BEFORE THE TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

FILING DETAIL

Case no: 002/19-09-2007-ECCC/TC
Filing party: Nuon Chea Defence Team
Filed to: Trial Chamber
Original language: English
Date of document: 22 July 2011

CLASSIFICATION

Classification suggested by the filing party: PUBLIC
Classification of the Trial Chamber: សាធារណៈ/Public
Classification status:
Review of interim classification:
Records officer name:
Signature:

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

Filed by

Nuon Chea Defence Team:
SON Arun
Michiel PESTMAN
Victor KOPPE
Andrew IANUZZI
Jasper PAUW
PRUM Phalla
Professor Michael RAMSDEN

Distribution

All Defence Teams

Co-Prosecutors:
CHEA Leang
Andrew CAYLEY

All Civil Parties

I. INTRODUCTION

1. Pursuant to this Chamber's direction,[1] counsel for the Accused Nuon Chea (the 'Defence') hereby submits its response to the request by the Office of the Co-Prosecutors (the 'OCP') to exclude the armed conflict nexus requirement from the definition of crimes against humanity (the 'Nexus Requirement').[2] The Defence will argue that the Nexus Requirement should be upheld as this was a requirement under customary international law at the relevant time. The Defence will further address certain submissions by the OCP regarding the principle of *in dubio pro reo*.

II. RELEVANT PROCEDURAL HISTORY

2. For reasons of brevity, the Defence refers to the OCP Request for an overview of the relevant procedural history.[3]

III. RELEVANT LAW

3. According to Article 38 of the Cambodian Constitution, '[a]ny case of doubt […] shall be resolved in favor of the accused'. Article 22(2) of the Rome Statute of the International Criminal Court provides a similar safeguard: '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 favor of the person being investigated, prosecuted, or convicted.' In this regard, the ECCC Supreme Court Chamber recently held: 'In so far as *in dubio pro reo* is applicable to dilemmas about the meaning of the law, it must be limited to doubts that remain after interpretation.'[4]

IV. ARGUMENT

A. The Nexus Requirement Existed During the Relevant Period

4. The Defence submits that the Nexus Requirement existed during the period of 1975–1979 (the 'DK Period'). In support of this position (and for reasons of brevity), the

---

1 *See* Document No **E-107**, Public 'Decision on Extension of Time', 7 July 2011, ERN 00711953–00711954.
2 Document No **E-95**, 'Co-Prosecutors' Request for the Trial Chamber to Exclude the Armed Conflict Nexus Requirement from the Definition of Crimes Against Humanity', 15 June 2011, ERN 00705887–00705901 (the 'OCP Request').
3 OCP Request, paras 1–5.
4 Document No **E-50/3/1/4**, 'Decision on Immediate Appeal by Khieu Samphan on Application for Immediate Release', 6 June 2011, ERN 00702763–00702786 (the 'SCC Decision'), para 13.

Defence adopts by reference the submissions made by the Ieng Sary and Ieng Thirith Defence Teams in their respective appeals against the Closing Order.[5] Simply put, it flows from the arguments set out therein that the OCP Request must be dismissed.

B. The PTC's Reasoning and Conclusion Should be Followed by this Chamber

5. Should the Trial Chamber reject the Defence submissions on the existence of the Nexus Requirement during the DK Period, it should, in the alternative, follow the reasoning and conclusion of the PTC in its decisions on the appeals against the Closing Order.[6] The Trial Chamber should agree with the PTC that, as it cannot be established that the Nexus Requirement had been abandoned during the relevant period, it therefore must be assumed that such requirement still existed. Consequently, this Chamber must rule that a nexus with an armed conflict must be charged and proven before the ECCC as far as crimes against humanity are concerned.

6. In assessing the existence of the Nexus Requirement, the PTC found:

> In sum, in the absence of a clear state practice and *opinio juris* from 1975–1979 evidencing severance of the armed conflict nexus requirement for crimes against humanity under customary international law, the principle of *in dubio pro reo* dictates that any ambiguity must be resolved in favor of the accused. [7]

The OCP takes strong issue with this invocation of the principle of *in dubio pro reo* by the PTC, stating: '[p]ursuant to the weight of domestic and international authority, the principle of *in dubio pro reo* calls for the benefit of the doubt to be given to the accused where there is uncertainty as to whether the evidence is sufficient to support a conviction.'[8] According to the OCP, this principle, therefore, 'cannot serve as a basis for resolution of disputes about pure legal issues, in particular disputes about the proper interpretation of customary international law.'[9]

---

5 *See* Document No **D-427/1/6**, 'Ieng Sary's Appeal Against the Closing Order', 25 October 2010, ERN 00617486–00617631, paras 188–189; Document No D-427/2/l, 'Ieng Thirith Defence Appeal from the Closing Order', 18 October 2010, ERN 00613874–00613905, paras 60–63; s*ee also* respective defence submissions in reply.

