



**អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា**

Extraordinary Chambers in the Courts of Cambodia

Chambres Extraordinaires au sein des Tribunaux Cambodgiens

**ព្រះរាជាណាចក្រកម្ពុជា  
ជាតិ សាសនា ព្រះមហាក្សត្រ**

Kingdom of Cambodia

Nation Religion King

Royaume du Cambodge

Nation Religion Roi

**អង្គជំនុំជម្រះសាលាដំបូង**

Trial Chamber

Chambre de première instance

សំណុំរឿងលេខ: ០០២/១៩ កញ្ញា ២០០៧/អវតក/អជសដ

Case File/Dossier No. 002/19-09-2007/ECCC/TC

**Before:**

**Judge NIL Nonn, President  
Judge Silvia CARTWRIGHT  
Judge YA Sokhan  
Judge Jean-Marc LAVERGNE  
Judge THOU Mony**

**Date:**

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**DECISION ON CO-PROSECUTORS' REQUEST TO EXCLUDE ARMED CONFLICT NEXUS  
REQUIREMENT FROM THE DEFINITION OF CRIMES AGAINST HUMANITY**

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## 1. INTRODUCTION

1. In the Closing Order of 16 September 2010, crimes against humanity were included without reference to any requirement that their underlying acts have a linkage or nexus to armed conflict.<sup>1</sup> The IENG Thirith Defence appealed this conclusion to the Pre-Trial Chamber, arguing that a nexus to armed conflict was part of the customary international law definition of crimes against humanity from 1975-1979.<sup>2</sup> In its 15 February 2011 Closing Order Decision, the Pre-Trial Chamber granted this ground of appeal, holding “it is not clear, as a matter of customary international law, whether the armed conflict nexus requirement was severed prior to, or during, the temporal jurisdiction of the ECCC.”<sup>3</sup> The Pre-Trial Chamber consequently maintained the charges for crimes against humanity in the Closing Order, while adding the requirement of a nexus between their underlying acts and an armed conflict.<sup>4</sup>

2. On 15 June 2011, the Chamber was seised of the Co-Prosecutor’s motion to exclude this armed conflict nexus requirement from the definition of crimes against humanity in the Amended Closing Order.<sup>5</sup> All Defence Teams oppose this motion.<sup>6</sup>

## 2. SUBMISSIONS

### 2.1. Admissibility

3. The Co-Prosecutors submit that the Trial Chamber has the competence and the obligation to correct the definition of crimes against humanity stated in the Amended Closing

<sup>1</sup> Closing Order, D427, 16 September 2010, paras 1350-1372.

<sup>2</sup> IENG Thirith Defence Appeal from the Closing Order, D427/2/1, 18 October 2010, paras 61-62.

<sup>3</sup> See Decision on Appeals by NUON Chea and IENG Thirith Against the Closing Order, Pre-Trial Chamber, D427/3/15, 15 February 2011, para. 137 (“PTC Decision on Appeals by NUON Chea and IENG Thirith”); Decision on IENG Sary’s Appeal Against the Closing Order, D427/1/30, 11 April 2011, para. 311.

<sup>4</sup> PTC Decision on Appeals by NUON Chea and IENG Thirith, para. 148.

<sup>5</sup> Co-Prosecutors’ Request for the Trial Chamber to Exclude the Armed Conflict Nexus Requirement from the Definition of Crimes Against Humanity (“Co-Prosecutors’ Motion”), E95, 15 June 2011; Closing Order, D427, 16 December 2010 (as amended by Decision on Appeals by NUON Chea and IENG Thirith Against the Closing Order, D427/3/15, 15 February 2011 and Decision on IENG Sary’s Appeal Against the Closing Order, D427/1/30, 11 April 2011)(“Amended Closing Order”).

<sup>6</sup> Defence Response to Co-Prosecutors’ Request for the Trial Chamber to Amend the Definition of Crimes Against Humanity (“IENG Thirith Response”), E95/2, 22 July 2011; Response to the Co-Prosecutors’ Request for the Trial Chamber to Exclude the Armed Conflict Nexus Requirement from the Definition of Crimes Against Humanity (“NUON Chea Response”), E95/5, 22 July 2011; *Réponse à la demande des co-procureurs par laquelle ils prient la chambre de première instance de supprimer le critère de rattachement avec un conflit armé dans la définition de crime contre l’humanité* (“KHIEU Samphan Response”), E95/3, 22 July 2011; 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 (“IENG Sary Response”), E95/4, 22 July 2011. The latter further seek a hearing on the issues raised in the Co-Prosecutor’s Motion; see IENG Sary Response, pp. 1, 15.

