

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

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**INTERNATIONAL CO-PROSECUTOR'S RESPONSE TO THE
INTERNATIONAL CO-INVESTIGATING JUDGE'S CALL FOR SUBMISSIONS
REGARDING CRIMES AGAINST HUMANITY**

Filed by:

**International
Co-Prosecutor**
Nicholas KOUMJIAN

Distributed to:

Co-Investigating Judges
Judge YOU Bunleng
Judge Michael BOHLANDER

Co-Lawyers for MEAS Muth
ANG Udom
Michael KARNAVAS

Copied to:

National Co-Prosecutor
CHEA Leang

All Civil Parties in Case 003
All Civil Parties in Case 004/1

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

All Civil Parties in Case 004

Co-Lawyers for IM Chaem
BIT Seanglim

Co-Lawyers for YIM Tith
SO Mosseny
Suzana TOMANOVIC

I. INTRODUCTION

1. The International Co-Prosecutor (“Co-Prosecutor”) hereby responds to the International Co-Investigating Judge’s (“ICIJ”) Call for Submissions regarding whether, under customary international law (“CIL”) applicable between 1975 and 1979, an attack by a state or organisation against members of its own forces may amount to an attack directed against a civilian population for the purpose of Article 5 of the ECCC Law.¹
2. For the reasons set out below, the Co-Prosecutor submits that, under CIL applicable before 1975, a state or organisation’s own military personnel (a) can constitute a civilian population for the purposes of Article 5 of the ECCC Law²; or (b) can be victims of crimes against humanity (“CAH”) in the context of a wider attack against a civilian population.

II. APPLICABLE LAW

3. Article 5 of the ECCC Law states, in relevant part that “[c]rimes against humanity [...] are any acts committed as part of a widespread or systematic attack directed against any civilian population [...]”.

III. SUBMISSIONS

A state or organisation’s own armed forces can constitute a “civilian population”

4. The Co-Prosecutor submits that the ECCC Trial Chamber’s conclusion that, for the purposes of article 5 of the ECCC Law, “[t]he civilian population [...] includes all persons who are not members of the armed forces or otherwise recognised as combatants”³ contemplates “combatants” being members of the armed forces of a state or organisation opposing the perpetrator’s state or organisation, and does not apply as between a state or organisation and its own forces. The Chamber’s articulation of “civilian population” mirrors that found in Article 50 of Additional Protocol I,⁴ which

¹ **D191/D306** Call for Submissions by the Parties in Cases 003 and 004 and Call for *Amicus Curiae* Briefs, 19 April 2016 (“Call for Submissions”).

² Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea *as amended on 27 October 2004* (“ECCC Law”).

³ Case 001-E188 Judgment, 26 July 2010 (“Duch Trial Judgment”), para. 304; Case 002-E313 Case 002/01 Judgment, 7 August 2014 (“Case 002/01 Judgment”), paras 185-186. The Chamber confirmed that soldiers *hors de combat* do not qualify as civilians for the purposes of article 5.

⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977. Article 50 states in relevant part: “1. A civilian is

has been applied by the *ad hoc* tribunals for this purpose.⁵

5. These definitions of “combatant” and “civilian” were written to regulate armed conflicts between opposing forces. In the theoretical situation presented by the ICIJ, wherein the perpetrators and victims are not engaged in armed conflict with each other, whether or not this takes place in the context of an armed conflict,⁶ mechanically transferring the terms “combatant” and “civilian” as they are defined in IHL into the law of CAH misunderstands both the relevant IHL and the foundation and evolution of CAH. Such a mechanical approach would produce an absurd result that would permit a government or organisation to commit mass atrocities with impunity simply by conscripting its subjects into its armed forces.
6. The Co-Prosecutor agrees with the ICIJ’s proposition that “the victims’ combatant quality merely because they are soldiers [is] entirely irrelevant in this context”.⁷ The victim’s status as a combatant or civilian is relevant during armed conflict – whether international or non-international – in establishing rights and duties with regard to the other party to the conflict, primarily to determine which persons may be legitimately targeted and who must be protected. The ultimate aim of military operations is to prevail over enemy forces, and parties are therefore not legally barred from attacking *each other’s* military objectives, including enemy personnel.⁸ As the laws of war

any person who does not belong to one of the categories of persons referred to in Article 4A(1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. [...] 2. The civilian population comprises all persons who are civilians.”

⁵ See e.g. *Blaškić*, Appeals Chamber, Judgment, 29 July 2004, para. 110; *Martić*, Appeals Chamber, Judgement, 8 October 2008 (“*Martić* Appeal Judgment”), para. 302.

