

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

FILING DETAILS

Case No: 003/07-09-2009-ECCC-OCIJ
Filed to: Greffier of the Office of the Co-
Investigating Judges
Date of document: 18 May 2016

Party Filing: *Amicus Curiae*, Center for
International and Comparative Law,
University of Baltimore School of Law

Original language:
ENGLISH

CLASSIFICATION

**Classification of the document
suggested by the filing party:**

PUBLIC

ឯកសារដើម	
ORIGINAL/ORIGINAL	
ថ្ងៃ ខែ ឆ្នាំ (Date):	23-May-2016, 16:09
CMS/CFO:	Sann Rada

Records Officer Name:

Signature:

**Amicus Brief filed by the Center for International and Comparative Law, University of
Baltimore School of Law on the Legality of Targeting Members of One's Own Military**

Filed by:

Amicus Curiae

Center for International and Comparative
Law, University of Baltimore School of
Law

Civil Party Lawyers

HONG Kimsuon
KIM Mengkhy
MOCH Sovannary S
AM Sokong
TY Srinna
VEN Pov
Philippe CANONNE
Laure DESFORGES
Ferdinand DJAMMEN- NZEPA
Nicole DUMAS
Isabelle DURAND
Françoise GAUTRY
Martine JACQUIN
Christine MARTINEAU
Barnabe NEKUI
Lyma NGUYEN
Nushin SARKARATI
Fabienne TRUSSES

Distribution to:

Co-Prosecutors

CHEA Leang
Nicholas KOUMJIAN

Meas Muth Defence

ANG Udom
Michael G. KARNAVAS

Office of the Administration

INTRODUCTION

1. On 19 April, 2016, the Office of the Co-Investigating Judges (OCIJ) of the Extraordinary Chambers in the Courts of Cambodia (ECCC) published a solicitation for amicus briefs, in exercise of the Office's power under Rule 33 of the Internal Rules of the ECCC. The purpose of this solicitation was to determine the customary international law on whether an attack by a state or organisation against members of *its own* armed forces may amount to an attack directed against a civilian population. Furthermore, if such acts would constitute a crime against humanity if they were both widespread and systematic.
2. No consent of the parties to these proceedings was sought prior to filing. The Center for International and Comparative Law (CICL) at the University of Baltimore School of Law has filed this amicus brief in direct response to the OCIJ solicitation.
3. The CICL promotes the study and understanding of international and comparative law, and of the political and economic institutions that support the international legal order. Established in 1994, the CICL sponsors research, publication, teaching and the dissemination of knowledge about international legal issues, with special emphasis on human rights, democracy, intellectual property and international business transactions. The Human Rights Initiative promotes the study, understanding and implementation of universal human rights, as embodied in international treaties, regional agreements, and customary international law. This initiative considers the nature and basis of universal human rights and fundamental freedoms, and encourages their equal realization for all persons and nations. The Human Rights Initiative also works to promote the dissemination of international humanitarian and promote the rule of law through research of international criminal law.
4. The supervising attorney and academic on this brief is Catherine Moore, Coordinator for International Law Programs and CICL Lecturer. CICL

Fellows Shane Bagwell, Christian Kim, John Rizos, and Kia Roberts-Warren assisted with this brief.

EXECUTIVE SUMMARY

5. Customary international law in the area of both international humanitarian law and international human rights law supports the view that human life should be respected and protected. Although there was no treaty law to reference from 1975-1979 that explicitly forbids targeting one's own military, customary international law at the time provides the necessary protections to such individuals.
6. While international humanitarian law does provide for the taking of life in the context of an armed conflict, it does not provide that such deaths be targeted against one's own population, even if those targeted are members of the military and particularly if inflicted without a judgment rendered by a regularly constituted court.
7. This analysis draws on two foundational tenets of international humanitarian law, the principle of distinction and humanity, as well as the non-derogable right to life in international human rights law.

