BEFORE THE OFFICE OF THE CO-INVESTIGATING JUDGES

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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YIM TITH'S SUBMISSION ON THE INTERPRETATION OF THE TERM 'CIVILIAN POPULATION' FOR THE PURPOSES OF ARTICLE 5 OF THE ESTABLISHMENT LAW

Filed by:

The Co-Lawyers:
SO Mosseny
Suzana TOMANOVIĆ

Distribution to:

The Co-Investigating Judges:
Judge YOU Bunleng
Judge Michael BOHLANDER

Co-Prosecutors:
CHEA Leang
Nicholas KOUMJIAN

Co-Lawyers for IM Chaem:
BIT Seanglim

Co-Lawyers for AO An:
MOM Luch
Göran SLUITER
Richard ROGERS

Co-Lawyers for MEAS Muth:
AND Udom
Michael G. KARNAVAS

All Civil Parties in Case 004

Mr YIM Tith, through his Co-Lawyers ('the Defence'), makes the following submissions pursuant to the *Call for Submissions by the Parties in Cases 003 and 004 and Call for Amicus Curiae Briefs* ('Request for Submissions')[1] and Rule 21 of the Internal Rules ('Rules') of the Extraordinary Chambers in the Courts of Cambodia ('ECCC'). In the Request for Submissions the International Co-Investigating Judge asks 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 Establishment Law.[2] The Defence submits that the term civilian population did not include members of a State's or organisation's own armed forces between 1975 and 1979 (the 'Relevant Period'). The Defence requests to file these submissions in English with the Khmer translation to follow.[3]

I. SUBMISSIONS

a. The law on crimes against humanity was codified after 1945 in order to protect the civilian population and did not address the military population

1. The law on crimes against humanity ('CAH') was first codified in the wake of the atrocities perpetrated by the Nazi State against German and Austrian Jews in the Second World War.[4] As the allied States debated how to respond to these acts, it was accepted that, due to the nationality of the victims, these offences could not be considered as war crimes *stricto sensu*. This is because the legal framework of traditional warfare was only applicable to citizens of another State.[5] Nonetheless, due to the scale and severity of the atrocities, the United Nations War Crimes Commission ('UNWCC') concluded that 'narrow legalisms were to be disregarded

[1] *Call for Submissions by the Parties in Cases 003 and 004 and Call for Amicus Curiae Briefs*, 19 April 2016, D306.
[2] Request for Submissions, para. 3.
[3] See Email from Interpretation and Translation Unit to the Defence, 'Translation of Motion ERN 01240540-01240554', 16 May 2016.
[4] M Lippman, 'Crimes Against Humanity' (1997) 17 *Third World Law Journal*, p. 173-177.
[5] United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War,* United Nations War Crimes Commission by His Majesty's Stationary Office, 1948, p. 174.

and the field of the violations of the laws of war extended so as to meet the requirements of justice'. [6]

2. The initial definition of CAH was set out in Article 6(c) of the Charter of the International Military Tribunal of Nuremberg ('IMT Charter'), annexed to the London Agreement of 8 August 1945 in the following terms:

> The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility…
> CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of 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.[7]

3. The term 'any civilian population' was included following a lengthy drafting process.[8] Its inclusion has been explained by reference to the Martens Clause as the legal basis of crimes against humanity[9] and as evidence that CAH were initially an extension of war crimes, since the category of protected persons is the same.[10] However, the primary reason for including the term was to criminalise offences committed by a State against its own nationals.[11]

4. In doing so, the term 'any civilian population' deliberately excluded members of the armed forces 'whether or not such persons were civilians fighting alongside enemy military forces', since such protection was rendered redundant by the existing rules of warfare.[12] The provision also excluded members of a State's own military, who

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[6] United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War,* United Nations War Crimes Commission by His Majesty's Stationary Office, 1948, p. 174.
[7] The Avalon Project, *Nuremberg Trial Proceedings Vol. 1 Charter of the International Military Tribunal*, 11 May 2016, *available at* http://avalon.law.yale.edu/imt/imtconst.asp#art6.
[8] For an account of the drafting process see Report of RH Jackson, *US Representative to the International Conference on Military Trials*, US Department of State (Washington, 1949); see commentary of A Cassese, *The Human Dimension of International Law*, Oxford University Press, 2008, p. 465.
[9] M Lippman, 'Crimes Against Humanity' (1997) 17 *Third World Law Journal*, p. 173-4.
[10] M Bassiouni, *Crimes Against Humanity in International Criminal Law*, Kluwer Law International, 1999, p. 10.
[11] M Bassiouni, *Crimes Against Humanity in International Criminal Law*, Kluwer Law International, 1999, p. 72.
[12] A Cassese, *The Human Dimension of International Law*, Oxford University Press, 2008, p. 466. The protection afforded to enemy military forces was firmly established by IHL instruments including the

were perceived to be protected by their own military laws and therefore not in need of such protection:

