**BEFORE THE OFFICE OF THE CO-INVESTIGATING JUDGES**

**EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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# MEAS MUTH'S COMBINED RESPONSE TO *AMICI CURIAE* SUBMISSIONS ON THE QUESTION OF WHETHER UNDER CUSTOMARY INTERNATIONAL LAW IN 1975-1979 AN ATTACK BY A STATE OR ORGANIZATION AGAINST ITS OWN ARMED FORCES COULD AMOUNT TO AN ATTACK DIRECTED AGAINST A CIVILIAN POPULATION FOR PURPOSES OF ARTICLE 5 OF THE ESTABLISHMENT LAW

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Mr. MEAS Muth, through his Co-Lawyers, submits his Combined Response.[1] Only relevant arguments are addressed.[2] The Defence does not dispute that in armed conflict a State's own soldiers can be victims of crimes against humanity but cannot be the sole object of such crimes, absent a broader attack against a civilian population.[3]

## I. RESPONSE

### A. Retroactively changing the definition of crimes against humanity to satisfy policy or moral concerns violates the principle of legality

#### 1. No State practice or *opinio juris* indicates the customary definition of crimes against humanity in 1975-79 permitted soldiers to be a "civilian population"

1. *Amici* assert the principle of legality would not be violated if the definition of "civilian population" is expanded for policy or moral reasons to include soldiers targeted by their own State.[4] Incorrect. Policy and moral concerns[5] about unprotected soldiers cannot expand applicable customary international law at the expense of the principle of legality,[6] particularly where contextual elements are at issue.[7] Policy and morality neither trump the

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[1] *See* Call for Submissions by the Parties in Cases 003 and 004 and Call for *Amicus Curiae* Briefs, 19 April 2016, D191 ("Call for Submissions").

[2] Incorrect and unsubstantiated factual arguments are disregarded. *See* Center for International and Comparative Law, University of Baltimore School of Law, 18 May 2016, D191/12 ("Baltimore, D191/12"), paras. 1, 3, 7-9, 18, 20, 23. Factual arguments are not relevant. The parties and *amici* were not called to address factual issues. Call for Submissions, para. 9. *See* Annex A for a list of the *amici*'s arguments.

[3] Drummond, Webb & Akande, 19 May 2016, D191/4 ("Drummond et al., D191/4"), paras. 1(a)(i), 7-10; Nicholson, 13 May 2016, D191/8 ("Nicholson, D191/8"), p. 2.

[4] Saul, 19 May 2016, D191/3 ("Saul, D191/3"), paras. 20, 22; Ido Rosenzweig, 19 May 2016, D191/7 ("Rosenzweig, D191/7"), p. 4, para. 3, p. 5, para. 2, p. 6, para. 4; Williams and Grey, 19 April [sic] 2016, D191/11 ("Williams & Grey, D191/11"), paras. 21-22; Baltimore, D191/12, para. 8; Queen's University Belfast Human Rights Centre, 12 May 2016, D191/13 ("QUB, D191/13"), para. 18.

[5] Baltimore, D191/12, para. 8, correctly noting soldiers are distinct from civilians "in every consideration of international law," cites no authority for its assertion that policy concerns regarding alleged Case 003 facts could overcome any such distinction. QUB, D191/13, para. 18, cites arguments from David Luban and Hansdeep Singh. Luban confirms the Charter of the International Military Tribunal ("IMT Charter"), the International Criminal Tribunals for the former Yugoslavia ("ICTY") and Rwanda ("ICTR"), and the International Criminal Court ("ICC") all require that a *civilian* population be the one targeted for an attack (David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT'L L. 85, 104 (2004)). Singh only discusses one ICTY judgement as to whether soldiers *hors de combat* can be *victims* of crimes against humanity (Hansdeep Singh, *Critique of the Mrksic Trial Chamber (ICTY) Judgment: A Re-Evaluation on Whether Soldiers* Hors de Combat *Are Entitled to Recognition as Victims of Crimes Against Humanity*, 8 L. & PRACTICE INT'L CTS. & TRIBS. 247 (2009)).

[6] As Alexander Hamilton stated: "The creation of crimes after the commission of the fact, or, in other words, the subjecting of men to punishment for things which, when they were done, were breaches of no law, and the practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny." THE FEDERALIST, No. 84, *Certain General and Miscellaneous Objections to the Constitution Considered and Answered* (28 May 1788). The principle of legality is enshrined in, e.g., the Universal Declaration of Human Rights ("UDHR"), Art. 11(2); the International Covenant on Civil and Political Rights ("ICCPR"), Art. 15; and Geneva Convention (IV), Art. 67.

[7] *See* Susan Lamb, Nullum Crimen, Nulla Poena Sine Lege *in International Criminal Law*, *in* 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 743, 745-46 (Cassese et al., eds., 2002), noting that in modern *ad hoc* tribunals Defence concerns about the principle of legality have greater substance regarding contextual elements of crimes, given the ICTY's and ICTR's tendency to expansively interpret international humanitarian law ("IHL"). *See also* Beth van Schaack, Crimen Sine Lege: *Judicial Lawmaking at the Intersection of Law and Morals*, 97 GEORGETOWN L. J. 119, 121-25, 182 (2008), opining that although

law, nor substitute for it when the law's application does not achieve a desired result. Justice Robertson cogently observes: "[I]t is precisely when the acts are abhorrent and deeply shocking that the principle of legality must be most stringently applied, to ensure that a defendant is not convicted out of disgust rather than evidence, or of a non-existent crime. *Nullem* [sic] *crimen* may not be a household phrase, but it serves as some protection against the lynch mob."[8] No State practice or *opinio juris* from 1975-79 demonstrates that crimes against humanity encompassed attacks directed against a population of soldiers.[9] All relevant instruments from 1945-1998 require a *civilian* population.[10]

**2. The purpose of creating crimes against humanity was to protect civilians**

2. *Amici* assert that "civilian population" must be interpreted expansively because the purpose of creating crimes against humanity was to plug gaps, such that any violation not covered by the laws of war would be covered by crimes against humanity.[11] Incorrect. Crimes against humanity were created to protect *civilians* who were not protected by the laws of war against acts committed against them by their State. The origins of crimes against humanity reflect the desire to protect civilian populations regardless of

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international judges expansively interpret and apply the principle of legality, *today's defendants* are on sufficient notice of jurisprudential innovations; however, in the "historical justice" cases before domestic courts or the ECCC, which "aris[e] out of the Cold War era, when relevant developments in international law were only just in motion at the time the defendants acted, the NCSL challenge may be more acute."

