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ព្រះរាជាណាចក្រកម្ពុជា
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Kingdom of Cambodia
Nation Religion King

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អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia
Chambres extraordinaires au sein des Tribunaux cambodgiens

អាជ្ញាធរជំនុំជម្រះសហចៅក្រមស៊ើបអង្កេត
Office of the Co-Investigating Judges
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Case File No: 004/07-09-2009-ECCC-OCIJ

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NOTIFICATION ON THE INTERPRETATION OF 'ATTACK AGAINST THE CIVILIAN POPULATION' IN THE CONTEXT OF CRIMES AGAINST HUMANITY WITH REGARD TO A STATE'S OR REGIME'S OWN ARMED FORCES

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I. PROCEDURAL HISTORY

1. Disagreements between the Co-Investigating Judges ("CIJs") in this case were registered on 7 February 2013, 22 February 2013, 17 July 2014, and 16 January 2017.

2. On 19 April 2016, I invited submissions from the parties to Cases 003 and 004 and *amici curiae* as to 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 for the purposes of Article 5 of the ECCC Law ("Issue").[1] In the invitation, I informed the parties that they would have 15 days to file combined responses to all briefs submitted by *amici curiae*, and that responses to other parties' submissions would not be admitted.[2]

3. On 19 May 2016, the Meas Muth Defence and the International Co-Prosecutor ("ICP") filed their submissions (respectively, "Meas Muth Submission" and "ICP Submission").[3]

4. Eleven *amici curiae* filed submissions on the Issue.[4] Submissions were also filed in Case 004 by the Ao An Defence and the Yim Tith Defence, (respectively, "Ao An Submission" and "Yim Tith Submission").[5]

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[1] Case File No. 003-D191, *Call for Submissions by the Parties in Cases 003 and 004 and Call for Amicus Curiae Briefs,* 19 April 2016, paras 3, 6-7.

[2] *Ibid.*, paras 13-14.

[3] Case File No. 003-D191/2, *Meas Muth's Submission on the Question of Whether Under Customary International Law in 1975-1979 an Attack by a State or Organization Against its Own Armed Forces Could Amount to an Attack Directed Against a Civilian Population for Purposes of Article 5 of the Establishment Law*, 19 May 2016, ("Meas Muth Submission"); Case File No. 003-D191/1, *International Co-Prosecutor's Response to the International Co-Investigating Judge's Call for Submissions Regarding Crimes Against Humanity*, 19 May 2016, ("ICP Submission").

[4] Case File No. 003-D191/3, *Amicus Curiae Brief in Cases 003 and 004 - Professor Ben Saul*, 19 May 2016 ("Ben Saul Brief"); Case File No. 003-D191/4, *Amicus Curiae Brief for Cases 003 and 004- Catherine Drummond, Philippa Webb and Dapo Akande*, 19 May 2016, ("Drummond, Webb, and Akande Brief"); Case File No. 003-D191/5, *Amicus Curiae Brief for Cases 003 and 004- TRIAL (Track Impunity Always)*, 19 May 2016, ("TRIAL Brief"); Case File No. 003-D191/6, *Amicus Curiae Brief of Professors Robinson, DeGuzman, Jalloh and Cryer on Crimes Against Humanity for Cases 003 and 004*, 17 May 2016, ("Robinson, DeGuzman, Jalloh and Cryer Brief"); Case File No. 003-D191/7, *Amicus Curiae Brief for Cases 003 and 004 - Ido Rosenzweig*, 19 May 2016 ("Ido Rosenzweig Brief"); Case File No. 003-D191/8, *Amicus Curiae Brief for Cases 003 and 004 - Dr. Joanna Nicholson*, 19 May 2016, ("Joanna Nicholson Brief"); Case File No. 003-D191/9, *Amicus Curiae Brief for Cases 003 and 004 - Professor Nicholas Tsagourias*, 17 May 2016, ("Nicholas Tsagourias Brief"); Case File No. 003-D191/10, *Amicus Curiae Brief for Cases 003 and 004 - Oliver Windridge*, 19 May 2016, ("Oliver Windridge Brief"); Case File No. 003-D191/11, *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, ("Williams and Grey Brief"); Case File No. 003-D191/12, *Amicus Brief Filed by the Center for International and Comparative Law, University of Baltimore School of Law on the Legality of Targeting Members of One's Own Military*, 18 May 2016, ("University of Baltimore Brief"); Case File No. 003-D191/13, *Queen's University Belfast Human Rights Centre Response to the ECCC Office of the Co-Investigating Judges "Call for Submissions by the Parties in Cases 003 and 004 and Call for Amicus Curiae Briefs"*, 12 May 2016, ("Queen's University Brief").

[5] Case File No. 004-D306/3, *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, ("Ao An Submission"); Case File No. 004-D306/1, *Yim Tith's Submission on the Interpretation of the Term 'Civilian Population' for the Purposes of Article 5 of the Establishment Law*, 19 May 2016, ("Yim Tith Submission").

5. On 31 May 2016, the Meas Muth Defence requested the CIJs to grant leave to file a fifteen-page combined response to the *amicus curiae* briefs.[6] On 1 June 2016, I granted the request.[7]

6. On 11 July 2016, the Meas Muth and Yim Tith Defences filed responses to the briefs submitted by the *amici curiae*.[8]

II. SUMMARY OF SUBMISSIONS

7. The ICP and *amici*, TRIAL; Robinson, DeGuzman, Jalloh and Cryer; Ido Rosenzweig; Williams and Grey; University of Baltimore; and Queen's University of Belfast, all submit that, under customary international law ("CIL") 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.[9] In contrast, the Meas Muth Defence, Ao An Defence, and Yim Tith Defence submit that members of a state's own armed forces can never be the sole targets for the purposes of the *chapeau* requirement whether in times of peace or armed conflict.[10] The remaining *amici* submit positions in between these two approaches; Ben Saul, Joanna Nicholson, and Oliver Windridge submit that only in times of peace can members of the armed forces be the sole targets of an attack that fulfils the chapeau requirement of an attack on a civilian population,[11] while Catherine Drummond, Philippa Webb, and Dapo Akande submit that only when the underlying crime is persecution can an attack on a state or organisation's own armed forces amount to an attack on a civilian population.[12]

8. The ICP and many of the *amici* rely on the fundamental premise that the object and purpose of crimes against humanity ("CAH") support their positions.[13] The Meas Muth and Ao An Defence counter that their position is also supported by the object and purpose of CAH, albeit construed differently.[14] For example, the Meas Muth Defence construe this purpose narrowly, arguing that the underlying

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[6] Case File No. 003-D191/14, *Meas Muth's Request to Be Permitted to File a Fifteen Page Combined Response to Amicus Curiae Briefs 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*, 31 May 2016.

[7] Case File No. 003-D191/15, *Notice of Extension of Page Limit to Respond to Amicus Curiae Briefs*, 1 June 2016.

[8] Case File No. 003-D191/17, *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, ("Meas Muth Response"); Case File No. 004-D306/16, *YIM Tith's Combined Response to Briefs Submitted by Amici Curiae Pursuant to D306*, 11 July 2016, ("Yim Tith Response").

[9] ICP Submission, paras 4, 13; TRIAL Brief, para. 21; Robinson, DeGuzman, Jalloh and Cryer Brief, para. 3; Ido Rosenzweig Brief, p. 6; Nicholas Tsagourias Brief,paras 25-26; Williams and Grey Brief, paras 3, 28,; University of Baltimore Brief, para. 23; Queen's University Brief, paras 2, 16, 18.

[10] Meas Muth Submission, para. 24; Meas Muth Response, p. 1; Ao An Submission, paras 2, 44; Yim Tith Submission, ERN 01240541, p. 1, para. 38.

[11] Ben Saul Brief, para. 24; Joanna Nicholson Brief, pp. 1, 5-6; Oliver Windridge Brief, para. 21.

[12] Drummond, Webb, and Akande Brief, paras 1, 22.

