

ANNEX 1
PROCEDURAL HISTORY LEADING UP TO THE APPEAL

1. On 23 June 2010, the Defence filed IENG Sary's Alternative Motion on the Limits of the Applicability of Crimes against Humanity at the ECCC before the OCIJ,¹ along with a supporting Annex.² The Defence asserted that charges of crimes against humanity against the Accused at the ECCC must comport with the definition of crimes against humanity in customary international law during 1975-1979 so as not to violate the principle of legality.³ The Defence argued that a nexus between the underlying acts and armed conflict was a requirement of crimes against humanity during the temporal period of the ECCC's jurisdiction - should the ECCC have jurisdiction to try crimes against humanity at all.⁴ The Annex explained the genesis of crimes against humanity and chapeau elements prior to and after 1975-1979.⁵ The OCP did not respond.
2. On 26 July 2010, the Trial Chamber rendered its Judgement in Case 001.⁶ The Trial Chamber held, *sua sponte*,⁷ that a nexus with armed conflict was not required as an element of crimes against humanity in customary international law during 1975-1979, and that Article 5 of the ECCC Law is consistent with customary international law existing in that period.⁸ Without being briefed on the issue by the parties, the Trial Chamber ruled on the armed conflict nexus, thereby creating non-binding precedent for the elements of crimes against humanity in future ECCC cases. To make the determination that there was no armed nexus in customary law during 1975-1979, the Trial Chamber relied on: **a.** the 1945 Control Council Law No. 10; **b.** the 1948 Convention on the Prevention and

¹ IENG Sary's Alternative Motion on the Limits of the Applicability of Crimes against Humanity at the ECCC, ("Motion"), 23 June 2010, D378/2.

² IENG Sary's Alternative Motion on the Limits of the Applicability of Crimes against Humanity at the ECCC, Annex: An Overview of Crimes against Humanity and their Evolution in International Jurisprudence, 23 June 2010, D378/2.2 ("Annex").

³ Motion, para. 5.

⁴ *Id.*, paras. 8-9.

⁵ Motion Annex, paras. 3-21.

⁶ *Case of KAIING Guek Eav*, 001/18-07-2007/ECCC/TC, Judgement, 26 June 2010, E188 ("Duch Judgement").

⁷ Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 1 HARV. INT'L L. J. 1, 13 (2004): "The main actors of the criminal process ... have different quanta of procedural powers and responsibilities in each system. For example, ... the inquisitorial decision-maker, as an active investigator, has more procedural power – e.g., to act *sua sponte* – than the adversarial decision maker."

⁸ *Duch Judgement*, para. 290.

Punishment of the Crime of Genocide; **c.** the 1954 International Law Commission’s Draft Code of Offenses against the Peace and Security of Mankind; **d.** the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity; **e.** the 1973 International Convention on the Suppression and Punishment of the Crimes of Apartheid; and **f.** contemporary tribunals.⁹

3. On 16 August 2010, the OCP filed its Rule 66 Final Submission.¹⁰ The OCP did not include an armed conflict nexus in its review of the general requirements for crimes against humanity pursuant to Article 5 of the ECCC Law.¹¹
4. On 1 September 2010, the Defence filed IENG Sary’s Response to the Co-Prosecutors’ Rule 66 Final Submission and Additional Observations.¹² The Defence reasserted that “State practice and *opinio juris* demonstrate that a nexus between the underlying acts and international armed conflict was a requirement of crimes against humanity in customary international law in 1975-79.”¹³
5. On 15 September 2010, the OCIJ issued the Closing Order in Case 002, excluding the nexus requirement between the underlying acts and armed conflict in the definition of crimes against humanity.¹⁴
6. On 23 October 2010, the Defence filed IENG Sary’s Appeal against the Closing Order.¹⁵ The Defence submitted that the OCIJ erred by failing to explain that a nexus with armed conflict is a requirement of crimes against humanity at the ECCC, and reiterated its position that customary international law included a nexus with international armed conflict during 1975-1979.¹⁶
7. On 19 November 2010, the OCP filed a Joint Response to NUON Chea, IENG Sary and IENG Thirith’s Appeals Against the Closing Order.¹⁷ The OCP submitted that the

⁹ *Id.*, paras. 291- 92.

