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EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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IENG SARY'S APPEAL AGAINST THE TRIAL CHAMBER'S DECISION ON CO-PROSECUTORS' REQUEST TO EXCLUDE ARMED CONFLICT NEXUS REQUIREMENT FROM THE DEFINITION OF CRIMES AGAINST HUMANITY

Filed by:

The Co-Lawyers:

ANG Udom
Michael G. KARNAVAS

Distribution to:

The Supreme Court Chamber Judges:

Judge KONG Srim
Judge SOM Sereyvuth
Judge MONG Monichariya
Judge YA Narin
Judge MOTOO Noguchi
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Judge Chandra Nihal JAYASINGHE
Reserve Judge SIN Rith
Reserve Judge Florence MUMBA

Co-Prosecutors:
CHEA Leang
Andrew CAYLEY

All Defence Teams

All Civil Parties

Mr. IENG Sary, through his Co-Lawyers ("the Defence"), hereby submits, pursuant to Rules 104(1), 104(4)(a), 105(2), and 21 of the ECCC Internal Rules ("Rules"), this Appeal against the Trial Chamber's Decision on Co-Prosecutors' Request to Exclude Armed Conflict Nexus Requirement from the Definition of Crimes Against Humanity ("Impugned Decision").[1] This Appeal is made necessary due to an error of law made by the Trial Chamber, invalidating the Impugned Decision. The Impugned Decision is subject to immediate appeal pursuant to Rule 104(4)(a) as it has the effect of terminating the proceedings of Case 002's "first trial."

I. GROUND OF APPEAL

At the ECCC, the Trial Chamber can only apply a definition of crimes against humanity that is consistent with the principle of legality – it must have been defined in customary international law from 1975-79 (should customary international law be found to be applicable at the ECCC) and have been foreseeable and accessible to Mr. IENG Sary. The definition of crimes against humanity after World War II under customary international law required a nexus with armed conflict. State practice and opinio juris *do not conclusively show that from 1975-79 the definition of crimes against humanity no longer required a nexus with armed conflict. Did the Trial Chamber err by excluding the nexus with armed conflict as a chapeau element for crimes against humanity?*

II. SUMMARY OF ARGUMENT

The Trial Chamber erred in law when it found and declared that the definition of crimes against humanity in customary international law between 1975 and 1979 did not require proof of a nexus between the underlying criminal acts and an armed conflict

1. The Trial Chamber violated the principle of legality when it altered the definition of crimes against humanity to exclude a nexus with armed conflict. The Trial Chamber's alteration subjects Mr. IENG Sary to prosecution for a crime that lacks an element that existed in customary international law during the period of the ECCC's temporal jurisdiction. Customary international law is defined by "extensive and virtually uniform" State practice and *opinio juris*. The international instruments and other materials cited by the Trial Chamber are not declarative of State practice and *opinio juris* from 1975-79.
2. Post-World War II, the Nuremberg Charter and the Nuremberg Judgement were the most accepted statements of international law. The Control Council Law No. 10 ("CCL 10") cases that occurred in Germany are inconsistent in their interpretation of the armed conflict nexus and, as domestic cases, are not declarative of customary international law. The Nuremberg Principles adopted in 1950 contained the nexus requirement in the definition of crimes against humanity. These principles had earlier been affirmed by the

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

United Nations ("UN") General Assembly as being principles of international law recognized in the Nuremberg Charter and Nuremberg Judgement.

3. The 1954 ILC Draft Code of Offences is not declarative of State practice and *opinio juris* regarding the armed conflict nexus. There was significant debate during the drafting as to the requirement of an armed conflict nexus in the definition of crimes against humanity. Demonstratively, the 1954 ILC Draft Code of Offences was not adopted by the UN General Assembly.
4. The 1948 Genocide Convention, which omits the nexus requirement from the definition of genocide, is not declarative of the status under customary international law in 1948 of crimes against humanity. Genocide is a distinct crime from crimes against humanity, containing different elements. The omission of the nexus requirement from the definition of genocide did not alter the existence of the nexus requirement in the definition of crimes against humanity.
5. Neither the 1968 Statute of Limitations Convention nor the 1973 Apartheid Convention provides conclusive evidence of State practice and *opinio juris* from 1975-79 concerning the nexus requirement. Both Conventions are political documents that failed to garner strong support from UN Member States during the period of the ECCC's temporal jurisdiction.
6. The *travaux préparatoires* of the post-1979 documents cited by the Trial Chamber indicate that the nexus issue was not settled by the drafting of the *ad hoc* Tribunals' Statutes and remained under debate through the negotiations leading to the adoption of the Statute of the International Criminal Court ("ICC Statute") in 1998. Therefore, disagreement about the existence of an armed conflict nexus requirement in the definition of crimes against humanity continued twenty years after the ECCC's temporal jurisdiction.
7. The instruments and materials cited by the Trial Chamber do not demonstrate "extensive and virtually uniform" State practice and *opinio juris* establishing that the definition of crimes against humanity from 1975-79 omitted a nexus with armed conflict. The Impugned Decision therefore violates the principle of legality. Even if the Supreme Court Chamber were to find that the definition of crimes against humanity under customary international law from 1975-79 did not require a nexus with armed conflict, criminal liability for the crime without the nexus requirement would not have been foreseeable and accessible to Mr. IENG Sary from 1975-79. Mr. IENG Sary could not have generally understood in 1975-79 that he could be criminally liable for charges of

crimes against humanity that were not connected with an armed conflict nor was criminal liability for such an offense accessible to him. To find otherwise would violate the principle of legality. In case of doubt, this issue must be resolved according to the principle of *in dubio pro reo*, in favor of Mr. IENG Sary. The Supreme Court Chamber should grant this appeal and annul the Impugned Decision.

III. ADMISSIBILITY

A. Admissibility of the Appeal

8. The **Ground of Appeal** concerns the Trial Chamber's error of law in finding and declaring that the definition of crimes against humanity in customary international law between 1975 and 1979 did not require proof of a nexus between the underlying criminal acts and an armed conflict. This error does not consist of erroneous factual findings or the misapplication of a properly stated rule of law. Rather, the error concerns an issue of law pertaining to the elements of crimes against humanity. As it impacts the taking of evidence, it must be resolved prior to the commencement of trial. The Impugned Decision violates the principle of legality and is therefore invalid. The Ground of Appeal is admissible pursuant to Rule 104(1)(a).[2]

B. Admissibility of the Appeal as an immediate appeal

1. Admissibility of immediate appeals

9. Pursuant to Rule 104(1)(a), an immediate appeal may be based on "an error on a question of law invalidating the judgment or decision." Pursuant to Rule 104(4)(a), decisions rendered by the Trial Chamber that "have the effect of terminating the proceedings" are subject to immediate appeal. Pursuant to Rule 105, a party filing an immediate appeal of a Trial Chamber Decision shall "specify an alleged error of law and demonstrate how it invalidates the decision." The Pre-Trial Chamber has held that Rule 21 "requires that the Pre-Trial Chamber adopt a broader interpretation of the Charged Person's right to appeal in order to ensure that the fair trial rights of the Charged Person are safeguarded in this particular instance."[3] The Impugned Decision has the effect of terminating the proceeding of Case 002's "first trial," and thus is subject to immediate appeal pursuant to Rule 104(4)(a).

2. The Impugned Decision would have terminated the "first trial" proceedings but for the Trial Chamber's errors

[2] *See* Annex 1: Procedural History Leading Up To The Appeal.
[3] Decision on IENG Sary's Appeal Against Co-Investigating Judges' Decision Refusing to Accept the Filing of IENG Sary's Response to the Co-Prosecutors' Rule 66 Final Submission and Additional Observations, and Request for Stay of the Proceedings, 20 September 2010, D390/1/2/4, para. 13.

10. The Trial Chamber has outlined the scope of the "first trial" in Case 002 through its Severance Order,[4] wherein it decided to "separate the proceedings in Case 002 into a number of discrete cases that incorporate particular factual allegations and legal issues.[5] In paragraph 6 of the Severance Order, the Trial Chamber expressly stated that it "may at any time decide to include in the first trial additional portions of the Closing Order in Case 002, subject to the right of the Defence to be provided with opportunity to prepare an effective defence and all parties to be provided with timely notice. At the conclusion of the first trial, a verdict in relation to these allegations, and appropriate sentence in the event of conviction, will be issued."[6]
11. The "first trial" will determine Mr. IENG Sary's criminal liability for alleged crimes against humanity pertaining to the movement of population phases 1 and 2.[7] The Severance Order does not anticipate consideration of other counts during the first trial[8] and does not contemplate that evidence will be taken during the "first trial" regarding the existence of an armed conflict during the period of the Indictment, or any alleged acts' connection therewith.[9]

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[4] Severance Order Pursuant to Rule 89*ter*, 22 September 2011, E124 ("Severance Order"). *See also* Decision on the Co-Prosecutors' Request for Reconsideration of the Terms of the Trial Chamber's Severance Order, 18 October 2011, E124/7 ("Decision on Severance"); Scheduling Order for Opening Statements and Hearing on the Substance in Case 002, 18 October 2011, E131.

[5] Severance Order, para. 2. The Trial Chamber ordered that the "first trial" shall comprise the following factual allegations and legal issues: **a.** The structure of Democratic Kampuchea; **b.** Roles of each Accused during the period prior to the establishment of Democratic Kampuchea, including when these roles were assigned; **c.** Role of each Accused in the Democratic Kampuchean government, their assigned responsibilities, the extent of their authority and the lines of communication throughout the temporal period with which the ECCC is concerned; **d.** Policies of Democratic Kampuchea on the issues raised in the Indictment; **e.** Factual allegations described in the Indictment as population movement phases 1 and 2; and **f.** Crimes against humanity including murder, extermination, persecution (except on religious grounds), forced transfer and enforced disappearances (insofar as they pertain to the movement of population phases 1 and 2). *Id.*, paras.1, 5.

[6] *Id.*, para. 6 (emphasis added). *See also* Decision on Severance, para. 15: "In its Severance Order, the Trial Chamber did not exclude the inclusion of additional charges and or counts to the first trial in Case 002 where circumstances permit."

[7] Severance Order, para. 5.

[8] *Id.*, para. 7: "[A]ll allegations of, *inter alia*, genocide, persecution on religious grounds as a crime against humanity and Grave Breaches of the Geneva Conventions of 1949 have also been deferred to later phases of the proceedings in Case 002."

[9] *See* Decision on Severance, para. 13, and Annex to Decision. *See also* Memorandum from Trial Chamber Senior Legal Officer, Response to issues raised by parties in advance of trial and scheduling of informal meeting with Senior Legal Officer on 18 November 2011, 17 November 2011, E141, p. 2: "The material issue for examination in the first trial is limited to the forced movement of the population (phases one and two). It follows that there will be no examination of the implementation of policies other than those pertaining to the forced movement of the population (phases one and two)…. No examination of topics to be included in later trials will be permitted." *Cf.* Closing Order, 15 September 2010, D427, paras. 150 *et seq.*, where it is alleged that "[a]lmost immediately following the entry into Phnom Penh of the Cambodian People's National Liberation Armed Forces (CPNLAF) on 17 April 1975, a state of international armed conflict came into existence between the Socialist Republic of Vietnam and Democratic Kampuchea. Protracted armed hostilities continued until the capture of Phnom Penh on 7 January 1979 by Vietnamese forces and beyond."