[13] ICP's Submission, para. 7; Ben Saul Brief, paras 3(d), 20, 24; Drummond, Webb, and Akande Brief, para. 10; TRIAL Brief, para. 22; Ido Rosenzweig Brief, pp. 3, 6; Nicholas Tsagourias Brief, para. 20; Oliver Windridge Brief, paras 8, 19; Williams and Grey Brief, paras 15, 20; Queen's University Brief, paras 6, 18.

[14] Meas Muth Submission, paras 1-2; Ao An Submission, para. 31.

purpose of CAH was to fill a gap uncovered by International Humanitarian Law ("IHL"), namely to protect *civilians* from attack by their own governments,[15] while Ben Saul construes the purpose widely as the protection of the *"fundamental rights and dignity of human beings against systematic violence, particularly persons who are defenceless against state power"*.[16] The Yim Tith Defence take a different position, arguing that to extend the interpretation of the term 'any civilian population' to include a State's own military would be an overly purposive interpretation of the state of customary international law at the relevant time,[17] that interpretation of the phrase does not require recourse to an investigation of the purported purpose of CAH, and that the CIJs should not seek to identify the 'purpose' of codifying CAH.[18]

9. The ICP and some *amici* also argue that to not include a state's own soldiers as impermissible targets of attack under CAH would lead to the absurd or problematic result of a lack of any legal protection for them under international criminal law ("ICL").[19] The Meas Muth Defence submit, in rebuttal of this argument that, depending on the circumstances, national laws, international human rights law, and the prohibition on genocide can provide protection for these soldiers, and it is not absurd for a state to internally regulate such protections of soldiers.[20]

10. The ICP and some of the *amici* also argue in favour of the adoption of the functional or legitimate target approach to the definition of civilian. This argument, which is drawn from the principle of distinction from IHL, states that civilians should be defined as those who cannot be lawfully or legitimately targeted in an armed conflict in accordance with IHL, which would include those members of the armed forces who are *hors de combat* or are not acting adversely to their own governments; that is, the person's function in the armed conflict, or lack of function, should be taken into account in determining his or her civilian status.[21] The Meas Muth Defence argue against this approach in their response, averring not only that the *amici* have misinterpreted the jurisprudence on this matter, but that IHL principles cannot be wholly imported in CAH and so CAH must be committed against civilian populations, not just against illegitimate targets under IHL.[22]

11. Certain *amici* take the position that persecution-type CAH do not include, among their *chapeau* elements, the requirement of an attack on a civilian population. This proposed interpretation would include under the protections of the law against CAH soldiers who are purged from their own countries' armed services due to

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[15] Meas Muth Submission, paras 1-2.
[16] Ben Saul Brief, para. 20.
[17] Yim Tit Submission, para. 38.
[18] Yim Tith Response, paras 13-15.
[19] ICP Submission, para. 5; Robinson, DeGuzman, Jalloh and Cryer Brief, paras 2, 22; Nicholas Tsagourias Brief, 17 May 2016, para. 22; Oliver Windridge Brief, para. 19; Ben SaulBrief, paras 21, 24.
[20] Meas Muth Response, paras 4-5, 23.
[21] ICP Submission, para. 6; Ben Saul Brief, para. 22; TRIAL Brief, paras 14-20; Robinson, DeGuzman, Jalloh and Cryer Brief, paras 2-22; Ido Rosenzweig Brief, pp. 4-6;Williams and Grey Brief, paras 6, 15, 17; University of Baltimore Brief, pp. 4-6.
[22]Meas Muth Response, paras 18-21.

their ethnicity, religion, ideological views, or another immutable characteristic.[23] However, the Meas Muth Defence reject this claim, arguing that (i) the principle of sovereignty dictates that such purges would fall under national, as opposed to international law, because such a provision under international law would lead to CAH charges for a state simply preventing a rebellion or *coup d'état*,[24] and (ii) the ECCC's CAH provision does not distinguish between persecution and other CAH, which means that the chapeau requirement of an attack on a civilian population applies to persecution as a CAH.[25]

12. Another core argument of the ICP and *amici* is that IHL is *lex specialis,* and thus must be distinguished from international criminal law ("ICL") and international human rights law ("IHRL"). Therefore, they reason, the definition of civilian used in IHL should not be imported as the definition of civilian for CAH, especially when considering attacks on soldiers during peacetime when IHL is completely inapplicable.[26] In their response, the Yim Tith Defence make a similar argument that IHL is *lex specialis*, and is inapplicable in defining civilian population for CAH.[27] However, the Yim Tith Defence reach a different conclusion, namely that members of the military are treated differently than civilians in both peacetime and during armed conflict, for instance by being subject to military, rather than ordinary, criminal law.[28] Similarly, the Meas Muth Defence acknowledge IHL's *lex specialis* status, but they argue that soldiers and civilians are subject to different standards and protections whether in times of war or peace, and that a regime's acts against its own soldiers in peacetime would, depending on the circumstances, be dealt with under national law or prosecuted as genocide, not as a CAH.[29] Furthermore, both the Meas Muth and Yim Tith Defence argue that ICL and IHRL are distinct bodies of law which should not be conflated, because ICL holds individuals accountable for violations of the law while IHRL holds states accountable.[30]

13. The Meas Muth and Ao An Defence both submit that the principles of legality and *in dubio pro reo* require that any doubt or ambiguity in the interpretation of the term civilian should be resolved in favour of the charged persons.[31] However Ben Saul submits that a wider definition of civilian, which would allow for the inclusion of a state's own soldiers, would not violate the principle of legality under Cambodian or international law because the principle does not prohibit the ECCC from interpreting and clarifying the law, and it was foreseeable between

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[23] Drummond, Webb, and Akande Brief, paras 11-17; Williams and Grey Brief, para. 16; Queen's University Brief, para. 3.
[24] Meas Muth Submission, paras 22-23.
[25] Meas Muth Response, paras 23-25.
[26] ICP Submission, paras 5-7; Ben Saul Brief, paras 7, 9, 11; Drummond, Webb, and Akande Brief, para. 18; TRIAL Brief, paras 7-10; Joanna Nicholson Brief, p. 1; Nicholas Tsagourias Brief, paras 18-21; Oliver Windridge Brief, paras 16, 20; Williams and Grey Brief, paras 18-20.
[27] Yim Tith Response, paras 19-20.
[28] *Ibid.*, paras 21-31.
[29] Meas Muth Submission, paras 17, 23.
[30] *Ibid.*, para. 22; Yim Tith Response, paras 16-18.
[31] Meas Muth Submission, para. 25; Meas Muth Response, paras 1, 31; Ao An Submission, paras 41-43.

1975 and 1979 that defenceless members of a state's military who are not protected by IHL could comprise part of the civilian population.[32]

14. Finally, the ICP, the Meas Muth Defence, Ao An Defence, and many *amici* concur that soldiers can be individual victims of an attack that qualifies as a CAH so long as the attack is directed more widely at a civilian population.[33] However, the Meas Muth and Ao An Defence argue that this is not relevant to the question at hand because whether soldiers, including those *hors de combat*, can be victims is not determinative of whether soldiers can constitute a civilian population.[34]

III. DISCUSSION

A. Introduction

15. In keeping with the principle of legality, the ECCC has jurisdiction over CAH as they existed and were defined in CIL between 1975 and 1979.[35] The Chambers of the ECCC have found that the definition contained in Article 5 of the ECCC Law is consistent with and reflective of the CIL definition.[36] In order to resolve the Issue, it is thus necessary to ascertain whether between 1975 and 1979 the requirement of an attack against *any civilian population* included an attack by a State or organisation against its own armed forces. The following analysis will interrogate the principle of legality and its corollaries, as well as the applicable criteria for the interpretation of criminal laws. It will identify the reasons for the introduction of the law on CAH, and review evidence of relevant state practice and *opinio juris* prior to 1975. Finally, it will analyse the jurisprudential interpretation of the term *any civilian population* after the period of 1975-1979 and determine the extent to which it can inform the discussion.

B. Principle of Legality

i. Legality

16. The principle of legality is a fundamental principle of national and international criminal law. Article 15(1) of the International Covenant on Civil and Political Rights ("ICCPR"), applicable at the ECCC, provides that "*[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.*" The principle was already included in the 1956 Cambodian Penal Code, and is now part of the 2007 Cambodian Penal Code.[37] In proceedings before the ECCC, the principle requires that charged offences and modes of liability existed under Cambodian or international law between 17 April

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[32] Ben Saul Brief, para. 22.

