

Chapter 5

Combatants as victims of crimes against humanity

Suitable quote required

Combatants run the risk of being injured, or ultimately losing their life, during an armed conflict: it is part and parcel of their job description and, as I have explained, international law accepts this reality.

Of course, not all deaths of combatants are lawful under international law, combatants can also become the victims of atrocities. Traditionally, most atrocities against combatants have been prosecuted as war crimes. However, not all crimes against combatants can fall into this category, for example crimes committed by the combatant's own state against them,¹ or crimes committed out with the context of an armed conflict.

The concept of crimes against humanity was originally developed to encompass atrocities which could not fall into the category of war crimes. Most definitions of the crime² require that there be an attack directed against any *civilian population*, and because of that, it has been unclear as to whether or not combatants could be victims of crimes against humanity.

In this chapter I shall examine the historical background of crimes against humanity and examine how different definitions of crimes against humanity have developed. I shall then explore how courts and tribunals have applied the various definitions of the crime in cases where combatants were victims.

¹ *Prosecutor v Sesay et al* (SCSL-04-15-T) 2 March 2009 para 1451, where the Trial Chamber stated “The Chamber is of the opinion that the law of armed conflict does not protect members of armed groups from acts of violence against them by their own forces”.

² There are several different definitions of crimes against humanity: Bassiouni cites twelve different international definitions, see Bassiouni, Cherif M., *Crimes against Humanity: The Case for a Specialised Convention*; 9 Wash. U. Global Stud. L. Rev. 575 at FN 44. Also see Badar, Mohamed Elewa; *From the Nuremberg Charter to the Rome Statute: Defining the Elements of Crimes against Humanity*; 5 San. Diego Int'l L.J. 73 2004

5.1 *The origins of crimes against humanity*

The idea that there are ‘laws of humanity’ has been with us since time immemorial.³ According to Schabas, “the notion of crimes against humanity was in wide circulation from at least the middle of the eighteenth century”.⁴ His view is that the author of the expression may have been Voltaire,⁵ and has unearthed several examples of the use of the phrase during the eighteenth and nineteenth centuries.⁶ It was not until the early twentieth century that reference was made to the concept in an official document when, in 1915, the term appeared in a Declaration issued by the British, French and Russian Governments following the killing of the Armenians by the Turks in the Ottoman empire, which referred to “new crimes of Turkey against humanity and civilisation”.⁷

In the aftermath of the First World War, a Commission was set up to inquire into the violations of international law committed by Germany and its allies during the war. Their final Report stated that the war had been carried out:

³ See Cassese, A, *Crimes against Humanity: Comments on Some Problematical Aspects* in Cassese, A; *The Human Dimension of International Law*, Selected Papers; Oxford University Press; 2008, p 457. An example of the use of the phrase in a legal text can be found in the Martens Clause, which originally appeared in the Convention with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 29 July 1899, which states: ‘the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the *laws of humanity*, and the requirements of the public conscience.’ Also see the St Petersburg Declaration 1868 and the Hague Convention of 1907. However, see Schwelb, Egon; *Crimes against Humanity*; 23 Brit. Y. B. Int’l L. 178 (1946) at p 180 who writes that “in older international documents...the expressions ‘humanity’, ‘laws of humanity’, ‘dictates of humanity’ were used in a non-technical sense and certainly not with the intention of indicating a set of norms different from the ‘laws and customs of war’”.

⁴ Schabas, William; *Unimaginable Atrocities: Justice Politics and Rights at the War Crimes Tribunals*; Oxford University Press; 2012; p 51

⁵ Schabas, supra *** p 51 referring to Voltaire, *A Philosophical Dictionary: From the French of M. De Voltaire*; 1793, repr., London: W. Dugale 1843, p 293

⁶ Schabas, supra ***, p 51 – 53. Also see Moir, Lindsay, *Crimes against Humanity in Historical Perspective*, 3 N.Z. Y.B. Int’l L. 101 (2006) at p 102- 107 who states ‘There may well have been a recognition of crimes under international law, and of what are now perceived as human rights, but it is inconceivable that Grotius, Vattel, *et al* were asserting the same category of offences as was prosecuted at Nuremberg’ (p 107).