Order by excluding the armed conflict nexus requirement pursuant to Internal Rule 98(2).<sup>7</sup> The Accused in this case are on notice that the Trial Chamber may not consider the armed conflict nexus to be an element of crimes against humanity on the basis of the present motion, the fact that this issue was litigated at the pre-trial stage and as the Trial Chamber did not require an armed conflict nexus in Case 001.<sup>8</sup>

4. The IENG Thirith, KHIEU Samphan and IENG Sary Defence teams counter that the Co-Prosecutors' Motion is inadmissible on grounds that it constitutes a preliminary objection pursuant to Internal Rule 89(1)(a), for which the deadline had long passed.<sup>9</sup> Further, it amounts to a disguised attempt to appeal the Pre-Trial Chamber's Decision of 15 February 2011, which is not permitted under the Internal Rules.<sup>10</sup> The IENG Thirith and KHIEU Samphan Defence further submit that the Co-Prosecutors' Motion is inadmissible as Rule 98 pertains solely to the legal re-characterisation of facts and does not permit modification of the legal definition of the crimes over which the Trial Chamber has jurisdiction.<sup>11</sup>

5. In reply, the Co-Prosecutors submit that Rule 89 does not limit the Trial Chamber's ability to consider broader jurisdictional issues within a motion for re-characterisation.<sup>12</sup> Although acknowledging that the Pre-Trial Chamber's Decisions are not subject to appeal, those decisions do not bind the Trial Chamber and cannot prevent the Trial Chamber from exercising its own competence to consider legal issues that have previously been determined by the Pre-Trial Chamber.<sup>13</sup> The Chamber in addition has the inherent power to re-characterise the crimes in this case and a duty to ascertain and apply the relevant law. The Trial Chamber should exercise this duty by amending the definition of crimes against humanity to reflect the applicable law.<sup>14</sup>

<sup>7</sup> Co-Prosecutors' Motion, paras 6-8 (citing several cases from the European Court for Human Rights which show that re-characterisation of the crimes charged in an indictment is permitted so long as the accused is apprised of the possibility that the legal characterization of facts may be subject to change and has an opportunity to prepare a defence accordingly).

<sup>8</sup> Co-Prosecutors' Motion, para. 9.

<sup>9</sup> IENG Thirith Response, paras 4-9; KHIEU Samphan Response, paras 6-18; IENG Sary Response, paras 14-18.

<sup>10</sup> IENG Thirith Response, para. 9; KHIEU Samphan Response, paras 17-18; IENG Sary Response, paras 14-18.

<sup>11</sup> IENG Thirith Response, para. 10; KHIEU Samphan Response, paras 8, 10-11 (further arguing that Rule 98 is inapplicable as this rule grants power only to the Trial Chamber, and not the Co-Prosecutors, to change the legal characterisation of facts at the trial stage).

<sup>12</sup> Co-Prosecutors' Consolidated Reply to Defence Responses to Co-Prosecutor's Requests to Recharacterise Charges in the Indictment and to Exclude the Nexus Requirement for an Armed Conflict to Prove Crimes Against Humanity, E95/6, 11 August 2011 ("Consolidated Reply"), para. 16.

<sup>13</sup> Consolidated Reply, para. 24.

<sup>14</sup> Consolidated Reply paras 31, 33 and 38 (*iuris novit curia*; "the court knows the law").

## 2.2. Merits

6. The Co-Prosecutors note that the definition of crimes against humanity in Article 5 of the ECCC Law does not include a nexus with armed conflict.<sup>15</sup> This definition comports with the principle of legality because no nexus to armed conflict requirement existed in customary international law during the temporal jurisdiction of the ECCC.<sup>16</sup> Further, the Pre-Trial Chamber incorrectly resolved this issue by reference to a rule of interpretation that requires all doubts to be resolved in favour of the accused (*in dubio pro reo*). This rule of interpretation is inapplicable to the issue of whether the definition of crimes against humanity in 1975 contained an armed conflict nexus requirement.<sup>17</sup>

7. The IENG Sary Defence contest this interpretation of the state of customary international law at the relevant time based on the Nuremberg Charter's inclusion of a nexus to armed conflict<sup>18</sup> and its reading of the *Einsatzgruppen*, *Justice* and *Flick* cases.<sup>19</sup> The exclusion of the armed conflict nexus in the Genocide Convention is also immaterial because genocide and crimes against humanity are legally distinct.<sup>20</sup> Further, the Apartheid Convention does not support the exclusion of the armed conflict nexus by 1975 as this treaty had not been signed by any Western countries by the time it entered into force in July 1976.<sup>21</sup> The drafters of the 1954 ILC Draft Code recognized that the definition it adopted was not reflective of customary international law at the time, whilst the Statute of Limitations Convention was a political document that garnered support from less than half the members of the UN member states, and in any case only exempted apartheid and genocide from the

<sup>15</sup> Co-Prosecutors' Motion, para. 14.

<sup>16</sup> Co-Prosecutors' Motion, paras 16-26 (noting that the inclusion of the armed conflict nexus within the International Military Tribunal's Charter was merely a jurisdictional limitation, and the Control Council Law No. 10 ("CCL 10"), as well as the *Einsatzgruppen* and the *Justice* cases decided on this basis, allowed for prosecutions absent an armed conflict nexus. Further, the 1948 Genocide Convention (1948 Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277, Article 1 ("Genocide Convention")), the 1973 Apartheid Convention (1973 International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November 1973, 1015 UNTS 243, Article 1 ("Apartheid Convention")) and the 1968 Statute of Limitations Convention UNGA Res. 2391 (XXVIII) of 26 November 1968, Annex, Article I(b) ("Statute of Limitations Convention")) did not include the armed conflict nexus as a requirement within their respective definitions of crimes against humanity. Nor did the 1954 International Law Commission's Draft Code of Offenses Against the Peace and Security of Mankind, UN Doc. A/2693 (1954) ("1954 ILC Draft Code") define crimes against humanity as requiring a nexus to armed conflict.

