Summary of Presentation by Michael G. Karnavas

ADC-ICT Annual Conference "International Crimes: Past, Present and Future Perspectives", 9 December 2017

The Meaning of "Civilian" for Crimes Against Humanity at the Extraordinary Chambers in the Courts of Cambodia in light of Recent Jurisprudence

On 19 April 2016, Michael Bohlander, the International Co-Investigating Judge for the Extraordinary Chambers in the Courts of Cambodia ("ECCC") issued a call for submissions by the Office of the Co-Prosecutors, the Defence in Cases 003 and 004, and qualified *amici curiae*.[1]

I. QUESTION:

Whether, under customary international law applicable between 1975 and 1979, an attack by a state or organization against members of its own armed forces may amount to an attack directed at a civilian population?

WHY this question?

The ECCC was established to try senior leaders of the Democratic Kampuchea (DK) regime and those who were most responsible for international crimes (genocide, crimes against humanity, and grave breaches of the 1949 Geneva Conventions) and national crimes committed in Cambodia during the DK rule (17 April 1975 to 6 January 1979).

The suspects in Cases 003 and 004 are charged, among other things, with crimes against humanity. As alleged, during the period when the Khmer Rouge took power, the DK regime was purging its own cadre: the many victims of the internal purges were soldiers of the Revolutionary Army of Kampuchea (RAK). Hence the question: **can soldiers constitute a civilian population for the purpose of crimes against humanity?**

[1] *See Case of MEAS Muth*, 003/07-09-2009-ECCC/OCIJ, Call for Submissions by the Parties in Cases 003 and 004 and Call for Amicus Curiae Briefs, 19 April 2016, D191.

II. PREDICATE TO JUDGE BOHLANDER'S CALL FOR SUBMISSIONS

In Case 002, the Trial Chamber held that **members of a state's armed forces, even if *hors de combat*, *do not* qualify as "civilians" for crimes against humanity**.[2] This holding related to the enemy population as opposed to a state's own armed forces.

In determining the meaning of "civilian," the Trial Chamber reasoned that a soldier is not accorded civilian status simply because he or she are unarmed or not in combat when the crimes are committed.

The Supreme Court Chamber confirmed that "soldiers *hors de combat* do not qualify as 'civilians'"– and clarified - that the Trial Chamber's findings meant that while former Khmer Republic soldiers were among the civilian population attacked, this did not make them civilians.[3]

Relying on the ICTY and ICTR jurisprudence, the Supreme Court Chamber upheld the Trial Chamber's finding that, in order to qualify as a civilian population for the purpose of crimes against humanity, "*the target population must be of a predominantly civilian nature.*"

The Supreme Court Chamber did not need to discuss any further the definition of "civilians" because the attack in Case 002 concerned the entire population of Cambodia in all regions, which was predominantly civilian – which, of course – led Judge Bohlander to muse that in Case 002 the Trial Chamber's interpretation of who constitutes a "civilian population" overlooked "a rather banal logical policy aspect, which is that the entire distinction between combatants and civilians might only make sense if we are talking about combatants and civilians of the *enemy* population."

Judge Bohlander surmised that it is undisputable that if a regime in peacetime is cleansing its own armed forces (for example, soldiers holding different ethnicity or faith) under customary international law would be engaging in a variety of crimes against humanity, because the victim's combatant quality would be irrelevant in this context."[T]here is no reason to think otherwise if such a campaign happened in the course of or otherwise connected to an armed conflict." Hence the call for submissions.

---

[2] *See Case of NUON Chea et al.*, 002/19-09-2007-ECCC/TC, Judgement, 7 August 2014, E313, para. 186.
[3] *See Case of NUON Chea et al.,* 002/19-09-2007-ECCC/SCC, Appeal Judgement, 23 November 2016, F36, para. 738 *et seq*.