[8] *Prosecutor v. Norman*, SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), 31 May 2004, Dissenting Opinion of Justice Robertson, para. 12. *See id.*, paras. 9 ("abhorrence alone does not make that conduct a crime in international law"), 14 (the principle of legality is fundamental and "is the reason we are ruled by law and not by police"). *See also Prosecutor v. Galić*, IT-98-29-A, Judgement, 30 November 2006, Separate and Partially Dissenting Opinion of Judge Schomburg, para. 21 (emphasis added): "[T]his Tribunal is not acting as a legislator; it is under the obligation to apply only customary international law applicable at the time of the criminal conduct.... *It would be detrimental not only to the Tribunal but also to the future development of international criminal law and international criminal jurisdiction if our jurisprudence gave the appearance of inventing crimes – thus highly politicizing its function – where the conduct in question was not without any doubt penalized at the time when it took place*."

[9] Saul fails to substantiate his assertion that a wide definition of "civilian population" does not violate the principle of legality and was foreseeable in 1975-79. Saul, D191/3, para. 22. Section F *infra* addresses the separate issue of whether soldiers may be *victims* of crimes against humanity. Drs. Williams and Grey (D191/11, paras. 21-22) assert that despite the absence of decisive authorities, recognizing soldiers targeted by their own State as civilians under crimes against humanity would be consistent with customary international law in 1975. Incorrect. An absence of decisive authorities reflects an absence of State practice and *opinio juris*, not simply that the issue "has not arisen for determination." *See infra* n. 123.

[10] *See* MEAS Muth's Submissions on the Question of Whether under Customary International Law in 1975-1979 an Attack by a State or Organization Against its Own Armed Forces Could Amount to an Attack Directed Against a Civilian Population for Purposes of Article 5 of the Establishment Law, 19 May 2016, D191/2 ("Submission"), paras. 3-7.

[11] Saul, D191/3, para. 20; TRIAL, 19 May 2016, D191/5 ("TRIAL, D191/5"), paras. 21-22; Rosenzweig, D191/7, p. 3, 4, 6; Tsagourias, 17 May 2016, D191/9 ("Tsagourias, D191/9"), paras. 20-21; Windridge, 19 May 2016, D191/10 ("Windridge, D191/10"), paras. 5, 8, 21; Williams & Grey, D191/11, para. 20.

nationality, not to criminalize any conduct not considered a war crime.[12] The scope of crimes against humanity cannot simply be broadened to fill a perceived gap in international humanitarian law ("IHL").

3. There is no gap or *lacunae* in IHL for a State's own soldiers: these soldiers are protected under national military laws[13] and, depending on the circumstances, from genocide or certain IHL violations.[14] The definitions of crimes against humanity in the IMT Charter and subsequent instruments demonstrate States' interests in and intention to retain the ability to deal internally with their own soldiers.[15] Whether the exclusion of soldiers from the definition of a civilian population aligns with human rights instruments is of no consequence.[16] The pertinent question is the customary status of crimes against humanity in 1975-79. All relevant instruments from that period – including, contrary to TRIAL's assertion,[17] the 1954 Draft Code of Offences – require a *civilian* population.[18]

**B. It is not absurd to interpret a "civilian population" as excluding soldiers**

4. *Amici* assert that interpreting "civilian population" as excluding a State's own soldiers would lead to an absurd result.[19] Unpersuasive. It is not absurd to consider that States prefer to regulate their conduct toward their own soldiers internally rather than through

[12] *See* Submission, n. 12.
[13] TRIAL (D191/5, para. 22, n. 35) cites Antonio Cassese to support its argument that including a State's own soldiers within the meaning of "civilian population" is consistent with the original logic behind crimes against humanity. Cassese *does not* support this argument. ANTONIO CASSESE, THE HUMAN DIMENSION OF INTERNATIONAL LAW, SELECTED PAPERS 466 (2008) (emphasis added to last sentence): "The rationale for this relatively limited scope of Article 6(c) 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.*"
[14] *See* Submission, paras. 21, 23.
[15] *See id.*, paras. 16-21.
[16] Williams & Grey (D191/11, para. 20) assert that a failure to treat members of a State's own armed forces as civilians during peacetime would be inconsistent with the object and purpose of crimes against humanity and of human rights instruments, such as the Convention Against Torture, that do not distinguish civilians from non-civilians. The *amici* cite Cassese in support of their arguments. *See* ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 87, 104 (Oxford University Press, 3rd ed., 2013). Cassese cites no authority for his statements regarding the development of crimes against humanity. The relevant determination is what the customary definition of crimes against humanity was in 1975-79, not what legal scholars consider it to be in the 2000s. *See also infra* Section D.
[17] TRIAL, D191/5, para. 22.
[18] *See* Submission, paras. 4-7. Article 2(11) of the 1954 Draft Code of Offences, defining crimes against humanity, includes the words (emphasis added): "committed against any *civilian population*…."
[19] Saul, D191/3, paras. 3(d), 21; Tsagourias, D191/9, para. 22.

international criminal law ("ICL"). Soldiers are distinct from civilians for a variety of reasons, but especially because of their functions in civil society.[20]

5. Tsagourias cites no authority for his assertion that absurdity results from excluding a State's own soldiers from a "civilian population."[21] Saul inaccurately cites *Duch* and *Fofana et al.*[22] *Duch* adopted the ordinary meaning of "civilian," holding that members of armed forces are not civilians simply because they are not armed or not engaged in combat.[23] *Fofana et al.* held that police forces are not civilians under IHL *when they are under the military's control*,[24] recognizing the distinction between soldiers and civilians. It is not absurd to apply this distinction to a State's soldiers vis-à-vis the State's civilians.

