

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

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***AMICUS CURIAE* BRIEF IN CASES 003 AND 004 – PROFESSOR BEN SAUL**

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INTRODUCTION

1. This *amicus curiae* brief ('Brief') responds to the Issue at para. 3 of the Call for *Amicus Curiae* Briefs in Cases 003 and 004, dated 19 April 2016 ('the Call'), namely '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'.
2. I am Challis Chair of International Law at the University of Sydney and a barrister, with expertise in the research and practice of international humanitarian law ('IHL'), international criminal law and international human rights. My short CV is at [Annex 3](#) (a full CV is available on request).
3. For the reasons below, this Brief answers the Issue in the affirmative:
 - (a) Some national judicial decisions indicate that crimes against humanity may be committed if a state attacks its own military personnel (at least outside of hostilities);
 - (b) Where a state's attack on its own military is not connected to an armed conflict, IHL does not apply and its definition of 'civilian' cannot govern the meaning of 'civilian' under customary international law ('CIL') on crimes against humanity;
 - (c) Outside armed conflict, the ordinary meaning of 'civilian population' is ambiguous. On a narrow interpretation, 'civilian' could be simply contrasted with 'military' so as to include all persons except military personnel. On a wider interpretation, a 'civilian population' could be understood in another common usage to mean *all permanent inhabitants of a country or area*; for example, the 'civilian population' of Australia.
 - (d) The above ambiguity must be resolved in favour of the latter interpretation, which (i) best fulfils the purpose of CIL on crimes against humanity – namely the protection of the basic rights and human dignity of defenceless persons from mass violence; and (ii) avoids the absurd result of protecting some defenceless persons from attack (such as a state's civil police) while excluding others who are equally defenceless (the state's military personnel outside IHL who are subordinate to the state's authority).

ARGUMENT

A. Case Law Interpreting ‘Civilian’ to include a State’s Own Military Personnel

4. The Call rightly observes that neither the ECCC nor other *international* criminal courts have explicitly dealt with the Issue (at para. 4). However, three decisions of a national tribunal applying international law, the Supreme Court of Germany in the British Occupied Zone, accepted that a state’s own military personnel may comprise part of ‘any civilian population’ under Article II(1)(c) of Council Control Law No. 10 (1945):¹
- (a) In *R* (1948),² a member of Nazi organisations denounced a military officer for insulting Nazism, resulting in a death sentence. It was held that a crime against humanity could occur where the perpetrator intended the victim to be surrendered to the ‘uncontrollable power structure’ of the state, with knowledge that the victim would be subordinated to an arbitrary and violent system (at 47);
- (b) In *P and Others* (1948),³ members of a German court martial imposed death sentences on three German military deserters around the time of Germany’s capitulation at the end of the war. The Supreme Court explicitly found that ‘action between soldiers’ can be part of an attack on a ‘civilian population’ constituting crimes against humanity, where it was part of the Nazis’ ‘criminal system’ (at 228). The members of the court martial were complicit in a crime against humanity because the excessive sentences imposed were part of Nazism’s brutal, intimidatory justice that degraded and depersonalised the victims and denied humanity (at 220).
- (c) In *H* (1949),⁴ a German judge sentenced to death two German naval officers (one had criticized Hitler; the other obtained foreign identity cards). A crime against humanity could occur if the judge intended to further the Nazi system of violence and terror.

¹ The original cases (in German) are at [Annex 1](#). They are cited in A Cassese et al, *Cassese’s International Criminal Law* (3rd ed, OUP, Oxford, 2013), 47 (footnote 16) and 102-103 (footnote 45) [see [Annex 2](#)].

² *R* case, 27 July 1948, *Entscheidungen in Strafsachen des Obersten Gerichtshofes für die Britische Zone* (‘Entscheidungen’), vol. I (W de Gruyter, Berlin, 1949), 45-49.

³ *P and Others* case, 7 December 1948, *Entscheidungen*, vol. I, 217-229.

⁴ *H* case, 18 October 1949, *Entscheidungen*, vol. II (1950), 18 October 1949, 231-246.