[33] ICP Submission, para. 14; Meas Muth Response, para. 26; Ao An Submission, para. 40; Ben Saul Brief, para. 23; Joanna Nicholson Brief, p. 2; Nicholas Tsagourias Brief, para. 23; Oliver Windridge Brief, para. 16; Williams and Grey Brief, paras 20, 24-26, 29.

[34] Meas Muth Response, para. 26; Ao An Submission, para. 40.

[35] Case File No. 001-F28, *Appeal Judgement in Case 001*, 3 February 2012, para. 99, ("Duch Appeal Judgement").

[36] *See* Case File No. 002-E313, *Case 002/01 Judgement*, 7 August 2014, para. 176, ("Case 002/01 Judgement"), *citing* Duch Appeal Judgement, paras 100-104.

[37] The French version of Article 6 of the 1956 Penal Code stated that: "*La Loi penale est sans effet retroactif. Aucune infraction ne peut être reprimée par l'application de peines qui n'étaient pas prononcées par la Loi auparavant qu'elle fut commise [...]*". *See also* Article 3 of the 2007 Penal Code.

1975 and 6 January 1979. The definition of crimes and modes of liability as they existed at the time must be applied, unless a partial or full decriminalisation had in the meantime intervened, under the rule of *lex mitior*.[38]

ii. Accessibility and foreseeability

17. As a further requirement, crimes and modes of liability that existed between 1975 and 1979 must have been sufficiently accessible and the possibility of prosecution sufficiently foreseeable to the charged person at the relevant time.[39] To this end, criminal offences must be clearly defined in the law (whether positive or customary), thus allowing an individual to know from their wording, and if necessary with the assistance of judicial interpretation or by seeking legal advice,[40] what acts and omissions will make him or her criminally liable.[41] The principle must be interpreted in such a way as to provide effective safeguards against arbitrary prosecution, conviction, and punishment.[42] Foreseeability does not require absolute certainty of the possibility of criminal prosecution.[43] *Sufficient* or *reasonable* foreseeability is all that is necessary.[44]

iii. Interpreting criminal law provisions

18. Legality does not prevent judges from interpreting and clarifying a legal provision.[45] While criminal norms need to be clearly drafted, like all legal provisions they are written in a general and abstract fashion. Some degree of judicial interpretation is thus inevitable.[46] As consistently stated in several decisions of the European Court of Human Rights ("ECtHR"), there will always be the need for elucidation of doubtful points and for adaptation to changing circumstances,[47] and legality *"cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the*

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[38] *See* Case 002/01 Judgement, para. 16. While the European Convention on Human Rights ("ECHR"), unlike the ICCPR, is not directly applicable at the ECCC, the jurisprudence of the European Court of Human Rights ("ECtHR") is characterized by a more extensive reasoning than that of the Human Rights' Committee, which is the organ overseeing the ICCPR's application. Furthermore, the text of Article 7(1) of the ECHR and Article 15(1) of the ICCPR is exactly the same, with the latter adding the further provision on the post-facto applicability of the *lex mitior* in criminal matters (however, the ECtHR has recently found, thus reversing a position expressed by the same court in 1978, that the *lex mitior* principle is part of Article 7(1), *see* ECtHR, *Scoppola v. Italy (No. 2)*, 17 December 2009, paras 103-109. I will therefore seek guidance in the ECtHR's jurisprudence on the principle of legality if necessary for the resolution of the Issue. The ECtHR stated that legality requires that at the time when an accused person performed the act which led to his prosecution and conviction there was in force a legal provision which made that act punishable, *see* ECtHR, *Coëme and Others v. Belgium*, 22 June 2000, para. 145.

[39] *See* Case 002/01 Judgement, para. 16;Duch Appeal Judgement, paras 96, 100-104.

[40] ECtHR, *Chauvy and Others v. France*, 29 June 2004, para. 44.

[41] ECtHR, *S.W. v. the United Kingdom*, 22 November 1995, para. 35.

[42] *Ibid.*, para. 34.

[43] *See* Case 002/01 Judgement, para. 16; Duch Appeal Judgement, paras 96, 100-104. *See also* ECtHR, *Scoppola v. Italy (No. 2)*, 17 September 2009, para. 101.

[44] *Ibid.*

[45] Duch Appeal Judgement, para. 95.

[46] ECtHR, *Scoppola v. Italy (No. 2)*, 17 December 2009, para. 100.

[47] *See e.g.* ECtHR, *S.W. v. the United Kingdom*, 22 November 1995, para. 36; ECtHR, *Kokkinakis v. Greece*, 25 May 1993, para. 40.

essence of the offence and could reasonably be foreseen."[48] Judges *"may not create new law or interpret existing law beyond the reasonable limits of acceptable clarification"*.[49] However, this does not detract from the simple logical fact that the mere absence of judicial precedent is not a bar to a court stating the law for the first time.[50]

iv. Applicable interpretative criteria

19. Article 31 of the 1969 *Vienna Convention on the Law of Treaties* ("VCLT") requires that a treaty should be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose. Article 32 of the VCLT allows recourse to the preparatory work of a treaty and the "*circumstances of its conclusion*" when the interpretive criteria of Article 31 either leave the meaning ambiguous or obscure, or lead to a result which is manifestly absurd or unreasonable. These interpretive criteria are substantively equivalent to those recognised at the ECCC, namely the language of the provision, its place in the overall framework of the law, its objective and purpose, and the need to avoid an interpretation which would lead to absurd results.[51]

20. Human right bodies and international criminal courts have often considered the object and purpose of a law when interpreting its constitutive terms.[52] However, criminal law provisions must not be extensively construed to an accused's detriment, for instance by analogy.[53]

21. With regard to the principle of *in dubio pro reo*, I am of the view, in line with the interpretation of the principle of the Supreme Court Chamber ("SCC"), that *in dubio pro reo* has a residual role in the interpretation of legal provisions, and its application is limited to doubts that remain after the application of the standard rules of interpretation.[54] At the International Criminal Court ("ICC"), the Pre-Trial Chamber in the *Al Bashir* case stated that the ICC *"fully embraces the general principle of interpretation in* in dubio pro reo."[55] More recently, the *Katanga* Trial Chamber at the ICC specified the circumstances under which this principle applies, stating, in line with the SCC, that it applies in cases of ambiguity that

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[48] ECtHR, *Scoppola v. Italy (No. 2)*, 17 December 2009, para. 101.
[49] Duch Appeal Judgement, para. 95, *citing Prosecutor v. Ojdanić et al.*, Case No. IT-99-37-AR72, *Appeal Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction-Joint Criminal Enterprise*, 21 May 2003, para. 38.
[50] *See* Kenneth S. Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 2009, Cambridge University Press, New York, p. 360.
[51] Case File No. 002-E50/3/1/4, *Decision on Immediate Appeal by Khieu Samphan on Application for Release*, 6 June 2011, para. 31; Case File No. 002-D427/1/30, *Decision on Ieng Sary's Appeal Against the Closing Order*, 11 April 2011, para. 122.
[52] *See e.g.* ECtHR, *S.W. v. the United Kingdom*, 22 November 1995, paras 34, 6; International Criminal Tribunal for the former Yugoslavia ("ICTY"), *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-T, *Judgement*, 14 January 2000, para. 547; *Prosecutor v. Milutinović et al.*, Case File No. IT-05-87-T, *Judgement*, 26 February 2009, para. 147; International Criminal Court ("ICC"), *Prosecutor v. Ntaganda*, Case No. ICC-01/04-02/06, *Second Decision on Defence's Challenge to the Jurisdiction of the Court in Respect to Counts 6 and 9*, 4 January 2017, para. 48.
[53] ECtHR, *S.W. v. the United Kingdom*, 22 November 1995, para. 35.
[54] *See* Case File No. 002-E50/3/1/4, *Decision on Immediate Appeal by Khieu Samphan on Application for Release*, 6 June 2011, para. 31.
[55] ICC, *Prosecutor v. Al Bashir*, Case No. ICC-02/05-01/09, *Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir*, 4 March 2009, para. 156.

