



ព្រះរាជាណាចក្រកម្ពុជា

ជាតិ សាសនា ព្រះមហាក្សត្រ

**Kingdom of Cambodia
Nation Religion King**

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

Extraordinary Chambers in the Courts of Cambodia
Chambres extraordinaires au sein des Tribunaux cambodgiens

**Royaume du Cambodge
Nation Religion Roi**

**ការិយាល័យសហចៅក្រមស៊ើបអង្កេត
Office of the Co-Investigating Judges
Bureau des co-juges d'instruction**

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

Before: **The Co-Investigating Judges**
Date: **19 April 2016**
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CALL FOR SUBMISSIONS BY THE PARTIES IN CASES 003 and 004 AND CALL FOR *AMICUS CURIAE* BRIEFS

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I. ISSUE

1. To amount to a crime against humanity, the specific offences listed in Article 5 of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia (“ECCC Law”) must have been committed, *inter alia*, as part of a widespread or systematic attack primarily directed against “any civilian population”.¹ There has been an ongoing and long-standing debate about the question of what effect the presence of soldiers or combatants in the wider sense among a target group has on the interpretation of that concept. This becomes a vital legal issue in the context of alleged internal military purges, i.e. when a regime targets its own soldiers under circumstances that could *ceteris paribus* qualify as crimes against humanity.
2. The Trial Chamber, in line with the jurisprudence of 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 of the ECCC Law.² However, this 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.
3. The ECCC has not considered 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 against a civilian population for the purpose of Article 5 of the ECCC Law (“Issue”).
4. Other international criminal courts have not, thus far and to the best of my knowledge, explicitly dealt with the Issue.
5. It is thus appropriate for me to put the Parties on notice of the legal question I am currently considering. It seems that an 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. Leaving the contentious issue about the nexus to an armed conflict under the ECCC’s jurisdiction aside, on which I have positioned myself elsewhere,³ one could further argue that it 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 under international customary law be engaging in a variety of crimes against humanity, because the victims’ combatant quality merely because they are soldiers would be entirely irrelevant in this context, 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.

¹ Case File No. 002-E313, *Judgement*, 7 August 2014, para. 182; *Prosecutor v Dragoljub Kunarac et al*, IT-96-23 & IT-96-23/1-A, Appeal Judgement, 12 June 2002, paras 91-92.

² Case File No. 002-E313, *Judgement*, 7 August 2014, para. 186; Case File No. 001-E188, *Judgement*, 26 July 2010, para. 304; *Prosecutor v Tihomir Blaškić*, IT-95-14-A, Appeal Judgement, 29 July 2004, para. 114.

³ Case File No. 003-D87/2/1.7/1, *Decision on Meas Muth’s Request for Clarification concerning Crimes against Humanity and the Nexus with Armed Conflict*, 5 April 2016.

II. CALL FOR SUBMISSIONS

6. A clearer understanding of the Issue may be relevant to the allegations in Case 003 – and to a lesser extent in Case 004 - and will benefit international criminal law as a whole. I therefore invite the parties in Case 003 and Case 004 to submit any observation they may have on the Issue.
7. I also consider it appropriate to invite, pursuant to Internal Rule 33, any qualified person or organisation to submit *amicus curiae* briefs on the Issue.⁴
8. I refer the parties and *amici curiae* to the Practice Direction on Filing of Documents before the ECCC, *Practice Direction ECCC/01/2007/Rev.7*, available on the ECCC website, for guidance on the format of the written brief. The briefs shall not exceed 3,000 words, and shall be filed in pdf format in Khmer, English, or French.
9. The parties to Cases 003 and 004, as well as the *amici curiae* shall at this time address the Issue in the abstract as a question of law, and not with particular reference to the allegations of Cases 003 or Case 004. Case-specific submissions by the parties may be made in the final submissions once I have taken a view on the law and notified the Parties accordingly.
10. The selection of *amicus curiae* briefs for citation will be based on merit.

FOR THE FOREGOING REASONS, I:

11. **INVITE** the parties to Case 003 and Case 004 to make submissions on the Issue by 19 May 2016;
12. **INVITE** scholars, academic organisations and any other organisation operating in the field of international criminal law to submit written *amicus curiae* briefs not exceeding 3,000 words (including footnotes) on the Issue by 19 May 2016. The briefs shall be emailed to the Greffier of the Office of the Co-Investigating Judges at the following address: Chhay.Chanlyda@eccc.gov.kh, and shall be accompanied by an academic CV of the amicus in a separate pdf file;
13. **INFORM** the parties to Case 003 and Case 004 that, pursuant to Internal Rule 33(2), they shall have 15 days to file a combined response to all briefs submitted by *amici curiae*. The fifteen days will start running from the notification of the total number of briefs submitted. For this purpose, all briefs will be notified on the same date once the deadline for submissions has passed. The combined responses shall not exceed 3,000 words (including footnotes);
14. **INFORM** the parties that responses to filings of other parties on the Issue will not be allowed and that I will not entertain case-specific submissions at this time; and
15. **REQUEST** the Office of the Administration to publish this call for submission on the ECCC's website and to take any other measure suitable to disseminate it

⁴ Rule 33 of the ECCC Internal Rules provides: “*At any stage of the proceedings, the Co-Investigating Judges or the Chambers may, if they consider it desirable for the proper adjudication of the case, invite or grant leave to an organization or person to submit an amicus curiae brief in writing concerning any issue. The Co- Investigating Judges and the Chambers concerned shall determine what time limits, if any, shall apply to the filing of such briefs.*”

among persons and organisations operating in the field of international criminal law.

Dated 19 April 2016



Michael Bohlander

សហចៅក្រមស៊ើបអង្កេតអន្តរជាតិ

**International Co-Investigating Judge
Co-juge d'instruction international**