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EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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I. INTRODUCTION

1. The Call for Submissions seeks briefs on "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". We submit the following:
    a. in times of armed conflict:
        i. members of a State's own armed forces can be victims of crimes against humanity but cannot, absent a broader attack against a civilian population, be the sole object of crimes against humanity;
        ii. persecution as a crime against humanity is an exception as it did not, under customary international law in 1975, have to be directed against a civilian population, and the *chapeau* to Article 5 of the Law on the ECCC should be interpreted accordingly; and
    b. in times of peace:
        i. members of the armed forces can be the object of crimes against humanity because in the absence of an armed conflict, all persons are civilians.
2. Crimes against humanity charged by the ECCC must have been proscribed by international law as applicable between 1975 and 1979.[1] Establishing customary international law requires evidence of State practice and *opinio juris*.[2] The Supreme Court Chamber of the ECCC has stated that, considering the difficulty in prosecuting international crimes, the requirement of *opinio juris* may be more important than the practice of State prosecutions.[3]

II. IN TIMES OF ARMED CONFLICT

A. Members of the armed forces as *victims* of crimes against humanity

3. It has been expressly accepted by the ECCC Trial Chamber that under customary international law as applicable between 1975 and 1979, members of the armed forces

[1] *Case 001*, Appeal Judgment, 3 February 2012 ("*Case 001* Appeal"), paras 98-100.

[2] *Case 001* Appeal, para 93 ("extensive and virtually uniform" State practice); Wood, Second report, UN Doc A/CN.4/672, 22 May 2014, paras 21-31, 52-59 ("general and consistent" State practice).

[3] *Case 001* Appeal, para 93.

could be victims of crimes against humanity.[4] This flows from the distinction between the Article 5 *chapeau* requirement that an attack be "directed against a civilian population", and the victims of the underlying crimes. To qualify as a "civilian population", those targeted must be "predominantly" civilian in nature, but the mere presence of combatants within the population does not change its character.[5] There is no requirement that victims of the underlying crimes be civilians.[6]

4. Individuals who are not civilians, such as prisoners of war and those rendered *hors de combat*, have been regarded as victims of crimes against humanity prior to 1975. The *High Command* case concerned abuse against prisoners of war and the Allied armed forces charged as war crimes *and* crimes against humanity.[7] The *Ministries*,[8] *Barbie*,[9] *Touvier*[10] and *Yugoslav-Italian*[11] cases characterised as crimes against humanity acts of which resistance fighters, combatants rendered *hors de combat* and prisoners of war were victims. In *P and Others*,[12] *R*[13] and *H*,[14] the Supreme Court in the British Occupied Zone considered that crimes against humanity had been committed against members of Germany's *own* armed forces for attempted desertion, insulting the leadership, and procuring identity cards in circumstances where the action taken against the victims formed part of the broader Nazi regime of brutal justice and terror.

5. The question arises as to whether deliberately targeting members of the armed forces could objectively form part of a broader attack on a civilian population. This question is answered by the standard inquiry into the nexus between the underlying act and the

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[4] *Case 001*, Trial Judgment, 26 July 2010 ("*Case 001* Trial"), para 311; *Case 002/01*, Trial Judgment, 7 August 2014 (*Case 002/01* Trial"), para 187.

[5] *Case 001* Trial, paras 305-306; *Case 002/01*, Trial, para 183; Additional Protocol I, Article 50(3).

[6] *Case 001* Trial, para 311; *Mrkšić*, Appeal Judgment, 5 May 2009 ("*Mrkšić* Appeal"), para 32; *Martić*, Appeal Judgment, 8 October 2008 ("*Martić* Appeal), paras 306-313.

[7] *Law Reports of the Trials of War Criminals*, vol XII, 3, 71.

[8] *Law Reports of the Trials of War Criminals*, vol XIV, 541-546.

[9] *Barbie*, 78 ILR 124.

[10] *Touvier,* 100 ILR 338.

[11] UN War Crimes Commission ("UNWCC"), *Yugoslav-Italian Charges of Crimes Against Humanity*, 22 November 1946, paras VII, X, XIII, XV-XVI.

[12] Cassese, *International Criminal Law* (2nd ed, 2008) ("Cassese, *ICL*"), 119.

[13] Cassese, *ICL*, 119.