> [t]he rationale for this relatively limited scope of Article 6(c) [of the IMT Charter] is that enemy combatants were already protected by the traditional laws of warfare, while it was deemed unlikely that a belligerent might commit atrocities against its own servicemen or those of allied countries. In any event, such atrocities, if any, would come under the jurisdiction of the courts-martial of the country concerned; in other words, they would fall under the province of national legislation.[13]

5. Although the codification of CAH infringed upon State sovereignty, it only did so to the extent required to criminalise the acts of the Nazi State during the Second World War. It is for this reason that Article 6(c) of the IMT Charter is limited to offences affecting the interests of other States, namely those perpetrated in execution of or in connection with war crimes or crimes against peace:

> [p]lainly, in 1945 the Allies did not feel that they should 'legislate' in such a way as to prohibit acts *regardless of their consequences or implications for third states*. At that stage, what happened within a national system, even if contrary to fundamental values of humanity, was still of exclusive concern to that state if it had no spill-over effects on other states: it fell within its own 'domestic jurisdiction'.[14]

6. This link between the prosecution of crimes under Article 6(c) of the IMT Charter to the prosecution of other acts punishable under the Statute, such as war crimes and crimes against peace, was made pursuant to the principle of State sovereignty and the non-involvement in the internal affairs of foreign States. During negotiations, the chief United States' negotiator Robert H Jackson noted that: '[i]t has been a general principle of foreign policy of our Government from time immemorial that the internal affairs of another government are not ordinarily our business.... [u]nless we have a war connection as a basis for reaching them, I would think we have no basis

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'Convention (IV) respecting the Laws and Customs of War on Land' and its annex, 'Regulations Concerning the Laws and Customs of War on Land' (1907). In 1946 the Nüremberg International Military Tribunal noted that by 1939 these rules were 'recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war'; see *Judgment of the Nuremberg International Military Tribunal 1946* (1947) 41 AJIL 172 p. 248-249.

[13] A Cassese, *The Human Dimension of International Law*, Oxford University Press, 2008, p. 466 (emphasis added); see also A Cassese, *Cassese's International Criminal Law (3rd Ed.),* Oxford University Press, 2013, p. 102-3.

[14] A Cassese, *Cassese's International Criminal Law (3rd Ed.),* Oxford University Press, 2013, p. 86.

for dealing with atrocities'.[15] Accordingly the definition of CAH as codified in the Charter would not have included the term 'any civilian population' if it infringed upon a State's sovereignty over its own military. Such offences did not affect other States and were seen as falling within the jurisdiction of a State's own military laws.

7. This 'restrictive' definition of crimes against humanity was subsequently adopted by Article II(c) of the Allied Control Council Law No. 10 (1945) and Article 5(c) of the Tokyo Charter (1946).

b. Post 1945 State practice and commentary does not support an extended interpretation of the term 'any civilian population'

8. The definition of crimes against humanity was considered a number of times after its initial application following the Second World War. During this time State practice and commentary did not support extending the definition of 'any civilian population' to include members of a State's own military.

9. The International Law Commission ('ILC') considered the definition of CAH periodically between 1948 and 1996. In its 1951 Draft Code of Offences against the Peace and Security of Mankind, the ILC put forward the following definition of CAH:

> Article 10 – Inhuman acts by the authorities of a State or by private individuals against <u>any civilian population</u>, such as murder, or extermination, or enslavement, or deportation, or persecutions, or enslavement, or deportation, or persecutions on political, racial, religious or cultural grounds, when such acts are committed in execution of or in connexion with other offences defined in this article. [16]

10. The definition includes the term 'any civilian population', mirroring the definition set out in Article 6(c) of the IMT Charter. The draft was extensively debated by State representatives and the issue of extending the meaning of the term 'any civilian

[15] The Avalon Project, *International Conference on Military Trials: London, 1945, Minutes of Conference Session of July 23, 1945*, 11 May 2016, *available at* http://avalon.law.yale.edu.imt/jack44.asp; see also, commentary of S Kirsch, 'Two Kinds of Wrong: On the Context of Crimes against Humanity' (2009) 22 *Leiden Journal of International Law*, p. 532.