¹⁰ Co-Prosecutors’ Rule 66 Final Submission, 16 August 2010, D390.

¹¹ *Id.*, paras. 1242-51; *see also* Establishment Law, Art. 5.

¹² IENG Sary’s Response to the Co-Prosecutors’ Rule 66 Final Submission and Additional Observations, 1 September 2010, D390/1/2/1.3.

¹³ *Id.*, paras. 32-33.

¹⁴ Closing Order, 15 September 2010, D427, paras. 1313-15, 1350-1478, 1613.

¹⁵ IENG Sary’s Appeal against the Closing Order, 25 October 2010, D427/1/6.

¹⁶ *Id.*, paras. 188-89.

¹⁷ Co-Prosecutors’ Joint Response to NUON Chea, IENG Sary and IENG Thirith’s Appeals Against the Closing Order, 19 November 2010, D427/3/6, paras. 175-85.

- “prohibition of crimes against humanity under customary international law ... did not require a nexus with armed conflict between 1975 and 1979.”¹⁸
8. On 6 December 2010, the Defence filed its Reply to the OCP’s Joint Response.¹⁹ The Defence directly addressed whether crimes against humanity required a nexus with armed conflict during the 1975-1979 period, again concluding that customary international law included the nexus at this time.²⁰
 9. On 13 January 2011, the Pre-Trial Chamber issued its Decision on IENG Sary’s Appeal against the Closing Order, with reasons to follow,²¹ and its Decision on IENG Thirith’s and NUON Chea’s Appeal the Closing Order, with reasons to follow.²² In both Decisions, the Pre-Trial Chamber held that the OCIJ erred by not including an armed conflict nexus in its definition of crimes against humanity in the Closing Order.²³
 10. On 14 January 2011, the Trial Chamber became seized with the Case File.
 11. On 15 February 2011, the Pre-Trial Chamber issued reasons for its Decision on Appeals by NUON Chea and IENG Thirith Against the Closing Order,²⁴ including reasons for its finding that the OCIJ erred in failing to include the armed conflict nexus requirement as part of its definition of crimes against humanity.²⁵ The Pre-Trial Chamber observed, “[w]hile the Trial Chamber did not reach this conclusion in the *Duch* Judgement with respect of its application of crimes against humanity in that case, the Pre-Trial Chamber notes that the issue of the existence of an armed conflict requirement was not specifically challenged by the accused and was therefore not before the Chamber.”²⁶
 12. On 11 April 2011, the Pre-Trial Chamber issued reasons for its Decision on IENG Sary’s Appeal Against the Closing Order.²⁷ The Pre-Trial Chamber held that the definition of crimes against humanity in the IMT Charter and Nuremberg Principles, which included a connection to crimes against peace or war crimes, continued to apply in the 1975-1979

¹⁸ *Id.*, paras. 175-85.

¹⁹ IENG Sary’s Reply to Co-Prosecutors’ Joint Response to NUON Chea, IENG Sary and IENG Thirith’s Appeals Against the Closing Order, 6 December 2010, D427/1/23.

²⁰ *Id.*, paras. 86-93.

²¹ Decision on IENG Sary’s Appeal Against the Closing Order, 13 January 2011, D427/1/26.

²² Decision on IENG Thirith’s and NUON Chea’s Appeals Against the Closing Order, 13 January 2011, D427/2/12 and D427/3/12.

²³ *Id.*

²⁴ Decision on Appeals by NUON Chea and IENG Thirith Against the Closing Order, 15 February 2011, D427/3/15.

²⁵ *Id.*, para. 144.