### C. Soldiers are distinct from civilians

#### 1. In peacetime, the legal distinction between soldiers and civilians remains and "civilian population" has the same unambiguous meaning as in war

6. *Amici* assert there is no legal distinction between soldiers and civilians in peacetime because there are no combatants, the exigencies underlying the principle of distinction do not apply, and soldiers are subject to the same protections and laws as civilians.[25] Incorrect. One cannot simply state that because a distinction exists under international law between soldiers and civilians during war, no such distinction exists in peacetime. The legal distinction between soldiers and civilians exists in peacetime and in war.[26] Soldiers are always subject to different laws and codes of conduct than civilians.[27]

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[20] *See Engel and Others v. The Netherlands*, no. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, 8 June 1976, Series A no. 22, § 54, and Joint Separate Opinion of Judges O'Donoghue and Pedersen: "There is a clear distinction in our opinion between the obligation of citizens at large to obey the law and the special position of military personnel to obey the disciplinary code which is a vital and integral constituent of the force of which they are members.... [T]here is an elementary factor which should be looked at in the structure and character of a military establishment in any country which is party to the Convention. This factor is the disciplinary code, the maintenance of which is vital to the very continued existence of an armed force, and quite different from any other body or association which purports to exercise a measure of discipline over its members."

[21] Tsagourias, D191/9, paras. 20-22.

[22] Saul, D191/3, para. 21.

[23] *Case of KAING Guek Eav,* 001/18-07-2007-ECCC/TC, Judgement, 26 July 2010, E188, para. 304. *See also Case of NUON Chea et al.*, 002/19-09-2007-ECCC/TC, Case 002/01 Judgement, 7 August 2014, E313, paras. 185-86.

[24] *Prosecutor v. Fofana et al.*, SCSL-04-41-A, Judgement, 28 May 2008, para. 260. Saul misquotes the Appeals Chamber. *See* Saul, D191/3, n. 30.

[25] Saul, D191/3, paras. 7-14; Drummond et al., D191/4, paras. 18-19; Nicholson, D191/8, p. 1, para. 3; Tsagourias, D191/9, paras. 18-19; Windridge, D191/10, para. 16; Williams & Grey, D191/11, paras. 19-20.

[26] *See, e.g., supra* n. 20 regarding the European Court of Human Rights' jurisprudence.

[27] *See* Submission, para. 17. *See also, e.g.*, Cambodian Order related to War Counsel (25 July 1973), Art. 4, setting out competence to try a soldier who commits offenses, and Art. 3, listing offenses; Army Act [United Kingdom] 1955, 3 & 4 ELIZ. 2 Ch. 18, §§ 24-143, 205-13, setting out the categories of personnel subject to the Act, and the procedures for trial and punishment of offenses committed by those subject to the Act.

7. Nicholson cites no authority for her assertion that there is no legal distinction between soldiers and civilians in peacetime.[28] Tsagourias inaccurately cites Chief Justice Mansfield.[29] Mansfield did not state there is no distinction between soldiers and civilians in peacetime, only that soldiers remain citizens of their State while they are soldiers.[30] Logical. That soldiers retain the duties of citizens does not mean they are subject to the same criminal laws as civilians, or that no peacetime distinction between the two exists.

8. Drummond et al. rely on Additional Protocol I ("AP I")[31] to assert that, just as soldiers of a State not involved in a conflict are not combatants under IHL, in peacetime there are no combatants; therefore, soldiers are civilians.[32] Unpersuasive. The inapplicability of IHL to peacetime does not mean that in peacetime *no* body of law distinguishes soldiers from civilians or that no distinction exists between the ordinary meanings of these terms.

9. Drummond et al. cite Romanian, Argentinian, and Spanish jurisprudence.[33] Inapposite. The Romanian court ruled that some imprisoned members of the military were victims of crimes against humanity, not that they were a population targeted for attack.[34] Further, the 1969 Romanian Criminal Code does not use the customary definition of crimes against humanity.[35] The Argentinian case, apparently brought under a law post-dating 1979,[36] does not involve convictions for crimes against humanity, but rather for domestic crimes

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[28] Nicholson, D191/8, p. 1, para. 3, in which she recognized that the European Court of Human Rights has distinguished between civilians and soldiers. *Id.*, n. 1. *See also supra* n. 20.

[29] Tsagourias, D191/9, para. 18, citing Mansfield in support of the argument that soldiers are subject to the same criminal laws as civilians in peacetime and have no additional privileges.

[30] Mansfield stated, as citizens, soldiers have a duty to prevent crimes; they must not stand by when a breach of peace or felony is occurring simply because their commanding officer or a Justice of the Peace is not present. *See* CAPTAIN THOMAS FREDERICK SIMMONS, R.A, REMARKS ON THE CONSTITUTION AND PRACTICE OF COURTS MARTIAL 404, para. 1097 (J. Murray, 1863); MANUAL ON MILITARY LAW 208, n. (a) (War Office, 5th ed., 1907) ("MANUAL"). The Manual notes English law differs from other countries regarding relations of officers and soldiers to civilian life, and a soldier's civil rights and duties are necessarily subject to limitations to allow him to fulfill his duties to the Crown. MANUAL at 208, paras. 1-2.

[31] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 ("AP I").

[32] Drummond et al., D191/4, paras. 18-19.

[33] *Id.*, para. 20.

[34] *See* D191/4.1.28, which excerpts High Court of Cassation and Justice, Case No. 3986/2/2014, p. 3, 140-41.

[35] According to the *amici*, the provision was Article 358(1) and (3) of the 1969 Romanian Criminal Code (online English translation): "(1) Subjection of injured or diseased persons, of members of the civil health personnel or of the personnel of the Red Cross or of organisations equated to it, of castaways, prisoners of war and in general of any other person fallen into the enemy's powers to inhuman treatment, or to medical or scientific experiments not justified by a medical treatment in their best interest, shall be punished by imprisonment from 5 to 20 years and the prohibition of certain rights …." The imprisonment terms appear to have been amended after 1969.