12. Had the OCP's Request[10] for the Trial Chamber to exclude the nexus requirement from the definition of crimes against humanity been dismissed (either due to inadmissibility or on the merits), the "first trial" would automatically terminate as a chapeau element of crimes against humanity (i.e. the nexus with armed conflict) could not be established based on the evidence the Trial Chamber has stated that it intends to hear during the "first trial" proceedings.[11] This scenario would not be remedied by modification of the Severance Order which, at this late stage, would fail to protect Mr. IENG Sary's right to be provided with an opportunity to prepare an effective defence.

3. Fair trial rights

13. The Supreme Court Chamber, adopting a broader interpretation of Rule 104(4)(a) in light of Rule 21 and Articles 33 new, 35 new and 37 new of the Establishment Law, has jurisdiction to find that the "first trial" would have terminated but for the Impugned Decision. The Supreme Court Chamber may accept jurisdiction over this immediate appeal pursuant to Rule 104(4)(a) on this basis.

14. Together, Articles 33 new, 35 new and 37 new[12] of the Establishment Law and Rule 21 operate to ensure that Mr. IENG Sary's fair trial rights are fully respected before the Supreme Court Chamber. Article 33 new requires that proceedings are "fair and expeditious and conducted … with full respect for the rights of the accused." The Supreme Court Chamber shall exercise its "jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights [("ICCPR")]." Article 14(5) of the ICCPR guarantees that "[e]veryone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law." This means that if a law provides for the remedy of appeal, access to that remedy may not be limited in its essence or in a disproportionate way.[13] Article 14(3) of the ICCPR entitles Mr. IENG Sary to minimum fair trial guarantees, including the rights: **a.** to be informed promptly and in detail of the nature and cause of the charge against him; and **b.**

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[10] 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 ("Request").
[11] *See* Decision on Severance, Annex.
[12] Article 37 new states: "The provision[s] of Articles 33 new and 35 new shall apply *mutatis mutandi* in respect of proceedings before the Extraordinary Chambers of the Supreme Court."
[13] *See Poitrimol v. France*, Eur Ct. H.R. 14032/88, Judgement of 25 November 1993, paras. 35-38; *Bogdanka Dimova v. Bulgaria*, Eur. Comm. H. R. App. No. 31806/96, Report of the Commission, 21 October 1998, paras. 52-59 (holding that if the rejection of a petition for review or cassation is the result of an omission on the part of the court, the right of access is violated by that omission).

to be tried without undue delay.[14] The right to be informed promptly and in detail of the nature and cause of the charge against him means that the Defence should not be expected to guess how and whether the Parties will be permitted to adduce evidence relating to the existence of armed conflict during the first trial.[15] Article 35 new of the Establishment Law expressly emphasizes Mr. IENG Sary's entitlement to these minimum fair trial guarantees.

15. Rule 21 provides that the ECCC's constitutive instruments, including the Establishment Law and the Rules, "shall be interpreted so as to always safeguard the interests of … [the] Accused … so as to ensure legal certainty and transparency of proceedings, in light of the inherent specificity of the ECCC, as set out in the ECCC Law and the Agreement." To that end, "ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties."

4. A broad interpretation of Rule 104(4)(a) in light of Rule 21 and Articles 33 new, 35 new and 37 new of the Establishment Law is necessary

16. The Supreme Court Chamber should adopt a broad interpretation of the right to immediate appeal in this particular instance to safeguard Mr. IENG Sary's fair trial rights to: **a.** have any potential conviction and sentence reviewed by a higher tribunal according to law;[16] **b.** be informed promptly and in detail of the nature and cause of the charge against him;[17] and **c.** be tried without undue delay.[18]

17. Should the Supreme Court Chamber finally determine that an armed conflict nexus did constitute an element of crimes against humanity in 1975-79 only after an appeal

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[14] *See* U.N. CCPR, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32, 23 August 2007, para. 35: "The right of the accused to be tried without undue delay, provided for by article 14, paragraph 3 (c), is not only designed to avoid keeping persons too long in a state of uncertainty about their fate and, if held in detention during the period of the trial, to ensure that such deprivation of liberty does not last longer than necessary in the circumstances of the specific case, but also to serve the interests of justice. What is reasonable has to be assessed in the circumstances of each case, taking into account mainly the complexity of the case, the conduct of the accused, and the manner in which the matter was dealt with by the administrative and judicial authorities.... This guarantee relates not only to the time between the formal charging of the accused and the time by which a trial should commence, but also the time until the final judgement on appeal. All stages, whether in first instance or on appeal must take place 'without undue delay'" (internal citations omitted), *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/437/71/PDF/G0743771.pdf?OpenElement.

[15] *See* STEFAN TRECHSEL, HUMAN RIGHTS IN CRIMINAL PROCEEDINGS 203 (Oxford University Press, 2005): "Even assuming that a clerical error occurred in the drafting of the indictment, a sensible interpretation of Article 6(3)(a) [of the ECHR, i.e. an Accused's right 'to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him'] requires that it be strictly applied and that the defendant is not expected to do intelligent guesswork. The consequence of errors must be borne by those who commit them – it is not acceptable that the defendant pays for errors made by the prosecution." The Defence submits that, in these circumstances, this principle applies *mutatis mutandis* to the Trial Chamber as it would to the prosecution in other circumstances.

[16] ICCPR, Art. 14(5).

[17] *Id.*, Art. 14(3)(a).

[18] *Id.*, Art. 14(3)(c).

following a verdict in the "first trial" (as envisaged by the Severance Order),[19] it will then be required to determine, as questions of fact: **a.** whether such an armed conflict existed during the period of the Indictment; and **b.** whether acts alleged to constitute crimes against humanity were sufficiently connected with such armed conflict. Yet if the parties are not permitted to adduce evidence on these issues during the "first trial" (as would be the case if the Impugned Decision is not stayed or annulled immediately), this evidence will be unavailable to the Supreme Court Chamber and the trial record will contain insufficient evidence upon which such decisive factual determinations could properly be made. The Supreme Court Chamber will then need to hear additional evidence on the issue pursuant to Rule 108(7).[20] No evidence will have been adduced on the nexus issue at trial. Consequently, the requesting party will be unable to comply with the Rule 108(7) requirement that he "clearly identify the specific findings of fact made by the Trial Chamber to which the additional evidence is directed."

18. This scenario, which: **a.** limits Mr. IENG Sary's right to appeal "in its essence"; **b.** requires the Defence to engage in "intelligent guesswork" as a result of the Trial Chamber's Orders and Decisions; and **c.** unduly delays final determination of this material issue, would violate Mr. IENG Sary's rights to: **a.** appeal to a higher tribunal according to law; **b.** be informed promptly and in detail of the nature and cause of the charge against him; and **c.** be tried without undue delay. These violations can be cured through determining this Appeal on an immediate basis. Mr. IENG Sary has a fundamental right to know, *prior to* the commencement of trial, the elements of *all* crimes with which he is charged.

C. Request for a Public Oral Hearing

19. The Defence requests a public, oral hearing to address the issues raised in this Appeal. Rule 109(1) indicates that appeal hearings should generally be conducted in public.[21] This Appeal affects Mr. IENG Sary's fair trial rights and the future course of the

[19] The Trial Chamber has stated its intention "to issue a first verdict limited to certain counts and factual allegations at an earlier stage, without the need to await a conclusion of the whole trial in relation to all portions of the Indictment. The Chamber does not consider that any appeal of the first verdict prevents continuation of the subsequent trials in Case 002 in relation to the remaining counts and factual allegations in the Indictment." Decision on Severance, para. 8.

[20] Rule 108(7) states: "Subject to Rule 87(3), the parties may submit a request to the Chamber for additional evidence provided it was unavailable at trial and could have been a decisive factor in reaching the decision at trial. The request shall clearly identify the specific findings of fact made by the Trial Chamber to which the additional evidence is directed. The other parties affected by the request may respond within 15 (fifteen) days of the receipt of notification of the request."

[21] Rule 109(1) states: "Hearings of the Chamber shall be conducted in public. The Chamber may decide to determine immediate appeals on the basis of written submissions only."

proceedings; it is of interest to the Cambodian public. None of the issues raised is confidential.

IV. APPLICABLE LAW

A. The Principle of Legality

20. The principle of legality provides that an Accused cannot be punished for a crime that did not exist in law at the time the alleged offense was committed.[22] This principle is enshrined in Article 6 of the 1956 Penal Code:[23]

> Criminal law has no retroactive effect. No crime can be punished by the application of penalties which were not pronounced by the law before it was committed.
>
> Nevertheless, when the Law abolishes a breach or reduces a punishment, the new legal dispositions are applicable to past justiciable breaches of the law, even if the breach discovered was committed at a time previous to the enactment of the new law, under the condition however that no definitive conviction already took place.

21. This principle is also set out in the Universal Declaration of Human Rights and the ICCPR, which must be respected pursuant to the Constitution, the Agreement and the Establishment Law.[24] Article 15 of the ICCPR states this principle as follows:

> 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.
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> 2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was

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[22] *See* 1956 Penal Code, Art. 6; ICCPR, Art. 15.

[23] Unofficial translation from the French version.

[24] According to Article 31 of the 1993 Constitution of the Kingdom of Cambodia, as amended 4 March 1999 ("Constitution"): "[t]he Kingdom of Cambodia *shall recognize and respect* human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights, the covenants and conventions related to human rights, women's and children's rights." (Emphasis added). According to Article 33 new of the Establishment Law: "The Extraordinary Chambers of the trial court shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the [ICCPR]." According to Article 13(1) 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: "[t]he rights of the accused enshrined in Articles 14 and 15 of the [ICCPR] shall be respected throughout the trial process." This principle of legality is similarly upheld in a multitude of other human rights instruments. *See* ECHR, Art. 7; Inter-American Convention on Human Rights, Article 9; African Charter of Human and People's Rights, Article 7(2); ICC Statute, Arts. 22, 24; Third Geneva Convention of 1949, Article 99; Fourth Geneva Convention of 1949, Article 67. It has also been recognized by the ICTY. *See e.g.*, *Prosecutor v. Vasiljević,* IT-98-32-T, Judgement, 29 November 2002, para. 193; *Prosecutor v. Galić*, IT-98-29-T, Judgment, 5 December 2003, para. 92.

criminal according to the general principles of law recognized by the community of nations.

