Leiden Journal of International Law, 22 (2009), pp. 727–752
 doi:10.1017/S0922156509990197

Defining Victims of Crimes against Humanity: *Martić* and the International Criminal Court

JOAKIM DUNGEL*

Abstract
In *Martić*, the ICTY held that the term 'civilian' in the *chapeau* of crimes against humanity excludes persons *hors de combat*, but that such persons may still be victims of crimes against humanity. This paper analyses that holding and its applicability before the ICC. It observes that the holding may result in additional protection to prisoners of war, leave the group of victims of crimes against humanity undefined, and render the term 'civilian' in the *chapeau* nugatory. Some recommendations are offered in these regards.

Key words
civilian; crimes against humanity; definition of victim; International Criminal Court; person *hors de combat*

1. Introduction

Crimes against humanity occur when certain offences are committed in a specific context, namely a widespread or systematic attack against a 'civilian population'. For example, murder in and of itself does not amount to a crime against humanity. Only when murder is committed as part of a widespread or systematic attack against a 'civilian population' does international criminal law elevate it to a crime against humanity. One question arising from this legal construction is whether both the underlying offence and the context must target 'civilians' for a crime against humanity to occur. Assume, for instance, that prisoners of war are murdered as part of an attack against an otherwise predominantly civilian population. Do those murders amount to crimes against humanity? On the one hand, logic would have it that they do not, because, strictly speaking they are not part of the attack against the 'civilian' population. On the other hand, prisoners of war and other combatants placed *hors de combat* are likely to be just as vulnerable as civilians during such an attack. It may therefore appear unjust to deny persons *hors de combat* the protection that the prohibition against crimes against humanity offers simply because they do not qualify formally as 'civilians'.

* LL M, New York University; LL M, Göteborgs Universitet/Université de Sherbrooke; Legal Officer, Special Court for Sierra Leone. The views herein are those of the author alone and do not necessarily reflect the views of the Special Court for Sierra Leone. The author is most grateful to Laetitia Husson and Philipp Ambach for their insightful and helpful comments on an earlier draft. This paper was completed in July 2009.

The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) recently addressed this issue and the related question of how to define the term 'civilian' in its judgment in the case *Prosecutor* v. *Milan Martić*.[1] Its holding settles these matters as far as the ICTY is concerned. However, both issues are likely to reappear before the International Criminal Court (ICC), which has yet to decide on them. This paper describes the ICTY Appeals Chamber's holding in *Martić* and offers some reflections on its applicability before the ICC. Section 2 provides a background to the holding by briefly analysing the origins of the term 'crimes against humanity'. In section 3 the holding itself and the reasoning behind it are set out in some detail. Section 4 examines the compatibility between *Martić* and the relevant provisions of the ICC along with related international jurisprudence, and highlights four issues arising from the *Martić* holding which the ICC may find useful to consider. Finally, a concluding remark is proffered in section 5.

2. The origins of 'crimes against humanity'

The earliest mention of 'crimes against humanity' as a label for a category of international crimes is found in a joint declaration by France, the United Kingdom, and Russia of 28 May 1915, wherein the three governments denounced the Ottoman government's massacre of Armenians in Turkey as constituting 'crimes against civilization and humanity', for which personal responsibility would attach.[2] However, although recommended by a war crimes commission established after the First World War, the 1919 Treaty of Versailles did not include such a crime because one representative objected that the juridical content of 'the laws of humanity' was too vague.[3]

At the end of the Second World War, the Holocaust and the other atrocities committed by the Nazi regime again raised the issue of crimes committed by a state against its own citizens. It was apparent that the classic definition of war crimes did not cover these acts, but at the same time it was clear that they could not go unpunished.[4] Indeed, most national criminal systems criminalized similar acts.[5] The 1945 Nuremburg Charter[6] filled this gap in the laws of war by including 'crimes against humanity' in Article 6(c), defined as

> murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the

1 *Prosecutor v. Milan Martić*, Judgement, Case No. IT-95–11-A, A.Ch., 8 October 2008 (hereinafter *Martić* Appeal Judgement).
2 R. Cryer et al., *An Introduction to International Criminal Law and Procedure* (2007), 187–8; M. C. Bassiouni, *International Criminal Law: Crimes* (1999), I, 536–7.
3 Cryer et al., *supra* note 2, at 188; Bassiouni, *supra* note 2, at 537–40.
4 Cryer et al., *supra* note 2, at 188. See also Bassiouni, *supra* note 2, at 521.
5 Bassiouni, *supra* note 2, at 571.
6 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Charter of the International Military Tribunal, August 1945, 59 Stat. 1544, 82 UNTS 279 (hereinafter Nuremberg Charter). The concept of crimes against humanity in the Nuremberg Charter was adopted shortly thereafter by the UN General Assembly, UNGA Res. 95(I), UN Doc. A/64/Add.1 (1946).

jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

By requiring that the enumerated acts be committed against 'any' civilian population, the drafters of the Nuremberg Charter thus solved the problem of crimes committed by a state against its own population. Crimes against humanity under the Nuremberg Charter also required a nexus to an armed conflict, as evidenced by the words 'in execution of or in connection with any crime within the jurisdiction of the Tribunal' – that is, crimes against peace and war crimes. Arguably, this link was inserted in order to connect the novelty, as it were, of criminalizing the enumerated acts when committed against a state's own population to its original normative source, namely the laws of war.[7]

With the exception of the Tokyo Charter,[8] the nexus requirement gradually disappeared in subsequent definitions of crimes against humanity,[9] whereas the element 'any civilian population' remained. For instance, the definition of crimes against humanity in Article 2(c) of Law No. 10 issued in 1945 by the Control Council established by the Allied Powers to govern occupied Germany, modelled on Article 6(c) of the Nuremberg Charter, required that the underlying acts be committed against 'any civilian population', but not that they be linked to an armed conflict.[10] Relying partly on this definition, a 1950 report of the International Law Commission (ILC) considered that the nexus to an armed conflict was no longer required.[11] Subsequent formulations of crimes against humanity by the ILC,[12] some domestic legislation,[13] international treaties,[14] and post-Second World War case law[15] did not include a nexus to an armed conflict. At present, there is a rule of customary

7 See Bassiouni, *supra* note 2, at 571; A. Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002), I, at 354. See also K. Ambos, *Internationales Strafrecht* (2006), §7, para. 174 (arguing that, through the nexus requirement, the criticism of an incrimination of conduct *ex post facto*, otherwise forbidden in international criminal law, could be pre-empted).

8 Charter of the International Military Tribunal for the Far East, approved 26 April 1946, TIAS No. 1589 (hereinafter Tokyo Charter), at 11, Art. 5(c).

9 Cassese et al., *supra* note 7, at 356.

10 Allied Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, 20 December 1945, Official Gazette of the Control Council for Germany, No. 3, Berlin, 31 January 1946 (hereinafter Control Council Law No. 10).

11 5 UN GAOR Supp/ (No. 12), UN Doc. A/1316 (1950), 11. It has been noted, however, that Control Council Law No. 10 was in the nature of domestic German legislation, and, as such, contrary to the Nuremberg Charter, the need to link the crimes to an international legal source (here, the laws of war) did not arise, Bassiouni, *supra* note 2, at 563–4, 572; *United States v. Josef Altstoetter* et al., *'The Justice Case'*, Judgment of 3–4 December 1947, Military Tribunal III, Law Reports of Trials of War Criminals, III (hereinafter *Justice* case), Separate Opinion of Judge Blair.

12 Draft Code of Offences against the Peace and Security of Mankind, UN GAOR, 9th Sess., supp. No. 9, UN Doc. A/2691 (1954), Art. 2; Draft Code of Offences against the Peace and Security of Mankind, Report of the International Law Commission on its Forty-Third Session, UN GAOR, 46th Sess., Supp. No. 10, UN Doc. A/46/10 (1991) (1991 ILC Draft Code), Art. 21; Draft Code of Offences against the Peace and Security of Mankind: Titles and Articles on the Draft Code of Crimes against the Peace and Security of Mankind adopted by the International Law Commission on its Forty-Eighth Session, UN GAOR, 51st Sess., UN Doc. A/CN.41.532 (1996), Art. 18.

13 See Cassese et al., *supra* note 7, at 356, citing the Canadian and French criminal codes.

14 Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity (1968); International Convention on the Suppression and Punishment of the Crime of Apartheid of 30 November 1973, 1015 UNTS 243 (hereinafter Apartheid Convention); Inter-American Convention on Enforced Disappearance (1994); UN Declaration on Enforced Disappearance (1992).

15 E.g. *Einsatzgruppen* Case, in *Trials of War Criminals*, IV, at 49; *Justice* case, *supra* note 11, at 974.

https://doi.org/10.1017/S0922156509990197 Published online by Cambridge University Press

international law that crimes against humanity do not require a connection to armed conflict.[16]

In this sense the UN Security Council defined crimes against humanity more narrowly than necessary under customary international law,[17] by including such a requirement when adopting the ICTY Statute in 1993.[18] Article 5, entitled 'Crimes against Humanity', reads:

> The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:
>
> (a) murder;
> (b) extermination;
> (c) enslavement;
> (d) deportation;
> (e) imprisonment;
> (f) torture;
> (g) rape;
> (h) persecutions on political, racial and religious grounds;
> (i) other inhumane acts.

Consonant with the Nuremberg Charter, this definition includes the *chapeau* element 'any civilian population'. Although not explicit in Article 5 of the ICTY Statute, the ICTY has interpreted the expression 'directed against any civilian population' as requiring 'that the acts be undertaken on a widespread or systematic basis'.[19]

The definitions of crimes against humanity in the statutes of other international or internationalized tribunals similarly include the element 'any civilian population' in their *chapeau*.[20] In particular, Article 7 of the Rome Statute of the International Criminal Court (ICC)[21] provides, in the relevant parts:

> 1. For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: . . .
> 2. For the purpose of paragraph 1:
> (a) 'Attack against any civilian population' means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population . . .

16 *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94–1-AR72, A.Ch., 2 October 1995 (hereinafter *Tadić* Jurisdiction Decision), para. 141.

17 Ibid., para. 141.

18 Statute of the International Criminal Tribunal for the former Yugoslavia, UN Doc. S/RES/827 (1993), Ann. (hereinafter ICTY Statute).

19 *Martić* Appeal Judgement, *supra* note 1, para. 305, referencing *Prosecutor v. Duško Tadić*, Opinion and Judgement, Case No. IT-94–1, T.Ch. 7 May 1997 (hereinafter *Tadić* Trial Judgement), para. 626.

