Extraordinary Chambers in the Courts of Cambodia

Office of the Co-Investigating Judges

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

AMICUS CURIAE BRIEF IN RESPONSE TO CALL FOR SUBSMISSIONS BY THE PARTIES IN THE CASES 003 and 004 AND CALL FOR *AMICUS CURIAE* BRIEFS

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Word Count: 2,999 (including footnotes)

I. Introduction

If crimes against humanity require an attack against "any civilian population", can members of the armed forces ever be victims of crimes against humanity?

1. The above question is simplistic, not taking into account the timeframe and nature of attacks, but at its heart, it seeks to answer the above question. In order to do so, this Amicus Brief focuses primarily on the "civilian" requirement for crimes against humanity under customary international law in 1975 to 1979. By focusing on the definition of "civilian" it will determine whether "military purges" would be exempt from prosecution as crimes against humanity.

2. The Amicus Brief will briefly recall the definition of "customary law" and the emergence of crimes against humanity and in particular the "civilian" requirement. It will then consider the important difference between the definition of "civilian" under the laws on war versus crimes against humanity. It concludes that, when considering the reasons for the creation of crimes against humanity and its use after the Second World War, customary international law should allow for a wide definition of the term "civilian" to include members of the armed services not directly involved in conflict.[2] The Amicus Brief advocates for the widest of possible definition of the term in order to avoid the incongruous situation that individuals subject to attacks based on, *inter alia*, their ethnicity or religion are left in a legal vacuum based on their profession as a member of the armed services when crimes against humanity were created to protect those for whom war crimes could not protect.

II. Definition of Customary International Law

[2] A position taken by Professor Antonio Cassese, *see* Crime Against Humanity, I The Rome Statute of the International Criminal Court; A commentary, 353, 375 (2002).

3. The ECCC has previously defined customary international law, as the "existence of "common, consistent and concordant" state practice or *opinio juris*, meaning that what States do and say represents the law".[3] The ECCC has further explained that a wealth of state practice does not usually carry with it a presumption that *opinio juris* exists and that "not 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 existence of a rule of law requiring it".[4] States by their consent determine the content of international law and judicial decision clearly constitutes "subsidiary means for the determination of rules of law".[5] This brief does not seek to challenge this definition and therefore no further examination is needed save to say that customary international law necessarily demands a high threshold be met; only common, consistent and concordant state practice will suffice.

III. The Emergence of Crimes Against Humanity and the "Civilian" Requirement

4. It is well documented that "crimes against humanity" as a concept can be traced back to the First World War in an attempt by Allied Powers to extend the existing law of war to all persons and not only nationals of opposing belligerent states, i.e. enemies. These first attempts were specifically in response to reported atrocities against Ottoman nationals of Armenian descent by the Ottoman Empire and can be found in broad reference to "the laws of humanity" in the 1919 Treaty of Sévres, although no prosecutions for crimes against humanity occurred.[6]

5. Crimes against humanity reappeared in the Charter of the International Military Tribunal at Nuremberg (IMT) after the Second World War, to capture criminal

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[3] Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise, 002/19-09-2007-ECCC/OCIJ(PTC38), 20 May 2010, para. 53 (JCE III Decision).
[4] JCE III Decision, para. 53.
[5] JCE III Decision, para. 53. Article 38(1)(b) of the Statute of the International Court of Justice lists "international custom, as evidence of a general practice accepted as law"
[6] These terms were themselves first contained in the Marten's Clause of the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land, as referred to in Payam Akhavan, *Reconciling Crimes Against Humanity with the Laws of War*, Journal of International Criminal Justice 6, 22 (2008).

acts which did not fit easily into the existing laws of war, for example inhumane acts against civilians who were not enemy nationals.[7] The inclusion of crimes against humanity in the IMT Statute can therefore be seen as extending protection to civilian populations irrespective of nationality. Egon Schwelb explained the impetus behind the move to codify not only war crimes but crimes against humanity as follows:

"The unprecedented record of crimes committed by the Nazi regime and the other Axis Powers, not only against Allied combatants, but also against the civilian population of the occupied countries and of the Axis countries themselves, made it necessary to provide that these crime also should not go unpunished."[8]

6. Accordingly, Article 6 (3) of the IMT Statute defined crimes against humanity as:

…murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or prosecutions on political, racial or religious grounds in execution 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.[9]

7. It has been argued that the term was "civilian" was kept in the IMT Statute as a compromise since the terms is well established in the precedents.[10] But these "precedents" seem to refer to the *laws of war* where the term "civilian" has a different context to that found in crimes against humanity, as discussed below.[11]

8. Thus, a common thread runs throughout the creation of crimes against humanity after the First World War and its codification in the IMT Statute statute and other tribunals after the Second World War; that there was a need to hold criminally responsible those who not only violate the established law on war, which covers

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[7] Darryl Robinson, *Defining "Crimes Against Humanity" at the Rome Conference*, The American Journal of International Law, Vol. 93, No.1, 44 (1999).
[8] Egon Schwelb, Crimes Against Humanity, 23 British Year Book of International Law, 1946 178-226, at 185.
[9] The offense was also included in Article 5 (c) of the Tokyo Charter and Article II (1) of Control Council Law No. 10. It should be noted however that while the Nuremberg and Tokyo Charters required that crimes against humanity evidence a connection to aggressive war or war crimes, this supplementary requirement was left out of Control Council Law No. 10
[10] Darryl Robinson, Defining "Crimes Against Humanity" at the Rome Conference, The American Journal of International Law, Vol. 93, No.1 (January 1999) pp. 43-57 at 51, fn. 50.
[11] The work of the International Law Commission, charged by the United Nations General Assembly with the formulation of the principles of international law recognized and reinforced in the Nuremberg Charter and judgment should also be noted.

primarily armed forces members involved in a conflict, but also atrocities not covered by the law on wars. Crimes against humanity therefore plugged the gaps and completed the quiver of international crimes in the international communities' possession to stop regimes and their leaders avoiding criminal responsibility for attacks on *any* person. The emergence of crimes against humanity as a stand-alone crime is therefore properly considered as unencumbered by the law of war and can be seen as the expansion of the criminalization of large-scale atrocities beyond war to peacetime situations.[12]

9. The actual prosecution of crimes against humanity in Second World War cases supports a liberal interpretation of the term "civilian" for crimes against humanity. In a case of the German Supreme Court in the British Occupied Zone, the defendants were convicted for having sentenced to death and ordered the execution of two German soldiers. Noting that the crimes were against soldiers, the Court nevertheless convicted the defendants of crimes against humanity.[13] The same court also convicted a defendant for sentencing to death two German soldiers who had committed the crimes of demoralization of the armed forces.[14] Both these decisions support the need for a liberal interpretation of the term "civilian". Additional cases in support include the French case of *Barbie* in which the French Court de Cassation decided that members of the Resistance could be victims of crimes against humanity.[15]

10. The next phase in the evolution of crimes against humanity steps over the relevant time period of 1975 to 1979, into the early 1990s. With the creation of the ICTY and ICTR, crimes against humanity once more were on the statute books.[16] The

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[12] Payam Akhavan, *Reconciling Crimes Against Humanity with the Laws of War*, Journal of International Criminal Justice, 6 21-37 at 22 (2008).
[13]German Supreme Court in the British Occupied Zone, Judgment, Case no. StS 111/48, 7 December 1948, in 1 ENTSCHEIDUNGEN DES OBERSTEN GERICHTSHOFES DER BRITISCHEN ZONE IN STRAFSACHEN 219, 228 (1948), referred to in Ambos and Wirth, The Current law of Crimes Against Humanity: An Analysis of UNTAET Regulation 15/2000, 13 Criminal Law Forum 1, 23 (2002).
[14] German Supreme Court in the British Occupied Zone, judgment, Case no. StS 309/49, 18 October 1949, in 2 ENTSCHEIDUNGEN DES OBERSTEN GERICHTSHOFES DER BRITISCHEN ZONE IN STRAFSACHEN 231 (1948) referred to in Ambos and Wirth, The Current law of Crimes Against Humanity: An Analysis of UNTAET Regulation 15/2000, 13 Criminal Law Forum 1, 23 (2002.
[15] *Barbie Case*, 78 I.L.R. 140 (French Court of Cassation).
[16] The Statute of the ICTR, ICTY and SCSL all use the term "against any civilian population" without elucidating on the definition of "civilian". The Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY), Article 5; The Statute of the International Criminal Tribunal for Rwanda

