

**BEFORE THE OFFICE OF THE CO-INVESTIGATING JUDGES
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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***AMICUS CURIAE* BRIEF FILED BY DRS WILLIAMS AND GREY IN
RESPONSE TO CALL FOR *AMICUS CURIAE* BRIEFS IN CASES 003 AND
004 DATED 19 APRIL 2016**

Filed by:

AMICUS CURIAE

DR SARAH WILLIAMS AND DR ROSEMARY GREY

INTRODUCTION

1. This *amicus* brief is filed pursuant to Internal Rule 33 and in response to the call for *amicus curiae* briefs issued by the International Co-Investigating Judge (ICIJ) and dated 19 April 2016.¹ Associate Professor Sarah Williams and Dr Rosemary Grey drafted the brief. Both are scholars operating in the field of international criminal law as detailed in the attached academic CV's. Dr Williams discloses her pre-existing relationship with Judge Bohlander as one of her doctoral supervisors (submitted in 2009) and as a former colleague.
2. The ICIJ has sought submissions concerning '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.'
3. This brief argues that members of a state's own armed forces may be considered as 'civilians' for the purpose of crimes against humanity perpetrated by their own State in two situations:
 - a. Where individuals are attacked in the context of an armed conflict due to their perceived allegiance to another party to the conflict or for reasons unconnected to the armed conflict, in particular on discriminatory grounds; and
 - b. Where the attack is perpetrated in peacetime;

In addition, members of a state's armed forces may be considered *victims* of crimes against humanity where the alleged crimes against members of the armed forces form part of a broader attack against a population that is predominantly 'civilian'.

¹ ECCC, Call for Submissions by the Parties in Cases 003 and 004 and Call for *Amicus Curiae Briefs*, 003/01-09-2009-ECCC-OCIJ, 19 April 2016.

ARGUMENT

A civilian population

4. Article 5 of the ECCC Law requires that crimes against humanity be committed as part of a widespread or systematic attack directed against ‘any civilian population’ (emphasis added).
5. The term ‘civilian’ was not clearly defined in any instrument of international law prior to the first Additional Protocol to the 1949 Geneva Conventions (API), which provides that a ‘civilian population’ is a population made up of persons who are not members of the armed forces.² Although API was not adopted until 1977, this definition of ‘civilian’ was widely accepted before that time. In 1948, the United Nations (UN) War Crimes Commission stated that the words ‘civilian population’, as used in provision on crimes against humanity in the Charter of the International Military Tribunal (IMT), ‘appear to indicate that “crimes against humanity” are restricted to crimes committed against civilians as opposed to members of the armed forces’.³
6. The inclusion of the term ‘civilian’ in crimes against humanity reflects the fact that the ‘principle of the protection of the civilian population is inseparable from the principle of the distinction which should be made between military and civilian persons’.⁴ Thus the term ‘civilian’ serves a functional purpose: it enables a legal distinction to be drawn between those that can lawfully be targeted in an armed conflict in accordance with international humanitarian law (IHL) and those that cannot.⁵ That is, the term excludes from the scope of

² ICRC, *Commentary of 1987: Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, para. 1912-1913.

³ *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 (UNWCC). Published for the UNWCC by His Majesty's Stationery Office (London 1948), 193.

⁴ ICRC, *Commentary* n 2, para. 1911.

⁵ Robert Cyrer, Håkan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure (3d edition)* (Cambridge University Press, Cambridge, 2014), 241. See also Prosecution’s Appeal Brief, *Prosecutor v Milan Martić*, IT-95-11-A, paras 3-5.

crimes against humanity ‘military actions against legitimate military objectives in accordance with international humanitarian law’.⁶

7. Consistent with this approach, existing jurisprudence suggests that members of the armed forces would not be regarded as a ‘civilian population’ for the purpose of crimes against humanity. For example, the ICTY Appeals Chamber has held that individual members of the armed forces are not civilians for the purpose of crimes against humanity. This is regardless of whether they are *hors de combat* at the time the crimes are committed.⁷
8. However, existing jurisprudence has generally not considered the status of a state’s own armed forces, nor has it considered the status of members of the armed forces in peacetime.

