially from the Charter. The latter defines crimes against humanity as inhumane acts, etc., committed, 'in execution of, or in connection with, any crime within the jurisdiction of the tribunal,' whereas in C. C. Law 10 the words last quoted are deliberately omitted from the definition."). *But see United States v. Flick et al. ("Flick Case")*, in 6 Trials of War Criminal Before the Nuremberg Military Tribunals Under Control Council Law No. 10, at 1212-13 (1952) (finding "no support" for the argument that "the omission of [the nexus language] from Control Council Law No. 10 evidences an intent to broaden the jurisdiction of th[e] Tribunal").

32 Egon Schwelb, *Crimes Against Humanity*, 23 BRIT. Y.B. OF INT'L L 178, 218 (1946). *See also* Theodore Meron, Theodor Meron, Editorial Comment, War Crimes in Yugoslavia and the Development of International Law, 88 AM. J. INT'L L. 78, 85 (1994) (concluding that CCL 10 "deleted the *jurisdictional* nexus between war crimes and crimes against peace . . . [such] that crimes against humanity exist independently of war").

that it "was essentially domestic legislation."[33] However, in the Pre-Trial Chamber Decision on Ieng Thirith's and Nuon Chea's Appeals against the Closing Order, the Chamber accepted CCL 10 as relevant evidence of "the definition and elements of crimes against humanity."[34] The Pre-Trial Chamber has elsewhere noted that CCL 10 was a legislative act "reflecting international agreement among the Great Powers on the law applicable to international crimes and the jurisdiction of the military courts called upon to rule on such crimes."[35] Indeed, international criminal courts and legal commentators frequently rely on CCL 10 as evidence of customary international law.[36]

22. Moreover, the fact that two international conventions, enacted prior to 1975, defined individual crimes against humanity without a nexus to an armed conflict strongly suggests that crimes against humanity were not inextricably linked with armed conflict during the DK period.[37] In 1948, genocide, a crime against humanity, was codified without an armed conflict nexus requirement.[38] Subsequently, in 1973, the crime against humanity of apartheid was defined without reference to the IMT Charter or the armed conflict nexus.[39]

23. Other evidence of state practice and *opinio juris* prior to 1975 further supports the notion that crimes against humanity could be committed outside of an armed conflict. The 1954 International Law Commission's Draft Code of Offenses Against the Peace and Security of Mankind defined genocide and "inhuman acts . . . against any civil population" without linking the offenses to armed conflict.[40] Similarly, the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity

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33 11 April 2011 PTC Decision on Ieng Sary's Closing Order Appeal, ¶ 309.

34 15 February 2011 PTC Decision on the Closing Order Appeals of Nuon Chea and Ieng Thirith, ¶ 130.

35 *See* Pre-Trial Chamber Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 38), D97/15/9, 20 May 2010, ¶ 57 (emphasis added).

36 *See, e.g. Tadić* Appeal Decision on Jurisdiction, ¶ 140; *Prosecutor v. Kupreskic*, Judgement, IT-95-16-A, ICTY Trial Chamber, 14 January 2000, ¶ 541 (indicating that CCL 10 was one of the international instruments "laying down provisions that were either declaratory of existing law or which had been gradually transformed into customary international law").

37 *Prosecution v. Tadić*, Decision on the Defence Motion on Jurisdiction, Case No. IT-94-I-T, ICTY Trial Chamber II, 10 August 1995, ¶ 140. *See also* Judgement in Case 001, ¶ 292 (citing the international conventions regarding genocide and apartheid as relevant evidence of whether an armed conflict nexus was required under customary international law during 1975-1979).

38 Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277, art. 1.

39 International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November 1973, 1015 UNTS 243, art. I.

40 International Law Commission's Draft Code of Offenses against the Peace and Security of Mankind, UN Doc A/2693 (1954), Art. 2(10-11) [hereinafter "ILC Draft Code of Offenses"].

applied to crimes against humanity "whether committed in war or in time of peace."[41] Moreover, domestic legislation like the 1950 Israeli Nazi and Nazi Collaborators (Punishment) Law, used for the prosecution of Adolf Eichmann and John Demjanjuk, lacked a nexus requirement.[42]

b. It Was Foreseeable and Accessible to the Accused That They Could Be Held Liable for Crimes Against Humanity Committed Outside of an Armed Conflict.