III. POSITIONS TAKEN

The International Co-Prosecutor, eleven *Amici Curiae*, and three Defence teams (one in Case 003 and two in Case 004) made submissions.

The International Co-Prosecutor and the *Amici* (save for one, Professor Joanna Nicholson, who took a neutral position) came down on the side hinted by Judge Bohlander that under customary international law applicable before 1975, a state or organization's own armed forces can constitute a civilian population for the purpose of crimes against humanity.

INTERNATIONAL CO-PROSECUTOR

The International Co-Prosecutor advanced three main arguments:[4]

1. The ECCC's prior jurisprudence in defining "civilians" was limited to attacks against enemy armed forces, and therefore did not apply to the factual matrix of Judge Bohlander's call for submissions – where the attack is against a state's *own* armed forces**.**

2. The International Humanitarian Law principle of distinction between "combatants" and "civilians" cannot apply to a state's own armed forces because there is no armed conflict.

3. Pre-1975 international instruments and state practice show that crimes against humanity were intended to protect every national of a state, including the military and thus, the victims' legal status is irrelevant for crimes against humanity.

AMICI CURIAE

Aside from making similar arguments as the International Co-Prosecutor, many *Amici* argued what the law *should* be as opposed to addressing what was the law between 1975 and 1979. Here is the gist of *Amici* arguments: [5]

[4] *See Case of MEAS Muth,* 003/07-09-2009-ECCC, International Co Prosecutor's Response to the International Investigating Judge's Call for Submissions Regarding Crimes Against Humanity, 19 May 2016, D191/1.

1. The definition of civilian population should be expanded and broadly interpreted for policy and moral reasons. To exclude soldiers from the definition of civilian population for crimes against humanity would lead to an absurd result.
2. Expanding the definition of "civilian population" for policy or moral reasons to include soldiers targeted by their own state would not violate the principle of legality.
3. The term "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.
4. The International Humanitarian Law principle of distinction only applies to civilians and enemy combatants; there is no legal distinction between soldiers and civilians in peacetime.
5. International Human Rights Law interprets civilian population broadly and since in an armed conflict, International Human Rights Law prevails over International Humanitarian Law – the term "civilian" should be broadly interpreted.
6. Persecution is distinct from other crimes against humanity in that it does not require an attack against a civilian population.

DEFENCE SUBMISSIONS

The Defence teams unanimously argued[6] that an attack against a state's own soldiers does not amount to an attack against a civilian population whether committed in times of war or peace, because:

---

[5] *See Case of MEAS Muth,* 003/07-09-2009-ECCC, Amicus Curiae Brief in Cases 003 and 004, Professor Ben Saul, 19 May 2016, D191/3; Amicus Curiae Brief for Cases 003 and 004, Catherine Drummond, Philippa Webb, and Dapo Akande, 19 May 2016, D191/4; Amicus Curiae Brief for Cases 003 and 004, TRIAL Track Impunity Always 19 May 2016, D191/5; Amicus Curiae Brief of Professors Robinson, DeGuzman, Jalloh, and Cryer on Crimes Against Humanity for Cases 003 and 004, 17 May 2016, D191/6; Amicus Curiae Brief for Cases 003 and 004, Ido Rosenzweig 19 May 2016, D191/7; Amicus Curiae Brief for Cases 003 and 004, Prof. Joanna Nicholson, 19 May 2016, D191/8; Amicus Curiae Brief for Cases 003 and 004, Professor Nicholas Tsagourias, 17 May 2016, D191/9; Amicus Curiae Brief for Cases 003 and 004, Oliver Windridge, 19 May 2016, D191/10; Amicus Curiae Brief Filed by Drs Williams and Grey in Response to Call for Amicus Curiae Briefs in Cases 003 and 004 Dated 19 April 2016, 19 April 2016, D191/11; 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 Own Military, 18 May 2016, D191/12; Queen University Belfast Human Rights Centre Response to the ECCC Office of the Investigating Judges "Call for Submissions by the Parties in Cases 003 and 004 and Call for Amicus Curiae Briefs, 12 May 2016, D191/13.

