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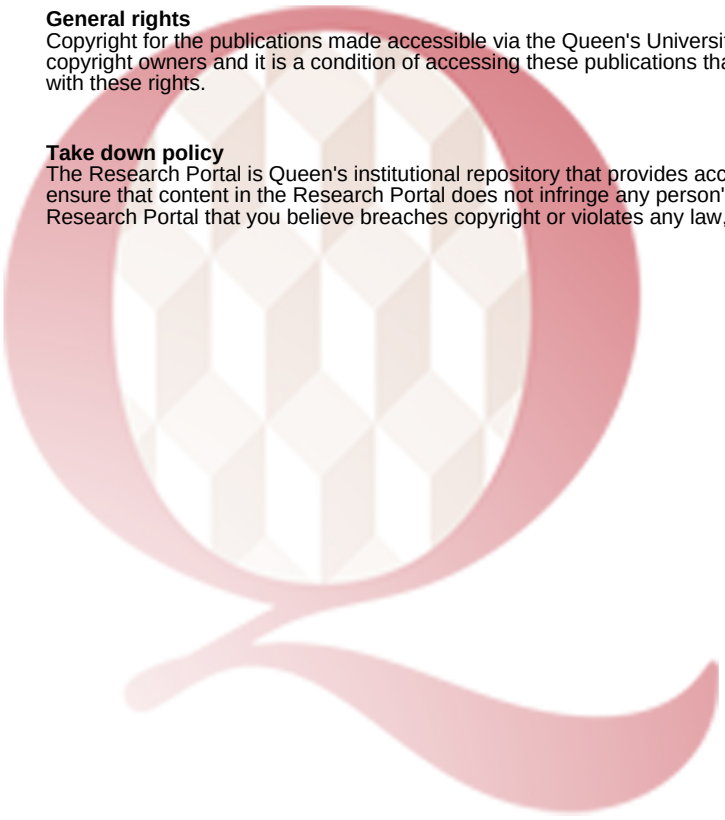

Soldiers as Victims at the ECCC: Exploring the Concept of 'Civilian' in Crimes against Humanity

Abstract: The inspiration for this article came from a call for amicus curiae briefs issued in April 2016 by the Office of the Co-Investigating Judges in the Extraordinary Chambers in the Courts of Cambodia (ECCC). The call sought guidance on: 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 against a civilian population for the purpose of constituting a crime against humanity under Article 5 of the ECCC Law. We argue that customary international law justifies a finding that an attack on members of the armed forces can constitute crimes against humanity. In particular, the article focuses on the importance placed on the persecution element of crimes against humanity in the post-Second World War jurisprudence, and the broad interpretation of the term 'civilian'. The article also examines the jurisprudence of contemporary international courts, finding that in some cases the courts have interpreted the term 'civilian' as incorporating *hors de combat*. However, the ICTY and ICC have moved towards a more restrictive interpretation of the term 'civilian', potentially excluding members of the armed forces. We argue that this move is regressive, and against the spirit in which the offence of crimes against humanity was created. The ECCC has an opportunity to counter this restrictive approach, thereby narrowing the protection gap which crimes against humanity were initially created to close.

Keywords: International Criminal Law; Crimes against Humanity; Extraordinary Chamber in the Courts of Cambodia; Civilian; Victims

1. Introduction

This article considers to what extent an attack against members of the armed forces can be a crime against humanity (CAH). It specifically analyses this issue within the context of the crimes perpetrated by the Khmer Rouge, a communist regime who held power in Cambodia from April 1975 to January 1979, and were responsible for the deaths of an estimated 1.7 million people.[1] For the last decade, the Extraordinary Chambers in the Courts of Cambodia (ECCC) has been attempting to hold former Khmer Rouge cadres accountable for their crimes, and has thus far found three individuals guilty of CAH, amongst other offences.[2] The inspiration for this article came from a call for amicus curiae briefs issued in April 2016 by the ECCC's Office of the Co-Investigating Judges (OCIJ), the organ responsible for the investigations, identification of crimes and collection of evidence.[3] Drafted by the International Co-Investigating Judge Michael Bohlander, the call sought guidance on a specific legal 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 against a civilian population for the purpose of constituting a crime against humanity under Article 5 of the ECCC Law. Under Article 5, CAH are any acts committed as part of a widespread or systematic attack directed against any civilian population, on national, political, ethnical, racial or religious grounds. The ECCC has previously found that while a 'civilian population' need not be entirely made up of civilians, members of the armed forces are not considered 'civilians', even if they are *hors de combat.*[4]

However, as explained by Judge Bohlander in the amicus call:

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[1] B. Kiernan, 'The Demography of Genocide in Southeast Asia' (2003) 35(4) *Critical Asian Studies* 585.
[2] *Case 001*, Appeal Judgement, 001/18-07-2007-ECCC/SC, A. Ch., 3 February 2012; *Case 002/01*, Trial Judgement, 002/19-09-2007/ECCC/TC, T. Ch., 7 August 2014.
[3] *Case 003*, Call for Submissions by the Parties in Cases 003 and 004 and Call for Amicus Curiae Briefs, 003/07-09-2009-ECCC-OCIJ, Office of the Co-Investigating Judges, 19 April 2016.
[4] *Case 001*, Trial Judgment, 001/18-07-2007-ECCC/TC, 26 July 2010, paras 304-305*; Case 002/01* Trial Judgment, *supra* note 2, paras183-186.

> It seems that an argument could be made that…the entire distinction between combatants and civilians might only make sense if we are talking about combatants and civilians of the enemy population…One could further argue that it would a) seem beyond dispute that a regime which in peace times tried to cleanse its own armed forces of, for example, all soldiers holding a particular ethnicity or faith, would under international customary law be engaging in a variety of crimes against humanity, because the victims' combatant quality merely because they are soldiers would be entirely irrelevant in this context, and that b) there is no reason to think otherwise if such a campaign happened in the course of or otherwise connected to an armed conflict.[5]

The factual context to this legal problem is contained within Cases 003[6] and 004[7] at the ECCC. It appears that the legal issue identified by the OCIJ has arisen in the context of attempting to prosecute a number of accused for internal purges perpetrated against Khmer Rouge cadres during the regime. As noted by the OCIJ, the issue of what effect the presence of soldiers or combatants among a target group has on the interpretation of 'civilian population' for the purposes of identifying a CAH becomes a vital legal issue when regimes target their own soldiers. The situation is complicated further by the need to ascertain customary international law at the time of the crimes, thus requiring particular consideration of jurisprudence prior to 1975-1979.

The authors were involved in the submission of an amicus on this issue. At the request of the OCIJ, the submission did not apply its legal findings to the specific context of the ECCC, but explored the issue as an abstract question of law. In this article, we wish to put forward some

[5] *Supra*, note 3, para. 5.
[6] 'Case 003', *ECCC Website*, www.eccc.gov.kh/en/case/topic/286 (last accessed 07/06/2016).
[7] 'Case 004', *ECCC Website*, www.eccc.gov.kh/en/case/topic/98 (last accessed 07/06/2016); 'Case 004/01', *ECCC Website*, www.eccc.gov.kh/en/case/topic/1662 (last accessed 07/06/2016).

thoughts on the possible legal approaches open to the OCIJ, applying our legal analysis to the specific factual context. The issue of whether attacks against soldiers and combatants may constitute CAH is not only of importance to the ECCC. As noted by the OCIJ, it does not appear that any of the other contemporary international criminal tribunals, such as the International Tribunals for Rwanda (ICTR) and the former Yugoslavia (ICTY), or the International Criminal Court (ICC) have specifically addressed this particular question.[8] Thus, the ECCC has the opportunity to contribute significantly to the development of international criminal law. An in-depth analysis of this area of law is therefore particularly timely.