⁷ See Cassese, supra ***, p 458, Badar, supra ***, p 77- 79; Bassiouni *** (62 in 1999 ed); Schabas, supra *** p 30

by the Central Empires together with their allies, Turkey and Bulgaria, by barbarous or illegitimate methods in violation of the established laws and customs of war and the *elementary laws of humanity*. (emphasis added)

and further that

all persons belonging to enemy countries ...who have been guilty of offences against the laws and customs of war, or the *laws of humanity*, are liable to criminal prosecution⁸ (emphasis added)

However, the American members of the Commission disagreed and wrote a dissenting report focussing on the Commission's use of the phrase 'laws of humanity', arguing that the phrase meant nothing since there were no such laws.⁹ They stated:

war was and is by its very nature inhuman, but acts consistent with the laws and customs of war, although these acts are inhuman, are nevertheless not the object of punishment by a court of justice.¹⁰

As a result of this disagreement, no reference was made to crimes against humanity in the Treaties of Versailles.¹¹ However, in the Treaty of Sèvres, which concerned the massacre of the Armenians by the Turks, and to which America was not a party, Turkey undertook to hand over those who were responsible for the massacres to the Allies for prosecution.¹² Although the term 'crime against humanity' was not used, it was, as Schwelb writes, an early example of reference to the crime, as:

⁸ *Carnegie endowment for International Peace, Pamphlet No 32, Violation of the Laws and Customs of War: Reports of Majority and Dissenting Reports of Japanese Members of the Commission of Responsibilities for the Conference of Paris*, 1919 and see Schwelb, supra *** p 180 – 181 and Matas, David; *Prosecuting Crimes against Humanity: The Lessons of World War I*: 13 *Fordam Int'l L. J.* 86 1989 – 1990 p 86 – 92. Also see United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War*, London; HMSO; 1948; p 21 - 52

⁹ Matas, supra *** p 89 - 90

¹⁰ Quoted in Schwelb, supra *** p 181 - 182

¹¹ Schwelb, supra *** p 182

¹² Article 226, Treaty of Sèvres, 1920

it was intended to bring to justice persons who, during the war, had committed on Turkish territory crimes against persons of Turkish citizenship though of Armenian or Greek race, a clear example of ‘crimes against humanity’ as understood in the 1945 London Charter.¹³

The Treaty was not ratified and never came into force, and so, ultimately, nothing came of the undertaking.

5.2 *The framing of the first definition of Crimes against Humanity*

It was not until the aftermath of the Second World War that the first definition of the crime was formulated.¹⁴ The problem facing the Allied Powers was that the Nazis had committed atrocities against their own people and it was understood that:

crimes committed by Germans against Germans, however reprehensible, are in a different category from war crimes and cannot be dealt with under the same procedure.¹⁵

Bassiouni writes:

These crimes were unimaginably horrific to the international community. The law was, therefore, lagging behind the facts, and ultimately, the facts drove the law.¹⁶

The first definition is found in Article 6(c) of the Charter of the International Military Tribunal for the Trial of the Major War Criminals, appended to the London Agreement of 8 August 1945 (hereafter the ‘*London Charter*’). Bassiouni explains that during the drafting process:

as they reviewed the facts, it was clear that certain atrocities did not fall within the traditional meaning of “war crimes”. In the course of their deliberations they

¹³ Schwelb, supra *** p 182

¹⁴ For a summary of the developments leading up to the drafting of the London Charter, see Schwelb, supra *** p 183 - 188

¹⁵ Schwelb, supra *** p 186 quoting Richard Law, then Minister of State in the House of Commons on 31 January 1945 (Hansard, House of Commons, 31 January 1945)

¹⁶ Bassiouni, supra ***(2011) p 724

gradually came to the realisation that a third separate category was needed, and by July 1945, they settled for the heading ‘crimes against humanity’¹⁷