<sup>17</sup> Co-Prosecutors' Motion, paras 27-32 (*in dubio pro reo*: "if in doubt, for the accused").

<sup>18</sup> IENG Sary Response, paras 21-22. The NUON Chea Defence adopts by reference the submissions of the IENG Sary and IENG Thirith Defence Teams; see NUON Chea Response, para. 4.

<sup>19</sup> IENG Sary Response, paras 23-24.

<sup>20</sup> IENG Sary Response, para. 26 (incorporating by reference IENG Sary's Reply to Co-Prosecutors' Joint Response to NUON Chea, IENG Sary and IENG Thirith's Appeals Against the Closing Order, D427/1/23, 6 December 2010, para. 88. ("IENG Sary's PTC Reply").

<sup>21</sup> IENG Sary PTC Reply, para. 88.

nexus requirement.<sup>22</sup> The KHIEU Samphan Defence submits that the negotiations leading up to the establishment of the International Criminal Court (“ICC”) from 1993 to 1998 support the conclusion that crimes against humanity retained an armed conflict nexus during the 1975-1979 period.<sup>23</sup> Reports of the International Law Commission and the *Ad Hoc* Committee on the Establishment of the ICC demonstrate that member states held different views on whether the definition of crimes against humanity required an armed conflict nexus at that time.<sup>24</sup> Each of the Defence teams contends that the principle of *in dubio pro reo* is an established principle of international law and should resolve the present issue in case of doubt.<sup>25</sup>

8. In reply, the Co-Prosecutors submit that the Nuremberg Principles represent only the principles of law applied by the Nuremberg Tribunal and do not necessarily reflect the state of customary law.<sup>26</sup> The fact that delegations expressed different views when the nexus to armed conflict was discussed in the negotiations leading up to the adoption of the ICC Statute is insufficient to alter the content of customary international law, which relies on consistency, rather than absolute uniformity, of state practice.<sup>27</sup> The 1954 ILC Draft Code provides “valuable evidence of the considered collective view of highly-qualified publicists as to state practice and *opinio juris* with regard to the armed conflict nexus issue.”<sup>28</sup> The number of parties to the Apartheid Convention is not a decisive factor, as state practice must also be taken into account.<sup>29</sup> The ECCC Law and the Agreement also provide “relevant evidence of the current views of United Nations member states, including Cambodia, and of distinguished scholars dedicated to the studying of the armed conflict nexus for crimes against humanity under customary international law at the relevant time.”<sup>30</sup>

<sup>22</sup> IENG Sary Response, paras 27-29; IENG Sary PTC Reply, para. 90 (further arguing that sources derived from national law, such as the 1950 Israeli Law defining crimes against humanity cited in the Co-Prosecutors Motion at para. 23 cannot be taken as declaratory of international customary law).

<sup>23</sup> KHIEU Samphan Response, para. 21.

<sup>24</sup> KHIEU Samphan Response, para. 22.

<sup>25</sup> IENG Thirith Response, paras 18-24; IENG Sary Response, paras 32-34; NUON Chea Response, paras 5-21.

<sup>26</sup> Consolidated Reply, paras 46-47 (noting the United Nations War Crimes Commission report, which concluded that crimes against humanity could occur in times of peace, but that the Nuremberg Charter limited the scope of the definition).

<sup>27</sup> Consolidated Reply para. 49.

<sup>28</sup> Consolidated Reply para. 57.

<sup>29</sup> Consolidated Reply paras 63-64 (further noting that the *travaux* of the Statute of Limitations Convention also suggest the primary objection to that convention was that it was not the appropriate vehicle to extend the categories of crimes against humanity rather than one of substance).

<sup>30</sup> Consolidated Reply para. 69.

### **3. FINDINGS**

#### **3.1. Admissibility**

9. The Trial Chamber has a duty to examine whether the acts committed by the Accused amount to a crime<sup>31</sup>, and to apply the correct law applicable at the time of the acts in question, in accordance with the principle of legality.<sup>32</sup> This determination falls squarely within the Trial Chamber's inherent powers. The Trial Chamber finds in consequence that it may at any time determine the applicable law in this case. This includes a determination of the elements of crimes contained in the Closing Order where necessary to accord with the correct state of the law and is subject only to the overriding requirements of a fair trial.<sup>33</sup> As the Co-Prosecutor's Motion has raised the issue of amendment of a threshold element of crimes against humanity before the commencement of the trial on the substance, there is accordingly no unfairness to the Accused in considering the Co-Prosecutor's motion at this time.<sup>34</sup>

#### **3.2. Nexus to Armed Conflict (Crimes Against Humanity)**

##### ***3.2.1. Introduction***

10. It is undisputed that a nexus to armed conflict is not currently an element of crimes against humanity within customary international law.<sup>35</sup> Nor does Article 5 of the ECCC Law include a nexus to armed conflict in its definition of crimes against humanity.<sup>36</sup> In order to

<sup>31</sup> See Internal Rule 98(3).

