BEFORE THE OFFICE OF THE CO-INVESTIGATING JUDGES

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

FILING DETAILS

Case No: 003/07-09-2009-ECCC/OCIJ

Party Filing: The Defence for MEAS Muth

Filed to: Co-Investigating Judges

Original language: ENGLISH

Date of document: 19 May 2016

CLASSIFICATION

Classification of the document suggested by the filing party: PUBLIC

Classification by OCIJ or Chamber: សាធារណៈ/Public

Classification Status:

Review of Interim Classification:

Records Officer Name:

Signature:

MEAS MUTH'S SUBMISSION ON THE QUESTION OF WHETHER UNDER CUSTOMARY INTERNATIONAL LAW IN 1975-1979 AN ATTACK BY A STATE OR ORGANIZATION AGAINST ITS OWN ARMED FORCES COULD AMOUNT TO AN ATTACK DIRECTED AGAINST A CIVILIAN POPULATION FOR PURPOSES OF ARTICLE 5 OF THE ESTABLISHMENT LAW

Filed by:
The Co-Lawyers:
ANG Udom
Michael G. KARNAVAS

Distribution to:
Co-Investigating Judges:
Judge YOU Bunleng
Judge Michael BOHLANDER

Co-Prosecutors:
CHEA Leang
Nicholas KOUMJIAN

All Civil Parties

Case 004 Defence Teams

Mr. MEAS Muth, through his Co-Lawyers ("the Defence"), hereby files this submission pursuant to the International Co-Investigating Judge's Call for Submissions.[1]

I. SUMMARY OF ISSUE AND SUBMISSION

> *Whether, under customary international law applicable between 1975 and 1979, an attack by a state or organisation against members of* its own *armed forces may amount to an attack directed at a civilian population for the purpose of Article 5 of the ECCC Law?*[2]

Predicate and judicial hints

A. Crimes against humanity under Article 5 "must have been committed, *inter alia*, as part of a widespread or systematic attack *primarily* directed against '*any civilian population*'."[3]

B. "The Trial Chamber, in line with the jurisprudence of the other *ad hoc* Tribunals, has clarified that members of an armed organisation, even if *hors de combat*, do not qualify as 'civilians' for the purpose of Article 5…."[4]

C. "[T]his principle was enunciated in relation to members of armies or armed groups, *other than those* belonging to the state or organisation which carries out the attack, in other words, of the *enemy* population."[5]

D. "[A]n argument could be made that the previous discussion about the interpretation of the concept may from the very beginning have overlooked a rather banal logical policy aspect, which is that the entire distinction between combatants and civilians might only make sense if we are talking about combatants and civilians of the *enemy* population."[6]

E. "[I]t would a) seem beyond dispute that a regime which in peace times tried to cleanse its own armed forces of, for example, all soldiers holding a particular ethnicity or faith, would be engaging in crimes against humanity, because the victims' combatant quality merely because they are soldiers would be entirely irrelevant in this context,

---

[1] Call for Submissions by the Parties in Cases 003 and 004 and Call for *Amicus Curiae* Briefs, 19 April 2016, D191 ("Call for Submissions").
[2] *Id.*, para. 3.
[3] *Id.*, para. 1 (emphasis added to "primarily," see para. 21).
[4] *Id.*, para. 2.
[5] *Id.*
[6] *Id.*, para. 5.

and that b) there is no reason to think otherwise if such a campaign happened in the course of or otherwise connected to an armed conflict."[7]

Answer

A. An attack against a State's own soldiers *does not* amount to an attack against a civilian population, even if such an attack amounts to a cleansing of a State's armed forces of a particular ethnicity or faith, whether committed in times of war or peacetime.

B. States do not relinquish their sovereignty over their own soldiers in peacetime. Soldiers and civilians are subject to different standards and protections whether in times of war or peace.

C. A regime's acts against its own soldiers in peacetime would be dealt with under national law, or could, depending upon the circumstances, be prosecuted as genocide.

D. During armed conflicts, if non-civilians (such as active soldiers, soldiers *hors de combat*, or detained soldiers) are the target of an attack by their own State, such an attack might be a violation of international humanitarian law, genocide, or a national crime, depending upon the circumstances. It would not be a crime against humanity.

II. SUBMISSION

A. Question 1: Have any policy aspects been overlooked concerning whether a distinction between soldiers and civilians might only make sense if speaking of soldiers and civilians of an enemy population?

Answer: No. Customary international law has always distinguished between soldiers and civilians in this regard, requiring crimes against humanity to be directed against a *civilian* population. No State practice or *opinio juris* indicates that the distinction between a soldier and a civilian is relevant only to enemy populations. Jurisprudence indicates that this distinction is relevant even in peacetime and when evaluating attacks by a State against its own soldiers.

1. Crimes against humanity "originated as an extension of war crimes."[8] The laws of war were first codified internationally in the 1899 and 1907 Hague Conventions[9] and the 1949

[7] *Id.*
[8] M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 48 (2d ed. 1999).