5. The above findings are significant because the protections of IHL (as it then stood) extended to an adversary's combatants and prisoners of war but did not protect German military personnel from Germany's own repression. The victims were also not engaged in armed hostilities against their own state. Rather, they were situated similarly to other German citizens – namely, subordinate to Germany's national laws and legal authority. Crimes against humanity were logically applied to fill the protection gap in IHL.
6. Relevant to assessing CIL is whether states have protested against an emerging rule or can be taken to have acquiesced in it.⁵ States do not appear to have objected to these published decisions of the German Supreme Court which treated a state's own military personnel as within the scope of 'any civilian population'. Collective practice through later processes to codify crimes against humanity also evidences a lack of protest.

B. IHL Cannot Determine the Meaning of 'civilian population' Outside Armed Conflict

7. The phrase 'any civilian population' originated as an element of crimes against humanity at a time when such crimes required a nexus to armed conflict ('Nexus'), namely in Article 6(c) of the Nuremberg Charter of the International Military Tribunal 1945. As such, reference to IHL, as the special law (*lex specialis*) applicable in armed conflict, was necessary in interpreting the meaning of 'civilian'.
8. The ECCC Trial Chamber and International Co-Investigating Judge Bohlander have correctly recognised that the subsequent development of CIL had severed the Nexus requirement by 1975.⁶ The ECCC Pre-Trial Chamber disagrees⁷ but its view, with respect, is incorrect for the reasons given by the Trial Chamber and Judge Bohlander.
9. Once it is accepted that the Nexus is severed, the term 'civilian' necessarily assumes a different meaning in the different context of *attacks or violence outside armed conflict*. IHL *only* applies in armed conflict and does not apply in peacetime or to violence not linked to a conflict. Violence outside armed conflict not covered by IHL includes violence: (a) in peacetime *stricto sensu*; (b) by a state against the state's own military

⁵ *Anglo-Norwegian Fisheries (UK v Norway)* [1951] ICJ Rep 116 at 138.

⁶ Case File No. 001-E188, ECCC Trial Chamber Judgment, 28 July 2010, paras. 209-292.

⁷ Case File 002-D427/3/15, ECCC Decision on Appeals by Nuon Chea and Ieng Thirith against the Closing Order, 15 February 2011, para. 144.

personnel that is not connected to any surrounding armed conflict; and (c) by criminal organisations, or resulting from inter-civilian tensions, that itself does not rise to the level of an armed conflict, and is not part of any surrounding armed conflict.

10. IHL generally does not protect members of state armed forces who are targeted by their own state. This is for two reasons:

(a) Internal violence (including ‘purges’) against military personnel will not constitute a non-international armed conflict (‘NIAC’)⁸ where it takes the form of uni-directional, non-combat repression (such as arrest, torture or execution), rather than intense military hostilities between the state and an organised armed group⁹ (such as a disaffected faction of the state’s military forces);

(b) Even if there exists a surrounding international armed conflict between two states, IHL protects each state’s military personnel from unlawful violence by the other state (for instance, through prisoner of war safeguards), but does not protect military personnel from violence by their own state. IHL historically assumed that national law would safeguard the interests of a state’s own military personnel and that it was accordingly unnecessary for IHL to intervene.

11. If IHL does not apply in these circumstances, its categorisation of persons as civilian (under Article 50 of Protocol I and the provisions it references to negatively define civilians in relation to combatants) cannot define the meaning of ‘civilian population’ under CIL on crimes against humanity in such situations. For instance, it is nonsensical to speak of persons *hors de combat* if there is no *combat*; or to refer to persons taking a direct part in hostilities if there are no hostilities; or to mention as ‘[m]embers of armed forces of a Party to the conflict’ (Geneva Convention III 1949, Article 4(1)) (or likewise resistance forces) if there is no conflict. These concepts only have meaning where they are connected to an armed conflict governed by IHL and defined by that law.

12. It is true that criminal tribunals have seemingly continued to interpret ‘civilian’ by reference to IHL, despite recognising that the Nexus requirement is no longer part of

⁸ Pursuant to the four Geneva Conventions 1949, common Article 3

⁹ The test for the existence of a NIAC: *Prosecutor v Tadic (Interlocutory Appeal on Jurisdiction)* (Appeal Chamber) IT-94-1 (2 October 1995), para. 70.

