E95/3

BEFORE THE TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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

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Before:

The Trial Chamber

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

Co-Prosecutors

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MAY IT PLEASE THE TRIAL CHAMBER

1. On 13 January 2011, the Pre-Trial Chamber amended the Closing Order[1], *inter alia,* by adding the "existence of a nexus between the underlying acts and the armed conflict" to the "Chapeau" requirements in Chapter IV(A) of Part Three of the Closing Order.[2]

2. Pursuant to Internal Rule 89, the parties were invited to raise their preliminary objections concerning the jurisdiction of the Chamber "no later than thirty (30) days after the Closing Order becomes final." Mr KHIEU Samphan filed his preliminary objections on 14 February 2011.[3]

3. On 15 June 2011, the Co-Prosecutors requested the Trial Chamber to exclude the armed conflict nexus requirement from the definition of crimes against humanity.[4] The Chamber granted the Defence teams and the Civil Parties until 22 July 2011 to respond.[5]

4. On 24 June 2011, Mr IENG Sary requested the Trial Chamber to issue an expedited decision as to whether the Co-Prosecutors' Request (amongst others) could be raised at this stage of the proceedings.[6]

5. To date, the Chamber has not yet disposed of Mr IENG Sary's Request.

I – Inadmissibility of the Co-Prosecutors' Request

6. The Co-Prosecutors' Request is inadmissible and should therefore be rejected *in limine.* The Request was filed "pursuant to Internal Rules 92 and 98 (2)",[7] which are not applicable, unlike Rule 89, pursuant to which the Co-Prosecutors are estopped from proceeding.

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[1] Closing Order, 16 September 2010, D427.
[2] Decision on Khieu Samphan's Appeal against the Closing Order ("Decision of 13 January 2011"), D427/4/14.
[3] Preliminary Objections Concerning Jurisdiction ("Preliminary Objections"), 14 February 2011, E46.
[4] Co-Prosecutors' Request for the Trial Chamber to Exclude the Armed Conflict Nexus Requirement from the Definition of Crimes Against Humanity ("Co-Prosecutors' Request"), 15 June 2011, E95. Notification on 16 June 2011 at 10:48 a.m. Translation requested on 16 June 2011 at 10:53 a.m. for 22 June 2011 and notified on 24 June 2011.
[5] Decision on Extension of Time, 7 July 2011, E107.
[6] Ieng Sary's Request for an Expedited Decision as to Whether the OCP May Raise Requests for Re-Characterization at this Stage in the Proceedings & Request for Extension of Time to Respond to Such Requests, Should Responses Be Necessary, 24 June 2011, E103. See procedural background to Mr IENG Sary's numerous requests to this effect.
[7] Co-Prosecutors' Request, para. 1.

7. Rule 98, entitled "The Judgment", provides no legal basis for the admissibility of the Co-Prosecutors' Request. Rule 98 states in relevant parts:

> "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. (...)
>
> 3. The Chamber shall examine whether the acts amount to a crime falling within the jurisdiction of the ECCC, and whether the Accused has committed those acts.
>
> (...)
>
> 7. Where the Chamber considers that the crimes set out in the Indictment do not fall within the jurisdiction of the ECCC, it shall decide that it does not have jurisdiction in the case."

8. Paragraph 2 permits the Trial Chamber, and not the Co-Prosecutors, to change the legal characterisation of facts at the trial stage "as long as no new constitutive elements are introduced". In the Judgment in Case 001, the Trial Chamber considered that this proviso is a reiteration of "this well-established limitation, namely that any re-characterisation must not go beyond the facts set out in the charging document".[8] It added: "The ICC's Regulations of the Court similarly permit its Trial Chambers to change the legal characterisation of facts following the start of the trial proceedings".[9]

9. Regulation 55 of the ICC Regulations, which is cited in reference, states in relevant parts:

> "1. **In its decision under Article 74**, the Chamber may change the legal characterisation of facts to **accord with the crimes** under articles (...), without exceeding the facts and circumstances described in the charges and any amendments to the charges.
>
> 2. If, at any time during the **trial**, it appears to the Chamber that the legal characterisation of facts may be subject to change, the Chamber shall give notice to the participants of such a possibility and **having heard the evidence**, shall, at an appropriate stage of the proceedings, give the participants the opportunity to make oral or written submissions (...)."[10].