[16] Draft Code against the Peace and Security of Mankind (1951) United Nations, *Yearbook of the International Law Commission* (1951) Vol. II at p. 136 (emphasis added).

population' does not feature in the resulting commentary, which accompanies the 1951 Draft Code.[17] Instead the main amendment included was the proposal to enlarge the scope of the paragraph to make the punishment of the acts enumerated in the paragraph independent of any connection with other offences in the Draft Code.[18] This demonstrates that the initial impetus to extend the laws of war, articulated by the UNWCC in 1948, and resulting in the codification of CAH in Article 6(c) of the IMT Charter, had been tempered by 1951.

11. The definition of CAH was subsequently set out again in the 1954 Draft Code of Offences against the Peace and Security of Mankind in the following terms:

> Article 10 – Inhuman acts such as murder, extermination, enslavement, deportation or persecutions, committed against any civilian population on social, political, racial, religious or cultural grounds by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities. [19]

12. The only amendment debated and adopted in the accompanying commentary was to state that acts committed by private individuals had to be committed at the instigation or with the toleration of a State.[20] The issue of dispensing with or widening the definition of 'any civilian population' did not arise.

13. The concept of 'any civilian population' was first omitted in the 1991 Draft Code of Crimes against the Peace and Security of Mankind. This Draft did not include a definition of CAH and instead included a provision entitled "Systematic or mass violations of human rights" which criminalised the following human rights violations:

> Murder; torture, establishing or maintaining over persons a status of slavery, servitude or forced labour; persecution on social, political, racial, religious or cultural grounds in a systematic manner or on a mass

[17] See commentary accompanying the text at United Nations, *Yearbook of the International Law Commission* (1951) Vol. II at p. 136.
[18] Draft Code against the Peace and Security of Mankind (1951) Documents of the Third Session including Report of the Committee to the General Assembly, in United Nations, *Yearbook of the International Law Commission* (1951) Vol. II at p. 136.
[19] Draft Code against the Peace and Security of Mankind (1954) Report of the International Law Commission on the Work of its Sixth Session, in United Nations in United Nations, *Yearbook of the International Law Commission* (1954) Vol. II at p. 150.
[20] Draft Code against the Peace and Security of Mankind (1954) Report of the International Law Commission on the Work of its Sixth Session, in United Nations in United Nations, *Yearbook of the International Law Commission* (1954) Vol. II at p. 150.

> scale; or deportation or forcible population shall, on conviction thereof, be sentenced ....[21]

14. The 1991 Draft Code was proposed almost two decades after the Relevant Period. As such, it does not reflect State practice between 1975 and 1979 for the purposes of establishing the state of customary international law. The 1991 Draft Code also simply omits the concept of CAH, rather than considering and altering the relevant definition of 'any civilian population'. In any case: '[t]he 1991 Draft Code was not particularly welcomed by States. Notably the provision[s] criminalizing human rights violations were taken to infringe on their sovereignty.'[22]

15. The issue of CAH was revisited in the 1996 Draft Code of Crimes against the Peace and Security of Mankind. Article 18 of the 1996 Draft Code included a provision for CAH, which omitted the term 'any civilian population'. The failure to explain the omission of the term 'civilian population' in the accompanying commentary supports the view that this was not the result of a thorough analysis of contemporary State practice.[23] The omission of the term is even less notable, as it was subsequently included in the definitions of CAH adopted in the statutes of the International Criminal Tribunal for the former Yugoslavia ('ICTY'), International Criminal Tribunal for Rwanda ('ICTR') and the International Criminal Court ('ICC').