<sup>32</sup> See e.g., *Fisheries Jurisdiction*, Judgement, I.C.J. Reports 1974, p. 175 (“[i]t [is] the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed upon any of the parties, for the law lies within the judicial knowledge of the Court.”).

<sup>33</sup> In the specific ECCC context, this requires the Chamber to remain within the confines of the facts as pleaded in the Closing Order (see Internal Rule 98(2): “The judgment shall be limited to the facts set out in the Indictment. The Chamber may, however, change the legal characterisation of the crime as set out in the Indictment, as long as no new constitutive elements are introduced”).

<sup>34</sup> 001/18-07-2007-ECCC/TC, Judgement, E188, 26 July 2010 (“*Duch* Judgement”), paras. 501-503 (finding that re-characterisation did not breach the fair trial rights of the Accused as the Accused in that case was on notice that the issue of joint criminal enterprise was before the Chamber and that it intended to rule on the issue in the verdict).

<sup>35</sup> See e.g., 1998 Rome Statute, Article 7 (which does not include an armed conflict nexus in the definition of crimes against humanity). There are currently 139 signatories and 116 States Party to the Rome Statute; see also, ICTR Statute, Article 3; Statute of the Special Court for Sierra Leone, Article 2; *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ICTY Appeals Chamber (Case No. IT-94-1-A), 2 October 1995, para. 140 (“*Tadić* Interlocutory Appeal”).

<sup>36</sup> Article 5 of the ECCC Law provides: “The Extraordinary Chambers shall have the power to bring to trial all Suspects who committed crimes against humanity during the period 17 April 1975 to 6 January 1979. Crimes against humanity, which have no statute of limitations, are any acts committed as part of a widespread or systematic attack directed against any civilian population, on national, political, ethnical, racial or religious

comply with the principle of legality, the Chamber must nevertheless ascertain whether this absence of any nexus with armed conflict from the definition of crimes against humanity reflects the state of national or international law between 1975 and 1979.<sup>37</sup>

11. In the *Duch* Judgement, the Trial Chamber addressed this issue on its own motion, finding that the definition of crimes against humanity in customary international law did not require a nexus with armed conflict at the relevant time.<sup>38</sup> Although the Nuremberg Charter required a nexus with crimes against humanity, this nexus was not included in the 1945 Control Council Law No. 10. Further, the 1948 Genocide Convention, 1954 ILC Draft Code, 1968 Statute of Limitations Convention and 1973 Apartheid Convention all omitted a nexus with armed conflict in defining crimes against humanity. Finally, the Chamber cited ICTY case law, a decision by the European Court of Human Rights and the Report of the Group of Experts for Cambodia to show that any nexus requirement between crimes against humanity and armed conflict no longer formed part of customary international law by 1975.<sup>39</sup>

12. Having evaluated the content of customary international law at the relevant time, the Trial Chamber has found, for the reasons which follow, no basis to reconsider its ruling on this issue in Case 001.<sup>40</sup>

### 3.2.2. *Nuremberg Charter and Control Council Law No. 10*

13. The definition of crimes against humanity in the Nuremberg Charter required a nexus between crimes against humanity and any crime within the jurisdiction of the Tribunal (*i.e.* crimes against peace and war crimes). The language of the Nuremberg judgement is ambiguous as to whether the nexus requirement within the Nuremberg Charter was merely a jurisdictional limitation unique to the Nuremberg Charter or of more general application:

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grounds, such as: murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecutions on political, racial, and religious grounds; other inhumane acts.”

<sup>37</sup> *Duch* Judgement, para. 283.

<sup>38</sup> *Duch* Judgement, para. 291.

<sup>39</sup> *Duch* Judgement para. 292.

<sup>40</sup> The content of customary international law derives from the actual practice of states and *opinio juris*; see *North Sea Continental Shelf Cases* (1969), Judgment, ICJ, 20 February 1969, pp. 43-44, para. 74 (“State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved. [...] Not only must the acts concerned amount to a settled practice, but 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 [*opinio juris*]”). Relevant sources of customary international law include conventions and treaties, statements of delegates during the negotiation of treaties, and the case law of international tribunals; see *e.g.*, *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, Judgment, ICJ, 27 June 1986, (ICJ Reports 1986), pp. 98-101, paras. 185-191.

To constitute Crimes against Humanity, the acts relied on before the outbreak of the war must have been in execution of, or in connection with, any crime within the jurisdiction of the Tribunal. The Tribunal is of the opinion that revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connection with, any such crime. The Tribunal therefore cannot make a general declaration that the acts before 1939 were Crimes against Humanity *within the meaning of the Charter*, but from the beginning of the war in 1939, War Crimes were committed on a vast scale, *which were also Crimes against Humanity*; and insofar as the inhumane acts charged in the Indictment, and committed after the beginning of the war, did not constitute War Crimes, they were all committed in execution of, or in connection with, the aggressive war, and therefore constituted Crimes against Humanity<sup>41</sup> (emphasis added).

