BEFORE THE OFFICE OF THE CO-INVESTIGATING JUDGES

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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AO AN'S SUBMISSION ON WHETHER AN ATTACK BY A STATE OR ORGANISATION AGAINST MEMBERS OF ITS OWNARMED FORCES COULD QUALIFY AS A CRIME AGAINST HUMANITY UNDER CUSTOMARY INTERNATIONAL LAW IN 1975-1979

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I. INTRODUCTION

1. AO An, through his Co-Lawyers, respectfully files this submission, pursuant to the International Co-Investigating Judge's ('*ICIJ's*') *Call for Submissions by the Parties in Cases 003 and 004 and Call for Amicus Curiae Briefs* ('*Request for Submissions*')[1] concerning whether under customary international law in 1975-1979, an attack by a state or organisation against members of its own armed forces is an attack directed against a civilian population ('*Civilian Population Requirement*') for the purpose of Article 5 of the ECCC Law.[2]

2. The Defence submits that under customary international law in 1975-1979, an attack by a state or organization against its own armed forces could not amount to an attack directed against any civilian population for the following reasons: (a) there is no evidence of state practice and *opinio juris* including combatants within the scope of 'any civilian population,' rather the ordinary meaning of this phrase and the available state practice point to the exclusion of combatants; (b) adopting an interpretation of 'any civilian population' beyond the ordinary meaning violates the principle of legality; and (c) if there is an absence of evidence of state practice and *opinio juris* concerning this issue, then the ICIJ must resolve the ambiguity in favour of AO An and the other charged persons, pursuant to the principle of *in dubio pro reo*.

II. APPLICABLE LAW

A. Determining customary international law

3. The Supreme Court Chamber ('*SCC*') has held that the state of customary international law is determined by the existence of prevalent and consistent relevant state practice and *opinio juris* (*i.e.*, acceptance or recognition by states that a practice is obligatory).[3] Similarly, the Pre-Trial Chamber ('*PTC*') has held that '[n]ot only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the

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[1] Case 004/07-09-2009, *Call for Submissions by the Parties in Cases 003 and 004 and Call for Amicus Curiae Briefs*, D306, 19 April 2016, paras 3, 6, 11.

[2] Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, with inclusion of amendments as promulgated on 27 Oct. 2004 (NS/RKM/1004/006) ('*ECCC Law*'), Art. 5 ('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….').

[3] Case 001/18-07-2007-ECCC/SC, *Appeal Judgement* ('*Case 001 Appeal Judgement*'), F28, 3 Feb. 2012, para. 92, attached as App. 1.

existence of a rule of law requiring it.'[4] Courts may rely upon treaty law or international jurisprudence to determine whether *opinio juris* supports the existence of customary international law.[5]

B. Rules of interpretation

4. Article 31 of the 1969 Vienna Convention on the Law of Treaties ('*Vienna Convention*') provides that:

> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
> (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
> (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account, together with the context:
> (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
> (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
> (c) Any relevant rules of international law applicable in the relations between the parties....[6]

5. International tribunals have reiterated the rules of treaty interpretation set out in the 1969 Vienna Convention.[7] The International Court of Justice ('*ICJ*') has held that 'a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose. As a supplementary measure recourse may be had to means of interpretation such as the preparatory work of the treaty and the circumstances of its conclusion.'[8]

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[4] Case 002/19-09-2007-ECCC/OCIJ (PTC38), *Decision on the Appeals against the Co-Investigative Judges Order on Joint Criminal Enterprise* ('*JCE Appeal Decision*'), D97/15/9, 20 May 2010, para. 53, attached as App. 2 (quoting *North Sea Continental shelf (Federal Republic of Germany v. Denmark, Federal Republic of Germany v. Netherlands)*, ICJ, 20 Feb. 1969, para. 77).
[5] *JCE Appeal Decision*, paras 53, 60; *Case 001 Appeal Judgement*, para. 93.
[6] Vienna Convention, 23 May 1969, Art. 31, attached as App. 3.
[7] *Territorial Dispute (Lybian Arab Jamahiriya/Chad)*, *Judgement* ('*ICJ Judgement on Territorial Dispute*'), ICJ, Reports 1994, para. 41, attached as App. 4; Case 002/19-09-2007/ECCC/TC, *Case 002/01 Judgement*, E313, 7 Aug. 2014, paras 185-186, attached as App. 5 (interpreting term 'civilian' based on ordinary meaning); *Prosecutor v. Martić*, ICTY, IT-95-11-A, *Appeal Judgement*, 8 Oct. 2008, para. 297, attached as App. 6 (holding provisions must be interpreted pursuant to 'natural and ordinary meaning in the context in which they occur,' taking into account their object and purpose); *Prosecutor v. Tadić, et al.*, ICTY, IT-95-9, *Decision on Motion for Judicial Assistance to be Provided by SFOR and Others*, 18 Oct. 2000, para. 47, attached as App. 7 (quoting principle of ordinary meaning set forth in Vienna Convention); *Golder v. U.K.*, ECHR, no. 4451/70, 21 Feb. 1975, para. 30, attached as App. 8 (holding fundamental interpretative principle is that treaty terms shall be interpreted in accordance with their ordinary meaning, context).
[8] *ICJ Judgement on Territorial Dispute*, para. 41.