6 *See, e.g.*, Document No **D-427/2/15**, Public 'Decision on Appeals by Nuon Chea and Ieng Thirith Against the Closing Order', 15 February 2011, ERN 00644462–00644571 (the 'PTC Decision'), paras 134–144.

7 PTC Decision, para 144.

8 OCP Request, para 27.

9 OCP Request, para 27.

7. First, the Defence submits that the PTC's decision does not stand or fall with the invocation of the principle of *in dubio pro reo*. The passage quoted above, shows that the PTC *could not establish* clear state practice and *opinio juris* on the severance of the Nexus Requirement (which finding would be required to consider this 'severance-viewpoint' to amount to customary international law). This conclusion holds true with or without the invocation of the *in dubio pro reo* principle. For this reason alone, the PTC's decision should be upheld.

8. But if one assumes, for argument's sake, that the proper interpretation of the *in dubio pro reo* principle *is* relevant to the instant inquiry, the OCP's reasoning must still be dismissed.

9. The Defence first submits that the narrow interpretation of the principle of *in dubio pro reo* advocated by the OCP is at odds with a recent finding by the ECCC Supreme Court Chamber (the 'SCC'). The SCC explicitly acknowledges that the principle of *in dubio pro reo* can also extend to 'dilemmas about the meaning of the law'.[10] As a consequence, in proceedings before the ECCC, the principle should be understood in its broader sense. Indeed, Trial Chamber Judge Jean-Marc Lavergne recognized as much in his dissenting opinion in the Duch Judgment.[11]

10. If one considers the definition of the principle in *international* legal proceedings, the Defence points out that there is not one single authoritative definition of the *in dubio pro reo* principle; both broader and more narrow interpretations can be discerned.[12] The Defence submits, however, that the exact definition and scope of the *in dubio* principle in international legal proceedings is irrelevant. This is true because there exists an overriding principle in *Cambodian* law, which can be found in Article 38 of the Constitution. This Article reads: 'Any case of doubt […] shall be resolved in favor of the

---

[10] SCC Decision, para 31 (albeit under certain conditions). *N.B.* General principles of judicial deference require the Trial Chamber to follow the SCC's broader interpretation of the *in dubio pro reo* principle.

[11] *See* Document No **E-188**, Public 'Judgment', 26 July 2010, ERN 00572517–00572797 (the 'Duch Judgment'), 'Separate and Dissenting Opinion of Judge Jean-Marc Lavergne on Sentence' (the 'Lavergne Dissent'), para 8 (stating that 'where the law is unclear or silent, the most favorable solution must be applied to the accused in the event of uncertainty as to the application of a given rule'; noting 'the widely-accepted principle that doubt must be resolved in favor of the accused'; and citing international criminal jurisprudence for the following proposition: 'The principle that doubt must be resolved in favor of the accused does not apply only to the assessment of the evidence pertaining to the guilt of the accused; its application is broader and includes interpretation of ambiguous or uncertain applicable legal standards.')

[12] *See, e.g., ibid.*

accused.'[13] This Cambodian constitutional language is broad and unambiguous: *any* case of doubt shall be resolved in favor of the accused. This refers to doubt as to guilt, *as well as to* doubt regarding ambiguities in the law. Because the Cambodian Constitution provides the ultimate safeguard for the rights of the Accused, the Trial Chamber must conclude that the principle as enshrined in Article 38 should lead to the resolution of any case of doubt in favor of the Accused. The PTC's approach should therefore be upheld.[14]

11. But even if one *does* turn to international sources of law, it is clear that there is every reason to follow the PTC's approach of giving the Accused 'the benefit of the doubt', regardless of which Latin epithet one wants to bestow upon this approach. The PTC's decision can be seen as a manifestation of the principle of *favor rei.* This principle means, simply put, that doubt and uncertainty must be decided in a way favorable to the defendant—in any case. It is closely related to (and some commentators would say: interchangeable with) the *in dubio* principle.

12. The principle of *favor rei* is an established principle in international law.[15] As such, it is reflected in one of the primary sources of international criminal law, the Rome Statute of the International Criminal Court. The Rome Statute states, in Article 22(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.'*[16]

---

[13] The French version states: 'Le bénéfice du doute profite à l'accusé.' While this wording places less emphasis on the 'any' doubt as compared to the English version, the French version still provides an *unqualified* protection to the suspect.