22. To satisfy the principle of legality at the ECCC as articulated by the Pre-Trial Chamber and Trial Chamber,[25] the following conditions must be met: **a.** the crime must be provided for in the Establishment Law; and **b.** the crime must have existed either under national law, international law or in the general principles of law recognized by the community of nations at the time it was committed.[26]
23. Once the above requirements have been met, it must also be established that criminal liability was both foreseeable and accessible to the Charged Person/Accused.[27] Concerning foreseeability, the Accused must be able to appreciate that the conduct is criminal in the sense generally understood, without reference to a specific provision.[28] Concerning accessibility, reliance can be placed on a law that is based on custom.[29]

B. Customary International Law

24. Customary international law is defined by two elements: State practice and *opinio juris*.[30] The International Court of Justice ("ICJ") has stated: "in the field of customary international law, the shared view of the Parties as to the content of what they regard as the [customary] rule is not enough. The Court must satisfy itself that the existence of the rule in the *opinio juris* of the States is confirmed by practice."[31] While State practice

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[25] *See* Decision on Ieng Sary's Appeal Against the Closing Order, 11 April 2011, D427/1/30 ("Pre-Trial Chamber Decision"), para. 226; *Case of Kaing Guek Eav, alias "Duch"*, Case 001/18-07-2007/ECCC/TC, Judgement, 26 July 2010, E188 ("*Duch* Judgement"), paras. 27-28.

[26] The IENG Sary Defence has contested this definition of the principle of legality as expansive, though the Trial Chamber has yet to issue a ruling on the matter. Article 6 of the 1956 Penal Code requires the law to have existed in applicable domestic law at the time of the crime at issue. Thus, the Defence contests the Pre-Trial Chamber's conclusion that the principle of legality may be satisfied if a law exists in international law or in general principles of law. *See* Summary of IENG Sary's Rule 89 Preliminary Objections & Notice of Intent of Noncompliance with Future Informal Memoranda Issued in Lieu of Reasoned Judicial Decisions Subject to Appellate Review, 25 February 2011, E51/4, para. 24, referring to Mr. IENG Sary's preliminary objection that the ECCC does not have jurisdiction to apply international crimes and forms of liability against him.

[27] Pre-Trial Chamber Decision, para. 229; *Duch* Judgement, paras. 28, 31.

[28] Pre-Trial Chamber Decision, para. 235; Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, D97/14/15 ("Pre-Trial Chamber Decision on JCE"), para. 45.

[29] Pre-Trial Chamber Decision, para. 235; Pre-Trial Chamber Decision on JCE, para. 45.

[30] *See Case Concerning the Continental Shelf (Libyan Arab Jamahirya/Malta), Judgement, I.C.J. Reports 1985*, p. 29-30, para. 27: "It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States."

[31] *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America), Judgement, I.C.J. Reports 1986*, p. 98, para. 184 ("*Nicaragua Case*").

should be both "extensive and virtually uniform in the sense of the provision invoked,"[32] it need not be "in absolutely rigorous conformity with the rule."[33]

25. *Opinio juris* reflects the subjective aspect of customary international law. Not only must the acts concerned constitute settled practice, "they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.... The States concerned must therefore feel that they are conforming to what amounts to a legal obligation."[34] Relevant sources of customary international law include international treaties and conventions, resolutions of the UN General Assembly, statements of State delegates during negotiations, and decisions of international judicial institutions.[35]

V. ARGUMENT

26. The Trial Chamber erred in law when it found that the definition of crimes against humanity in customary international law between 1975 and 1979 did not require proof of a nexus between the underlying criminal acts and an armed conflict. The Trial Chamber violated the principle of legality when it altered the definition of crimes against humanity by removing an element that existed under customary international law from 1975-79. This error of law invalidates the Impugned Decision. In contrast to the Pre-Trial Chamber's treatment of the issue, the Trial Chamber failed to consider comprehensively all necessary and available sources and interpreted its cited sources so as to achieve the desired result. The sources cited by the Trial Chamber do not indicate "extensive and virtually uniform" State practice and *opinio juris* demonstrating the lack of a nexus requirement under customary international law.[36] If anything, the sources support the contrary conclusion. The Trial Chamber disregarded the materiality of the Nuremberg Charter and the Nuremberg Principles to the definition of crimes against humanity under customary international law immediately after World War II. The Trial Chamber minimized or ignored the significant debates about the armed conflict nexus requirement that occurred among State delegates during the drafting of several international instruments, such as the 1954 ILC Draft Code of Offences, the 1968 Statute of

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[32] *North Sea Continental Shelf Cases (Germany v. Denmark, Germany v. The Netherlands), Judgement, I.C.J. Reports 1969*, p. 43, para. 74 ("*North Sea Continental Shelf Cases*"). *See also Asylum Case (Colombia/Peru), Judgement, I.C.J. Reports 1950,* p. 276; MALCOLM N. SHAW, INTERNATIONAL LAW 76 (Cambridge University Press, 6th ed., 2008) ("SHAW").
[33] *Nicaragua Case,* p. 98, para. 186.
[34] *North Sea Continental Shelf Cases,* p. 44, para. 77.
[35] *Nicaragua Case,* p. 98, paras. 185, 188-91. *See also* SHAW, at 82.
[36] *See infra* Sections A-G for an analysis of the sources cited by the Trial Chamber in its Impugned Decision, paras. 13-32.

Limitations Convention and the ICC Statute. The Trial Chamber ignored evidence that at least two of the instruments it cited – the 1968 Statute of Limitations Convention and the 1973 Apartheid Convention – received minimal support from UN Member States during the ECCC's temporal jurisdiction. Several of the sources cited by the Trial Chamber are not ICJ-defined sources of customary international law.[37] Moreover, although the Trial Chamber is not bound by decisions of the Pre-Trial Chamber,[38] it failed to give due consideration and respect to the Pre-Trial Chamber's previous findings on this issue.[39] The following analysis of the Impugned Decision mirrors the order in which the Trial Chamber addressed international instruments and other documents.

A. The Trial Chamber erred in its interpretation of the Nuremberg Charter and Control Council Law No. 10 [Impugned Decision, paras. 13-20]

1. The Nuremberg Charter

27. The Trial Chamber found that the language of the Nuremberg Judgement is ambiguous as to whether the nexus requirement contained in the Nuremberg Charter was a jurisdictional limitation unique to the Charter itself or whether the nexus requirement reflected a more general application of law.[40] The Defence submits that the language of the Nuremberg Charter reflects the genesis of crimes against humanity, which arose from the laws and customs of war in the late nineteenth and early twentieth centuries.[41] The Pre-Trial

[37] The Trial Chamber cites several press releases as evidence of a consensus among delegates at the Conference on the Establishment of an International Criminal Court as to the exclusion of the nexus requirement. *See* Impugned Decision, n. 72-74.

[38] As the Pre-Trial Chamber has noted, "it is inherent to courts where several proceedings are pending that a decision in one case on a legal issue will guide the court in future similar cases where no new circumstances or arguments are raised." *Case of Kaing Guek Eav, alias "Duch,"* 001/18-07-2007-ECCC/OCIJ (PTC 02), Decision on IENG Sary's Request to Make Submissions on the Application of the Theory of Joint Criminal Enterprise in the Co-Prosecutors' Appeal of the Closing Order against Kaing Guek Eav "Duch," 5 December 2008, D99/3/19, para. 14. The Request raised no new arguments regarding the existence under customary international law from 1975-79 of a nexus with armed conflict in the definition of crimes against humanity. Compare the Request to the OCP's previous filing, which sets forth the same arguments: Co-Prosecutors' Joint Response to the Appeals of Nuon Chea, Ieng Sary and Ieng Thirith Against the Closing Order, 19 November 2010, D427/1/17, paras. 174, 176-83.

[39] *See* Pre-Trial Chamber Decision, paras. 307-11; Decision on Appeal by NUON Chea and IENG Thirith Against the Closing Order, 15 February 2011, D427/3/15 ("Pre-Trial Chamber NUON Chea Decision"), paras. 137-44. In *Duch*, without seeking submissions from the parties or *amici curiae*, the Trial Chamber held *sua sponte* that the definition of crimes against humanity under customary international law from 1975-79 did not require a nexus with armed conflict. *Duch* Judgement, paras. 283, 291-92. Other than in the introductory paragraph of the Impugned Decision, the only mention by the Trial Chamber of the Pre-Trial Chamber's Decisions occurs when it summarizes the OCP's arguments. *See* Impugned Decision, paras. 5-6.

[40] Impugned Decision, para. 13.

[41] *See* IENG Sary's Reply to the Co-Prosecutors' Joint Response to the Defence Appeals of the Closing Order, 6 December 2010, D427/1/23 ("IENG Sary Reply"), para. 87; IENG Sary's Appeal Against the Closing Order, 25 October 2010, D427/1/6, para. 189. *See also* M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 77 (Kluwer International, 1999) ("BASSIOUNI"): "The conclusion is clear that 'crimes against humanity' are analogous to war crimes and are an extension thereof, and that they are based on the same moral and legal principles that have long existed and that are the underpinning of principles, norms and rules of the humanization and regulation of armed conflicts"; Egon Schwelb, *Crimes Against Humanity*, 23 B.

Chamber found that the armed conflict nexus was included to avoid allegations that the principle of legality had been violated; if the Nuremberg Charter had not included a nexus with armed conflict, it is doubtful that there would have been a sufficient legal basis to prosecute such crimes immediately after World War II.[42]

28. The Trial Chamber erred in its analysis of the Nuremberg Charter. The Nuremberg Charter conferred jurisdiction upon the International Military Tribunal ("IMT") over crimes against humanity committed "in execution of or in connection with" any crime within the jurisdiction of the Tribunal, i.e. crimes against peace and war crimes.[43] The IMT Judges stated unequivocally that the Nuremberg Charter represented "the expression of international law existing at the time of its creation."[44] Post-World War II, the Nuremberg Charter's definition of crimes against humanity, including the requirement of a nexus with armed conflict, was the most accepted statement of international law.[45]

2. CCL 10 cases

29. The Trial Chamber found the CCL 10 jurisprudence to be material to the definition of crimes against humanity under customary international law from 1975-79. It also found that there was no consistency among the CCL 10 cases as to whether the armed conflict nexus was particular to the Nuremberg Charter or whether it existed generally under customary international law.[46] The Defence submits that the judgements rendered under CCL 10 should not be viewed as a more authoritative declaration of customary international law than the Nuremberg Charter or the Nuremberg Judgement. The Trial

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Y.B. INT'L L. 178, 206 (1946) ("Schwelb"): "[A crime against humanity] is … a kind of by-product of war, applicable only in time of war or in connexion with war and destined primarily, if not exclusively, to protect the inhabitants of foreign countries against crimes committed, in connexion with an aggressive war, by the authorities and organs of the aggressor state.... As defined in the Nuremberg Judgement, the crime against humanity is an 'accompanying' or an 'accessory' crime to either crimes against peace or violations of the laws and customs of war."

[42] Pre-Trial Chamber Decision, para. 308. *See* BASSIOUNI, at 255-56: International crimes are distinguished from national crimes by the existence of additional international legal elements that are particular to the specific crimes. One of the international elements contained within the Nuremberg Charter's definition of "crimes against humanity" was the connection to war. *See also id.,* p. 265: "At the time the Nuremberg Charter was enacted, the war connecting element was indispensable to link 'crimes against humanity' to pre-existing conventional and customary international law prohibiting such conduct in time of war. Without such a connecting element, the Nuremberg Charter would have clearly violated the 'principles of legality.'"