10. It is abundantly clear from a reading of Internal Rule 98, Regulation 55 of the ICC Regulations and Article 74 of the ICC Statute that it is permissible for the Chamber to re-characterise facts during the trial on the merits. Legal re-characterisation of facts while evidence is being heard makes it possible to **accord** the facts with a more appropriate

[8] Duch Judgment, 26 July 2010, E188, para. 494.
[9] Duch Judgment, para. 495 (emphasis added).
[10] Article 74(2) of the Rome Statute ("Requirements for the Decision") provides: "The Trial Chamber's decision shall be based on its evaluation of the evidence and the entire proceedings. The decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges. The Court may base its decision only on evidence submitted and discussed before it at the trial."

characterisation, it being understood, of course, that the more appropriate legal characterisation is provided by law and is within the jurisdiction of the court, otherwise the Chamber must purely and simply decline jurisdiction.

11. Legal re-characterisation of facts is the process by which the court re-categorises an act or a fact under its proper characterisation; it is not a process by which the court can change the legal definition of crimes, over which it has jurisdiction.

12. Yet, it is precisely this latter process that the Co-Prosecutors are asking the Trial Chamber to undertake in their Request. By asking the Chamber to exclude the armed conflict nexus requirement from the definition of crimes against humanity, what they are actually seeking is for the Chamber to determine **the law applicable before** the ECCC.

13. Rule 98(2) is therefore not applicable in this instance, and neither is Rule 92.[11] However, there is a specific provision under which the parties may request the Chamber to change the legal definition of the crimes set out in the amended Indictment, in other words, the law applicable before the Chamber; that provision is Rule 89 which deals with preliminary objections concerning the jurisdiction of the Chamber. It is only on the basis of that rule and the principle of legality that the Chamber can determine whether or not the crimes set out in the Indictment are within its jurisdiction.

14. In fact, requesting the Chamber to rule on the armed conflict nexus requirement in the definition of crimes against humanity under customary international law is tantamount to requesting it to rule on the law applicable before the Chamber, and is thus properly within its jurisdiction. This is even clearer in light of international jurisprudence.[12]

15. In this instance, the Co-Prosecutors failed to discharge their Rule 89 obligation to raise their preliminary objections concerning the jurisdiction of the Chamber no later than 30

[11] Rule 92 permits the parties to file written submissions up until the closing statements, but does not specify the nature of such submissions. It is therefore a general provision which only applies in the absence of a special provision.

[12] See for example: International Criminal Tribunal for the former Yugoslavia (ICTY), *The Prosecutor v. Vojislav SESELJ*, IT-03-67-AR72.1, ***Decision on the Interlocutory Appeal Concerning Jurisdiction***, 31 August 2004. In this Decision, the Appeals Chamber examined the **definition of crimes against humanity and the armed conflict nexus: "**As expressed in the jurisprudence of the Tribunal, the jurisdictional requirement of Article 5 requires the existence of an armed conflict at the time and place relevant to the indictment [...]. Likewise, the above mentioned *Tadic* Appeals Chamber's interpretation of the application of international humanitarian law, of which Article 5 is a part, supports a broad interpretation of the jurisdictional requirement that a crime against humanity be committed in armed conflict.", para. 13 (emphasis added).

days after the Closing Order became final, "failing which [the preliminary objections] shall be inadmissible". In fact, they filed their Request on 15 June 2011, i.e. more than four months after the prescribed time limit had expired. It is therefore inadmissible.

16. Furthermore, in their Joint Response to the Appeals against the Closing Order, the Co-Prosecutors requested the Pre-Trial Chamber to dismiss the ground of appeal stating that crimes against humanity require an armed conflict nexus, because the objection was time-barred.[13] The Co-Prosecutors cannot contend that this objection has been time-barred for more than three years for the Defence, and then raise the same matter nearly eight months later.

17. The fact of the matter is that the Co-Prosecutors are trying to lodge a "disguised" appeal against the Closing Order and the Pre-Trial Chamber's decision of 13 January 2011. This is clear from the wording employed by the Co-Prosecutors when they "request that the Trial Chamber correct the legal definition of crimes against humanity set out in the Indictment – as amended by the Pre-Trial Chamber – by removing the requirement of a nexus between crimes against humanity and an armed conflict."[14]

18. However, the Pre-Trial Chamber recalled in its Decision of 13 January 2011 that "In accordance with Internal Rule 77(13), this decision is not subject to appeal." Indeed, the Co-Prosecutors acknowledged this on 31 January 2011 at the hearing on the application for release, when they stated:

> "(...) this request is inadmissible before this Court. It is inadmissible because it seeks this Trial Chamber to review a decision of the Pre-Trial Chamber. In effect, it seeks for you to determine the validity of that decision of the 13th of January 2011. And the rules of this Court are very clear. Rule 77(13), that Pre-Trial Chambers are not subject to review. And indeed I hardly need to point out, and I do so most respectfully, that the Trial Chamber was not established under the rules as an appellate body. So our submission is this: even if you find merit in the arguments of Nuon Chea, simply put, this decision of the Pre-Trial Chamber cannot be reviewed by you, and you have no authority to review it."[15]

[13] Co-Prosecutors' Joint Response to Nuon Chea, Ieng Sary and Ieng Thirith's Appeals Against the Closing Order, 19 November 2010, D427/1/17, paras. 35-42.

[14] Co-Prosecutors' Request, para. 1, emphasis added. The entirety of the request takes on the form of an appeal against the Pre-Trial Chamber decision that is referenced 15 times. See also, conclusion para.33 whereby the Co-Prosecutors request the Trial Chamber to "amend the definition of crimes against humanity in the Amended Indictment to exclude the armed conflict nexus requirement added by the Pre-Trial Chamber" (emphasis added).

[15] Transcript of Hearing on Application for Release: NUON Chea, KHIEU Samphan, IENG Thirith, 31 January 2011, E1/1.1, pp. 47-48 (emphasis added).

II – Nexus between Armed Conflict and Crimes against Humanity

19. If the Chamber were to find the Co-Prosecutors' Request admissible,[16] Mr KHIEU Samphan submits that the Co-Prosecutors have not demonstrated that the law in force from 1975 to 1979 did not require the existence of an armed conflict in the definition of crimes against humanity.

Principle of legality

20. The Co-Prosecutors are of the view that "the definition of crimes against humanity as stated in the ECCC Law is consistent with the principle of legality".[17] This issue is currently pending before the Trial Chamber, which has afforded the parties the possibility to make their submissions in writing and at the initial hearing.[18] Mr KHIEU Samphan therefore refers to the arguments set out in his Preliminary objections concerning the principle of legality.[19]

Customary International Law

21. The Co-Prosecutors assert that customary international law did not require that there be a nexus between an armed conflict and crimes against humanity during the 1975-1979 period.[20] The Pre-Trial Chamber reached the opposite conclusion in its decision on the appeal against the Closing Order. Mr KHIEU Samphan refers to the arguments articulated by the Pre-Trial Chamber.[21] The Pre-Trial Chamber's correct reasoning is reinforced by the debates and negotiations leading up to the establishment of the International Criminal Court ("ICC") from 1993 to 1998, involving the International Law Commission, many NGOs and more than 120 countries. In fact, the definition proposed prior to the Rome Conference had raised the issue of whether to include armed conflict in the definition.[22] Mr KHIEU Samphan recalls that State practice is a component in the creation of customary international law.[23]

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[16] Without prejudice to the arguments he raised in his Preliminary Objections concerning the inapplicability of crimes against humanity and customary international criminal law at the ECCC: Preliminary Objections, paras. 16-17 and 22-24.
[17] Co-Prosecutors' Request, paras. 14-16.
[18] Directions to parties concerning Preliminary Objections and related issues, 5 April 2011, E51/7.
[19] See Preliminary Objections paras. 4-10, 16-17 and 20-27.
[20] Co-Prosecutors' Request, paras. 17-23.
[21] Decision on Ieng Sary's Appeal Against the Closing Order, 11 April 2011, D427/1/30, paras. 309-310.
[22] United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 15 June – 17 July 1998, Official Records Volume III, A/CONF.183/13 (Vol. III), page 20: "1. For the purpose of the present Statute, a "crime against humanity" means any of the following acts when committed [as