ICTY and ICTR considered in detail the term "civilian" in crimes against humanity. Their conclusions see the clear separation of definitions of "civilian" in war crimes from crimes against humanity, and the consequent explicit liberalization of the term "civilian".

11. Indeed, the ICTY set out that the laws of war can be seen as *guidance* in the legality of acts in the course of conflicts and the targeting of the "population" without recourse as to defining the population along the laws of war. Fot example in *Gotovina* the ICTY Trial Chamber found that "the inclusion of separate articles covering crimes against humanity and war crimes is clearly not a matter of coincidence, but indicates that the two regimes exists separately and independently.[17]

12. As to the liberalization of the term "civilian", the ICTY has established that the population can be "predominantly" civilian in nature and gives an expansive interpretation of the term "civilian".[18] It also found that the presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character,[19] and that the presence of those involved in conflict does not deprive population of civilian nature.[20] It further has made it clear that "civilian" includes those who were members of a resistance movement and former combatants but who are no longer taking part in hostilities, in line with Second World War cases examined above.[21] To construe civilian population liberally.[22] Crimes against humanity protect "any" civilian population.[23]

(ICTR), Article 3. *See also* The Statute of the Special Court for Sierra Leone (SCSL), Article 2 and later the ICC Rome Statute Article 7(1) which also uses the term "against any civilian population".

[17] Deciusion on Several Motions Challenging Jurisdiction, *Gotovina* (IT-06-90-PT) Trial Chamber, 19 March 2007, para. 26.

[18] See Tadic Trial Judgement, (IT-94-1-T) (may 7 1997) paras. 68-642. *Kordic and Cerkez,* (Trial Chamber), February 26, 2001, para. 180: *Naletilic and Martinovic,* (Trial Chamber), March 31, 2003, para. 235: *Naletilic and Martinovic,* (Trial Chamber), March 31, 2003, para. 235:

[19] *Jelisic*, (Trial Chamber), December 14, 1999, para. 54:

[20] *Prosecutor v. Kupreskic et al.,* Case No. IT-95-16 (Trial Chamber), January 14, 2000, para. 549: *Blaskic*, (Trial Chamber), March 3, 2000, para. 214:

[21] *Blaskic*, (Trial Chamber), March 3, 2000, para. 214; *Jelisic*, (Trial Chamber), December 14, 1999, para. 54; *Kordic and Cerkez,* (Trial Chamber), February 26, 2001, para. 180: *Naletilic and Martinovic,* (Trial Chamber), March 31, 2003, para. 235

[22] *Kupreskic et al.,* (Trial Chamber), January 14, 2000, para. 547-549: *Jelisic*, (Trial Chamber), December 14, 1999, para. 54.

[23] *Vasiljevic,* (Trial Chamber), November 29, 2002, para. 33:

13. Similarly, at the ICTR a wide definition of civilian is applicable.[24] In *Akayesu* the ICTR Trial Chamber stated that "Members of the civilian population 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."[25] The ICTR has also made clear that presence of non-civilians does not strip population of its civilian character.[26]

14. Whilst this ICTY and ICTR jurisprudence comes after the relevant time period here, it is nevertheless indicative of the state of customary law upon the their creation and therefore applicable to the period 1975 to 1979.

15. In conclusion, there exists a fork in the road, or at least an addition of lanes from World War One onwards. Before, the road was primarily one lane, that of the law of wars. Consideration of civilians as victims of atrocities was not considered, instead the focus was on what was considered reasonable behavior during international armed conflict including how to treat combatants to fall into the hands of the enemy. New lanes on the international law highway were added following the emergence of details of crimes committed by armed forces by the Nazi regime but not against enemy armed forces but against civilians.