C. Definitions of crimes against humanity

i. Pre-1975

6. By 1975, numerous legal instruments defined crimes against humanity with the Civilian Population Requirement.[9] Article 6(c) of the IMT Charter[10] incorporated the Civilian Population Requirement and the armed conflict nexus requirement:

> 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.[11]

7. Under the IMT Charter definition, crimes against humanity were divided into two categories: the murder-type and the persecution-type.[12] Scholars have argued that the IMT Charter applied the Civilian Population Requirement to the murder-type crimes against humanity but not to the persecution-type.[13] However, this assertion has been criticised as 'not lead[ing] to satisfactory results.'[14]

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[9] 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 Aug. 1945, 82 UNTS 279 ('*IMT Charter*'), Art. 6(c), attached as App. 9; Control Council Law No 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, 20 Dec. 1945, 3 Official Gazette Control Council for Germany 50-55 (1946) ('*Control Council Law No 10*'), Art II (1) (c), attached as App. 10; Charter of the International Military Tribunal for the Far East, General Order 1, General Headquarters Supreme Commander of the Allied Forces, 19 Jan. 1946, as amended 26 April 1946 ('*Tokyo Charter*'), Art. 5(c), attached as App. 11; Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, with commentaries, *Yearbook of the International Law Commission* (1950), Vol. II, 374-378 ('*Nuremberg Principles*'), Principle 6(c), attached as App. 12; Draft Code of Offences against the Peace and Security of Mankind, *Yearbook of the International Law Commission* (1951), 133-137 ('*1951 Draft Code*'), Art. 2(10), attached as App. 13; Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, adopted 26 Nov. 1968, General Assembly Resolution 2391 (XXIII), entered into force 11 Nov. 1970, 754 UNTS 73 ('*Convention on the Non-Applicability of Statutory Limitations*'), attached as App. 14.

[10] Case 003/07-09-2009-ECCC-OCIJ, *Decision on MEAS Muth's Request for Clarification Concerning Crimes against Humanity and the Nexus with Armed Conflict* ('*Armed Conflict Nexus Decision*'), D87/2/1.7/1, 5 April 2016, para. 24 (stating Article 6(c) is 'the first instance of the concept of crimes against humanity being turned into positive law'); Beth Van Schaack, *The Definition of Crimes Against Humanity: Resolving the Incoherence*, 37 Colum. J. Transnat'l L. 787, 1998-1999, p. 789, attached as App. 15.

[11] IMT Charter, Art. 6(c) (emphasis added).

[12] *See* Antonio Cassese, *International Criminal Law* (3d ed., Oxford: 2013), p. 101, attached as App. 16; Van Schaak, p. 802.

[13] Cassese, p. 102; Egon Schwelb, 'Crimes Against Humanity,' *The British Yearbook of Int'l Law* (1946), 23rd Year of Issue, Geoffrey Cumberlege, Oxford Univ. Press, 178-226, p. 190, attached as App. 17.

[14] *Prosecutor v. Tadić*, ICTY, IT-94-1-T, *Trial Judgment*, 7 May 1997, para. 640, attached as App. 18 (citing United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* 32-38 (The United Nations War Crimes Commission: London, 1948), p. 193); Schwelb, pp. 190-191 ('An interpretation distinguishing between crimes of the murder type and persecutions would in respect of this particular phrase not lead to satisfactory results for the following reasons: Crimes of the murder type, to which the words "any civilian population" undoubtedly pertain, are certainly graver offences than "persecutions on political, racial, or religious grounds", if we restrict the latter to persecutions which do not go as far as murder, extermination, enslavement, and deportation. It would be difficult to understand the rationale of a provision under which the number of persons afforded protection against a less serious crime

8. Similar to the definition of crimes against humanity in the IMT Charter, the definition in Control Council Law No 10 retained the Civilian Population Requirement. However, it did not mention the armed conflict nexus requirement:

> Crimes against Humanity. 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.[15]

9. The Tokyo Charter mirrored the definition in the IMT Charter, including both the Civilian Population Requirement and the armed conflict nexus requirement:

> 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 or racial 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.[16]

10. The Nuremberg Principles, formulated by the International Law Commission ('*Commission*') following General Assembly Resolution 177(II),[17] again echoed the wording of the IMT Charter with respect to the definition of crimes against humanity:

> Murder, extermination, enslavement, deportation and other inhumane acts *done against any civilian population*, or persecutions on political, racial, or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime.[18]

11. In the Draft Code of Offences against the Peace and Security of Mankind adopted in 1951 ('*1951 Draft Code*'), the Commission required that all crimes against humanity (although not naming them as such) be directed against civilians, thus abandoning the division between murder-type and persecution-type crimes against humanity:

> Inhuman acts by the authorities of a State or by private individuals *against any civilian population*, such as murder, or extermination, or enslavement, or deportation, or persecutions on political, racial, religious or cultural grounds, when such acts are committed in execution of or in connexion with other offences defined in this article.[19]

12. Notably, the 1951 Draft Code took into account observations from 13 Member States, and none of the States objected to the civilian population requirement.[20] In its accompanying

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(persecution) would be larger than that of potential victims protected against the graver offences of the murder type.').