²⁶ *Id.*

²⁷ Decision on IENG Sary’s Appeal Against the Closing Order, 11 April 2011, D427/1/26.

period, adding the requirement of a nexus between the underlying acts and armed conflict to the “chapeau” requirements of crimes against humanity in the Closing Order.²⁸ The Pre-Trial Chamber made the following additional findings:

- a. The IMT Charter and the Nuremberg Principles included the armed conflict nexus requirement.²⁹
- b. The ICTY *Tadić* Appeals Chamber, holding that the nexus requirement existed within the Nuremberg context only, has limited value because the cases before the ICTY “relate to a different point in time from that which is within ECCC’s jurisdiction.”³⁰
- c. The ICTY *Tadić* Trial Chamber, in its Decision on the Defence Motion on Jurisdiction, quoted the *Einsatzgruppen* Case in support of the position that Control Council Law No. 10 removed the nexus with armed conflict,³¹ but does “not mention later jurisprudence of the Nuremberg Military Tribunal that reaffirmed the war nexus.”³²
- d. The predecessors to crimes against humanity were firmly based in the law and customs of war,³³ including the preamble of the Declaration of St. Petersburg in 1868, and the Martens Clause in Hague Convention (II) and (IV); thus, the drafters of the IMT Charter included a nexus to ensure that the definition of crimes against humanity was within the bounds of customary international law.³⁴
- e. It is unclear whether the nexus was severed prior to, or during, the temporal jurisdiction of the ECCC:
 - i. Control Council Law No. 10 was “essentially domestic legislation...”³⁵
 - ii. The 1948 Genocide Convention did not include an armed conflict nexus requirement for genocide, and was unanimously adopted by the UN General Assembly.³⁶ However, genocide differs from crimes against

²⁸ *Id.*, para. 313.

²⁹ *Id.*, para. 306.

³⁰ *Id.*, para. 307.

³¹ *Id.*, para. 308.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*, para. 309.

³⁶ *Id.*

humanity because it has a “specific intent” element; also, the Convention did not change the nexus requirement for other crimes against humanity.³⁷

- iii. The 1954 International Law Commission’s Draft Code of Offences Against the Peace and Security of Mankind, which defined crimes against humanity without an armed conflict nexus, was not accepted by the United Nations General Assembly.³⁸
- iv. The 1968 Statute of Limitations Convention, which defined crimes against humanity without an armed conflict nexus, was signed, ratified or acceded to by only 18 of 134 Member States by 17 April 1975, rendering it unrepresentative of general state practice.³⁹
- v. The Apartheid Convention, which defined crimes against humanity without an armed conflict nexus, was signed, ratified or acceded to by only 25 of 134 UN Member States by 17 April 1975, and by 32 more States of 148 UN Member States by 1979.⁴⁰ Further, the removal of the armed conflict nexus did not affect the nexus requirement in other crimes against humanity.⁴¹

f. It remained unclear exactly when the nexus requirement was severed and “[a]ccording to the principle of *in dubio pro reo*, any ambiguity such as this must be resolved in the favour of the accused.”⁴²

13. On 19 April 2011, the OCP submitted a list of legal issues it intended to raise at the Initial Hearing.⁴³ In this list, it notified the Trial Chamber that it will “*Request to Recharacterize Charges in Indictment at Judgment to include: (a) that an armed conflict is not required to prove a crime against humanity...*”⁴⁴

14. On 3 May 2011, the Defence filed Observations on the OCP’s list of legal issues, arguing that pursuant to Rule 89, the OCP was time barred from raising these matters.⁴⁵ Further,

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*, para. 310.

⁴³ Co-Prosecutors’ Indication of Legal Issues It Intends to Raise at the Initial Hearing, 19 April 2011, E9/30.

⁴⁴ *Id.*, para. 1(9).

⁴⁵ IENG Sary’s Observations to the Co-Prosecutors’ Notification of Legal Issues It Intends to Raise at the Initial Hearing, 3 May 2011, E9/30/1, opening.

even if they were not time barred, “Rule 98 does not allow the Trial Chamber to make these re-characterizations.”⁴⁶