remain after having interpreted the law through the conventional methods of interpretation set forth in Articles 31 and 32 of the VCLT.[56]

22. Finally, in interpreting criminal laws, especially those of a customary nature, decisions of other international and national criminal courts may be of great assistance. They are also relevant to assessing the foreseeability requirement. However, they are not binding upon the ECCC.[57]

C. Purpose of the law on CAH

23. Prior to the codification of CAH in Article 6(c) of the 1945 *Charter of the International Military Tribunal* ("Nuremberg Charter"), the narrow formulation of war crimes meant that victims who were nationals of the perpetrating state would not be protected from acts or omissions that would amount to war crimes if they had been committed against enemy nationals.[58] The United Nations War Crimes Commission attempted to address this lacuna when elaborating on the notion of CAH in its work from 1944 to 1945, which formed the precursor to Article 6(c) of the Nuremberg Charter. The Commission took the approach that the dictates of justice were to be prioritised over narrow legalisms, and considered that CAH were, unlike war crimes, *"crimes committed against any person without regard to nationality, stateless persons included, because of race, nationality, religious or political belief, irrespective of where they have been committed"*.[59]

24. Indications on the object and purpose of the law of CAH can be found in the jurisprudence of post-WWII cases tried under *Control Council Law No. 10* ("CCL10"). In the *Einsatzgruppen* case, the Court noted that the law of CAH *"envisages the protection of humanity at all times."*[60] In *Alstötter,* the Court stated that the intent behind the introduction of CAH was that compliance with German law should be no defence, so acts by Germans against *German nationals* could constitute CAH within its jurisdiction.[61] In the *H Case,* the Criminal Division of the German Supreme Court of the British Occupied Zone stated that CCL10 was, *"according to its sense and purpose"*, directed against the planned oppression and prosecution committed arbitrarily and violently by the national socialist state against *"anyone they did not like for whatever reason"*, especially if they did not blindly follow its goals as compliant instruments.[62] The Court further stated that when such a system becomes state policy, it offends humanity.[63]

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[56] ICC, *Le Procureur v. Katanga,* Case No. ICC-01/04-01/07, *Jugement rendu en application de l'article 74 du Statut,* 7 March 2014, para. 53.

[57] *See* Case Duch Appeal Judgement, para. 97. *See also* ICTY, *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-T, *Judgement,* 14 January 2000, paras 540-541.

[58] United Nations War Crimes Commission, *1948 History of the United Nations War Crimes Commission and the Development of the Laws of War,* 1948, His Majesty's Stationary Office, London, p. 174.

[59] *Ibid.*, pp. 174, 176.

[60] Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Nuernberg, October 1946-April 1949, Vol. IV, *United States of America v. Otto Ohlendorf et al.*, p. 497.

[61] Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Nuernberg, October 1946-April 1949, Vol. III, *United States of America v. Josef Alstötter, et al.*, p. 973.

[62] *H case,* 18 October 1949, Entscheidungen in Strafsachen des Obersten Gerichtshofes für die Britische Zone, vol. II (W de Gruyter, Berlin, 1949), p. 234, n. 26 ("*H case*") (OCIJ translation).

[63] *Ibid.*

25. Academic comment has characterised the elaboration of CAH by the Commission, and its codification in Article 6(c) of the Nuremberg Charter, as a normative development in the law that sought to address atrocities against civilian populations which did not fit the technical definitions of existing crimes, and yet went against the dictates of public conscience and general principles of law recognised by the community of nations.[64] The inclusion of CAH in the Nuremberg Charter has also been recognised as a legal innovation for placing a limitation on the doctrine of state sovereignty by ensuring that citizens of a state are under the protection of international law even if they are the subject of attacks by their compatriots.[65]

26. Thus, the purpose of CAH under international law may be characterised as the protection against human rights violations perpetrated on a large scale against individuals including a state's own nationals, who were not otherwise protected by the existing laws and customs of war.

D. Interpreting the term *civilian population* in the context of CAH

v. Preliminary considerations

27. International criminal cases tried before 1975 do not address in detail the meaning of *civilian population* for the purposes of the *chapeau* elements of CAH. While there are cases offering guidance relevant for the resolution of the Issue, an in-depth judicial discussion on the meaning of this term in relation to CAH only started in the 1990s, when the International Criminal Tribunal for the former Yugoslavia ("ICTY") was given jurisdiction to try war crimes and CAH committed in the context of the Yugoslav conflicts.

28. While the ICTY, the other *ad hoc* tribunals, the ECCC, and the ICC have all discussed the meaning of *civilian population*, no case has addressed the term in the context of the scenario envisaged in the Issue. Rather, the discussion has focused on the meaning of *civilian population* with reference to the population of an opposing party in a national or international armed conflict.

29. To resolve the Issue, I will first review evidence of state practice and *opinio juris* pre-1975, in order to determine whether in 1975 *civilian population* included, and could be understood to include, a state or organisation's own armed forces. I will then analyse the elaboration of the term by courts who interpreted it, starting from the 1990s. This review will show that, while nowadays the vast majority of international and hybrid criminal courts define *civilian population* narrowly and based on the IHL meaning of the term, this jurisprudence originated in the context of cases where CAH were inextricably linked to an ongoing armed conflict. The main question to be resolved in answering the Issue is whether such an interpretation is appropriate and applicable in times of peace or for CAH merely

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[64] E Schwelb, "Crimes Against Humanity", *British Yearbook of International Law*, Vol. 23, 1946, pp. 184-185; M. Cherif Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application*, 2011, Cambridge University Press, New York, pp. 9, 29, 475; Darryl Robinson, "Defining 'Crimes Against Humanity' at the Rome Conference", *The American Journal of International Law*, Vol. 93(1), 1999, p. 44; Payam Akhavan, "Reconciling Crimes Against Humanity with the Laws of War", *Journal of International Criminal Justice*, Vol. 6(1), 2008, pp. 22-23.

[65] Beth Van Schaack, "The Definition of Crimes Against Humanity: Resolving the Incoherence", *Columbia Journal of Transnational Law*, Vol. 37, 1999, pp. 790-791.

committed during the duration of but not contextually connected to an ongoing armed conflict, and whether it is binding for crimes committed between 1975 and 1979.

vi. Review of state practice and *opinio juris* pre-1975

Pre-1975 definition of CAH

30. CAH were first "codified"[66] in August 1945 in the Nuremberg Charter. In December 1945, the Allied Powers issued CCL10,[67] which essentially reproduced the definition of the Nuremberg Charter with the exception of the requirement that CAH be committed in connection with an armed conflict ("Nexus").[68] The Nuremberg Charter, CCL10, and all but one of the definitions of CAH elaborated and/or adopted before 1975, require that for a certain act to amount to a CAH, it must have been committed, *inter alia*, in the context of a widespread or systematic attack *"against any civilian population"*.[69] Article 5 of the ECCC Law contains the same requirement.[70]

31. Considering that the Nexus was no longer a constitutive element of CAH by 1975,[71] and that with the exception of the Nuremberg Principles[72] no further official definition of CAH was provided before it was included in the statutes of the *ad hoc* tribunals in the 1990s, the definition of CAH contained in Article 2(1)(c) of CCL10 will be used as reference point in reviewing post-WWII jurisprudence relevant to the resolution of the Issue. Article 2(1)(c) defined CAH as:

> Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against **any civilian population**, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.[73] (emphasis added)

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[66] The term is used here in a loose definitional sense rather than as a true equivalent of legislative enactment, which did not occur, arguably, before the advent of the Rome Statute.

[67] Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, 20 December 1945.

[68] *See* Case No. 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, paras 24-27, 33, ("Nexus Decision"); Case File 002-F36, *Appeal Judgement*, 23 November 2016, para. 714 ("Case 002/01 Appeal Judgement").

[69] *See* 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, Article 6(c), ("Nuremberg Charter"); Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, 20 December 1945, Article 2(1)(c); Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgement of the Tribunal, *Yearbook of the International Law Commission* (1950), Vol. II, Principle VI, p. 377.