20 Statute of the International Criminal Tribunal for Rwanda, S/RES/955 (1994), Ann., Art. 3; Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Att., 16 January 2002, Art. 2; Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, as amended 27 October 2004 (NS/RKM/1004/006), Art. 5; Reg. No. 2000/15 On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, UNTAET/REG/2000/15, 6 June 2000, Section 5. See also Statute of the Iraqi Special Tribunal for Crimes against Humanity, Art. 12 (see also Elements of the Crimes, Section 3 (1)(b), available at www.law.case.edu/saddamtrial/documents/IST_Elements.pdf, last visited Feb. 14, 2009).

21 Rome Statute of the International Criminal Court, 37 ILM 1002, 2187 UNTS 90 (hereinafter Rome Statute).

https://doi.org/10.1017/S0922156509990197 Published online by Cambridge University Press

In sum, the contemporary notion of crimes against humanity has disengaged its legal provenance – the laws of war – to the extent that it no longer requires a nexus to an armed conflict. At the same time, the notion retains a firm connection with its original purpose of protecting civilians, by requiring an attack against a 'civilian population'. For present purposes this conclusion raises two questions. First, whether the notion of crimes against humanity has moved so far away from the laws of war that this body of law is ineffective in interpreting its elements, in particular the term 'civilian'. Second, whether the notion is so attached to its original purpose of protecting civilians that it excludes from the group of potential victims persons *hors de combat*. The next section examines how these matters were addressed in the *Martić* case.

3. THE *MARTIĆ* HOLDING

The Appeals Chamber in *Martić* partly upheld and partly overturned the relevant impugned findings of the trial chamber. The Appeals Chamber essentially concluded that although persons *hors de combat* cannot be considered 'civilians', they can nonetheless be victims of crimes against humanity. Sub-sections 3.1 and 3.2 set out the trial chamber's and the Appeals Chamber's reasoning in turn.

3.1. The trial chamber's reasoning

The accused, Milan Martić, was charged with murder, extermination, deportation, imprisonment, torture, persecution, and other inhumane acts (including forcible transfer) as crimes against humanity under Article 5 of the ICTY Statute.[22] Addressing the law on Article 5, the trial chamber first noted that 'the status of the victim as civilian' is one of the elements which characterize a crime against humanity.[23] As to the definition of the term 'civilian', it noted the ICTY Appeals Chamber's holding in *Blaškić* that the provisions of Article 50 of Additional Protocol I[24] 'may largely be viewed as reflecting customary law'.[25] Article 50 of Additional Protocol I defines 'civilian' as follows:

> 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[26] and in Article 43 of this

22 *Prosecutor v. Milan Martić*, Judgement, Case No.IT-95–11-T, T.Ch., 12 June 2007 (hereinafter *Martić* Trial Judgement), para. 48. Art. 5 of the ICTY Statute is cited in text at notes 18–19, *supra*. For a more detailed analysis of the *Martić* Trial Judgement see F. Bostedt and J. Dungel, 'The International Criminal Tribunal for the former Yugoslavia in 2007: Key Developments in International Humanitarian and Criminal Law', (2008) 7 (2) *Chinese Journal of International Law* 389, at 390–2.

23 *Martić* Trial Judgement, *supra* note 22, para. 51, citing *Prosecutor v. Tihomir Blaškić*, Judgement, Case No. IT-95–14-A, A.Ch., 29 July 2004 (hereinafter *Blaškić* Appeal Judgement), para. 107.

24 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977, 1125 UNTS 3 (hereinafter Additional Protocol I).

25 *Martić* Trial Judgement, *supra* note 22, para. 51, citing *Blaškić* Appeal Judgement, *supra* note 23, para. 110.

26 Geneva Convention III Relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (hereinafter Geneva Convention III).

https://doi.org/10.1017/S0922156509990197 Published online by Cambridge University Press

> Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.[27]

The trial chamber found that this definition also applies 'when determining . . . the status of victims under Article 5 of the [ICTY] Statute'.[28]

The trial chamber continued by analysing what it considered to be an inconsistency in the ICTY Appeals Chamber's jurisprudence on whether persons *hors de combat* can be considered 'civilian'. It noted that, while the Appeals Chamber in *Blaškić* and in *Galić* excluded the possibility that members of the armed forces and organized resistance groups, even when placed *hors de combat*, can claim civilian status, in *Kordić and Čerkez* the Appeals Chamber appeared to have considered that the term 'civilian' does cover persons *hors de combat*.[29] The trial chamber endorsed the approach taken in *Blaškić* and *Galić* – which narrowly defined the term 'civilian' – as being in keeping with the definition of that term in Article 50 of Additional Protocol I.[30] It also found that the application of Article 5 of the Statute to persons *hors de combat* would impermissibly blur the principle of distinction between civilians and combatants.[31]

---

27 Art. 4 A (1), (2), (3) and (6), of Geneva Convention III provides:

> A Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:
>
> 1. Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.
> 2. Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
>
> (a) That of being commanded by a person responsible for his subordinates;
>
> (b) That of having a fixed distinctive sign recognizable at a distance;
>
> (c) That of carrying arms openly;
>
> (d) That of conducting their operations in accordance with the laws and customs of war.
>
> 3. Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power . . . .
> 6. Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.'

Art. 43 of Additional Protocol I provides:

> 1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.
> 2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.
> 3. Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict.

28 *Martić* Trial Judgement, *supra* note 22, para. 51.

29 Ibid., paras. 52–55. The relevant portions of the three appeal judgements are: *Blaškić* Appeal Judgement, *supra* note 23, para. 114; *Prosecutor v. Dario Kordić and Mario Čerkez*, Judgement, Case No. IT-95–14/2-A, A.Ch., 17 December 2004 (hereinafter *Kordić and Čerkez* Appeal Judgement), paras. 421–422; *Prosecutor v. Stanislav Galić*, Judgement, Case No. IT-98–29-A, A.Ch., 30 November 2006 (hereinafter *Galić* Appeal Judgement), fn. 437.

30 *Martić* Trial Judgement, *supra* note 22, para. 55.

31 Ibid., para. 56.

https://doi.org/10.1017/S0922156509990197 Published online by Cambridge University Press

The trial chamber concluded that, under Article 5 of the ICTY Statute, the prosecution must prove beyond reasonable doubt that the victim of the alleged offence was a civilian in accordance with Article 50 of Additional Protocol I, and that persons *hors de combat* do not constitute civilians for this purpose.[32]

3.2. The Appeals Chamber's reasoning

The Prosecution advanced a twofold appeal against the trial chamber's finding that persons *hors de combat* cannot constitute victims of crimes against humanity. First, it posited that the expression 'civilian population' (or 'civilians') under Article 5 of the ICTY Statute should not be limited to its meaning under international humanitarian law (that is, individuals who are not members of the armed forces),[33] but should also include other categories of persons, in particular persons *hors de combat*. Second, the prosecution argued that, in any event, the requirement that the crimes be 'directed against any civilian population'[34] does not necessarily entail that each single victim of the crimes must be civilian.[35] The Appeals Chamber addressed these two legal questions separately, in the order they were presented.

3.2.1. Definition of 'civilian'

At the outset, the Appeals Chamber recalled its holding in *Blaškić* that armed forces and other combatants (militias, volunteer corps, and members of organized resistance groups) cannot claim civilian status.[36] This holding had arisen in the context of determining the scope of the term 'civilian population' in Article 5 of the ICTY Statute. The Appeals Chamber reasoned in *Blaškić* that

> Read together, Article 50 of Additional Protocol I [which largely reflects customary law[37]] and Article 4A of the Third Geneva Convention establish that members of the armed forces, and members of militias or volunteer corps forming part of such armed forces, cannot claim civilian status. Neither can members of organized resistance groups, provided that they are commanded by a person responsible for his subordinates, that they have a fixed distinctive sign recognizable at a distance, that they carry arms openly, and that they conduct their operations in accordance with the laws and customs of war.[38]

The Appeals Chamber concluded in *Blaškić* that the victim's status under these articles, and not his or her specific situation at the moment the crime was committed, controls whether the victim is 'civilian'.[39] The prosecution in *Martić* argued that the *Kordić and Čerkez* Appeal Judgement departed from *Blaškić* by finding that persons *hors de combat* 'were without a doubt . . . "civilians" in the sense of Article 5 of the

32 Ibid., paras. 51 and 55.
33 The Parties often referred to 'international humanitarian law' as meaning the law of armed conflict in a strict sense, excluding crimes against humanity. The Appeals Chamber adopted the same language for ease of reference: *Martić* Appeal Judgement, *supra* note 1, fn. 735. The present paper follows the ICTY Appeals Chamber's approach in this regard.
34 Cf. text at notes 18–19, *supra*.
35 *Martić* Appeal Judgement, *supra* note 1, paras. 274 and 275.
36 Ibid., para. 292.
37 *Blaškić* Appeal Judgement, *supra* note 23, para. 110.
38 Ibid., para. 113.
39 Ibid., para. 114; *Martić* Appeal Judgement, *supra* note 1, para. 292.

https://doi.org/10.1017/S0922156509990197 Published online by Cambridge University Press

Statute'.[40] The *Martić* Appeals Chamber disagreed, on the basis that *Kordić and Čerkez* neither provided any reasoning for an expansive interpretation of the term 'civilian' nor addressed the prior *Blaškić* holding on the matter.[41] In fact, *Kordić and Čerkez* followed *Blaškić* on the relevant law.[42] In addition, the Appeals Chamber in *Galić* also excluded persons *hors de combat* from the definition of 'civilian'.[43]

Having analysed the ICTY's jurisprudence on the issue, the Appeals Chamber turned to the prosecution's assertion that the definition of 'civilian' enshrined in Article 50 of Additional Protocol I, which is part of international humanitarian law, is not applicable to the distinctive context of crimes against humanity.[44] At the outset, the Appeals Chamber considered that the term 'civilian' must be interpreted according to the natural and ordinary meaning in the context in which it occurs, taking into account its object and purpose.[45] It observed that the definition of 'civilian' found in Article 50 of Additional Protocol I accords with the ordinary meaning of the term 'civilian' in English, and *civil* in French, as persons who are not members of the armed forces.[46]

That said, the Appeals Chamber acknowledged that certain terms have been defined differently in international humanitarian law and in the context of crimes against humanity. However, it considered that 'the fundamental character of the notion of civilian in international humanitarian law and international criminal law militates against giving it differing meanings' under Article 3 (violations of the laws or customs of war) and Article 5 (crimes against humanity) of the ICTY Statute.[47] Such definitional consistency, it continued, 'also accords with the historical development of crimes against humanity, intended as they were to fill the gap left by the provisions pertaining to crimes against peace and war crimes in the [Nuremberg] Charter'.[48]