[36] Possibly the 1995 Law ratifying the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity. *See* D191/4.1.29, p. 3, which excerpts the judgement and refers to p. 1982 and p. 1986 of the judgement.

of homicide, torture, and abuse of public authority.[37] Pinochet was charged with terrorism as a stand-alone crime, and with genocide and torture.[38] Crimes against humanity were not prohibited under Spain's Penal Code at that time.[39] These decisions indicate that non-civilians can be victims of crimes (some of which are described as crimes against humanity), not that non-civilians can be a population targeted for attack under crimes against humanity. The decisions are not useful or relevant for State practice or *opinio juris* as to the customary definition of "civilian population" in 1975-79.

10. *Kayishema*'s peacetime definition of "civilian" is satisfactory.[40] This definition applied to Kibuye Prefecture, where there was no armed conflict,[41] and aligns with AP I's definition of armed forces.[42] Additional Protocol II ("AP II"), relating to non-international armed conflicts (e.g., Rwanda),[43] incorporates AP I's definitions.[44] The Trial Chamber applied a definition that aligns with AP I, AP II, and the ordinary meaning of "civilian."[45] Citing no authority, Tsagourias asserts the definition is generic and circumstance-specific;[46] yet, where there is no armed conflict, the Trial Chamber defined "civilian" as excluding soldiers. The *amici* do not demonstrate why this definition is inappropriate.

11. It is conceptually insignificant that delegations involved in drafting the ICC Statute believed the term "civilian" was vague and confusing because it implied a connection to armed conflict.[47] 160 States were involved in drafting the Statute over three years.[48] The

[37] *Id.*, p. 3. *See also* Argentine Criminal Code (Law No. 11.179 (1984)), Arts. 80(2)-(4), 81(b), 144*bis*, 144*ter*, for the definitions of these offenses.
[38] *See* Central Court of Instruction, Summary 19/97, "Condor Operation," Order, 3 December 1998, p. 40.
[39] Drummond et al. (D191/4, para. 20) incorrectly assert that Pinochet was charged with the underlying offense of terrorism as part of the category of crimes against humanity. The offense of crimes against humanity was added to the Penal Code in 2003. *See* Law No. 15/2003 of November 25, 2003 amending the Penal Code, also called Organic Law No. 10/1995 of November 23, 1995.
[40] Drummond et al. assert that the definition is unsatisfactory because the Trial Chamber was inconsistent in seeking a wide definition but then using a narrower one than exists in IHL. Drummond et al., D191/4, para. 21.
[41] *Prosecutor v. Kayishema & Ruzindana*, ICTR-95-1-T, Judgement, 21 May 1999, para. 127 ("*Kayishema*").
[42] Article 50 defines civilians with reference to Article 43's definition of armed forces, which includes, *inter alia*, State law enforcement agencies incorporated into a State's armed forces. *See* AP I, Arts. 43, 50.
[43] The Trial Chamber found there was no armed conflict in Kibuye Prefecture, but that a non-international armed conflict had occurred in the territory of Rwanda. *Kayishema*, para. 172.
[44] *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, 1125 UNTS 609, Art. 1(1).
[45] This definition is still favored today. *See* U.N. General Assembly, Int'l Law Comm'n Rep (ILC), *First Report on Crimes Against Humanity*, U.N. Doc. A/CN.4/680 (17 February 2015), para. 135: "During a time of peace, 'civilian' shall include all persons except those individuals who have a duty to maintain public order and have legitimate means to exercise force to that end at the time they are being attacked," citing *Kayishema*, para. 127.
[46] Tsagourias, D191/9, para. 17.
[47] *See* Saul, D191/3, para. 19.
[48] *See* Submission, para. 6.

final agreed-upon definition of crimes against humanity required that an attack be directed against a *civilian population*, as required under customary international law.[49]

12. Saul asserts IHL cannot determine the meaning of "civilian population" outside of armed conflict[50] and that the ordinary meaning of "civilian population" is ambiguous. He prefers a definition equating to "inhabitants of a country or area."[51] Windridge asserts without authority that a "civilian population" can include soldiers, as it does teachers or doctors.[52] Absurd. Saul and Windridge seek to apply the definition of a "population"[53] to crimes against humanity, not a "civilian" population. The ordinary meaning of "civilian population" is unambiguous in peacetime or war; it means a non-military population.[54] Even if there is ambiguity in its meaning, one cannot simply choose the wider meaning. The principle of *in dubio pro reo* must be applied.[55]

**2. IHL does not support considering a State's own soldiers a civilian population**

13. TRIAL asserts the Hague Regulations recognize the possibility that soldiers might not be considered combatants.[56] Irrelevant. Crimes against humanity provisions do not require an attack to be directed against a *non-combatant* population. That soldiers may be considered non-combatants is not equivalent to considering them as civilians.

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[49] A number of delegations considered the phrase must be retained "to avoid significantly changing the existing definition of these crimes." Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I, UN Doc. A/51/22, 1996, para. 86. Although proposals were made to replace "attack" with "acts" or "crimes," there were few proposals to delete the words "civilian" or "civilian population" from the definition. Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. II, UN Doc. A/51/22, 1996, p. 65-69. The ICC Statute aligns with the *ad hoc* and internationalized criminal tribunals. ICTY Statute, Art. 5; ICTR Statute, Art. 3; Statute for the Special Court for Sierra Leone, Art. 2; UN Transitional Administration in East Timor, Regulation 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, Section 5.1.

[50] Saul, D191/3, paras. 7-14. The Defence disputes Saul's assertion that the International Co-Investigating Judge and the Trial Chamber were correct in their decisions on the nexus requirement. *See* MEAS Muth's Appeal Against the International Co-Investigating Judge's Decision on MEAS Muth's Request for Clarification Concerning Crimes Against Humanity and the Nexus with Armed Conflict, 1 July 2016, D87/2/1.7/1/1/2.

[51] Saul, D191/3, paras. 16-19.

[52] Windridge, D191/10, para. 16.

[53] The online Merriam-Webster Dictionary defines a "population" as, *inter alia*, "the number of people who live in a place" or "the whole number of people or inhabitants in a country or region." *See* Merriam-Webster Dictionary, *available at* http://www.merriam-webster.com/dictionary/population (last accessed on 6 July 2016).