5.2.1 Article 6 (c) of the London Charter

Section 6(c) of the London Charter defines crimes against humanity 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 jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Thus, in this first definition of the crime, the acts must be ‘committed against any civilian population’. However, it is important to recall that it was necessary to include a crime of crimes against humanity in the London Charter for a specific reason: in order to include crimes committed by the Nazi regime against its own civilians, which could not constitute war crimes. The drafters of the London Charter would have assumed that atrocities committed against combatants would have taken place within the context of the war itself, an international armed conflict, where more well-established war crimes laws would cover criminal acts perpetrated against combatants. As Cassese writes:

The rationale for this relatively limited scope of Article 6(c) is that *enemy* combatants were already protected by the traditional laws of warfare, while it was deemed unlikely that a belligerent might commit atrocities against *its own* servicemen or those of *allied* countries. In any event, such atrocities, if any, would come under the jurisdiction of the courts-martial of the country concerned; in other words they would fall under the province of *national* legislation.¹⁸

The framing of Article 6(c) in this way led to some disagreement regarding how the article should be interpreted. The International Law Commission observed that it prohibited two

¹⁷ Bassiouni, M. Cherif; *Crimes Against Humanity in International Criminal Law*; Kluwer Law International, 2nd revised edition, 1999 p 17. For a discussion of whether crimes against humanity constituted *ex post facto* law see Moir, *supra* ***, p 117 - 123

¹⁸ Cassese, *supra* *** p 466

different categories of crimes.¹⁹ The first included crimes of murder, extermination, enslavement, deportation, and other inhumane acts which have been committed against any civilian population ('murder type' crimes against humanity); while the second included persecutions on political, racial or religious grounds ('persecution type' crimes against humanity).

Some have argued that this meant that combatants could not be the victims of 'murder type' crimes against humanity, since they had to be directed against 'any civilian population', but could be victims of 'persecution type' crimes against humanity, which did not have this requirement.²⁰ Schwelb argues that such a distinction would "not lead to satisfactory results",²¹ as

It would be difficult to understand the *rationale* of a provision under which the number of persons afforded protection against a less serious crime (persecution) would be larger than that of potential victims protected against the graver offences of the murder type.²²

Others believed that combatants could not be victims of crimes against humanity at all- the UN War Crimes Commission, for example, when comparing the London Charter, the Tokyo Charter²³ and Control Council Law No 10, concurred that there were two different types of crimes against humanity, and that offences against members of the armed forces were probably outside murder type crimes against humanity, which had to be committed against the civilian population, and were probably also outside the scope of persecution type.²⁴

Let us now turn to the handful of cases from post-World War II jurisprudence which considered whether combatant victims could be victims of crimes against humanity.

¹⁹ *Report of the International Law Commission*, U.N.GAOR, 5th Sess., Supp. No. 12 UN Doc A/1316 (1950) at para 120

²⁰ See for example Cassese, *supra* ***, p 465 - 471

²¹ Schwelb, *supra* *** p 190

²² Schwelb, *supra* *** p 190

²³ International Military Tribunal for the Far East Charter, 19 January 1946

²⁴ *History of the United Nations War Crimes Commission*, *supra* *** p 193 - 194 and see Bassiouni, (bk) ***, p 36

5.3 *Post World War II Jurisprudence*

The Nuremberg Tribunal did not have occasion to consider whether combatants could be victims of crimes against humanity under Article 6(c) of the London Charter. It was, rather, in the courts administered by the Allies where the matter arose. These courts were not applying Article 6(c), which applied solely to the Nuremberg Tribunal, however the definitions of the crime which they applied were based on the definition given in the London Charter, and contained a requirement that the crime be ‘committed against any civilian population’.²⁵

In *P et al*,²⁶ dating from 1948, the Supreme Court of Germany in the British Occupied Zone, applying Article II (1) (c) of Control Council Law No. 10,²⁷ considered whether the treatment of four German marines who had been captured trying to escape from Denmark back to Germany on the eve of German capitulation, constituted a crime against humanity. Three were sentenced to death for desertion by a German court-martial, and were duly executed. It was held that the members of the court martial were guilty of crimes against humanity, since the sentence was overly excessive for the supposed crime, and the Court held it to be a

²⁵ There were some important differences between the different definitions of crimes against humanity and the definition contained in Article 6(c): Article II (c) of Control Council Law No. 10, for example, removed the requirement for there to be a connection with crimes against peace or war crimes, see Bassiouni supra (bk CvH)**, p 32 - 37, however all of the definitions have a similar requirement that the acts be ‘committed against any civilian population’.