⁶ Both the ICIJ and the Trial Chamber have held that, by 1975, CAH did not require proof of a nexus with an armed conflict. See Case 003-D87/2/1.7/1 Decision on Meas Muth’s Request for Clarification concerning Crimes against Humanity and the Nexus with Armed Conflict, 5 April 2016; and Case 002-E95/8 Decision on Co-Prosecutors’ Request to Exclude Armed Conflict Nexus Requirement from the Definition of Crimes Against Humanity, 26 October 2011.

⁷ **D191/D306** Call for Submissions, para. 5.

⁸ See ICRC Customary IHL Database, Rule 1: “The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.” As a matter of CIL applicable in both international (“IAC”) and non-international armed (“NIAC”) conflict, only *enemy* combatants may be targeted. See **IAC**: Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, St. Petersburg, 29 November–11 December 1868, preamble (“the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy”); Regulations concerning the Law and Customs of War on Land, The Hague, 29 July 1899 & 18 October 1907, article 22 (“The right of belligerents to adopt means of injuring the enemy is not unlimited.”); The Laws of War on Land, Oxford, 9 September 1880, article 1 (“The state of war does not admit of acts of violence, save between the armed forces of belligerent States.”); UK Military Manual 2004, para. 5.4.1 (“The term ‘military objective’ includes combatant members of the enemy armed forces”); **NIAC**: See e.g. UK Military Manual 2004, para. 15.9.1 (“There is no definition of military objectives or attacks in treaty law dealing with [NIAC]. Nevertheless, the definitions used in respect of [IAC] should be treated as applicable.”).

recognise the legitimacy of targeting one's enemies in a conflict, it is logical that the lawful killing of enemy combatants who have not been rendered *hors de combat* is excluded from the scope of CAH. However, this rationale does not apply to a state or organisation's *own* forces who are *not* lawful targets under IHL. Furthermore, it is wholly inapposite in peacetime when military personnel are not engaged in any active combat.

7. From their inception, CAH were intended to protect the human rights of every national of a state, including military personnel, against the widespread or systematic brutality of governmental or other organisations. In its 1919 report on the responsibility of Germany and its allies for crimes committed during World War I,⁹ the Commission recognised a species of international crime “against the laws of humanity”¹⁰ applicable to the attacks by Turkey against its own nationals, chiefly Armenians, on its own territory. In formulating those conclusions, the Commission relied on evidence that the Turks had targeted Armenians *within the Ottoman army* by disarming Armenian soldiers, transferring many to labour brigades and subjecting many to eventual execution.¹¹
8. The jurisprudence of the German Supreme Court in the British Occupied Zone acting pursuant to Control Council Law No. 10 (“CCL 10”) after World War II recognised on at least three occasions that CAH can be committed against military personnel of the same nationality as the perpetrators.¹² In doing so, it considered the requirement in CCL 10, article II(I)(c), that offences be committed ‘against any civilian population’, and considered it fulfilled in circumstances of the Nazi state’s widespread and systematic oppression and abuse of its subjects, irrespective of their status. The Court held:

Whoever notes the expressly emphasised illustrative character of the instances and classes of instance mentioned therein cannot come to the conclusion that action between soldiers may not constitute crimes against humanity. A single and isolated excess would not constitute a crime

⁹ Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties (“Commission”), Report presented to the Preliminary Peace Conference, 29 March 1919 (“Commission Report”), reproduced in (1920) 14 AJIL 95-154.

¹⁰ See e.g. Commission Report, (1920) 14 AJIL 113, 115.

¹¹ See Commission Report, (1920) 14 AJIL 112-113 and Annex I (see <https://babel.hathitrust.org/cgi/pt?id=mdp.39015039699726;view=1up;seq=28#view=1up;seq=36>), p. 30, referring to the report of the British Commission under Viscount Bryce on the Treatment of Armenians in the Ottoman Empire, in particular “A Summary of Armenian History Part VI: Deportation of 1915–Procedure”, paras 3, 4, 7 (available at <http://net.lib.byu.edu/~rdh7/wwi/1915/bryce/a18.htm#hist6>).

¹² *P. and others*, OGHSt 1, 217-229; *H.*, OGHSt 2, 231-246; *R.*, OGHSt 1, 45-49. For further factual details regarding the cases, see Cassese’s *International Criminal Law* (2013), pp. 102-103 (fn. 45).

against humanity pursuant to the legal notion of such crimes. [However] it has already been shown [in the judgment] that the action at issue *can* belong to the system and volume of crimes of the Nazi era.¹³

It considered the objective element of a CAH under CCL 10 to be fulfilled since the military personnel were victims of “an attack against human value and human dignity.”¹⁴ There had taken place “an intolerable degradation of the victims to mere means to pursue a purpose, hence the depersonalisation and objectification of human beings”¹⁵ thereby attacking humanity as a whole.¹⁶