Geneva Conventions,[10] to regulate the conduct of States and their armed forces during war.[11] Crimes against humanity crystallized as a separate category of offenses from war crimes after World War II, thus closing a gap in the laws of war and protecting civilians from their own States.[12]

2. The separation of crimes against humanity and war crimes developed in recognition of the principle of distinction,[13] a norm of customary international law that is fundamental to the laws of war.[14] This principle provides that parties to a conflict must at all times distinguish between civilians and combatants; attacks may only be directed against combatants, never against civilians.[15] This distinction between civilians and combatants underpins the laws of war and international criminal law,[16] evidenced by the application of crimes against humanity only to attacks against civilian populations and not soldiers under customary international law.

---

[9] The concept of crimes against humanity was referred to in the Preambles (the Martens Clause) to the Hague Convention (II) with Respect to the Laws and Customs of War on Land (1899) and the Hague Convention (IV) respecting the Laws and Customs of War on Land (1907).

[10] Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949 ("First Geneva Convention"); Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949; Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949; Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949 ("Fourth Geneva Convention").

[11] CUSTOMARY INTERNATIONAL HUMANITARIAN LAW VOLUME I: RULES xxxi, xxxiv (Jean-Marie Henckaerts & Louise Doswald-Beck eds., Cambridge University Press, 2005) ("Henckaerts, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOL. 1").

[12] During World War II, the Allied Powers realized that many offenses committed by the Axis Powers were not war crimes *stricto sensu* because the victims were nationals of the Axis Powers. Accordingly, the concept of the laws of war was widened to enable justice for civilians who were attacked by their own States or could not be deemed to be under enemy occupation. Complete History of the United Nations War Crimes Commission and the Development of the Laws of War, compiled by the United Nations War Crimes Commission (His Majesty's Stationery Office, London, 1948), Ch. 8, p. 174-75.

[13] The principle of distinction gained fundamental importance as international humanitarian law developed alongside the laws of war to ensure the protection of the wounded, the sick, detainees, and the civilian populations in enemy States during armed conflicts. *See* Henckaerts, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOL. 1, at 3-4.

[14] This principle was first recognized in the 1868 Declaration Renouncing the Use, in Time of War, of Certain Explosive Projectiles, St. Petersburg, 29 November/11 December 1868, Preamble. It subsequently has been codified in Additional Protocols I and II to the 1949 Geneva Conventions and numerous national military manuals. *See* International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 ("API"), Arts. 48, 51(2), 52(2); International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, 1125 UNTS 609 ("APII"), Art. 13(2); Henckaerts, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOL. 1, at 3-6.

[15] Henckaerts, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOL. 1, Rule 1.

[16] *Prosecutor v. Martić*, IT-95-11-A, Judgement, 8 October 2008, para. 299.

3. Applicable customary international law recognizes a distinction between soldiers and civilians regardless of whether the soldiers and civilians are members of an enemy population or the State's own population. No State practice or *opinio juris* (necessary to establish customary international law) indicates that the target of an attack can be anything other than a civilian population.[17] If States intended to protect soldiers from crimes against humanity, whether during war or peacetime, they would have drafted the relevant international instruments defining crimes against humanity to reflect this intention. They have not done so.[18]

4. The Charters for the International Military Tribunal ("IMT") and the International Military Tribunal for the Far East ("IMTFE") required that crimes against humanity be committed against a civilian population.[19] Control Council Law No. 10 ("CCL10") also required that the acts underlying crimes against humanity be committed against a civilian population.[20] The Nuremberg Principles, which codify the principles of international law recognized in the IMT Charter and Judgement,[21] define crimes against humanity as

---

[17] State practice exists where there is "constant and uniform usage [of a rule or principle] practised by the States in question." *Asylum Case (Colombia/Peru), Judgement, I.C.J. Reports 1950,* p. 276. *Opinio juris* exists where the acts at issue are settled practice and demonstrate, or are performed so as to demonstrate, a State's belief that the practice is obligatory under the law. *North Sea Continental Shelf Cases (Germany v. Denmark, Germany v. The Netherlands), Judgement, I.C.J. Reports 1969*, p. 44, para. 77.

[18] Instead, as discussed *infra*, States intended such matters to be addressed through national law.

[19] Charter of the International Military Tribunal, Annex to Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (adopted and entered into force 8 August 1945) 82 UNTS 279, Art. 6(c) (emphasis added): "Crimes against Humanity: Namely, murder, extermination, enslavement, deportation, and other inhumane acts **committed against any civilian population**, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated." The 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity later defined crimes against humanity with reference to the IMT Charter. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (adopted 26 November 1968 GA Res. 2391 (XXIII), entered into force 11 November 1970) 754 UNTS 73, Art. I(b): "Crimes against humanity whether committed in time of war or in time of peace as they are defined in the Charter of the International Military Tribunal, Nürnberg, of 8 August 1945…."; Charter of the International Military Tribunal for the Far East, General Order 1, General Headquarters Supreme Commander of the Allied Forces (19 January 1946) 4 Bevans 20 (as amended 26 April 1946, 4 Bevans 27), Art. 5(c) (emphasis added): "Crimes against Humanity: Namely, murder, extermination, enslavement, deportation, and other inhumane acts **committed against any civilian population** …."