A - UNDER INTERNATIONAL HUMANITARIAN LAW, THE ATTACK BY A STATE OR ORGANISATION AGAINST MEMBERS OF ITS OWN ARMED FORCES COULD BE ILLEGAL

1. The targeting of a country's own soldiers is not inherently a violation of international humanitarian law (IHL), provided that certain prohibitions are placed upon such an action. The customary international law has developed over the last several centuries to dictate the rules of combat between nations, while domestic regulations have determined what is necessary for internal discipline. Here, we engage a unique blend of the two due to the sheer scale of discipline, both in terms of soldiers affected and the severity of the punishment inflicted, as well as the fact that the soldiers are nationals of and were targeted within Cambodia. **The actions taken by the Defendants go**

far beyond what could be considered internal discipline, amount to a violation of IHL, and constitute crimes against humanity. Therefore, Article 5 of the ECCC law is applicable.

2. The International Criminal Tribunal for the Former Yugoslavia (ICTY) held in the *Tadić* case that non-international armed conflicts are subject to Common Article 3 of the Geneva Conventions (CA3), Additional Protocol II (APII), as well as customary IHL, including the principles of distinction, proportionality, military necessity, and the prohibition on unnecessary suffering.¹ Distinction and the principle of humanity are the two “cardinal principles” of IHL that are most applicable here.²

Distinction

3. We first turn to the issue of distinction, as soldiers within the Revolutionary Army of Kampuchea (RAK) were targeted by political elements of their own government and at the hands of those in the armed forces in which they served.
4. During an armed conflict (both international and non-international), a State must direct attacks only at objects and persons that are legitimate military targets. The principle of distinction is at the core of IHL, whereby attacks must not be directed at civilian objects or protected persons, which includes the civilian population, the wounded and sick, and prisoners of war. Combatants of an enemy force are always considered legitimate military targets, unless they are *hors de combat* (i.e. wounded, sick, prisoners of war, medical personnel, or inactive soldiers).
5. Attacks must also be directed at military objectives. Attacks are limited to objects by which their purpose or use makes effective contribution to military action and whole or partial destruction offers a definite advantage.³ Interestingly, the Preamble of the 1868 St. Petersburg Declaration states:

¹ Major Ian G. Corey, *The Fine Line Between Policy and Custom: Prosecutor v. Tadic and the Customary International Law of Internal Armed Conflict*, 166 Mil. L. Rev. 145, 152 (2000)

² *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. 226, P 78 (1996)

³ International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* (“AP I”), 8 June 1977, 1125 U.N.T.S. 3, art. 52(2); See also, *Draft Rules for the Limitation of the Dangers incurred by the Civilian Population in Time of War*. ICRC (1956), art. 7 (“Only objectives belonging

“The only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy.”⁴

Arguably, the targeting of a State’s own armed forces would not “weaken the military forces of the enemy” and, thus, not be considered a legitimate target by this standard. When a State kills its own soldiers, it is weakening its own armed forces, rather than the enemy’s armed forces by depleting its own stock of troops.

6. As the OCIJ rightly pointed out, any distinction between militants and civilians is typically directed toward opposing forces. However, for our purposes we must consider the rationale behind the use of force. Internal discipline and security are fundamental for an effective fighting force, and governments are given a great deal of leeway in how they enforce rules/regulations within the ranks, even so far as to authorize execution in cases of cowardice, malingering, poor performance, treason, etc.⁵ There was a justifiable reason to kill those soldiers who had threatened national security or likelihood of victory based on performance or character, and not on racial, ethnic composition, or political belief or will.
7. Finally, soldiers killed by the Khmer Rouge may not have traditional *hors de combat* status, but exhibit many similarities. These soldiers were not hostile against their own regime to warrant such killings nor did they attempt to combat or set mutiny against the Khmer Rouge; they were subordinates at the mercy of the regime, such as prisoners of war are at the mercy of their captors. Further, the soldiers who were executed were of different racial composition. They had become part of the Khmer Rouge’s armed forces after the civil war, when the regime won control of the State and, thus,

to the categories of objective which, in view of their essential characteristics, are generally acknowledged to be of military importance, may be considered as military objectives... However, even if they belong to one of those categories, they cannot be considered as a military objective where their total or partial destruction... offers no military advantage.”)

⁴ *Declaration Renouncing the Use, in Time of War, of certain Explosive Projectiles*. Saint Petersburg (1868).

⁵ See, e.g. Article 90, Uniform Code of Military Justice: Assaulting or willfully disobeying superior commissioned officer, codified as 10 U.S.C. § 890.