[15] Control Council Law No 10, Art II 1(c) (emphasis added). As stated by the ICIJ, '[t]he purpose of this law was to establish a uniform legal basis in Germany for the prosecution of persons other than those dealt with by the International Military Tribunal.' *Armed Conflict Nexus Decision*, para. 26.

[16] Charter of the International Military Tribunal for the Far East ('*Tokyo Charter*'), Art. 5(c) (emphasis added).

[17] General Assembly Resolution 177 (II), 21 Nov. 1947, para (a), attached as App. 19.

[18] Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal ('*Nuremberg Principles*'), Principle 6(c) (emphasis added).

[19] 1951 Draft Code, Art. 2(10) (emphasis added).

[20] General Assembly, 'Comments Received from Governments Regarding the Draft Code of Offences Against the Peace and Security of Mankind and the Question of Defining Aggression,' UN Doc. A/2162, 27 Aug. 1952, p. 28, attached as App. 20; General Assembly, 'Comments Received from Governments Regarding the Draft

report, the Commission did not discuss whether combatants could be victims of crimes against humanity, but instead, focused on interpreting 'any civilian population' to include acts committed by the perpetrator against its own population.[21]

13. In 1954, the Commission adopted a second draft code ('*1954 Draft Code*') that also defined crimes against humanity with the Civilian Population Requirement and did not distinguish between murder-type and persecution-type crimes.[22] It is important to note that although the armed nexus requirement was debated within the Commission, the Civilian Population Requirement was not viewed as contentious.[23]

14. The 1968 Convention on the Non-Applicability of Statutory Limitations adopted the definition of crimes against humanity in the IMT Charter and importantly included the Civilian Population Requirement.[24] With regards to this convention, the ICIJ has stated that '[i]rrespective of the number of signatures, ratifications, or accessions, the positions expressed by the governments of Member States in relation to the Statutory Limitations and Apartheid Convention, which can be characterised as verbal acts of a State, are evidence of state practice.'[25]

ii. Post-1979

15. The Civilian Population Requirement remained a constant in the definitions of crimes against humanity after 1975-1979 with few exceptions. One exception was the 1991 Draft Code of Crimes against the Peace and Security of Mankind adopted by the Commission.[26]

Code of Offences Against the Peace and Security of Mankind and the Question of Defining Aggression,' UN Doc. A/2162/Add.1, 16 Sept. 1952, attached as App. 21.

[21] Report of the International Law Commission, UN GAOR, 5th Sess., Supp. No 12, U.N. Doc. A/1316 (1950), p. 377, para. 124, attached as App. 22.

[22] Draft Code of Offences against the Peace and Security of Mankind, *Yearbook of the International Law Commission*, 1954, Vol. I, Summary records of the 6th session (3 June - 28 July 1954) ('*1954 Draft Code*'), pp. 140-148, para. 36, attached as App. 23 ('Inhuman acts by the authorities of a State or by private individuals acting under the instigation or toleration of the authorities against any civilian population, such as murder, or extermination, or enslavement, or deportation, or persecutions, on political, social, racial, religious or cultural grounds.'). With respect to the effect of the 1954 Draft Code on customary international law, the ICIJ has specifically noted: '[The] UNGA only decided to postpone further consideration of the 1954 Draft Code because it was awaiting the submission of a report on the definition of aggression. The UNGA did not reject the adoption of the Draft Code because of a disagreement on the constitutive elements of crimes against humanity. In this sense, the effect of the mere non-adoption becomes less relevant and the de facto superseding effect of the legal views espoused by the 1954 Draft Code vis-a.-vis the equally non-adopted Nuremberg Principles gains more prominence.' *Armed Conflict Nexus Decision*, para. 56.

[23] *See e.g. 1954 Draft Code*, '269th Meeting, 16 July 1954,' pp. 140-146 (stating discussions among Commission members demonstrate that Civilian Population Requirement was widely accepted and that many members wanted to distinguish these crimes from human rights violations).

[24] *Convention on the Non-Applicability of Statutory Limitations*, Art. I(b).

[25] *Armed Conflict Nexus Decision*, paras 62-63.

[26] Phyllis Hwang, *Defining Crimes against Humanity in the Rome Statute of the International Criminal Court*, 22 Fordham Int'l L.J. 457 (Dec. 1998), pp. 465-466, attached as App. 24 (discussing Draft Code of Offences

This draft departed significantly from its 1951 and 1954 predecessors and from the definition of crimes against humanity contained in the IMT Charter, primarily because it removed the Civilian Population Requirement. [27] Because the draft diverged so significantly from previous relevant legal texts, it is not considered an expression of international customary law and was later disregarded.[28]

16. The 1993 Statute of the International Criminal Tribunal for the former Yugoslavia ('*ICTY*') and the 1994 Statute of the International Criminal Tribunal for Rwanda ('*ICTR*') again included the Civilian Population Requirement.[29]

17. The Rome Statute of the International Criminal Court ('*ICC*') also requires that crimes against humanity include the Civilian Population Requirement: 'For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack *directed against any civilian population*, with knowledge of the attack.'[30] The second paragraph of the article elaborates on the term 'attack': 'Attack directed against any civilian population' means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.'[31]

18. Finally, in August 2010, the Crimes Against Humanity Initiative, composed of international criminal law experts and others, drafted the Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity which retained the Civilian Population Requirement, thereby building upon and complementing the Rome Statute.[32]

D. Principle of legality

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against the Peace and Security of Mankind, *Yearbook of the International Law Commission* (1991), Vol. II ('*1991 Draft Code*')).