Attack against a State’s own armed forces in the context of an armed conflict

9. The term ‘crimes against humanity’ was first defined in the 1945 Charter of the IMT, which referred to certain acts when ‘committed as part of any civilian population’.⁸ The term ‘any’ was included in this definition to recognise that crimes against humanity can be committed against civilians of ‘any’ nationality; and thus protect a state’s own population in situations where IHL may not.⁹ This legal development was a ‘major advancement,’ given that, prior to the advent of the human rights movement, international law generally regulated conduct between States and rather than a State’s treatment of its own citizens.¹⁰ Accordingly, that members of the armed forces may have been Cambodian nationals does not preclude the State’s actions against them from constituting crimes against humanity under article 5 of the ECCC Law.

⁶ Cryer, *ibid*, 241.

⁷ *Prosecutor v. Blaškić* (IT-95-14-A), Appeal Judgment, 29 July 2004, para. 114; *Prosecutor v. Milan Martić*, Appeal Judgment, 2 October 2008, para. 295.

⁸ IMT Charter, Article 6(c).

⁹ Rodney Dixon and Christopher Hall, ‘Article 7’, in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (2nd edition) (CH Beck, Hart and Nomos, 2008), 181.

¹⁰ Cryer et al (n 5) 230.

10. IHL mainly regulates conduct directed toward the opposing forces and those falling into the hands of the enemy (civilians, prisoners of war, sick and wounded).¹¹ It does not generally regulate the treatment of a state's own forces or population, although there are some emerging exceptions to this principle.¹² Consequently, the provisions in IHL concerning civilian status that have informed the definition of a civilian population for the purposes of crimes against humanity do not readily apply to members of a state's own armed forces.

11. In particular, article 50 of API defines 'civilian' by reference to those eligible for prisoner of war status under Article 4A of the Third Geneva Convention (GCIII). This includes 'Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces'. As Trial Chamber III of the ICTY (TCIII) in *Prlić* noted: 'An teleological interpretation seeking to establish the objective of the Third Convention unambiguously leads to the conclusion that only those persons belonging to the armed forces of a Party other than the detaining Party are concerned.'¹³

12. Moreover, TCIII considered that 'members of the armed forces of a party to the conflict may not be considered prisoners of war when they are placed into detention by their own armed forces' as they cannot be considered to have 'fallen into the power of the enemy' within the meaning of Article 4 of GCIII.¹⁴

13. Having found that the that Muslims in the Croatian Defence Council detained by other members of that group could not be prisoners of war, TCIII held that

¹¹ *Cryer et al*, n 5, 285.

¹² See, for example: ICC, *The Prosecutor v. Bosco Ntaganda*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, ICC-01/04-02/06-309, 9 June 2009, Pre-Trial Chamber II, para. 74-82.

¹³ ICTY, *The Prosecutor v. Prlić et al* (IT-04-74), Judgment, 29 May 2013, Trial Chamber III, vol. 3, para 603.

¹⁴ *Prlić*, para 604.

the detained Muslims were in fact persons protected within the meaning of Article 4 of the Fourth Geneva Convention' (GCIV).¹⁵ Given that GCIV relates to "the Protection of *Civilians* in Time of War", this decision suggests that members of armed forces or groups can constitute 'civilians', or at least enjoy the same legal protections as 'civilians', when detained by their own State or group.

14. The detained individuals in *Prlić* were detained as they were seen as a security threat due to their perceived allegiance to an opposing party. TCIII relied on a test of allegiance, rather than nationality, to find that these individuals had fallen into the hands of the 'enemy power' for the purpose of GCIV.¹⁶

15. The approach adopted by the TC is consistent with a functional approach to the definition of 'civilian' for the purpose of crimes against humanity. IHL does not consider members of a state's own armed forces to be combatants, and there is no need to distinguish members of the armed forces from the civilian population. Therefore, where members of a state's armed forces are targeted due only to their perceived allegiance to another party to the conflict, they should be considered as civilians for the purpose of crimes against humanity.