“inherited” the army, and therefore rendering the soldiers more like prisoners of war.

8. Although soldiers are distinct and separate from civilians in every consideration of international law, the magnitude and severity of the discipline imposed upon the RAK here, as a matter of policy could overcomes these limitations of distinction.

Principle of Humanity

9. Second, we consider the customary principle of humanity in IHL. It follows *a fortiori* that the scale of discipline imposed upon members of the RAK constituted one of unnecessary suffering. **The execution, torture, starvation, and forced labor that was pressed upon soldiers served no legitimate military purpose.**
10. CA3 of the Geneva Conventions protects “persons taking no active part in the hostilities, including **members of armed forces who have laid down their arms** and those placed *hors de combat* by sickness, wounds, **detention, or any other cause.**”⁶ There is a requirement that these individuals be “treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.”⁷ CA3 does not specify that the “members of the armed forces” be that of enemy forces but, rather, any “**who have laid down their arms.**”⁸ Although the ECCC Trial Chamber has held that members of an armed organisation, even if *hors de combat*, do not qualify as civilians for the purpose of Article 5 of the ECCC Law,⁹ those who have laid down their arms should be considered as *hors de combat* in the same way that prisoners of war are considered *hors de combat*.
11. CA3 also prohibits “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted

⁶ International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Treatment of Prisoners of War* (“Third Geneva Convention”), 12 August 1949, 75 U.N.T.S. 135, art. 3

⁷ *Id.*

⁸ *Id.*

⁹ Case File No. 002-E313, *Judgement*, 7 August 2014, para. 186; Case File No. 001-EI88, *Judgement*, 26 July 2010, para. 304

court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”¹⁰ Such judicial guarantees cannot be suspended during times of armed conflict.¹¹

B. UNDER INTERNATIONAL HUMAN RIGHTS LAW, THE TARGETED KILLING OF A MEMBER OF A STATE’S OWN ARMED FORCES MAY CONSTITUTE A BREACH OF INTERNATIONAL HUMAN RIGHTS LAW. WHEN CARRIED OUT IN A SYSTEMATIC WAY, SUCH KILLINGS MAY AMOUNT TO CRIMES AGAINST HUMANITY OR GENOCIDE.

12. The application of international human rights law (IHRL) during a non-international armed conflict is an intensely debated area of law.¹² However, for the purposes of this brief, it is necessary to enunciate that even if an individual is a member of the military and deemed a combatant in an armed conflict, he could still be afforded protections under IHRL.

The Right to Life

13. The right to life is a universal, fundamental right declared in many human rights treaties and is customary international law.¹³ Per the International Covenant on Civil and Political Rights (ICCPR),

“Every human being has the inherent right to life...No one shall be arbitrarily deprived of his life.”

¹⁰ Third Geneva Convention, *supra* note 6, art. 3

¹¹ See, e.g., AP II, Article 6(2) (adopted by consensus); AP I, art. 75(4) (adopted by consensus)

¹² See, generally, United Nations Office of the High Commissioner for Human Rights, *International Legal Protection of Human Rights in Armed Conflict*, HR/PUB/11/01 (2011)

¹³ United Nations General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III) art. 3 (“Everyone has the right to life, liberty and security of person.”); *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171, art. 6; *African Charter on Human and Peoples’ Rights*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), art. 4; Organization of American States, *American Convention on Human Rights “Pact of San Jose, Costa Rica”* (B-32), 22 January 1969, art. 4; League of Arab States, *Arab Charter on Human Rights*, 15 September 1994, art. 5-8; Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, E.T.S. 5, art. 2; See also, OAS, Inter-American Commission on Human Rights, 81st Sess, Annual Report of the Inter-American Commission on Human Rights, *Victims of the Tugboat ‘13 de Marzo’ v Cuba*, Rep No 47/96, OR OEA/Ser.L/V/II.95/Doc.7, rev (1997) at 146-147 (The Commission held that the right to life is jus cogens)

The aim of this article is to, among other things, prevent State interference with human life and prevent extrajudicial killings and enforced disappearances.¹⁴