[27] Hwang, pp. 465-466.

[28] Hwang, pp. 465-466 (stating 1991 Draft Code differs from 1954 Draft Code in number of ways and thus 'its significance in reflecting the development of crimes against humanity in international law is limited').

[29] ICTY Statute, Art. 5; ICTR Statute, Art. 3.

[30] Rome Statute (adopted 17 July 1998 and entered into force 1 July 2002) (emphasis added), Art. 7(1).

[31] Rome Statute, Art. 7(2)(a).

[32] *Proposed International Convention for the Prevention and Punishment of Crimes Against Humanity* ('*Proposed Convention*'), Crimes Against Humanity Initiative, Washington University School of Law, Whitney R. Harris World Law Institute, Aug. 2010, available at http://law.wustl.edu/harris/cah/docs/EnglishTreatyFinal.pdf ('For the purpose of the present Convention, "crimes against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack…"Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack').

19. The principle of legality, also referred to as *nullum crimen sine lege* (no crime without law), prohibits the retroactivity of crimes and requires that prohibited conduct be sufficiently specific so as to guide the behaviour of citizens.[33] Under this principle, criminal laws must be strictly construed, and extension by analogy is prohibited.[34] Courts may interpret and clarify existing laws, but the substance must be foreseeable and ascertainable to the accused at the time of the alleged crimes.[35]

20. Under ECCC law, the ICIJ must respect the principle of legality. The Chambers 'shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the International Covenant on Civil and Political Rights [('*ICCPR*')].'[36] Article 15(1) of the ICCPR codifies and defines the principle of legality.

21. Furthermore, the SCC has found that satisfying the principle of legality is a prerequisite to exercising jurisdiction.[37] It has stated that 'as an additional safeguard, fairness and due process concerns underlying the principle of legality require that charged offences or modes of liability were "sufficiently foreseeable and that the law providing for such liability [was] sufficiently accessible [to the accused] at the relevant time."'[38] Foreseeable means that the accused was 'able to appreciate that the conduct is criminal in the sense

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[33] *Case 001 Appeal Judgement*, para. 91; *Prosecutor v. Vasiljevic*, ICTY, IT-98-32-T, *Judgement*, 29 Nov. 2002, para. 193, attached as App. 25 (holding 'it would be wholly unacceptable…to convict an accused person on the basis of a prohibition which, taking into account the specificity of customary international law and allowing for the gradual clarification of the rules of criminal law is either insufficiently precise to determine the conduct and distinguish the criminal from the permissible, or was not sufficiently accessible at the relevant time').

[34] Cassese, p. 33.

[35] *Case 001 Appeal Judgement*, paras 95, 96 (finding legality principle prevents chambers from 'creating new law or from interpreting existing law beyond the reasonable limits of acceptable clarification'); *accord Prosecutor v. Hadsihasanovic, et al.*, ICTY, IT-01-47-AR72, *Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility*, 16 July 2003, para. 34, attached as App. 26 (holding it must be foreseeable and accessible to accused that his conduct was punishable); *Kafkaris v. Cyprus*, ECHR, no. 21906/04, 12 Feb. 2008, para. 140, attached as App. 27 (holding definition of both offence and penalty must be accessible and foreseeable); *SW v. U.K.*, ECHR, no. 20166//92, 22 Nov. 1995, para. 36, attached as App. 28 (holding judicial interpretation is permitted 'provided that the resulting development is consistent with the essence of the offence and could reasonably be foreseen').

[36] ECCC Law, Art. 33 *new*; Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea ('*UN-RGC Agreement*'), Art. 12; *see* Cambodian Constitution, Arts 31, 38 (obliging courts to protect rights recognized in key human rights instruments and to follow legal procedures in force); 1956 Penal Code of Cambodia, Art. 6 (requiring strict application of legality).

[37] *Case 001 Appeal Judgement*, paras 90, 98-100 (holding charged offences and modes of liability must 'have existed under Cambodian or international law between 17 April 1975 and 6 January 1979' to be within ECCC jurisdiction).