[20] Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, 20 December 1945, 3 Official Gazette Control Council for Germany 50-55 (1946), Art. II(c) (emphasis added): "Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts **committed against any civilian population**, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated."

[21] U.N. General Assembly, GA Res. 177 (II), *Formulation of the Principles Recognized in the Charter of the Nurnberg Tribunal and in the Judgment of the Tribunal*, 21 November 1947.

crimes committed against a civilian population.[22] To progress international law, the International Law Commission ("ILC"), which formulated the Nuremberg Principles, drafted codes of offenses against the peace and security of mankind in 1951, 1954, 1991, and 1996, but none of these codes were adopted.[23]

5. Consistent with the aforementioned instruments, the post-1979 statutes of the international and internationalized tribunals also specified that crimes against humanity require an attack against a civilian population. The International Criminal Tribunal for the Former Yugoslavia ("ICTY"),[24] the International Criminal Tribunal for Rwanda

---

[22] Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, II Yearbook of the International Law Commission (1950) 374-78, Principle 6(c) (emphasis added): "Murder, extermination, enslavement, deportation and other inhumane acts **done against any civilian population**, or persecutions on political, racial, or religious grounds…." Although the instruments enacted in the aftermath of World War II may be interpreted by some as providing that only crimes against humanity of the "murder-type" must be committed against a civilian population, while persecution may be committed against a civilian or non-civilian population, such an interpretation is unreasonable. This interpretation may stem from the apparent separation in the IMT and IMTFE Charters, CCL10, and the Nuremberg Principles between "murder-type" crimes committed against a civilian population and persecutions. *See* IMT Charter, Art. 6(c); IMTFE Charter, Art. 5(c); CCL10, Art. II(a); Nuremberg Principles, Principle 6(c). Were crimes against humanity to apply only to a civilian population where murder, extermination, enslavement, deportation, or other inhumane acts allegedly occurred, but to *any* population with regard to persecutions, fewer people would be protected from more serious crimes (such as murder and extermination) than would be protected from a less serious crime (persecution). Such an outcome is not in keeping with the origins of crimes against humanity. *See* Egon Schwelb, *Crimes against Humanity*, 23 BRIT. Y. B. INT'L L. 178, 190 (1946). Schwelb also notes that the Berlin Protocol of 6 October 1945, amending the semi-colon after "war" in the English and French versions of Article 6(c) to a comma, to align the two versions with the Russian version, makes a division of crimes against humanity into "murder type" crimes on the one hand, and persecutions on the other hand, unsustainable. *Id.*

[23] U.N. General Assembly, GA Res. 177 (II), *Formulation of the Principles Recognized in the Charter of the Nurnberg Tribunal and in the Judgment of the Tribunal*, 21 November 1947. The ILC 1951 and 1954 draft codes define crimes against humanity as requiring an attack directed against a civilian population. The 1991 draft code did not expressly define crimes against humanity. The 1996 draft code defined crimes against humanity without any requirement that an attack be directed against a civilian population. *See* Draft Code of Offences against the Peace and Security of Mankind, II Yearbook of the International Law Commission (1951) 133-37, Art. 2(10); Draft Code of Offences against the Peace and Security of Mankind, II Yearbook of the International Law Commission (1954), Art. 2(11); Draft Code of Offences against the Peace and Security of Mankind, II YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 101-07 (1991); 1996 Draft Code of Crimes against the Peace and Security of Mankind, 51 UN GAOR Supp. (No. 10) at 14, U.N. Doc. A/CN.4/L.532, corr.1, corr.3 (1996), Art. 18. These draft codes are not indicative of customary international law. They are examples of the ILC's efforts to progress international law, not codify it. Statute of the International Law Commission, adopted by the General Assembly in resolution 174 (II) of 21 November 1947, as amended by resolutions 485 (V) of 12 December 1950, 984 (X) of 3 December 1955, 985 (X) of 3 December 1955 and 36/39 of 18 November 1981, Arts. 1, 15.

[24] Updated Statute of the International Criminal Tribunal for the former Yugoslavia (September 2009), Art. 5 (emphasis added): "The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, … **and directed against any civilian population**: …." The drafters of the Statute included only those provisions that were "beyond any doubt" customary international law. Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704, 3 May 1993, para. 34: "In the view of the Secretary-General, the application of the principle nullum crimen sine lege requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise." *See also id.*, para. 29.

("ICTR"),[25] the Special Court for Sierra Leone ("SCSL"),[26] and the Special Panels for Serious Crimes in East Timor,[27] each established after or during the commission of the crimes they were created to address, were required to apply settled customary international law.[28] They could not create new law to be applied *ex post facto*. These Statutes reflect States' (and the United Nations') consistent understanding of customary international law since Nuremberg.