[14] Cassese, *ICL*, 120.

attack on the civilian population.[15] In *Mrkšić*, the ICTY Appeals Chamber, while recognising that individuals who were not civilians could be victims of crimes against humanity, upheld acquittals since the acts in question were directed against a specific group of individuals on the basis of their perceived involvement in the Croatian armed forces. As such, they were treated differently from the civilian population of Vukovar and these acts were not intended to form part of the broader attack against the civilian population. There was, accordingly, no nexus between the acts of the accused and the systematic attack against the civilian population.[16]

6. It therefore follows that if members of the armed forces are targeted on the same basis as civilians as part of a broader attack against a predominantly civilian population, they could be victims of a crime against humanity. This will be clear in cases where, for example, the acts against members of the armed forces and civilians are motivated by the same discriminatory intent.

B. Members of the State's *own* armed forces as the *object* of crimes against humanity

7. A close reading of the Geneva Conventions and Additional Protocols reveals that there are *some* war crimes that can be committed against a State's *own* armed forces.[17] The lack of general protection, however, for members of the armed forces vis-à-vis their own State[18] and the development of international human rights law have fostered arguments in favour of extending the definition of "civilian" and "civilian population" to encompass a State's *own* armed forces.[19]

8. This issue arose in the *Martić* Appeal. The Prosecution relied on the post-WWII cases of *P and Others*, *R*, *H*, *Barbie* and *Touvier*—three of which included attacks against the State's *own* armed forces—to argue that the definition of "civilians" in

[15] *Case 001* Trial, para 318.

[16] *Mrkšić* Appeal, paras 32, 36, 42-43.

[17] Compare Article 75 of Additional Protocol I ("in the power of a Party") and Common Article 3 ("[p]ersons taking no active part in hostilities") with Article 4A of the Third Geneva Convention (in the "power of the enemy"). See also *Ntaganda*, Decision on the Confirmation of Charges, 9 June 2014, paras 77-80.

[18] *Pilz* (17 ILR 391) and *Motosuke* (15 ILR 682) wherein ordering the execution of persons who had joined the occupying forces did not constitute war crimes; *Sesay*, Trial Judgment, 2 March 2009, para 1451-1454.

[19] Eg, Ambos and Wirth, "The Current Law of Crimes Against Humanity" (2002) 13 *CLF* 1, 24-25; Werle and Jeßberger, *Principles of International Criminal Law* (3rd ed, 2014) ("Werle, *Principles*"), para 888; *Kupreškić*, Trial Judgment, 14 January 2000 ("*Kupreškić* Trial"), para 547.

international humanitarian law ("IHL") could not be applied directly in the context of crimes against humanity, and that the meaning of "civilians" should encompass all persons not directly participating in hostilities.[20] The ICTY Appeals Chamber rejected this argument, and importantly for the status of custom in 1975, considered that the post-WWII jurisprudence was authority for the proposition that members of the armed forces could be *victims* of crimes against humanity but *not* for the proposition that they could be *civilians*.[21] This position is confirmed by *Pilz*, in which a Dutch court held that the denial of medical treatment and killing by a German military doctor of a Dutch national who had enlisted in the German army did not constitute a crime against humanity since the victim was part of the occupying force and therefore not a civilian.[22]

9. There is little jurisprudential support for a State's *own* armed forces being "civilians" in times of armed conflict.[23] The general proposition is also problematic on a practical level, including insofar as the State has an obligation to distinguish between its own armed forces and civilian population.[24]

10. While there are reasons consonant with the underlying purpose of crimes against humanity for members of a State's *own* armed forces to be "civilians" and thus qualify as *objects* of crimes against humanity, the lack of clear evidence militates against the conclusion that this was custom in 1975. Members of a State's armed forces are not, however, without protection under international law; the State still has human rights obligations in respect of those persons.

C. The special case of persecution

11. It is arguable that the crime against humanity of persecution did not, as custom stood

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[20] *Martić*, Prosecution Appeal Brief, 25 September 2007, paras 44-45. This reflects the approach taken by ICTR Trial Chambers: *Akayesu* Trial Judgment, 2 September 1998, para 582 but cf *Bagosora et al*, Trial Judgment, 18 December 2008, fn 2353 citing *Martić* Appeal.

[21] *Martić* Appeal, paras 298-301, 309-310.