This article shall proceed as follows. We shall first provide some factual background by exploring the phenomenon of internal purges during the Khmer Rouge era and outlining some of the crimes allegedly perpetrated by the accused in Cases 003 and 004. We shall then explore the creation of CAH, which emerged as a way of addressing what was later described as the 'protection gap' between genocide and war crimes.[9] We then examine the customary international law applicable between 1975 and 1979. We argue that the law at this time permitted members of the armed forces to be considered civilians for the purposes of CAH, and that the OCIJ would be justified in adopting such an approach. We then analyse recent developments in contemporary international criminal tribunals. While these developments are outside the period under discussion, they may provide guidance, as the language of Article 5 of the ECCC Statute reflects contemporary formulations of CAH. We argue that while international criminal law continues to acknowledge that attacks against members of the armed forces may amount to CAH, recent jurisprudence has adopted a restrictive approach which goes against the spirit in which the crime was created, and reopens the 'protection gap'. We argue that not only is a less restrictive interpretation justified by our analysis of the law at the

[8] Call for Submissions, *supra* note 3, para. 4.
[9] *The Prosecutor v Mrkšić et al*, Trial judgment, Case No. IT-95-13/1-T, T. Ch. II, 27 September 2007 para. 461.

relevant time, it is also appropriate in light of the spirit in which CAH was created. Thus, the OCIJ has the opportunity to both clarify the law, and oppose this restrictive interpretation.

2. Purges and Persecution under the Khmer Rouge

The Khmer Rouge purges undoubtedly constituted a significant source of death and suffering during the regime.[10] Former cadres have spoken of Pol Pot's plan to address 'betrayal' within the party,[11] and to 'smash' those who were seen as 'impure'.[12] The result was a massive wave of internal purges that led to the deaths of thousands of cadres.[13] The violence accelerated throughout the regime, as the Khmer Rouge 'purged and re-purged itself'.[14] It appears that the standard purge process was to send trusted cadres into an area and systematically arrest and execute local officials,[15] while the Khmer Rouge leaders publicly denounced the victims as enemies.[16] Many were sent to the infamous S-21 security centre, where, of the 14,000 individuals murdered, it is estimated that more than 1,000 were Khmer Rouge soldiers.[17]

In his call for amicus submissions, the International CIJ spoke of 'a regime which… tried to cleanse its own armed forces of, for example, all soldiers holding a particular ethnicity or faith.'[18] This may be interpreted as a reference to the strong discriminatory nature of many of the purges, and to the broader discriminatory policies that the Khmer Rouge directed against

[10] For details, see B. Kiernan, *The Pol Pot Regime: Race, Power, and Genocide in Cambodia under the Khmer Rouge, 1975-1979* (2008) Chapter Eight.
[11] R. Moss, 'Cadre addresses KR purges' *Phnom Penh Post*, 23 April 2015.
[12] J. Ciorciari and Y. Chhang, 'Documenting the Crimes of Democratic Kampuchea' in J. Ramjo and B. Van Schaak (eds.), *Bringing the Khmer Rouge to Justice. Prosecuting Mass Violence Before the Cambodian Courts* (2005) 221 at 241, 280.
[13] *Ibid.*
[14] K. D. Jackson (ed.), *Cambodia, 1975–1978: Rendezvous with Death* (1989) 3; S. Heder and B.D. Tittemore, *Seven Candidates for Prosecution: Accountability for the Crimes of the Khmer Rouge* (2001) 36.
[15] Kiernan, *supra* note 10, at 244.
[16] S. Heder and B.D. Tittemore, Seven Candidates for Prosecution: Accountability for the Crimes of the Khmer Rouge (2001) at 39 citing "Weekly Report of the Sector 5 Committee," May 21, 1977 (DC-Cam document with no cataloguing mark visible).
[17] R.J. Fey, *Genocide and International Justice* (2009) 91.
[18] Call for Submissions, *supra* note 3, at para. 4.

ethnic and religious groups such as the Khmer Krom,[19] the Cham Muslims,[20] Buddhists[21] and the ethnic Vietnamese.[22] The regime singled these groups out for extermination, as it pursued its goal of creating a completely homogenous society.[23] It is therefore likely that the CIJ was referring to the Khmer Rouge's violent attempts to purge the Party of members who it deemed undesirable because of their ethnic, political or religious background, as well as those who demonstrated an alleged lack of ideological commitment.

The accused in Cases 003 and 004 face a number of charges of CAH,[24] and the OCIJ has identified purges in Case 004, and crimes perpetrated against members of Khmer Rouge Divisions in Case 003, as being part of its investigations.[25] Indeed, two of the largest purges appear to fall within the scope of Cases 003 and 004.[26] In the context of Case 003, it is alleged by Heder and Tittemore and others that in April 1975 the accused Meas Muth became secretary of a section of Cambodia known as Division 164,[27] where he used his authority to bring about a purge, executing some, and sending others to the S-21 security centre in Phnom Penh.[28] The charges against him reflect these allegations, as they include CAH perpetrated at various security centres, in a number of worksites, and against members of Divisions 164, 502, 117,

[19] Kiernan, *supra* note 10, at 299. See also J.D. Ciorciari, 'The Khmer Krom and the Khmer Rouge Trials' (August 2008) DC-Cam.
[20] Case 002, Closing Order, 002/19-09-2007/ECCC/, Office of the Co-Investigating Judges, 15 September 2010, paras. 1336-1449.
[21] *Ibid.* at para. 210.
[22] Ciorciari and Chhang, *supra* note 12, at 247.
[23] J.A. Tyner, *The Killing of Cambodia: Geography, Genocide and the Unmaking of Space* (2008), 114.
[24] 'The International Co-Investigating Judge Charges Im Chaem in absentia in Case 004', *ECCC Website*, www.eccc.gov.kh/en/articles/international-co-investigating-judge-charges-im-chaem-absentia-case-004; 'Mr Yim Tith charged in Case 004', *ECCC Website*, www.eccc.gov.kh/en/articles/mr-yim-tith-charged-case-004; 'The International Co-Investigating Judge charges Ao An in Case 004', *ECCC Website*, www.eccc.gov.kh/en/articles/international-co-investigating-judge-charges-ao-case-004; 'Mr Meas Muth charged in Case 003', *ECCC Website*, www.eccc.gov.kh/en/articles/mr-meas-muth-charged-case-003 (all last accessed 07/06/2016).
[25] *Ibid.*
[26] R.C. DeFalco, 'Cases 003 and 004 at the Khmer Rouge Tribunal: The Definition of "Most Responsible" Individuals According to International Criminal Law' (2014) 2(8) *Genocide Studies and Prevention: An International Journal* 45, at 57.
[27] Heder and Tittemore, *supra* note 16, at 99-113.
[28] 'Meas Muth, Trial: Profiles', *Trial International*, www.trial-ch.org/en/resources/trial-watch/trial-watch/profiles/profile/4269/action/show/controller/Profile.html (last accessed 02/06/2016).