14. According to the Indictment, the first act of aggressive war occurred on 1 September 1939.<sup>42</sup> Therefore, the Tribunal held that only crimes against humanity committed after the first act of aggressive war in 1939 were in execution of or in connection with it. In concluding that acts before the initiation of hostilities in 1939 did not constitute crimes against humanity within the meaning of the Nuremberg Charter, the Tribunal appeared to limit itself strictly to the language of the Charter. It did not evaluate the content of customary international law that may have existed outside these confines.<sup>43</sup>

15. Control Council Law No. 10 removed the limitation that crimes against humanity be committed in connection with any crime within the jurisdiction of the Tribunal (namely crimes against peace or war crimes).<sup>44</sup> 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.<sup>45</sup> In *United States v. Flick*, the Tribunal considered that the London Agreement and by extension the Nuremberg Charter, were incorporated by reference into CCL 10<sup>46</sup> and noted that the Nuremberg Tribunal "declined to take jurisdiction of crimes against humanity occurring before 1 September 1939."<sup>47</sup> It reasoned that "implicit in [...] this chartering legislation is the purpose to provide for punishment of crimes committed during

<sup>41</sup> Trials of the Major War Criminals before the International Military Tribunal, Vol. 22, 30 September 1946 ("Nuremberg Judgement"), p. 498.

<sup>42</sup> Nuremberg Judgement, p. 427.

<sup>43</sup> The Trial Chamber notes that Article 5(c) of the Charter of the International Military Tribunal for the Far East ("IMTFE") contained a similar definition of crimes against humanity.

<sup>44</sup> Control Council Law No. 10 on the Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 December 1945, art. II(1)(c).

<sup>45</sup> *Flick and Others Case*, Judgment 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*"), pp. 1212-13; *Ohlendorf and Others Case (Einsatzgruppen Trial)*, Judgment of 8-9 April 1948, reprinted in *Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10*, Vol. IV ("*Ohlendorf and Others Case*") p. 499.

<sup>46</sup> *Flick and Others Case*, pp. 1212-13.

<sup>47</sup> *Flick and Others Case*, pp. 1212-13.



the war or in connection with the war [...]. To try war crimes is a task so large, as the numerous prosecutions prove, that there is neither necessity nor excuse for expecting this Tribunal to try persons for offences wholly unconnected with the war.”<sup>48</sup> In consequence, it dismissed charges of crimes against humanity on grounds that the alleged crimes took place prior to the war.

16. Similar treatment of the armed conflict limitation in the Nuremberg Charter occurred in the *Einsatzgruppen* case, where the Tribunal noted:

The International Military Tribunal, operating under the London Charter, declared that the Charter’s provisions limited the Tribunal to consider only *those crimes against humanity* which were committed in the execution of or in connection with crimes against peace and war crimes. The Allied Control Council, in its Law No. 10, removed this limitation so that *the present Tribunal has jurisdiction to try all crimes against humanity as long known and understood under the general principles of criminal law*<sup>49</sup> (emphasis added).

17. Again, in stating that the Charter only contemplated certain crimes against humanity (*i.e.* those committed during the war), the Tribunal appeared to recognize that crimes against humanity existed independently of the Nuremberg Charter, where their definition may not be similarly confined. However, two other CCL 10 cases appear to have viewed the armed conflict nexus as part of the general definition of crimes against humanity and not merely a specific jurisdictional limitation. In the *Justice* case, the Tribunal stated:

The evidence to be later reviewed establishes that certain inhumane acts charged in count three of the indictment 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, but it must be noted that C. C. Law 10 differs materially from the Charter. The latter defines crimes against humanity as inhumane acts, etc., committed, "in execution of, or in connection with, any crime within the jurisdiction of the tribunal", whereas in C. C. Law 10 the words last quoted are deliberately omitted from the definition<sup>50</sup> (emphasis added).

18. The Tribunal in the *Justice* case appeared to view the armed conflict nexus as a feature of the Nuremberg Charter and possibly also as a universal element of crimes against humanity. Its acknowledgment of the removal of the war nexus requirement from CCL 10 nonetheless indicates that the Tribunal recognized that the Nuremberg Charter definition of

<sup>48</sup> *Flick and Others Case*, p. 1213 (concluding that “[w]e can see no purpose nor mandate in the chartering legislation of this Tribunal requiring it to take jurisdiction of such cases”).

<sup>49</sup> *Ohlendorf and Others Case*, p. 499.

<sup>50</sup> *Alstoetter and Others Case (Justice Trial)*, Judgment of 3-4 December 1947, reprinted in *Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10*, Vol. III, p. 974.

crimes against humanity was not the only acceptable definition of crimes against humanity in existence at that time.