Understandably, the Appeals Chamber did not refer to the requirement in Article 5 of the ICTY Statute that there be a nexus to an armed conflict for these statements,[49] since that requirement renders the definition of crimes against humanity in Article 5 narrower than necessary under customary international law.[50] Instead, for its position that 'civilian' should not be given different meanings under Articles 3 and 5 of

40 Ibid., para. 293; *Kordić and Čerkez* Appeal Judgement, *supra* note 29, para. 421. See also ibid., paras. 480, 570, and 571.
41 *Martić* Appeal Judgement, *supra* note 1, para. 294.
42 Ibid., para. 294, quoting *Kordić and Čerkez* Appeal Judgement, *supra* note 29, para. 97.
43 *Galić* Appeal Judgement, *supra* note 29, para. 144 and fn. 437.
44 *Martić* Appeal Judgement, *supra* note 1, para. 297.
45 Ibid., para. 297, referencing *Prosecutor v. Duško Tadić*, Judgement, Case No. IT-94–1-A, A.Ch., 15 July 1999 (hereinafter *Tadić* Appeal Judgement), paras. 282–283, 285 (quoting with approval the *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion of 3 March 1949, [1950] ICJ Rep., at 8).
46 *Martić* Appeal Judgement, *supra* note 1, para. 297, referencing *Oxford English Dictionary* (2007), 'civilian': 'One who does not professionally belong to the Army or the Navy; a non-military person', and *Dictionnaire de l'Académie Française* (1991), 'civil': 'Par opposition à *Militaire*'.
47 *Martić* Appeal Judgement, *supra* note 1, para. 299.
48 Ibid., para. 299.
49 Text at notes 18–19, *supra.*
50 *Tadić* Jurisdiction Decision, *supra* note 16, para. 141. See also text at note 17, *supra.*

https://doi.org/10.1017/S0922156509990197 Published online by Cambridge University Press

the ICTY Statute, the Appeals Chamber relied on ICTY case law.[51] In *Kunarac* et al. and *Blaškić*, the Appeals Chamber had held that where crimes against humanity are 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'.[52] In a similar vein, the *Krnojelac* and *Galić* trial chambers had stated that the laws of war 'play an important part in the assessment of the legality of the acts committed in the course of an armed conflict and whether a civilian population may be said to have been targeted as such'.[53] The Appeals Chamber further noted the ICRC Commentary's call for 'a rigorous and clear definition of the notion of civilian'.[54]

For its statement that crimes against humanity were intended to 'fill the gap' in the laws of war, the Appeals Chamber relied on texts by distinguished academics, a case decided under Control Council Law No. 10, and the 1948 Report by the United Nations War Crimes Commission. This last stated,

> The notion of crimes against humanity, as it evolved in the Commission, was based upon the opinion that many offences committed by the enemy could not technically be regarded as war crimes *stricto sensu* on account of one of several elements, which were of a different nature. . . . It was felt that, but for the fact that the victims were technically enemy nationals, such persecutions were otherwise in every respect similar to war crimes.[55]

The Appeals Chamber also addressed the argument that the definition of 'civilian' in Article 50 of Additional Protocol I, which applies in international armed conflicts, is not directly transferable to non-international conflicts. It noted that according to the ICRC Commentary, Article 13 of Additional Protocol II[56] – which applies in non-international conflicts – corresponds with Article 50 of Additional Protocol I. Therefore, it held, 'civilians' in the context of non-international armed conflicts can be defined as those persons who do not belong to the armed forces, militias, or volunteer corps forming part of such armed forces, organized resistance groups, or a *levée en masse*.[57] The Appeals Chamber thus appears to have considered that the definition of 'civilian' is essentially similar in international and non-international conflicts.[58]

---

51 *Martić* Appeal Judgement, *supra* note 1, fn. 806, referencing *Prosecutor v. Dragoljub Kunarac et al.*, Judgement, Case No. IT-96–23 and IT-96–23/1-A, A.Ch., 12 June 2002 (hereinafter *Kunarac et al.* Appeal Judgement), para. 91; *Blaškić* Appeal Judgement, *supra* note 23, para. 106; *Prosecutor v. Milorad Krnojelac*, Judgement, Case No. IT-97–25-T, T.Ch., 15 March 2002 (hereinafter *Krnojelac* Trial Judgement), para. 54; *Prosecutor v. Stanislav*, Judgement and Opinion, Case No. IT-98–29-T, T.Ch., 5 December 2003 (hereinafter *Galić* Trial Judgement), para. 144.

52 *Kunarac et al.* Appeal Judgement, *supra* note 51, para. 91; *Blaškić* Appeal Judgement, *supra* note 23, para. 106.

53 *Krnojelac* Trial Judgement, *supra* note 51, para. 54; *Galić* Trial Judgement, *supra* note 51, para. 144.

54 C. Pillot et al., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987) (hereinafter ICRC Commentary on Additional Protocols), paras. 1911–1913, cited in *Martić* Appeal Judgement, *supra* note 1, fn. 806.

55 UN War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (1948), 174.

56 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Geneva of 8 June 1977, 1125 UNTS 609 (hereinafter Additional Protocol II).

57 *Martić* Appeal Judgement, *supra* note 1, para. 300.

58 Cf. text of Art. 50 of Additional Protocol I at note 27, *supra*.

https://doi.org/10.1017/S0922156509990197 Published online by Cambridge University Press

In conclusion, the Appeals Chamber held that

> the definition of civilian contained in Article 50 of Additional Protocol I reflects the definition of civilian for the purpose of applying Article 5 of the Statute and . . . the Trial Chamber did not err in finding that the term civilian in that context did not include persons *hors de combat*.[59]

This holding is confined to the definition of the term 'civilian' under Article 5 of the ICTY Statute. The only place where that term appears in Article 5 is in the *chapeau* requirement that the underlying acts be part of a widespread or systematic attack against any 'civilian' population; Article 5 is silent on the required status, if any, of the victims of those acts. As such, merely defining 'civilian' does not necessarily answer the question of whether the individual victims of crimes against humanity must be civilians, or whether persons *hors de combat* can also be considered victims of crimes against humanity.[60] The Appeals Chamber's findings on this question are presented in the next section.

3.2.2. Individual victims

Martić's defence argued that the reference to 'civilians' in Article 5 of the ICTY Statute should be considered as meaning that both the *chapeau* requirement of a widespread or systematic attack and the individual crimes listed in that provision must target civilians.[61] The Appeals Chamber commenced its analysis by recalling that its previous jurisprudence on the *chapeau* requirement 'attack directed against a civilian population' did not imply that the acts within such an attack must be committed against civilians only.[62] It was therefore misleading for the trial chamber to rely on jurisprudence relating to the category of persons who may be the object of the attack under the *chapeau* requirement in order to exclude persons *hors de combat* from the category of persons who may be victims of the individual acts within that attack.[63] The Appeals Chamber further considered that the drafters of the ICTY Statute did not intend to exclude persons *hors de combat* from the purview of victims of Article 5 of the ICTY Statute. The preparatory works of the ICTY expressly referred to Common Article 3 of the Geneva Conventions (which covers persons *hors de combat*), and to the fact that Article 4 of Additional Protocol II addresses 'fundamental guarantees' and protects 'all persons who do not take a direct part or who have ceased to take part in hostilities'.[64] The Appeals Chamber concluded that there is nothing in the text of Article 5 of the ICTY Statute or its previous

59 *Martić* Appeal Judgement, *supra* note 1, para. 302.
60 See ibid., para. 302.
61 Ibid., para. 303.
62 Ibid., para. 305, referencing *Kunarac et al.* Appeal Judgement, *supra* note 51, paras. 90 and 91; *Kordić and Čerkez* Appeal Judgement, *supra* note 29, para. 95; *Blaškić* Appeal Judgement, *supra* note 23, para. 105. Rather, the *chapeau* only requires that the attack itself is primarily directed against a civilian population, as opposed to a limited and randomly selected number of individuals. Ibid.
63 See *Martić* Appeal Judgement, *supra* note 1, para. 307.
64 Ibid., para. 306, referencing Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Res. 808 (1993), UN Doc. S/25704, 3 May 1993, fn. 9; UN Doc. S/RES/827 (1993) (approving the Report of the Secretary-General); Final Report of the Commission of Experts Established Pursuant to the Security Council Resolution 780, SCOR, 49th Session, Ann., UN Doc. S/1994/674, paras. 77–80.

jurisprudence that requires individual victims of crimes against humanity to be civilians.[65]

The Appeals Chamber went on to note that this approach had been followed, albeit implicitly, in ICTY case law and that of the International Criminal Tribunal for Rwanda (ICTR). It considered that previous cases had not distinguished between victims of crimes against humanity as being 'civilians' or 'persons *hors de combat*' under international humanitarian law. Instead, victims of crimes against humanity had been generally discussed simply as 'persons', 'people', or 'individuals'.[66]

Importantly, the Appeals Chamber found this approach to reflect customary international law.[67] It noted that Article 6(c) of the Nuremberg Charter and Article 2(c) of Control Council Law No. 10 required that crimes against humanity be committed 'against any civilian population', but that subsequent practice established that the victims of crimes against humanity were not restricted to 'civilians'.[68] In particular, the Appeals Chamber referred to the *High Command* case before the United States Military Tribunal,[69] cases of the Supreme Court in the British Occupied zone,[70] and the recent French cases of *Barbie* and *Touvier*.[71] As for the last two, the Appeals Chamber cited parts of the opinion of the Cour de cassation (*chambre criminelle*) which showed that the victims' membership of the Resistance, and thereby their potential status as combatants, did not negate their status as victims of crimes against humanity.[72] Moreover, whereas post-Second World War case law generally considered war crimes and crimes against humanity together, when it did distinguish between the two, it was *not* on the basis of the victims' status but on the element of scale or organization involved in crimes against humanity.[73] In this regard, the Appeals Chamber provided the following quote from the *Justice* case:

> It is not the isolated crime by a private German individual which is condemned, nor is it the isolated crime perpetrated by the German Reich through its officers against a private individual. *It is significant that the* enactment *employs the words 'against any civilian population' instead of 'against any civilian individual.'* The provision is directed against offenses and inhumane acts and persecutions on political, racial, or religious grounds systematically organized and conducted by or with the approval of government.[74]