²⁶ *P and Others*, 7 December 1948, Entscheidungen des Obersten Gerichtshofes für die Britische Zone in Strafsachen, St S 111/48 cited in Cassese, supra *** p 468 – 469; Also see H. Singh, *Critique of the Mrkšić Trial Chamber (ICTY) Judgment: A Re-evaluation on whether soldiers hors de combat are entitled to recognition as victims of crimes against humanity*, The Law and Practice of International Courts and Tribunals 8 (2009) p 257-258

²⁷ Article II (1) (c) of Control Council Law No. 10 states:

Each of the following acts is recognized as a crime.....

a) Crimes against Humanity. Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.

manifestation of the Nazi's brutal regime. In relation to the wording of Article II (1)(c), the court observed:

whoever notes the expressly emphasised illustrative character of the instances and classes of instances mentioned there, cannot come to the conclusion that action between soldiers may not constitute crimes against humanity.²⁸

In the case of *H*, from 1949, the same court considered the actions of a German judge who had presided in cases against two officers in the German navy: one had been accused of criticising Hitler, whilst the other was accused of procuring foreign identity cards for himself and his wife. The Judge initially sentenced both to death. He was found guilty of crimes against humanity, in that his actions were held to have been part of the system of Nazi brutality.²⁹

In the US Occupied Zone, in the case of *RuSHA*, count one of the charges against the defendants included crimes against humanity against prisoners of war.³⁰ The Court found the acts to constitute crimes against humanity.³¹

The possible distinction between case combatants as victims of 'murder-type' crimes against humanity, and combatants as victims of 'persecution-type' crimes against humanity was an issue for the Dutch Special Court of Cassation, in the case of *Pilz*.³² The Court considered whether a soldier of the occupying German army, who was Dutch by birth, could be a victim of crimes against humanity. A doctor within the German army was accused of ordering, or allowing, a subordinate to shoot and wound the soldier and thereafter refusing to give him medical assistance, thereby allowing him to die. The court held that the offence could not be

²⁸ Ibid, at 228 – 229, quoted in Cassese supra *** p 469 CHECK QUOTE

²⁹ *H*.; 18 October 1949; Entscheidungen des Obersten Gerichtshofes für die Britische Zone in Strafsachen; St S 309/49. cited in Cassese, supra ***, p 469 and Singh, supra ***, p 258 - 259

³⁰ Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10, Vol. 4 Washington DC.: US G:P:O: 1950; p 5 available at http://www.loc.gov/r/r/frd/Military_Law/pdf/NT_Indictments.pdf#page=162 and see Singh, supra *** p 259

³¹ Ibid, p 152- 153

³² *Pilz*; Nederlandse Jurisprudentie; 1950; No. 681 at 1210 – 1211 and *International Law Reports*; 1950; 391 – 392 and see Cassese, supra *** p 466

regarded as a war crime, but neither could it constitute a crime against humanity. The court's opinion was that this was so because

the victim was not part of the civilian population of an occupied territory, nor (could) the acts with which he (was) charged be seen as forming part of a system of persecution on political, racial or religious grounds.³³

Thus, the case law dating from the end of World War Two tends to suggest that combatants could qualify as victims of crimes against humanity, although, as the case of *Pilz* shows, not all courts agreed with this interpretation.

5.4 *Moving on from Article 6(c)*

Since the creation of the first definition of crimes against humanity in Article 6(c) of the London Charter, several other definitions of the crime have been formulated. These definitions have often varied in small, but significant, ways,³⁴ and one of these ways has been as to whether an act requires to be 'committed against a civilian population' or not for it to constitute a crime against humanity.