19. In the *Ministries* case, the Tribunal noted that its jurisdiction was limited by reference to the Nuremberg Charter, stating that a broader interpretation of its jurisdiction pursuant to CCL 10 to include jurisdiction over crimes whenever and wherever committed could not be presumed.<sup>51</sup> It held that the Nuremberg Charter was an expression of international law existing at the time of its creation, whereas CCL 10 unjustifiably expanded the international law definition of crimes against humanity to include crimes perpetrated against German nationals and without a nexus to armed conflict. The *Ministries* Tribunal thus considered that it lacked jurisdiction over crimes against humanity that did not have a nexus to armed conflict.<sup>52</sup>

20. There was accordingly no consistency among the CCL 10 cases as to whether the armed conflict nexus was a jurisdictional limitation particular to the Nuremberg Charter or instead part of the definition of crimes against humanity within general international law.<sup>53</sup> The notion that crimes against humanity may have been independent of armed conflict was nevertheless live from the inception of crimes against humanity within positive law. A number of subsequent authorities have interpreted the armed conflict nexus in the Nuremberg Charter to be a jurisdictional limitation specific to that instrument, or at least that any required nexus to crimes against humanity ceased soon afterwards and in any case prior to 1975.<sup>54</sup>

<sup>51</sup> *Ernst von Weizsaecker and Others Case (Ministries Trial)*, 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, p. 112 (“*Ministries Case*”), pp. 115-117 (finding that crimes perpetrated against German nationals were not crimes against international law because they were not perpetrated in connection with a crime against peace or war crime).

<sup>52</sup> *Ministries Case*, p. 116 (“In holding that crimes here defined as crimes against humanity as perpetrated against German nationals were not, when committed, crimes against international law, there being no claim that such crimes were perpetrated in connection with crimes against peace or war crimes, we are not losing sight of the fact that the[se] charges [...] accuse defendants of having been [...] responsible for the perpetration against humanity of the most extensive programs of cruelty and persecution ever recorded in the annals of mankind”).

<sup>53</sup> See also, Law Reports of the Trials of War Criminals, the United Nations War Crimes Commission, Vol. IX, p. 45 (1949) and Vol. XV, pp. 136-137 (1949) (concluding that the *Flick*, *Justice*, and *Einsatzgruppen* cases left the issue of the existence of an armed conflict nexus undecided).

<sup>54</sup> See e.g., *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”); United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (1948), pp. 192-93; See UN Doc. A/CONF.183/C.1/SR.3 (“Summary Record of the 3<sup>rd</sup> Meeting, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court” dated 20 November 1998), 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” (comments of delegate of the United Kingdom)); Theodor Meron, Editorial Comment, *War Crimes in Yugoslavia and the Development of International Law*, 88 AM. J. INT’L L. 78, 85 (1994) (“the Nuremberg Tribunal did not consider crimes committed before the war to be crimes against

### 3.2.3. 1954 ILC Draft Code

21. The notion that the Nuremberg Charter's armed conflict nexus requirement was a jurisdictional limitation specific to that instrument rather than integral to the concept of a crime against humanity is also consistent with the work of the International Law Commission ("ILC") on the definition of crimes against humanity.

22. In 1950, the ILC set forth the definition of crimes against humanity applied in the Nuremberg Charter, including the nexus with armed conflict.<sup>55</sup> Although 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, the Special Rapporteur of the ILC in his report to the General Assembly in 1950 nonetheless stated that "the Commission is of the opinion that such crimes [against humanity] may take place also before a war in connection with crimes of peace".<sup>56</sup>

23. In 1954, the ILC proposed a draft code, which included a definition of crimes against humanity consistent with the Special Rapporteur's 1950 report to the General Assembly, excluding a nexus to armed conflict requirement.<sup>57</sup> While this definition was ultimately not adopted by the UN General Assembly, it is evidence of the considered view of experts in international criminal law from various interested states at the time.

### 3.2.4. 1948 Genocide Convention

24. The definition of genocide in the 1948 Genocide Convention and the negotiating history of this treaty further show that any armed conflict nexus that may have existed after Nuremberg was tenuous and rapidly eroding. The 1948 Genocide Convention was adopted by

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humanity, [but] it may have been guided by jurisdictional considerations and not necessarily by a conceptually narrow definition of crimes against humanity"); Roger S. Clark, "Crimes Against Humanity at Nuremberg", in *The Nuremberg Trial and International Law* (Ginsburgs and Kudriavtsev (eds.), 1990) 177, 195 ("what [the Nuremberg Tribunal] was concerned with was both a much narrower question as to its own jurisdiction and a question as to what had been proved in respect of the relationship between pre-1939 offenses and aggressive war"); see also, *Korbely v. Hungary*, Judgement, ECtHR Grand Chamber (no. 9174/02), 19 September 2008, para. 82; UN Doc. A/53/850-S/1999/231, Annex ("Report of the Group of Experts for Cambodia established pursuant to General Assembly Resolution 52/135" dated 18 February 1999), para. 71).

<sup>55</sup> Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, Principle VI (c) adopted by the UN General Assembly, Affirmation of Principles of International Law Recognized by the Charter of the Nürnberg Tribunal, UNGA Res. 93(I) of 11 December 1946.

<sup>56</sup> "Report of the International Law Commission to the General Assembly on the work of its second session" dated 5 June–29 July 1950 (Official Records of the General Assembly, 5th Session, Supplement No. 12, reproduced in Yearbook of the International Law Commission: 1950, Vol. II), UN Doc. A/1316, para. 123.