9. Treaties dealing with CAH concluded before 1975 apply to all military personnel and civilians without distinction. The International Convention on the Suppression and Punishment of the Crime of Apartheid 1973,¹⁷ which declared apartheid a CAH,¹⁸ makes no mention of “civilian populations,” and criminalises “inhuman acts committed for the purpose of establishing and maintaining domination *by one racial group* of persons *over any other racial group of persons* and systematically oppressing them.”¹⁹ Similarly, the Genocide Convention²⁰, to which Cambodia acceded in 1950, does not limit its application to the treatment of civilian populations. Rather, the criminal acts may be directed against *any* “national, ethnical, racial or religious group.”²¹
10. Prior to 1975, international human rights standards, which govern the relationship between a state and its subjects, also protected all individuals, including military personnel, against abuses of their own governmental authorities of the type protected by

¹³ *P. and others, supra* fn. 12, 228 (“Wer indes den dort ausdrücklich hervorgehobenen Beispielcharakter der gesetzlichen Beispiele und Beispielgruppen beachtet, vermag garnicht auf den Gedanken zu kommen, Handlungen unter Soldaten können keine Unmenschlichkeitsverbrechen sein. Ein gesondert dastehender Einzelexzeß wäre kein tatbestandsmäßiges Unmenschlichkeitsverbrechen. Daß die Tat hier dem System unter der Masse der Verbrechen der Nazizeit zugehören kann, ist bereits dargelegt.”). See also *H., supra* fn. 12, 233-4; 238; 241-4 (holding that the judge could be held guilty of CAH to the extent that his action was undertaken deliberately in connection with the Nazi system of violence and terror) and *R., supra* fn. 12, 47 (holding that an act could constitute a CAH if it could be proven that the agent had intended to hand over the victim to the “uncontrollable power structure of the [Nazi] party and State” knowing that the victim was likely to be caught up in an arbitrary and violent system (“Das erfüllt den inneren Tatbestand indessen nur dann, wenn damit desagt sein soll, daß der Angeklagte den Zeugen dem unkontrollierbaren Machtapparat von Partei und Staat überliefert habe, und zwar zumindest mit dem Eventualvorsatz, daß willkürlich mit ihm verfahren werde.”)).

¹⁴ *P. and others, supra* fn. 12, 220 (“einen Angriff gegen Menschenwert und Menschenwürde”).

¹⁵ *Ibid.* (“unerträgliche Herabwürdigung des Opfers zum bloßen Mittel für einen Zweck, also Entpersönlichung, Versachlichung des Menschen.”).

¹⁶ *Ibid.* (“so ist damit zugleich der überpersönliche Wert der Humanitas und als ihr Träger und Hüter die Menschheit selbst angegriffen”).

¹⁷ International Convention on the Suppression and Punishment of the Crime of Apartheid, New York, 30 November 1973 (“Apartheid Convention”).

¹⁸ Apartheid Convention, article I.

¹⁹ Apartheid Convention, article II. There were no contrary declarations or reservations.

²⁰ Convention on the Prevention and Punishment of the Crime of Genocide, Paris, 9 December 1948.

²¹ Genocide Convention, article II.

CAH.²² The Universal Declaration of Human Rights 1948²³ confirms, without exception, that

recognition of the inherent dignity and of the equal and inalienable rights of *all members of the human family* is the foundation of freedom, justice and peace in the world.

[...]

Everyone is entitled to all the rights and freedoms set forth in this Declaration, *without distinction of any kind*, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth *or other status*.²⁴

11. Similarly, in the International Convention on the Elimination of All Forms of Racial Discrimination 1965,²⁵ which Cambodia signed on 12 April 1966, state parties consider that:

all human beings are equal before the law and are entitled to equal protection of the law against any discrimination.²⁶

12. The European Convention on Human Rights 1950²⁷ also protects all citizens of its state parties without exception,²⁸ and the European Court of Human Rights has expressly confirmed that a state's military personnel are protected by the terms of the Convention.²⁹
13. For all these reasons, the Co-Prosecutor submits that CIL applicable in 1975 recognised that an attack by a state or organisation against members of its own armed forces, in times of armed conflict and in peacetime, may amount to an attack directed against a civilian population for the purpose of Article 5 of the ECCC Law.

²² For short names, see fns 23-25, 27 below. **Right to life:** ICCPR, article 6; ECHR, article 2; UDHR, article 3; **Freedom from torture:** ICCPR, article 7; UDHR, article 5; ECHR, article 3; **Freedom from cruel, inhuman or degrading treatment:** UDHR, article 5; ECHR, article 3; ICCPR, article 10; **Freedom of choice in marriage:** UDHR, article 16; ICCPR, article 23(3); **Freedom from forced labour:** ICCPR, article 8(3); ECHR, article 4; **Freedom from slavery:** ICCPR, article 8(1); UDHR, article 4; ECHR, article 4; **Freedom from arbitrary arrest or imprisonment:** UDHR, articles 9, 10; ICCPR, articles 9, 14; UDHR, article 3; ECHR, articles 5, 7; **Freedom of thought, conscience and religion:** ICCPR, article 18, 27; UDHR, article 18; ECHR, article 9; **Freedom from discrimination:** ICCPR, article 26; UDHR, articles 2, 7; ECHR, article 14; ICEAFRD.