16. The ILC Draft Codes and their drafting process suggest that State practice following the Second World War was to adopt both the requirement that CAH target 'any civilian population' and its restrictive definition. Despite the opportunity to develop and possibly widen the definition in both 1951 and 1954, this suggestion is wholly absent from the accompanying commentary. This can be contrasted to other issues, including the armed conflict nexus requirement, which were extensively debated during this period. The first suggestion that the term 'any civilian population' may be dispensed with or developed arises in the 1991 and 1996 Draft Codes, almost two

[21] Draft Code of Crimes against the Peace and Security of Mankind (1991) Report of the International Law Commission on the Work of its Forty- Third Session, in United Nations, *Yearbook of the International Law Committee* (1991) Vol. II, Part Two, p. 79-80.
[22] M Boot, *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court,* School of Human Rights Research, 2002, p. 466.
[23] Draft Code of Crimes against the Peace and Security of Mankind with Commentaries (1996) Report of the International Law Commission on the Work of its Forty- Eighth Session, in United Nations, *Yearbook of the International Law Committee* (1996) Vol. II, Part Two, p. 47-50.

decades after the Relevant Period. The issue was not explicitly considered during either drafting process and the 1991 and 1996 Draft Codes received very little international support. They are therefore not indicative of contemporary State practice and certainly do not reflect customary international law in the 1970s.

c. There is insufficient jurisprudence post 1945 to constitute clear judicial practice extending the term 'any civilian population' to include members of the military

17. The majority of court practice following the Second World War adopted a restrictive interpretation of the term 'any civilian population', excluding members of the military.[24]

18. In *Neddermeier*, the British Court of Appeals sitting in Germany directly considered the question of who can be a victim of a crime against humanity.[25] The case considered the status of Polish workers who entered Germany as prisoners of war but subsequently purportedly renounced this status by signing written agreements. The Court at first instance convicted the defendant of CAH for his mistreatment of the workers. In their reply to the defendant's appeal, the Director of Public Prosecutions accepted that the conviction for CAH could be substituted for war crimes, should the workers be classified as Prisoners of War ('POWs'). On appeal, the Court found that the workers were POWs and therefore substituted the defendant's conviction for CAH with one for war crimes.

19. This restrictive approach to the potential victims of CAH, was also adopted by the Dutch Special Court of Cassation. In *Pilz* the defendant was a doctor who failed to offer medical assistance to a wounded person, who died as a result. [26] The wounded person was a Dutch national but a member of the German armed forces, as was the

[24] A Cassese, *Cassese's International Criminal Law (3rd Ed.),* Oxford University Press, 2013, p. 102-103.
[25] *Neddermeier*, Control Commission Courts established under Control Council Law No. 10, Court of Appeals, 10 March 1949 in *Germany- British Zone of Control, Control Commission Courts, Court of Appeal Reports, Criminal Cases* (1948) No. 1, p. 58-60 (*'Neddermeier'*); see also, A Cassese, *The Oxford Companion to International Criminal Justice*, Oxford University Press, 2009, p. 840.
[26] *Pilz,* Dutch Special Court of Cassation, Judgment of 5 July 1950, *Nederlandse Jurisprudentie,* 1950, No. 681, p. 1210-11 (*'Pilz'*); summary in A Cassese, *The Human Dimension of International Law*, Oxford University Press, 2008, p. 466.

defendant. On appeal, the Dutch Special Court of Cassation considered *inter alia* whether a CAH had been committed. The Court concluded that it had not since 'the victim was not part of the civilian population and the acts committed were not part of systematic persecutions'.[27]

20. In both instances the courts directly considered the meaning of the term 'civilian population' in relation to CAH and rejected the suggestion that this could include members of the military. In *Pilz* this is applied to members of the Germany army, confirming that no exception was made for members of a State's own military. These decisions are both decisions by appeal courts and demonstrate the practice of both British and Dutch courts. They are thus reflective of customary practice during the post-Second World War period.

21. By contrast, the only jurisprudence that suggests a more expansive interpretation of the term 'any civilian population' during this period comes from the Supreme Court of Germany in the British Occupied Zone in a series of three judgments.

22. In *R.*, the Court convicted a member of the Nazi commandos for denouncing a non-commissioned officer in uniform and member of the Sturmabteilung for insulting the leadership of the Nazi party. This resulted in several trials and the officer being sentenced to the death penalty. The Court found that the denunciation could be a CAH 'if it could be proved that the agent had intended to hand over the victim to the "uncontrollable power structure of the [Nazi] party and state"'.[28] In coming to its decision, the Court failed to consider the status of the non-commissioned officer or the definition of the term 'any civilian population'.

