In the
Extraordinary Chambers in the Courts of Cambodia
Cases 003 and 004

Brief of
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as *Amicus Curiae*
in Support of Neither Party

Interest of the Amicus Curiae

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Summary of the Issue

Article 5 of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia states that for an offence to constitute a crime against humanity, the specific offences must be committed *inter alia* as part of a widespread or systematic attack primarily directed against 'any civilian population'. Under customary international law applicable between 1975 and 1979, did an attack by a state or organisation against members of its own armed forces amount to an attack against a civilian population for the purposes of Article 5?

Argument

1. In peacetime, military personnel form part of the civilian population for the purposes of the *chapeau* requirement of Article 5

Whilst there is a societal distinction between members of the military and civilians in peacetime, there is no legal distinction.[1] Accordingly, during peacetime military personnel constitute civilians and form part of the civilian population for the purposes of the *chapeau* requirement of crimes against humanity.

[1] There are some legal implications, the European Court of Human Rights, for example, has held that the interpretation and application of the European Convention on Human Rights may be different when applied to members of the armed forces than it is for civilians during peacetime, see *Engel v The Netherlands (No. 1)* (1976) 1 ECtHR 647, para. 54 and *Akbulut v Turkey,* ECtHR Application No. 45624/99, Admissibility Decision, 6 February 2003.

2. During times of armed conflict, there is a distinction between non-enemy military personnel and civilians for the purposes of Article 5

If an armed conflict is taking place, international humanitarian law (IHL) applies. IHL requires that a distinction be drawn between combatants[2] and civilians. The obligation upon a party to the conflict to distinguish exists not only as regards enemy armed forces and civilians, but also *vis-à-vis* a party to the conflict's own armed forces and civilian population. Although IHL is primarily concerned with the obligations of a state or non-state actor towards adverse parties to the conflict, it also imposes obligations concerning a party to the conflict's own civilian population[3] and military personnel.[4]

Some obligations under IHL clearly apply only regarding individuals who are connected with the opposing party to the conflict- protected persons under the Fourth Geneva Convention[5] and prisoners of war (POWs),[6] for example. Other IHL provisions have no such qualifications. Article 48 of Additional Protocol I, for example, states 'the Parties to the conflict shall *at all times* distinguish between the civilian population and combatants' (emphasis added); while Additional Protocol II states that 'The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations'. Thus, the obligation to distinguish between civilians and combatants applies also to the party to the conflict itself *vis-à-vis* its own armed forces and civilian population. Accordingly, non-opposing military personnel do not necessarily qualify as being part of the civilian population for the purposes of crimes against humanity during an armed conflict.

3. Persons who are *hors de combat* are not part of the civilian population, but can nevertheless be victims of crimes against humanity

Uncertainty has surrounded the issue of whether or not military personnel who are *hors de combat* can be victims of crimes against humanity. The difficulty arises due to the requirement in the *chapeau* element of the majority of definitions of crimes against humanity[7]

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[2] The concept of combatant status applies only in international armed conflicts (Article 43, Additional Protocol I), but for ease of expression it will be used here as a means of describing those who directly participate in hostilities on a continuous basis.

[3] For example, the obligation to take precautions to protect civilians against the effects of attacks applies as regards a party's own civilians, *see* Article 58, Additional Protocol I.

[4] Several IHL provisions apply as regards a party's own forces. In international armed conflicts, protections for the wounded, sick and shipwrecked apply to all, regardless of affiliation (Geneva Conventions I and II), as do certain fundamental guarantees (Article 75, Additional Protocol I); while in non-international armed conflicts Common Article 3 of the Geneva Conventions applies, as do sections of Additional Protocol II. For a more detailed discussion, *see* Joanna Nicholson, Can War Crimes be Committed against Military Personnel against Members of Non-Opposing Forces?, *ICD Brief No. 16,* December 2015, available at: http://www.internationalcrimesdatabase.org/upload/documents/20151209T150352-Nicholoson%20ICD%20Format.pdf.

[5] Article 4, Geneva Convention IV.

[6] Article 4A, Geneva Convention III and Article 44(1), Additional Protocol I.