5.4.1 *The approach taken by the International Law Commission*

The International Law Commission ('ILC') was created by the United Nations General Assembly in 1947.³⁵ One of its first tasks was to formulate a set of principles of international law arising from the London Charter and the Judgement of the Nuremberg Tribunal, and thereafter it was charged with creating a draft code of Offences against the Peace and Security of Mankind.³⁶

The Nuremberg Principles were completed in 1950. Crimes against humanity were defined as:

³³ As quoted in Cassese, *supra* ***, p 466 at footnote 27

³⁴ See Badar, *supra* note ***, Van Schaak, Beth, *The Definition of Crimes against Humanity: Resolving the Incoherence*, 37 Colum. J. Transnat'l L. 787 1998-1999 and Sluiter, Göran, "*Chapeau Elements*" of Crimes against Humanity in the Jurisprudence of the UN Ad Hoc Tribunals in Sadat, Leila Nadya (ed), *Forging a Convention for Crimes against Humanity*, Cambridge University Press 2011

³⁵ G.A. Res. 174 (II) UN GAOR, 2d Sess., 123rd plen. mtg. at 105 U.N. Doc. A/519 (1947)

³⁶ G.A. Res. 177 (II) UN GAOR, 2d Sess., 123rd plen. mtg. at 111 U.N. Doc. A/519 (1947)

Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connexion with any crime against peace or any war crime.

This definition therefore accords with the definition found in Article 6(c), in that it continues to require that acts be ‘done against a civilian population’ and makes a distinction between ‘murder type’ and ‘persecution type’ crimes against humanity.

In its accompanying Report, the ILC makes no reference as to whether it considers that combatants can be victims of crimes against humanity or not, their focus being rather upon interpreting the phrase ‘any civilian population’ to include acts committed by the perpetrator against his own population.³⁷

The first draft of the Code of Offences against the Peace and Security of Mankind was prepared by the ILC in 1951, followed shortly by a revised Code, which was adopted by them and submitted to the General Assembly in 1954.³⁸

The 1954 formulation did not refer to ‘crimes against humanity’ as such. Article 2(11) defines one offence against the peace and security of mankind as:

Inhuman acts such as murder, extermination, enslavement, deportation or persecutions, committed against any civilian population on social, political, racial, religious or cultural grounds by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities.

The Commentary to the Draft Code states “This paragraph corresponds substantially to article 6, paragraph (c), of the Charter of the Nurnberg Tribunal, which defines "crimes against

³⁷ *Report of the International Law Commission*, UN GAOR, 5th Sess., Supp. No 12, U.N. Doc. A/1316 (1950) at para 124

³⁸ *Report of the International Law Commission to the General Assembly, Draft Code of Offences against the Peace and Security of Mankind*; U.N. GAOR, 9th Sess., Supp. No. 9, ch 3, art. 2., sec. 11, U.N. Doc. A/2691 (1954)

humanity".”³⁹ When outlining the differences between the two provisions, the Commentary makes no reference to the fact that, unlike Article 6(c), this definition requires both ‘murder’ and ‘persecution’ type crimes against humanity to be directed against a civilian population.⁴⁰ This change would have the effect, on a strict interpretation of the provision, such as the one taken by the Dutch Court of Cassation in *Pilz*, that it would operate to preclude combatants from being victims of the crime.

Work on the draft Code was suspended until the 1980s,⁴¹ with a new version of the Code being adopted by the ILC in 1991.⁴² Once more, this version did not contain a specific crime entitled ‘crime against humanity’;⁴³ Article 21 of the draft Code comes closest to it. Under the heading of “Systematic or mass violations of human rights” it states:

An individual who commits or orders the commission of any of the following violations of human rights:

- Murder
- Torture
- establishing or maintaining over persons a status of slavery, servitude or forced labour
- persecution on social, political, racial, religious or cultural grounds, in a systematic manner or on a mass scale; or
- deportation or forcible transfer of population