23. In *P et al.*, the Court convicted the members of a court-martial for complicity in a CAH for sentencing four German marines to death for desertion and executing three of them. As with *R.*, the decision was the result of the desire to criminalise the

[27] *Pilz,* Dutch Special Court of Cassation, Judgment of 5 July 1950, *Nederlandse Jurisprudentie,* 1950, No. 681, p. 1210-11 (*'Pilz'*); summary in A Cassese, *The Human Dimension of International Law*, Oxford University Press, 2008, p. 466.
[28] *R.,* Decision of 27 July 1948, *Entscheidungen des Obersten Gerichtschofes für die Britische Zone in Strafsachen,* Berlin 1950, Vol. 1, p. 45-9 (*'R.'*); summary in A Cassese, *The Human Dimension of International Law*, Oxford University Press, 2008, p. 468.

actions of the Nazi regime, rather than a deliberate decision to widen the scope of potential victims of CAH, with the Court finding that the punishment constituted 'a clear manifestation of the Nazi's brutal and intimidatory justice'.[29]

24. Lastly, in *H.* the Court convicted a German presiding judge who presided over two courts-martial against two officers of the German Navy. The Judge initially sentenced them to death, but the sentences were later commuted to ten years' imprisonment. Rather than considering the status of the officers, the conviction was made on the basis that the 'action was undertaken deliberately in connection with the Nazi system of violence and terror'.[30]

25. Despite often being cited in support of an expansive interpretation of the term 'any civilian population', it is clear that these cases did not consider the interpretation of this term.[31] Instead the cases were decided pursuant to the desire to criminalise the brutality of the Nazi regime.[32] Jurisprudence resulting from decisions made on such policy grounds is not reflective of customary international law during this period or during the Relevant Period.

26. Indeed the lack of an established definition of 'civilian' under customary international law during the Relevant Period was noted by the Trial Chamber in Case 002/01: [33]

> In determining whether a population may be considered to be 'civilian', the Chamber notes that there was no established definition of civilian under customary international law in April 1975. The ordinary meaning of the term "civilian" (in English) and "civil" (in French) encompasses persons who are not members of the armed forces. On this basis, the Chamber holds that at the time relevant to the charges here at issue, the

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[29] *P et al., Entscheidungen des Obersten Gerichtschofes für die Britische Zone in Strafsachen,* Berlin 1950, Vol. 1, p. 220 (*'P et al.'*); summary in A Cassese, *The Human Dimension of International Law*, Oxford University Press, 2008, p. 468.

[30] *H.,* Supreme Court in the British Occupied Zone, Judgment of 18 October 1949, *Entscheidungen des Obersten Gerichtschofes für die Britische Zone in Strafsachen,* Vol. 2, p. 231-46 (*'H.'*); summary in A Cassese, *The Human Dimension of International Law*, Oxford University Press, 2008, p. 469.

[31] See, eg, A Cassese, *Cassese's International Criminal Law (3rd Ed.),* Oxford University Press, 2013, p. 102-3.

[32] This could not be achieved through other means, since no domestic or international criminal law existed to criminalise or punish a regime.

[33] Case 002/01, *Case 002/01 Judgment*, 7 August 2014, E313, para. 185.

> civilian population included all persons who were not members of the armed forces or otherwise recognised as combatants. [34]

27. The issue of whether members of the military could be victims of CAH was not considered again until the case of *Barbie* in 1985, ten years after the Relevant Period. In *Barbie* the Court considered whether members of the French resistance could be included in the victim group of the CAH allegedly committed by the defendant. The *Chambre d'accusation* ordered that an indictment be drawn up for crimes against humanity, but only for the crimes committed against the civilian Jewish population. On appeal the *Cour de cassation* found:

> [This Court considers] however that the judgment under appeal states that the "heinous" crimes committed systematically or collectively against persons who were members or could have been members of the Resistance were presented, by those in whose name they were perpetrated, as justified politically by the national socialist ideology. Neither the driving force which motivated the victims, nor their possible membership of the Resistance, excludes the possibility that the accused acted with the element of intent necessary for the commission of crimes against humanity. In pronouncing as it did and excluding from the category of crimes against humanity all the acts imputed to the accused committed against members or possible members of the Resistance, the *Chambre d'accusation* misconstrued the meaning and the scope of the provisions listed in these grounds of appeal. [35]

28. In the judgement the Court only considers members of an enemy military. It does not address members of a State's own military. As with the jurisprudence resulting from the Supreme Court of Germany in the British Occupied Zone, discussed above, this judgment did not explicitly consider the correct definition of the term 'any civilian population'. Instead the case was decided by considering the intent of the accused, rather than the nature of the victims.