6. Under the Rome Statute of the International Criminal Court ("ICC") an attack directed against a civilian population is a required element of crimes against humanity.[29] As the Rome Statute would apply only prospectively, if States perceived there to be an unacceptable protection gap and considered that customary international law had progressed to the extent that a State's own armed forces could, under certain circumstances, be considered civilians, they would have included this language in the definition of crimes against humanity. The 160 States Parties, after a three-year drafting process, chose not to alter the definition.[30]

7. Similarly, the currently proposed ILC Draft Convention on Crimes Against Humanity could have removed the requirement that the target of an attack be a civilian population, had the drafters considered that a State's own soldiers require protection under international criminal law. Yet, the 2015 draft retains the consistent requirement that an attack be directed against a civilian population.[31]

Definition of Civilian Population

---

[25] Statute of the International Criminal Tribunal for Rwanda (31 January 2010), Art. 3 (emphasis added): "The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack **against any civilian population** on national, political, ethnic, racial or religious grounds: …."

[26] Statute of the Special Court for Sierra Leone, adopted by U.N. Security Council Resolution 1315 (14 August 2000), Art. 2.

[27] Regulation on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, adopted by U.N. Transitional Administration in East Timor, U.N. Doc. UNTAET/REG/2000/15 (6 June 2000), Art. 5(1).

[28] *See, e.g.*, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704, 3 May 1993, para. 34.

[29] Rome Statute of the International Criminal Court, done at Rome on 17 July 1998, in force on 1 July 2002, 2187 UNTS 38544, Art. 7.

[30] As 160 States participated in a three-year process to draft the Rome Statute, it is considered to demonstrate strong indicia of the *opinio juris* of the international community regarding customary international law on crimes. DOMINIC MCGOLDRICK ET AL., THE PERMANENT INTERNATIONAL CRIMINAL COURT: LEGAL AND POLICY ISSUES 340 (Hart Publishing, 1st ed., 2004).

[31] U.N. General Assembly, Int'l Law Comm'n Rep (ILC), *First Report on Crimes Against Humanity*, para. 177, U.N. Doc. A/CN.4/680 (Feb. 17 2015).

8. None of the statutes from Nuremberg to today define the expression "civilian population." However, definitions of "civilian population" are provided in two international instruments that pre-date 1975, the 1938 Draft Convention for the Protection of Civilian Populations against New Engines of War[32] and the International Committee for the Red Cross and Red Crescent's ("ICRC") 1956 Draft Rules for the Limitation of the Dangers incurred by the Civilian Population in Time of War.[33] Both of these instruments define "civilian population" as those who are not members of the armed forces or combatants. These definitions of "civilian population" accord with the ordinary meaning of the term "civilian": "a person not in the armed services or the police force."[34]

9. The *ad hoc* tribunals' jurisprudence interprets the expression "civilian population" and whether soldiers can ever be considered civilians. The requirement that the attack be directed against a civilian population has remained constant; there is no indication that the meaning of "civilian population" acquired any different interpretation after 1979.

10. These tribunals uniformly require that the targeted population be predominantly civilian in nature, although the presence of certain non-civilians in their midst *does not* change the character of the population.[35] The ICTY has relied on Additional Protocol I to determine the definition of "civilian."[36] As the ECCC Trial Chamber has noted, this definition accords with the ordinary meaning of "civilian."[37]

---

[32] International Law Association (ILA), Draft Convention for the Protection of Civilian Populations against New Engines of War, Amsterdam, Adopted on the Fortieth Conference of the ILA, 29 August-2 September 1938. Article 1 states: "the phrase 'civilian population' within the meaning of this Convention shall include all those not enlisted in any branch of the combatant services nor for the time being employed or occupied in any belligerent establishment as defined in Article 2."

[33] International Committee of the Red Cross (ICRC), Draft Rules for the Limitation of the Dangers incurred by the Civilian Population in Time of War, Geneva, September 1956. Article 4 states: "the civilian population consists of all persons not belonging to one or other of the following categories: (a) Members of the armed forces, or of their auxiliary or complementary organizations. (b) Persons who do not belong to the forces referred to above, but nevertheless take part in the fighting."

[34] *See* CUSTOMARY INTERNATIONAL HUMANITARIAN LAW VOLUME II: PRACTICE paras. 712-48 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., Cambridge University Press, 2005), setting out the definition of civilians in the military manuals of various States. The usual definition of "civilian" in these manuals accords with its dictionary definition as found in the CONCISE OXFORD ENGLISH DICTIONARY, 261 (10th ed., 2002).

[35] *See, e.g., Prosecutor v. Tadić,* IT-94-1-T, Judgement, 7 May 1997, para. 638; *Prosecutor v. Kordić & Čerkez*, IT-95-14/2-A, Judgement, 17 December 2004, para. 91; *Prosecutor v. Galić*, IT-98-29-A, Judgement, 30 November 2006, para. 136; *Prosecutor v. Milošević*, IT-98-29/1-A, Judgement, 12 November 2009, para. 50; *Prosecutor v. Akayesu*, ICTR-96–4-T, Judgement, 2 September 1998, para. 582; *Prosecutor v. Fofana & Kondewa,* SCSL-04–14-A, Judgment, 28 May 2008, para. 258.