[43] Charter of the International Military Tribunal, 8 August 1945 ("Nuremberg Charter"), Art. 6(c).

[44] Judgement, *Trial of Major War Criminals Before the International Military Tribunal*, Vol. I (1947) ("Nuremberg Judgement"), p. 218. This statement was borne out in the case of Julius Streicher, who was convicted of the crime against humanity of persecution. Although the Nuremberg Judgement referenced his "25 years of speaking, writing, and preaching hatred of the Jews," he was convicted only of crimes committed during the war. *Id.*, p. 302, 304.

[45] *See* U.N.G.A. Res. 95(I), Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal, 11 December 1946; Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, A/1316 (1950) ("Nuremberg Principles"). *See also* Annex 2: Authority on State Practice in Relation to the Armed Conflict Nexus in Crimes Against Humanity (1868-Present) providing a historical background of the armed conflict nexus requirement.

[46] Impugned Decision, para. 20.

Chamber appears to recognize this by finding that there was more than one acceptable definition of crimes against humanity in existence immediately after World War II.[47] The Pre-Trial Chamber agreed, finding CCL 10 jurisprudence inconsistent on the nexus issue, and that in any event CCL 10 was "essentially domestic legislation."[48]

30. The Trial Chamber erred in drawing substantive conclusions from inconsistent CCL 10 jurisprudence. While CCL 10, which was established by the Control Council for Germany,[49] omitted the armed conflict nexus from its definition of crimes against humanity,[50] it incorporated international law in its provisions. The Preamble states that CCL 10 was enacted "to give effect to the terms of the Moscow Declaration of 30 October 1943 and the London Agreement of 8 August 1945, and the [Nuremberg] Charter issued thereto." Although CCL 10 incorporates international law, the Preamble also indicates that CCL 10 was intended to be domestic legislation established to prosecute war criminals "in Germany,"[51] with local tribunals administering local law.[52] Despite the omission of the armed conflict nexus from the definition of crimes against humanity, several CCL 10 Tribunals nevertheless adhered to Nuremberg precedent and required a nexus between the underlying acts and an armed conflict.[53] Additionally, some Tribunals were limited temporally to hearing only those crimes against humanity charges alleged to have occurred during an armed conflict.[54] Accordingly, the significance of the omission of the armed conflict nexus from CCL 10 should not be overestimated.[55]

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[47] *Id.*, para. 18.
[48] Pre-Trial Chamber Decision, para. 309.
[49] The Berlin (Potsdam) Conference, Protocol of the Proceedings, 1 August 1945, Section II(A)(1).
[50] Control Council Law No. 10 on the Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 December 1945 ("CCL 10"), Art. II(1)(c).
[51] CCL 10, Preamble. Art. IV states that when a person is alleged to have committed a crime in a country other than Germany, that person may, upon request, be transferred to that other country for trial. The language of CCL 10, therefore, implies that the Tribunals created under CCL 10 did not have jurisdiction over crimes committed outside of German territory. *See also* BASSIOUNI, at 33; Sydney L. Goldenberg, *Crimes Against Humanity – 1945-1970*, 10 W. ONT. L. REV. 1, 10 (1971) ("Goldenberg").
[52] UN War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (1948) ("1948 UN War Crimes Commission Report"), p. 213.
[53] *See e.g., Flick and Others Case*, Judgement of 22 December 1947, reprinted in *Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10*, Vol. VI ("*Flick and Others Case*"); *Alstoetter and Others Case*, Judgement of 3-4 December 1947, reprinted in *Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10*, Vol. III ("*Justice Case*"); *Ernst von Weizsaecker and Others Case*, Order of the Tribunal Dismissing Count Four and Tribunal Memorandum attached Thereto, 26 March 1948, reprinted in *Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10*, Vol. XIII ("*Ministries Case*").
[54] *See e.g., Ohlendorf and Others Case*, Judgement of 8-9 April 1948, reprinted in *Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10*, Vol. IV ("*Einsatzgruppen Case*"), p. 15; *Greifelt and Others Case*, Judgement of 10 March 1948, *Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10*, Vol. V ("*The RuSHA Case*"), p. 88; *Brandt and Others Case*, Judgement of 20 August 1947, *Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10*, Vol. II ("*Medical Case*"), p. 171.
[55] *See* Goldenberg, at 10.

31. The Trial Chamber erred in its reliance on CCL 10 jurisprudence. Two of the Tribunals did not directly address the question of whether an armed conflict nexus was a requirement of crimes against humanity under customary international law. The two Tribunals that did directly address the question found that a nexus with an armed conflict *was* required for the definition of crimes against humanity. The Trial Chamber found that two of the Tribunals established pursuant to CCL 10 – the *Flick* Tribunal and the *Einsatzgruppen* Tribunal – interpreted the Nuremberg Charter's armed conflict nexus as a specific jurisdictional limitation.[56] In *Flick*, the Tribunal addressed only whether the evidence presented constituted crimes within its jurisdiction; it did not assess the customary international law status of crimes against humanity.[57] The *Flick* Tribunal, however, expressly rejected the argument that the lack of a nexus requirement in CCL 10 broadened the scope of crimes against humanity to include crimes not committed in connection with an armed conflict, holding that such an interpretation would violate the Preamble of CCL 10.[58] As to *Einsatzgruppen*, the statement by the Tribunal that CCL 10 gave it jurisdiction to try "all crimes against humanity as long known and understood under the general principles of criminal law"[59] was *obiter dictum*. As the UN War Crimes Commission observed, since the jurisdiction of the *Einsatzgruppen* Tribunal was temporally limited to crimes against humanity committed between May 1941 and May 1943, it could only hear crimes against humanity charges that were linked to an armed conflict. Therefore, the Tribunal's observations on the nexus requirement were not material to the *ratio decidendi*.[60] They cannot be considered as material to the determination of the status of the nexus requirement in customary international law at that time.[61]

32. Unlike the *Einsatzgruppen* Tribunal, the *Flick* Tribunal had temporal jurisdiction to try cases occurring before the war, *yet* it prosecuted crimes against humanity charges

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[56] Impugned Decision, para. 15: "Several Tribunals constituted pursuant to [CCL 10], in evaluating the scope of their own competence, interpreted the Nuremberg Charter's armed conflict nexus as jurisdictional," *citing Flick and Others Case*, p. 1212-13 and *Einsatzgruppen Case*, p. 499.
[57] *Flick and Others Case,* p. 1213.
[58] *Id.*, p. 1212-14.
[59] Impugned Decision, para. 16, *citing Einsatzgruppen Case*, p. 499.
[60] *See Law Reports of Trial of War Criminals*, UN War Crimes Commission, Vol. XV (1949) ("UN War Crimes Commission Report"), p. 137. *See also* 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 and Request for an Oral Hearing, 22 July 2011, E95/4 ("IENG Sary Response"), para. 24; Beth Van Schaack, *The Definition of Crimes Against Humanity: Resolving the Incoherence*, 37 COL. J. TRANSNAT'L L. 787, 810 (1999) ("Van Schaack").
[61] Black's Law Dictionary defines *obiter dictum* as a "judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (though it may be persuasive)." BLACK'S LAW DICTIONARY 1100 (8th ed. 2004).

occurring only during the war.[62] Given the differences in temporal jurisdiction, the UN War Crimes Commission found *Flick* to be more authoritative than *Einsatzgruppen* on the issue of whether a nexus with an armed conflict was an element of crimes against humanity as applied by the Tribunals.[63]

33. Two additional CCL 10 cases cited by the Trial Chamber – the *Justice* case and the *Ministries* case – interpreted the armed conflict nexus as an element of the definition of crimes against humanity under customary international law.[64] In the *Justice* case, the Tribunal found that, although CCL 10 omitted the requirement of a nexus with armed conflict, "certain inhumane acts … were committed in execution of, and in connection with, aggressive war and were therefore crimes against humanity even under the provisions of the IMT Charter…"[65] The Tribunal recognized the requirement that crimes against humanity must have a nexus with armed conflict.[66]

34. In the *Ministries* case, the Tribunal found that the crimes charged in the Indictment did not constitute crimes against humanity because there was "no claim that such crimes were perpetrated in connection with crimes against peace or war crimes."[67] In so finding, the Tribunal cited the Nuremberg Tribunal, which it found to be applying existing law,[68] and found that to broaden its own jurisdiction would be to disregard "the well-established principle of justice that no act is declared to be a crime which was not a crime under law existing at the time when the act was committed."[69]

B. The Trial Chamber *inaccurately* and *selectively* quoted certain authorities in interpreting the armed conflict nexus requirement in the Nuremberg Charter [Impugned Decision, n. 54]

35. The Trial Chamber found that a number of authorities subsequent to CCL 10 have interpreted the nexus requirement in the Nuremberg Charter to be specific to that instrument, or that any required nexus with crimes against humanity ceased soon

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[62] *Flick and Others Case*, p. 437; UN War Crimes Commission Report, p. 137.
[63] UN War Crimes Commission Report, p. 137: "In estimating the relative authoritativeness of the decision on [the nexus] question reached in the *Flick* Trial and in the *Einsatzgruppen* Trial, it should be remembered that since the Indictment in the latter charged crimes against humanity committed 'between May, 1941 and July, 1943' the dictum quoted from the judgment delivered therein was not necessary to the decisions reached. In the *Flick* Trial, on the other hand, Count 3 charged the commission of crimes against humanity between January, 1936 and April, 1945."
[64] Impugned Decision, para. 17.
[65] *Justice Case*, p. 974.
[66] Van Schaack, at 811: "In discussing crimes against humanity more generally, the [*Justice*] Tribunal recognized that the war nexus operated to distinguish crimes against humanity from ordinary crimes."
[67] *Ministries Case*, p. 116, *citing* statements by Lord Chief Justice Wright in the Law Quarterly Review, Vol. 62 (January 1946): "[the crimes prosecuted at the Nuremberg Tribunal] are not crimes because of the agreement of the four Governments, [but] the Governments have scheduled them as coming under the jurisdiction of the Tribunal because they are already crimes by existing law."
[68] *Id.*, *citing* Lord Chief Justice Wright in the Law Quarterly Review, Vol. 62 (January 1946).
[69] *Id.*

afterwards and in any case prior to 1975.[70] The Defence submits that several of the authorities cited by the Trial Chamber are inaccurate, irrelevant or consist of selective (contextually misleading) quotations from the documents. To the extent that it addressed these authorities, the Pre-Trial Chamber agreed.[71]

36. The Trial Chamber erred as follows:

> First: the ICTY *Tadić* Interlocutory Appeal decision does not demonstrate conclusively that the definition of crimes against humanity under customary international law prior to or as of 1975-79 excluded a nexus with armed conflict.[72]
>
> Second: the 1948 UN War Crimes Commission Report does not demonstrate that the requirement of a nexus with armed conflict ceased to exist after the Nuremberg Charter.[73]

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[70] Impugned Decision, para. 20, n. 54.