[7] For example, Article 5, ICTY Statute; Article 3, ICTR Statute; Article 2, Statute of the Special Court for Sierra Leone; Article 7, Statute of the International Criminal Court. However see the Draft Code of Crimes against the Peace and Security of Mankind, in *Yearbook of the International Law Commission 1991*, Volume 1, Summary

that the individual offences be directed against 'any civilian population'. The International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Tribunal for Rwanda (ICTR) have taken different approaches to this issue.

The ICTY has considered the matter a number of times. Some cases endeavoured to include those who are *hors de combat* within the notion of civilian,[8] whereas others sought to include them within the notion of civilian population.[9] This has caused a certain amount of confusion within the jurisprudence. In *Kordić and Čerkez*, for example, the Appeals Chamber found persons *hors de combat* to be civilians. The Chamber stated that the

> soldiers were killed after their arrest, after being placed *hors de combat*. These persons, wilfully killed by Croat forces, were without doubt… 'civilians' in the sense of Article 5 of the Statute…There is no doubt that these acts were also part of the widespread attack conducted at that time against the civilian Muslim population.[10]

This can be contrasted with the case of *Natalilić and Martinović*, where some of the alleged victims had been POWs. The Trial Chamber considered the notion of 'civilian population' and held that 'the definition of civilian population includes individuals who may at one time have performed acts of resistance and persons *hors de combat*.'[11] It found the POWs to have been victims of crimes against humanity.[12]

The issue was considered in detail by the ICTY Appeals Chamber in two cases: *Martić* and *Mrškić*. The Trial Chambers in both cases had held that military personnel who were *hors de combat* were not civilian for the purposes of Article 5 of the ICTY Statute.[13] This was confirmed on appeal.[14] However, in *Martić* the prosecutor made a second submission, asking the tribunal to determine whether it is a condition of the *chapeau* of Article 5 that in order to be a victim of a crime against humanity, the victim has to have civilian status, and whether those who are *hors de combat* who are present within the civilian population are excluded from being victims of the crime.[15]

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records of the meetings of the forty-third session 29 April–19 July 1991, A/CN.4/SER.A/1991 pp. 218–223, which contained no such requirement.

[8] For example, see *Prosecutor v Zoran Kupreškić* et al, ICTY, IT-95-16-T, Trial Judgment, 14th January 2000 para. 547; *Prosecutor v Tihomir Blaškić*, ICTY, IT-95-14-T, Trial Judgment, 3rd March 2000, para. 214; *Prosecutor v Vidoje Blagojević and Dragan Jokić,* ICTY, IT-02-60-T, Trial Judgment, 17th January 2005, para. 544.

[9] *Prosecutor v Goran Jelisić,* ICTY, IT-95-10-T, Trial Judgment, 14th December 1999, para 54.

[10] *Prosecutor v Dario Kordić and Mario Čerkez*, ICTY, IT-95-14/2-A, Appeal Judgment, 17th December 2004, para. 421.

[11] *Prosecutor v Mladen Naletilić and Vinko Martinović*, ICTY, IT-98-34-T, Trial Judgment, 31st March 2003 para. 235.

[12] *Ibid*, para. 392.

[13] *Prosecutor v Milan Martić*, ICTY, IT-95-11-T, Trial Judgment, 12th June 2007, para. 56 and *Prosecutor v Mile Mrškić* et al, ICTY, IT-95-13/1-T, Trial Judgment, 27th September 2007, paras 459-463 and para. 481.

[14] *Prosecutor v Milan Martić*, ICTY, IT-95-11-A, Appeal Judgment, 8th October 2008, paras. 297 and 302 and *Prosecutor v Mile Mrškić* et al, ICTY, IT-95-13/1-A, Appeal Judgment, 5th May 2009.

[15] *Martić, ibid.,* para. 303.

The *Martić* Appeals Chamber held that the *chapeau* requirement does not require that the individual criminal acts be committed against civilians, but rather that it serves to emphasise the collective nature of the crime. Providing the chapeau requirement is fulfilled, and that there has been a widespread and systematic attack against the civilian population, individual victims who are *hors de combat* can be victims of crimes against humanity.[16] This was found to have been customary international law at the time of the offences.