[70] Case 002/01 Appeal Judgement, para. 707.

[71] *See* Nexus Decision, para. 80. *See also* Case 002/01 Appeal Judgement, para. 721.

[72] A definition of CAH was codified in 1950 under Principle VI of the Nuremberg Principles, which still included the Nexus requirement. However, because the Nexus had been severed by 1975, it seems preferable to rely on the definition of CAH included in Article 2(1)(c) of Control Council Law No. 10 as the positive definition of CAH applicable in 1975. *See* Nexus Decision, para. 47.

[73] Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, 20 December 1945, Article 2(1)(c), available at: http://avalon.law.yale.edu/imt/imt10.asp.

32. I note that one instrument, in 1946, defined CAH without the requirement that they be committed in the context of an attack against any civilian population. The Charter of the International Military Tribunal for the Far East ("IMTFE Charter") issued on 19 January 1946 initially included the civilian population requirement under its Article 5, which defined CAH.[74] By General Order No. 20, on 26 April 1946, the Supreme Commander of the Allied Powers removed the civilian population requirement from Article 5.[75] This change, however, appears to have been made at the prosecution's behest a few days before the start of the trial, a circumstance which has drawn criticism both by contemporary scholars and by a Judge of the International Military Tribunal for the Far East.[76] Further, the unilateral issuance of the IMTFE Charter by General MacArthur renders its value in assessing the state of CIL rather limited.[77] I thus do not consider it appropriate to give any significant weight to the amended version of the IMTFE Charter in deciding the Issue.

The persecution-type CAH argument

33. As a preliminary observation, the syntax of Article 2(1)(c) of CCL10 allows for the interpretation that the *chapeau* element of the attack against any civilian population did not apply to persecution-type CAH. If this interpretation were to be accepted, the resolution of the Issue would no longer be relevant in relation to persecution as a CAH. This argument has been advanced by some *amici curiae*, and adopted, for example, by Antonio Cassese, for a long time.[78]

34. Article 5 of the ECCC Law, however, explicitly requires that persecution-type CAH be committed in the context of a widespread or systematic attack against any civilian population. In practice, therefore, even if the persecution argument were to be accepted, the ECCC would have jurisdiction only over those persecutions committed in the context of a widespread or systematic attack against a civilian population. By way of example, while the ICTY found in 1995 that it was well settled in CIL that CAH no longer required proof of the Nexus, it acknowledged that its inclusion under Article 5 of the ICTY Statute amounted to a jurisdictional limitation.[79] The persecution argument will thus not be addressed further in this decision.

Civilian population in post-WWII jurisprudence

35. Before the creation of the *ad hoc* tribunals and their thorough review of the elements of international crimes under their jurisdictions, the sources that shed

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[74] General Order No. 1 is available at: http://imtfe.law.virginia.edu/collections/tavenner/1/3/general-order-number-1-charter-international-military-tribunal-far-east.

[75] General Order No. 20 is available at: http://imtfe.law.virginia.edu/collections/tavenner/2/1/general-order-no-20-charter-international-military-tribunal-far-east.

[76] *See* Neil Boister & Robert Cryer, *The Tokyo International Military Tribunal: A Reappraisal*, Oxford, Oxford University Press, 2008, pp. 156-157;Neil Boister & Robert Cryer, *Documents on the Tokyo International Military Tribunal: Charter, Indictment, and Judgments*, Oxford, Oxford University Press, 2008, p. 1324, para. 1031.

[77] *See* Nexus Decision, para. 28.

[78] Antonio Cassese, et al., *Cassese's International Criminal Law*, Third Edition, 2013, Oxford University Press, Oxford, p. 102.

[79] *See* ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, 2 October 1995, paras 138-142.

light on the interpretation of the term civilian population in international criminal jurisprudence were few and far between.

36. The first international criminal judgement on CAH is the judgement of the International Military Tribunal ("Nuremberg Judgement").[80] An analysis of the reasoning reveals that, while the judges did not analyse in depth the meaning of *civilian population*, they repeatedly highlighted the *"consistent"*, *"systematic"*, and *"planned"* character of the inhumane system of persecution and other crimes perpetrated *"on a vast scale"* by the Nazi regime, without apparently carrying out an enquiry – as is common in international criminal judgements on CAH issued by international and hybrid tribunals created after the 1990s – as to the composition of the population and the status of the targeted people.[81]

37. Cases tried under CCL10 provide no explicit analysis of the *civilian population* requirement either. In fact, similarly to the Nuremberg Judgement, no particular effort was made to ascertain the formal status of the targeted people. Nevertheless, some of the considerations of the courts that tried these cases shed light on their understanding of the breadth of the protection offered by the law of CAH, which conforms to the purpose of CAH identified above.

38. The courts, in judging allegations of CAH, primarily looked at the systematic and large scale of the attacks rather than at the formal status of the attacks' victims. In *Altstötter*, for instance, the Court stated that CCL10 provided for the punishment of crimes committed against German nationals – without further specifying their status - where there was proof of *"conscious participation in systematic government organized or approved procedures amounting to atrocities and offences of the kind specified in the act and committed against populations or amounting to persecutions on political, racial, or religious grounds."*[82] A similar approach was adopted in the *Ohlendorf et al.* case.[83]

39. Three cases decided by the German Supreme Court of the British Occupied Zone have been cited extensively by the ICP and *amici curiae* in support of a positive resolution of the Issue. The Defence for Meas Muth, Ao An, and Yim Tith have greatly taken issue with this case law, arguing that it is not relevant to the resolution of the Issue, but rather to the non-contentious issue that soldiers may be *victims* of CAH.[84] The cases, indeed, concern servicemen who fell victim of CAH and do not explicitly discuss the civilian population requirement, at least not to the extent that it has been discussed in international criminal jurisprudence from the mid-1990s onwards. However, they provide insights into the courts' understanding of the elements of CAH, including a lack of focus on the formal

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[80] International Military Tribunal, *Judgement*, 1 October 1946, reprinted in *Trial of the Major War Criminals before the International Military Tribunal*, Vol. I, ("Nuremberg Judgement").
[81] Nuremberg Judgement, pp. 247, 250, 254.
[82] Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Nuernberg, October 1946-April 1949, Vol. III, *United States of America v. Josef Alstotter and others*, p. 982.
[83] Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Nuernberg, October 1946-April 1949, Vol. IV, *United States of America v. Otto Ohlendorf et al.*, p. 498.
[84] Meas Muth Response, paras 26-27; Ao An Submission, para. 38; Yim Tith Submission, paras 21-25, 28.

status (military or civilian) of the targets of a system of human rights violations when committed on a massive or systematic scale.

40. In *P and Others,* the Court stated that "*anyone considering the non-exhaustive character of the typified offence elements listed therein* [s. 10 CCL] *cannot believe that actions* ***among soldiers*** *cannot represent crimes against humanity*" when they belong "*to the system and the massive number of crimes committed in the Nazi rule.*" (emphasis added).[85] With regard to the elements of CAH, the Court stated that "*for the internal elements of the crime to be met, it is further necessary that the willful intent to cause harm includes the fact that the harm is connected with a system of tyranny and violence*".[86]

41. In the *H Case*, the Court stated that for the elements of CAH to be met it is necessary that the accused was aware of the connection between his conduct "*and the system of violence and tyranny.*"[87] Relevant to the Issue, the Court had previously defined that system and the planned oppression and prosecution committed arbitrarily and violently by the socialist state against "***anyone*** *they did not like for whatever reason*" (emphasis added),[88] a formulation that resonates with the words of the Court in the *Einsatzgruppen* case, which stated that the law of humanity "*envisages the protection of* ***humanity*** *at all times*".[89] (emphasis added).

42. Finally, in the *R Case*, the Court stated the objective elements of CAH to be "*the necessary correlation between the offence and the tyranny of the national socialist rule, the further circumstance that the offence affected the victim profoundly, and finally the supra-individual effects of the offence.*"[90]

43. In conclusion, while the civilian population requirement was part of the law of CAH applied in the aftermath of WWII, the courts that applied that law considered the elements of CAH satisfied when the individual crimes were connected to a system of large-scale abuses of human rights by the Nazi authorities not perpetrated during combat military operations. In the presence of these circumstances, the courts found that CAH had been committed without further enquiring into the formal status of the persons affected by that system. As discussed below, an ICTY Trial Chamber also reasoned that more than formal civilian status, it was the collective dimension of the crime which characterised CAH. This approach, which I consider consistent with the objective and purpose of CAH, evidences a broad interpretation of the term *civilian population* in the aftermath of WWII.