[54] This is consistent with the "narrow" definitions of "civilian population" that Saul rejects. *See* Saul, D191/3, para. 17. The definition of "civil" in the *Dictionnaire de l'Académie française* also includes a definition distinguishing civilians from the military: "Par opposition à *Militaire. Les autorités civiles et militaires. Le courage civil. Une pension civile. Après avoir servi plusieurs années dans l'armée, il a obtenu un emploi civil. Être en tenue civile* et, ellipt., *être en civil.* Subst. *Un civil….*" Unofficial translation: "Vs. *Military. The civil and military authorities. Civil courage. A civil pension. After serving for many years, he obtained a civil employment. Be in civilian clothes and, ellipt., be civil. Noun. A civilian….*"

[55] *See* Submission, para. 25.

[56] TRIAL, D191/5, para. 12.

14. TRIAL asserts a State's soldiers cannot be targeted when they do not directly participate in hostilities against their own State because in IHL civilians cannot be targeted when they do not directly participate in hostilities.[57] Misconceived. The logic is fallacious and the argument irrelevant. The question is not whether IHL permits targeting soldiers who do not directly participate in hostilities, but whether ICL permits treating soldiers as a civilian population.

15. TRIAL also asserts civilians are protected persons when interned, the nationality requirement regarding such persons can be interpreted to mean that they may merely hold a different allegiance than toward the detaining State, and therefore soldiers may enjoy the protection of civilians in this respect.[58] Misconceived. This logic is fallacious. Laws regulating whether civilians may be protected persons do not address whether *soldiers* may be protected persons. The cited ICTY jurisprudence broadened the meaning of "protected person." It does not reflect the law applicable in 1975-79.[59]

16. Tsagourias asserts IHL distinguishes only between civilians and enemy combatants; a soldier who is not part of the enemy population is a civilian.[60] Incorrect. Soldiers are always distinct from civilians.[61] The principle of distinction may distinguish enemy soldiers from civilians for the purpose of identifying legitimate targets in IHL; it does not establish whether soldiers may be a civilian population under crimes against humanity.

17. Baltimore asserts Common Article 3 requires humane treatment for persons who have laid down arms; even if a State's own soldiers are not civilians, they should be protected as *hors de combat*.[62] TRIAL similarly asserts that unless soldiers act hostilely toward their own State, they should be considered *hors de combat* regarding that State.[63] Inapposite. That a State's soldiers may be protected under the Geneva Conventions does not indicate they may constitute a civilian population under crimes against humanity.

### 3. There is no support for using a legitimate target / functional approach

18. *Amici* assert the term "civilian" serves a functional purpose in IHL, enabling a legal distinction between lawful and unlawful targets in armed conflict, and that those not

[57] *Id.*, paras. 14-15.
[58] *Id.*, paras. 14, 16.
[59] *See* MEAS Muth's Application to Seize the Pre-Trial Chamber with a Request for Annulment of Charges of Grave Breaches, 29 July 2015, D146.
[60] Tsagourias, D191/9, para. 23.
[61] *See supra* Section C1.
[62] Baltimore, D191/12, para. 10.
[63] TRIAL, D191/5, paras. 18-20.

involved in a conflict or targeted for reasons unconnected to a conflict are illegitimate targets and must be considered part of the civilian population.[64] Misleading. IHL principles cannot be wholly imported into crimes against humanity. A State may violate IHL by attacking an unlawful target without the attack entailing individual criminal responsibility. Crimes against humanity must be committed against civilian populations, not merely against illegitimate targets.

19. Robinson et al. assert that jurisprudence supports the legitimate target approach.[65] Incorrect. They rely on post-World War II jurisprudence addressing whether combatants or soldiers can be *victims* of crimes against humanity.[66] These cases did not analyze the meaning of "civilian population." Rather, they decided *victims* of crimes against humanity could be soldiers, a position rejected by the Dutch Special Court of Cassation in *Pilz*[67] and the British Court of Appeals sitting in Germany in *Neddermeier*.[68] Robinson et al. assert international bodies have followed the legitimate target approach, citing only the Commission of Experts on the former Yugoslavia.[69] This Commission did not adopt a legitimate target approach. It stated: "'Civilian population' is used in this context in contradistinction to combatants *or members of armed forces*."[70] Had the Commission intended a legitimate target approach, it would have contrasted "civilian population" only with combatants, rather than using its ordinary definition.

20. Robinson et al. assert the *ad hoc* tribunals departed unjustifiably from the legitimate target approach.[71] Incorrect. The *Akayesu* Trial Chamber may have defined a "civilian population" expansively.[72] However, it was not faced with the question of whether a State's own soldiers could form a civilian population, nor was its definition considered on appeal. *Tadić* and other jurisprudence did not determine that soldiers could be a civilian

[64] *Id.*, paras. 14-15; Robinson, deGuzman, Jalloh and Cryer, 17 May 2016, D191/6 ("Robinson et al., D191/6"), paras. 4-21; Rosenzweig, D191/7, p. 5, para. 3, p. 4, para. 1; Williams & Grey, D191/11, paras. 6, 16-17; Baltimore, D191/12, paras. 4- 5.
[65] Robinson et al., D191/6, paras. 9-21.
[66] *See* Section F *infra*, explaining why this is a distinct, unrelated issue and discussing the national cases.
[67] *In re Pilz*, Special Court of Cassation, 5 July 1950.
[68] According to the summary in Emily Haslam, *Neddermeier*, *in* ANTONIO CASSESE ET AL. EDS., THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE 840 (Oxford University Press 2009).
[69] Robinson et al., D191/6, para. 14.
[70] Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), UN Doc S/1994/674 Annex (1994), para. 77 (emphasis added).
[71] Robinson et al., D191/6, paras. 18-21.
[72] *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment, 1 June 2001, para. 582, defining "civilian population" as "people who are not taking any active part in the hostilities, including members of the armed forces who laid down their arms and those persons placed *hors de combat* by sickness, wounds, detention or any other cause."

population; rather that they could be *victims*[73] or that soldiers *hors de combat* could be a civilian population.[74] The Appeals Chamber determined that soldiers *hors de combat* could *not* be a civilian population.[75] It did not "copy" AP I's definition of "civilian";[76] it was aware of its obligation to ascertain applicable customary international law.[77] It considered, *inter alia*, ICRC Commentary[78] implicitly recognizing a distinction between civilian and soldier: "A civilian who is incorporated in an armed organization … becomes a member of the military…."[79]

21. Williams and Grey assert that the *Prlić* Trial Chamber's extension of IHL protections to soldiers detained by their own forces is consistent with a functional approach to defining "civilian."[80] Misleading. The Trial Chamber may have extended IHL protections to such detainees; nevertheless, it held that crimes against humanity required an attack directed against a *civilian* population.[81] *Prlić* does not support the assertion that soldiers targeted for their perceived allegiance to another party should be considered a civilian population.