24. In light of the legal characterisation of crimes against humanity in the years leading up to 1975, it was undoubtedly foreseeable that the Accused could be held responsible for crimes against humanity committed within Cambodia whether or not an armed conflict existed at the relevant time. As the Pre-Trial Chamber recognized, the standard for foreseeability requires that "a charged person must be able to appreciate that the conduct is criminal in the sense generally understood, without reference to any specific provision."[43] The heinous acts committed in Cambodia during 1975-1979 were indeed "criminal in the sense generally understood" regardless of whether or not they were linked to armed conflict. The information necessary to come to this conclusion was public and readily accessible.[44]

25. Even if there were a degree of uncertainty in relation to the legal characterisation of crimes against humanity as of 1975, it has been recognized that the principle of legality "'does not prevent a court from interpreting and clarifying the elements of a particular crime'. Nor does it preclude the progressive development of the law by the court."[45] Indeed, to the extent that there was any uncertainty as to the existence of the nexus requirement

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41 U.N. Doc. No. A/RES/2391 (XXIII), 26 November 1968, Annex, art. 1(b). Although the Convention refers to the IMT Charter definition of crimes against humanity, the immediately preceding phrase "whether committed in time of war or in time of peace" clarifies that the armed conflict nexus did not apply. *See id.* (stating that no statutory limitation shall apply to "crimes against humanity *whether committed in time of war or in time of peace* as they are defined in the Charter of the International Military Tribunal . . . ") (emphasis added).

42 § 1(b) of the Israeli statute provides that "'crime against humanity' means any of the following acts: murder, extermination, enslavement, starvation or deportation and other inhumane acts committed against any civilian population, and persecution on national, racial, religious or political grounds." Nazi and Nazi Collaborators (Punishment) Law, 5710 (1950). *See also* Bangladesh Act No. XIX of 1973, The International Crimes (Tribunals) Act, 20 July 1973, art. 3(2)(a) (prohibiting crimes against humanity, defined with no reference to the IMT Charter or to any armed conflict nexus requirement).

43 15 February 2011 PTC Decision on the Closing Order Appeals of Nuon Chea and Ieng Thirith, ¶ 106.

44 As a member of the United Nations General Assembly, the DK regime and its senior officials were undoubtedly on notice of the relevant international instruments concerning crimes against humanity. *See, e.g.* Report of the Security General, UN S/13021, 11 January 1979 (attaching a letter from Ieng Sary confirming the composition of Democratic Kampuchea's delegation to the U.N. General Assembly).

45 *Prosecutor v. Milutinovic et al.*, Decision on Ojdanic's Motion Challenging Jurisdiction – Joint Criminal Enterprise, Case No. IT-99-37-AR72, ICTY Appeals Chamber, 21 May 2003 [hereinafter *Milutinovic* JCE Decision], ¶ 38.

between 1975 and 1979, the resolution of that uncertainty by judicial determination was readily foreseeable.[46] In light of the international treaties and evidence of state practice considered above, such a determination falls well within the "reasonable limits of acceptable clarification."[47]

26. This conclusion is buttressed by the abhorrent nature of the criminal acts committed in Cambodia from 1975 to 1979 which, while not a stand-alone justification for criminalization, makes it inconceivable that a reasonable person could have believed that such atrocities did not violate universal dictates of law and decency.[48]

C. THE PRINCIPLE OF IN DUBIO PRO REO DOES NOT SERVE AS A PROPER BASIS FOR RESOLUTION OF DISPUTES RELATING TO THE STATUS OF CUSTOMARY INTERNATIONAL LAW.

27. The Pre-Trial Chamber justified its inclusion of an armed conflict nexus requirement in the Indictment on the basis that the status of customary international law with respect to the armed conflict nexus requirement was uncertain[49] and that, therefore, the principle of *in dubio pro reo* required the Pre-Trial Chamber to rule in favour of the accused.[50] Although the Pre-Trial Chamber's decision is not binding on the Trial Chamber, the Co-Prosecutors hereby record their objection to the Pre-Trial Chamber's interpretation and application of the principle of *in dubio pro reo*. In particular, the Co-Prosecutors submit that the principle of *in dubio pro reo* – properly understood – is a rule of proof, not of legal interpretation. As such, the principle cannot serve as a basis for resolution of disputes about pure legal issues, in particular disputes about the proper interpretation of customary international law.

28. Pursuant to the weight of domestic and international authority, the principle of *in dubio pro reo* calls for the benefit of the doubt to be given to the accused where there is uncertainty as to whether the evidence is sufficient to support a conviction. As the ICTY

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46 *See SW v United Kingdom*, ECHR, 22 November 1995, Ser A 335-B, ¶¶ 32-43 (finding that the removal of a husband's immunity from prosecution for rape of his wife was "reasonably foreseeable with appropriate legal advice").