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[85] *P and Others case*, 7 December 1948, Entscheidungen in Strafsachen des Obersten Gerichtshofes für die Britische Zone,vol. I (1949), p. 228, n. V (OCIJ translation).
[86] *Ibid.*, p. 224, n. III (OCIJ translation).
[87] *H case*, p. 246, n. 26 (OCIJ translation).
[88] *Ibid.*, p. 234, n. 26 (OCIJ translation).
[89] Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Nuernberg, October 1946-April 1949, Vol. IV, *United States of America v. Otto Ohlendorf et al.*, p. 497.
[90] *R case*, 27 July 1948, Entscheidungen in Strafsachen des Obersten Gerichtshofes für die Britische Zone, vol. I (1949), p. 49 (OCIJ translation).

Relevant pre-1975 international instruments

44. Article II of the Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention"), adopted by the United Nations General Assembly ("UNGA") on 9 December 1948, and which Cambodia acceded to in 1950, does not limit the prohibition to a civilian population in defining the crime of genocide. Rather, it forbids a number of human rights violations, carried out with a genocidal intent, against *all individuals*. Similarly, Article II of the Convention on the Suppression and Punishment of the Crime of Apartheid ("Apartheid Convention"), after defining apartheid as a CAH, prohibits a number of discriminatory measures and human rights violations against all individuals.

45. Genocide and apartheid, as CAH, do not require proof of the *chapeau* elements of CAH enshrined in Article 5 of the ECCC Law. Further, the crime of apartheid has very specific historical origins. Because of their specific nature, the debates preceding their adoption did not – unsurprisingly – focus on the military or civilian status of potential victims. Their direct relevance for the interpretation of the term civilian population set forth in Article 5 is thus limited. However, these instruments underline the international community's resolution to protect all individuals against grave human rights violations committed either in times of peace or when, in the context of an armed conflict, they are not committed for military necessity. I thus find them relevant to the Issue, albeit limited to the foreseeability limb of the principle of legality.

vii. Majority interpretation of *civilian population* in post-1975 jurisprudence: the IHL criterion

46. The SCC and Trial Chamber at the ECCC have interpreted the *civilian population* requirement consistently with the majority view in the case law of the *ad hoc* tribunals. To date, the most widely accepted definition is that provided by the *Blaškić* Appeals Chamber at the ICTY, which found that members of the armed forces, militias, volunteer corps, and members of resistance groups cannot be considered civilians for the purposes of the civilian population requirement, even when *hors de combat*.[91]

47. In defining the term civilian population, the *Blaškić* Appeals Chamber relied on Article 50(1) of the 1977 Additional Protocol I to the Geneva Conventions, which it found to be reflective of CIL.[92] Article 50(1) defines "*civilians*" and "*civilian population*" in the negative by stating that:

> A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.

The persons referred to in Article 4 A of the Third Geneva Convention and in Article 43 of Additional Protocol I are, essentially, different types of combatants belonging to regular armed forces, militias, or resistance movements. The

[91] Case 002/01 Appeal Judgement, para. 738, *citing* ICTY, *Prosecutor v. Blaškić*, IT-95-14-A, *Judgement*, 29 July 2004 ("*Blaškić* Appeal Judgement"), paras 110-113.
[92] *Blaškić* Appeal Judgement, para. 110.

interpretation of the *Blaškić* Appeals Chamber has since been followed by the ICTY in its subsequent judgements[93] and recently by the ICC.[94]

48. At the ECCC, the Trial Chamber found that in 1975, two years prior to the adoption of Additional Protocol I, there was no established definition of *civilians* under CIL.[95] It thus adopted what it characterised as the ordinary definition, which includes all persons not members of the armed forces or otherwise recognised as combatants.[96] In essence, the Trial Chamber decided consistently with the *Blaškić* Appeal Chamber's definition, stating that soldiers *hors de combat* do not qualify as civilians for the purpose of Article 5 of the ECCC Law and that the ordinary definition that it adopted was consistent with the one included in Article 50(1) of Additional Protocol I.[97] The Trial Chamber, however, also noted that as a general presumption, "*the armed law enforcement agencies of a State are considered to be civilians for purposes of international humanitarian law.*"[98] The appropriateness of relying on IHL in interpreting the law of CAH will be discussed below in Section ix.

viii. Alternative interpretation of *civilian population*: the specific situation criterion

49. A number of international criminal judgements have approached the interpretation of *civilian population* differently from the *Blaškić* Appeals Chamber. For instance, the *Blaškić* Trial Chamber had considered that the specific situation of the victims at the moment the crimes were committed, rather than their formal status, had to be taken into account in determining whether they qualify as civilians. Following this approach, the Chamber concluded that persons *hors de combat* qualified as civilians for the purpose of the *chapeau* elements of CAH.[99] The same conclusion was reached in the *Kupreškić* Trial Judgement.[100] The *Jelisić* Trial Chamber, which also stood in favour of a broad interpretation of *civilian population*, considered the term to place the emphasis "*more on the collective aspects of the crime than on the status of the victims.*"[101] Notably, *Jelisić*'s focus on the collective dimension of the crime rather than on the status of the victims is consistent with the approach followed in the trials in the aftermath of WWII, reviewed under Section vi above.[102]

50. Although this interpretation was rejected by the *Blaškić* Appeals Chamber, a number of judgements of the International Criminal Tribunal for Rwanda ("ICTR"), including judgements issued after the *Blaškić* Appeal Judgement,

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[93] ICTY, *Prosecutor v. Galić*, Case No. IT-98-29-A, *Judgement*, 30 November 2006, para. 144; *Prosecutor v. Martić*, Case No. IT-95-11-A, *Judgement*, 8 October 2008, paras 291-302; *Prosecutor v. Mrkšić and Šlivančanin*, Case No. IT-95-13/1-A, *Judgement*, 5 May 2009, paras 28-33.

[94] ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, *Judgment Pursuant to Article 74 of the Statute*, 21 March 2016, para. 152.

[95] Case 002/01 Judgement, para. 185.

[96] *Id.*

[97] *Ibid.*, para. 186.

[98] *Id.*

[99] *Prosecutor v. Blaškić*, Case No. IT-95-14-T, *Judgement*, 3 March 2000, para. 214.

[100] ICTY, *Prosecutor v. Kupreškić*, Case No. IT-95-16-T, *Judgement*, 14 January 2000, paras 547-549.

[101] ICTY, *Prosecutor v. Jelisić*, Case No. IT-95-10-T, *Judgement*, 14 December 1999, para. 54.

[102] *See also* Rosa Ana Alija Fernández & Jaume Saura Estapá, "Towards a Single and Comprehensive Notion of 'Civilian Population' in Crimes against Humanity", *International Criminal Law Review*, 2016, pp. 13-14.

followed the specific situation criterion elaborated by the *Blaškić* Trial Chamber.[103]

ix. Relying on IHL to interpret the law of CAH

51. The interpretation of the term civilian population elaborated by the *Blaškić* Appeals Chamber and followed by the Chambers of the ECCC in Case 002 is based on the meaning of civilian population in IHL.[104] Article 50(1) of Additional Protocol I is a key provision in a broader set of rules written to regulate the conduct of armed hostilities between *opposing* forces. This definition is functional and strictly related to the principle of distinction, a fundamental principle of IHL, and part of CIL, mandating that the parties to a conflict must at all times distinguish between civilian and combatants, and that attacks may only be directed against combatants, not against civilians.[105] The function of Article 50(1) is thus to identify the category, i.e. combatant or civilian, to which an individual belongs to during an armed conflict.