### D. International human rights law ("IHRL") cannot alter the meaning of "civilian population"

22. *Amici* assert that IHRL supports interpreting "civilian population" as including a State's own soldiers.[82] Inapposite. IHRL is distinct from ICL. These separate bodies of law cannot be conflated.[83] TRIAL's argument[84] that IHRL is *lex specialis* regarding IHL is similarly inapposite, as well as incorrect.[85] IHRL generally imposes obligations on States;

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[73] Concerning *Tadić*, *see Prosecutor v. Tadić*, IT-94-1-T, Judgement, 7 May 1997, para. 643 (emphasis added): "[A]lthough crimes against humanity *must target a civilian population*, individuals who at one time performed acts of resistance may in certain circumstances be *victims* of crimes against humanity."
[74] *Prosecutor v. Jelisić*, IT-95-10-T, Judgement, 14 December 1999, para. 54.
[75] *Prosecutor v. Blaškić*, IT-95-14-A, Judgement, 29 July 2004, paras. 103-16; *Prosecutor v. Galić*, IT-98-29-A, Judgement, 30 November 2006, para. 144; *Prosecutor v. Martić*, IT-95-11-A, Judgement, 8 October 2008, paras. 291-314; *Prosecutor v. Mrkšić*, IT-95-13/1-A, Judgement, 5 May 2009, paras. 20-33.
[76] As alleged in Robinson et al., D191/6, para. 18.
[77] *Prosecutor v. Blaškić*, IT-95-14-A, Judgement, 29 July 2004, para. 110.
[78] *Id.*, para. 114.
[79] As quoted in *Id.*
[80] Williams & Grey, D191/11, paras. 10-15.
[81] *See* Submission, paras. 13, 22, discussing the *Prlić* Trial Chamber Judgement. The "allegiance test" relied upon by the *Prlić* Trial Chamber was not part of applicable law in 1975-79. *See supra* para. 15.
[82] TRIAL, D191/5, paras. 1-10; Williams & Grey, D191/11, para. 20; Baltimore, D191/12, paras. 12-16.
[83] *See Prosecutor v. Kunarac*, IT-96-23-T & IT-96-23/1-T, Judgement, 22 February 2001, paras. 468-71, explaining that when determining the customary definition of torture, it cannot simply adopt the definition under IHRL, because of structural differences in the different bodies of law. The Trial Chamber needed to consider, *inter alia*, that the role and position of the State as an actor is different in IHRL and IHL. *Id.*, para. 470(ii).
[84] TRIAL, D191/5, para. 7.
[85] *See Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, para. 25, where the International Court of Justice observes that although the protection of the ICCPR does not cease in times of war, the applicable *lex specialis* in times of war is IHL. TRIAL misinterprets the Report of the Study Group of the International Law Commission, Fragmentation of International Law, UN Doc. A/CN.4/L.682, 13 April

ICL imposes liability on individuals. IHRL conventions (e.g., the ICCPR, the UDHR, and the Convention Against Torture) do not criminalize crimes against humanity.[86] They cannot expand the scope of penal provisions or customary ICL. Retroactively expanding a criminal provision to cover a violation of IHRL conflicts with the principle of *nullum crimen sine lege*.[87] That all persons might be subject to the same IHRL protections does not mean that attacks against soldiers can be crimes against humanity in ICL. Not every IHRL violation is an ICL violation.[88]

**E. Persecution may not be treated differently from other crimes against humanity**

23. *Amici* assert that persecution is distinct from other crimes against humanity in that it does not require an attack against a civilian population.[89] Incorrect. This idea arose because of the structure of Article 6(c) in the IMT Charter, which separated persecution from other crimes against humanity by a semi-colon and the disjunctive "or."[90] Although noting the separation, the ECCC's Supreme Court Chamber did not conclude[91] that the applicable customary definition of persecution has different *chapeau* elements than other crimes against humanity.[92]

24. There is no evidence that the drafters of Article 6(c) intended to give persecution different *chapeau* requirements than other crimes against humanity. To do so would lead to an absurd result. Were crimes against humanity to apply only to a civilian population where murder, extermination, enslavement, deportation, or other inhumane acts occurred, but to

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2006, para. 57 (TRIAL, D191/5, n. 15) and fails to demonstrate how IHRL and ICL give incompatible directions as to how to address a State's acts against its own soldiers.

[86] *See*, *e.g.*, Convention Against Torture, Arts. 4-5, requiring States to take measures to establish jurisdiction over and punish torture as a violation of criminal law, but not providing for individual criminal liability.

[87] *See* ICCPR, Art. 15.

[88] "[A]lmost every international crime is a violation of fundamental human rights, but not every violation of human rights entails direct criminal responsibility. The reason for this is that human rights create obligations primarily upon States, and it is up to them to decide how to ensure respect of these obligations by their own agents." Salif Nimaga, *The International Criminal Law Regime and International Human Rights Law: Theoretical and Empirical Explorations*, *in* ETHICS AND HUMAN RIGHTS IN A GLOBALIZED WORLD 104-05 (2009).

[89] Drummond et al., D191/4, paras. 1(a)(ii), 11-17; QUB, D191/13, paras. 3-9.

[90] The provision is defined similarly in the Charter for the International Military Tribunal for the Far East, Control Council Law No. 10, and the Nuremberg Principles. Schwelb explained that in the Berlin Protocol, States replaced the semi-colon with a comma to align the English and French versions of the IMT Charter with the Russian version. This replacement extended the nexus requirement to all crimes against humanity, rather than only "persecution-type" crimes, and made dividing crimes against humanity into murder-type crimes and persecution-type crimes unsustainable. Egon Schwelb, *Crimes against Humanity*, 23 BRIT. Y.B. INT'L L. 178, 190, 194-95 (1946). *See also* International Law Commission, Memorandum of the UN Secretary-General, The Charter and Judgement of the Nürnberg Tribunal: History and Analysis, UN Doc. A/CN.4/5, 1949, p. 65-66.