²³ Universal Declaration of Human Rights, 10 December 1948, GA res. 217A (III) ("UDHR").

²⁴ UDHR, preamble (recital 1), article 2 (emphasis added). See also International Covenant on Civil and Political Rights 1966, New York, 16 December 1966 ("ICCPR"), preamble (recital 1).

²⁵ International Convention on the Elimination of All Forms of Racial Discrimination, New York, 21 December 1965 ("ICEAFRD").

²⁶ ICEAFRD, preamble (recital 2).

²⁷ Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, 213 UNTS 221 ("ECHR").


²⁸ ECHR, articles 1, 14.

²⁹ See *Engel et al v. the Netherlands*, Judgment, 8 June 1976, para. 54 ("the Convention applies in principle to members of the armed forces and not only to civilians."). The ECtHR has applied the Convention to military personnel in many other cases. See e.g. *Grigoriades v. Greece*, Judgment, 25 November 1997, para. 45 ("Article 10 does not stop at the gates of the army barracks. It applies to military personnel as to all other persons within the jurisdiction of the Contracting States.").

Individual victims of crimes against humanity need not be civilians

14. In any event, it is widely accepted – at the ECCC³⁰ and other international criminal tribunals³¹ - that, as long as the acts in question form part of a widespread or systematic attack against a civilian population,³² individual victims of CAHs need not themselves be “civilians”³³. Where an attack on a state or organisation’s forces comprises just one component of the widespread or systematic attack directed primarily at a civilian population, as is patently the situation where the DK regime targeted its own military and civilian cadres together with ordinary Cambodian civilians, an unlawful attack on a member of those forces (whether or not they are considered *hors de combat*) can constitute a CAH.³⁴

Respectfully submitted,

Date	Name	Place	Signature
19 May 2016	Nicholas Koumjian International Co-Prosecutor	Phnom Penh	

³⁰ Case 001-E188 Duch Trial Judgment, para. 311; Case 002-E313 Case 002/01 Judgment, para. 187.

³¹ *Martić* Appeal Judgment, paras 307-314; *Mrškić*, Appeals Chamber, Judgment, 5 May 2009 (“*Mrškić* Appeal Judgment”), paras 29, 32-33; *Tolimir*, Appeals Chamber, Judgment, 8 April 2015 (“*Tolimir* Appeal Judgment”), paras 141-142; *Taylor*, Trial Chamber, Judgment, 18 May 2012, para. 507.

³² There must be a nexus between the acts of the accused and the attack against a civilian population (Case 002-E313 Case 002/01 Judgment, para. 190; *Mrškić* Appeal Judgment, para. 41) and the perpetrator must have known that there was an attack on a civilian population and that his/her acts formed part of that attack (Case 002-E313 Case 002/01 Judgment, para. 191; *Kunarac*, Appeals Chamber, Judgment, 12 June 2002, para. 85). The presence within the population of non-civilian individuals does not necessarily deprive the population of its civilian character but will be relevant to a determination of whether the population remains of a “predominantly civilian nature” (Case 001-E188 Duch Trial Judgment, paras 305-306, Case 002-E313 Case 002/01 Judgment, paras 183-184 and citations therein.).

³³ As defined by the ECCC and *ad hoc* tribunals, excluding combatants and soldiers *hors de combat*. See *supra* para. 4.

³⁴ *Mrškić* Appeal Judgment, para. 32 (“there is no requirement nor is it an element of [CAH] that the victims of the underlying crimes be ‘civilians’”); *Martić* Appeal Judgment, paras 307-314 *citing* at fns 829-831 *Leeb et al.*, Judgment, 27 October 1948, XI TWC 520, 596-599, 675, 679, 683; *Weizsaecker et al.*, Judgment, 11-13 April 1949, XIV TWC 541-546; *P. and others*, OGHSt 1, 217-229; *H.*, OGHSt 2, 231-246; *R.*, OGHSt 1, 45-49; *Barbie*, 78 ILR 125, 140 and *Touvier*, 100 ILR 338, 352 (confirming CAH had been committed against members of the Resistance). See further *Tolimir* Appeal Judgment, para. 143 (The Appeals Chamber chose not to decide the status of the ABiH fighters killed. Rather, it determined their status was immaterial since the “vast majority of victims of the overall attack on the civilian population [...] remained civilians”); Case 002-E313 Case 002/01 Judgment, para. 194 (confirming that, irrespective of their status, Khmer Republic soldiers could be victims of CAH since “[i]n any event, [they] only formed part of the millions of civilians attacked.”).