³⁹ Available in *Report of the International Law Commission*, 3rd Session, Vol II Yearbook of the International Law Commission 123 at 136 (1951). Also see Dinstein, Yoram, *Crimes against Humanity after Tadić*; 13 *Leiden Journal of International Law* 373- 393 (2000) at p 377

⁴⁰ Hwang, Phyllis, *Defining Crimes against Humanity in the Rome Statute of the International Criminal Court*, 22 *Fordham Int’l L. J.* 457 1998 – 1999 at p 464 - 465

⁴¹ Work on the Code was recommenced following G.A. Res., 106, UN GAOR, 36th sess. (1981)

⁴² Draft Code of Crimes against the Peace and Security of Mankind, in *Yearbook of the International Law Commission* 1991, Volume 1, Summary records of the meetings of the forty-third session 29 April – 19 July 1991, A/CN.4/SER.A/1991 p 218 – 223 and see Dinstein (*Leiden Journal* 2000) p 377

⁴³ Hwang, *supra* *** p 465 – 466 is of the view that “because the ILC did not indicate that this crime was intended as a substitute for crimes against humanity, its significance in reflecting the development of crimes against humanity in international law is limited”.

shall, on conviction thereof, be sentenced [to . . .] .⁴⁴

No indication is provided in the discussion among the drafters as to why the phrase “against any civilian population” was thought to be unnecessary.⁴⁵

Work on the Code continued, with a further draft Code being produced and thereafter adopted in 1996.⁴⁶ This time a specific definition of crimes against humanity was included in Article 18, which states:

A crime against humanity means any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group...

Following the lead taken by the 1991 draft, the 1996 draft contains no requirement for the specified acts to be directed against any civilian population.⁴⁷ Dinstein comments that:

the most striking aspect of Article 18 is that it quite inexplicably omits the requirement that the prohibited acts be committed against a civilian population.⁴⁸

Once again, no explanation is given within the accompanying Commentary as to why this approach was taken.⁴⁹ It has been suggested that one reason for this omission could be that the contemporary jurisprudence at that time was opting for an expansive definition of the term

⁴⁴ Available in Yearbook of the International Law Commission 1991, Volume 1, Summary records of the meetings of the forty-third session 29 April – 19 July 1991, A/CN.4/SER.A/1991 p 222 - 223

⁴⁵ Ibid, p 218 - 223

⁴⁶ Draft Code of Crimes against the Peace and Security of Mankind; U.N. GAOR. 48th Sess., at 6-7 U.N. Doc.. A/CN.4/L.532 (8 July 1996), available in *Yearbook of the International Law Commission, 1996*, vol. II (Part Two).

⁴⁷ Hwang, supra FN* p 468 and see Allain, J and Jones, John; *A Patchwork of Norms: A Commentary on the 1996 Draft Code of Crimes against the Peace and Security of Mankind*; 1 EJIL (1997) 100-117 at p 112

⁴⁸ Dinstein (Leiden 2000) at p 379

⁴⁹ Yearbook of the International Law Commission 1996, Volume II, Part two, documents of the 48th Session, p 47- 48

‘civilian population.’⁵⁰ However, no reference was made within the Commentary accompanying the draft Code as to why the change was made.

5.4.2 *The definitions of crimes against humanity in the ICTY and ICTR Statutes*

Although the Statutes for the ICTY and ICTR were drafted within a relatively short period of time of one another, and both emanated from the same source, the UN Security Council, there are some significant differences in the way that the definition of crimes against humanity has been defined.⁵¹ Be that as it may, both of the Statutes require that the attack be against a civilian population, although Article 3 of the ICTR Statute requires it to be “against any civilian population” while Article 5 of the ICTY Statute requires it to be “directed against any civilian population”.⁵²

The Committee of Experts in their Final Report concerning the formation of the ICTY paid some consideration to the matter.⁵³ It noted that “civilian population”, as it appears in Article 5 of the ICTY Statute,⁵⁴ “is used in this context in contradistinction to combatants or members of armed forces.”⁵⁵ However, it then proceeds:

It seems obvious that article 5 applies first and foremost to civilians, meaning people who are not combatants. This, however, should not lead to any quick conclusions concerning people who at one particular point in time did bear arms.⁵⁶

⁵⁰ Singh, *supra* ***, p 279 and Allain and Jones *supra* *** at p 112 - 113, referring to the *Barbie* case to the *Vukovar* case, which I shall refer to later.