29. Furthermore, the approach adopted in *Barbie* was informed by the unique facts of the case. The victims in this case were members of the French resistance and included Jean Moulin, a prominent member of the French resistance. Ordinarily international humanitarian law will protect combatants that are *hors de combat.*

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[34] Case 002/01, *Case 002/01 Judgment*, 7 August 2014, E313, para. 185.

[35] *Barbie,* Cour de cassation, Judgment, 20 December 1985 (*'Barbie'*); summary in A Cassese, G Acquaviva, M Fan and A Whiting, *International Criminal Law: Cases and Commentary*, Oxford University Press, 2011, p.174-5.

However, because the case was brought so long after the events, the crimes committed under International Humanitarian Law ('IHL') would have been barred by the 20 year statute of limitations. Given these circumstances, it is likely that decision was the result of a purposive reading of the law and therefore not indicative of general court practice during the Relevant Period.[36]

30. Lastly, the correct interpretation of the term 'any civilian population' has also arisen in the case law of modern tribunals, including the ICTY and, indirectly, the Special Court for Sierra Leone ('SCSL'). The Co-Investigating Judges must exercise caution when considering this jurisprudence, as it is not necessarily reflective of customary international law in during the Relevant Period. Nonetheless, the jurisprudence of the ICTY demonstrates that even if the definition of 'any civilian population' had expanded by the 1990s, it did not explicitly include members of a State's own military forces.

31. This was clearly set out by the ICTY Appeal Chamber in *Martić*, which considered two issues arising out of the definition of 'any civilian population'. It first confirmed that the definition of civilian contained in Article 50 of Additional Protocol 1 reflects the definition of civilian for the purpose of applying Article 5 of the Statute and that the Trial Chamber did not err in finding that the term civilian in that context did not include persons *hors de combat.*[37] The Appeal Chamber then widened the definition of the term civilian in one respect only, by finding that combatants that are *hors de combat* could be incidental victims of CAH, 'provided that all other necessary conditions are met, in particular that the act in question is part of a widespread or systematic attack against any civilian population'.[38] The factual pattern in this case

[36] See A Cassese, G Acquaviva, M Fan and A Whiting, *International Criminal Law: Cases and Commentary*, Oxford University Press, 2011, p. 179.
[37] International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Milan Martić*, Case No. IT-95-11-A, Appeal Judgment, 8 October 2008, para. 302 (*'Martić'*).
[38] International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Milan Martić*, Case No. IT-95-11-A, Appeal Judgment, 8 October 2008, para. 313 (*'Martić'*), In support of this approach, the Appeal Chamber cites the case law from the Supreme Court in the British Occupied Zone and the case of *Barbie*, discussed above. The Appeal Chamber also relies on two cases decided by the US Military Tribunal Nuremberg: *United States v. Wilhelm von Leeb et al.*, (*'The High Command Case'*), Judgement of 27 October 1948, Military Tribunal V, Law Reports of the Trials of War Criminals, Vol. XI and *United States v. Ernst Von Weizsaecker et al.*, (*'The Ministries Case'*), Judgement of 11-13 April 1949, Military Tribunal IV, Law Reports of the Trials of War Criminals, Vol. XIV. These cases do not directly consider the definition of the term 'civilian population'. While the factual patterns addressed in the judgments include attacks on populations

only considered enemy combatants that were *hors de combat*. It therefore cannot be inferred that this applies to all such combatants.

32. By contrast, the issue of attacks on members of a State's own military did arise in the *RUF* case before the SCSL.[39] The Trial Chamber considered the killing of 'Kayioko', an *hors de combat* member of the AFRC, who fought alongside the RUF in armed conflict. Despite the SCSL statute containing a CAH provision in Article 2, this act was only charged as the war crime of violence to life rather than CAH. The issue was considered by the Trial Chamber, which found that it was 'trite law that an armed group cannot hold its own members as prisoners of war' and therefore decided that the killing did not fall within the ambit of IHL. Crucially, the Trial Chamber did not suggest that the act could have constituted a CAH. This supports the suggestion that even by 2009 the definition of 'any civilian population' had not expanded to include *hors de combat* members of a State's own military forces.

d. The decoupling of the CAH and armed conflict nexus does not extend the definition of 'any civilian population' to include members of a State's own forces

33. It is suggested that one consequence of decoupling the nexus between CAH and armed conflict is the liberalization of the insistence that only civilians can be victims of crimes against humanity. This is posited by Cassese, who describes it as a: 'trend towards loosening the strict requirement that the victims of murder-type crimes against humanity be civilians, also continued, however, in more recent times.'[40] In support of this suggestion Cassese cites the jurisprudence of the Supreme Court of Germany in the British Occupied Zone and the case of *Barbie*, discussed above.