[71] Pre-Trial Chamber Decision, para. 307: "The Pre-Trial Chamber observes that, in general terms, it has to show caution in relying to [sic] ICTY findings where it discusses the state of customary international law because the cases before ICTY relate to a different point in time from that which is within the ECCC's jurisdiction. Also, the Pre-Trial Chamber has to observe the difference between ICTY discussing the state of customary international law for the purpose of finding an accurate definition of a crime as opposed to ICTY discussing the state of customary international law for the purpose of determining whether a crime existed at a certain time."

[72] Impugned Decision, para. 20, n. 54, *citing Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, 2 October 1995 ("*Tadić* Interlocutory Appeal"), para. 140: "the nexus between crimes against humanity and either crimes against peace or war crimes, required by the Nuremberg Charter, was peculiar to the jurisdiction of the Nuremberg Tribunal." See *infra* paras. 52-53 for a further analysis of the *Tadić* Appeals Chamber Decision.

[73] *See* Impugned Decision, para. 20, n. 54, *citing* 1948 UN War Crimes Commission, p. 192-93. The documents referenced in the Report itself either mirrored the language of the Nuremberg Charter or did not explicitly address crimes against humanity. The pre-Nuremberg Charter documents referenced crimes against humanity as a concept existing in conjunction with armed conflicts. *See* 1948 UN War Crimes Commission Report, p. 188-91, *citing* the Fourth Hague Convention of 1907; the Declaration of 28 May 1915; Ethiopia-Italy Peace Treaty of 10 February 1947 (stemming from the 1936 annexation of Ethiopia by Italy); International Agreement for Collective Measures against Piratical Attacks in the Mediterranean by Submarines, 14 September 1937; Resolution, *Draft Convention for the Creation of an International Criminal Court,* London International Assembly (1943). The post-Nuremberg Charter documents either explicitly or implicitly mirrored the language of the Nuremberg Charter. *See* 1948 UN War Crimes Commission Report, p. 204-12, *citing* the Charter for the International Military Tribunal for the Far East and Indictment; Treaties of Peace with Italy, Roumania, Bulgaria, Hungary and Finland, 10 February 1947; U.N.G.A. Res. 3(I), Extradition and Punishment of War Criminals, 13 February 1946; U.N.G.A. Res. 95(I), Affirmation of the Principles of Law recognized by the Charter of the Nürnberg Tribunal (11 December 1946). Finally, the military commissions and national laws cited either mirrored the language of the Nuremberg Charter, did not explicitly prohibit crimes against humanity, or, incorporated the terms of the Nuremberg Charter and/or applied primarily local law. *See* 1948 UN War Crimes Commission Report, p. 212-19, *citing* Control Council Law No. 10; Regulations for the United States Military Commissions in the Far Eastern and China Theatres of War (24 September 1945); Royal Warrant of 14 June 1945 (Regulations for British Military Courts); War Crimes Regulations of Canada (30 August 1945); Commonwealth of Australia War Crimes Act (1945); French Ordinance of 28 August 1944; Netherlands Royal Decree establishing a Commission for the Investigation of War Crimes (29 May 1946); Belgian Decree of 13 December 1945; Grand Ducal Decree of 3 July 1945 (Luxembourg); Roumanian Decree-Law of April 1945; Austrian Constitutional Law of 26 July 1945; Danish Act of 12 July 1946.

Third: the declaration made by the United Kingdom delegate to the Conference on the Establishment of an International Criminal Court does not demonstrate that the definition of crimes against humanity excluded a nexus with armed conflict from 1975-79.[74]

Fourth: contrary to the Trial Chamber's claims, the position of Theodor Meron (the recently elected President of the ICTY) in 1994 regarding the armed conflict nexus was that the status of the nexus requirement in crimes against humanity was unclear.[75]

Fifth: the 1999 Report of the Group of Experts for Cambodia does not provide conclusive evidence of the status under customary international law from 1975-79 of the armed conflict nexus requirement.[76]

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[74] *See* Impugned Decision, para. 20, n. 54, *citing* Summary Record of the 3rd Meeting, UN Diplomatic Conference of Plenipotentaries on the Establishment of an International Criminal Court, A/CONF.183/C.1/SR.3, 20 November 1998, p. 9, para. 89: "Although, both the Charter of the Nuremberg Tribunal and the Statute of the Tribunal of the Former Yugoslavia referred to armed conflict, in both those cases the instruments had been set up after the event and neither indicated that a nexus existed in international law." The Trial Chamber omitted to point out that at the conference there were several other delegates who were of the opinion that a nexus with armed conflict *did* exist under customary international law. *See infra* para. 55 for further discussion of the Conference on the Establishment of an International Criminal Court.

[75] *See* Impugned Decision, para. 20, n. 54. Judge Meron's position is illustrated by his statement, in the same article as that cited by the Trial Chamber, that "neither in the literature nor in the work of the [International Law Commission] can one find consistent positions on the nexus requirement." Theodor Meron, *War Crimes in Yugoslavia and the Development of International Law*, 88 AM. J. INT'L L. 78, 85 (1994). This article was written in 1994, *prior to* the ICTY *Tadić* Appeals Chamber decision holding that customary international law did not require a nexus with armed conflict; the article is indicative of scholarly opinion at the time. *See, e.g.*, Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L. J. 2537, 2589 (1991) ("Orentlicher"): "The legal status of the nexus requirement – then and now – is ambiguous."

[76] *See* Impugned Decision, para. 20, n. 54, *citing* Report of the Group of Experts for Cambodia established pursuant to General Assembly Resolution 52/135, 18 February 1999, para. 71 ("Group of Experts Report on Cambodia"). The Group of Experts was appointed by then- Secretary-General Kofi Annan and consisted of three individuals: Rajsoomer Lallah, Ninian Stephen and Steven Ratner. The Report claimed that "[t]he bond between crimes against humanity and armed conflict appear[ed] to have been severed by 1975." *See* Group of Experts Report on Cambodia, para. 71. In support, the Group cited two pages from a book – written by one of the members of the Group – that considers the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity ("1968 Statute of Limitations Convention"). *See* Group of Experts Report on Cambodia, para. 71, *citing* STEVEN R. RATNER and JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 53-54 (Oxford 1997). The Group of Experts cites only one other source, the 1954 International Law Commission ("ILC") Draft Code of Offences Against the Peace and Security of Mankind ("1954 ILC Draft Code of Offences"), in support of its claim. Group of Experts Report on Cambodia, para. 71. While noting the difficulties a tribunal would have in prosecuting Khmer Rouge officials if the "nexus [were] still required as of 1975, [because] the vast majority of the Khmer Rouge's atrocities would not be crimes against humanity," (*id.*) the experts failed to note either the lack of significant support shown by UN Member States for the 1968 Statute of Limitations Convention or the fact that the 1954 ILC Draft Code of Offences was never adopted by the UN General Assembly. *See infra* paras. 44-47 for further discussion of the 1968 Statute of Limitations Convention. *See also* U.N.G.A. Res. 897(IX), Draft Code of Offences Against the Peace and Security of Mankind, 4 December 1954. The utility of the Group of Experts' sources – and indeed of the outcome-oriented Report itself

C. The Trial Chamber erred in failing to consider the Nuremberg Principles as a material statement of customary international law and erred in finding that the 1954 ILC Draft Code of Offences is conclusive evidence of State practice and *opinio juris* [Impugned Decision, paras. 21-23]

1. The Nuremberg Principles

37. The Trial Chamber refers to the Nuremberg Principles in a cursory fashion (almost dismissively) in one sentence of a section titled "1954 ILC Draft Code."[77] This treatment of the Nuremberg Principles is in stark contrast to the manner in which they were considered by the Pre-Trial Chamber.[78] The Trial Chamber found that in "1950, the ILC set forth the definition of crimes against humanity applied in the Nuremberg Charter, including the nexus with armed conflict,"[79] observing that the "ILC's mandate was limited to formulating the principles of law applied by the Nuremberg Tribunal and not to reassessing the status of customary international law."[80] The Defence submits that the Nuremberg Principles codified principles of customary international law existing at the time. The Pre-Trial Chamber agrees, finding that the "1950 Nuremberg Principles … reflected principles of international law at the time."[81]

38. The Trial Chamber erred by failing to acknowledge that in 1946, when directing the Committee on the Progressive Development of International Law and its Codification to formulate the Nuremberg Principles,[82] the UN General Assembly had *affirmed* the "principles of international law recognized by the Charter of the Nürnberg Tribunal and the judgment of the Tribunal." [83] It cannot be argued that in 1946 UN Member States considered the nexus requirement in the Nuremberg Charter merely to be a jurisdictional requirement.

39. The Trial Chamber errs by stating, in relation to the Nuremberg Principles, that the "ILC's mandate was limited to formulating the principles of law applied by the Nuremberg Tribunal and not to reassessing the status of customary international law."[84]

– as indicators of State practice and *opinio juris* regarding the requirement of a nexus with armed conflict from 1975-79 is limited.

[77] Impugned Decision, para. 22.

[78] Pre-Trial Chamber Decision, para. 309.

[79] Impugned Decision, para. 22.

[80] *Id.*

[81] Pre-Trial Chamber Decision, para. 309.

[82] The ILC was mandated only to codify the Nuremberg Principles in November 1947. *See* U.N.G.A Res 177(II) (21 November 1947) (delegating the task of formulating the Nuremberg Principles to the ILC).

[83] U.N.G.A. Res. 95(I), Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal, 11 December 1946: "*[a]ffirming* the principles of international law recognized by the [Nuremberg] Charter and the judgement of the Tribunal" and directing the ILC to formulate those principles in the context of a general codification of offenses against the peace and security of mankind, or an International Criminal Code.

[84] Impugned Decision, para. 22.

As the UN General Assembly had affirmed these principles,[85] it should be concluded that the Nuremberg Principles reflected the relevant principles of customary international law at the time.[86]

2. The 1954 ILC Draft Code of Offences

40. The Trial Chamber found that the notion that the nexus requirement was specific to the Nuremberg Charter, rather than integral to the concept of crimes against humanity, was consistent with the ILC's work in the 1950s.[87] The Defence submits that a careful examination of the relevant documents does not support this finding. The Pre-Trial Chamber found that the "1954 [ILC] Draft Code of Offences Against the Peace and Security of Mankind was not accepted by the United Nations General Assembly."[88]

41. The Trial Chamber erred in drawing conclusions from the 1954 ILC Draft Code of Offences regarding State practice and *opinio juris*.[89] Records from the negotiations indicate that in 1954 substantial support remained at the ILC for requiring a nexus with armed conflict.[90] The ILC has a dual function: **a.** the codification of existing international

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[85] U.N.G.A. Res. 95(I), Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal, 11 December 1946.