[91] As implicitly asserted by Drummond et al., D191/4, para. 14.

[92] *Case of KAING Guek Eav,* 001/18-07-2007-ECCC/SC, Appeal Judgement, 3 February 2012, F28 ("*Duch* Appeal Judgement"), para. 233.

*any* population where persecutions occurred, fewer people would be protected from more serious crimes (e.g., extermination) than from a less serious crime (persecution).[93] Drummond et al. and QUB cite international conventions, ICTY jurisprudence, and domestic jurisprudence.[94] Irrelevant. The Genocide Convention and Apartheid Convention are specialized conventions; they do not alter the customary definition of crimes against humanity.[95] The jurisprudence indicates only that soldiers can be *victims* of persecution, not that they can form a "civilian population" in relation to persecution.[96]

25. Article 5 of the Establishment Law requires an attack against a civilian population as a *chapeau* element for *all* crimes against humanity.[97] Drummond et al. assert, since "there appears to be no justification for or conscious intention to exclude" persecution against Cambodia's own soldiers from the ECCC's jurisdiction, Article 5 may be "an attempt to retroactively, and impermissibly, alter the [customary] definition of crimes against humanity."[98] Incorrect. The Cambodian government agreed to define crimes against humanity as defined in the ICC Statute,[99] which incorporates customary international law.[100] Even assuming there ever were a distinction between persecution and other crimes against humanity, the Establishment Law does not recognize one, nor does current customary international law. Where a binding law is subsequently changed to a more favorable law by which the court also is bound, the more lenient law will apply.[101]

### F. Whether soldiers, including those *hors de combat*, can be victims is not the issue and is not determinative of whether soldiers can constitute a civilian population

26. *Amici* assert that jurisprudence holding that soldiers can be victims demonstrates soldiers can form a civilian population.[102] Incorrect. Jurisprudence demonstrating soldiers can be victims of crimes against humanity does not demonstrate soldiers can constitute a civilian

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[93] Egon Schwelb, *Crimes against Humanity*, 23 BRIT. Y.B. INT'L L. 178, 190 (1946). Drummond et al. note the UN War Crimes Commission's indication that persecution requires a civilian population. Drummond et al., D191/4, para. 13.
[94] Drummond et al., D191/4, paras. 12-13; QUB, D191/13, paras. 3-8.
[95] *See* Drummond et al., D191/4, para. 12, asserting that the Conventions do not require persecution to be committed against a civilian population.
[96] *See infra* Section F. QUB (D191/13, para. 7) also cites a resolution from the 1947 Conference for the Unification of Penal Law. This resolution, drafted by academics and not adopted by States, proposed a definition of murder. It has no bearing on whether persecution requires an attack against a civilian population.
[97] As acknowledged by QUB, D191/13, para. 9.
[98] Drummond et al., D191/4, paras. 15-16.
[99] Agreement, Art. 9.
[100] *See supra* n. 49.
[101] ICCPR, Art. 15. *See also Prosecutor v. Deronjić*, IT-02-61-A, Judgement, 20 July 2005, para. 97.
[102] Saul, D191/3, paras. 4-6; TRIAL, D191/5, paras. 18-20; Tsagourias, D191/9, para. 24; Windridge, D191/10, paras. 9, 19; Williams & Grey, D191/11, paras. 3, 25-27, 29; Baltimore, D191/12, para. 10; QUB, D191/13, paras. 12-15.

population. Other *amici* correctly recognized that while soldiers may be victims of crimes against humanity, this is a distinct question and is not determinative of whether soldiers can be a civilian population.[103] The British Zone's Supreme Court, cited by certain *amici*,[104] did not analyze the meaning of "civilian population," but only whether soldiers could be *victims* of crimes against humanity. These cases are inapposite. In *R Case* and *H Case*, the judges *did not* address whether the acts at issue occurred *as part of an attack directed against a civilian population*. The cases focus on *mens rea*[105] and the Nazi system.[106] In *P and Others*, the judges expressly found the acts were not an act against a civilian population under Control Council Law No. 10,[107] but nevertheless stated in *dictum* that a crime against humanity had been committed by pointing to the underlying offenses set out in the Law.[108] *P and Others* reacts to the Nazi regime of despotism and violence.[109] It contains scarce legal reasoning defining or analyzing the *chapeau* elements of crimes against humanity. These cases do not establish widespread State practice or *opinio juris* that the customary definition of the crime – in 1975-79 or today – permits soldiers to be considered a civilian population for purposes of the *chapeau* requirements.

27. Saul asserts the German decisions are relevant to the customary scope of "any civilian population" because States apparently have not objected to them.[110] Misleading. These decisions have no bearing upon the customary definition of "civilian population" under crimes against humanity, but arguably only upon who can be a victim of said crimes. States are not required to object to foreign domestic jurisprudence with which they disagree in order to prevent such jurisprudence from demonstrating customary

[103] Drummond et al., D191/4, paras. 3-4; Nicholson, D191/8, p. 2-6.
[104] Saul, D191/3, para. 4; Drummond et al., D191/4, paras. 4, 8; TRIAL, D191/5, para. 20; Nicholson, D191/8, p. 5-6; Tsagourias, D191/9, para. 24; Windridge, D191/10, para. 9; QUB, D191/13, para. 11.
[105] *R Case*, StS 19/48, Decisions in Criminal Cases of the Supreme Court for the British Zone, Vol. 1, 27 July 1948, 46-48. The Supreme Court treats the offense of crimes against humanity akin to a national crime, upholding the misdemeanor conviction and fine of 6,000 RM or 60 days in prison despite stating that crimes against humanity under Control Council Law No. 10 involve grave injustice.
[106] *H Case*, StS 309/49, Decisions in Criminal Cases of the Supreme Court for the British Zone, Vol. 2, 18 October 1949, 233 (defining a crime against humanity as involving the violation of a person's human rights in a manner that affects the foundations of human coexistence through conscious and intentional offensive behaviour connected to the national socialist rule of violence and tyranny), 238, para. 2, and 246.
[107] Contrary to the assertion in Saul, D191/3, para. 4(b).
[108] *P and Others*, StS 111/48, Decisions in Criminal Cases of the Supreme Court for the British Zone, Vol. 1, 7 December 1948, 228. The judges do discuss the *mens rea* required for crimes against humanity under their judicial precedents (*id.*, 224-27).
[109] *See id.*, 224, 228.
[110] Saul, D191/3, para. 6.