[6] *See Case of MEAS Muth,* 003/07-09-2009-ECCC, Meas Muth's Submission on the Question of Whether Under Customary International Law in 1975 1979 an Attack by State or Organization Against its Own Armed Forces Could Amount to an Attack Directed Against Civilian Population for Purposes of Article of the Establishment Law, 19 May 2016, D191/2; *Case of Yim Tith and Ao An*, 004/07-09-2009-ECCC, Yim Tith's Submission on the Interpretation of the Term 'Civilian Population' for the Purposes of Article 5 of the Establishment Law, 19 May

1. States do not relinquish their sovereignty over their own soldiers in peacetime. Soldiers and civilians are subject to different standards and protections at all times.
2. There is no gap or lacuna in soldier's legal protection.
    - In peacetime, a regime's acts against its own soldiers would be dealt with under national law, or could, depending on the circumstances, be prosecuted as genocide.
    - During armed conflicts, such an attack might be a violation of International Humanitarian Law, genocide, or a national crime, depending on the circumstances.
3. It is not absurd to interpret "civilian population" to exclude soldiers. The distinction remains whether in peacetime or wartime.
4. International Human Rights Law cannot be used to interpret the term "civilian." It is distinct from International Criminal Law and the two should not be conflated. Not every International Human Rights Law violation is a violation of International Criminal Law.

IV. JUDGE BOHLANDER'S HOLDING & REASONING

Judge Bohlander held that an attack by a state against its own armed forces amounted to an attack against a civilian population under the law of crimes against humanity between 1975-1979. However, if the attacked armed forces were allied or otherwise providing military support to the enemy in an armed conflict, a state's attack would not amount to a crime against humanity**.** Judge Bohlander provided the following reasons:[7]

- Pre-1975 international instruments (Genocide and Apartheid Conventions) demonstrate the state's resolution to protect all individuals in times of war or peace, regardless of the civilian or military status of victims.

2016; Ao An's Submission on Whether an Attack by a State or Organisation Against Members of its Own armed Forces Could Qualify as a Crime Against Humanity Under Customary International Law in 1975-1979, 19 May 2016; *Case of MEAS Muth*, 003/07-09-2009-ECCC, 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, 11 July 2016, D191/17.

[7] *See Case of MEAS Muth,* 003/07-09-2009-ECCC/OCIJ, Notification of the Interpretation of 'attack against the civilian population' in the context of crimes against humanity with regard to state's or regime's own armed forces, 7 February 2017, D191/18.

- Although post-World War II jurisprudence does not address in detail the meaning of "civilian population," the courts considered the elements of crimes against humanity satisfied when individual crimes were connected to a system of large-scale abuses and found that crimes against humanity were committed without inquiring into the formal status of victims.
- Post-1975 jurisprudence provides for two interpretations of "civilians":

  1. **The majority approach** – defining civilian population based on the International Humanitarian Law meaning, which excludes any types of combatants, such as regular armed forces, militias, or resistance movements. ICTY jurisprudence follows this approach because ICTY jurisdiction is limited to crimes against humanity committed during an armed conflict.

  2. **The minority approach** – defining civilian population based on the specific situation of the victims when the crimes were committed. This alternative interpretation was formulated by some ICTY Trial Chambers (*Blaškić*, *Kupreškić*, and *Jelišić*). Although this interpretation was rejected by the Appeals Chamber in *Blaškić*, some ICTR Trial Chambers (*Akayesu*, *Bisengimana*, *Muvunyi*, *Bagilishema*) continued to follow the "specific situation" approach.

- At the ECCC, considering the purpose of crimes against humanity and the context of the alleged crime (attack against own soldiers in peacetime), the "specific situation" approach is appropriate and must be applied.