15. On 18 May 2011, the OCP responded to IENG Sary’s Observations, notifying the Trial Chamber and the Parties that it “will file submissions requesting the re-characterization of charges in the indictment at judgment” and intends to do so prior to the Initial Hearing.⁴⁷
16. On 6 June 2011, the Defence alerted the Trial Chamber (through a letter which was distributed to all Parties) of certain concerns, including the status of the proposed OCP intentions to make submissions on crimes against humanity.⁴⁸ The Defence reiterated its position that the OCP may not submit requests to re-characterize the charges, as the matter was already time-barred. The Defence requested the Trial Chamber to issue an order to that effect.⁴⁹
17. On 15 June 2011, the OCP filed its Request for the Trial Chamber to Exclude the Armed Conflict Nexus Requirement from the Definition of Crimes Against Humanity (“Request”).⁵⁰ The OCP requested that the Trial Chamber correct the legal definition of crimes against humanity in the Closing Order as amended by the Pre-Trial Chamber by removing the armed conflict nexus.⁵¹ The OCP argued that the Trial Chamber’s decision in Case 001 was correct, and submitted that: **a.** Article 5 of the ECCC Law contains no nexus requirement; **b.** the armed conflict nexus requirement did exist in customary international law during 1975-1979; and **c.** “it was foreseeable that the Accused could be held responsible for crimes against humanity committed within Cambodia outside of an armed conflict...”⁵²

⁴⁶ *Id.*

⁴⁷ Co-Prosecutors’ Response to “IENG Sary’s Observations to the Co-Prosecutors’ Notification of Legal Issues it Intends to Raise at the Initial Hearing,” 18 May 2011, E9/30/2, paras. 3-4.

⁴⁸ Letter from IENG Sary Defence to the Trial Chamber: Request for Information as to Supplementary Submission on Certain Preliminary Objections, Agenda and Information Concerning Initial Hearing, and Status of Proposed OCP Submissions on JCE III and Crimes against Humanity, 6 June 2011.

⁴⁹ *Id.*, p. 3.

⁵⁰ Co-Prosecutors’ Request for the Trial Chamber to Exclude the Armed Conflict Nexus Requirement from the Definition of Crimes Against Humanity, 15 June 2011, E95.

⁵¹ *Id.*, para. 1.

⁵² *Id.*, para. 2. Following the Request, on 20 June 2011, the Trial Chamber Senior Legal Officer sent an email to all Parties, which stated that the Defence teams may have until 22 July 2011 to respond to the Request, and that the OCP and Civil Parties may have 10 days to reply. On 7 July 2011, the Trial Chamber issued an official Decision (Decision on Extension of Time, E107), which corrected this email by stating that the Defence teams and Civil Parties have until 22 July 2011 to respond and the OCP may reply by 1 August 2011.

18. On 22 July 2011, the Defence filed IENG Sary's Response to the OCP Request for the Trial Chamber to Exclude the Armed Conflict Nexus Requirement from the Definition of Crimes Against Humanity & Request for an Oral Hearing ("Response to Request").⁵³ The Defence submitted that the Request should be dismissed because it is an untimely preliminary objection concerning the jurisdiction of the Trial Chamber.⁵⁴ Alternatively, the Defence asserted the Request has no merit because the issue of an armed conflict was comprehensively litigated and the Request failed to show any discernible errors in the Pre-Trial Chamber's decision (that the definition of crimes against humanity in the Closing Order requires an armed conflict nexus) that would warrant a reversal.⁵⁵ Further, the IENG Sary Defence reiterated that the armed conflict nexus requirement existed in customary international law in 1975-1979.⁵⁶
19. On 22 September 2011, the Trial Chamber issued its Severance Order Pursuant to Internal Rule 89*ter* ("Severance Order").⁵⁷ The Trial Chamber separated proceedings in Case 002 into discrete trials, each dealing with different portions of the Closing Order.⁵⁸
20. On 26 October 2011, the Trial Chamber issued its Decision on the Co-Prosecutors' Request to Exclude Armed Conflict Nexus Requirement from the Definition of Crimes Against Humanity ("Impugned Decision").⁵⁹ The Trial Chamber found that the OCP's Request was admissible,⁶⁰ and "affirmed its earlier finding in Case 001 that the armed conflict nexus was not part of the definition of crimes against humanity within customary international law between 1975-79,"⁶¹ granting the Request and excluding the armed