[38] *Case 001 Appeal Judgement*, para. 96 (quoting *Prosecutor v. Ojdanić, et al.*, ICTY, IT-99-37-AR72, *Appeal Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction-Joint Criminal Enterprise*, 21 May 2003, paras 21, 37).

generally understood, without reference to any specific provision.'[39] Accessible means that the criminality of the conduct was 'sufficiently available to the accused' through international treaty, customary, or domestic law.[40]

22. The principle of legality is applied *strictly in civil law jurisdictions*.[41] The SCC has explained that legality should have a 'restraining function' in international criminal law, 'prevent[ing] international or hybrid tribunals and courts from unilaterally exceeding their jurisdiction by providing clear limitations on what is criminal.'[42] The importance of the principle of legality has not only been recognized and emphasized by ECCC and Cambodian law but also by international and national tribunals.[43]

E. Principle of *in dubio pro reo*

23. Under IR 21(1), the legal framework applicable to the Court 'shall be interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims and so as to ensure legal certainty and transparency of proceedings…d) Every person suspected or prosecuted shall be presumed innocent as long as his/her guilt has not been established….' Consistent with IR 21, Article 38 of the Cambodian Constitution provides that '[a]ny case of doubt, it should be resolved in favour of the accused.'[44]

24. In discussing IR 21, the ECCC SCC has held that '[a]n issue related to [IR] 21 is the notion of *in dubio pro reo*…which results from the presumption of innocence, is guaranteed by the Constitution of Cambodia and has as its primary function to denote a default finding in the event where factual doubts are not removed by the evidence. 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.'[45]

25. Concerning the interpretation of international customary law, the PTC has held that 'in the absence of clear state practice and *opinio juris* from 1975-1979 evidencing severance

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[39] *Case 001 Appeal Judgement*, para. 96 (quoting *Hadzihasanovic & Kubura*, ICTY, IT-01-47-A, *Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility*, 16 July 2003, para. 34).
[40] *Case 001 Appeal Judgement*, para. 96 (internal citation omitted).
[41] Cassese, p. 33.
[42] *Case 001 Appeal Judgement*, para. 90.
[43] *Prosecutor v. Lubanga*, ICC, ICC-01/04-01/06, *Decision on the confirmation of charges*, 29 Jan. 2007, para. 303, attached as App. 29; *Prosecutor v. Delalic, et al.*, ICTY, IT-96-21-T, *Trial Judgement*, 16 Nov. 1998, para. 402, attached as App. 30; *Kokkinakis v. Greece*, ECHR, no. 14307/88, 25 May 1993, para. 52, attached as App. 31; Conseil Constitutionnel, Décision n° 80-127 DC 'Loi renforçant la sécurité et protégeant la liberté des personnes', 20 janvier 1981, para. 7, attached as App. 32; Conseil Constitutionnel, Décision n° 98-399 DC, 'Loi relative à l'entrée et au séjour des étrangers en France et au droit d'asile', 05 mai 1998, paras. 7 et 8, at App. 33.
[44] Cambodian Constitution, Art. 38.
[45] Case 002/19-09-2007-ECCC-TC/SC(04), *Decision on Immediate Appeal by Khieu Samphan on Application for Immediate Release*, E50/3/1, 6 June 2011, para. 31, attached as App. 34 (internal citation omitted).

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 the favor of the accused.'[46] The principle of legality and *in dubio pro reo*, as articulated by the SCC and PTC, are consistent with Article 22 of the Rome Statute.[47]

III. ARGUMENT

26. Under customary international law in 1975-1979, an attack by a state or organization against members of its own armed forces could not amount to an attack directed against any civilian population, and thus, could not constitute a crime against humanity. First, in 1975-1979, there is no evidence of state practice and *opinio juris* including combatants within the scope of 'any civilian population,' rather the available state practice points to the exclusion of combatants. Second, adopting a definition of 'any civilian population' that exceeds the ordinary meaning violates the principle of legality. Finally, if there is an absence of evidence of state practice and *opinio juris* confirming that an attack by a state or organization against the members of its own armed forces constitutes an attack directed against any civilian population, then the principle of *dubio pro reo* requires the ICIJ to resolve the ambiguity in favour of the charged persons.

A. There is evidence of state practice and *opinio juris* in 1975-1979 indicating that 'any civilian population' excluded combatants

27. The state practice and *opinio juris* in 1975-1979 confirm that the phrase 'any civilian population' did not cover combatants. First, the ordinary meaning of 'any civilian population' in the relevant pre-1975 legal texts did not include combatants, and construing the phrase to include a state's or organization's own armed forces would expand the phrase well beyond its ordinary meaning, thereby violating the rule of strict interpretation. Second, the jurisprudence before and after the period in question establishes that members of a state's or organization's own armed forces could not qualify as 'any civilian population' in 1975-1979.

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[46] Case 002/19-09-2007 ECCC/OCIJ (PTC 145 & 146), *Decision on Appeal by Nuon Chea and Ieng Thirith against the Closing Order*, D427/2/15, 15 Feb. 2011, paras 134-144, attached as App. 35 (holding whether armed conflict nexus requirement was part of definition of crimes against humanity was not sufficiently clear to charge accused); *Prosecutor v. Akayesu*, ICTR, ICTR-96-4-T, *Trial Judgement*, 2 Sept. 1998, para. 319, attached as App. 36 (stating 'the general principles of law stipulate that, in criminal matters, the version favourable to the Accused should be selected').