CIL. The ECCC has also followed this approach, finding that '[c]ivilian status is defined through the provisions of the law of armed conflict, particularly Article 50 of Additional Protocol I and Article 4A of the Third Geneva Convention'.¹⁰

13. Crucially, however, all of the crimes against humanity cases that have invoked IHL's definition of 'civilian' have done so *because their facts involved conduct connected to armed conflict governed by IHL*. This includes all of the cases before the International Criminal Tribunal for the former Yugoslavia ('ICTY'). Some cases have determined that civilians exclude members of armed forces, resistance organisations, or persons *hors de combat*¹¹ – all categories defined by the IHL applicable to the armed conflicts in the former Yugoslavia. The cases have also looked to IHL to determine if the presence of combatants or former combatants amongst civilians deprives the civilian population of its civilian character.¹² The ICTY has found it necessary to consider the lawfulness of attacks under IHL to determine whether violence against civilians *during conflict* constitutes crimes against humanity.¹³ The ECCC has followed this approach.¹⁴
14. Notably, Article 5 of the ICTY Statute 1993 limits the ICTY's jurisdiction to crimes against humanity 'when committed in armed conflict'. Admittedly, this has been interpreted by the ICTY as a jurisdictional requirement rather than an element of the offence,¹⁵ such that it need only be shown that an armed conflict existed and the accused's acts 'are linked geographically as well as temporally' with it.¹⁶ The ICTY has further accepted that a Nexus is not required under CIL.¹⁷ Moreover, the ICTY has indicated that the meaning of 'civilian' under IHL and the law on crimes against humanity should not be given 'differing meanings'.¹⁸ The fact remains, however, that the facts of all of the relevant ICTY cases have *necessitated* reference to IHL because of

¹⁰ Case File No. 001-E188, ECCC Trial Chamber Judgment, 28 July 2010, para. 304.

¹¹ *Prosecutor v Martić*, IT-95-11-A, Appeals Chamber Judgment, 8 October 2008, para. 307; *Prosecutor v Mrkšić*, IT-95-13/1-A, Appeals Judgment, 5 May 2009, para. 25; *Prosecutor v Galić*, IT-98-29-A, Appeals Chamber Judgment, 30 November 2006, para. 137; *Prosecutor v Blaškić*, IT-95-14-A, Appeals Chamber Judgment, 29 July 2004, para. 113.

¹² *Blaškić Appeals*, *ibid*, paras. 113-114; see also Additional Protocol I 1977, Article 50(3).

¹³ *Prosecutor v Kunarac*, IT-96-23 & IT-96-23/1-A, Appeals Chamber Judgment, 12 June 2002, para. 91; *Prosecutor v Galić*, IT-98-29-T, Trial Chamber Judgment, 5 December 2003, para 144.

¹⁴ Case File No. 001-E188, ECCC Trial Chamber Judgment, 28 July 2010, para 308.

¹⁵ *Prosecutor v Tadić*, IT-94-1-A, Appeals Chamber Judgment, 15 July 1999, para. 249; *Prosecutor v Kunarac*, IT-96-23 & IT-96-23/1-A, Appeals Chamber Judgment, 12 June 2002, para. 83.

¹⁶ *Kunarac Appeals*, above n13, para. 83; *Prosecutor v Tadić*, IT-94-1-A, Appeals Chamber Judgment, 15 July 1999, para. 249.

¹⁷ *Tadić*, *ibid*, para. 251; *Tadić*, above note 9, para. 141.

¹⁸ *Martić Appeal*, above n11, para. 299.

their direct connection to armed conflict. They are not therefore dispositive of the definition of ‘civilian population’ outside of armed conflicts governed by IHL.

C. The Independent Meaning of ‘Civilian Population’ Outside Armed Conflict and IHL

15. The meaning of ‘any civilian population’ is to be derived from CIL on crimes against humanity at the relevant time.¹⁹ Strictly the question is not one of *interpretation*, since interpretation pertains to written texts (treaty or statute),²⁰ but rather of determining state practice and *opinio juris* on the content of the CIL rule. The German Supreme Court cases above provide authority that crimes against humanity may include a state’s violence against its own military forces outside hostilities covered by IHL. Practice has thereby shaped the content of the CIL rule on the scope of ‘any civilian population’.
16. A question remains whether the cases can be logically reconciled with the plain textual meaning of the words ‘civilian population’ that are part of the CIL rule. To the extent that this aspect of the CIL rule is reflected in the codification of crimes against humanity in international instruments (including those examined by the ECCC²¹), the interpretation of those instruments may assist in clarifying CIL.²² 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’.²³
17. The ordinary meaning of ‘civilian population’ outside IHL is *ambiguous* because it bears at multiple, distinct possible understandings in common usage (and there is no general legal definition of ‘civilian’ in public international law). On one narrow interpretation,