[36] *Prosecutor v. Blaškić*, IT-95-14-A, Judgement, 29 July 2004, paras. 110-13.

[37] *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/TC, Case 002/01 Judgement, 7 August 2014, E313, para. 185 (internal citations omitted): "The ordinary meaning of the term 'civilian' (in English) and *'civil'* (in French)

11. The ICTR *Kayishema* Trial Chamber, even when considering crimes against humanity that occurred in a time of relative peace, required that the population be civilian and determined that the civilian population "includes all persons *except* those who have the duty to maintain public order and have the legitimate means to exercise force."[38] This interpretation of "civilian" was recently cited approvingly by the Special Rapporteur on the Topic of Crimes Against Humanity.[39] *Kayishema* shows that even a broad definition of "civilian" excludes soldiers, and the distinction between civilian and soldier retains its significance even outside the context of armed conflict.

12. The ICTY *Martić* Appeals Chamber considered whether soldiers *hors de combat* could be considered civilians for purposes of determining the civilian character of the population and decided that they could not, but that they could be *victims* of the underlying crimes.[40] Under *Martić*, persons *hors de combat* do not form part of the "civilian population." *Martić* shows the importance of the distinction between soldiers and civilians, even when

---

encompasses persons who are not members of the armed forces. [A]t the time relevant to the charges here at issue, the civilian population included all persons who were not members of the armed forces or otherwise recognized as combatants.... While the Chamber does not here rely on the definition of 'civilian' set out in Article 50 of Additional Protocol I to the 1949 Geneva Conventions, adopted by the ad hoc Tribunals as reflecting customary international law for the purposes of crimes against humanity post-1977, it notes that this accords with the ordinary meaning of the term."

[38] *Prosecutor v. Kayishema & Ruzindana*, ICTR-95-1-T, Judgement, 21 May 1999, para.127 (emphasis in original).

[39] U.N. General Assembly, Int'l Law Comm'n Rep (ILC), *First Report on Crimes Against Humanity*, U.N. Doc. A/CN.4/680, (17 February 2015), n. 272.

[40] *Prosecutor v. Martić*, IT-95-11-A, Judgement, 8 October 2008, paras. 291-314, espec. paras. 302, 311. The SCSL *Taylor* Trial Chamber also decided that soldiers *hors de combat* could not be considered civilians, even though the prosecution and defence had agreed on a broader definition of civilian that would encompass those *hors de combat*. *Prosecutor v. Taylor*, SCSL-03-01-T, Judgement, 18 May 2012, paras. 508-10. Early crimes against humanity jurisprudence was inconsistent as to whether soldiers could be victims of crimes against humanity. While in some cases the courts considered that the *victims* of crimes against humanity could be soldiers (*see* a summary of some such cases in Hansdeep Singh, *Critique of the Mrkšić Trial Chamber (ICTY) Judgment*, 8 LAW & PRAC. INT'L CTS. & TRIB. 247, 257-59 (2009). *See also* Cour de Cassation, Chambre Criminelle [French Supreme Court, Criminal Chamber], 20 December 1985 ("Barbie Case"), No. de Pourvoi 85-95166), other courts rejected the position that soldiers could be victims since they were not part of the civilian population (*See, e.g., In re Pilz*, Special Court of Cassation, 5 July 1950. *See also* Emily Haslam, *Neddermeier*, *in* THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE 840 (Antonio Cassese, ed., Oxford University Press 2009) *summarizing Neddermeier v. Director of Public Prosecutions,* British Court of Appeals, sitting in Germany, 30 September 1948, in Control Commission Courts, Court of Appeal Reports, Criminal Cases (1949), No. 1, 58-60. Importantly, whether a soldier can be a *victim* of a crime against humanity is a distinct question from whether soldiers can be considered to constitute a "civilian population." (A victim's status as civilian or soldier is not an element of crimes against humanity). It is not the issue that has been raised by the International Co-Investigating Judge and is not the subject of the present Submissions.

soldiers are no longer actively participating in hostilities and are no longer a threat to the State.[41]

13. The recent ICTY *Prlić et al.* case implicitly shows that while the ICTY Trial Chamber recognizes that a State's own soldiers might require protection, they still are not considered to constitute part of a civilian population for purposes of crimes against humanity. The Trial Chamber considered the application of Grave Breaches of the Geneva Conventions and crimes against humanity arising from the treatment of Muslim members of the Croatian Defence Council ("HVO") (the official military body of the Croatian Community of Herceg-Bosna, consisting of both Croatian and Muslim soldiers) by non-Muslim members of the HVO. The Trial Chamber determined that the Muslim HVO members could be considered "protected persons" for purposes of the Fourth Geneva Convention (persons who have "fallen into the hands of a party to the conflict of which they were not nationals") using allegiance rather than nationality to determine the Muslim HVO soldiers' status.[42] In extending protection to the soldiers under the Grave Breaches regime, the Trial Chamber found that the soldiers' status as soldiers did not change and still required that the targeted population be civilian for purposes of crimes against humanity.[43] This case is consistent with statutes and jurisprudence maintaining that the distinction between soldier and civilian remains relevant, even when evaluating attacks against a State's own soldiers rather than an enemy population.