[47] Rome Statute, Art. 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.').

i. The ordinary meaning of 'any civilian population' in the relevant pre-1975 legal texts did not include combatants, and construing it as such would expand the phrase well beyond its ordinary meaning

28. Inclusion of combatants, such as the attacker's own armed forces, in the definition of 'any civilian population' stretches the phrase well beyond its ordinary meaning. The ordinary meaning of 'any civilian population' in the relevant pre-1975 legal texts was confined to persons who were not members of armed forces or otherwise recognized as combatants.[48] Customary international law did not distinguish between enemy combatants or an attacker's own armed forces; rather, it prohibited combatants generally from being considered as civilians for the purpose of crimes against humanity.[49]

29. According to the ECCC Trial Chamber, in 1975-1979, '[t]he ordinary meaning of the term "civilian" (in English) and "civil" (in French) encompasses persons who are not members of the armed forces.'[50] It held that 'the civilian population included all persons who were not members of the armed forces or otherwise recognized as combatants.'[51] Moreover, it noted that the ordinary meaning of 'any civilian population' is consistent with the definition in Article 50 of Additional Protocol I, which the *ad hoc* tribunals have adopted as reflecting customary international law post-1977.[52]

30. In applying the ordinary meaning of 'any civilian population,' the ECCC Trial Chamber held that soldiers *hors de combat* could not qualify as 'civilians' for the purposes of Article 5 of the ECCC Law.[53] It explained the following:

> In determining civilian or non-civilian status of a person, the specific situation of the individual at the time of the crimes may not be determinative. A member of an armed organization is not accorded civilian status by reason of the fact that he or she is not armed or in combat at the time of the commission of the crimes.'[54]

Accordingly, the Defence submits that if unarmed soldiers and soldiers *hors de combat* were not protected under the definition of crimes against humanity in 1975-1979, then it

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[48] Cassese, pp. 101-102 (stating 'it is apparent that [Article 6(c) of IMT Charter] does not cover combatants').
[49] *See* Mohamed Elewa Badar, *From Nuremberg Charter to the Rome Statute: Defining the Elements of Crimes Against Humanity*, 5 San Diego Int'l L.J. 73, (2004), pp. 101-102, attached as App. 37 (explaining United Nations War Crimes Commission stated in reference to Article 6(c) that terms 'civilian population' appear to indicate that crimes against humanity 'are restricted to inhumane acts committed against civilians as opposed to members of the armed forces….').
[50] *Case 002/01 Judgement*, para. 185.
[51] *Case 002/01 Judgement*, para. 185.
[52] *Case 002/01 Judgement*, para. 185; *Prosecutor v. Blaškić*, IT-95-14-A, *Appeal Judgement*, 29 July 2004, para. 110, attached as App. 38.
[53] *Case 002/01 Judgement*, para. 186; *Blaškić*, paras 114-115 (finding Trial Chamber erred in holding that specific situation of victims at time of crimes is determinative of civilian or non-civilian status).
[54] *Case 002/01 Judgement*, para. 186.

would be considered illogical and inconsistent to find that an attacker's own armed forces were protected.

31. The ordinary meaning of 'any civilian population' must also be examined in the context of the object and purpose of crimes against humanity in 1975-1979. It is clear from the text and *travaux préparatoires* relating to the relevant pre-1975 legal instruments that the drafters of these instruments did not intend for 'any civilian population' to cover all individuals and did not intend to create an exception whereby an attacker's own armed forces would be covered.[55]

32. As explained in Section II, the legal instruments defining crimes against humanity before and after 1975-1979 have consistently included the Civilian Population Requirement without any caveats or objections.[56] Rather, the requirement and its ordinary meaning were widely accepted. This is also evidenced in post- Nuremberg domestic legislation and jurisprudence relating to crimes against humanity -- none of which penalises conduct beyond 'any civilian population.'[57]

33. If the drafters of these instruments had intended to remove the Civilian Population Requirement, then they would have done so, as they did with the armed conflict nexus requirement in in the ICC definition of crimes against humanity or the discriminatory requirement which surfaced in the ICTR definition but not in the ICTY definition.[58] Likewise, if the drafters had intended to protect all individuals, regardless of their status as civilians or military, then they would have stated so in the text.

34. Furthermore, the law on crimes against humanity historically emerged to protect civilian populations, other than those associated with the enemy and protected by international humanitarian law, from widespread and systematic attacks.[59] The Civilian Population

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[55] Cassese, p. 102.

[56] *E.g.,* IMT Charter, Art. 6(c); Control Council Law No 10, Art II(a); Tokyo Charter, Art. 5(c); Nuremberg Principles, Principle 6(c); 1951 Draft Code, Art. 2(10); Convention on the Non-Applicability of Statutory Limitations. The only exception identified by the Defence is in the 1991 Draft Code of Crimes against the Peace and Security of Mankind which was heavily criticized.

[57] *E.g.,* French Penal Code, Art. 212-1; Cass. Crim., 7 Jan. 2015, No 14-86850, attached as App. 39 ('…qu'en l'espèce, les deux incriminations présentent des éléments constitutifs distincts, visent des valeurs protégées distinctes et des intentions criminelles différentes ; que le crime de génocide vise à protéger des groupes déterminés de leur destruction totale ou partielle ; que les autres crimes contre l'humanite visent quant à eux à protéger " un groupe de population civile 'contre des atteintes à leur intégrité physique ou psychique, sans qu'il ne soit requis que les actes visés mettent à exécution un plan dont la finalité est sa destruction totale ou partielle').

