In The Extraordinary Chambers in the Courts of Cambodia (ECCC)

In the matter of case No. 003/07-09-2009-ECCC-OCIJ

Brief of Ido Rosenzweig, *Amicus Curiae* on the question whether under customary international law applicable between 1975 and 1979, an attack by a state or organization 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 (crimes against humanity).

Summary

This brief is submitted pursuant to the public notice issued by the international Co-Investigating Judge of the Extraordinary Chambers in the Courts of Cambodia (ECCC) dated 19 April, 2016, inviting submissions by *Amicus Curiae* pursuant to Internal Rule 33 of the ECCC on the question of "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."[1]

Interest of Amicus Curiae

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[1] http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/2016-04-20%2017:53/D191_EN.PDF

Introduction

In accordance with the invitation of the International Co-Investigating Judge of the ECCC, this amicus brief will refrain from providing a thorough description of the development of "crimes against humanity" under international law and will focus on the definition of "any civilian population" under article 5 of the ECCC Law and, in particular, whether that definition can include the members of a state's or organization's own armed forces.

In order to address this question we must focus on three issues:

(1) Can "crimes against humanity" be committed against combatants?

(2) Can "crimes against humanity" be committed against one's "own" combatants?

(3) Did such a "crime against humanity" exist in customary international law in 1975-1979?

(1) Can "crimes against humanity" be committed against combatants?

The meaning of "any civilian population" in the context of "crimes against humanity" has been dealt with by several international tribunals. The ICTY and ICTR jurisprudence has based its understanding on the general definition of "civilian population" under international humanitarian law (IHL), holding those are not allowed to be directly attacked are "**people who are not taking any active part in the hostilities, including members of the armed forces who laid down their arms and those persons placed hors de combat by sickness, wounds, detention or any other cause.**"[2]

The notion of "civilian" population in the context of "crimes against humanity" was later clarified in the *Kayishema* and *Ruzindana* case, where the Trial Chamber held that

> Traditionally, legal definitions of 'civilian' or 'civilian population' have been discussed within the context of armed conflict. However, under the Statute, crimes against humanity may be committed inside or outside the context of an armed conflict. Therefore, the term civilian must be understood within the context of war as well as relative peace. The Trial Chamber considers that a wide definition of civilian is applicable and, in the context of the situation of Kibuye Prefecture where there was no armed conflict,

[2] Akayesu, (Trial Chamber), September 2, 1998, para. 582;

> includes all persons except those who have the duty to maintain public order and have the legitimate means to exercise force.[3]

The same definition can be found in the jurisprudence of the ICTY in *Blagojevic and Jokic*:

> "The term 'civilian' refers to persons not taking part in hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds detention or any other cause. It is a principle of customary international law that these persons are protected in armed conflicts."[4]

It is therefore, seems clear that the notion of "civilians" is based on the relevant definition under IHL, but it's also clear that in the context of "crimes against humanity", that notion should be widely interpreted. For example, combatants *hors de combat* maintain their classification as combatants under IHL, but in the context of "crimes against humanity" are to be considered as part of the civilian population. This becomes more coherent when taking into account the purpose of "crimes against humanity" prohibition of safeguard basic human values by banning atrocities directed against human dignity.[5]

Therefore, is seems that in accordance to the jurisprudence of the ICTY and ICTR, the definition of civilians is broader then the IHL definition of a civilian and especially on article 50 of API. However, it is important to note two relevant elements derived from this jurisprudence:

1. This definition of civilian population under "crimes against humanity" excludes combatants and **civilians** taking direct part in the hostilities. This in contrast to IHL where the distinction between civilians and combatants is central and has several important consequences, including, from the point of view of combatants, privileges such as "combatant immunity". Therefore, the scope of civilians under "crimes against humanity" **does not include all of the civilian population** (since it excludes civilians taking part in the hostilities).

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[3] *Kayishema and Ruzindana*, (Trial Chamber), May 21, 1999, paras. 127

[4] *Blagojevic and Jokic*, (Trial Chamber), January 17, 2005, para. 544

[5] *Prosecutor v. Kupreskic et al.,* Case No. IT-95-16 (Trial Chamber), January 14, 2000, para. 547

2. This definition of "civilian" includes combatants who are *hors de combat* or who have laid down their arms. While under IHL such combatants do not lose their Combatancy status and privileges, according to the jurisprudence they fall within the category of "civilians" for the purpose of "crimes against humanity."

Therefore, the definition of "civilians" in the context of "crimes against humanity", is based on the function of that population – their functional role during armed conflict. Those who are not involved in the conflict at all are considered to be part of "any civilian population". This is in complete contrast to the definition of a combatant under IHL. So with regard to the first question: "can "crimes against humanity" be committed against combatants?", the answer is positive. In certain situations, combatants can be considered as civilians for the purpose of "crimes against humanity."