---

65 *Martić* Appeal Judgement, *supra* note 1, para. 307.
66 Ibid., para. 308, with references in fns. 821–6.
67 Ibid., paras. 309 and 311.
68 Ibid., para. 309, referencing *inter alia* Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, 78 UNTS 277; Apartheid Convention, *supra* note 14; *Tadić* Jurisdiction Decision, *supra* note 16, para. 140; 1991 ILC Draft Code, Art. 21.
69 *United States v. Wilhelm von Leeb et al.*, '*The High Command Case*', Judgment of 27 October 1948, Military Tribunal V, *Law Reports of the Trials of War Criminals*, XI, at 520, 596–9, 675, 679, 683. The Appeals Chamber also referenced *United States v. Ernst Von Weizsaecker et al.*, '*The Ministries Case*', Judgment of 11–13 April 1949, Military Tribunal IV, *Law Reports of the Trials of War Criminals*, XIV, at 541–6.
70 *Supreme Court in the British Occupied Zone*, OGHSt 1, 217–29; *Supreme Court in the British Occupied Zone*, OGHSt 2, 231–46; *Supreme Court in the British Occupied Zone*, OGHSt 1, 45–9.
71 *Crim. 20 décembre 1985, Bull. n° 407, Cour de cassation (chambre criminelle), M. Barbie*; *Crim. 27 novembre 1992, Bull. n° 394, Cour de cassation (chambre criminelle), M. Touvier*.
72 *Martić* Appeal Judgement, *supra* note 1, fn. 831. For an overview of the *Barbie* case see also *Prosecutor v. Mile Mrkšić, Miroslav Radić, and Veselin Šljivančanin*, Judgement, Case No. IT-95–13/1-T, T.Ch., 27 September 2007 (hereinafter *Mrkšić et al.* Trial Judgement), fn. 1686.
73 *Martić* Appeal Judgement, *supra* note 1, para. 310.
74 *Justice* case, *supra* note 11, at 973, 982 (emphasis by *Martić* Appeals Chamber).

https://doi.org/10.1017/S0922156509990197 Published online by Cambridge University Press

The Appeals Chamber also quoted from the commentaries to this case:

> [I]t is clear that war crimes may also constitute crimes against humanity; the same offences may amount to both types of crime. If war crimes are shown to have been committed in a widespread, systematic manner, on political, racial or religious grounds, they may amount also to crimes against humanity.[75]

The Appeals Chamber concluded that a person *hors de combat* may be the victim of crimes against humanity, all other conditions being met.[76] It was further satisfied that such crimes against persons *hors de combat* attracted individual criminal responsibility under customary international law at the relevant time and that, therefore, the principle of *nullum crimen sine lege* is not violated.[77]

3.3. Conclusion

The Appeals Chamber's holding in *Martić* is twofold. First, it stipulates that the term 'civilian' is to be defined under the customary international law formulation of that term contained in Article 50 of Additional Protocol I for purposes of applying crimes against humanity under the ICTY Statute. As a result, persons *hors de combat* cannot be considered 'civilians'. This part of the holding is based on ICTY jurisprudence, the ordinary meaning of the word 'civilian', its fundamental character in international humanitarian and international criminal law, the undesirability of giving it different meanings in the context of war crimes and crimes against humanity, and the historical purpose of crimes against humanity to fill a gap in the laws of war.

Second, the *Martić* holding states that customary international law does not require the individual victims of crimes against humanity under the ICTY Statute to be civilians as defined; persons *hors de combat* can also be victims of such crimes. Here, the holding relies on the jurisprudence and the preparatory works of the ICTY, the fact that neither the ICTY nor post-Second World War jurisprudence has distinguished between victims of crimes against humanity on the basis of whether or not they were 'civilians', and other case law indicating that even potential combatants can be victims of crimes against humanity.

The following section examines these conclusions in the context of the ICC.

4. *Martić* and the ICC

Crimes against humanity are defined in Article 7 of the Rome Statute, which has been set out above.[78] It mirrors the requirement under Article 5 of the ICTY Statute[79] that the underlying acts must be part of a widespread or systematic attack directed

75 *Justice* case, *supra* note 11, *Law Reports of Trials of War Criminals*, VI, at 79.
76 *Martić* Appeal Judgement, *supra* note 1, paras. 313 and 314.
77 Ibid., para. 313.
78 Text at note 21, *supra*.
79 Text at note 19, *supra*.

https://doi.org/10.1017/S0922156509990197 Published online by Cambridge University Press

against 'any civilian population'. Also, both formulations are silent on the required status, if any, of the victims.[80] Thus the issues which arose from Article 5 of the ICTY Statute in *Martić* may also arise from Article 7 of the Rome Statute. Given that crimes against humanity are charged in proceedings related to all situations (and in all but two of the cases[81]) presently before the ICC,[82] these issues are likely to come before the Court. In keeping with previous practice, the ICC will most probably look to the jurisprudence of the ICTY when they do.[83]

The subsections below offer some observations related to the ICC's prospective considerations in this regard. Subsection 4.1 examines, as a preliminary issue, whether the *Martić* holding is compatible with the Rome Statute and related legal authorities, with a view to determining whether it is open to the ICC to adopt the holding. Subsection 4.2 analyses other relevant international criminal jurisprudence which the ICC will want to consider alongside *Martić*. Finally, subsection 4.3 examines four issues which may be of particular interest for the ICC's consideration of the *Martić* holding, and subsection 4.4 provides a conclusion.

80 Art. 7(2)(a) of the Rome Statute corresponds, to an extent, to ICTY and ICTR case-law holding that the 'attack' can be described as a course of conduct involving the commission of acts of violence. See *Prosecutor v. Dragoljub Kunarac et al.*, Judgement, Case No. IT-96–23-T & IT-96–23/1-T, T.Ch., 22 February 2001 (hereinafter *Kunarac et al.* Trial Judgement), para. 415, endorsed in *Kunarac et al.* Appeal Judgement, *supra* note 51, para. 89, reiterated in *Kordić and Čerkez* Appeal Judgement, *supra* note 29, para. 666, followed in *Prosecutor v. Fatmir Limaj et al.*, Judgement, Case No. IT-03–66-T, T.Ch., 30 November 2005 (hereinafter *Limaj et al.* Trial Judgement), paras. 182, 194; *Prosecutor v. Vidoje Blagojević and Dragn Jokić*, Judgement, Case No. IT-02–60-T, T.Ch., 17 January 2005, para. 543; *Prosecutor v. Radoslav Brđanin*, Judgement, Case No. IT-99–36-T, T.Ch., 1 September 2004, para. 131; *Galić* Trial Judgement, *supra* note 51, para. 141; *Prosecutor v. Milomir Stakić*, Judgement, Case No. IT-97–24-T, T.Ch., 31 July 2003, para. 623; *Prosecutor v. Mladen Naletilić and Vinko Martinović*, Judgement, Case No. IT-98–34-T, T.Ch., 31 March 2003 (hereinafter *Naletilić and Martinović* Trial Judgement), para. 233; *Prosecutor v. Mitar Vasiljević*, Judgement, Case No. IT-98–32-T, T.Ch., 29 November 2002, para. 29. The ICTR Appeals Chamber has adopted the exact same approach as Art. 7(2)(a) of the Rome Statute, *Nahimana et al. v. Prosecutor*, Judgement, Case No. ICTR-99–52-A, A.Ch., 28 November 2007 (hereinafter *Nahimana et al.* Appeal Judgement), para. 918.

81 The two exceptions are the proceedings against Bosco Ntaganda and Thomas Lubanga, the charges against whom are confined to war crimes. See *Le Procureur c. Bosco Ntaganda*, Mandat d'arrêt, Case No. ICC-01/04–02/06, PT.Ch., 22 August 2006 (under seal, but reclassified as public pursuant to Dec. ICC-01/04–02/06–18 dated 28 April 2008); *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Confirmation of Charges, Case No. ICC-01/04–01/06, PT.Ch., 29 January 2007 (hereinafter *Lubanga* Decision on Confirmation of Charges).

82 For the situation in Uganda, see Case No. ICC-02/04: Warrant of arrest for Joseph Kony Issued on 8 July 2005 as amended on 27 September 2005; Warrant of Arrest for Okot Odhiambo, Warrant of Arrest for Dominic Ongwen and Warrant of Arrest for Vincent Otti, 8 July 2005; situation in the Central African Republic: see *Le Procureur c. Jean-Pierre Bemba Gombo*, Mandat d'arrêt à l'encontre de Jean-Pierre Bemba Gombo remplaçant le mandat d'arrêt décerné le 23 mai 2008, Case No. ICC-01/05–01/08, PT.Ch., 10 June 2008; Situation in Darfur, Sudan: see *Prosecutor v. Ahmad Harun and Ali Kushayb*, Warrant of Arrest for Ahmad Harun (hereinafter *Harun* Arrest Warrant), and Warrant of Arrest for Ali Kushayb, Case No. ICC-02/05–01/07, PT.Ch., 27 April 2007; situation in the Democratic Republic of the Congo: see *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on Confirmation of Charges, Case No. ICC-01/04–01/07, PT.Ch., 30 September 2008 (hereinafter *Katanga and Chui* Decision on Confirmation of Charges), paras. 389 ff.

83 Although not binding, the jurisprudence of the ICTY has so far been extensively used by the ICC in interpreting the material elements of the crimes under the Rome Statute inasmuch as they coincide with the corresponding elements under the ICTY Statute. See, e.g., *Lubanga* Decision on Confirmation of Charges, *supra* note 81, paras. 208–211 (adopting the 'overall control' test set out by the ICTY's *Tadić* Appeal Judgement in order to determine whether an armed conflict is international in situations where a state does not intervene directly on the territory of another state). See also ibid., para. 233; *Katanga and Chui* Decision on Confirmation of Charges, *supra* note 82, paras. 268, 395, 448–450. See further Rome Statute, Art. 21(1)(a).

4.1. Compatibility between *Martić* and the Rome Statute

Neither the Rome Statute nor the Elements of Crimes, adopted to assist the ICC in interpreting the Statute,[84] provide a definition of the term 'civilian'.[85] These legal instruments also do not expressly state whether the victims of the enumerated crimes against humanity must be civilians. Article 7(2)(a) of the Rome Statute could possibly be read to imply such a requirement,[86] but it is more likely that it merely specifies what kind of acts can constitute an 'attack'.[87] Moreover, and in contrast to the listed elements of war crimes, the Elements of Crimes refer to the victims simply as 'persons'.[88] Pursuant to the basic rule of interpretation that the lawmakers intended to give some effect to each of the words used in a legal provision,[89] there is thus an argument to be made that, in line with *Martić*, Article 7 of the Rome Statute does not require the victims to be civilians.