14. There are certain circumstances in which a State may derogate from the right to life. While engaged in an armed conflict, for example, the deprivation of life by a lawful combatant against an enemy belligerent is considered lawful under IHL.
15. The ICCPR does not expressly limit the circumstances when a government authority may take a life.¹⁵ However, in *Suarez de Guerrero v. Colombia*, the Human Rights Committee (HRC) ruled on the use of lethal force within article 6(1) which nuanced the right. A deprivation of life must not be intentional. It must also be necessary and proportionate.¹⁶
16. A government authority can only take a life in limited and strict circumstances: during lawful actions of war, using lethal force detaining and keeping a person detained, to quell a riot or insurrection, and when imposing the death penalty. When a government uses lethal force it must be proportionate and necessary on a case by case basis. The death penalty where States still impose it may only be used for the “most serious crimes in accordance with the law.”¹⁷

Genocide and Crimes against Humanity

17. The Genocide Convention can be applied in both peacetime and armed conflict.¹⁸ The killing of, causing serious bodily or mental harm, preventing births, forcibly transferring children, and the deliberate infliction on the group conditions of life calculated to bring about its physical destruction in

¹⁴ UN Commission on Human Rights, *Summary or arbitrary executions: Report by the Special Rapporteur*, E/CN.4/1983/16 (1983)

¹⁵ Elizabeth Wicks, *The Meaning of 'Life': Dignity and the Right to Life in International Human Rights Treaties*, 12 Hum. Rts. L. Rev. 199, 203 (2012)

¹⁶ *Id.* See also Human Rights Committee, Communication No. 45/1979: Colombia, 31/03/82, CCPR/C/15/D/45/1979 (Jurisprudence), 31 March 1982

¹⁷ ECHR, art. 2

¹⁸ *Convention on the Prevention and Punishment of the Crime of Genocide*, 78 U.N.T.S. 277 (1948)

whole or in part.¹⁹ These acts must be done with the “intent to destroy, in whole or in part, a national, ethnical, racial, or religious group.”²⁰

18. In the Cambodian situation, there was not a particular targeted ethnic group but, rather, a targeted class of individuals. This group consisted of those showing disloyalty or resistance to the Khmer Rouge, which includes members of the military. The fact that these individuals were members of the State’s own military force does not matter in this context.
19. Although not entirely analogous, in *Prosecutor v. Krstic*, a deputy commander was charged with genocide.²¹ The commander’s defense was that he did not commit genocide since he only targeted military aged men to minimize the Bosnian Muslim enemy. The ICTY ruled that removing these men was a form of genocide since the remaining population had no means to defend themselves. Thus, a genocide need not be limited to only ethnic or racial groups.
20. Although the ECCC Trial Chamber has articulated that members of an armed organization do not qualify as civilians for the purpose of Article 5 of the ECCC Law, the fact that the deprivation of the right to life was so widespread and systematic in this case should overcome this procedural hurdle should the OCIJ find that CA3 does not apply to RAK soldiers who have laid down their arms and been removed from the theater of war by their own commanders.

CONCLUSION

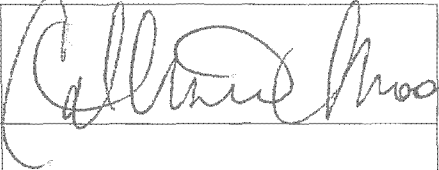
21. Based upon the law at the time, it is possible that the attack by a state of organization against members of its own armed forces could be illegal under international humanitarian law given the fact that such targeting would not represent a valid military objective and would be directed at members of the armed forces who had laid down their arms.

¹⁹ *Id.* at art. 2

²⁰ *Id.*

²¹ *The Prosecutor v. Radislav Krstic*, Appeals Chamber, Case No. IT-98-33-A (2004)

22. Furthermore, under customary international human rights law, the deprivation of the right to life could amount to a violation. When either genocide, when a specific group is targeted with the intent to destroy that group, or crimes against humanity, if widespread and systematic.
23. As such, the OCIJ should find that Article 5 of the ECCC law is applicable in this particular situation given the severity of the abuses and the widespread and systematic use of such targeting practices.

18 May 2016	Catherine Moore	Baltimore, MD USA	
Date	Name	Place	Signature