Judge Bohlander further explained that this interpretation does not violate the principle of legality because:

1. The majority approach (IHL-based) to the interpretation of crimes against humanity became *the* majority view only after 1979 (after the time-period over which the ECCC has jurisdiction).

2. The majority approach is unsuitable for crimes against humanity not connected to an armed conflict.

3. The accused could foresee that massive human rights violations could be considered a crime, regardless of its precise legal characterization.

4. Excluding a state's own armed forces from the protection against crimes against humanity would frustrate the purpose of the law and lead to absurd results.

V. PROFESSOR JOANNA NICHOLSON'S AMICUS POSITION AND FOLLOW-UP BLOG POST

In her *Amicus* submissions, Prof. Nicholson took a neutral position, admitting that customary international law had not crystallized to consider soldiers, including soldiers *hors de combat*, as a "civilian population" for the purpose of crimes against humanity, during armed conflict. She observed that some jurisprudence establishes that soldiers *hors de combat* can be individual victims of crimes against humanity, if they were part of an attack on civilians as the primary target. She rightly points out that whether soldiers *hors de combat* form part of the civilian population is a distinct issue.

After submitting her *Amicus* brief Prof. Nicholson posted on the *Opinio Juris* blog, *Is the Requirement That Crimes Against Humanity Be Committed Against a "Civilian Population" Really Necessary?* Nicholson elaborated her position and advocated for dropping the "civilian population" requirement from future definitions of crimes against humanity.

Prof. Nicholson found it problematic that attacks purely against soldiers *hors de combat* cannot amount to crimes against humanity. In her view, prosecuting such acts as war crimes "fails to adequately reflect the gravity of the offence, and ignores the symbolic nature that a charge of crimes against humanity has." She suggested that future definitions of crimes against humanity could omit reference to a "civilian" population and replace the term with simply "population." Since the "civilian population" requirement "should no longer be considered a necessary element" of crimes against humanity; attacks against soldiers *hors de combat* could "be prosecuted as crimes against humanity and can receive the recognition they deserve."

VI. CONCLUSION

My take is that Judge Bohlander might have gotten it wrong. There is no gap in legal protection of soldiers. There is no absurdity in prosecuting attacks against soldiers as crimes under national law, or as war crimes, or genocide. It would be inconsistent to consider a state's own soldiers as civilians while treating another state's soldiers *hors de combat* as non-civilians for purposes of determining the civilian character of an attack, particularly since soldiers *hors de combat* are unable to fight while a state's own soldiers could be armed and more dangerous to the state.

Policy and moral concerns, or merit-based arguments, do not trump the law. Neither can they substitute for the law when the law's application does not achieve a desired result. The requirement that an attack must be directed at a *civilian* population cannot be disregarded because it is uncomfortable or inconvenient. The ECCC must apply the definition of crimes against humanity as set out in the Establishment Law and as it existed in 1975-1979.

As for Prof. Nicholson's suggestion that crimes against soldiers *hors de combat* should be prosecuted as crimes against humanity so that such crimes receive the deserved recognition, here she makes a value-based argument of sorts. In my opinion, this detracts from her overall argument. I can understand that soldiers *hors de combat*, because they are effectively mothballed (so to speak), should perhaps be treated as civilians. But to suggest that we should do so because crimes against humanity have greater symbolic *caché* than war crimes, is wanting. That said, kudos to Prof. Nicholson for raising the issue in the way she has done in her blog post, as opposed to tailoring her arguments in her *Amicus* brief to arrive at this desired, though untenable, destination. I concur with her that perhaps it might be the time to do away with the term "civilian population" and replace it with simply "population."

The issue of *whether an attack by a state or organization against members of its own armed forces may amount to an attack directed at a civilian population* remains unsettled at the ECCC. It has not been addressed by the ECCC Pre-Trial, Trial, and Supreme Court Chambers. The Pre-Trial, Trial, and Supreme Court Chambers may take a different position on this issue.