and 310.[29] In the context of Case 004, the accused, Ao An, is alleged to have held the position of Deputy Secretary of the Central Zone in 1977, where approximately 150,000 people were executed.[30] He allegedly purged the Zone of those he declared 'disloyal' for failing to meet the goals set by the regime, arresting and murdering virtually all officials and their families.[31] Amongst the charges against him are allegations of persecution on political and religious grounds, including crimes against Khmer Rouge cadres and their families.[32] The accused Im Chaem allegedly became Secretary of Preah Net Preah district in Banteay Meanchey province during the 1977 Khmer Rouge purge of the Northwest Zone, where she reportedly oversaw five camps and prisons where nearly 50,000 people died.[33] The charges against her include allegations of persecution on political grounds.[34] Finally, the accused Yim Tith initially held the position of Secretary of Kirivong in the Southwest Zone, later becoming Deputy Secretary of the Northwest Zone, where he 'had knowledge of, ordered and possibly directly participated in the torture and mutilation of prisoners'.[35] The charges against him specifically include 'persecution against the so-called "17 April people", "East Zone Evacuees", Northwest Zone cadres, their families and subordinates, as well as the Khmer Krom and Vietnamese'.[36]

Having outlined the factual background to the OCIJ's query, we now turn to the law applicable at the time of the Khmer Rouge, in order to consider whether there is support for classifying crimes perpetrated against members of the armed forces as CAH. The following sections will consider the initial purpose behind the creation of the offence of CAH, before considering who

[29] Mr Meas Muth charged in Case 003', *ECCC Website*, www.eccc.gov.kh/en/articles/mr-meas-muth-charged-case-003 (last accessed 24/06/2016).
[30] DeFalco, *supra* note 26, at 56.
[31] D.Gillison, 'Extraordinary Injustice', *The Investigative Fund*, 27 February 2012, www.theinvestigativefund.org/investigations/international/1612/extraordinary_injustice/ (last accessed 07/06/2016).
[32] G. Wright, 'Khmer Rouge Tribunal Charges Ta An with Genocide' *The Cambodia Daily*, 15 March 2016.
[33] DeFalco, *supra* note 26, at 56.
[34] OCIJ Charges Im Chaem, *supra* note 24.
[35] J. Ferrie, 'Khmer Rouge crimes in legal limbo', *The National*, 24 July 2011.
[36] OCIJ Charges Yim Tih, *supra* note 24.

has been historically considered as constituting a victim of such crimes. Case law will be used to demonstrate that while CAH are often defined as being perpetrated against 'civilians', this has historically been interpreted broadly, allowing members of the armed forces to be victims of CAH perpetrated by their own state.

3. Defining Crimes Against Humanity

One of the primary purposes behind the conception of CAH was the protection of the human rights of all people within a state against widespread or systematic brutality committed by governments or other organizations.[37] From the earliest attempts to define crime 'against the laws of humanity' following the First World War, through to the first codifications of CAH in the aftermath of the Second World War, it is evident that the legislation was designed to protect the human rights of all individuals.[38] The concept of CAH was initially linked to international humanitarian law,[39] an area of law that has historically drawn a distinction between civilians and combatants,[40] but has also sought to ensure that individuals' rights are protected during conflict. While the absolute protection of civilians during conflict must be balanced against military necessity – which may justify an otherwise unlawful act against the civilian population or a civilian object – an attempt to narrow 'protection gaps' is nonetheless evident in international humanitarian law.[41] The Fourth Geneva Convention, for instance, focuses on the notion of protected persons, providing that:

[37] International Co-Prosecutor Amicus (D306/2). N. Geras, *Crimes against Humanity: Historical Evolution and Contemporary Application* (2011), at 5-7, discusses the purposes behind the creation of CAH, including the primary purpose stated above, as well as such purposes as an attempt to further the norms of warfare.
[38] Amicus, *ibid.*
[39] M. C. Bassiouni, *Crimes against Humanity in International Criminal Law* (1999), at 44-60.
[40] *Prosecutor v. Martic*, ICTY, IT-95-11-A, Appeal Judgement, 8 October 2008, para 299.
[41] M.N. Schmitt, 'Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance' (2010) 50(4) *Virginia Journal of International Law* 795, at 798

> Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.[42]

While Article 4 provides that those afforded special protection under the other Geneva Conventions 'shall not be considered as protected persons within the meaning of the present Convention',[43] the 1958 Commentary to the Geneva Conventions provides that 'if, for some reason, prisoner of war status – to take one example – were denied to them, they would become protected persons'.[44] As such, the concept of protected persons is residual in nature, demonstrating an intention to narrow the 'protection gap'.

Crimes against humanity emerged as a distinct category of crime in order to continue narrowing this protection gap, by protecting individuals from extreme harm that fell outside the definitions of war crimes and genocide.[45] Specifically this category of crime can be used to try individual perpetrators for acts that: form part of a widespread or systematic attack on civilians both within or *outside* of an armed conflict; a state commits against its own people;[46] and do not fit the technical and narrow requirements of genocide.[47] CAH's subsequent development has been influenced by international human rights law, which was designed, in part, to protect individuals in their relationships with states.[48] While the definition of CAH has undergone many revisions, one of the foremost scholars in international criminal law, Cassese, suggests that definitions of CAH have the following common features:[49]

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[42] Article 4 Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.
[43] *Ibid.*
[44] International Committee of the Red Cross, *IV Geneva Convention relative to the Protection of Civilian Persons in Time of War: Commentary*, 1958, 49.
[45] Bassiouni, *supra* note 39, at 61.
[46] *Case No. 35 (The Justice Trial: Trial of Josef Altstötter and Others)*, UNWCC, 30 November 1947.
[47] A. Cassese, *International Criminal Law: Cases and Commentary* (2013), 154.
[48] *Ibid* at 155.
[49] A. Cassese, *International Criminal Law* (2003), 64.

> They are particularly odious offences [,] … they are not isolated or sporadic events, but are part of a governmental policy, or of a widespread or systematic practice of atrocities tolerated, condoned, or acquiesced in by a government or a de facto authority [,] … they are prohibited … regardless of whether they are perpetrated in time of war or peace [, and] … the victims may be civilians.

When determining the applicability of the 'crimes against humanity' label to crimes perpetrated against Khmer Rouge cadres, it is the last element, defining 'victimhood' and 'civilians', that is the most important, and which will be particularly considered in the following sections.

3.1. The 'Civilian' Requirement

Following the First World War, France, Britain, and Russia issued a Joint Declaration on 24 May 1915, condemning 'those new crimes of Turkey against humanity and civilisation', and pronouncing that the Allied governments, 'will hold personally responsible these crimes all members of the Ottoman government and those of their agents who are implicated in such massacres'.[50] The Paris Peace Conference in 1919 resulted in the establishment of a Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties (Commission), whose report presented evidence of violations 'against the law and customs of war and of the laws of humanity'.[51] This report essentially proposed a new category of international crime 'against the laws of humanity' that could be applied to the attacks committed by Turkey on its own nationals in its own territories. Specifically, the Commission pointed to the mass killings of Armenians within the Ottoman Empire.[52] In addition, the

[50] Joint Declaration by France, Great Britain and Russia (24 May 1915, Paris, London & Petrograd), www.armenian-genocide.org/Affirmation.160/current_category.7/affirmation_detail.html (last accessed 05/07/2015).
[51] L. Moir, 'Crimes Against Humanity in Historical Perspective', (2006) 3 *New Zealand Yearbook of International Law* 101, at 108.
[52] Cassese, *supra* note 49, at 64.