47 *Milutinovic* JCE Decision, ¶ 38.

48 *Milutinovic* JCE Decision, Case No. IT-99-37-AR72, ICTY Appeals Chamber, 21 May 2003, ¶ 42 (stating that "although the immorality or appalling character of an act is not a sufficient factor to warrant its criminalization under customary international law, it may in fact play a role in that respect, insofar as it may refute any claim by the Defense that it did not know of the criminal nature of the acts.").

49 15 February 2011 Pre-Trial Chamber Decision on Appeal by Nuon Chea and Ieng Thirith against the Closing Order, D427/3/15, ¶ 137. *See also* 11 April 2011 Pre-Trial Chamber Decision on Ieng Sary's Appeal Against the Closing Order, ¶ 309.

50 15 February 2011 Pre-Trial Chamber Decision on Appeal by Nuon Chea and Ieng Thirith against the Closing Order, D427/3/15, ¶ 144; 11 April 2011 Pre-Trial Chamber Decision on Ieng Sary's Appeal Against the Closing Order, ¶ 310.

Trial and Appeals Chambers have held, the principle of *in dubio pro reo* "is applicable to findings of fact and not of law"[51] and "encompasses doubts as to whether an offence has been proved at the conclusion of a case."[52] The analysis of *in dubio pro reo* claims in international jurisprudence reflects this understanding of the principle. For example, in *Prosecutor v. Renzahu*, the ICTR Appeals Chamber rejected the Defence's claim that the Trial Chamber had failed to properly consider doubts concerning the perpetrators and circumstances of the death of particular individuals and referred to the principle of *in dubio pro reo* "as a corollary to the presumption of innocence and the burden of proof beyond reasonable doubt."[53] The same understanding of *in dubio pro reo* is reflected in various domestic jurisdictions, including France, whose law has heavily influenced Cambodian law.[54]

29. While it is true that a few judges and commentators have encouraged a broader understanding of *in dubio pro reo* whereby uncertainty in the interpretation of the law would be interpreted in favour of the accused,[55] the Co-Prosecutors are not aware of any international jurisprudence where this broad interpretation of the principle of *in dubio pro reo*, per se, has been applied by a tribunal in order to determine a legal issue.[56] In fact, such an interpretation coexists uneasily with the basic maxim of *iura novit curia* (the judge knows the law). Deferring automatically to the Accused where the prosecution has failed to submit evidence adequate to sustain its burden of proof is one thing; automatic deferral to the accused wherever the law is difficult to ascertain is another thing entirely. As Judge Schomburg stated in a declaration in the case of *Prosecutor v. Limaj*:

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51 *Prosecutor v. Stakic*, Judgement, Case No. IT-97-24-T, ICTY Trial Chamber, 31 July 2003, ¶¶ 416, 510

52 *Prosecutor v. Galic*, Appeals Judgement, Case No. IT-98-29-A, ICTY Appeals Chamber, 30 November 2006, ¶ 77.

53 *Prosecutor v. Renzahu*, ICTR-97-31-A, Appeals Judgement, 1 April 2011, ¶¶ 472-475. *See also Prosecutor v. Halilovic*, Appeals Judgement, IT-01-48-A, 16 October 2007, ¶ 109 (reflecting an understanding of *in dubio pro reo* as a principle relevant to the interpretation of evidence against the Accused).

54 *See Prosecutor v. Limaj*, Declaration of Judge Schomburg, IT-03-66-A, 27 September 2007, ¶¶ 17 (quoting a French treatise, which confirms that the principle of *in dubio pro reo* is inapplicable to the interpretation of law but rather is a rule requiring acquittal of an accused where the evidence submitted is insufficient to serve as the basis for a conviction).

55 *See Prosecutor v. Limaj*, Declaration of Judge Shahabuddeen, IT-03-66-A, 27 September 2007, ¶ 2 (stating his view that *in dubio pro reo* can apply both to questions of fact and to law).