This approach received approval in the *Mrškić* Appeal Judgment. The Appeals Chamber concurred in holding that there is no requirement under the *chapeau* of Article 5 that the individual victims of crimes against humanity be civilian, providing that it is shown that there has been a widespread or systematic attack against a civilian population; that there is a nexus between the acts and the attack; and that the accused knew that his acts were so related.[17] The Chamber found that the civilian status of the victims, the number of civilians and the proportion of the victims within the civilian population are important when defining whether or not the *chapeau* element had been fulfilled.[18]

The ICTY's approach has been followed by the Special Court for Sierra Leone. In the *RUF* case, the Trial Chamber stated that,

> the Chamber concurs with the ICTY Appeals Chamber in the *Martić* case that where a person is *hors de combat* is the victim of an act which objectively forms part of a broader attack directed against a civilian population, this act may amount to a crime against humanity.[19]

The court found that the killing of a soldier who had been *hors de combat* constituted a crime against humanity.[20] The matter has yet to be considered by the ICC.

The ICTR's approach to this issue differs from the ICTY's. It has found persons *hors de combat* to be part of the civilian population. In *Akayesu,* the Trial Chamber stated

> Members of the civilian population are people who are not taking any active part in hostilities, including members of the armed forces who laid down their arms and persons placed *hors de combat* by sickness, wounds, detention or any other cause.[21]

This definition of civilian population has been applied consistently by the ICTR in subsequent cases and has not been the subject of dispute.[22]

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[16] *Martić*, *supra* note 14, paras. 303-314.
[17] *Mrškić*, *supra* note 14, para. 33.
[18] *Ibid.,* paras. 30-32.
[19] *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, SCSL-2004-15-T, Trial Judgment, 2nd March 2009, para. 82.
[20] *Ibid,* para, 1448.
[21] *Prosecutor v Jean-Paul Akayesu,* ICTR-96-4-T, Trial Judgment, 2nd September 1998, para. 582.
[22] For example, *Prosecutor v George Anderson Nderubumwe Rutaganda*, ICTR-96-3-T, Trial Judgment, 6th December 1999, para. 71; *Prosecutor v Paul Bisengimana,* ICTR-00-60-T, Trial Judgment, 13th April 2006, paras. 48-51; *Prosecutor v Athanase Seromba*, ICTR-2001-66-I, Trial Judgment, 13 December 2006, para. 358;

Thus, while the *ad hoc* tribunals agree that persons *hors de combat* can be victims of crimes against humanity, their approaches as to why this is so is different. The ICTY has held that those who are *hors de combat* are not civilian for the purposes of Article 5 of its Statute, nor do they form part of the civilian population. Nevertheless, they can be victims of crimes against humanity, provided that there is an attack directed against a civilian population and that there is a nexus between this attack and the offences committed against the persons *hors de combat*. In contrast, the ICTR has held that persons *hors de combat* are part of the civilian population.

These differing approaches have significant implications. At the ICTY, an attack solely against persons *hors de combat* would not qualify as a crime against humanity, as they do not form part of the civilian population and there is no nexus between the attack and a wider attack against a civilian population.[23] Indeed, this is precisely what happened in the *Mrškić* case, which concerned detained military personnel. The Appeals Chamber held that the victims could not be victims of crimes against humanity as they had been singled out for being members of the Croatian armed forces, and there was no nexus between the attacks against them and the attack against the civilian population. The alleged victims could only be victims of a war crime.[24] Applying the ICTR's approach would mean that such an attack would constitute a crime against humanity, as the persons *hors de combat* would form part of the civilian population.

Of the two approaches, the ICTY's is more thoroughly considered and it is submitted that it is this that the ECCC should adopt. If persons *hors de combat* are not civilian, as both the ICTY and the ECCC has found, it is illogical that they can nevertheless form part of the civilian population.