⁵³ IENG Sary's Response to the Co-Prosecutors' Request for the Trial Chamber to Exclude the Armed Conflict Nexus Requirement from the Definition of Crimes Against Humanity & Request for an Oral Hearing, 22 July 2011, E95/4. All other Defence teams filed Responses to the Request; *see* Response to Co-Prosecutors' Request for the Trial Chamber to Amend the Definition of Crimes Against Humanity, (IENG Thirith), 22 July 2011, E95/2; Response to the Co-Prosecutors' Request for the Trial Chamber to Exclude the Armed Conflict Nexus Requirement from the Definition of Crimes Against Humanity, (KHIEU Samphan), 22 July 2011, E95/3; Response to the Co-Prosecutors' Request for the Trial Chamber to Exclude the Armed Conflict Nexus Requirement from the Definition of Crimes Against Humanity, (NUON Chea), 22 July 2011, E95/5.

⁵⁴ *Id.*, para. 14.

⁵⁵ *Id.*, intro.

⁵⁶ *Id.*, paras. 21-22.

⁵⁷ Severance Order Pursuant to Internal Rule 89*TER*, 22 September 2011, E124.

⁵⁸ *Id.*, paras. 2-6.

⁵⁹ Decision on Co-Prosecutors' Request to Exclude Armed Conflict Nexus Requirement from the Definition of Crimes Against Humanity, 26 October 2011, E95/8.

⁶⁰ *Id.*, para. 9.

⁶¹ *Id.*, para. 33.

conflict nexus requirement from the definition of crimes against humanity in Case 002.⁶² The Trial Chamber did not address the Pre-Trial Chamber's legal findings in its Decision on IENG Sary's Appeal Against the Closing Order,⁶³ including as to the applicability of *in dubio pro reo* to the armed conflict nexus issue.⁶⁴ The Trial Chamber reiterated its arguments from Case 001 and relied on: **a.** the 1945 Control Council Law No. 10;⁶⁵ **b.** the 1948 Convention on the Prevention and Punishment of the Crime of Genocide;⁶⁶ **c.** the 1954 International Law Commission's Draft Code of Offenses against the Peace and Security of Mankind;⁶⁷ **d.** the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity;⁶⁸ **e.** the 1973 International Convention on the Suppression and Punishment of the Crimes of Apartheid;⁶⁹ and **f.** contemporary tribunals.⁷⁰ In addition, the Trial Chamber relied on jurisprudence pursuant to Control Council Law No. 10.⁷¹

21. On 2 November 2011, the IENG Sary Defence notified the Trial Chamber of its intent to file this appeal through its Request for a Stay of Execution of the "Decision on Co-Prosecutors' Request to Exclude Armed Conflict Nexus Requirement from the Definition of Crimes Against Humanity".⁷²

⁶² *Id.*, p.15.

⁶³ Decision on IENG Sary's Appeal Against the Closing Order, 11 April 2011, D427/1/26.

⁶⁴ *Id.*, paras. 310-11. The Pre-Trial Chamber held: "[I]n the absence of clear State practice and *opinio juris*, this Chamber ... remains unable to identify the crucial tipping point ... when the transition [to the armed conflict nexus] occurred. According to the principle of *in dubio pro reo*, any ambiguity such as this must be resolved in the favour of the accused. Thus the Pre-Trial Chamber determines that the definition of crimes against humanity in the Nuremberg Charter and Nuremberg Principles continued to apply in the period 1975-1979, such that a connection to crimes against peace or war crimes remained a necessary element."

⁶⁵ Impugned Decision, para. 15.

⁶⁶ *Id.*, paras. 24-25.

⁶⁷ *Id.*, paras. 21-23.

⁶⁸ *Id.*, paras. 26-29.

⁶⁹ *Id.*, para. 30.

⁷⁰ *Id.*, paras. 31-32.

⁷¹ *Id.*, paras. 15-20.

⁷² IENG Sary's Request for a Stay of Execution of the "Decision on Co-Prosecutors' Request to Exclude Armed Conflict Nexus Requirement from the Definition of Crimes Against Humanity," 2 November 2011, E134.