[86] Pre-Trial Chamber Decision, para. 309. *See also* Nuremberg Principles, Principle VI(c). During the discussion of the Nuremberg Principles, several State delegates – including the Brazilian, Mexican, Panamanian, and American delegates – argued that a nexus with armed conflict was a required element of crimes against humanity. Of the fourteen delegates at the meeting, six spoke in favour of requiring a nexus with armed conflict in the definition of crimes against humanity. *See* Summary of the 48th Meeting of the International Law Commission, A/CN.4/SR.48, 16 June 1950, p. 55-58, paras. 91, 94-96, 103, 112-13. One delegate was opposed to including a nexus with armed conflict (Summary of the 48th Meeting of the International Law Commission, A/CN.4/SR.48, 16 June 1950, p. 57, para. 117). The delegates ultimately voted to retain the nexus requirement in the definition of crimes against humanity (Summary of the 48th Meeting of the International Law Commission, A/CN.4/SR.48, 16 June 1950, p. 58.) *See also* Report of the International Law Commission on its Second Session, 5 June-29 July 1950, A/CN.4/34, Supp. No. 12, p. 377, para. 123. It should be noted that the Trial Chamber cites the Special Rapporteur's report to the General Assembly regarding the Nuremberg Principles, wherein the Special Rapporteur stated that the ILC was of the opinion that crimes against humanity could take place before a war "in connection with crimes of [sic] peace." (The Special Rapporteur actually stated that the ILC was of the opinion that crimes against humanity could take place before a war "in connection with crimes *against* peace.") This statement merely provides further support that a nexus with armed conflict was a requirement of the definition of crimes against humanity under customary international law in 1975-79. *See* Report of the International Law Commission to the General Assembly, A/1316, 5 June-29 July 1950, para. 123.

[87] Impugned Decision, para. 21.

[88] Pre-Trial Chamber Decision, para. 310, *citing* Draft Code of Offences Against the Peace and Security of Mankind, U.N. G.A. Res. 897(IX), 4 December 1954.

[89] Impugned Decision, para. 23.

[90] Summary Record of the 267th Meeting of the International Law Commission, A/CN.4/SR.267, 13 July 1954, paras. 42, 46, 52-54, 57. Notably, the proposal to delete the language requiring a nexus with armed conflict from the definition of crimes against humanity was adopted by a vote of 6 votes to 5, with 1 abstention (*id.*, p. 133, para. 59). *See* Summary Record of 90th Meeting of the International Law Commission, A/CN.4/SR.90, 28 May 1951, p. 70-71, paras. 138-39; Second Report on a Draft Code of Offences Against the Peace and Security of Mankind, Special Rapporteur, A/CN.4/44, 12 April 1951, p. 55-56. *See also* Matthew Lippman, *Crimes Against Humanity,* 17 B.C. THIRD WORLD L. J. 171, 232 (1997); Stuart Ford, *Crimes Against Humanity at the Extraordinary Chambers in the Courts of Cambodia: Is a Connection with Armed Conflict Required?*, 24 UCLA PAC. BASIN L. J. 125, 157 (2007) ("Ford"); Van Schaack, at 822.

law, and **b.** the progressive development of international law.[91] The drafting of a new code of offenses is an example of the ILC contributing to the progressive development of international law.[92] Thus, even if one could consider that a draft Code that had not been adopted by the UN General Assembly constituted "evidence of the considered view of experts in international criminal law from various interested states,"[93] the debate among State delegates indicates that in 1954 the status of the nexus requirement was not settled.

D. The Trial Chamber erred in finding that the 1948 Genocide Convention constitutes evidence of State practice and *opinio juris* regarding the nexus requirement [Impugned Decision, paras. 24-25]

42. The Trial Chamber found that the 1948 Genocide Convention and its negotiating history indicate that any nexus that may have existed after the Nuremberg Charter was "tenuous and rapidly eroding."[94] The Defence submits that the 1948 Genocide Convention does not demonstrate State practice and *opinio juris* in 1948 regarding the armed conflict nexus requirement under customary international law. Genocide and crimes against humanity are legally distinct crimes. The Pre-Trial Chamber agrees: the crime of genocide has "unequivocally departed from its crimes against humanity origins."[95]

43. First, genocide and crimes against humanity each have a distinct *mens rea*.[96] Second, in contrast with crimes against humanity, the definition of genocide does not require that the acts occur as part of a widespread or systematic attack against a civilian population.[97] Finally, the removal of the nexus requirement from the definition of genocide did not impact the definition of crimes against humanity.[98] Evidence of this is shown by the Nuremberg Principles, which retained a nexus with armed conflict in the definition of crimes against humanity and were formulated in 1950 – three years after drafting of the 1948 Genocide Convention began.[99]

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[91] Statute of the International Law Commission, Art. 15.
[92] *See* Draft Code of Offences Against the Peace and Security of Mankind – Report by J. Spiropoulos, Special Rapporteur, A/CN.4/25 (1950), p. 255, para. 2, noting that the Rapporteur was not codifying existing international law but, rather, engaging in a task of a more "speculative nature." *See also id.*, p. 257, para. 20, noting that the ILC had discussed the issue and concluded that the 1954 ILC Draft Code of Offences represented the "progressive development of international law."
[93] Impugned Decision, para. 23.
[94] *Id.*, para. 24.
[95] Pre-Trial Chamber Decision, para. 309.
[96] *See* Convention on the Prevention and Punishment of the Crime of Genocide, U.N.G.A. Res. 260(III), 9 December 1948 ("1948 Genocide Convention"), Art. 2: "In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such."
[97] *See* ICC Statute, Art. 7. *C.f.* 1948 Genocide Convention, Art. 2.
[98] Pre-Trial Chamber, para. 309. *See also* Orentlicher, at 2586, n. 216: "The Genocide Convention['s] … definition of the crime [of genocide] is not coextensive with crimes against humanity punished at Nuremberg."
[99] *See* Ford, at 152-53.

E. The Trial Chamber erred in finding that the 1968 Statute of Limitations Convention was significant evidence of State practice and *opinio juris* in 1968 [Impugned Decision, paras. 26-29]

44. The Trial Chamber found the views expressed by States during the negotiations of the 1968 Statute of Limitations Convention to be "significant in ascertaining *opinio juris* as of 1968 with regard to the armed conflict nexus."[100] The Trial Chamber also found that that there was significant support for excluding the armed conflict nexus requirement from the definition of crimes against humanity.[101] The Defence submits that the 1968 Statute of Limitations Convention cannot be said to qualify as general practice. The Pre-Trial Chamber agrees.[102]

45. The Trial Chamber erred in finding that there was significant support for the exclusion of the armed conflict nexus requirement from the 1968 Statute of Limitations Convention. When a draft definition was proposed based on the definition of crimes against humanity in the 1954 ILC Draft Code of Offences, six States, consisting mainly of the Soviet Bloc, endorsed the language, but did not explicitly mention the nexus requirement,[103] and one State noted the exclusion of the nexus requirement with approval.[104] A greater number of States criticized the draft definition as being "too vague, imprecise or expansive."[105] The UN General Assembly never voted on the draft definition.[106]

46. The Trial Chamber erred by finding that the 1968 Statute of Limitations Convention's failure to garner significant support from UN Member States was due to its inclusion of the crimes of apartheid and eviction by armed attack or occupation.[107] According to a scholar cited by the Trial Chamber, States voted against the 1968 Statute of Limitations Convention because they "regarded the defects of the convention as being so numerous

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[100] Impugned Decision, para. 29.
[101] *Id.*, para. 26.
[102] Pre-Trial Chamber Decision, para. 309: "While the Pre-Trial Chamber accepts that the practice of States need not be perfectly uniform to amount to general practice, it cannot be said that the 1968 Statute of Limitations Convention had passed a threshold level of acceptance in order to qualify as general practice."
[103] Ford, at 165, *citing* Question of Punishment of War Criminals and of Persons Who Have Committed Crimes Against Humanity, Report of the Secretary-General, A/71774, 21 August 1968, p. 6, 8, 36, 41, 43, 45.
[104] Ford, at 164-65, *citing* Question of Punishment of War Criminals and of Persons Who Have Committed Crimes Against Humanity, Report of the Secretary-General, A/71774, 21 August 1968, p. 15.
[105] Ford, at 165, *citing* Question of Punishment of War Criminals and of Persons Who Have Committed Crimes Against Humanity, Report of the Secretary-General, A/71774, 21 August 1968, p. 9, 14, 17, 20, 22-23, 26, 47; Question of Punishment of War Criminals and of Persons Who Have Committed Crimes Against Humanity, Note by the Secretary-General, A/7174/Add.2, 14 October 1968, p. 2; Question of Punishment of War Criminals and of Persons Who Have Committed Crimes Against Humanity, Note by the Secretary-General, A/7174/Add.3, 17 October 1968, p. 4.
[106] Ford, at 166.
[107] Impugned Decision, para. 29, *citing* Robert H. Miller, *The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, 65 AM. J. INT'L L. 477, 490-91 (1971) ("Miller"); Commission on Human Rights, Report of the Twenty-Third Session, 20 February 1967-23 March 1967, paras. 144-45.

and so fundamental in character that they could not support it," particularly because the 1968 Statute of Limitations Convention violated the principle of non-retroactivity.[108]

47. It is beyond cavil that the 1968 Statute of Limitations Convention did not have significant State support. It is "fundamentally a political document"[109] that gained support from less than half of the 126 UN Member States in existence at the time it was adopted and opened for signature.[110] By 17 April 1975, only 18 of a total of 134 UN Member States had signed, ratified or acceded to the 1968 Statute of Limitations Convention.[111] One additional UN Member State ratified the 1968 Statute of Limitations Convention during the ECCC's temporal jurisdiction.[112] The small number of UN Member States who signed, ratified or acceded to the Convention during the period of the ECCC's temporal jurisdiction is not evidence of "extensive and virtually uniform" State practice or a subjective belief by States that they were conforming to a legal obligation.[113]

F. The Trial Chamber erred in finding that the 1973 Apartheid Convention is indicative of State practice and *opinio juris* regarding the armed conflict nexus [Impugned Decision, para. 30]

48. The Trial Chamber found the 1973 Apartheid Convention was evidence of the status of the armed conflict nexus under customary international law.[114] The Defence submits that the 1973 Apartheid Convention is not indicative of State practice and *opinio juris* on this issue. The Pre-Trial Chamber agrees.[115]

49. The Trial Chamber erred in its analysis and findings regarding the 1973 Apartheid Convention. In regard to the drafting of the 1973 Apartheid Convention, the Trial Chamber referred to a statement from one delegate that the definition of crimes against humanity in the Nuremberg Charter and the Nuremberg Principles had not been expanded and, therefore, apartheid was not a crime against humanity in the legal sense. The Trial Chamber did not describe in any detail the substance of the negotiations leading up to the

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[108] Miller, at 500.
[109] Ford, at 160. *See also* Yoram Dinstein, *International Criminal Law*, 20 ISR. L. REV. 206, 232 (1985) ("Dinstein"): "The Convention is admittedly very controversial, because [Article I] needlessly defines crimes against humanity and does it in an arbitrary and tendentious way, its targets being less the criminal of the Second World War and more South Africa and Israel"; Natan Lerner, *The Convention on the Non-Applicability of Statutory Limitations to War Crimes*, 4 ISR. L. REV. 512, 525 (1969): "The fact that article I [defining war crimes and crimes against humanity] was adopted in the Third Committee by a vote of 59 to 12, with 27 abstentions, and by the joint working group by a vote of 8 to 2 with 5 abstentions, shows to what extent its text involves controversial issues with strong political implications."
[110] Miller, at 477-78. *See also* Goldenberg, at 50; Orentlicher, at 2591, n. 240.
[111] *See* Pre-Trial Chamber Decision, para. 309. *See also* IENG Sary Response, para. 28; IENG Sary Reply, para. 90.
[112] Pre-Trial Chamber Decision, para. 309.
[113] *See North Sea Continental Shelf Cases*, p. 43, para. 74; p. 44, para. 77.
[114] Impugned Decision, para. 30.
[115] Pre-Trial Chamber Decision, para. 309.