4. This was the position in customary international law between 1975 and 1979

That persons *hors de combat* could be victims of crimes against humanity perpetrated by non-enemy personnel was customary international law between 1975 and 1979. The issue was addressed in cases from the post Second World War period. In *P et al*,[25] the Supreme Court of Germany in the British Occupied Zone, applying Article II (1)(c) of Control Council Law No. 10, considered whether the killing of a group of German marines constituted a crime against humanity. The marines had been captured while trying to escape from Denmark back to Germany on the eve of German capitulation. Three were sentenced to death for desertion by a German court martial and were duly executed. The Supreme Court found the members of the court martial to be guilty of crimes against humanity, as the

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Prosecutor v Jean de Dieu Kamuhanda, ICTR-95-54A-T, Trial Judgment, 22nd January 2004, para. 667; *Prosecutor v Juvénal Kajelijeli,* ICTR-98-44A-T, Trial Judgment, 1st December 2003, paras. 873-874; and *Prosecutor v Alfred Musema,* ICTR-96-13-A, Trial Judgment, 27th January 2006, para. 207.

[23] *Mrškić*, *supra* note 14, paras. 42-44.

[24] *Ibid*.

[25] *P and Others,* 7 December 1948, Entscheidungen des Obersten Gerichtshofes für die Britische Zone in Strafsachen, St S 111/48.

sentence they had imposed on the marines was excessive in relation to the gravity of the supposed crime, and was a manifestation of the Nazi's brutal regime.[26]

The issue arose again before the same court in the case of *H*. It concerned the actions of a German judge who had presided over cases against two officers in the German navy. One German officer had been accused of criticising Hitler, whilst the other had been accused of procuring foreign identity cards for himself and his wife. The Judge sentenced both to death. The Supreme Court convicted the Judge of crimes against humanity. The excessive sentence imposed upon the German officers was found to have been part of the system of Nazi brutality.[27]

A different view was taken in the case of *Pilz,* before the Dutch Special Court of Cassation.[28] The case concerned whether a soldier in the occupying German army could be a victim of crimes against humanity. A German army doctor was accused of ordering, or allowing, a subordinate to shoot and wound the soldier, and thereafter refusing to give him medical assistance, causing him to die. The Court held that the offence could not be regarded as a war crime, but neither could it constitute a crime against humanity as

> the victim was not part of the civilian population of an occupied territory, nor (could) the acts with which he (was) charged be seen as forming part of a system of persecution on political, racial or religious grounds.[29]

The outcome of this case can be explained by the fact that at this time some believed that there was a distinction between persecution-type crimes against humanity and murder-type crimes against humanity,[30] and that military personnel could only be victims of the former. This case would seem to agree with that view. However, of the handful of cases which considered the issue, this is the only case which makes such a distinction.[31]

Conclusion

Members of non-opposing forces can be victims of crimes against humanity. In peacetime they form part of the civilian population for the purpose of the *chapeau* requirement of Article 5. During times of armed conflict the distinction between combatants and civilians

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[26] *Ibid.,* pp. 228–229.
[27] *H.,* 18 October 1949, Entscheidungen des Obersten Gerichtshofes für die Britische Zone in Strafsachen, St S 309/49.
[28] *Pilz*, Nederlandse Jurisprudentie, 1950, No. 681 at 1210– 211 and *International Law Reports*, 1950, 391–392 and see Cassese, *supra* *** p. 466.
[29] As quoted in Cassese, *supra* ***, p. 466 at FN 27.
[30] Antonio Cassese, 'Crimes against Humanity: Comments on Some Problematical Aspects' available in Antonio Cassese, *The Human Dimension of International Law*: *Selected Papers* (Oxford University Press, 2008) p. 465-471. United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (London, HMSO, 1948), p. 193. Not everyone agreed with this distinction, *see* Egon Schwelb, 'Crimes against Humanity', 23 *The British Yearbook of International Law* 178 (1946), p. 190.
[31] In addition to the cases mentioned above, see the *RuSHA* case, which found POWs to have been victims of crimes against humanity.

also applies to the non-enemy population. Members of non-enemy forces do not form part of the civilian population, but can nevertheless be victims of the crime in the same way as members of enemy forces can, namely if the attack against them forms part of a wider attack against the civilian population, and a nexus between the two attacks exists. Furthermore, this was the customary law position in the period from 1975-1979.

Respectfully submitted,

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