[22] *Pilz*, 17 ILR 391. There was no discussion of a broader attack against the civilian population.

[23] In *Pius Nwaoga* (52 ILR 494) the appellant was convicted of murder as a domestic crime and as a crime against humanity for facilitating the killing of a fellow member of the Biafran Army in 1969 during the Nigerian civil war. No facts were offered to suggest the murder formed part of a broader attack on a civilian population.

[24] Additional Protocol I, Articles 44(3), 51(7).

in 1975, have to be directed against a civilian population. The terms of the Charters of the International Military Tribunal ("IMT") and International Military Tribunal for the Far East ("IMFTE"), Control Council Law No 10 and the International Law Commission's 1950 Nuremberg Principles recognised two types of crimes against humanity: the "murder type" and the "persecution type".[25] By reason of the disjunctive "or", only the "murder type" was conditioned by the requirement that it be directed against a civilian population.

12. This position is supported by subsequent instruments.[26] Neither the 1948 Genocide Convention nor the 1973 Apartheid Convention, both of which concern particular forms of persecution as a crime against humanity,[27] refer to a target civilian population. They refer only to "persons" or "groups". The 1968 Convention on the Non-Applicability of Statutes of Limitation retained the distinction by adopting the definition in Article 6(c) of the IMT Charter.[28]

13. The UNWCC stated that "[c]rimes against humanity of the murder type were offences committed against the civilian population. Offences committed against members of the armed forces were outside the scope of this type, and *probably* also outside the scope of the persecution type."[29] The ICTY Trial Chamber in *Kupreškić* was less equivocal. Relying on post-WWII prosecutions, it stated that "under customary international law in the case of persecution, the victims of crimes against humanity need not necessarily be civilians; they may also include military personnel".[30] This is a long-standing argument made by Cassese.[31]

14. The ECCC Supreme Court Chamber accepted the distinction between "murder type"

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[25] IMT Charter, Article 6(c); IMFTE Charter, Article 5(c); Control Council Law No 10, Article II(1)(c); ILC Nuremburg Principles, Principle VI(c); UNWCC, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (1948) ("UNWCC, *History*"), 178.

[26] *Cf* the 1954 Draft Code of Offences against the Peace and Security of Mankind (Report of the ILC (1954), UN Doc A/2693, 10).

[27] *Case 001* Trial, para 288; Schabas, *Genocide in International Law* (2000), 254.

[28] 754 UNTS 73, Article I(b).

[29] UNWCCC, *History*, 178 (emphasis added).

[30] *Kupreškić*, Trial, 14 January 2000, para 568.

[31] Cassese, *ICL*, 121.

and "persecution type" crimes in customary international law applicable in 1975,[32] but did not directly consider whether persecution had to be directed against a civilian population. In its discussion of the customary law on persecution, however, it did not refer to "civilians" or the "civilian population". It referred only to "persons", "individuals" and "groups".[33]

15. Consistent with the principle of legality, the plain words of the IMT Charter, IMTFE Charter, Control Council Law No 10 and the Nuremberg Principles demonstrate that the criminal consequences of persecuting individuals, whether members of the armed forces or otherwise, was foreseeable in 1975.

16. If, then, persecution under customary international law could be perpetrated against members of the armed forces, what is the relationship between this customary definition of persecution and Article 5 of the Law of the ECCC? The *chapeau* to Article 5 requires that the widespread or systematic attack be directed against a civilian population in respect of all underlying crimes, including persecution. Article 5 cannot retroactively alter the scope of persecution in 1975,[34] but it can narrow the jurisdiction of the ECCC over crimes against humanity.[35] Unlike other jurisdictional limitations that serve the purpose of restricting a court's jurisdiction to crimes that have actually occurred in a particular situation,[36] there appears to be no justification for or conscious intention to exclude from the ECCC's jurisdiction persecution committed against Cambodia's own armed forces.[37]

17. In such circumstances, Article 5 appears to be an attempt to retroactively, and impermissibly, alter the definition of crimes against humanity under customary international law. The civilian population requirement in the *chapeau* to Article 5 must, therefore, be interpreted as inapplicable to persecution. The persecution of

[32] *Case 001* Appeal, paras 232-233, 238-239.

[33] *Case 001* Appeal, paras 226-278.

[34] *Case 001* Appeal, para 100.