adoption of the 1973 Apartheid Convention. The Trial Chamber *merely pronounced without citing any legal authority or supporting documentation* that the delegate's view "was apparently rejected, as the 1973 Apartheid Convention was adopted on 30 November 1973."[116]

50. As with the 1968 Statute of Limitations Convention, the 1973 Apartheid Convention is a political document.[117] The crime of apartheid is an underlying act constituting a crime against humanity; it requires the intent by one racial group to establish and maintain domination over any other racial group and systemically oppress that group.[118] Aimed at the "practices of racial segregation and discrimination as practised in southern Africa,"[119] it was not signed, ratified or acceded to by a significant number of UN Member States during the ECCC's temporal jurisdiction.[120] The Pre-Trial Chamber found that by 17 April 1975 only 25 of a total of 134 UN Member States had signed, ratified or acceded to the 1973 Apartheid Convention.[121] By the time the 1973 Apartheid Convention entered into force on 18 July 1976, no Western countries had signed it.[122] This categorically indicates a lack of "extensive and virtually uniform" State practice and *opinio juris*[123] in assessing the status under customary international law from 1975-79 of the definition of crimes against humanity.[124] By 6 January 1979, only 48 UN Member States had signed, ratified or acceded to the 1973 Apartheid Convention.[125] The accession of Democratic Kampuchea in 1982, to which the Trial Chamber referred, is simply not material to the issue of the state of customary international law in 1975-79.[126]

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[116] Impugned Decision, para. 30.
[117] Ford, at 168-69. *See also* Dinstein, at 217.
[118] International Convention on the Suppression and Punishment of the Crime of Apartheid, U.N.G.A. Res. 3068(XXVII), 30 November 1973, Art. II ("1973 Apartheid Convention"). *See also* ICC Elements of Crimes (adopted 9 September 2002, entered into force 9 September 2002), Art. 7(1)(j).
[119] 1973 Apartheid Convention, Art. II.
[120] Pre-Trial Chamber Decision, para. 309.
[121] *Id.*
[122] IENG Sary Reply, para. 88.
[123] *See North Sea Continental Shelf Cases*, p. 43, para. 74.
[124] IENG Sary Reply, para. 88. *See also* Ford, at 169; Orentlicher, at 2591, n. 240.
[125] United Nations, *Multilateral Treaties Deposited with the Secretary-General Treaty Series* Database, "Status of Treaties", Chap. IV, 7. It should be noted that the Pre-Trial Chamber Decision states that 32 additional UN Member States signed, ratified or acceded to the Apartheid Convention during the ECCC's temporal jurisdiction. *See* Pre-Trial Chamber Decision, para. 309. This may be a counting error. For the purposes of this Appeal, the IENG Sary Defence conducted its own survey of the status of the Parties to the Apartheid Convention between 17 April 1975 and 6 January 1979 and calculated the number of additional UN Member States signing, ratifying or acceding to the Apartheid Convention during the relevant time period to be 23, rather than 32. Significantly, this calculation makes the Apartheid Convention an even less likely candidate to demonstrate sufficiently the status in customary international law from 1975-79 of the armed conflict nexus requirement.
[126] *See* Impugned Decision, para. 30.

G. The Trial Chamber erred in considering post-1979 developments in customary international law as material to the status of the armed conflict nexus from 1975-79 [Impugned Decision, paras. 31-32]

51. The Trial Chamber found that the ICTY Statute, the 1994 Statute for the International Criminal Tribunal for Rwanda ("ICTR") and the 2000 Statute for the Special Court for Sierra Leone indicate that the nexus with armed conflict "long ceased to be part of the definition of crimes against humanity."[127] The Defence submits that these authorities do not provide conclusive evidence that from 1975-79 customary international law did not require an armed conflict nexus in the definition of crimes against humanity. To the extent that it addressed these authorities, the Pre-Trial Chamber agrees.[128]

52. The Trial Chamber erred in finding that the definition of crimes against humanity contained within the ICTY Statute does not reflect customary international law. The definition of crimes against humanity in the ICTY Statute contains a nexus with armed conflict.[129] The *Tadić* Appeals Chamber held that the nexus requirement was a jurisdictional limitation specific to the ICTY and that the drafters of the Statute defined crimes against humanity more narrowly than was justified under customary international law.[130] The ICTY, however, has tended to be unencumbered in the exercise of its jurisdiction, adopting an "expansive approach"[131] that has resulted in definitions of international crimes that have "a somewhat emotive, *de lege ferenda* quality."[132] The

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[127] *Id.*, para. 31.
[128] Pre-Trial Chamber Decision, para. 307; Pre-Trial Chamber NUON Chea Decision, para. 143.
[129] ICTY Statute, Art. 5.
[130] *Tadić* Interlocutory Appeal, paras. 140-41.
[131] *See, e.g., Prosecutor v. Tadić,* IT-94-1-A, Judgement, 15 July 1999, paras. 185-234, in which the Appeals Chamber created the doctrine of joint criminal enterprise ("JCE") as a form of criminal liability. JCE has been the most controversial form of liability applied at the *ad hoc* Tribunals because it has been viewed as judge-made law not grounded in customary international law. *See* William A. Schabas, Mens Rea *and the International Criminal Tribunal for the Former Yugoslavia,* 37 NEW ENGLAND L. REV. 1015, 1033-34 (2002-2003): "Granted these two techniques [JCE and command responsibility] facilitate the conviction of individual villains who have apparently participated in serious violations of human rights. But they result in discounted convictions that inevitably diminish the didactic significance of the Tribunal's judgements and that compromise its historical legacy"; Ciara Damgaard, *The Joint Criminal Enterprise Doctrine: A "Monster Theory of Liability" or a Legitimate and Satisfactory Tool in the Prosecution of the Perpetrators of Core International Crimes?, in* INDIVIDUAL CRIMINAL RESPONSIBILITY FOR CORE INTERNATIONAL CRIMES 129 (Springer, 2008): [T]his doctrine raises a number of grave concerns. It, arguably, *inter alia* is imprecise, dilutes standards of proof, undermines the principle of individual criminal responsibility in favour of collective responsibility, infringes the nullum crimen sine lege principle and infringes the right of the accused to a fair trial."
[132] Susan Lamb, Nullum Crimen, Nulla Poena Sine Lege *in International Criminal Law, in* 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 743, 746 (Cassese, Gaeta, Jones, eds., 2002). In her discussion of the expansionist methods of the *ad hoc* Tribunals, Ms. Lamb cited Judge Meron, regarding the interpretation of international humanitarian law by tribunals. Judge Meron stated: "[Given the] tendency to ignore, for the most part, the availability of evidence of state practice (scant as it may have been) ... it may well be that, in reality, tribunals have been guided by, and are likely to continue to be guided, by the degree of offensiveness of certain acts to human dignity; the more heinous the act, the more likely the tribunal will assume that it violates not only a moral principle of humanity but also a positive norm of customary law." Theodor Meron, *The Geneva Conventions as Customary Law*, 81 AM. J. INT'L L. 348, 361 (1987).

Appeals Chamber's findings on the nexus issue are not conclusive evidence that the lack of a nexus requirement in the definition of crimes against humanity was "beyond any doubt" in 1993.

53. The ICTY was established to prosecute individuals for serious violations of international humanitarian law committed since 1991 in the territory of the former Yugoslavia.[133] The drafters of the ICTY Statute wanted to ensure that the principle of legality was respected; therefore, it was decided that the Statute would convey jurisdiction over only those parts of international humanitarian law that had become "beyond any doubt" a part of customary international law.[134] The four relevant sources of customary international law were determined to be the Geneva Conventions of 1949, the Hague Convention of 1907, the Genocide Convention, and the Nuremberg Charter.[135] The drafters of the ICTY Statute considered that it was "beyond any doubt" that under customary international law the definition of crimes against humanity included a nexus with armed conflict.[136]

54. The Trial Chamber erred in finding that the 1994 ICTR Statute, which omitted a nexus with armed conflict, constitutes evidence that a nexus is no longer part of the definition of crimes against humanity.[137] Professor Schabas has reasoned that the language of the Statute was considered by the UN Secretary-General to be "a departure from customary international law."[138] Unlike the ICTY Statute, which was drafted by the Secretary-General and sent to the Security Council with the legal bases for the Statute, the ICTR Statute was drafted by the UN Security Council alone.[139] There were objections to the approach taken by the Security Council, particularly with regard to the lack of participation of jurists in the drafting process,[140] and the inclusion within the ICTR's jurisdiction of international instruments regardless of whether they were part of customary international law.[141] Given the drafting history, the ICTR Statute cannot be considered as declarative of customary international law in 1994.

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[133] ICTY Statute, Art. 1.
[134] Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), S/25704, 3 May 1993, para. 33.
[135] *Id.*, para. 35.
[136] *See* WILLIAM A. SCHABAS, THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE 145 (Oxford University Press, 2010) ("SCHABAS"): "Without much doubt, those in the United Nations Secretariat who drafted [Article 5 of the ICTY Statute] believed that [a nexus to armed conflict] was imposed by customary international law, and that to prosecute crimes against humanity in the absence of armed conflict would violate the maxim *nullen crimen sine lege.*" *See also* Ford, at 175.
[137] Impugned Decision, para. 31.
[138] SCHABAS, at 145, *citing* Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955 (1994), S/1995/134, 13 February 1995 ("Report of the Secretary-General"), para. 12.
[139] Report of the Secretary-General, para. 9.
[140] *See* UN Security Council, 3453rd Meeting, S/PV.3453, 8 November 1994, p. 9. *See also* Ford, at 179, n. 299.
[141] *See* Report of the Secretary-General, para. 12.