<sup>57</sup> "International Law Commission Draft Code of Offenses against the Peace and Security of Mankind", UN Doc. A/2693 (1954).

unanimous vote and does not include any nexus to armed conflict requirement.<sup>58</sup> During the debate of the draft convention in 1948, the Greek delegate stated that the Nuremberg Charter had included crimes against humanity committed in times of peace and that genocide constituted a particular category of crimes against humanity.<sup>59</sup> Further, the proposal during the debate to insert the language “whether committed in time of peace or of war” was readily adopted.<sup>60</sup>

25. The Chamber considers that the explicit removal of the armed conflict nexus from the definition of genocide is consistent with the progression of customary international law with regard to all crimes against humanity.

### 3.2.5. 1968 Statute of Limitations Convention

26. Although certain states expressed a contrary view, there was significant support for explicitly redefining crimes against humanity as excluding any requirement of a nexus to armed conflict within the 1968 Statute of Limitations Convention.

27. The question of whether this Convention was the appropriate occasion to redefine war crimes and crimes against humanity proved controversial during its negotiation.<sup>61</sup> Some states considered that the task of defining crimes should be left to other bodies, whereas other states considered this Convention to be an opportunity to bring the definition of war crimes and crimes against humanity up to date.<sup>62</sup> Ultimately, the 1968 Statute of Limitations Convention was expanded to include reference to the crimes against humanity of apartheid and eviction by armed force. The definition in the Convention removed the armed conflict nexus, providing that “[n]o statutory limitation shall apply to the following crimes, irrespective of the date of their commission: Crimes against humanity whether committed in time of war or in

<sup>58</sup> See Genocide Convention, Article 1 (“[G]enocide, whether committed in time of peace or in time of war, is a crime under international law which [the Contracting Parties] undertake to prevent and to punish”).

<sup>59</sup> Schabas, pp. 81, 87-88 (“Several States feared [that inclusion of reference to Nuremberg judgement in the preamble to the Genocide Convention] would confuse genocide with crimes against humanity, and consequently limit the concept, because crimes against humanity had received a relatively restrictive interpretation at Nuremberg, notably in the requirement that they be committed in relation to armed conflict”).

<sup>60</sup> William A. Schabas, *Genocide in International Law* (Cambridge 2009 (2<sup>nd</sup> ed.) (“Schabas”), p. 81.

<sup>61</sup> Robert H. Miller, *The Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, 65 AM. J. INT’L LAW (1971) (“Miller”) 476, 485.

<sup>62</sup> Miller, p. 485

time of peace as they are defined in the Charter of the International Military Tribunal, Nürnberg, of 8 August 1945.”<sup>63</sup>

28. This Convention accordingly also clarified that crimes against humanity could be perpetrated in time of peace. Furthermore, each of the definitions of crimes against humanity considered by the Working Group dispensed with the armed conflict nexus, showing a consensus among the members of the Working Group that the armed conflict nexus was no longer a part of international law, if indeed it ever was.<sup>64</sup>

29. Although the Statute of Limitations Convention did not garner significant support, the opposition to this Convention was largely based on its inclusion of the crimes of apartheid and eviction by armed attack or occupation.<sup>65</sup> The Trial Chamber considers the views expressed by states as to its definition of crimes against humanity to be significant in ascertaining *opinio juris* as of 1968 with regard to the armed conflict nexus.

### 3.2.6. 1973 Apartheid Convention

30. The Apartheid Convention also defines the crime against humanity of apartheid without any reference to armed conflict.<sup>66</sup> During the debates leading up to the adoption of this Convention, the United Kingdom delegate stated that the Nuremberg Charter and the Nuremberg Principles had set forth a definition of crimes against humanity that had not been subsequently expanded. She therefore suggested that apartheid did not constitute a crime against humanity in the strictly legal sense and that it was wrong to alter the existing definition to fit a particular situation.<sup>67</sup> This view was apparently rejected, as the Convention

<sup>63</sup> Statute of Limitations Convention, Article 1(b).

<sup>64</sup> Commission on Human Rights, Report of the Twenty-Third Session, 20 February 1967-23 March 1967, pp. 45-46.

<sup>65</sup> Miller, pp. 490-91; *see also*, Commission on Human Rights, Report of the Twenty-Third Session, 20 February 1967-23 March 1967, paras 144-145 (debate of the Human Rights Commission on a draft of the Statute of Limitations Convention, during which some representatives were of the opinion that the draft definition of crimes against humanity was too narrow in scope by making reference to the Nuremberg Charter. Other representatives stated that the concept of crimes against humanity had already been developed at Nuremberg and that certain offenses that were punishable irrespective of a connection to crimes against peace or war crimes were defined in the Genocide Convention and some of the Geneva Conventions. These latter representatives were nonetheless of the view that each State could apply existing international law to punish crimes against humanity unconnected with a state of war. There was no vote taken on this issue).

<sup>66</sup> Articles I and II, International Convention on the Suppression and Punishment of the Crime of Apartheid, UNGA Res. 3068 (XXVIII), 30 November 1973 (adopted on 30 November 1973). Democratic Kampuchea acceded to the convention on 28 July 1981 (*see* United Nations Treaty Collection, Chapter IV (7) International Convention on the Suppression and Punishment of the Crime of Apartheid, Status of Treaties).