However, this position is not unequivocally borne out by the preparatory works of the Rome Statute. During the negotiations on the Rome Statute, the term 'any civilian population' was deliberately left undefined, as most delegations 'quickly agreed that this was too complex a subject and evolving area in the law, better left to resolution in case law'.[90] To be sure, some delegations preferred to simply refer to 'any population' rather than 'any civilian population'.[91] Others, relying on the *Barbie* case and the *Tadić* Trial Judgement, pointed out that 'the term has been judicially interpreted in a flexible manner, so that combatants do not necessarily lose all protection'.[92] Nonetheless, the term 'any civilian population' was in the end maintained as a compromise, as it was considered to be consistent with customary international law.[93] Accordingly, the only uniform intention of the drafters of the Rome Statute regarding the definition of the term 'civilian' and the status of the victims that can be established with any certainty is that these issues were to be left for determination by the Court's case law.

To date, two pre-trial chambers have arguably had occasion to address these issues, namely Pre-Trial Chamber I in its *Katanga and Chui* Decision on Confirmation of Charges and Pre-Trial Chamber II in its *Bemba* Decision on Confirmation

84 Rome Statute, Art. 9; Elements of Crimes, ICC-ASP/1/3 (hereinafter Elements of Crimes).

85 It might be worth noting in this regard that Arts. 8(b)(i) and 8(e)(i) appear to distinguish between 'civilians' and persons 'not taking direct part in hostilities'. This would imply that, for purposes of war crimes, the term 'civilian' is not to be defined under Common Art. 3 or Art. 4 of Additional Protocol II.

86 Art. 7(2)(a) reads in relevant parts, '"Attack against any civilian population" means a course of conduct involving the multiple commission of *acts* referred to in paragraph 1 *against any civilian population*' (emphasis added).

87 This is apparently how the ICTR Appeals Chamber understood Art. 7(2)(a) of the Rome Statute. *Nahimana et al.* Appeal Judgement, *supra* note 80, para. 918.

88 Elements of Crimes, Art. 7 Crimes against Humanity, at 5–13. The exception is forced pregnancy, where the victims is referred to simply as 'one or more women'. Ibid., at 10.

89 E.g. *Prosecutor v. Jean-Paul Akayesu*, Judgement, Case No. ICTR-96–4-A, A.Ch., 1 June 2001 (hereinafter *Akayesu* Appeal Judgement), para. 468.

90 *Katanga and Chui* Decision on Confirmation of Charges, *supra* note 82, para. 399, quoting R. S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Evidence* (2001), at 78.

91 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* (1999), 79, at 97, fn. 54. See also L. N. Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millenium*, (2002), 153, fn. 111.

92 Von Hebel and Robinson, *supra* note 91, at 97, fn. 54.

93 Ibid.

https://doi.org/10.1017/S0922156509990197 Published online by Cambridge University Press

of Charges.[94] In the *Katanga and Chui* decision, rendered shortly before the *Martić* Appeal Judgement, Pre-Trial Chamber I noted the lack of a statutory definition of the term 'any civilian population'[95] and observed a statement in the *Tadić* Trial Judgement that 'the definition of a "civilian" population and the implications of the term "population", require further examination'.[96] For its part, the *Tadić* trial chamber did not consider that victims of crimes against humanity must be civilians.[97] The *Katanga and Chui* Pre-Trial Chamber chose to remain silent on the matter.

The Pre-Trial Chamber then turned to the evidence presented on the *chapeau* requirement 'attack directed against any civilian population'. The relevant charges concerned an alleged attack by the Forces de résistance patriotique en Ituri and the Front des nationalistes et intégrationnistes on the village of Bogoro, in Ituri district in the Democratic Republic of the Congo. The Pre-Trial Chamber found substantial grounds to believe[98] *inter alia* that there was a military camp of the Union des patriotes Congolais in Bogoro, but that 'the attack was not only directed against the military target but also against the predominantly Hema civilian population of the village'.[99] This finding evokes the possibility that some of the victims of the underlying offences during this attack may *not* have been civilians.

However, the Pre-Trial Chamber did not clarify whether this was the case and what the legal ramifications might be if not all the victims were civilians. Indeed, both its legal and factual findings on the underlying acts (murder, sexual slavery, rape, and other inhumane acts) are ambiguous as far as the status of the victims is concerned. As to the murder charges, it held that the *actus reus* is met where the perpetrator causes the death of one or more 'persons'.[100] This is consistent with the Elements of Crimes, which, as noted, also merely refers to 'persons' as victims of crimes against humanity, and in line with the Pre-Trial Chamber's own reference to *Tadić*. Yet, subsequently, the Pre-Trial Chamber found that the objective element of murder as a crime against humanity is fulfilled where the accused caused 'the death of *civilians* as part of the widespread or systematic attack'.[101] On the facts before it, the Pre-Trial Chamber found substantial grounds to believe that murder as a crime against humanity was committed against 'civilians'.[102] With respect to the underlying offences of sexual slavery[103] and rape,[104] the Pre-Trial Chamber made neither legal nor factual findings as to whether the victims had to be, or were, civilians. Regarding other inhumane acts as crimes against humanity, it made no

94 *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Pursuant to Art. 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecution against Jean-Pierre Bemba Gombo, Case No. ICC-01/05–01/08, PT.Ch., 15 June 2009 (hereinafter *Bemba* Decision on Confirmation of Charges).
95 *Katanga and Chui* Decision on Confirmation of Charges, *supra* note 82, para. 399.
96 Ibid., para. 399, quoting *Tadić* Trial Judgement, *supra* note 19, para. 635.
97 *Tadić* Trial Judgement, *supra* note 19, para. 643.
98 Which is the test at the confirmation of the charges stage. Rome Statute, Art. 61(7).
99 *Katanga and Chui* Decision on Confirmation of Charges, *supra* note 82, paras. 403 and 405.
100 Ibid., para. 421.
101 Ibid., para. 422 (emphasis added).
102 Ibid., paras. 424–427 (although the prosecution did not claim that all the murder victims were 'civilians'; ibid., para. 420).
103 See ibid., paras. 428–436 (even though the prosecution alleged that the victims were 'civilians', ibid., para. 428).
104 See ibid., paras. 437–444 (again, the prosecution alleged that the victims were 'civilians', ibid., para. 437).

legal findings as to the required status of the victims,[105] but, on the facts, spoke of the victims as 'civilians'.[106]

Pre-Trial Chamber II's decision in *Bemba* was rendered after the *Martić* Appeal Judgement. Similarly to the *Katanga and Chui* decision, it noted that the Rome Statute does not define the terms 'civilian' or 'civilian population'.[107] However, relying *inter alia* on Article 50 of Additional Protocol I, the Pre-Trial Chamber held that 'according to the well-established principle of international humanitarian law, '[t]he civilian population . . . comprises all persons who are civilians as opposed to members of armed forces and other legitimate combatants'.[108] Although the Pre-Trial Chamber did not explicitly endorse the *Martić* holding on the matter, it thus reached the same conclusion, namely that the term 'civilian' for purposes of crimes against humanity is defined in accordance with Article 50 of Additional Protocol I.

The *Bemba* decision did not, however, clarify the issue of the required status of the victims. Like the *Katanga and Chui* decision, the Pre-Trial Chamber's factual findings on the *chapeau* appear to have recognized that the alleged victims might not have been exclusively civilians,[109] and its factual findings on the particular underlying acts charged are equivocal on the matter.[110] This allows for the possibility that some of the victims might have been combatants or *hors de combat*. However, once again, the Court's findings on the legal elements of both the *chapeau*[111] and the underlying offences[112] failed to pronounce on whether these potential victims were excluded from the ambit of crimes against humanity, and whether it is required that victims of crimes against humanity be civilians.

It is not immediately clear from their decisions why the Pre-Trial Chambers chose not to pronounce on the required status of the victims. In particular, given Pre-Trial Chamber I's own observation that the term 'civilian' needed clarification and the fact that the prosecution does not consistently allege that the victims of crimes against humanity are civilians,[113] a decision on this issue would have been expected not least to enable the accused to prepare their defence.

In sum, it can be concluded that the two issues addressed by the ICTY Appeals Chamber's holding in *Martić* are not regulated by the Rome Statute or the Elements of Crimes. One pre-trial decision has arrived at the same conclusion as *Martić* regarding the definition of the term 'civilian', but otherwise the ICC's jurisprudence has not addressed the issues. At the same time, the *Martić* holding does not appear to be

105 See ibid., paras. 445–455 (for this underlying offence the prosecution did not expressly allege that all the victims were civilians, ibid., para. 445).
106 Ibid., paras. 456–475. However, this charge was not confirmed for other reasons. Ibid., paras. 458–465.
107 *Bemba* Decision on Confirmation of Charges, *supra* note 94, para. 78.
108 Ibid., para. 78.
109 Ibid., paras. 96–99.
110 Ibid., paras. 140 (finding that the victims of murder were 'civilians'), 165 (failing to specify whether the victims of rape were civilians). The underlying acts of torture were either subsumed by the charges on rape (ibid., para. 209) or insufficiently noticed (ibid., para. 205).
111 See ibid., paras. 73–89.
112 See ibid., paras. 131–134 (murder), 161–162 (rape), 191–193 (torture).
113 In addition to the pleadings referenced in notes 102–105 *supra* in the *Katanga and Chui* case, compare *Harun* Arrest Warrant, *supra* note 82, Counts 2, 4, 9, 11, 13, 17, 20, 34, 35, 40, 48, 51 (alleging that the victims were 'civilians') with ibid., Counts 9 and 20 (charging forcible transfer of 'primarily Fur civilians'), 22, 24 and 28 (not specifying whether the alleged victims were civilians).

incompatible with these legal authorities. It would thus be open to the ICC to adopt the *Martić* holding. In considering whether it should do so, it is useful to examine briefly other international jurisprudence related to the matters decided in *Martić*.