55. The Trial Chamber erred in finding that the negotiations of the ICC Statute, and the final language of the ICC Statute, show "beyond doubt" that by 1998 crimes against humanity no longer required a nexus with armed conflict.[142] The debates leading up to the adoption of the ICC Statute militate against the Trial Chamber's claims; the debates demonstrate that the question was still not settled prior the adoption of the ICC Statute.[143] In its report to the UN General Assembly, the *Ad Hoc* Committee on the Establishment of an International Criminal Court noted the difference of opinions among members regarding the nexus requirement.[144] During the Rome Conference, "a significant number of delegations" argued vigorously that crimes against humanity required a nexus with armed conflict.[145] Although the ICC Statute was ultimately adopted without a nexus with armed conflict, the debate continued until the moment of its adoption.
56. Finally, the Trial Chamber erred in citing UN press releases as support for its findings.[146] Press releases cannot be considered as authoritative sources of customary international law.[147]

H. The Trial Chamber erred in failing to consider whether liability for crimes against humanity as it claims they were defined at the relevant time would have been foreseeable and accessible to Mr. IENG Sary in 1975-79

57. The Trial Chamber erred in failing to analyze foreseeability and accessibility. While crimes against humanity are provided for in the Establishment Law, they did not exist in Cambodian law in 1975-79. They existed in international law, but, as explained *supra*, the applicable definition of crimes against humanity in customary international law in 1975-79 required a nexus with armed conflict. Even assuming *arguendo* that customary international law by 1975-79 did not require a nexus with armed conflict, this definition must have been foreseeable and accessible to Mr. IENG Sary in 1975-79 before criminal liability can be applied. If liability was not foreseeable or accessible, the principle of

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[142] Impugned Decision, para. 32.
[143] *See also* Summary Record of the 3rd Meeting, UN Diplomatic Conference of Plenipotentaries on the Establishment of an International Criminal Court, A/CONF.183/C.1/SR.3, 20 November 1998.
[144] Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, A/50/22 (1995), p. 16, para. 79.
[145] Herman von Hebel & Darryl Robinson, *Crimes Within the Jurisdiction of the Court*, *in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS 92, (Roy S. Lee, ed., 1999): "[s]everal delegations of the Arab Group advanced [the] view [that a nexus was required], as did some other African and Asian delegations." *See also* SCHABAS, at 146, noting that two out of the five permanent members of the Security Council (China and Russia) favoured retaining the nexus with armed conflict; Van Schaack, at 844: "[A] consensus definition of crimes against humanity eluded drafters until the final days of the Diplomatic Conference. China, India, the Russian Federation and a number of states from the Middle East continued to support the retention of the war nexus requirement."
[146] *See* Impugned Decision, n. 72-74.
[147] *See Case concerning Military and Paramilitary Activities in Nicaragua, I.C.J. Reports 1986*, p. 98, paras. 185, 188-91; SHAW, at 82.

legality is violated if the definition of crimes against humanity that is now applied against Mr. IENG Sary excludes the nexus with armed conflict.

58. The foreseeability requirement will be met where an Accused is able to appreciate that the relevant conduct is criminal in the sense generally understood.[148] While judicial resolution may be instrumental in removing uncertainty and providing foreseeability,[149] such is not the case concerning the issue of the nexus requirement from 1975-79. Save for the cases of CCL 10, which, as demonstrated *supra*, raise more uncertainty than certainty, there is no clear body of jurisprudence from which a conclusion can be drawn that the lack of a nexus requirement in 1975-79 would have been foreseeable. Moreover, the inevitability of the resolution of uncertainty in a law is not tantamount to foreseeability. It is speculative at best to conclude that the eventual resolution of uncertainty in a law is likely, if not ineluctably, to result in the removal of an element of a crime. Neither Mr. IENG Sary nor an objective observer would or could have foreseen the way in which uncertainty concerning a nexus requirement would have been resolved, particularly when considering the disparate opinions and positions held by leading scholars, organizations and States, as indicated in the attached Annexes 2 and 3.[150] Even if the Supreme Court Chamber disagrees with the Defence's position that the nexus remained an element of crimes against humanity in 1975-79, and relies solely on the materials cited by the Trial Chamber for its analysis, the materials show that there was at least doubt as to whether crimes against humanity required a nexus with armed conflict from 1975-79. This doubt was not resolved until the adoption of the ICC Statute in 1998. It is unreasonable to find that Mr. IENG Sary or an objective observer could have generally understood at that time that he could be prosecuted for crimes against humanity committed outside of an armed conflict.

59. The accessibility requirement will be met where the applicable law is accessible to the Accused, even if it is a law based on custom.[151] Criminal liability for a definition of crimes against humanity that omitted an armed conflict nexus requirement would not have been accessible in 1975-79. It is not sufficient for the accessibility requirement that an Accused has information that certain acts may be criminal in a sense generally understood. The accessible definition of crimes against humanity in customary

[148] Pre-Trial Chamber Decision, para. 235; Pre-Trial Chamber Decision on JCE, para. 45.
[149] Request, para. 25, *citing S.W. v. United Kingdom*, Eur. Ct. H.R. 20166/92, Judgement of 22 November 1995, paras. 32-43.
[150] *See* Annex 2: Authority on State Practice in Relation to the Armed Conflict Nexus in Crimes Against Humanity (1868-Present); Annex 3: Commentary on the Armed Conflict Nexus in Crimes Against Humanity for commentary from scholars on the issue.
[151] Pre-Trial Chamber Decision, para. 235; Pre-Trial Chamber Decision on JCE, para. 45.

international law in 1975-79 included a nexus with armed conflict as a requisite element of the crime. At the very least, the status of the nexus requirement at the time was unclear and therefore it could not be considered accessible.

60. Foreseeability and accessibility cannot be established merely by an Accused having access to appropriate legal advice that assesses the direction of the law, as alleged by the OCP.[152] Rather, it must be determined whether there has been a "long and consistent stream" of international and domestic instruments and decisions regarding the status of the armed conflict nexus in customary international law from 1975-79.[153] State practice and *opinio juris* demonstrate that a nexus was required in 1975-79 or, at the very most, as the Pre-Trial Chamber held, the status of the nexus was in doubt. As the Pre-Trial Chamber found, "even if [the] instruments are judged by their combined effect, such that their inadequacies when judged individually are somehow reduced, it remains unclear precisely when severance" of the nexus requirement occurred in customary international law.[154] Where there is doubt as to the elements of crimes against humanity under customary international law from 1975-79, the fundamental principle of *in dubio pro reo* must be applied.

61. The Pre-Trial Chamber, upon determining that the status of the nexus requirement was unclear, properly applied the principle of *in dubio pro reo*.[155] The Trial Chamber, however, failed to refer to the principle at all in its findings, although the issue had been raised by the Parties.[156] The principle of *in dubio pro reo* is a fundamental principle of criminal law, recognized by the Cambodian Constitution,[157] the ECCC and international law. This principle does not apply solely to findings of fact;[158] rather, as the Supreme Court Chamber has found, it also applies to findings of law, subject to Civil Law rules of interpretation.[159] Article 22 of the ICC Statute – an

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[152] Request, n. 46.
[153] *Prosecutor v. Milutinović et al.*, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – *Joint Criminal Enterprise*, IT-99-37-AR.72, 21 May 2003, para. 41.
[154] Pre-Trial Chamber Decision, para. 310.
[155] *Id.*, para. 310: "[I]n the absence of clear State practice and *opinio juris*, this Chamber [remains] unable to identify the crucial tipping point between 1968 and 1984 when the transition occurred. According to the principle of *in dubio pro reo*, any ambiguity such as this must be resolved in the favour of the accused."
[156] *See* Request, paras. 27-32; IENG Sary Response, paras. 32-34; NUON Chea 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, E95/5, paras. 3, 7-14; IENG Thirith's Response to Co-Prosecutors' Request for the Trial Chamber to Amend the Definition of Crimes Against Humanity, 22 July 2011, E95/2, paras. 18-24.
[157] Constitution, Art. 38 (emphasis added): "*Any* case of doubt shall be resolved in favor of the accused."
[158] The OCP has erroneously made this argument in a previous filing. *See* Request, paras. 27-32.
[159] Decision on Immediate Appeal by KHIEU Samphan on Application for Immediate Release, 6 June 2011, E50/3/1/4, para. 31: "In so far as *in dubio pro reo* is applicable to dilemmas about the meaning of the law, it is limited to doubts that remain after interpretation. Therefore, *in dubio pro reo* is primarily applied to doubts about the content of a legal norm that remain after the application of the civil law rules of interpretation, that is,

authoritative source of international criminal law – affirms the applicability of *in dubio pro reo* to findings of law: "In case of ambiguity [as to the definition of a crime], the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted."[160] The Defence submits that, although the ICC Statute is treaty-based law not customary law, Article 22 constitutes international recognition and acceptance of the fundamental principles of legality and *in dubio pro reo*. Moreover, Article 22 affirms the application of *in dubio pro reo* to findings of law. As mandated by Cambodian and international law, any doubt as to the existence of the nexus requirement under customary international law in 1975-1979 *must* ultimately be resolved in favor of Mr. IENG Sary. In contrast to the Pre-Trial Chamber, which considered all authoritative sources in arriving at its Decision and determined that the ambiguity of the sources required the application of *in dubio pro reo*, the Trial Chamber failed comprehensively to analyze all authoritative sources in reaching the Impugned Decision. Had it done so, the Trial Chamber would have determined that the nexus existed in 1975-79 or, at the very least, that the status was ambiguous, in which case it should have applied the principle of *in dubio pro reo* to its legal findings.

VI. CONCLUSION AND RELIEF REQUESTED

62. The Trial Chamber's errors in interpreting the international instruments relevant to the nexus issue, and in failing to analyze foreseeability and accessibility or apply the principle of *in dubio pro reo*, invalidate the Impugned Decision. As a result, the Trial Chamber subjects Mr. IENG Sary to prosecution for a crime that lacks an element that existed under customary international law from 1975-79, in violation of the principle of legality. In case of doubt as to the status of the nexus requirement, the Trial Chamber should have applied the principle of *in dubio pro reo* and resolved the issue in favor of Mr. IENG Sary. The ECCC will not be judged by the number of convictions it enters, but by the fairness of its trials.[161] The Trial Chamber's result-determinative approach to

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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." *See also* IENG Sary Response, para. 33.

[160] ICC Statute, Art. 22: "1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court. 2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted. 3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute."

[161] *See Prosecutor v. Milošević*, IT-02-54-AR73.4, Dissenting Opinion of Judge David Hunt on Admissibility of Evidence in Chief in the Form of Written Statement, 21 October 2003, para. 22: "This Tribunal will not be judged by the number of convictions which it enters, or by the speed with which it concludes the Completion Strategy which the Security Council has endorsed, but by the fairness of its trials."

determining the nexus issue constitutes an "abandonment of the rule of law"[162] and a violation of its obligations under the Establishment Law, the Rules and the ICCPR to guarantee justice, fairness and due process of law.

WHEREFORE, for all the reasons stated herein, the Defence respectfully requests the Supreme Court Chamber to:

a. GRANT an oral, public hearing to address the issues raised in this Appeal; and
b. FIND and DECLARE that the current appeal is admissible under Rule 104(1), 104(4)(a), Rule 105(2), and Rule 21; and
c. GRANT the ground of appeal; and
d. ANNUL the Impugned Decision excluding the armed conflict nexus requirement from the definition of crimes against humanity to be applied in Case 002.

Respectfully submitted,

AVOCAT ATTORNEY AT LAW KINGDOM OF CAMBODIA

ANG Udom Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this **25th** day of **November, 2011**

[162] Susan Lamb, Nullum Crimen, Nulla Poena Sine Lege *in International Criminal Law*, *in* 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 743 (Cassese, Gaeta, Jones, eds., 2002), *citing* Bruce Broomhall, *Article 22:* Nullum Crimen Sine Lege, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 451 (Triffterer, ed., 1999).