international law.[111] Saul fails to substantiate his assertion that collective practice through later codifications of crimes against humanity also shows no protest.[112] Later codifications require that an attack be directed against a *civilian* population.[113]

28. *Barbie* and *Touvier*, cited by some *amici*,[114] also indicate *only* that soldiers may be *victims* of a crime against humanity, not that soldiers could constitute a civilian population. These cases do not, as claimed by Williams and Grey,[115] support an argument that where soldiers are targeted by their own State for reasons unconnected to an armed conflict, particularly on discriminatory grounds, they should be considered civilians under crimes against humanity. As Nicholson recently confirmed, *ad hoc* tribunals' post-1979 jurisprudence states that soldiers, including those *hors de combat*, may be *victims* (a point not contested by the Defence), but *cannot* form a civilian population.[116]

29. Even if the German and French cases are indicative of the customary definition of a "civilian population," they would not have been foreseeable or accessible in 1975-79 to anyone outside of Germany or France. Even today the cases are not widely published or readily available in languages other than German or French.[117]

**G. Whether killing a State's own soldiers could amount to genocide is irrelevant**

30. Baltimore asserts a State's systematic targeting of its own soldiers could be genocide.[118] Irrelevant. Whether certain conduct is genocide is not determinative of whether that conduct is a crime against humanity. Each crime has distinct elements.[119] The Genocide Convention does not require that genocidal acts be perpetrated as part of an attack against a civilian population. Baltimore incorrectly reads *Krstić*. Baltimore asserts genocide need not be limited to ethnic or racial groups because the Trial Chamber held Krstić committed genocide despite his argument that he only targeted military-aged men to minimize the

[111] *If*, however, States persistently object to the development of a customary rule, then they cannot be held to that law when the custom ripens. *Fisheries Case (United Kingdom v. Norway)*, ICJ Reports (1951), p. 138-39.
[112] Saul, D191/3, para. 6.
[113] *See* Submission, paras. 4-7.
[114] Drummond et al., D191/4, para. 4; TRIAL, D191/5, n. 34; Robinson et al., D191/6, para. 13; Windridge, D191/10, para. 9; Williams & Grey, D191/11, n. 17; QUB, D191/13, para. 5.
[115] Williams & Grey, D191/11, para. 16.
[116] Nicholson made this statement in a 4 July 2016 blog post for *Opinio Juris*. *See also supra* n. 75.
[117] The Defence could not locate English translations of the German decisions, only English summaries. The Office of the Co-Investigating Judges refused a request to translate the decisions into English. *See* Order on Request to Obtain English Translations of Three German Decisions and One Dutch Decision, 21 June 2016, D191/16/1. The ECCC's Interpretation and Translation Unit refused to translate the decisions without a Court order. The Defence was left having to seek the services of an external translator. The translations are set out in Annex B, making these cases accessible in English, presumably for the first time.
[118] Baltimore, D191/12, paras. 17-20.
[119] *See Prosecutor v. Nahimana et al.*, ICTR-99-52-A, Judgement, 28 November 2007, para. 1029.

Bosnian Muslim enemy.[120] The Chamber did not extend the definition of genocide.[121] It determined whether killing part of a group could constitute genocide. Krstić intended to destroy a substantial part of the Bosnian Muslim group; his motive was irrelevant.[122]

## II. CONCLUSION

31. In 1975-79, the *chapeau* elements of crimes against humanity required an attack directed against a *civilian population*. This requirement does not cause an absurd result. It cannot be excised because it is uncomfortable or inconvenient. It cannot be expanded to include soldiers to assuage policy or moral concerns. Attacks directed against a non-civilian population are not part of the applicable *chapeau* of crimes against humanity. The ECCC must apply the definition of crimes against humanity that existed in 1975-79[123] and is set out in the Establishment Law,[124] provided it was foreseeable and accessible.[125] Under the principle of legality, Judges cannot create new law or interpret existing law "beyond the reasonable limits of acceptable clarification."[126] Were the Co-Investigating Judges to alter or expand the definition of crimes against humanity to include soldiers as a "civilian population," they would violate this well-established principle and their judicial duties.

Respectfully submitted,

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Signed in Phnom Penh, Kingdom of Cambodia on this **11th** day of **July**, **2016**

[120] Baltimore, D191/12, para. 19.

[121] *See Prosecutor v. Krstić*, IT-98-33-T, Judgement, 2 August 2001, para. 554.

[122] *Id.*, paras. 549, 558-68, 591, 594.

[123] As demonstrated by State practice and *opinio juris*, which exist where there is extensive and virtually uniform usage by States of a rule and States consider the practice obligatory under the law. *North Sea Continental Shelf Cases,* ICJ Reports (1969), para. 74; *Nicaragua v. US*, (Merits), ICJ Reports (1986), para. 207.

[124] "While overriding clear language is not unheard of, it is certainly exceptional. Courts generally won't use legislative history to trump statutory language that seems plain on its face, at least when the plain meaning is not absurd. This approach is consistent with regard for legislative intent. Because unambiguous language is very strong evidence of intent, it should normally outweigh less reliable evidence such as legislative history. In the long run, if courts were to make a frequent practice of going against clear statutory language, Congress would lose its best tool for communicating its intentions. Thus, a presumptive 'plain language' rule, which limits the use of legislative history when the statutory language is clear can actually serve to implement legislative intent." DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 94 (University of Chicago Press 1991).

[125] *Duch* Appeal Judgement, para. 96. *See also id.*, paras. 89-91, for a discussion of the principle of legality.

[126] *Id.*, para. 95, quoting *Prosecutor v. Milutinović et al.*, IT-99-37-AR72, Appeal Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction-Joint Criminal Enterprise, 21 May 2003, para. 38.