Commission explored the issue of the targeting of Armenians within the Ottoman Army, acts that included disarming Armenian soldiers, transferring them to labour brigades and subjecting many to eventual execution.[53] Although the report was adopted unanimously, its recommendations to establish a further commission of inquiry as well as an international tribunal for war crimes were not carried out.[54] Nonetheless, the report marked an important shift in the realm of international law: it solidified some of the foundational conceptions informing the creation of CAH; it highlighted the issue of defining victimhood, notably including members of the armed forces within this definition; and it served as a precedent for Article 6 of the Nuremberg Charter.[55] Furthermore, according to Wexler, it also implied that minority groups would have protection from their own government through international law, established individual criminal responsibility for violations of the 'laws of humanity', and recognised their independence from war crimes.[56] Thus, an analysis of the very conception of CAH demonstrates that members of the armed forces were not excluded from constituting victims, and that members of minority groups were intended to receive protection against persecution by state actors.

Subsequent definitions have varied in their approach towards the definition of CAH, and the inclusion or otherwise of a 'civilian' requirement. CAH first appeared in positive international law in 1945, when it was defined in Article 6 of the Nuremberg Charter.[57] The Nuremberg Charter[58] and the subsequent Control Council Law No.10, [59] both define CAH as:

[53] Amicus, *supra* note 37.
[54] Moir, *supra* note 51, at 109
[55] Amicus *supra* note 37; Moir, *supra* note 50, at 112.
[56] L. S. Wexler, 'The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again', (1994-1995) 32 *Columbia Journal of Transnational Law* 289, at 298.
[57] Moir, *supra* note 51, at 112.
[58] *Charter of the International Military Tribunal, Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis*, 8 August 1945, Art. 6(c).
[59] *Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity*, 20 December 1945, Art. II.

> murder, extermination enslavement, deportation, imprisonment, torture, rape or other inhuman acts committed against any civilian population *or* persecution on political, racial or religious grounds, whether or not in violation of the domestic laws of the country where perpetrated.

This definition gives rise to two categories of CAH, (i) acts against civilian populations, and (ii) persecution on political, racial, or religious grounds. Whilst the first category within this definition clearly contains reference only to 'civilian' populations, the second category contains no such exclusions. As explained by Cassese,

> since no mention is made of the possible victims of persecutions, or rather, as it is not specified that such persecutions should target 'any civilian population', the inference is warranted that not only any civilian group but also members of the armed forces may be the victims of this class of crimes. [60]

Support for a primary focus on persecution, rather than on the status of the victim, can be found in the work of jurists in the aftermath of the Second World War. For example, at the 1947 Conference for the Unification of Penal Law, discussions around CAH focused predominantly on the existence of persecution. Its Resolution, drafted by some of the 'best jurists in the world',[61] proposed a definition of CAH that removed the concept of 'civilians', and instead specified that:

> Any manslaughter, or act which can bring about death, committed in peace time as in war time, against individuals or groups of individuals, because of their race,

[60] A. Cassese, *International Criminal Law* (2nd ed) (2008), 118.
[61] Joseph Y. Dautricourt, 'Crime Against Humanity: European Views on Its Conception and Its Future' (1949-1950) 40(2) *Journal of Criminal Law and Criminology* 170, at 170.

> nationality, religion or opinions, constitutes a crime against humanity and must be punished as murder.[62]

While the Nuremberg Charter's two-category definition continued to be utilised, for example in the International Law Commission's (ILC) 1950 Nuremberg Principles and the 1968 Convention on the Non-Applicability of Statutory Limitations,[63] in 1954 the ILC released its Draft Code of Offences against the Peace and Security of Mankind, defining CAH as:

> Inhuman acts such as murder, extermination, enslavement, deportation or persecutions, committed against any civilian population on social, political, racial, religious or cultural grounds.[64]

This definition is significantly closer to that used by the ECCC, and merges the two categories of CAH together, entrenching the civilian requirement into incidences of persecution. Certainly, the drafting process demonstrated a state practice to include a 'civilian' requirement.[65] However, these sources illustrate that prior to 1975 differing approaches existed with regards to the inclusion of a civilian requirement in cases of persecution. Furthermore, the creation of these legal instruments included relatively little consideration of the definition of a 'civilian', or whether combatants could be victims.[66] It is therefore worth considering how case law interpreted the 'civilian' requirement.

[62] Resolution of the VIII Conference for the Unification of Penal Law, Brussels, 10th and 11th July, 1947.
[63] Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal. Adopted by the International Law Commission of the United Nations, 1950; Convention on the Non-Applicability of Statutory Limitations, Art. I (b).
[64] Yearbook of the International Law Commission 1954, vol. E, pp. 150-152, document A/2673.
[65] E.g. Report of the International Law Commission on the Work of its Sixth Session, in United Nations, Yearbook of the International Law Commission (1954) Vol.II at p.150.
[66] Report of the International Law Commission, UNGAOR, 5th Sess., Supp. No 12, U.N.Doc. A/1316(1950).

4. Exploring the boundaries of 'Civilian'

Definitions of 'victims' and 'civilians' were not the focus of many cases prior to 1975. Within its judgments, the Nuremberg Tribunal failed to make a distinction between the two categories of CAH and neglected to address the term 'civilian population'; thus, failing to advance the conceptualisation of victimhood.[67] Fortunately, subsequent trials have tackled these issues, in particular, two judgments delivered in the French courts. These judgments provide evidence in support of Cassese's conclusion that in a situation where the state is engaging in inhumane acts and persecution on political, racial, or religious grounds, there is no requirement that the victims be civilians.[68] This is important in the context of CAH before the ECCC, as Article 5 of the ECCC Law defines CAH as crimes perpetrated on 'national, political, ethnical, racial or religious grounds'.

The French Cour de cassation issued one of the most important judgments on the definition of 'victims' during the trial of Klaus Barbie. A major question raised during the *Barbie* Trial was 'whether this specific crime can be applied to any individual victim, or is it reserved only for those victims who are not fighting in the war?'[69] Initially, the Investigating Judge and Grand Jury of the Appeals Court argued that the victim's status as members of the Resistance prevented them from being victims of CAH. However, the Cour de cassation quashed this judgment, finding that 'members of the resistance could be victims of crimes against humanity as long as the necessary intent for crimes against humanity was present'.[70] Thus, the *Barbie* case reinforced the distinction between the two categories of CAH, reaffirming that when a

[67] Wexler, *supra* note 56, at 310.
[68] *Case No. 35*, *supra* note 45; *In re Pilz. Holland*, District Court of The Hague (Special Criminal Chamber), 21 December 1949; Special Court of Cassation, 5 July 1950.
[69] J-O. Viout, 'The Klaus Barbie Trial and Crimes against Humanity' (1999) 3 *Hofstra Law & Policy Symposium* 155, at 163.
[70] *Ibid*. at 164.

state engages in persecutions on political, racial, or religious grounds, there is no requirement that the victims be civilian. As stated by the Cour de cassation:

> it is the intention of the perpetrator of the crimes and not the quality or motives of the victims that determine the nature of the persecution committed … *neither the victims' motives nor their classification as combatants could exclude the guilty intent* giving rise to Crimes against Humanity which shall be prosecuted… Crimes against Humanity include inhumane acts and persecutions committed in a systematic manner against people belonging to a particular race or religious community in the name of the State which is carrying out its policy of ideological hegemony … including inhumane acts and *persecutions committed against adversaries of this policy, no matter what form this opposition may take*.[71]

The Cour de cassation followed this line of reasoning in relation to the crimes committed against members of the Resistance, including Lise Lesevre and Professor Gompel. The Court found that Barbie had arrested, tortured, and sent Lesevre to a concentration camp. It concluded that:

> when Barbie has tortured, or had others torture, members of the Resistance in order to obtain information of a military nature, he has committed war crimes, but when Barbie had Resistance members deported to concentration camps, where they were tortured and exterminated, he acted as a participant in the National Security policy of ideological hegemony.[72]

Thus, the Court affirmed that an individual's membership in an armed group was irrelevant, what was important was the establishment of the perpetrator's intention while engaging in acts

[71] *Ibid.* at 155-166 (emphasis added).
[72] N. R. Doman, 'Aftermath of Nuremberg: The Trial of Klaus Barbie', (1989) 60 *University of Colorado Law Review* 449, at 460-61.

of persecution. Gompel was another member of the Resistance who Barbie had arrested and tortured. The Court originally held that because it was 'not clear whether Professor Gompel has been arrested in his capacity as a Jew or in his capacity as a member of the Resistance, Barbie would benefit from the doubt and could not be charged with this offense, as it had prescribed'.[73] However, the Cour de cassation took the opposite approach, stating that:

> in excluding from the definition of crimes against humanity the acts imputed to the defendant that could have been committed against persons belonging to or that could have been part of the Resistance, whereas the opinion states that these "atrocious" crimes, of which the persons who were systematically or collectively the victims, were presented, by those in whose name they were perpetrated, as being politically justified by the national-socialist [Nazi] ideology, and *whereas neither the mental intent of the victims, nor the possibility that they were combatants, could exclude the existence, on the defendant's part, of the mental intent required* for the infraction pursued, the Indicting Chamber has misunderstood the scope and meaning of the law.[74]

Thus, the Court emphasised the intent of the perpetrator, rather than the status of the victim. While the *Touvier* case did not delve into as much depth when considering the issue of victimhood, the Court did come to a similar conclusion. The Cour d'appel de Paris found that:

> Jews and members of the Resistance persecuted in a systematic manner in the name of a state practising a policy of ideological supremacy, the former by reason of their membership of a racial or religious community, the latter by reason of their opposition to that policy, can equally be the victims of crimes against humanity.[75]

[73] Wexler, *supra* note 56, at 339.
[74] *Ibid*. at 342.
[75] *Republic of France v Paul Touvier*, Cour d'appel de Paris, 13 April 1992, 352.

It is clear from the *Barbie* and *Touvier* cases that members of the armed forces, including the resistance, were to be included within the second category of CAH. According to these judgments, the status of the victims as members of the armed forces was irrelevant, the intention of the perpetrator and the context of the crimes were what was important. This appears to be in keeping with the original spirit in which CAH were established: as a means of ensuring protection of the human rights of all people within a state against widespread or systematic brutality committed by governments or other organisations.[76]

Thus, an analysis of the law and legal opinion in relation to CAH prior to the Khmer Rouge regime of 1975-1979 supports the conclusion that in a situation where the state is engaging in inhumane acts and persecution on political, racial, or religious grounds, there is no requirement that the victims be civilians.[77] As concluded by Cassese:

> Plainly, in times of peace military personnel too may become the objects of crimes against humanity at the hands of their own authorities. By the same token, in times of armed hostilities, *there is no longer any reason for excluding servicemen, whether or not hors de combat (wounded, sick, or prisoners of war),* from protection against crimes against humanity (chiefly persecution), whether committed by their own authorities, by allied forces, or by the enemy.[78]

As noted above, Article 5 of the ECCC law requires CAH to have been perpetrated on 'national, political, ethnical, racial or religious grounds', thus incorporating an implied reference to persecution. Unlike the formulations used in these courts, Article 5 does not separate crimes against civilians and the crime of persecution. However, we argue that the above approach should nonetheless guide the ECCC in its application of Article 5; as we

[76] Bassiouni, *supra* note 39, at 61.
[77] *Case No. 35*, *supra* note 46; *In re Pilz. Holland*, *supra* note 68.
[78] Cassese, *supra* note 60, at 122.

explore below, the addition of the civilian requirement should not be used to limit the applicability of CAH through persecution.

It is worth noting that post-Second World War jurisprudence also featured a liberal interpretation of the term 'civilians' outside the context of persecution. For example, in the case of *R. (StS 19/48),*[79] the Supreme Court for the British Occupied Zone found that denouncing a non-commissioned officer in uniform could constitute CAH, as long as it could be demonstrated that the agent's intention was to hand over the victim to the 'uncontrollable power structure of the party and State', knowing that, as a consequence, the victim was likely to be caught up in an arbitrary and violent system.[80] Similarly, in *P. and others*, five members of a Court Martial were found guilty of complicity in a CAH for their role in executing three German marines who tried to escape from Denmark following Germany's partial capitulation. The Court noted that actions between soldiers could constitute CAH, if it could be shown that the 'action at issue can belong to the criminal system and criminal tendency of the Nazi era'.[81] In the *H. case*, the same Court found that a judge who had sentenced to death two officers of the German Navy 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.[82]

From this analysis, it can be seen that customary international law at the time of the Khmer Rouge crimes incorporated a broad conception of who could be a victim of a CAH. The status of victims has been repeatedly found to be irrelevant, where the crimes were perpetrated in the context of states practising hegemonic political ideologies enforced through arbitrary and violent systems. There is therefore a strong case in support of the International CIJ's supposition that a regime which, during an armed conflict, tried to cleanse its own armed forces

[79] *Case of R. (StS 19/48*), Supreme Court for the British Occupied Zone, 27 July 1948.
[80] *Ibid*, 47.
[81] *P. and others*, Germany, Supreme Court in the British Occupied Zone, 7 December 1948, 228.
[82] *H. case*, Germany, Supreme Court in the British Occupied Zone, 18 October 1949, 233-4, 238, 241-4.

of all soldiers holding a particular ethnicity or faith, would under international customary law be engaging in a variety of CAH, because the victims' combatant quality merely because they are soldiers would be entirely irrelevant in this context.

Such an approach is also in keeping with the spirit of international humanitarian law. As noted above, one of the goals of this area of law has historically been to protect those rendered vulnerable during conflict. For example, while Article 50 of the 1977 Additional Protocol I[83] excludes members of the armed forces from being considered a 'civilian',[84] Commentary on the Protocols notes that: 'In protecting civilians against the dangers of war, the important aspect is not so much their nationality as the *inoffensive character of the persons to be spared and the situation in which they find themselves'*.[85] Thus, while international humanitarian law has traditionally explicitly excluded members of the armed forces from its definition of 'civilian', it nonetheless recognises the importance of protecting individuals who find themselves in a situation of vulnerability. The development of CAH reflects the desire to protect vulnerable individuals who fall outside the remit of international humanitarian law. Indeed, the need for the law to recognise and protect vulnerability is a theme that consistently runs through our analysis.

The following section explores the boundaries of civilian in the jurisprudence of the ICTY, ICTY and ICC. Due to the principle of non-retroactivity, the jurisprudence of these contemporary courts have no direct applicability to the status of customary international law between 1975 and 1979. Furthermore, contemporary tribunals have adopted varying definitions of CAH, and Bassiouni has opined that the tribunals developed their specific

[83] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.
[84] *Ibid.*
[85] International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, 1987, 610.

definitions to reflect their specific contexts and were not intended for future application.[86] Nonetheless, these tribunals have considered the appropriate definition of the term 'civilian', and have in some instances used similar formulations of CAH to that utilised by the ECCC. As such, they can provide guidance on possible interpretations of CAH, the term 'civilian', and the possibility of armed forces being victims of CAH perpetrated by State actors. It will be demonstrated below that while nothing in this jurisprudence explicitly excludes members of the armed forces from being victims of CAH, a more restrictive interpretation of 'civilian' has emerged, which the ECCC has the opportunity to counter in its own work.