14. At the ECCC, the Trial Chamber took the same approach in Cases 001 and 002 as the *ad hoc* tribunals. The Trial Chamber specified: "Members of the armed forces are not considered 'civilians' merely because they were not engaged in combat at the time of their arrests."[44] It held that a soldier is a non-civilian even if he or she is not armed or in combat at the time the crimes are committed.[45] In determining the meaning of "civilian," the Trial Chamber specifically considered the possibility that the "entire population of a

[41] Further, under the laws of war, neither soldiers *hors de combat* nor civilians may be lawful targets of an attack. *See* Fourth Geneva Convention, espec. Art. 3 (common to the four Geneva Conventions).
[42] *Prosecutor v. Prlić et al.*, IT-04-74-T, Judgement, 29 May 2013, Vol. 3, Ch. 5, paras. 607-11.
[43] *Id.*, paras. 647-48.
[44] *Case of KAING Guek Eav*, 001/18-07-2007-ECCC/TC, Judgement, 26 July 2010, E188, para. 304.
[45] *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/TC, Case 002/01 Judgement, 7 August 2014, E313, para. 186.

territory – including both civilian and military elements – is encompassed within an attack" and still required that the attack be directed at civilians.[46]

15. All statutes of international and internationalized tribunals since Nuremberg explicitly refer to a *civilian* population when defining crimes against humanity, without any qualification of that expression. There is no State practice applying crimes against humanity to attacks against a State's own soldiers or considering soldiers to constitute a civilian population. The importance placed on the distinction between civilians and soldiers – even in peacetime and even where the soldiers are *hors de combat* and, therefore, no longer a threat – at the *ad hoc* tribunals and the ECCC confirms the fundamental nature of this distinction. It would be inconsistent to consider a State's own soldiers as civilians while treating another State's soldiers *hors de combat* as non-civilians for purposes of determining the civilian character of an attack, particularly since soldiers *hors de combat* are unable to fight while a State's own soldiers could be armed and more dangerous to the State. Customary international law does not support such an interpretation.

B. Question 2A: Would a regime that in peacetime tried to cleanse its own armed forces of, for example, all soldiers holding a particular ethnicity or faith, commit crimes against humanity under customary international law, since the victims' combatant quality might be irrelevant in this context?

Answer: No. Such a campaign would not constitute crimes against humanity under customary international law if committed in peacetime. Under customary international law, a regime's acts against its own soldiers in peacetime would be dealt with under national law.

16. The laws of war recognize the inviolability of States' national sovereignty.[47] The principle of non-intervention in the internal affairs of sovereign States was well-respected after World War II, continuing through 1975-79.[48] No State practice or *opinio juris* from

[46] *Case of KAING Guek Eav*, 001/18-07-2007-ECCC/TC, Judgement, 26 July 2010, E188, para. 307.
[47] International Committee of the Red Cross (ICRC), Commentary to Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, Art. 3, para. 4500, 1987.
[48] *See* U.N., Charter of the United Nations, 24 October 1945, 1 UNTS XVI, Art. 2, para. 7; U.N., General Assembly, Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, G.A. Res. 2131 (XX), 21 December 1965, U.N. Doc. A/RES/20/2131 (1965); U.N., General Assembly, Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), 24 October 1970, U.N. Doc. A/RES/25/2625 (1970); U.N., General Assembly, Declaration

1975 to 1979 indicates that States intended to weaken sovereignty over their own soldiers during peacetime, such that their treatment of their own soldiers would be regulated by international criminal law rather than national law.

17. Soldiers are normally held to different standards than civilians, even in peacetime.[49] Such disparate treatment is necessary to instill a sense of discipline in soldiers.[50] Soldiers' primary business is to fight wars;[51] thus they are more dangerous than civilians. States have an abiding interest in retaining the ability to deal with their own soldiers internally, both to address potential internal uprisings by soldiers and to be able to employ otherwise lawful military tactics. National laws address such situations.[52]

18. Were a State's treatment of its own soldiers in peacetime to be subjected to international criminal law, a State could be accused of crimes against humanity for attacking its own soldiers if those soldiers turned against the State; for example, in a rebellion or attempted *coup d'état*. States never intended such a result, as demonstrated by Additional Protocol II ("AP II"). AP II applies during non-international armed conflicts between a State Party's armed forces and dissident armed forces or other organized armed groups that, under responsible command, exercise such territorial control that they can carry out sustained, concerted military operations and implement AP II.[53] Article 3(1) of AP II states that AP II shall not be invoked to "affect[] the sovereignty of a State or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State."

19. The ICRC's 1987 Commentary on AP II explains that Article 3(1) does not affect "the right of States to take appropriate measures for maintaining or restoring law and order,

---

on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, G.A. Res. 36/103, 9 December 1981, U.N. Doc. A/RES/36/103 (1981).