56 The principle of *in dubio pro reo* is distinct from the "rule of lenity" or the principle of *contra proferentum*, which are sometimes applied in the interpretation of ambiguous statutory language where other rules of construction cannot resolve the issue. *See, e.g.* Special Tribunal for Lebanon, Rules of Procedure and Evidence (rev. 29 Nov. 2010), rule 3 (providing for the resolution of doubts in the interpretation of the rules in favour of the accused if and only if other specified rules of construction are insufficient to clarify the text; the rules of construction that must be applied first include [i] the principles of interpretation codified in Articles 31-33 of the Vienna Convention on the Law of Treaties, [ii] international human rights standards, [iii] the general principles of international criminal law and procedure; and [iv] the Lebanese Code of Criminal Procedure).

> "It is the duty and noble obligation of a court itself to ascertain and apply the relevant law in the given circumstances of the case, for the law lies within the judicial knowledge of a court of law. There is no room for doubt in this determination . . . The court must arrive at only one decisive conclusion. The court may err in this determination, which may be corrected on appeal. However, a court of law cannot leave any remaining doubts about the correct interpretation of relevant law. It is the nobile officium and task of a judge to make that final assessment."[57]

30. The ECCC Supreme Court Chamber has discussed *in dubio pro reo* recently in the context of a dispute about the meaning of the ECCC Rules. The Chamber first indicated that the fair trial rights incorporated in Rule 21 "are not to be construed so as to automatically grant the Accused an advantage in every concrete situation arising on the interpretation of the Internal Rules."[58] The Chamber went on to explain that the "primary function" of the *in dubio pro reo* rule is to "denote a default finding in the event where factual doubts are not removed by the evidence" and that "insofar as *in dubio pro reo* is applicable to dilemmas about the meaning of the law, it must be limited to doubts that remain after . . . application of the civil law rules of interpretation, that is, upon taking into account the language of the provision, its place in the system, including its relation to the main underlying principles, and its objective."[59]

31. The application of a broad conception of *in dubio pro reo* is particularly concerning in the context of customary international law, which – by its very nature – is less straightforward than other types of law and is necessarily subject to an ongoing process of judicial synthesis and elaboration.[60] Extending the principle of *in dubio pro reo* to "uncertain" legal issues in this context would stifle the progression of customary international law, at risk of serious detriment to the international legal system. As one of the lead prosecutors at the Nuremberg Tribunal warned:

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[57] *See Prosecutor v. Limaj*, Declaration of Judge Schomburg, IT-03-66-A, 27 September 2007, ¶¶ 16, 18. *See also United Kingdom v. Iceland*, International Court of Justice (1974) (stating that because it is "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.").

[58] Supreme Court Chamber Decision on Immediate Appeal by Khieu Samphan on Application for Release, Case File No. 002/19-09-2007-ECCC-TC/SC(04), E50/3/1/4, 6 June 2011 [hereinafter "SCC Decision on Khieu Samphan's Application for Release"], para. 30.

[59] SCC Decision on Khieu Samphan's Application for Release, para. 31.

[60] *See Prosecutor v. Delalic, Mucic, Delic & Landzo,* Judgment, IT-96-21-T, ICTY Trial Chamber, 16 November 1998, ¶ 405 (noting that the application and standard for the principle of legality may be different in international criminal law than in domestic systems and that the objective of the principle of legality as applied in the international system "appear[s] to be distinctive, in the obvious objective of maintaining a balance between the preservation of justice and fairness towards the accused and taking into account the preservation of world order").

> "[i]f we reject international law unless it is embodied in codes and statutes, with all the paraphernalia of modern judicial systems, we shall never find it at all, for it cannot exist in this form without a correspondingly highly developed world political organization. And it is, indeed, from the very process of enforcing the law that political institutions develop."[61]

32. At the very least, any sort of practice of deciding difficult or "uncertain" issues of customary international law in favor of the accused should be limited to exceptional circumstances where no other rules of interpretation can assist in resolution of the issue and where grave fairness issues outweigh the countervailing need to preserve a functioning system of international criminal justice. Such exceptional circumstances do not exist here.

V. CONCLUSION

33. For the reasons set forth above, the Co-Prosecutors respectfully request: (1) that the Trial Chamber amend the definition of crimes against humanity in the Amended Indictment to exclude the armed conflict nexus requirement added by the Pre-Trial Chamber; and (2) that the Trial Chamber decide on the Co-Prosecutors' request prior to the start of the trial proceedings or give notice that it has taken the Co-Prosecutors' request under advisement.

Respectfully submitted,

Date	Name	Place	Signature
15 June 2011	YET Chakriya Deputy Co-Prosecutor	Phnom Penh	
	Andrew CAYLEY Co-Prosecutor		

[61] Telford Taylor, Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials under Control Council Law No. 10, 15 August 1949, at 221.