5. Crimes Against Humanity in Contemporary Tribunals

The ECCC definition of CAH is an almost verbatim repetition of Article 3 of the Statute of the ICTR, which contains a list of crimes that constitute CAH when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.[87] A particularly significant development is that the two categories of CAH identified under customary international law – acts against a civilian population and persecution on national, political, ethnic, racial or religious grounds – have been collapsed into one category under Article 3. Due to its similarities to the ECCC's formulation, the ICTR's jurisprudence is of particular interest as an example of how courts have interpreted such provisions, which will be returned to below.

In contrast, the ICTY and ICC have abandoned the discriminatory element of CAH – although persecution is included as a specific underlying crime - while retaining the notion of 'civilians' as victims. Article 5 of the Statute of the ICTY contains a list of crimes that, when committed in armed conflict, whether international or internal in character, and directed against any

[86] Bassiouni, *supra* note 39, at 198.
[87] Art. 3 *Statute of the International Criminal Tribunal for Rwanda* (as last amended on 13 October 2006), 8 November 1994.

civilian population, constitute CAH.[88] Ultimately, this definition is regressive in nature, as it revives the original 'Nuremberg' nexus with armed conflict.[89] However, the court has subsequently found that 'customary international law may not require a connection between CAH and any conflict at all'.[90] Consequently, the ICTY has held that Article 5 only requires that the acts are committed within an armed conflict, for the purposes of jurisdiction, and that 'the nexus which is required is between the accused's acts and the attack on the civilian population'.[91] Article 7 of the Statute of the ICC provides an extended list of crimes that may constitute CAH when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.[92] During the negotiations for the Rome Statute, the inclusion of a civilian requirement proved controversial with some delegations preferring the wording 'any population' as opposed to 'any civilian population'. In the end, the latter term was agreed upon as it was held to be consistent with customary international law; however, those against such wording were comforted by the fact that case-law existed to support a flexible interpretation of the term 'civilian', such as the *Barbie* case discussed earlier.[93] While the exclusion of a discriminatory element renders the jurisprudence of these courts less persuasive in the context of the ECCC, they still contain useful guidance on the interpretation of the term 'civilian'.

These contemporary formulations of CAH are a regression from customary international law and are troubling, as they potentially leave soldiers and combatants unprotected. Consequently, the question of how courts should interpret the phrase 'any civilian population' becomes of

[88] Art.5 *Statute of the International Criminal Tribunal for the former Yugoslavia* (as amended on 17 May 2002), 25 May 1993.
[89] Art. 6(c) *Nuremberg Charter*, *supra* note 58.
[90] *The Prosecutor v Tadić* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-T, T. Ch., 2 October 1995, para. 141.
[91] *The Prosecutor v Kordic and Cerkez*, Trial Judgment, Case No. IT-95-14/2-T, T.Ch., 26 February 2001, para. 33.
[92] Art. 7 *Rome Statute of the International Criminal Court* (last amended 2010), 17 July 1998.
[93] H. von Hebel and D. Robinson, 'Crimes Within the Jurisdiction of the Court' in R.S. Lee (ed) *The International Criminal Court: The Making of The Rome Statute Issues, Negotiations, Results* (1999) 97.

significant practical importance. Contemporary tribunals have considered this question in two parts: firstly, which individuals fall within the definition of 'civilian' and, secondly, what are the necessary characteristics of the population under attack.

5.1 From Civilian to *Hors de Combat*

While the term 'civilian' is primarily understood as referring to non-combatants, case-law from the ICTR has adopted a broad interpretation of the term civilian, which incorporates *hors de combat*.[94] In *Akayesu* it was held to include '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.'[95] Furthermore, the *Kayishema* case provided a negative definition of civilian in the context of relative peace: 'all persons except those who have the duty to maintain public order and have the legitimate means to exercise force'.[96] On the face of it, this latter interpretation could be viewed as regressive in nature as it excludes, for example, members of the police or peacekeeping forces as potential victims. However, the interpretation of civilian as including *hors de combat* enables these individuals to claim victim status. This was evidenced in the military cases; when 10 Belgian peacekeepers were beaten and executed by the Rwandan army after being captured, it was held that it did not matter that one of them had obtained a weapon to use in self-defence before they were killed. The fact of a weapon did not change their vulnerable status and the attack against them forming part of a larger CAH.[97] Moreover, the peacekeepers were held to be protected persons because their 'mandate "did not include combat"', indicating that they 'were disarmed

[94] For definition see J. Henckaerts and L. Doswald-Beck, *Customary International Law, Volume 1: Rules*, (2005) Rule 47.
[95] *The Prosecutor v Akayesu*, Trial Judgment, Case No. ICTR-96-4-T, T.Ch. I., 2 September 1998, para. 582.
[96] *The Prosecutor v Kayishema*, Trial Judgment, Case No. ICTR-95-1-T, T. Ch. II, 21 May 1999, para. 127 (emphasis in original).
[97] *The Prosecutor v. Théoneste Bagosora et al.* Trial Judgment, Case No. ICTR-98-41-T, T.Ch. I,, 18 December 2008, paras. 2175 and 2239; *The Prosecutor v Augustin Ndindiliyimana, Augustin Bizimungu, François-Xavier Nzuwonemeye, Innocent Sagahutu*, Trial Judgment, Case No. ICTR-00-56-T, T.Ch II., 11 May 2011, paras. 2095-96 and 2140.

before they were killed'.[98] Thus, the focus was on their heightened vulnerability rather than their formal status. We would argue that the ECCC should follow this approach: Khmer Rouge cadres subjected to purges would be in a position of heightened vulnerability, with their formal status having little relevance to their victimhood. Such an approach is also in keeping with that of customary international law post-Second World War.

Early jurisprudence from the ICTY similarly recognised the need to adopt a 'wide definition of civilian population'.[99] In *Kupreskic*, the ICTY juxtaposed the protection afforded to civilians as opposed to combatants under Article 5 of its Statute:

> It would seem that a wide definition of "civilian" and "population" is intended. This is warranted first of all by the object and purpose of the general principles and rules of humanitarian law, in particular by the rules prohibiting crimes against humanity. *The latter are intended to safeguard basic human values by banning atrocities directed against human dignity.* One fails to see why only civilians and not also combatants should be protected by these rules (in particular by the rule prohibiting persecution), given that these rules may be held to possess a *broader humanitarian scope* and purpose than those prohibiting war crimes.[100]

According to Ambos and Wirth, *Kupreskic* represents a human rights-based understanding of CAH, as 'not only the human rights of civilians but also those of soldiers can be violated'.[101] Building on this expansive approach, *Blaškić* delimited two categories of people who could qualify as civilians for the purposes of CAH. The first category included 'members of resistance movements and former combatants – regardless of whether they…wore uniform or

[98] *The Prosecutor v Ndindiliyimana, Nzuwonemeye, Sagahutu,* Appeal Judgment, Case No. ICTR-00-56-A, A.Ch., 11 February 2014, para. 216.
[99] *The Prosecutor v Tadić.* Trial Judgment, Case, No. IT-94-1-T, T.Ch., 7 May 1997, para. 643.
[100] *The Prosecutor v Kupreskic* Trial Judgment, Case No. IT-95-16, T.Ch., 14 January 2000, para. 547.
[101] K. Ambos and S. Wirth, 'The Current law of Crimes Against Humanity: An analysis of UNTAET Regulation 15/2000' (2002) 13(1) *Criminal Law forum* 1, at 22.

not – but who were no longer taking part in hostilities when the crimes were perpetrated because they had either left the army or were no longer bearing arms or…had been placed *hors de combat*…'. The second category was to be determined by the 'specific situation of the victim the moment the crimes were committed, rather than his status'.[102]

It is clear from the above analysis that there has been continued recognition within contemporary courts that soldiers, combatants and those who have the legitimate means to exercise force can be victims of CAH where they are placed *hors de combat*: effectively demobilized and in a state of vulnerability. From what we know of the Cambodian context, the cadres were detained in security centres, suggesting that they were disarmed; thus, they were *hors de combat* and qualify as 'civilians' for the purpose of establishing CAH, so long as the discriminatory motive required under Article 5 of the ECCC Statute is proven. Indeed, the Khmer Rouge based its purges on the ethnicity, political or religious background of the soldiers as well as their lack of ideological commitment.