52. As seen above, Article 50(1) defines *civilians* and *civilian population* in the negative, stating that civilians are person not belonging to official or unofficial armed forces and groups. The categories referred to by Article 50(1), however, presuppose the existence of an armed conflict (whether national or international in nature is irrelevant for this discussion). In deciding to refer to Article 50(1), the *Blaškić* Appeals Chamber relied, *inter alia*, on a Report of the United Nations' Secretary General characterising the Geneva Conventions as the instruments providing *"the core of customary law applicable in international armed conflicts."*[106] This very reason, however, renders Article 50(1) *prima facie* unsuitable to define the term civilian population in relation to CAH which are not related to an ongoing armed conflict. As noted approximately five years before the issuance of the *Blaškić* Appeal Judgement by a trial chamber of the ICTR, traditionally the legal definitions of *civilian* and *civilian population* have been discussed within the context of armed conflict and have hence always been viewed against the backdrop of opposing forces. However, considering that CAH may be committed both inside and outside the context of an armed conflict, these terms need to be understood uniformly both within the context of as well as in the absence of armed conflict.[107]

53. The ICTY's reliance on the IHL definition of civilian population is understandable considering that its jurisdiction is limited to CAH committed in the context of an armed conflict.[108] The *Kunarac* Appeals Chamber, in fact, noted

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[103] ICTR, *see e.g. Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, *Judgement*, 2 September 1998, para. 582 ; *Prosecutor v. Bisengimana*, Case No. ICTR-00-60-T, *Judgement*, 13 April 2006, paras 48-51; *Prosecutor v. Muvunyi*, Case No. ICTR-2000-55A-T, *Judgement*, 12 September 2006, para. 513; *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-T, *Judgement*, 7 June 2001, para. 79.

[104] *See Blaškić* Appeal Judgement, paras 110-113.

[105] *See* ICRC, Rule 1. The Principle of Distinction between Civilians and Combatants, in *Customary IHL Database*, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter1_rule1.

[106] *Blaškić* Appeal Judgement, para. 110.

[107] *See* ICTR, *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T, *Judgement*, 21 May 1999, para. 127.

[108] ICTY Statute, Article 5. *See Prosecutor v. Tadić*, Case No. IT-94-1-A, *Judgement*, 15 July 1999, para. 249;*Prosecutor v. Šešelj*, Case No. IT-03-67-AR72.1, *Decision on the Interlocutory Appeal Concerning Jurisdiction*, 31 August 2004, paras 12-13.

that *"[t]o the extent that the alleged CAH were committed in the course of an armed conflict, the laws of war provide a benchmark against which the Chamber may assess the nature of the attack and the legality of the acts committed in its midst."*[109] The Trial Chamber in the *Taylor* case at the Special Court for Sierra Leone expressed similar considerations.[110] It is thus not surprising that at the ICTR, where there is no Nexus requirement in relation to CAH, some trial chambers decided not to apply the IHL definition of *civilian population* adopted by the *Blaškić* Appeals Chamber.[111]

54. It is consolidated in international criminal jurisprudence that the *widespread or systematic attack* against *any civilian population* need not be a military attack in the traditional sense, but it encompasses *"any mistreatment of the civilian population"*.[112] It is a separate concept from that of an armed conflict.[113] It has been aptly observed that if the IHL concept of "attack" is not used to define the same term in the context of CAH, it is unclear why the IHL definition of civilian population should be automatically applied to the law of CAH.[114] As noted at the ICTY by the *Tadić* Trial Chamber, the IHL definition of civilians is *"not immediately applicable to crimes against humanity because it is a part of the laws or customs of war and can only be applied by analogy."*[115]

x. Interpreting *civilian population* for the purposes of CAH

55. In the commentary on the draft additional protocols to the Geneva Conventions, the International Committee of the Red Cross ("ICRC") advocated *"as wide as possible a definition"* of the definition of *civilian*, which was justified, according to the ICRC, *"by the purpose intended, namely, general protection against effects of hostilities"*.[116] In Section C above, upon review of reports and jurisprudence on the purpose of the law of CAH, I have found that it can be characterised as the protection against human rights violations perpetrated on a large scale against individuals including a State's own nationals, who were not otherwise protected by the existing laws and customs of war. I am thus convinced that, in interpreting the law of CAH consistently with this objective and purpose in a scenario such as that envisaged in the Issue, the specific situation criterion, rather than the IHL criterion (*see supra* Section ix) must be applied. Therefore, a broader definition of civilian population, that of the entire population of a certain country,[117] must be adopted.

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[109] ICTY, *Prosecutor v. Kunarac et al.*, Case No. IT-96-23/1-A, *Judgement*, 12 June 2002 ("*Kunarac* Appeal Judgement"), para. 91.
[110] Special Court for Sierra Leone, *Prosecutor v. Taylor*, Case No. SCSL-03-01-T, *Judgement*, 18 May 2012, para. 510.
[111] *See e.g. Prosecutor v. Bisengimana*, Judgement, ICTR Trial Chamber II (ICTR-00-60-T), 13 April 2006, paras 48-51; *Prosecutor v. Muvunyi*, Judgement, ICTR Trial Chamber II (ICTR-2000-55A-T), 12 September 2006, para. 513.
[112] Case 002/01 Judgement, para. 178, *citing Kunarac* Appeal Judgement, para. 86.
[113] *Ibid.*, para. 178.
[114] Leila Nadya Sadat, "Putting Peacetime First: Crimes against Humanity and the Civilian Population Requirement", *Emory International Law Review*, Vol. 31(2), 2017, p. 253.
[115] ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-T, *Opinion and Judgment*, 7 May 1997, para. 639.
[116] ICRC, *Draft Additional Protocols to the Geneva Conventions of August 12, 1949: Commentary*, Geneva, October 1973, p. 55.
[117] Ben Saul Brief, paras 3(c)-(d), 18-19, citing *Dictionnaire de l'Académie française* (9th edition), online.

56. On this basis, I consider that, as a matter of principle, between 1975 and 1979 an attack by a state or organisation against its own armed forces, when carried out in peacetime, satisfied the *chapeau* requirement of an attack against any civilian population under Article 5 of the ECCC Law.

57. An attack carried out by a state or regime against its own armed forces during an armed conflict did also, as a matter of principle, satisfy that *chapeau* requirement, unless the attacked armed forces were in fact allied with or otherwise providing militarily relevant support to an opposing side in the conflict. In such a scenario, the targeted armed forces could not be considered as civilians, and the *chapeau* requirement of the relevant CAH would not be satisfied.[118]

58. The principle of legality is not offended by this conclusion for several reasons.

59. Firstly, the pre-1975 jurisprudence reviewed above in Section vi did not interpret civilian population by reference to IHL. Rather, it focused on the systematic and vast-scale character of the crimes, and on their collective dimension, without enquiring into the composition of the group victim of the state-sponsored abuses. In fact, courts explicitly stated that the law of CAH protected *"anyone they did not like"*[119] or *"humanity"*, a statement which is difficult to reconcile with an interpretation that would exclude a state's own armed forces from the protection against CAH.[120] The IHL-based interpretation of civilian population became the majority position only *after* the time-period over which the ECCC has jurisdiction. In this regard, I do not consider that the later interpretation of civilian population based on IHL represents an instance of the introduction of a more lenient law against CAH requiring the application of the *lex mitior*. This principle concerns the introduction of more lenient penalties in relation to a certain offence, or partial or full decriminalisation,[121] while in this instance we are concerned with a different interpretation in the context of IHL which, for the reasons explained above, is unsuitable for CAH not contextually connected to an armed conflict to begin with.

60. Secondly, it was foreseeable in 1975, by consulting the materials then available and relied on in this analysis and if necessary with the assistance of legal counsel, that the perpetration of massive human rights violations by a state against its own armed forces could have given rise to personal criminal responsibility of the perpetrators. It is, in any event, not required that the offender foresaw the precise legal characterisation of her conduct, or whether it was a national or international crime.[122]

61. The criminal nature of an attack such as the one envisaged in the Issue could also be reasonably and sufficiently foreshadowed in 1975 through the existence of

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[118] Similarly, for example, Kai Ambos, Treatise on International Criminal Law, Vol. II, (OUP), 2014, p. 66 f. – It bears pointing out in this context that as far as individual perpetrators are concerned, liability may, of course, be excluded from the ICL perspective as a matter of the *mens rea* related to the *chapeau* elements if and to the extent that the perpetrator of the actual crimes had a mistaken belief that there existed such an alliance or lending of support.