[35] *Case 001* Trial, paras 313-314.

[36] *Akayesu* Appeal Judgment, 1 June 2001, paras 464-465.

[37] The Report of the Group of Experts for Cambodia, UN Doc A/53/850-S/1999/231, 18 February 1999, paras 66(b), 68 cf 69.

members of the armed forces[38] could, in 1975, constitute a crime against humanity.

III. IN TIMES OF PEACE

18. An argument can be made that in peacetime members of the armed forces may be "civilians" such that an attack directed against them may constitute an attack directed against a "civilian population". The ECCC has defined "civilian" in 1975 as including "all persons who are not members of the armed forces or otherwise recognised as combatants" and confirmed that this is consistent with Article 50 of Additional Protocol I.[39] Article 50 of Additional Protocol I defines "civilians" negatively by reference to the armed forces *of a party to the conflict* or those otherwise recognised as combatants *belonging to a party to the conflict* (in both international and non-international armed conflicts[40]). Despite the lack of reference to the "party to the conflict" in the ECCC's discussion, it is submitted that the intended definitional consistency with IHL means that such a qualifier applies to the term "civilians". The categories of "civilians" and "combatants" are conceived of only in opposition to each other and primarily for the purpose of targeting.[41] The relationship between combatants and a party to the conflict is important for their recognition in and the operation of IHL. The contextual connection between civilians and a party to the conflict is important for the negative definition of "civilians".

19. In the same way that the armed forces of a State not involved in a conflict would not be "combatants" for the purpose of IHL, in peacetime, there is no conflict, there are no parties to the conflict and there are, therefore, no combatants. Applying the definition of "civilian" as regards crimes against humanity, all persons in peacetime, including those forming part of the armed forces, qualify as civilians.[42]

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[38] Lawful conduct in IHL would not form the basis of a crime against humanity: *Gotovina and Markač*, Appeal Judgment, 16 November 2012, paras 96, 114; Werle, *Principles*, para 890.

[39] *Case 001* Trial, para 304; *Case 002/001* Trial, para 185, citing *Martić* Appeal, para 297.

[40] *Martić*, Appeal, para 300.

[41] ICRC, *Commentary on the Additional Protocols*, paras 1913-1914.

[42] As this position *applies* the definition of "civilian", it is not the same as the argument adopted by Cassese that, as a result of the advancements in international human rights law, there is no longer any justification for requiring that the attack be directed against a civilian population at any time, but especially in peacetime: Cassese, *ICL*, 122. Both positions are premised on the principle of distinction having no relevance in peacetime.

20. This finds support in the conviction of a former Romanian commander for murder, torture and extermination as crimes against humanity for the treatment of political prisoners, including members of the Romanian military reserve, during peacetime from 1956-1963.[43] No distinction was made between detainees based on their military membership. Similarly, a member of the Argentinian military dictatorship of 1976-1983 was convicted of crimes against humanity where at least one victim was a serving member of the armed forces and no distinction was made based on his status.[44] Pinochet was indicted in Spain for acts including terrorism as a crime against humanity committed between 1973-1990 through acts that included internal military purges.[45]

21. This argument rejects the ICTR Trial Chamber's conclusion in *Kayishema* that the meaning of "civilian" or "civilian population" differs depending on whether the crime against humanity occurred during armed conflict or peacetime.[46] *Kayishema*'s internal inconsistency, in stating that a wide definition should be given to the term "civilian" but giving it an even narrower definition than would be applicable in IHL by excluding police, renders it unsatisfactory.

IV. CONCLUSION

22. 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 in peacetime, or in armed conflict where: (i) the underlying crime is persecution; or (ii) members of the armed forces are victims of a broader attack directed against a civilian population.

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[43] *Vişinescu*, Romanian High Court of Cassation and Justice, 16 February 2016, 3, 23, 26-28, 140-141.

[44] "ESMA" (Navy Mechanics School-GT 3.3.2.), Buenos Aires Federal Criminal Court, 28 December 2011, 766, 1272-1273, 1986-1988.

[45] Summary 19/97 Terrorism and Genocide "Condor Operation" Order, Central Court of Instruction, 10 December 1998, 1-5, 58-62, 349, 354.

[46] *Kayishema and Ruzindana*, Trial Judgment, 21 May 1999, para 127.

Respectfully submitted,

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