(2) <u>Can "crimes against humanity" be committed against one's own combatants?</u>

IHL rules regulating behaviour towards a state's own combatants are very limited. The vast majority of IHL provisions codified in the 1907 Hague Regulations, 1949 Geneva Conventions and 1977 Additional Protocols, as well as under customary IHL, relates to the treatment of adversary combatants and civilians. For this reason our second question becomes relevant – the purpose of "crimes against humanity" is to complete the lacuna in international criminal law - violations not covered by the "war crimes regime".

The reason why "crimes against humanity" focuses on acts committed against civilians is based on the notion that the same atrocities against adversary combatants are covered by IHL and as stipulated by Cassese:

> "[t]he rationale for this relatively limited scope of Article 6(c) is that enemy combatants were already protected by the traditional laws of warfare, while **it was deemed unlikely that a belligerent might commit atrocities against its own servicemen or those of allied countries**."[6] (emphasis added)

Cassese also holds that atrocities against one's own forces should be treated domestically, and therefore there is no concept of "crimes against humanity" against one's own combatants under

[6] Cassese, A, Crimes against Humanity: Comments on Some Problematical Aspects in Cassese, A; The Human Dimension of International Law, Selected Papers; Oxford University Press; 2008, p. 466

international law. However, if we accept the basic notion that "crimes against humanity" were intended to address with mass atrocities against civilians, and the understanding that the "war crimes" regime does not cover such atrocities when committed against one's own combatants, it is necessary to examine whether the "crimes against humanity" regime was meant and is able to address relevant atrocities against one's own combatants.

To my understanding there is no precedent in jurisprudence for using the "crimes against humanity" framework to investigate or prosecute the commission of crimes against one's own combatants. However, the absence of such practice should not automatically lead to a conclusion that this type of population is excluded from the protection of that framework. On the contrary.

The position that attacks against one's own combatants can fall within the scope of "crimes against humanity" can be based on two alternative notions:

1. Morally based – it seems morally inconceivable that the commission of such atrocities will be covered against adversary combatants and civilians, and against a party's own civilians, but not against its own combatants. The outcome would be that an order "to call all Jewish soldiers in our forces" or "rape and torture all Jewish female soldiers in our forces" would not be covered by the framework of "crimes against humanity".

2. Merit based – as shown earlier, the definition of civilians under "crimes against humanity" includes both civilians and some adversary combatants, and excludes both adversary combatants and some civilians. The test for classification is based on the merits and not on the formal classification. When we apply this functional test to a party's one's own combatants we can see that "crimes against humanity" can be committed against them. Moreover, with regard to own combatants the functional test must be viewed in a broader sense. They are to be considered as civilians not only when hors de combat, but in fact, when they are being subjected to such atrocities – when they are the subject to widespread or systematic attacks of murder, extermination, enslavement, deportation, imprisonment, torture, rape or persecutions they are no longer fulfilling the functional role of a combatant. Under such terms they cannot be considered as one's own combatants and they are to be considered as civilians under the framework of "crimes against humanity".

(3) <u>Did this prohibition reflect customary international law of 1975-1979?</u>

The concept of "crimes against humanity" goes back decades if not centuries. The contemporary meaning of this concept goes back to 1915 and the codification of it under this meaning was originated in 1945 in the Nuremberg tribunal.[7]

According to Article 6(C) of the Nuremberg Principles

> "c) 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."

Similar language can be found in the ICTY statute. The ICTR statue and the ICC Rome Statute did not include the requirement for a nexus to an armed conflict.

Since the public notice issued by the international Co-Investigating Judge of the ECCC noted that during peacetime the classification of soldiers as combatants is irrelevant for their classification as civilian under article 5, the main question about the customary nature between 1975-1979 relates to the classification of one's own combatants as civilians for the purpose of "crimes against humanity" in the context or nexus to an armed conflict, where their combatant status is active.

The rational for the definition of "crimes against humanity" of 1945 was to criminalize atrocities that were not covered by IHL.[8] When crimes relevant to the definition of "crimes against humanity" were conducted against one's own combatants, they were not covered by IHL. Therefore, it seems like inevitable conclusion that by combining the functional interpretation of "any civilian population" together with the understanding that atrocities against one's own combatants are not covered by IHL, the prohibition of "crimes against humanity" against one's own combatants has been part of customary international law rules relating to "crimes against humanity" since their emergence in 1945, and it remained that during the years 1975-1979 and it is so in current days.

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[7] William A. Schabas, *An Introduction to the International Criminal Court*, Cambridge University Press, 2011 (Fourth Edition), p. 107.

[8] Cassese, Supra 6, p. 466