34. A 'trend towards loosening' is not sufficient to establish customary international law during the Relevant Period. Particularly if the purported trend is based on limited

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encompassing both civilians and *hors de combat* military personnel, the Court does not analyse or make findings on the legal definition of 'civilian population'.

[39] Special Court for Sierra Leone, *Prosecutor v. Issa Hassan Sesay, Morris Kallon, Augustine Gbao,* Case No. SCSL-04-15-A, Trial Judgment, 2 March 2009, paras 1451-3 (*'RUF'*); note that the issue was not considered on appeal.

[40] A Cassese, *Cassese's International Criminal Law (3rd Ed.),* Oxford University Press, 2013, p. 104.

jurisprudence, not supported by State practice or commentary, which does not directly address the correct definition of 'any civilian population'. The paucity of attention to this issue can be contrasted with the level of State and academic commentary garnered by the armed conflict nexus. Put simply, the correct definition of the term 'any civilian population' has not been sufficiently debated by States or academics.

35. Furthermore, the existence of such a 'trend' is not reflected in the drafting negotiations and final wording of the Rome Statute. This is particularly significant since the Rome Statute is the result of multilateral negotiations involving 160 States.[41] This is in contrast to previous definitions of CAH, which were either imposed by the victors, as is the case in the Nuremberg and Tokyo Charters, or by the Security Council, as is the case for the Statutes of the ICTY and ICTR. [42]

36. The unique drafting process of the Rome Statute meant that it was both progressive and reflective of contemporaneous State practice. As such the wording of Article 7 included many of the contemporary developments in international criminal law: 'for example, the definition does not require any nexus to armed conflict, does not require proof of a discriminatory motive, and recognizes the crime of apartheid and enforced disappearance as inhumane acts'. [43]

37. The inclusion of the term 'any civilian population' was debated during the drafting process, with some States and non-governmental organisations arguing to expand the definition to 'any population'. However, this suggestion was ultimately rejected 'since the term is well established in the precedents'.[44] The ultimate wording of Article 7 therefore confirms that the abolition of the armed conflict nexus requirement, does not extend the potential victims of CAH to any population.

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[41] D Robinson, 'Defining "Crimes Against Humanity" at the Rome Conference' (1999) 93:1 *The American Journal of International Law,* p. 43.
[42] D Robinson, 'Defining "Crimes Against Humanity" at the Rome Conference' (1999) 93:1 *The American Journal of International Law,* p. 51.
[43] D Robinson, 'Defining "Crimes Against Humanity" at the Rome Conference' (1999) 93:1 *The American Journal of International Law,* p. 51.
[44] D Robinson, 'Defining "Crimes Against Humanity" at the Rome Conference' (1999) 93:1 *The American Journal of International Law,* p. 51, fn. 50; note that the author served as the Secretary of the Committee of the Whole of the Rome Conference.

e. Conclusion

38. The International Co-Investigating Judge suggests that 'there is no reason to think' that the term 'any civilian population' should not include an attack on members of a State's own military if 'such a campaign happened in the course of or otherwise connected to an armed conflict'.[45] A review of State practice, commentary and jurisprudence supports the submission that the term 'any civilian population' did not include members of the military during the Relevant Period. The Co-Investigating Judges must not adopt an expansive interpretation of the term simply to fill a lacuna in customary international law during the Relevant Period. To extend the interpretation of this term to include members of a State's own military would be an overly purposive interpretation of the state of customary international law at the relevant time.

WHEREFORE, for all the reasons stated herein, the Defence respectfully submits that the term 'civilian population' in crimes against humanity did not encompass members of a State's or organisation's armed forces during the Relevant Period.

Respectfully submitted,

AVOCAT ATTORNEY AT LAW KINGDOM OF CAMBODIA

SO Mosseny Suzana TOMANOVIĆ

Co-Lawyers for Mr YIM Tith

Signed in Phnom Penh, Kingdom of Cambodia on this 19th day of May, 2016

[45] Request for Submissions, para. 5.