16. Additionally, where members of a State's armed forces are targeted by their own State for reasons unconnected to the armed conflict they should be considered as civilian for the purposes of crimes against humanity. This is particularly so where they are targeted on discriminatory grounds, for example, on the basis of their race, ethnicity, religion, support of or opposition to a particular ideology. This is consistent with the position adopted in two post-WWII cases, where it was held that members of the Resistance were targeted

¹⁵ *Prlić*, para. 611. Subject to appeal: *The Prosecutor v. Prlić et al* (IT-04-74), 'Notice of filing the corrigendum to the public redacted version of Bruno Stojić's Appellant's brief, 28 July 2015, Appeal Chamber, para. 386-391.

¹⁶ *Ibid* para. 608-610.

due to their religion or opposition to a particular ideology and not as combatants.¹⁷

17. It should be noted that there was no suggestion that the detained Muslims in *Prlić* had actively engaged in hostilities against their own group (the Croatian Defence Council). However, had they done so (for example, having joined the armed forces of another state or party to the conflict), a functional approach would require that they be considered as combatants, not civilian. Such individuals could be lawfully targeted under IHL and must be distinguished from the civilian population. Provided any attack is directed against such individuals *due* to their actual role in the armed conflict on behalf of another armed group, any alleged mistreatment should be examined as a potential war crime, rather than as a crime against humanity.

Attack against a State's own armed forces in peacetime

18. To the best of our knowledge, existing jurisprudence has not specifically considered the status of members of a State's own armed forces for the purpose of crimes against humanity perpetrated in peacetime. Crimes against humanity were initially conceived as being linked to armed conflict, although this connection to armed conflict was no longer required as a matter of customary international law by 1975.¹⁸
19. As outlined above, the term 'civilian' in crimes against humanity has drawn its meaning from IHL, which does not regulate the status of individuals in peacetime. Great care is therefore required when extrapolating definitions from IHL to limit the scope of crimes against humanity perpetrated in peacetime. The term 'civilian' has no meaning and indeed serves no function when there is no armed conflict and therefore no need to distinguish between civilians and combatants.

¹⁷ French Court of Cassation, *Prosecutor v Barbie*, 20 December 1985, 78 ILR 124, 140; Court of Appeal of Paris, *Prosecution v Touvier*, 13 April 1992, 100 ILR 337, 352.

¹⁸ ECCC-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,

20. Members of a state's armed forces should therefore be considered 'civilians' for the purpose of crimes against humanity perpetrated by the State in peacetime.¹⁹ This is so even where the attack is specifically directed at the armed forces and is not part of an attack against the broader civilian population. To hold otherwise would be contrary to the object and purpose of crimes against humanity, which is to protect against 'all actions running contrary to those basic values that are, or should be, considered inherent in any human being'.²⁰ It would also be inconsistent with human rights instruments, such as the Convention Against Torture, that regulate mistreatment during peacetime and make no distinction between military and non-military victims.

Nullum crimen sine lege

21. To recognise members of the armed forces targeted by their own State as 'civilians' for the purpose of crimes against humanity would be consistent with customary international law in 1975. This interpretation reflects the functional role performed by the term 'civilian population' in crimes against humanity, recognised from at least 1945.

22. The absence of decisive authorities on this issue is not inconsistent with this position; rather it shows that this issue has not arisen for determination. Post WWII cases recognised that members of the armed forces or resistance movements could constitute civilians in certain circumstances, as did early ICTY and ICTR jurisprudence.

23. There is a possible issue as to whether it was also foreseeable to an accused that deliberately targeting members of the armed forces believed to be supporting another party to the conflict could constitute a crime against humanity. This may depend on the relevant provisions of Cambodian and other military discipline laws in 1975. However, a deliberate attack on

¹⁹ A Cassese and P Gaeta, *Cassese's International Criminal Law*, 3rd edition, (2013), 104.

²⁰ *Ibid*, 87.

individuals, with no due process and leading to execution and mistreatment, would likely exceed the permissible scope of such laws.