[49] *See* 1954 Cambodian Code de Justice Militaire, which establishes a separate military justice system that applies to soldiers but not civilians and applies in peacetime as well as war. *See also* Projet de loi portant institution d'un code de justice militaire [French Law Project imposing a Code of Military Justice], French Senate, 8 July 1965; United States Uniform Code of Military Justice (10 U.S.C. §§ 801-946), which took effect in 1951. *Parker v. Levy*, 417 U.S. 733, 743 (1974): "[T]he military is, by necessity, a specialized society separate from civilian society…. [T]he military has, again by necessity, developed laws and traditions of its own during its long history."

[50] Louis B. Nichols, *The Justice of Military Justice*, 12 WM. & MARY L. REV. 482, 483-84 (1971).

[51] *Parker v. Levy*, 417 U.S. 733, 743 (1974).

[52] For example, in Cambodia a perpetrator of crimes against soldiers would have been subject to the 1954 Cambodian Code de Justice Militaire or the 1956 Penal Code.

[53] APII, Art. 1(1).

defending their national unity and territorial integrity."[54] States recognized that there may be situations where they might need to attack dissident armed forces. They made specific provisions to regulate such conduct, rather than prohibiting a State from attacking its own soldiers in such a situation. States' interests in retaining their sovereignty and regulating their militaries internally demonstrate that they would not have intended crimes against humanity to include attacks against a State's own soldiers in peacetime.

20. If crimes against humanity could be committed by a State against its own soldiers, States might, in limited situations, be accused of crimes against humanity for using their soldiers in otherwise legitimate military tactics. A State using its own soldiers as kamikaze pilots,[55] with the intent that they die for certain military objectives, might be deemed to have committed a crime against humanity.[56] States would not have intended to create a law preventing the implementation of military strategies aimed at lawful targets.

21. For the purposes of crimes against humanity, customary international law requires that the population targeted for attack be civilian.[57] Even in peacetime, customary international law does not recognize a crime against humanity where the target population is predominantly comprised of soldiers. Any concern that a gap in legal protections for soldiers may arise if States cannot be prosecuted for crimes against humanity against their own soldiers is unfounded. Under certain circumstances, States could be prosecuted for acts of genocide involving their soldiers,[58] in addition to facing national prosecutions. Under applicable customary international law, crimes against humanity apply only to a *civilian* population. Article 5 of the Establishment Law recognizes and applies this

---

[54] International Committee of the Red Cross (ICRC), Commentary to Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the protection of Victims of Non-International Armed Conflicts, Art. 3, para. 4500, 1987, also noting that Article 3(1) reaffirms the principle of the inviolability of the national sovereignty of States.

[55] Kamikaze pilots were used by the Japanese in World War II to crash into enemy ships. While this military tactic was costly, it resulted in the sinking or damage of 263 Allied ships and was reported to have had a major impact on the Allies' plans concerning an invasion of Japan. INTERNATIONAL ENCYCLOPEDIA OF MILITARY HISTORY 706 (James C. Bradford, ed., 2015). Yoram Dinstein explains: "[s]ome suicide attacks (epitomized by Japanese kamikaze pilots in World War II, flying properly marked military aircraft) are brave manifestation of lawful combatancy." YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT n. 235 (3d ed., Cambridge University Press 2016).

[56] An attack may be defined as a course of unlawful acts such as those enumerated in Article 5 of the Establishment Law (i.e. murder). *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/TC, Case 002/01 Judgement, 7 August 2014, E313, para. 178.

[57] *See supra* paras. 3-15.

[58] Genocide does not require that the acts be committed against a civilian population and, unlike war crimes or crimes against humanity from 1975-79, can occur in peacetime. *See* Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the UN General Assembly, 9 December 1948, Art. II.

definition.[59] The *chapeau* requirements of crimes against humanity cannot be extended at the ECCC to encompass an attack that is only "primarily"[60] directed against a civilian population or directed against a non-civilian population comprised of soldiers. The attack must be wholly directed against a *civilian* population.

C. Question 2B: Would a regime that tried to cleanse its own armed forces of, for example, all soldiers holding a particular ethnicity or faith, in the course of or otherwise connected to an armed conflict, commit crimes against humanity under customary international law?

Answer: No. During armed conflicts, if non-civilians (such as active soldiers, soldiers *hors de combat*, or detained soldiers) are the target of an attack by their own State, such an attack might be a violation of international humanitarian law, genocide, or national law, depending upon the circumstances; it would not be a crime against humanity.

22. During an armed conflict, every person is either a legitimate military target or a person protected against a direct attack; the two categories are mutually exclusive.[61] The Geneva Conventions distinguish between the protections provided to soldiers and those provided to civilians during an armed conflict.[62] As illustrated by the ICTY *Prlić et al.* case,[63] depending upon their status, non-civilians may be protected by the laws of war but are not entitled to the same level of protection as civilians.

---

[59] Establishment Law, Art. 5 (emphasis added): "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 grounds …."

[60] *See* Call for Submissions, para. 1. The International Co-Investigating Judge appears to inaccurately recite Article 5 of the Establishment Law, where he states that the attack must be "primarily directed" against a civilian population. He relies on ICTY jurisprudence, which indicates only that the phrase "directed against," in the ICTY's definition of crimes against humanity, requires that the civilian population must be the "primary rather than an incidental target of the attack." *Prosecutor v. Kunarac*, IT-96-23 & IT-96-23/1-A, Judgement, 12 June 2002, para. 92.