IV. "Civilian" Under Law on Wars Versus Crimes Against Humanity

16. When considering "civilian" under crimes against humanity it is important not to rely on the term as found in international humanitarian law. The use of the word "civilian" means different things to different crimes. The problem with using the laws of war as guidance to determine the definition of "civilian" is that under the laws of war, the killing of a civilian does not necessarily amount to murder as it can be part of non-excessive incidental damage resulting from an attack on a military target.[27] For crimes against humanity, killing can never be justified as part of incidental damage. For war crimes the difference is important as it denotes different treatment of combatants and non-combatants. This differentiation is not

[24] *Kayishema and Ruzindana,* (Trial Chamber), May 21, 1999, para. 127-129:
[25] September 2, 1998, para. 582; *See also Rutaganda,* (Trial Chamber), December 6, 1999, para. 72; *Musema,* (Trial Chamber), January 27, 2000, para. 207.
[26] *Akayesu,* (Trial Chamber), September 2, 1998, para. 582; *See also Rutaganda,* (Trial Chamber), December 6, 1999, para. 72; *Musema,* (Trial Chamber), January 27, 2000, para. 207.
[27] See for example Article 51 (5)(b), Protocol I Geneva Conventions.

so obvious for crimes against humanity. In crimes against humanity it is infact not the "civilian" per se but the "civilian *population*, a subtle but important difference to IHL which deals in individuals rather than population. There is no reason why the "civilian population" cannot include those within the armed forces as it does teachers, or doctors? The importance of "civilian" as "non members of armed forces" is in fact a war crimes concept not automatically applied to crimes against humanity.

V. Conclusion

17. The ICTY has stated that crimes against humanity constitute egregious attacks on human dignity, on the very notion of humaneness. They consequently affect, or should affect, each and every member of mankind, whatever his or her nationality, ethnic group or location.[28]

18. Crimes against humanity can therefore be distinguished from war crimes primarily by extending protection to civilian populations irrespective of combat status, since it is concerned with the protection of people not just armed forces. Consequently, the use of the term "civilian" can be properly seen as a "relic" of origins of crimes against humanity in the laws of war.[29]

19. To not include members of the armed forces as "civilians" would actually create gaps in the protection of armed force members. Given that crimes against humanity were codified in order to plug gaps in international law to protect all persons, it would seem incongruous to produce gaps through the narrow interpretation of terms of crimes against humanity. In support of this position, as demonstrated above, the Second World War tribunals wove into the fabric of customary law cases where convictions were upheld where the victims of crimes against humanity were soldiers. A position not challenged by 1975.

20. Indeed, to eliminate serving armed forces as victims of crimes against humanity simply because by dint of their profession not only conflates definitions found in war crimes with those in crimes against humanity, but effectively removes this level of victim status based on a profession whereas all other professions are

[28] Joint Separate Opinion of Judge McDonald and Jodge Vohrah, *Erdemović* (IT-96-22-A) Appeals Chamber, 7 October 1997, para. 21.
[29] Ambos and Wirth, The Current Law of Crimes Against Humanity: An Analysis of UNTAET Regulation 15/2000, 13 Criminal Law Forum 1, 3 (2002).

protected. Undoubtedly, when a person serves as a member of the armed forces their actions are governed by the laws of war, but this should not mean they lose their status as potential victims of crimes against humanity.

21. The solution, based on customary international law in 1975 to 1979, is to consider members of armed forces as civilians under crimes under against humanity, apart from when they are directly involved in conflicts. At the point of involvement in conflicts, the members of the armed forces are then protected under the law of war. This scenario allows for the complete protection of members of the armed forces if they are targeted by a regime as a part of a widespread and systematic attack based on, *inter alia*, ethnicity or religion (crimes against humanity) or whilst engaged in international or non-international armed conflicts (war crimes), and is line with both the spirit of the creation of crimes against humanity and its application up to 1975.