Crimes against members of the armed forces will not alter the character of a civilian population

24. Even where individual members of the armed forces are not considered as civilians for the purpose of crimes against humanity, it is well established that a population is a ‘civilian population’ if it is *predominantly* civilian in nature.²¹ Hence, the presence of soldiers within an intentionally targeted civilian population does not necessarily change the civilian character of that population;²² rather, the question of whether the presence of soldiers will deprive a population of its ‘civilian’ character depends on a number of factors.²³

25. It is also clear that members of the armed forces may be *victims* of crimes against humanity, if they were killed or injured as part of an attack which was directed against a ‘civilian’ (i.e. non-military) population. As the ICTY Appeals Chamber stated expressly in the *Martić* case, ‘[t]here is nothing in article 5 of the [ICTY] Statute, or previous authorities of the Appeals Chamber that requires that individual victims of crimes against humanity be civilians.’²⁴ Hence, at least those persons rendered *hors de combat* may be victims of crimes against humanity, providing that the attack in which they were harmed was directed against a ‘civilian population’.²⁵ The Appeals Chamber noted that this position was consistent with customary international law, as evinced by prosecutions under Control Council Law No 10 in the 1940s.²⁶

²¹ *Tadić* Trial Judgment, para. 638 (cited in numerous trial judgments including *Blagojević and Jokić* Trial Judgment, para. 544; *Karadžić* Trial Judgment, para. 474; *Kunarac* Trial Judgment, *Milutinović et al.* Trial Judgment, Vol. I, para. 146;).

²² *Blaškić* Appeal Judgment, para. 115; *Karadžić* Trial Judgment, para. 474, note 1549; ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment pursuant to article 74 of the Statute, ICC-01/05-01/08-3343, 21 March 2016, Trial Chamber II, para. 153.

²³ *Blaškić* Appeal Judgment, para. 115

²⁴ *Martić*, (n X), para. 307.

²⁵ *Ibid.*, para. 307.

²⁶ *Ibid.*, 309.

26. Therefore, the fact that members of the armed forces are targeted as part of a broader attack directed against a predominantly civilian population will not alter the civilian character of that population. Accordingly, military personnel can in some circumstances be *victims* of crimes against humanity under article 5 of the ECCC Law.

27. This has been the approach adopted by ECCC Chambers to date. In the context of Cases 001 and 002/01, ECCC Chambers have considered the relevant attack to have been ‘directed at the entire Cambodian population’ and that, although the attack engulfed ‘both civilian and military elements without distinction’, it could still be said to ‘have been directed against a civilian population’.²⁷ Members of the armed forces and former soldiers of the previous regime have been considered victims of crimes against humanity in relation to S-21²⁸ and Tuol Po Chrey.²⁹

CONCLUSION

28. Applying a functional approach to the term ‘civilian’ in article 5 of the ECCC Law demonstrates that members of a State’s armed forces attacked by their own State should be considered civilian in two circumstances:

- a. Where individuals are attacked in the context of an armed conflict due to their perceived allegiance to another party to the conflict or for reasons unconnected to the armed conflict, in particular on discriminatory grounds; and
- b. Where the attack is perpetrated in peacetime.

29. In addition, members of a state’s armed forces may be *victims* of crimes against humanity where the crimes against members of the armed forces form part of a broader attack against a population that is predominantly ‘civilian’.

²⁷ ECCC, Case 001, Judgment, Trial Chamber, 26 July 2010 para 325; ECCC, Case 002/01, Judgment, Trial Chamber, 7 August 2014, para 193-4.

²⁸ Case 001, Judgment, para 324-5

²⁹ Case 002/01, Judgment paras 682-7.

19 May 2016, Sydney

The image shows two handwritten signatures in black ink. The signature on the left is for Sarah Williams, characterized by a large, stylized 'S' and 'W'. The signature on the right is for Rosemary Grey, featuring a more fluid, cursive style with a long horizontal stroke at the end. A thin horizontal line is drawn below the second signature.

Sarah Williams

Rosemary Grey