4.2. Related jurisprudence

Some of the earliest decisions at the ICTY are consonant with the *Martić* holding, inasmuch as they held that persons *hors de combat* may be victims of crimes against humanity.[114] Later trial judgments found that the definition of 'civilian' for purposes of crimes against humanity ought to be broadly defined to include all persons who do not take active part in hostilities.[115] Yet many of these decisions appear to have confused the *chapeau* requirement of a 'civilian population' with whether the individual victims of the underlying acts must be civilians. In addition, the pertinent passages are interspersed with other findings as to whether the presence of non-civilians within a population divests it of its civilian character. These decisions therefore do not provide clear guidance on the two distinct issues addressed by the *Martić* holding. As for the definition of 'civilian', it should be noted that the ICTY Appeals Chamber has consistently held that it is controlled by Article 50 of Additional Protocol I, and therefore excludes persons *hors de combat*.[116]

The *Mrkšić et al.* Trial Judgement analysed the definition of 'civilian' and the required status of the individual victims separately. Here, the vast majority of the victims had been involved in hostilities and therefore could not possibly be considered to be civilians.[117] Although rendered before the *Martić* Appeal Judgement, the *Mrkšić et al.* trial chamber reached the same conclusion on the definition of the term 'civilian', holding that Article 50 of Additional Protocol I controls the term and that, therefore, it excludes persons *hors de combat*.[118] However, like the *Martić* trial chamber, the *Mrkšić et al.* trial chamber (seemingly contrary to its own previous decision[119]) found that the victims of crimes against humanity must be civilians.[120] The Appeals Chamber rendered its judgment in *Mrkšić* after the *Martić* Appeal Judgement. Largely based on the latter, the Appeals Chamber affirmed its definition of the term 'civilian'[121] and overturned the trial chamber's finding that the victims must be civilians.[122] However, the Appeals Chamber acknowledged that the status

114 See *Prosecutor v. Mrkšić et al.*, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, Case No. IT-95–13-R61, PT.Ch., 3 April 1996 (hereinafter *Mrkšić et al.* Rule 61 Decision), para. 29; *Tadić* Trial Judgement, *supra* note 19, para. 643. See also *Prosecutor v. Kupreškić et al.*, Case No. IT-95–16-T, 14 January 2000, Judgement, para. 549.

115 *Prosecutor v. Momčilo Krajišnik*, Judgement, Case No. IT-00–39-T, T.Ch., 27 September 2006, para. 706(c); *Limaj et al.* Trial Judgement, *supra* note 80, para. 186; *Naletilić and Martinović* Trial Judgement, *supra* note 80, para. 235; *Prosecutor v. Prosecutor v. Krnojelac*, Judgement, Case No IT-97–25-T, T.Ch., 15 March 2002, para. 56.

116 *Blaškić* Appeal Judgement, *supra* note 23, para. 113; *Kordić and Čerkez* Appeal Judgement, *supra* note 29, para. 97; *Galić* Appeal Judgement, *supra* note 29, para. 144 and fn. 437.

117 *Mrkšić et al.* Trial Judgement, *supra* note 72, paras. 473–481. For a detailed analysis of the *Mrkšić et al.* Trial Judgement, see Bostedt and Dungel, *supra* note 22, at 392–7.

118 *Mrkšić et al.* Trial Judgement, *supra* note 72, para. 461.

119 See *Mrkšić et al.* Rule 61 Decision, *supra* note 114, para. 29.

120 *Mrkšić et al.* Trial Judgement, *supra* note 72, paras. 462–463.

121 *Prosecutor v. Mile Mrkšić v. Veselin Šljivančanin*, Judgement, Case No. IT-95–13/1-A, A.Ch., 5 May 2009 (hereinafter *Mrkšić and Šljivančanin* Appeal Judgement), para. 35.

122 Ibid., para. 33.

https://doi.org/10.1017/S0922156509990197 Published online by Cambridge University Press

of the victims as civilians may nonetheless be relevant in assessing whether the *chapeau* element that a civilian population be the primary target of an attack is met on the facts.[123]

In the recent judgment in *Milutinović et al.*, the trial chamber noted that Article 5 of the ICTY Statute is narrower than customary international law, as it requires a nexus to an armed conflict. Therefore the trial chamber did not consider itself 'limited by the definition of civilian status in international humanitarian law', but deemed 'that body of law [to] provide useful guidelines for defining the victims of a crime against humanity'.[124] It went on to find that, in order to give full effect to the object and purpose of the prohibition against crimes against humanity, 'it is necessary to adopt a broad definition of the key terms that extends as much protection as possible'.[125] The trial chamber concluded by defining 'civilian' in accordance with Article 50 of Additional Protocol I, and referred to the *Martić* holding that persons *hors de combat* may be victims of crimes against humanity.[126] It should be noted that the *Milutinović et al.* trial chamber was bound by the *Martić* holding.[127]

The ICTR trial chamber in the *Bagosora et al.* case cited both parts of the *Martić* holding in its recent judgment. Although it did not explicitly say whether it adopted the holding in its entirety, nothing indicates that the trial chamber disapproved of it.[128] However, drawing on Common Article 3 to the Geneva Conventions, a number of previous ICTR trial judgments have found that 'civilian' for purposes of crimes against humanity should be defined as including persons *hors de combat*.[129] Such an approach is, as noted, contrary to the *Martić* holding. Neither this issue nor that of the victims' status appears to have come to the point before the ICTR Appeals Chamber, perhaps because the particular factual context related to the jurisdiction of the ICTR does not entail much doubt as to whether a civilian population was targeted and whether the individual victims were in fact civilians.[130] It remains to be seen whether the ICTR Appeals Chamber will have occasion to pronounce on these matters in *Bagosora et al.*

At the Special Court for Sierra Leone (SCSL), the trial chamber in the case *Brima et al.* endorsed ICTY jurisprudence that persons *hors de combat* cannot be considered 'civilians' for purposes of determining a 'civilian population'. This distinction is particularly important, the trial chamber held, in a case were the prosecution alleges

123 Ibid., para. 30.
124 *Prosecutor v. Milan Milutinović et al.*, Judgement (Vol. I), Case No. IT-05–87-T, T.Ch., 26 February 2009, para. 146.
125 Ibid., para. 147.
126 Ibid.
127 See *Prosecutor v. Zlatko Aleksovski*, Judgement, Case No. IT-95–14/1-A, A.Ch., 24 March 2000, para. 113; *Prosecutor v. Naser Orić*, Judgement, Case No. IT-03–68-A, A.Ch., 3 July 2008, para. 165.
128 *Prosecutor v. Théoneste Bagosora et al.*, Judgement and Sentence, Case No. ICTR-98–41-T, T.Ch., 18 December 2008, fn. 2353.
129 *Prosecutor v. Jean-Paul Akayesu*, Judgement, Case No. ICTR-96–4-T, T.Ch., 2 September 1998 (hereinafter *Akayesu* Trial Judgement), para. 582, fn. 146; *Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, Judgement, Case No. ICTR-96–03-T, T.Ch., 6 December 1999, para. 71; *Prosecutor v. Alfred Musema*, Judgement, Case No. ICTR-96–13-T, T.Ch., 27 January 2000, para. 207; *Prosecutor v. Athanase Seromba*, Judgement, Case No. ICTR-2001–66-I, T.Ch., 13 December 2006, para. 358. See also *Prosecutor v. Clement Kayishema and Obed Ruzindana*, Judgement, Case No. ICTR-95–04-T, T.Ch., 21 May 1999, para. 127 (though the status of the victims as civilians was not in dispute, ibid., para. 129).
130 See *Akayesu* Appeal Judgement, *supra* note 89, para. 464.

that crimes against humanity were committed in a situation of armed conflict.[131] Similarly, in the case *Fofana and Kondewa* the trial chamber relied on the *Blaškić* Appeal Judgement to hold that under customary international law the term 'civilian population' includes all of those persons who are not members of the armed forces or otherwise recognized as combatants.[132] The *Brima et al.* and *Fofana and Kondewa* trial chambers did not pronounce on the required status, if any, of the individual victims. The aforementioned holdings by the *Brima et al.* trial chamber do not appear to have been at issue on appeal,[133] but the Appeals Chamber in *Fofana and Kondewa* considered 'that Article 50 of Additional Protocol I is a useful tool in determining a "civilian population"' for purposes of crimes against humanity.[134] Subsequently, the trial chamber in the *Sesay et al.* case has held that persons *hors de combat* do not fall within the customary international law definition of 'civilian population'.[135] Concurring with *Martić*, it further held that 'where a person *hors de combat* is the victim of an act which objectively forms part of a broader attack directed against a civilian population, this may amount to a crime against humanity'.[136] The *Sesay et al.* Trial Judgement is currently under appeal.

The Extraordinary Chambers in the Courts of Cambodia has not yet ruled on either of the two issues. They could arguably have been addressed by the pre-trial chamber, sitting as an appellate chamber, in the case against Kaing Guek Eav (alias 'Duch'). The chamber compared the underlying acts of crimes against humanity and grave breaches of the Geneva Conventions with the corresponding offences under domestic law. However, in so doing the pre-trial chamber expressly left aside 'the contextual elements of crimes against humanity and grave breaches of the Geneva Conventions'.[137] As a result, although its decision does not appear to have required the victims of crimes against humanity to be civilians,[138] it is of limited use for present purposes.

In the light of the foregoing, the following conclusions can be drawn as to international criminal jurisprudence insofar as it has pronounced on the two issues addressed by the *Martić* holding. Regarding the term 'civilian', the jurisprudence of both the ICTY and the SCSL defines it according to Article 50 of Additional Protocol I, thereby excluding persons *hors de combat* from the ambit of the term. As previously noted, this approach has also been followed by one pre-trial chamber of the ICC. The ICTR, on the other hand, largely appears to define 'civilian' to include persons *hors de combat*, although the matter has never been authoritatively addressed by the

131 *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, Judgement, Case No. SCSL-04–16-T, T.Ch., 20 June 2007, para. 219.
132 *Prosecutor v. Moinana Fofana and Allieu Kondewa*, Judgement, Case No. SCSL-04–14-T, T.Ch., 2 August 2007, para. 116, referencing *Blaškić* Appeal Judgement, *supra* note 23, paras. 110–113.
133 See *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, Judgment, Case No. SCSL-04–16-A, A.Ch., 22 February 2008.
134 *Prosecutor v. Moinana Fofana and Allieu Kondewa*, Judgment, Case No. SCSL-04–14-A, A.Ch., 28 May 2008, para. 259.
135 *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Judgement, Case No. SCSL-04–15-T, T.Ch., 2 March 2009, para. 82.
136 Ibid.
137 Case No. 001/18–07-2007-ECCC/OCIJ (PTC 02), Public Decision on Appeal against Closing Order indicting Kaing Guek Eav alias 'Duch', 5 December 2008, para. 59.
138 Ibid., paras. 67 (torture), 80 (murder).

ICTR Appeals Chamber, and a recent trial judgment indicates a move away from previous jurisprudence toward the *Martić* holding. As for the required status of the victims of crimes against humanity, the ICTY jurisprudence prior to *Martić*, with the exception of the *Mrkšić et al.* Trial Judgement, indicates that the victims need not be civilians, and can also include persons *hors de combat*. The one judgment of the SCSL that has addressed this issue so far takes the same approach and a recent ICTR judgment appears to agree with it.