[58] *E.g.,* ICTY Statute, Art. 5; ICTR Statute, Art. 3; Rome Statute, Art. 7(1).

[59] Cassese, pp. 101-102 ('As for 'any', it is apparent, both from the text of the provision and from legislative history of Article 6(c), that it was intended to cover civilian populations other than those associated with the enemy, who were already protected by the traditional rules of the law of warfare…As for the word civilian, it is apparent that it does not cover combatants.'); Van Schaack, p. 807 ('What was truly revolutionary about the

Requirement has been part of the definition since the crime's codification in the IMT Charter.[60] The reference to 'any civilian population' was an innovative part of the IMT Charter's definition of crimes against humanity, as compared to war crimes, because it allowed for the prosecution of acts committed against a perpetrator's own population, which was not covered by the law of armed conflict.[61] In fact, the phrase 'any civilian population' was the IMT Charter's *raison d'être*.[62]

35. The Defence submits that an interpretation of 'any civilian population' exceeding the ordinary meaning would erode the distinction between civilians and non-civilians in international law. This distinction is a fundamental principle of international humanitarian law.[63] Without it, the lines between crimes against humanity and war crimes would be blurred, and crimes against humanity would become an extension of war crimes, which would be inconsistent with its objective of protecting civilians.[64]

36. On the basis of the above, there is evidence of state practice and *opinio juris* in 1975-1979 excluding combatants from the definition of 'any civilian population in crimes against humanity.' Interpreting the phrase to include an attacker's own armed forces would expand the definition well beyond its ordinary meaning, as applied in both domestic and international practice in the prosecution of crimes against humanity. This will be explained further below.

ii. Pre-1975 jurisprudence adopted the ordinary meaning of 'any civilian population' and excluded combatants from the definition

37. Pre-1975 jurisprudence evidences state practice and *opinio juris* adopting the ordinary meaning of 'any civilian population' and excluding combatants from the definition. For example, in the case of *Pilz*, the Dutch Special Court of Cassation held that the murder of

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concept of crimes against humanity was that while the prohibited acts…do not differ substantially from traditional war crimes, the class of victims who are protected by the two prohibitions does differ significantly.').

[60] Goran Sluiter, *'Chapeau Elements' of Crimes against Humanity in the Jurisprudence of the UN Ad Hoc Tribunals*, in Leila Nadya Sadat (ed.), Forging a Convention for Crimes Against Humanity (Cambridge University Press: Cambridge 2011), pp. 20-24, attached as App. 40 in Word format.

[61] Sluiter, pp. 20; Joakim Dungel, *Defining Victims of Crimes Against Humanity: Martić and the ICC*, Leiden Journal of Int'l Law, 28 Oct. 2009, p. 729, attached as App. 41 ('By requiring that the enumerated acts be committed against "any" civilian population, the drafters of the Nuremberg Charter thus solved the problem of crimes committed by a state against its own population.'); Van Schaack, pp. 789-790 (stating crimes against humanity in IMT Charter 'encompassed acted committed by Nazi perpetrators against German victims, who were thus of the same nationality as their oppressors, or against citizens of a state allied with Germany').

[62] Sluiter, pp. 20.

[63] *Martić*, para. 299 ('fundamental character of the notion of civilian in international humanitarian law and international criminal law militates against giving it different meanings' under Article 3 and Article 5 of the ICTY Statute).

[64] *Martić*, para. 299; Dungel, p. 734.

a German soldier, who was also a Dutch national, by a German doctor, who served in the Germany army occupying the Netherlands, could not constitute a crime against humanity because the victim 'was not part of the civilian population of occupied territory.'[65]

38. In fact, the few examples of pre-1975 international jurisprudence in which courts expanded the application of crimes against humanity to non-civilians did so in a very limited way. In three cases, the Supreme Court of Germany in the British Occupied Zone found that military persons could be individual victims of the underlying offences of crime against humanity.[66] However, this issue is different from the issue at hand. Although the court acknowledged the victim's status in each case, it was not a significant factor in the court's decisions.[67] And notably, the court never went so far as to hold that an attack targeting military members could be an attack directed against a civilian population.[68] This is also true with respect to post-1979 international jurisprudence.[69]

39. In conclusion, even today, there is not the beginning of any formation of customary international law -- neither state practice nor *opinio juris* – stating that 'any civilian population' could include combatants. Such a drastic expansion of crimes against humanity cannot be done lightly and certainly cannot be based on a single case or sporadic state practice.