22. According to the Co-Prosecutors, the fact that "two international conventions, enacted prior to 1975, defined individual crimes against humanity [genocide and apartheid] without a nexus to an armed conflict strongly suggests that crimes against humanity were not inextricably linked with armed conflict during the DK period."[24] Mr KHIEU Samphan submits that such a conclusion is baseless. The International Law Commission came to the conclusion in 1993 that only the crimes of apartheid and genocide constituted crimes against humanity under international law. In fact, only these crimes, and not crimes against humanity as such, are mentioned in the Draft Statute of an International Criminal Court.[25] It therefore follows that only these two crimes against humanity constituted international crimes, and not that crimes against humanity could be committed during peacetime. This conclusion is corroborated by the debates following and leading to the establishment of the ICC. For example, it is stated in the records of the debates between States on the definition of crimes against humanity that "attention was drawn to the reference to an armed conflict in the statute of the *ad hoc* Tribunal for the former Yugoslavia", and "it was pointed out that there was no convention containing a generally recognized and sufficiently precise juridical definition of crimes against humanity" and that "these crimes could be committed against any civilian population in contrast to war crimes."[26] The intrinsic nexus between an armed conflict and crimes against humanity led States to consider whether crimes against humanity could be committed in peacetime.[27] The establishment of the ICC was the result of many years of

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part of a widespread [and] [or] systematic commission of such acts against any population]: [as part of a widespread [and] [or] systematic attack against any [**civilian**] population] [committed on a massive scale] [**in armed conflict**] [on political, philosophical, racial, ethnic or religious grounds or any other arbitrarily defined grounds]" (emphasis added).

[23] See for example Preliminary Objections, para. 10.

[24] Co-Prosecutors' Request, para. 22.

[25] Report of the International Law Commission on the work of its forty-fifth session (3 May-23 July 1993), A/48/10, page 107 : "In the view of the Working Group, the two main criteria which led to considering the crimes contemplated in the treaties listed in article 22 as crimes under international law were (a) the fact that the crimes are themselves defined by the treaty concerned in such a way that an international criminal court could apply a basic treaty law in relation to the crime dealt with in the treaty and (b) the fact that the treaty created, with regard to the crime therein defined, either a system of universal jurisdiction based on the principle *aut dedere aut judicare* or the possibility that an international criminal tribunal try the crime, or both".

[26] Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, A/AC.244/CRP.6/Add.3, 23 August 1995.

[27] Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, A/50/22 "There were different views as to whether crimes against humanity could be committed in peacetime in the light of the Nürnberg precedent, as well as the statute of the ad hoc Tribunal for the former Yugoslavia. Some delegations singled out, among the developments since the Nürnberg precedent which militated in favour of the exclusion of any requirement of an armed conflict, the precedent of the statute of the ad hoc Tribunal, for Rwanda and the recent decision of the ad hoc Tribunal for the former Yugoslavia in the Tadic´ case. However, the view was also expressed that the crimes in question were usually committed during an armed conflict and only exceptionally in peacetime, that the existence of customary law on this issue was questionable in view of the conflicting

research and involved several state and non-state actors. It clearly emerges from all these developments that there was no internationally recognised definition of crimes against humanity between 1993 and 1998 (period during which these debates took place) or, for that matter, a definition that did not require a nexus to an armed conflict.

ECCC Law

23. The Co-Prosecutors assert that there is no reference to armed conflict in the definition of crimes against humanity in Article 5 of the ECCC Law.[28] Mr KHIEU Samphan is of the view that such a nexus exists even though it is not expressly stated in the definition. The definition specifies – in order to distinguish war crimes from crimes against humanity – that the attack must be "against a civilian population". In the absence of an armed conflict, this specification would be unnecessary.

Foreseeability

24. The Co-Prosecutors assert that it was foreseeable that the Accused could be held criminally responsible for crimes against humanity committed, whether or not an armed conflict existed at the relevant time.[29] Mr KHIEU Samphan recalls that the 1956 Penal Code criminalised acts that constituted crimes against humanity under domestic law.[30] To the extent that the alleged crimes were punishable under the Cambodian Penal Code, it was not foreseeable that they could have been charged under a different legal characterisation. The Defence therefore refers to the arguments it set out in paragraph 16 of its Preliminary Objections.[31]

FOR THESE REASONS

25. The Trial Chamber is requested:

- TO DECLARE the Co-Prosecutors' Request inadmissible;
- In the alternative, TO DISMISS the Co-Prosecutors' Request.

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definitions contained in the various instruments and that the matter called for further consideration." (emphasis added).

[28] Co-Prosecutors' Request, para.14.

[29] Co-Prosecutors' Request, paras. 24-26.

[30] See, for example, Articles 209, 210, 500, 501, 503-508 of the 1956 Penal Code.

[31] Preliminary Objections, para.16.

WITHOUT PREJUDICE,

AND IT WILL BE JUSTICE

	SA Sovan Jacques VERGÈS	Phnom Penh Paris	
Date	Name	Place	Signature