¹⁹ Case File No. 002-E1313, ECCC Trial Chamber Judgment, 7 August 2014, para. 18 (‘in accordance with the [UN-Cambodia] Agreement, the Cambodian lawmakers intended to grant the ECCC jurisdiction over crimes against humanity as defined in international law’); see also para. 100.

²⁰ The ECCC’s jurisdiction is founded in CIL on crimes against humanity and the ECCC is thus not interpreting the corresponding terms in the UN-RGC Agreement or the ECCC Law. The ECCC has elsewhere indicated the principles of statutory interpretation under Cambodian domestic law: Decision on Ieng Sary’s Appeal Against the Closing Order, ECCC Pre-Trial Chamber, 11 April 2011, D427/1/30, para. 122 (‘the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity or inconsistency’).

²¹ Case File No. 001-E188, ECCC Trial Chamber Judgment, 28 July 2010, paras. 285-288; Case File No. 001/18-07-2007-ECCC/SC, Supreme Court Chamber Appeal Judgment, 3 February 2012, paras. 103, 108-116; Case File No. 003/07-09-2009-ECCC-OCIJ, Decision on Meas Muth’s Request for Clarification Concerning Crimes against Humanity and the Nexus with Armed Conflict, 5 April 2016, paras. 23-71.

²² *Martić Appeal*, above n11, para. 294.

²³ Vienna Convention on the Law of Treaties 1969, Article 31(1). In addition, ‘supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion’ may be utilized where the ordinary meaning ‘leads to a result which is manifestly absurd or unreasonable’: Article 32.

‘civilian’ could be simply contrasted with ‘military’ so as to include all persons except military personnel. The Oxford English Dictionary (thus suggests that a civilian is ‘[a] person who is not professionally employed in the armed forces; a non-military person’.²⁴ On a second, even narrower interpretation, an authoritative American English dictionary, Merriam Webster’s, defines civilians to exclude members of ‘the military, or of a police or firefighting force’.²⁵

18. On a third, wider interpretation, a ‘civilian population’ can be understood in another common usage to mean *the inhabitants of a country or area*; for example, in the sense of the ‘civilian population’ of Australia. For example, the most authoritative French dictionary, the *Dictionnaire de l’Académie française*, gives one definition of ‘civil’ as ‘[q]ui concerne la cité, la communauté nationale. *La vie, la société civile. L’ordre civil...*’ (‘concerned with the city, the national community. *Life, civil society. The civil order...*’).²⁶ Military personnel are equally part of the life of the national community, outside the special legal context of IHL. In this sense, ‘civilian’ is an inseparably joined to ‘population’; inversely, one would not normally speak of a ‘military population’ in peacetime. In many states, military personnel (like police and firefighters) would be regarded by others, and regard themselves, as part of the regular ‘civilian population’.
19. Whereas the adjective ‘civilian’ is a legal term of art under IHL, outside armed conflict its meaning changes and it thus stands as a shorthand description for a country or area’s population as a whole. In this respect it is conceptually significant that during the drafting of the Rome Statute of the International Criminal Court, some delegations believed that the term ‘civilian’ population was vague, unnecessary and confusing, since the term implied that armed conflict was required for crimes against humanity.²⁷
20. In resolving the ambiguity of ‘civilian population’, the meaning that best accords with the purpose of CIL on crimes against humanity must be preferred. The law aims to protect the fundamental rights and dignity of human beings against systematic violence, particularly persons who are defenceless against state power.²⁸ To this end the law was specifically designed to fill a gap in the coverage of war crimes law at the time, namely

²⁴ Oxford English Dictionary, online subscription.

²⁵ Merriam Webster Dictionary, online.

²⁶ *Dictionnaire de l’Académie française* (9th edition), online.