[14] In retrospect, perhaps it would have been wiser for the PTC to refrain from using the somewhat ill-defined expression '*in dubio pro reo'* to underpin its reasoning; perhaps it should rather have invoked the established principle stemming from Article 38 of the Cambodian Constitution. Such an approach would have obviated the need for the OCP to challenge the PTC's apparent understanding of the *in dubio* principle. Put another way: regardless of whether one labels the protection afforded by Article 38 to be an embodiment of the '*in dubio pro reo*' principle, or calls it by any other name, such as a manifestation of the *favor rei* principle, or simply 'Article 38 protection', it is clear that this (Cambodian Constitutional) protection is absolute and extends to any case of doubt, both as to guilt as well as to issues of law.

[15] *See* A Cassese (Ed), The Oxford Companion to International Criminal Justice (Oxford 2009), pp 440–441 (*Favor rei* 'is the principle […] requiring, in the case of conflicting interpretations of a rule, the construction that favors the accused. […] An ICTR TC upheld this principle in *Akayesu* with regard to the interpretation of the word 'killing' in the Genocide Convention and the ICTR St. (Judgment, Akayesu (ICTR-96-4-T) TC, 2 September 1998, [paras] 500-501). An ICTY TC reaffirmed the principle in *Krstic* (Judgment, Krstic (IT-98-33-T), TC, 2 August 2001, [para.] 502. It […] has also been conceived of as a standard governing the appraisal of evidence: in this case the principle is known as *in dubio pro reo.*') The Lavergne Dissent can also be considered a reflection of the *favor rei* principle. Article 38 of the Cambodian Constitution is yet another manifestation.

[16] Rome Statute, Article 22(2) (emphasis added).

13. This provision clearly refers to ambiguity[17] as to the meaning of law, and more specifically, to ambiguity as to the definition of a crime.[18] And any such ambiguity shall be interpreted in favor of the person being investigated, prosecuted, or convicted; a clear reflection of the *favor rei* principle.[19]

14. The Rome Statute is one of the most authoritative sources of international criminal law. So if guidance is sought in rules established at the international level,[20] the Trial Chamber should embrace the approach reflected in Article 22(2) of this statute and interpret any ambiguity as to the definition of a crime in favor of the accused. In this case, this would mean that the Trial Chamber should follow the PTC's approach, conclude that there is an uncertainty as to whether the Nexus Requirement was part of the definition of crimes against humanity in the DK Period, and adopt the interpretation most favorable to the accused.

C. The OCP Exaggerates the Consequences of the PTC Approach

15. In its submission, the OCP mischaracterizes what the PTC has actually done in its decision on appeal and overstates the potential negative consequences of the PTC's approach. In objecting to the PTC's interpretation and application of the principle of *in dubio pro reo*, the OCP states that the PTC's interpretation 'coexists uneasily with the

---

17 'Ambiguity' is defined as follows: 1a : the quality or state of being ambiguous especially in meaning (see ambiguous) b : a word or expression that can be understood in two or more possible ways : an ambiguous word or expression 2: uncertainty. *See* www.merriam-webster.com.

18 Clearly, the strong debate as to whether or not the Nexus Requirement existed during the DK Period can be regarded as an 'ambiguity' (in the sense of Article 22(2) Rome Statute) as to the 'definition' (in the sense of Article 22(2) Rome Statute) of Crimes against Humanity in that period.

19 The fact that Article 22 of the Rome Statute seems concerned with rules of statutory interpretation rather than interpretation of customary international law ('CIL') concepts is of no import. Many of the rules, definitions and concepts of the Rome Statute stem from CIL, and will in all likelihood continue to be influenced by (permanently developing) concepts in CIL (also pursuant to the provisions of ICC Statute Article 21(1)(b) and (c). In cases where the ICC is asked to interpret rules and concepts of CIL when deciding on the definition of a crime, it will be explicitly bound by the provision in Article 22(2); and, also in that case, any definition of a crime must be interpreted in favor of the person being prosecuted. In short, Article 22(2) embodies the broad notion in modern international criminal law that the accused should get 'the benefit of the doubt,' or *favor rei*. There is no reason to not apply that notion to questions of customary international law, as long as one is dealing with customary international law that is concerned with the criminalization of certain conduct.

20 This, again, does not seem necessary considering that the Cambodian Constitution provides an unqualified and unambiguous protection to the accused.

basic maxim of *iura novit curia* (the judge knows the law)' and suggests that the PTC has chosen 'automatic deferral to the accused wherever the law is difficult to ascertain.'[21]

16. The OCP fails to appreciate that the PTC did not in fact find that the law was 'difficult' to ascertain. Rather, the PTC found that the relevant law was *impossible* to ascertain. *After* a thorough analysis of case law and other sources, and therefore after application of the normal rules of interpretation in these matters, the PTC has come to the conclusion that it simply cannot determine, *as a matter of customary international law*,[22] when the Nexus Requirement was severed. One should note once more that the PTC reached this conclusion by explicitly pointing to 'the *absence* of clear state practice and *opinio juris* from 1975–1979 evidencing severance of the armed conflict nexus requirement for crimes against humanity under customary international law.'[23]

17. Only *then* did the PTC proceed to resolve this state of uncertainty (ambiguity) in favor of the Accused. There is nothing improper about this approach; to the contrary, the PTC has followed both the relevant provision of the Cambodian Constitution (Article 38) as well as international legal standards.