[61] Nils Melzer, *The Principle of Distinction Between Civilians and Combatants*, THE OXFORD HANDBOOK OF INTERNATIONAL LAW IN ARMED CONFLICT 296-97 (Andrew Clapham & Paola Gaeta, eds., Oxford University Press 2014).

[62] Common Article 3 requires that persons who are not actively taking part in hostilities be treated humanely. A soldier who lays down his arms, is wounded, detained, or becomes sick during a conflict is still protected under Articles 3, 12, 13(1) of the First Geneva Convention. This protection might exist in relation to the soldier's own State as well as an opposing State. *See* Commentary to the First Geneva Convention (2016), Section D, para. 1. The Third Geneva Convention protects prisoners of war (combatants who have fallen into enemy hands). Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, Art. 4. The Fourth Geneva Convention protects persons (not soldiers) who are not protected by the other Geneva Conventions and who are in the hands of a Party or Occupying Power of which they are not nationals. Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, Art. 4.

[63] Despite extending protection to Muslim HVO soldiers under the Grave Breaches regime, the Trial Chamber required that the targeted population be civilian for purposes of crimes against humanity. *See supra* para. 13.

23. A State's attacks against its own soldiers are not a zero-sum game, i.e., either they are crimes against humanity or they are not a crime. If a regime attempts to cleanse its own armed forces during an armed conflict, this might violate international humanitarian law,[64] genocide, or national law, depending upon the circumstances of the acts. It would not constitute a crime against humanity.

III. CONCLUSION

24. Under applicable customary international law, crimes against humanity apply only to a *civilian* population. Soldiers – whether a State's own soldiers or enemy soldiers – are *always* distinct from civilians. Whether in peacetime or war, acts of a State against its own soldiers are not crimes against humanity. No banal logical policy aspect has been consistently overlooked by States since the time of Nuremberg.

25. Finding that an attack may be directed against soldiers reads two words[65] out of Article 5's definition of crimes against humanity. Statutory language must not be ignored simply because it may be inconvenient.[66] Any doubt as to the meaning of "civilian" must be interpreted in a light most favorable to Mr. MEAS Muth, in accordance with Article 38 of the Cambodian Constitution and the principle of *in dubio pro reo*.[67]

26. The ECCC must apply the law that existed from 1975 to 1979. It is not for the Court to "fill [a perceived] gap through its case law."[68] The question is *not* what the law *should be*,

---

[64] Henckaerts, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOL. 1, Rule 156.

[65] Not only is the word "civilian" ignored, but "population" is also ignored. Interpreting the requirement that an attack be directed against a "population" as merely another way of requiring that the attack be "widespread or systematic" (i.e. that crimes against humanity do not consist of isolated or random acts but require a broader context) makes the word "population" superfluous. It is meaningful only when modified by the word "civilian."

[66] The principle of *verba quae aliquid operari possunt non debent esse superflua* provides that words that can have some effect ought not to be treated as superfluous. It is a basic principle of statutory interpretation that courts should give effect to every word of a statute. Congressional Research Services, *Statutory Interpretation: General Principles and Recent Trends*, p. 13-14.

[67] *See Case of NUON Chea et al.*, 002/19-09-2007-ECCC-TC/SC(04), Decision on Immediate Appeal by KHIEU Samphan on Application for Release, 6 June 2011, E50/3/1/4, para. 31. This is particularly true since a broad interpretation of the phrase "an attack against a civilian population" that includes attacks against soldiers would not have been foreseeable or accessible in 1975-79. *See Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ(PTC75), Decision on IENG Sary's Appeal Against the Closing Order, 11 April 2011, D427/1/30, para. 210 (explaining that foreseeability and accessibility are elements of the principle of legality, which must be satisfied before a crime can be applied at the ECCC).

[68] At the ICTY, Chambers recognize that even where they perceive "protection gaps" in the law, they are limited by the wording of the ICTY Statute and may not fill these gaps through jurisprudence. *See Prosecutor v. Mrkšić et al.*, IT-95-13/1-T, Judgement, 27 September 2007, para. 460. The *Mrkšić* Trial Chamber incorrectly concluded that victims of crimes against humanity must be civilians in accordance with the ICTY Statute. The Appeals Chamber overturned this holding, finding that the ICTY Statute did not contain such a

but rather what customary international law was in 1975-79 and how that law may be applied in accordance with the Establishment Law.

Respectfully submitted,

ANG Udom

Michael G. KARNAVAS

Co-Lawyers for Mr. MEAS Muth

Signed in Phnom Penh, Kingdom of Cambodia on this **19th** day of **May**, **2016**

limitation. *Prosecutor v. Mrkšić et al.*, IT-95-13/1-A, Judgement, 5 May 2009, para. 29, referring to *Prosecutor v. Martić*, IT-95-11-A, Judgement, 8 October 2008, para. 307.