<sup>67</sup> UN Doc. A/C.3/SR.1863, Third Committee, 1859<sup>th</sup> Meeting, 9 November 1971, p. 249.

was adopted on 30 November 1973.<sup>68</sup> Democratic Kampuchea subsequently deposited its accession to the Apartheid Convention, signed by IENG Sary, on 28 July 1981.<sup>69</sup>

### 3.2.7. *Post-1979 developments*

31. Later developments in international criminal law are consistent with the conclusion that the armed conflict nexus had long ceased to be part of the definition of crimes against humanity by the time of the creation of the *ad hoc* Tribunals. For instance, while the 1993 ICTY Statute does include an armed conflict nexus requirement within the chapeau of its definition of crimes against humanity, the ICTY Appeals Chamber has stressed that this is a feature of the ICTY Statute not found in customary international law.<sup>70</sup> Moreover, the 1994 ICTR Statute and the 2000 Statute of the Special Court for Sierra Leone omit any nexus with armed conflict in the definition of crimes against humanity applicable before these tribunals.<sup>71</sup>

32. During the first session of the Preparatory Committee for the creation of the International Criminal Court, there was a general consensus that crimes against humanity need not be limited to actions during times of war.<sup>72</sup> However, the delegates from China and the Russian Federation expressed the view that the nexus with armed conflict was necessary.<sup>73</sup> The summary of the Preparatory Committee's first session reported that several delegations expressed the view that crimes against humanity need not be associated with military conflict, while others called for such a nexus.<sup>74</sup> Although during the Rome Conference on 17 June 1998, several delegates also expressed the view that crimes against humanity required an armed conflict nexus, the Rome Statute was ultimately adopted without any reference to the

<sup>68</sup> UNGA Res. 3068 (XXVIII), 30 November 1973 (International Convention on the Suppression and Punishment of the Crime of Apartheid).

<sup>69</sup> United Nations Treaty Collection, Chapter IV (7) International Convention on the Suppression and Punishment of the Crime of Apartheid, Status of Treaties; *Adhesion du Kampuchea Democratique à la convention internationale sur l'élimination et la repression du crime d'apartheid*, 29 June 1981 (on file with the Trial Chamber).

<sup>70</sup> ICTY Statute, Article 5; *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ICTY Appeals Chamber (Case No. IT-94-1-A), para. 140; *see also, Prosecutor v. Tadić*, Judgement, ICTY Appeals Chamber (Case No. IT-94-1-A), 15 July 1999, para. 251 ("The armed conflict requirement is satisfied by proof that there was an armed conflict; that is all that the Statute requires, and in so doing, it requires more than does customary international law").

<sup>71</sup> ICTR Statute, Article 3; SCSL Statute, Article 2.

<sup>72</sup> "Preparatory Committee For Establishment of International Criminal Court Discusses Definitions of 'Genocide,' 'Crimes Against Humanity'" (UN Press Release dated 25 March 1996), UN Doc. L/2762.

<sup>73</sup> "Crimes Against Humanity Must Be Precisely Defined Say Speakers in Preparatory Committee For International Court" (UN Press Release dated 26 March 1996), UN Doc. L/2763/Rev.1.

<sup>74</sup> "Preparatory Committee on International Criminal Court Concludes First Session" (UN Press Release dated 12 April 1996), UN Doc. L/2787, p. 4.

nexus requirement.<sup>75</sup> It is therefore beyond doubt that crimes against humanity had shed any reference to an armed conflict nexus requirement by 1998.

### 3.2.8. Conclusion

33. Having reviewed the pertinent state practice and *opinio juris* between 1945 and 1975, the Trial Chamber concludes that from the earliest inception of crimes against humanity within the Nuremberg Charter and CCL 10, there was already a significant tendency to delink these crimes from armed conflict. This tendency to view crimes against humanity as grave international crimes not inherently connected to armed conflict gained momentum in the aftermath of the Nuremberg era and constituted settled law by 1975. The Trial Chamber therefore affirms its earlier finding in Case 001 that the armed conflict nexus was not part of the definition of crimes against humanity within customary international law between 1975-1979.

#### FOR THE FOREGOING REASONS, THE TRIAL CHAMBER:

**DECLARES** the Co-Prosecutors' request that the Trial Chamber exclude the nexus to armed conflict requirement from the definition of crimes against humanity to be admissible;

**FINDS AND DECLARES** 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;

**GRANTS** therefore the Co-Prosecutor's request and excludes the armed conflict nexus requirement from the definition of crimes against humanity to be applied in Case 002;

**DENIES** in consequence IENG Sary's Motion for an oral hearing on this matter. *Rf gs*



Phnom Penh, 26 October 2011  
President of the Trial Chamber

*Nil Nonn*  
**Nil Nonn**

<sup>75</sup> "United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Summary Record of the 3<sup>rd</sup> Meeting" dated 20 November 1998, UN Doc. A/CONF.183/C.1/SR.3 ("There was a difference of opinion as to whether there should be a nexus between crimes against humanity and armed conflict, and some delegations also wished to limit 'armed conflict' to international armed conflict" (concluding statement of Chairman)); *see also*, W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford 2010), pp. 146-47 (noting that during the Rome Conference, a handful of delegates took the view that crimes against humanity could not be committed in peacetime). The chapeau requirements of Article 7 of the ICC Statute as ultimately adopted read: "For the purposes of this Statute, 'crimes against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: ...".