[119] *H case*, p. 234, n. 26.

[120] Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, Nuernberg, October 1946-April 1949, Vol. IV, *United States of America v. Otto Ohlendorf et al.*, p. 497.

[121] ECtHR, *Scoppola v. Italy (No. 2)*, 17 December 2009, paras 103-109.

[122] ECtHR, *S.W. v. the United Kingdom*, 22 November 1995, paras 35-36.

human rights conventions, such as the Universal Declaration of Human Rights and the ICCPR, which offer universal protection in relation to the fundamental rights protected by the law of CAH.[123] In this regard, I note the objection lodged by the Meas Muth Defence that human rights law is not criminal legislation, and cannot therefore be used to interpret criminal provisions.[124] This view, if expressed in such a broad and sweeping claim, is inherently incorrect. The human rights violation directly informs the content of a criminal provision which merely provides a sanction for the violation. What is right in the Meas Muth Defence's argument is that not every human rights violation necessarily entails criminal liability on the international or national level. This is, with respect, not the focus of the Issue. Article 50(1) of Additional Protocol I has been used extensively, as seen above, to interpret the term civilian population in relation to CAH. Article 50(1) is not a criminal provision either.[125]

62. Further, as noted above under Section vi, the Apartheid and Genocide conventions also contribute to satisfying the foreseeability requirement in relation to the Issue.

63. Thirdly, excluding a state's own armed forces from the protection against CAH would frustrate the purpose of the law and lead to absurd results. It would exclude from the protections of CAH nationals of a state who are not participating in hostilities but enjoy the same human rights as people employed by other public authorities of that state. The fact of the matter is that *vis-à-vis* a state's own soldiers, the IHL distinction based on combatant status does not make any sense at all. In fact, even in the IHL context, civilians lose their civilian status for the purposes of protection under war crimes provisions as soon as they take up arms and join the regular armed forces; they become legitimate targets. Hence a purely abstract status-based definition of civilian versus combatant without any reflection on their actual activity does not even hold true in the classical scenario of an enemy population. The interpretation must by necessity look at the aim and purpose of the protection meant to be provided under the law on CAH, absent a clear indication to the contrary by unambiguous state practice. No such practice could be found for the temporal jurisdiction of the ECCC, as explained above.

64. It would also seem patently unrealistic, as the Meas Muth Defence argue, with passing reference to an argument advanced by Cassese, that CAH committed against a state's own soldiers could be left to the military courts of the offending state.[126] This could hold true in instances of isolated, non-systematic crimes committed by rogue officers or state officials. In the event, however, of a systematic or widespread attack which in essence forms part of a state or regime policy,[127] the argument advanced by the Defence would be tantamount to expecting a state to first persecute its servicemen and -women and then prosecute itself for it.

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[123] ICP Submission, para. 10.

[124] Meas Muth Response, para. 22.

[125] For the emerging tendency to seek guidance on the jurisprudence of human right bodies in defining, *inter alia*, human rights violations that amount to international crimes *see* Annika Jones, "Insights Into an Emerging Relationship: Use of Human Rights Jurisprudence at the International Criminal Court", *Human Rights Law Review*, 2016, 16, 701-729.

[126] Meas Muth Response, n. 13.

[127] While this is a circumstance relevant to the resolution of the Issue, CAH do not require, among their elements, that the widespread or systematic attack is part of a state policy. *See* Case File No. 002/1-E313, *Case 002/1 Judgement*, 7 August 2014, para. 181.

65. In addition, there is no discernible justification that would mandate or allow a different treatment of a regime's own soldiers simply because of their formal employment status. An example will suffice to show that such a view is untenable: imagine a change in government during peace-time, with the new administration being firmly of the view that members of its armed forces belonging to a certain religion are inherently unreliable and unfit to defend the interests of the state. The government orders the incarceration, interrogation under torture and execution of all servicemen and women belonging to that religion. Keeping in mind the purpose and object of CAH, how could their employment status as soldiers place them outside the protection of the law of CAH? Indeed, if the government employed the same policy against members of its civil intelligence services, who are by status clearly civilians but nonetheless participate in the gathering of data that may be also used for military purposes, what conceivable difference could that distinction make? A resolution of the Issue as suggested by counsel for Yim Tith, Ao An, and Meas Muth would protect armed members of the police forces against CAH,[128] but not members of the state's army, irrespective of whether they are even carrying weapons as part of their daily duties.

66. ICL after Nuremberg should no longer be interpreted too readily as conceding to states a right to arbitrary exceptions from the logic of its reach. In other words, after Nuremberg, states are no longer allowed to cherry-pick which restrictions and liabilities in their conduct towards individual persons they submit to; the fact that they occasionally do so under the mantle of sovereignty is an expression of power, not of justice. That much was already clear in 1975. While it may be apposite in the relationship between states to accord sovereignty a high value, this argument was and is of no relevance in the context of the criminal law which relates to both the protection and liability of individual human beings, and even less so in the environment of the ECCC, a Cambodian court, tasked with investigating and, if appropriate, trying and sentencing Cambodians for crimes committed overwhelmingly against Cambodians. Criminal law is the ultimate expression of a society's moral judgment in relation to certain kinds of behaviour. Once the international community after WWII had chosen to adopt the criminal law as a means of reaction to what was then recognised as internationally criminalised behaviour, it submitted to that law's systemic logic under the rule of law. Exceptions from liability under that logic are in principle possible, as in any legal system, but they need to be based on arguments acceptable to that logic. Anything else is ultimately nothing but an expression of arbitrary power. Exempting one's own soldiers from the protection provided otherwise under the law of CAH based on an overly restrictive interpretation of its terminology, which is what the Defence are in essence promoting, is not such an acceptable argument, even less so when the exception is meant to be based on a simple historical omission to confront the issue, rather than an active expression of intentional divergence. As Oliver Wendell Holmes stated aptly in *Olmstead v. The United States*, *"Courts are apt to err by sticking too closely to the words of a law where those words import a policy that goes beyond them."*[129]

67. The principle of *in dubio pro reo* as interpreted by the SCC does not stand in the way of the view adopted here. Firstly, this principle is a residual interpretive

[128] Case 002/01 Judgement, paras 185-186.
[129] *Olmstead v. United States*, 277 U.S. 438, 469 (1928) (Holmes, J., concurring and dissenting).

criterion, which applies only after having interpreted the law through the appropriate criteria, including strict construction. As seen above, including a state's own armed forces within the term civilian population is required by the purpose of CAH and is consistent with the interpretation of the law in post-WWII jurisprudence. Thus, in 1975, the conduct described in the Issue could have been expected to fall under CAH as they existed in CIL at that time.

68. Secondly, neither the principle of *in dubio pro reo* nor that of strict construction require the adoption of a patently nonsensical point of view. Because, as the analysis in this decision shows, the mere formal status of members of the armed forces is logically entirely irrelevant in their relationship to their *own* State or regime, to exclude them from the protection under the law of CAH and cast them at the mercy of the military courts of the very regime that is victimising them would indeed make the law into a Dickensian parody: "*If the law supposes that," said Mr Bumble [...], "the law is a ass—a idiot."*[130]

FOR THE FOREGOING REASONS, I:

69. **FIND** that:

i. as a matter of principle, under the law of crimes against humanity as it existed between 1975 and 1979, an attack by a state or organisation against its own armed forces amounted to an attack against a civilian population for the purpose of Article 5 of the ECCC Law; and

ii. that the finding under i. above does not apply insofar as the attacked armed forces were in fact allied with or otherwise providing militarily relevant support to an opposing side to an armed conflict.

This notification is filed in English, with a Khmer translation to follow.

Dated 21 February 2017, Phnom Penh

Judge Michael Bohlander

International Co-Investigating Judge
Co-juge d'instruction international

[130] Charles Dickens, *Oliver Twist*, (Richard Bentley, London) 2nd Edition in 3 Volumes, vol. III, 1839, p. 279.