In conclusion, the vast majority of international criminal jurisprudence supports the *Martić* holding that the term 'civilian' excludes persons *hors de combat* for purposes of crimes against humanity. However, to a lesser extent, the *Martić* holding that the victims of crimes against humanity can include persons *hors de combat* also finds support in the case law of international criminal tribunals, and only one trial judgment directly contradicts it.[139]

4.3. Suggested considerations

At the heart of the *Martić* holding lies a vivid distinction between (i) the group of persons targeted by the attack in which the underlying offences occur; and (ii) the group of persons targeted by the underlying offences themselves. The determination of the former group is curtailed by the definition of 'civilian' under international humanitarian law, whereas the determination of the latter group is not so limited. As a result, the two groups need not be identical.

The first subsection below concerns the legal inconsistency which flows from this distinction, and attempts to discern whether any feasible alternatives exist that would avoid the inconsistency. The remaining subsections examine three legal questions related to the fact that the group of victims is not restricted to 'civilians', and offers some observations in relation thereto which may be particularly relevant to the ICC.

The issues treated here transpire where international humanitarian law and the provisions on crimes against humanity apply concurrently – that is, in times of armed conflict. The analysis focuses on consequences which arise out of the holding, and, as such, does not question the legal basis on which it was reached, in particular the state of customary international law.

4.3.1. Legal inconsistency and alternative approaches to solving it

The distinction in *Martić* leads to a legal inconsistency between the provisions controlling the determination of the group of persons targeted by the attack envisaged in the *chapeau* and those applicable to the group of potential victims of the underlying acts of crimes against humanity. Such inconsistency could have been avoided by applying Article 50 of Additional Protocol I to the definition of both groups. Both the attack and the underlying acts would thus have to target 'civilians' as defined in Article 50 of Additional Protocol I. This approach finds support in the original rationale behind crimes against humanity, which was to 'fill a gap' in the laws of

139 See further *Al-Dujail*, Case No. 1/9 First/2005, Iraqi High Tribunal, Translation Part 2, at 8 (referring to victims of the crime against humanity of murder simply as 'persons').

https://doi.org/10.1017/S0922156509990197 Published online by Cambridge University Press

war pertaining to civilians. If this rationale, as the *Martić* Appeals Chamber found, justifies determining the group of persons targeted by the attack according to the definition of 'civilian' in international humanitarian law, it ought also to justify defining the group of victims within the context of that attack in accordance with the same provision. A consistent use of the rationale would have been to define both groups under the same rule, namely Article 50 of Additional Protocol I.[140] This would moreover accord with the principle of distinction between civilians and combatants under international humanitarian law.

However, such an approach would be incompatible with the rule of customary international law that the group of potential victims of crimes against humanity is not restricted to civilians.[141] As noted above, that rule was advocated by certain delegations during the negotiation of the Rome Statute.[142] As such, there is much to say for *Martić* insofar as it did not define the victims under Article 50 of Additional Protocol I.

Another way to avoid the legal inconsistency, yet without infringing the aforementioned customary rule, would be to define both the term 'civilian' in the *chapeau* and the status of the victims in accordance with Common Article 3 to the Geneva Conventions.[143] Common Article 3 reads, in relevant parts,

> Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause . . .

However, as this approach would allow persons *hors de combat* to be considered 'civilians' under the *chapeau*, it conflicts with the customary international law definition of 'civilian' in Article 50 of Additional Protocol I, which excludes persons *hors de combat* from being 'civilians'. In addition, the approach allows for a situation wherein the population targeted by the attack consists entirely of persons *hors de combat*. This is not an implausible scenario, assuming that the ICC adopts the standard under which a 'systematic' attack refers to 'the organized nature of the acts of violence and the improbability of their random occurrence'.[144] For instance, a number of prisoner of war camps and/or military hospitals could conceivably be targeted in such a manner. Coupled with the fact that in such a situation the individual victims would most probably also be exclusively persons *hors de combat*, this approach could potentially divest crimes against humanity of any link to civilians at all. It is doubtful whether the customary rule allowing non-civilians to be victims of crimes against humanity reaches that far, as evidenced by the fact that the statutes and the jurisprudence of current international criminal tribunals all require that at least the *chapeau* be linked to civilians.[145]

---

140 Which was basically the defence's position in *Martić*; *Martić* Appeal Judgement, *supra* note 1, paras. 288, 303.
141 Text at notes 65–7, *supra*.
142 Text at notes 91–2, *supra*.
143 Which essentially reflects the prosecution's position in *Martić*. *Martić* Appeal Judgement, *supra* note 1, para. 278.
144 *Kunarac et al.* Trial Judgement, *supra* note 80, para. 429, endorsed in *Kunarac et al.* Appeal Judgement, *supra* note 51, para. 94, reiterated in *Kordić and Čerkez* Appeal Judgement, *supra* note 29, para. 666.
145 Text at notes 20–1, 93, 138–9.

https://doi.org/10.1017/S0922156509990197 Published online by Cambridge University Press

In sum, the legal inconsistency in *Martić* between the provisions controlling the group of persons encompassed by the *chapeau* and those controlling the group of potential victims appears to be a necessary consequence of formulating crimes against humanity within the boundaries of customary international law: if the term 'civilian' in the *chapeau* is understood to include persons *hors de combat*, the formulation would be too broad; if the group of victims is limited to 'civilians' under Article 50 of Additional Protocol I, the formulation would be too narrow.

This state of the law raises three issues in particular which result from the fact that the group of victims is not restricted to 'civilians'.

4.3.2. Added protection for prisoners of war

The first issue stems from the fact that *Martić* includes prisoners of war in the group of potential victims of crimes against humanity. This entails a potential conflict between the provisions on the underlying acts of crimes against humanity and the rules of international humanitarian law concerning prisoners of war, inasmuch as some of the underlying acts constituting crimes against humanity may be permissible under international humanitarian law if committed against prisoners of war.[146] Thus, while forcible displacement is an underlying act of crimes against humanity,[147] Article 46 of Geneva Convention III specifically allows for the transfer of prisoners of war. Similarly, as to the underlying act of imprisonment,[148] the arrest of prisoners of war is lawful under international humanitarian law.[149] As a result, the *Martić* approach arguably affords prisoners of war *greater* protection than they would otherwise be accorded by international humanitarian law if chance would have it that their transfer or detention occurs as part of an attack against a civilian population.

The Rome Statute provides a potential solution to this problem, in that Articles 7(2)(d) and 7(1)(e), respectively, require that forced displacement must take place 'without grounds permitted under international law' and that imprisonment must be 'in violation of fundamental rules of international law'. If the ICC agreed that persons *hors de combat* can be victims of crimes against humanity, it ought to clarify whether these two provisions provide a legal basis for rejecting charges of crimes against humanity based on acts which would be permissible under rules of international humanitarian law, in particular those related to prisoners of war. In this regard it may build on ICTY jurisprudence holding that international humanitarian

146 See also *Mrkšić et al.* Trial Judgement, *supra* note 72, para. 458.

147 Rome Statute, Arts. 7(1)(d) and 7(2)(d); ICTY Statute, Art. 5(d).

148 Rome Statute, Art. 7(1)(e); ICTY Statute, Art. 5(e). Similarly, although not listed as an underlying act in Art. 7 of the Rome Statute, the conditions under which forced labour (ICTY Statute, Art. 5(h)) is permitted differs depending on whether the victim is a civilian or a prisoner of war. Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (hereinafter Geneva Convention IV), Art. 51; Geneva Convention III, Section III.

149 By contrast, international humanitarian law generally prohibits both deportation and imprisonment of civilians; see Geneva Convention IV, Arts. 49 and 70.

law 'plays an important role' and constitutes 'a benchmark' in assessing the legality of the underlying acts of crimes against humanity.[150]

4.3.3. Definition of the group of potential victims

The second issue concerns the definition of the group of potential victims. *Martić* did not embark on the issue, but one interpretation is that it limited the group to 'civilians' as defined pursuant to Article 50 of Additional Protocol I[151] and 'persons *hors de combat*' as defined under Common Article 3.[152] If this interpretation holds, two preliminary points related to procedural fairness should be made. First, the accused in a given case should be put on notice of whether the prosecution claims that the victims were 'civilians' under Article 50 of Additional Protocol I, or persons *hors de combat* under Common Article 3, or both. This is so because a determination of 'civilian' status under Article 50 of Additional Protocol I does not necessarily take into account the victim's situation at the time of the commission of the crime,[153] whereas establishing whether a person is *hors de combat* under Common Article 3 very much depends on the victim's activity at the time of the crime.[154] As a result, the defence's strategy (whether or not to rely on the victim's activity in challenging his or her status as a victim) will differ depending on which provision the prosecution relies on. Second, care should be taken not to transpose the presumption in Article 50 of Additional Protocol I that '[i]n case of doubt whether a person is a civilian, that person shall be considered to be a civilian' into a criminal law context. Where the criminal responsibility of an individual turns on whether the victim was civilian, the onus is on the prosecution to establish the civilian status of the victim beyond reasonable doubt.[155]

Turning to the substance of the interpretation that the *Martić* holding is limited to 'civilians' and 'persons *hors de combat*', an immediate reflection is that the wording of Common Article 3 appears to allow for two different definitions of the term 'persons *hors de combat*'. On the one hand, there is an argument that the clause 'members of the armed forces . . . placed hors de combat by sickness, wounds, detention, or any other cause' in Common Article 3[156] suggests that persons *hors de combat* constitute a distinct sub-category within the broader group of persons 'taking no active part in hostilities'. On the other hand, it may be argued that a 'person *hors de combat*' is anyone who, under the terms of Common Article 3, takes 'no active part in hostilities'. If that is the case, new definitional issues arise as to the meaning of the term 'taking no active part in hostilities'.[157] For instance, there is a question of whether a member of

150 *Kunarac et al.* Appeal Judgement, *supra* note 51, para. 91; *Blaškić* Appeal Judgement, *supra* note 23, para. 106; *Krnojelac* Trial Judgement, *supra* note 51, para. 54; *Galić* Trial Judgement, *supra* note 51, para. 144.

151 See *Martić* Appeal Judgement, *supra* note 1, para. 302 (holding that that definition 'reflects the definition of civilian for purposes of applying Article 5 of [the ICTY] Statute').

152 See ibid., para. 306.

153 Ibid., para. 292; *Blaškić* Appeal Judgement, *supra* note 23, para. 114.

154 Common Art. 3; see *Tadić* Trial Judgement, *supra* note 19, para. 616.

155 See *Blaškić* Appeal Judgement, *supra* note 23, para. 111.

156 Common Art. 3 has been quoted in text at note 143, *supra*.

157 For a definition of that term see N. Melzer, *Interpretive Guidelines on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, International Committee of the Red Cross, (2009) (hereinafter ICRC Guidelines), 46.

https://doi.org/10.1017/S0922156509990197 Published online by Cambridge University Press

the armed forces who is on leave from active duty could be considered as taking no active part in hostilities and therefore become a victim of crimes against humanity.