²⁷ See W Schabas, *The ICC: A Commentary on the Rome Statute* (OUP, Oxford, 2010), 152-153.

²⁸ G Werle, *Principles of International Criminal Law* (TMC Asser Press, The Hague, 2005), 222, 294.

the protection of a state's own civilian population.²⁹ Thus, where IHL protections do not apply to military personnel attacked by their own state, the wide interpretation of 'civilian population', as all inhabitants of a country or area, is to be preferred. Such interpretation best fills the gap in IHL in the humanitarian protection of defenceless military personnel who are subordinate to their state's authority but not at war with it.

21. Interpreting 'civilian' outside IHL to exclude military personnel would also lead to absurd results and so must be avoided. For example, in peacetime members of police forces are commonly armed and authorised to use force, while military personnel are commonly unarmed and often not authorised to use force outside a conflict. Nonetheless, police are commonly regarded as civilians outside conflict.³⁰ It would be absurd to treat unarmed military personnel as not civilians merely because they are formally employed by the military under national law and irrespective of their actual functions.
22. The wider, second meaning of 'civilian population' also does not infringe the principle of legality under Cambodian and international law, namely that the law concerning crimes must be 'clear, ascertainable and non-retrospective'.³¹ The principle does not prohibit the ECCC 'from interpreting and clarifying the law or from relying on those decisions that do so in other cases', without "creating new law or ... interpreting existing beyond the reasonable limits of acceptable clarification".³² It was entirely foreseeable between 1975 and 1979 that defenceless members of a state's military (who are subordinate to their state's authority, not in armed conflict against it, and not protected by IHL) could comprise part of the civilian population – that is, the state's own inhabitants – against whom crimes against humanity were directed by a state engaging in mass violence.
23. By way of completion, it is recalled that international law does not require that the 'individual victims of crimes against humanity be civilians',³³ but that the attack is directed against a civilian population, amongst whom may be non-civilians. It is

²⁹ Case File No. 001-E188, ECCC Trial Chamber Judgment, 28 July 2010, para. 312, citing *Prosecutor v Mrkšić*, IT-95-13/1-T, Trial Chamber Judgment, 27 September 2007, para 441.

³⁰ Also in armed conflict: Case File No. 001-E188, ECCC Trial Chamber Judgment, 28 July 2010, para. 304; see also *Prosecutor v Norman et al*, SCSL-04-14-A, Judgment, 28 May 2008, para. 261 ('[a]s a general presumption, the armed law enforcement agencies of a State are considered to be civilians for purposes of international humanitarian law').

³¹ Case File No. 002-E313, ECCC Trial Chamber Judgment, 7 August 2014, para. 16.

³² *Ibid*; see similarly Case File No. 001/18-07-2007-ECCC/SC, Supreme Court Chamber Appeal Judgment, 3 February 2012, para. 234.

³³ *Martić Appeal*, above n11, para. 307; *Mrkšić Appeals*, above n11, para. 32.

accordingly necessary to determine whether a state's attack on military personnel is directed at them *as* civilians, or as military personnel within a civilian population.

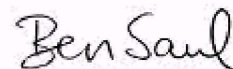
CONCLUSION

24. CIL on crimes against humanity between 1975 and 1979 included amongst a 'civilian population' state military personnel subjected to violence by their own state, where the violence was not connected to an armed conflict and governed by IHL. This conclusion is supported by: (a) three decisions of the German Supreme Court in 1948-49 that were uncontested by other states; (b) a logical differentiation of the special meaning of 'civilian' under IHL from its meaning outside IHL; and (c) an ordinary interpretation of 'civilian population' outside armed conflict, while resolving ambiguity by reference to the purpose of the law on crimes against humanity (to widen the protection of human rights and dignity beyond the extant protections of IHL) and the necessity of avoiding absurd results (namely, treating armed police as 'civilian' outside conflict while excluding unarmed military personnel for formalistic reasons of status, regardless of their actual conduct or participation in state violence or crimes against humanity).

19 May 2016

Professor Ben Saul

Sydney, Australia



Date

Name

Place

Signature

Attached:

- Table of Authorities (2 pages)
- Annex 1: German Supreme Court decisions (18 pages)
- Annex 2: Extract from *Cassese's International Criminal Law* (2 pages)
- Annex 3: Short CV (1 page)