However, there has been a subsequent narrowing of the ICTY's approach to the term 'civilian' and a growing consensus that the term should be defined as provided in Article 50 of Additional Protocol I, meaning that members of armed forces and other armed groups would be excluded.[103] Moreover, it must be noted that the broad categorization of civilian put forward in *Blaškić* (see above) was subsequently overturned on Appeal. The Appeal Chamber held that members of the armed forces and members of organized resistance groups cannot claim civilian status and that the Trial Chamber had erred in holding the specific situation of the victim at the time of the crime was determinative of one's status.[104] In a further narrowing of the definition, the *Mrkšić et al* Appeal case held that the term civilian 'does not include combatants or fighters

[102] *The Prosecutor v Blaškić*, Trial Judgment, Case No. IT-95-14, T.Ch., 3 March 2000, para. 214.
[103] *The Prosecutor v Martić* Appeal Judgment, Case No. IT-95-11, A.Ch., 8 October 2008, para. 300.
[104] *The Prosecutor v Blaškić* Appeal Judgment, Case No. IT-95-14-A, A.Ch. 29 July 2004, para. 113.

hors de combat'.[105] The Chamber came to this conclusion despite acknowledging that it leaves a fundamental protection gap in the law:

> It is important to observe that failing to consider atrocities against fighters *hors de combat* as crimes against humanity does not mean that these acts will go unpunished. If committed in the context of an armed conflict, they are likely to qualify as war crimes, as will be the situation in the typical case before the ICTY. If committed in peacetime, they will be punishable under national law. There may perhaps be a "protection gap" in those situations, as crimes of this nature would fall outside the jurisdiction of international criminal courts and national authorities may not always be willing to prosecute.[106]

This narrowing of approach can be linked to the fact that the definition of CAH under Article 5 of the Statute of the ICTY requires that it take place within an armed conflict, and that the cases before the ICTY were concerned with the treatment of belligerent states' citizens, whether civilians or armed troops. In the *Martić* Appeal case, the ICTY explained that it did not want to 'blur the necessary distinction' between civilians and the military, and between war crimes and CAH.[107]

While the definition of CAH under the Statue of the ICC does not require the presence of an armed conflict and therefore applies in times of peace, the ICC has aligned itself with the narrow interpretation adopted at the ICTY.[108] This narrow approach has also been supported by Bartels, who believes that an expansive definition of civilian results in 'problematic rulings'

[105] *Mrkšić, supra* note 9.
[106] *Ibid,* at para. 460.
[107] *The Prosecutor v Martić* Appeal Judgment, Case No. IT-95-11-A, A.Ch., 8 October 2008, para. 299.
[108] *The Prosecutor v. Katanga* Trial Judgment, Case No. ICC-01/04-01/07, T.Ch. II, 7 March 2014, para. 801.

that 'qualify acts as crimes against humanity although they would be legitimate under IHL'.[109] Yet, our analysis has demonstrated that even humanitarian law recognises the need to consider the vulnerability of the individual as opposed to their formal status. Moreover, Bartels' view should be contrasted with that of Ambos and Wirth who argue that, as CAH can be committed in times of war and times of peace, the term 'civilian' should be interpreted broadly 'because it must cover all persons which are not protected by humanitarian law, especially in times of peace'.[110] Ambos and Wirth endorse the original interpretation of civilian as set out in *Blaškić*, providing that 'it meets the needs of comprehensive protection of human rights very well since *everyone except an active combatant of a hostile armed force* is in a "specific situation" requiring the protection of his or her human rights'.[111]

In contrast to the ICTY Statute, there is no specific requirement within the ECCC's Statute that CAH be committed in the context of an armed conflict. War crimes and CAH, as defined in the ECCC Statute, are distinct. CAH are widespread and systematic in nature, require no link to a conflict, can be committed against the state's own citizens, and have discriminatory intent; whereas war crimes occur within the context of an armed conflict and typically involve the treatment of protected persons of the belligerent power. Furthermore, the factual context within which the ECCC operates, while involving an armed conflict, also involves crimes perpetrated by a state against its own nationals. Such victims would fall within the protection gap if too narrow an interpretation of CAH was pursued, as such crimes would not fall within the definition of war crimes. Thus, we would argue that the ECCC should avoid the trap of

[109] R. Bartels, 'Two Cheers for the ICTY Popovic et al. Appeals Judgment: Some Words on the Interplay Between IHL and ICL' EJIL: Talk!, 4 February 2015, www.ejiltalk.org/two-cheers-for-the-icty-popovic-et-al-appeals-judgement-some-words-on-the-interplay-between-ihl-and-icl/ (last accessed 06/06/2016).
[110] Ambos and Wirth, *supra* note 101, at 25.
[111] *Ibid.* (emphasis added).

widening the protection gap and narrowing the reach of CAH in order to retain a distinction with war crimes.

The second part of the analysis adopted by contemporary tribunals explores the characteristics of the population under attack. The jurisprudence from all of the contemporary tribunals provide that the 'targeted population must be of a predominantly civilian nature. The presence of certain non-civilians in their midst does not change the character of the population'.[112] In *Katanga*, the ICC held that 'the crime may be established even if the military operation also targeted a legitimate military objective. It is important, however, to establish that the primary object of the attack was the civilian population or individual civilians'.[113] While one could interpret the requirement that civilians must be the primary object of attack as overly restrictive, an expansive approach towards the interpretation of the term civilian would minimize this risk. Indeed, in situations such as that before the ECCC, where a regime targets its own armed forces, the distinction between combatants and civilians becomes less relevant, as does the overall composition of the targeted population. Rather, as argued by Luban, it should be 'the use of political and military power to assault rather than protect the well-being of those over whom the perpetrators exercise de facto authority' that is the crux of CAH.[114] Thus, a focus on the intent of the perpetrator is of greater significance than the formal status of those victimised.

6. Conclusion and Recommendations

This article considered the question of whether, under customary international law applicable between 1975 and 1979, an attack by a state or organisation against members of its own armed forces may amount to an attack directed against a civilian population, constituting a CAH under Article 5 of the ECCC Law. We considered this question in the context of specific allegations

[112] *Tadić, supra* note 99, at para. 638; *Akayesu*, *supra* note 95, at para. 582, n. 146; *The Prosecutor v. Bemba Gombo* Trial Judgment, Case No. ICC-01/05 -01/08, T.Ch. III, 21 March 2016, para. 153.
[113] *Katanga*, *supra* note 108, at para. 802.
[114] D. Luban 'A Theory of Crimes Against Humanity' (2004) 29(1) *Yale Journal of International Law* 85, 101.

made against a number of individuals charged at the ECCC. We have argued that such an attack may constitute a CAH, demonstrating that customary international law applicable between 1975 and 1979 supports this approach.