18. Furthermore, the OCP's arguments as to the perceived negative consequences of a broader application of *in dubio pro reo*, including its assertion that such a broader application of *in dubio pro reo* would 'stifle' the progression of customary international law, 'at risk of serious detriment to the international legal system', are untenable. The OCP paints the issue of the correct scope of the *in dubio* principle as a conflict in which the interests of the Accused are pitched directly against the 'need to preserve a functioning system of international criminal justice,' thus suggesting that the very future of this system hinges on a strict interpretation of the *in dubio pro reo* principle. None of these dire predictions, of course, are grounded in reality.

19. First of all, one merely needs to look at the possible consequences of a broad application of the *in dubio* principle *in this particular situation* to conclude that the OCP is overstating its case. It is hard to see how the 'progression of customary international law' would be stifled, 'at risk of serious detriment to the international legal system' no less, by a broad application of this principle in this case. The fact that the PTC embraced a broad

[21] OCP Request, para 29.
[22] PTC Decision, para 137.
[23] PTC Decision, para 144 (emphasis added).

definition of *in dubio pro reo* in finding that it cannot now, in 2011, positively conclude that the Nexus Requirement for crimes against humanity had been severed *some 35 years ago*, does nothing in terms of stifling the 'progression' of customary international law.[24]

20. Second of all, the suggestion that a broad application of the *in dubio pro reo* principle (resulting in a strict application of the Nexus Requirement for the DK Period) would in any way impact on the 'need to preserve a functional system of international criminal justice' is untenable. The Defence submits that the approach chosen by the PTC has not jeopardized the system of international criminal justice in the slightest. If anything, the PTC has *bolstered* the system of international criminal justice by *adding* to the protections that this system provides to the Accused; this added protection might help to increase the legitimacy and acceptance of the system of international criminal justice in the long run.

21. In that sense, contrary to the OCP submission, the fact that customary international law ('CIL') is 'less straightforward than other types of law and is necessarily subject to an ongoing process of judicial synthesis and elaboration'[25] does not, in and of itself, mean that a broader application of *in dubio pro reo* would stifle its progression. To the contrary, the Defence would submit: a broader application of *in dubio pro reo* might in fact stimulate the progression of CIL. Considering that a broader adherence to the *in dubio* principle will result in CIL being more protective of the rights of the Accused, which would be in conformity with other developments in international criminal law such as the adoption of Article 22(2) of the ICC Statute, the *qualitative* progression of CIL will thus in fact be stimulated.[26] Rather than forming an impediment to developing CIL, this

---

[24] This is especially true considering that now, of course, every scholar and legal professional is in agreement that the Nexus Requirement *has* been severed in present-day customary international law; there is no remaining ambiguity whatsoever.

[25] OCP Request, para 31.

[26] When considering questions of CIL, the first and most important task for a court will be to look at the standard questions that need be considered when assessing CIL: state practice and *opinio juris*. Once a court finds unambiguously that these two conditions are met, nothing will stop the court in then concluding that a rule qualifies as CIL, regardless of how harmful this rule may be to the Accused. On the other hand, in situations where there is serious uncertainty as to whether state practice and *opinio juris* exist to an adequate degree (to amount to CIL), there is no principled reason to *not* rule in favor of an Accused in a situation in which he would be harmed by the promoting of a certain rule to the status of CIL. *See, e.g.*, on the need for clear state practice: *Prosecutor v Vasiljevic*, IT-98-32-T, 'Judgment', 29 November 2002, para 203 ('In the absence of any clear indication in the practice of states as to what the definition of the offence of "violence to life and person" identified in the Statute may be under customary law, the Trial Chamber is not satisfied that such an offence giving rise to individual criminal responsibility exists under that body of law'.)

approach will ensure that CIL develops in full conformity with generally recognized principles of international criminal law.

V. CONCLUSION

22. Accordingly, the Defence requests the Trial Chamber to: (a) dismiss the OCP Request and (b) conclude that the Nexus Requirement existed in the DK Period. Should the Chamber be inclined to grant the OCP Request, the Defence requests an oral hearing on this issue well before the substantive start of trial.

CO-LAWYERS FOR NUON CHEA

SON Arun

Michiel PESTMAN & Victor KOPPE