40. If the ICIJ nevertheless seeks guidance in isolated cases – while not being indicative of any rule of customary international law – it is clear that only an isolated combatant victim, amongst a broader targeted civilian population, could fall within the scope of application of crimes against humanity. However, if a substantive number of military persons are attacked, then this attack could never qualify as an attack directed against a civilian population, as the broader attack would no longer be regarded as being directed at

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[65] Cassese, p. 102 (citing *Pilz,* Dutch Special Court of Cassation, Judgment of 5 July 1959, in *Nederlandse Jurisprudentie*, 1950, no. 681, 1209-11).
[66] Cassese, pp. 102-103, fn 44-46 (referring to *Case of R.*; *Case of P. and others*; and *Case of H*).
[67] Cassese, pp. 102-103.
[68] Cassese, pp. 102-103, fn 44-46.
[69] *Prosecutor v. Mrkšić*, ICTY, IT-95-13/1-A, *Appeal Judgement*, 5 May 2009, para. 32, attached as App. 42 ('Accordingly, whereas the civilian status of the victims, the number of civilians, and the proportion of civilians within a civilian population are factors relevant to the determination of whether the chapeau requirement of Article 5 of the Statute that an attack be directed against a "civilian population" is fulfilled, there is no requirement nor is it an element of crimes against humanity that the victims of the underlying crimes be "civilians."'); *Martić*, paras 303-312 (finding as long as an attack targets 'civilian population,' it is not necessary to establish that each individual victim of underlying crimes perpetrated as part of that attack is a 'civilian'). Therefore, the ICTY has effectively confirmand that for the purpose of establishing the chapeau elements of crimes against humanity, the prosecutor still must prove that the 'attack' was aimed at the civilian population and not at combatants.

the civilian population. Clearly, this issue is not the situation that has triggered the *Request for Submissions*.

B. It would not have been foreseeable or accessible to the charged persons that an attack by a state or organization against its own armed forces could qualify as an attack directed against any civilian population

41. The principle of legality requires the ICIJ to adopt an interpretation of 'any civilian population' that is consistent with the ordinary meaning of the term. Adopting an interpretation that departs markedly from the ordinary meaning would violate the principle. Even if it were considered illogical for crimes against humanity to protect civilians and not military personnel, whether during peacetime or conflict, this would not justify expanding the meaning of 'any civilian population' to such an extent that it is inconceivable for any persons in 1975-1979 to have adapted their conduct to it.

42. Further, the fact that post-1979 jurisprudence, for example at the ICTY,[70] struggled with questions, such as whether soldiers *hors de combat* could fall within 'any civilian population,' clearly indicates that in 1975-1979, an attack by a state or organization against its own armed forces could not have amounted to a crime against humanity. Criminal liability was not foreseeable or accessible to the charged persons in 1975-1979.

C. If there is an absence of state practice and *opinio juris* in 1975-1979 regarding whether 'any civilian population' encompasses a state's or organization's own armed forces, the principle of *in dubio pro reo* dictates that the ambiguity be resolved in favour of AO An

43. In the event that there is no evidence of state practice or *opinio juris* in 1975-1979 including combatants in the meaning of 'any civilian population,' then the ICIJ must resolve this ambiguity in favour of AO An and the other charged persons in Cases 003 and 004. The ICIJ must conclude that under international customary law in 1975-1979, 'any civilian population' could not include members of the state's or organization's own armed forces, and thus, attacks against these persons could not constitute crimes against humanity.[71]

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[70] *E.g., Blaškić*, paras 103-112; Hansdeep Singh, *Critique of the Mrkšić Trial Chamber (ICTY) Judgment: A Re-evaluation on Whether Soldiers Hors de Combat Are Entitled to Recognition as Victims of Crimes Against Humanity*, Law and Practice of Int'l Courts and Tribunals 8 (2009) 247–296, pp. 282-285, attached as App. 43

[71] *See* Rome Statute, Art. 22(2); *Prosecutor v. Ngudjolo*, ICC, ICC-01/04-02/12, *Judgment pursuant to Article 74 of the Statute*, *Concurring Opinion of Judge Christine Van den Wyngaert*, 18 Dec. 2012, paras 20-21, attached as App. 44 ('Individuals must have been in a position to know at the time of engaging in certain conduct that the law criminalised it…whether anyone (inside or outside the DRC) could have known, prior to the Pre-Trial Chamber's first interpretations of Article 25(3)(a), that this article contained such an elaborate and peculiar form of criminal responsibility….').

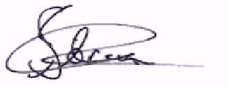
IV. CONCLUSION

44. The Defence respectfully submits that an attack by a state or organization against members of its own armed forces could not amount to an attack directed against any civilian population under customary international law in 1975-1979. The ordinary meaning of 'civilian population' in the definition of crimes against humanity excludes combatants, and thus, there was no state practice or *opinio juris*, up to and including 1975-1979, on the basis of which an attack against a state's or organization's own armed forces could amount to an attack against a civilian population. Further, if the ICIJ chooses to seek guidance from a few isolated decisions – while clearly not part of customary international law – these decisions would only allow for prosecution of crimes against humanity in relation to a few isolated military victims in an attack directed against a civilian population. This is not the situation at hand. Finally, the inclusion of an attack by a state or organization against its own armed forces in crimes against humanity would be unlawful, violating both the principle of legality and the principle of *in dubio pro reo*.

Respectfully submitted,


MOM Luch


Richard ROGERS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Signed 19 May 2016, Phnom Penh, Kingdom of Cambodia