We have demonstrated that CAH were initially designed to fill a protection gap left by war crimes and genocide, thereby ensuring protection of the human rights of all people within a state against widespread or systematic brutality committed by governments or other organizations. From the first attempts to define crime 'against the laws of humanity' following the First World War, through to the first codifications in the aftermath of the Second World War, it is evident that the intention was to protect the human rights of all individuals.[115] It is therefore already evident that the spirit of CAH would allow for state attacks against their own armed forces to be CAH. Support for this view can also be found in post-World War Two case-law. A complication arises, however, in that initial formulations of CAH were split into two categories: those involving persecution, and those involving attacks against civilians. Article 5 of the ECCC Law contains implicit reference to persecution through its reference to 'national, political, ethnical, racial or religious grounds'. Furthermore, within the charges made against the accused in Cases 003 and 004 are a number of allegations of persecution: including crimes perpetrated on political and religious grounds against Khmer Rouge cadres and their families;[116] and 'persecution against the so-called "17 April people", "East Zone Evacuees", Northwest Zone cadres, their families and subordinates, as well as the Khmer Krom and Vietnamese'.[117] Thus, it would appear that the jurisprudence relating to the crime of persecution is of particular relevance, implying that there should be no civilian requirement at all. However, the wording of Article 5 includes specific reference to a civilian population, and does not distinguish between the two categories identified in customary international law.

[115] Amicus, *supra* note 37.
[116] Wright, *supra* note 32.
[117] OCIJ Charges Yim Tih, *supra* note 24.

Thus, the interpretation of 'civilian' remains a crucial element. While the ECCC found in its judgments in Cases 001 and 002/01 that a member of the armed forces could not be a civilian, even if *hors de combat,*[118] we believe our analysis of the relevant law at the time demonstrates that this is the incorrect approach.

In exploring the boundaries of the term 'civilian' in case law prior to 1975-1979, broad understandings of who may constitute a victim of CAH were evident in relation to both categories outlined above. In cases concerning persecution, such as *Barbie*[119] and *Touvier,*[120] it was demonstrated that the status of the victims as members of the armed forces was irrelevant, and that it was the intention of the perpetrator and the context of the crimes that were central to establishing CAH. Further, the cases of *R. (StS 19/48),*[121] *P. and others,*[122] and *H. case,*[123] demonstrated that even in the absence of persecution, CAH could be perpetrated against soldiers in the context of state policies of violence and terror. Thus, customary international law applicable from 1975-1979 provides a strong case for holding that the purges carried out by the Khmer Rouge against its own armed forces can qualify as an attack against a 'civilian population' for the purposes of establishing CAH. We would support the analysis of Cassese, and the jurists at the 1947 Conference for the Unification of Penal Law, who advocated for a focus on persecution, rather than the status of victims, as being the crux of the criminality of CAH.[124] We acknowledged that international humanitarian law has traditionally excluded armed forces from the definition of 'civilian'. However, we found that a broad definition of the term in the context of CAH was in keeping with international humanitarian

[118] *Case 001* and *Case 002/01 supra* note 4.
[119] See Viout, *supra* note 69.
[120] *Touvier*, *supra* note 75.
[121] *Case of R. (StS 19/48*), *supra* note 79.
[122] *P. and others*, *supra* note 79.
[123] *H. case*, *supra* note 82.
[124] Cassese, *supra* note 60, at 122; Dautricourt, *supra* note 61, at 170.

law norms, which have sought to narrow the protection gap and protect those of 'inoffensive character', a characteristic not unique to those who benefit from formal civilian status.

We also looked for guidance within the Statutes and jurisprudence of contemporary courts, while acknowledging that these courts have not specifically addressed the question of whether attacks against armed forces can constitute an attack against a civilian population, and recognising their more limited relevance to the ECCC's analysis. We found that contemporary formulations of CAH have been inconsistent. While the ICTY and ICC have removed the requirement of persecution from their definitions, the ICTR has also collapsed the two categories into one, transposing the civilian requirement onto crimes of persecution. This merger arguably widens the protection gap in a way that is counter to the spirit in which the offence was created, as it risks leaving soldiers and combatants without protection under the law of CAH. However, an expansive interpretation of 'civilian' can counter this, and the ICTR has shown a willingness to include *hors de combat* within the category of 'civilian' in the *Akayesu*[125] case and the military cases. The ICTY has also occasionally adopted a broad interpretation, for example in the case of *Blaškić*.[126] While this case was ultimately overruled on appeal, we have argued that the standard set in *Blaškić* is in keeping with a human rights-based approach to CAH. The Khmer Rouge's practice of purging appeared to involve arresting and sending to security centres those cadres who were deemed 'undesirable' whether due to their religion, ethnicity, or lack of ideological commitment. Such individuals would constitute *hors de combat* and therefore this jurisprudence legitimises the OCIJ recognising the purges of the Khmer Rouge cadres as CAH.

Unfortunately, the ICTY has shown a recent tendency to adopt a more restrictive interpretation of 'civilian', due to concerns over the blurring of lines between CAH and war crimes. However,

[125] *Akayesu*, *supra* note 95.
[126] *Blaškić*, *supra* note 102.

we would agree with the statement of the ECCC International CIJ, who observed that 'the entire distinction between combatants and civilians might only make sense if we are talking about combatants and civilians of the enemy population'.[127] In the context of the ECCC, what has occurred is a widespread attack on a population with discriminatory intent, [128] perpetrated by state actors against their own armed forces. As observed by the International CIJ, when a regime seeks to cleanse its own armed forces of soldiers holding a particular ethnicity or faith, the victims' combatant quality would be entirely irrelevant. [129]

The ECCC has an opportunity to provide clarity to a complex area of law, to contribute significantly to the development of international criminal law, and to counter the regression that has emerged in the contemporary jurisprudence. We suggest that the ECCC take a human rights approach, which recognizes vulnerability, rather than the official status of the victim, as being relevant in interpreting 'civilian populations' and gives priority to the intention of the perpetrator. Such an approach would narrow the protection gap, and ensure that widespread and systematic abuses of state power are appropriately criminalised as CAH. Criminalization of CAH arose to protect individuals left vulnerable to abuse by those in power.[130] Symbolically, these crimes penalize acts that shock the conscience of humanity due to their flagrant disregard for human spirit, life, integrity and dignity.[131] The OCIJ should adopt an interpretation of Article 5 that is in keeping with the overall purpose of international criminal law, international human rights law, and international humanitarian law, to protect the basic values of human dignity, regardless of the legal status of those entitled to such protection.[132] As such, the breadth

[127] Call for Submissions, *supra* note 3, at para. 5.
[128] Viout, *supra* note 69, at 164.
[129] Call for Submissions, *supra* note 3, at para. 5.
[130] Luban, *supra* note 114.
[131] H. Singh 'Critique of the Mrkšić Trial Chamber (ICTY) Judgment: A Re-evaluation on Whether Soldiers Hors de Combat Are Entitled to Recognition as Victims of Crimes Against Humanity' (2009) 8 *The Law and Practice of International Courts and Tribunals* 247-96.
[132] See *Kupreškíc*, *supra* note 100, at paras. 547–49; *The Prosecutor v Jelisíc* Trial Judgment, Case No. IT-95-10-T, T.Ch., 14 December 1999, para. 54.

of the ‘civilian population’ requirement should be considered a lower threshold to establish when construed against other elements of the crime.