Another interpretation of the *Martić* holding is that anyone, whether defined as a 'civilian' or as a 'person *hors de combat*',[158] who takes 'no active part in hostilities' within the meaning of Common Article 3 is eligible for status as a victim of crimes against humanity. Indeed, the Appeals Chamber relied on jurisprudence referring to the victims simply as 'persons', 'people', or 'individuals'.[159] Importantly, it found that this approach 'reflects customary international law'.[160] It further relied on Common Article 3 and Article 4 of Additional Protocol II,[161] neither of which, it may be argued, is confined to persons *hors de combat* and civilians, but rather include all 'persons taking no active [or direct] part in hostilities'.[162] Under this interpretation, it would be irrelevant for purposes of determining victim status whether the victim was 'civilian' or '*hors de combat*'. All that would matter is that the victim did not take active part in hostilities.

In sum, if the ICC adopted the *Martić* holding, interests of legal certainty[163] call for it to make the scope of the group of potential victims abundantly clear. In particular, the Court should explicitly clarify whether the group is confined to civilians as defined in Article 50 of Additional Protocol I and persons *hors de combat* as defined in Common Article 3, or whether anyone 'taking no active part in hostilities' can be a victim of crimes against humanity. In either instance, the Court might consider elaborating on the meaning of the term 'persons taking no active [or direct] part in the hostilities'.[164]

4.3.4. Situations where no victims are civilians

Lastly, the ICC should consider that the *Martić* holding allows a conviction for crimes against humanity even if none of the victims is civilian. The situation has arisen wherein an attack against a civilian population is shown, but all the individual victims of the underlying acts as charged in the indictment are persons *hors de combat*.[165] Allowing a conviction for crimes against humanity in such a

158 It is noted in this respect that the Elements of Crimes, Art. 8(2)(c) ff., which mirrors Art. 43(2) of Additional Protocol I, envisages that certain persons do not qualify either as civilians or persons *hors de combat*, such as medical or religious military personnel.

159 *Martić* Appeal Judgement, *supra* note 1, para. 308.

160 Ibid., para. 309.

161 Ibid., para. 306.

162 See *Akayesu* Trial Judgement, *supra* note 129, para. 629 (holding that the term 'active' in Common Art. 3 is synonymous with the term 'direct' in Art. 4 of Additional Protocol II in this respect). See also ICRC Guidelines, *supra* note 157, at 43.

163 See, e.g., *Prosecutor v. Duško Tadić*, Case No. IT-94–1-A and IT-94–1-A *bis*, Judgement in Sentencing Appeals, 26 January 2000, Separate Opinion of Judge Cassese, para. 4(ii).

164 See, e.g., ICRC Guidelines, *supra* note 157, at 46 ff.; Third Report on the Human Rights Situation in Colombia, Inter-American Commission on Human Rights, OEA/Ser.L/V/II.102 Doc. 9 rev. 1, 26 February 1999, para. 53 (stating that 'direct participation' is understood to mean 'acts which by their nature or purpose, are intended to cause actual harm to the enemy personnel and material'. See also ICRC Commentary on Additional Protocols, *supra* note 54, Additional Protocol I, Art. 43(2), para. 1679 ('Direct participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and place where the activity takes place.')

165 See *Mrkšić et al.* Trial Judgement, *supra* note 72, paras. 472–481. The question why, in these situations, the prosecution goes through the seeming trouble of charging certain acts as crimes against humanity as

https://doi.org/10.1017/S0922156509990197 Published online by Cambridge University Press

case flies in the face of the ICTY Appeals Chamber's holding that 'the status of the victim as civilian' is one of the elements which 'characterise[s] a crime against humanity'.[166]

A straightforward answer to this issue is that the above-mentioned situation is an unavoidable result of the rule of customary international law that persons *hors de combat* can be victims of crimes against humanity. In that sense, the law on crimes against humanity protects not only civilians but also persons *hors de combat*. But if that is so, one wonders why all contemporary formulations of crimes against humanity require in their *chapeau* that the underlying acts form part of an attack against a 'civilian population'. It seems illogical for a criminal provision ostensibly to protect one group of persons (civilians) in its *chapeau*, but criminalize acts committed against both that group *and* another group of people (persons *hors de combat*) through the underlying offences.[167] If indeed that other group is also protected, this ought to be reflected in all relevant parts of the provision, including the *chapeau*.[168] Taking the customary rule allowing persons *hors de combat* to be victims of crimes against humanity seriously would therefore mean deleting the word 'civilian' from the *chapeau* of crimes against humanity. As noted, this was the position of some delegations during the negotiations of the Rome Statute. However, the word was retained because customary international law mandated its place in the definition of crimes against humanity.[169] It will be interesting to see how the ICC would reconcile these issues were it to adopt the *Martić* holding.

---

opposed to war crimes is not dealt with in this paper. Suffice it to note that a number of reasons, ranging from sufficiency of evidence to broader notions of comprehensive justice, may weigh in the choice between different prosecutorial strategies. See also *Martić* Appeal Judgement, *supra* note 1, para. 312, citing *Tadić* Appeal Judgement, *supra* note 45, para. 286 ('those war crimes which, in addition to targeting civilians as victims, present special features such as the fact of being part of a widespread or systematic practice, must be classified as crimes against humanity and deserve to be punished accordingly').

166 *Blaškić* Appeal Judgement, *supra* note 23, para. 107. The Appeals Chamber's statement in *Mrkšić* that this holding in *Blaškić* cannot be understood as implying that the underlying acts of crimes against humanity 'can *only* be committed against civilians' does not detract from the support the *Blaškić* holding lends to the proposition that such acts cannot be deemed to have occurred where none of the victims was a civilian. *Mrkšić and Šljivančanin* Appeal Judgement, *supra* note 121, para. 28 (emphasis added).

167 Indeed, such inconsistency does not exist between the *chapeau* and the underlying offences of war crimes, both of which cover 'protected persons' or 'protected property'; see the Rome Statute and Elements of Crimes, Art. 8(2)(a), at 14 ff. Admittedly, however, war crimes do not have the heterogeneous pedigree of crimes against humanity.

168 Unless the *chapeau* consists of purely jurisdictional prerequisites which do not form part of the elements of the crime, but that is not the case for crimes against humanity. See *Prosecutor v. Mladen Naletilić and Vinko Martinović*, Judgement, Case No. IT-98–34-A, A.Ch., 3 May 2006, paras. 116 and 118. The term 'jurisdictional prerequisite' is here understood to mean requirements related to a court's temporal, geographical or personal jurisdiction, as opposed to its subject-matter jurisdiction, which latter consists of the statutory crimes and their substantive elements. If the term were employed to encompass also conditions of subject-matter jurisdiction, then it would lose its distinguishing purpose, as all substantive elements of all crimes would be 'jurisdictional' in the same sense as the temporal, geographical, and personal conditions for a court's exercise of jurisdiction are. It is noted that the Appeals Chamber in *Mrkšić* consistently spoke of the *chapeau* as a 'jurisdictional element', but it did not elaborate on the meaning of the term, in particular whether it would imply that the *chapeau* does not form part of the substantive elements of crimes against humanity, and, if so, why and on what legal basis such a novel and radical approach was justified. See *Mrkšić and Šljivančanin* Appeal Judgement, *supra* note 121, paras. 25, 26, 28, 30, 37, 43. In any event, given that it is the *chapeau* which changes the character of offences such that they are elevated to crimes against humanity, there can be no doubt that it forms part of the substantive elements of crimes against humanity.

169 Text at note 93, *supra*.

https://doi.org/10.1017/S0922156509990197 Published online by Cambridge University Press

4.4. Conclusion

The *Martić* holding offers a compromise between the customary rule that victims of crimes against humanity need not be civilians, and crimes against humanity's origin which mandates that international humanitarian law control the definition of 'civilian' in the *chapeau*. This solution comes at the price of internal inconsistency in the formulation of crimes against humanity. However, the alternatives which could avoid the inconsistency – applying either Article 50 of Additional Protocol I or Common Article 3 to both the *chapeau* and the status of the victims of crimes against humanity – are either too restrictive or too broad in comparison with customary international law. As such, the *Martić* approach is a viable middle way which, despite its internal inconsistency, at least reflects contemporary customary international law. If the ICC were to adopt this approach, it would be well advised to clarify the precise scope of the category of persons who can be victims of crimes against humanity. It should also explain the legal relationship between the provisions protecting prisoners of war under international humanitarian law and the provisions on the underlying offences of crimes against humanity.

5. Concluding remark

The two issues addressed in *Martić* are of fundamental importance to the notion of crimes against humanity, and they are likely to affect all but two of the cases currently pending before the ICC. As such, the Court should seize the earliest opportunity to resolve them expeditiously, as this would materially advance the proceedings.[170] Indeed, the parties are entitled to know the legal confines within which they are to prepare their cases from the outset of the proceedings, lest they suffer serious prejudice which, if those confines are not spelled out until a late stage of the proceedings, may only be remedied by a retrial.[171] Additionally, it cannot be excluded that a clarification of the required status of the victims could potentially affect the determination of whether a person qualifies as a 'victim' so as to be eligible to participate in court proceedings and to claim reparations before the ICC.[172]

170 Art. 82(1)(d) of the Rome Statute and Rule 155 of the Rules of Procedure and Evidence, ICC-ASP/1/3 (hereinafter ICC RPE) allow for an immediate resolution by the Appeals Chamber of appeals from decisions that involve issues which would significantly affect the outcome of the trial and the immediate resolution of which by the Appeals Chamber may materially advance the proceedings.

171 See Rome Statute, Art. 83(2)(b).

172 Arts. 15(3), 19, 53(3), and 61 of the Rome Statute, and Rule 93 of the ICC RPE allow for different forms of victims' participation at various stages of the proceedings. Under Art. 75 and Rules 94–99 of the ICC RPE, victims can seek reparations. Arguably, the notion of 'victim' in the context of participation in proceedings and reparations is somewhat broader than in relation to the objective elements of a specific crime; see Rule 85 of the ICC RPE and Report of the Working Group on Procedural Matters, UN Doc. A/CONF.183/C.1/WGPM/L.2/Add.7, at 5 (defining 'victim' broadly). See also C. Stahn et al., 'Participation of Victims in Pre-trial Proceedings of the ICC', 2006 4 *Journal of International Criminal Justice* 219, at 221; M. Henzelin et al., 'Reparations to Victims before the International Criminal Court: Lessons from International Mass Claims Processes', 2006 17 *Criminal Law Forum* 317, at 323.

https://doi.org/10.1017/S0922156509990197 Published online by Cambridge University Press