⁵¹ Dinstein (Leiden 2000) and Sluiter, *supra* *** p 107

⁵² Sluiter, *supra* *** p 117 - 120

⁵³ *Final Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992) S/1994/674*

⁵⁴ Article 5 contains the definition of crimes against humanity to be applied by the ICTY. It states:

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...

⁵⁵ *Id.*, para 77

⁵⁶ *Id.*, para 78

It then provides some examples- the head of a family protecting his family, gun in hand against a paramilitary group attacking the village; or a sole policeman or local defence guard doing the same thing, even if they joined hands- stating:

in such circumstances, the distinction between improvised self-defence and actual military defence may be subtle, but is none the less important.⁵⁷

From these examples, it is evident that they are far from envisaging that combatants, can be victims of crimes against humanity. It should be recalled that the ICTY Statute applies in very specific circumstances: to serious violations of IHL committed in the territory of the former Yugoslavia since 1991.⁵⁸ The *chapeau* of Article 5 requires that for an act to constitute a crime against humanity under the Statute, it must be committed during an armed conflict.⁵⁹ Perhaps, as with Article 6(c) of the London Charter, it was intended by the Committee that crimes committed against combatants would be prosecutable as war crimes, and therefore there would be no difficulty with the fact that the *chapeau* requiring that the crimes be directed against any civilian population.

5.4.3 *The Drafting of the Rome Statute*

An examination of the preparatory works leading up to the Rome Conference in 1998 makes it plain that the content of the article defining crimes against humanity which was to appear in the Rome Statute was far from a foregone conclusion.⁶⁰

⁵⁷ Id., para 78

⁵⁸ ICTY Statute Article 1

⁵⁹ However, see *Prosecutor v Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, 2 October 1995; para 140, which states “It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed, as the Prosecutor points out, customary international law may not require a connection between crimes against humanity and any conflict at all. Thus, by requiring that crimes against humanity be committed in either internal or international armed conflict, the Security Council may have defined the crime in Article 5 more narrowly than necessary under customary international law.”

⁶⁰ See for example Report of the Ad Hoc Committee on the Establishment of the International Criminal Court, A/50/22 (1995) para 78 - 80

During the meetings of the Preparatory Committee in 1996,

some delegations expressed the view that the phrase "attack against any civilian population" which appeared in the Rwanda Tribunal Statute was vague, unnecessary and confusing since the reference to attack could be interpreted as referring to situations involving an armed conflict and the term "civilian" was often used in international humanitarian law and was unnecessary in the current context. There were proposals to delete this phrase or to replace the word "attack" by the word "acts".⁶¹

In the draft Statutes prepared by the Preparatory Committee, in the years leading up to the Rome Conference in 1998, alternative phrasings were proposed which did not refer to 'civilian population'.⁶² The final draft prepared prior to the conference proposed different alternatives, which include the specified acts being against 'any population' rather than 'any civilian population':

A "crime against humanity" means any of the following acts when committed [as part of a widespread [and] [or] systematic commission of such acts against any population]:

[as part of a widespread [and] [or] systematic attack against any [civilian] population]⁶³

At the Rome Conference itself, crimes against humanity were first discussed at the 3rd and 4th meetings on 17 June 1998. The principal issues of contention were whether they could be committed within internal armed conflicts; whether there was a requirement that they be widespread and systematic; and also, what specific crimes should be included.

⁶¹ See *Report of the Preparatory Committee on The Establishment of an International Criminal Court*, Volume 1 GAOR, 51st Session Supplement No 22 (A/51/22) p22

⁶² For example see *Report of the Preparatory Committee on The Establishment of an International Criminal Court*, Volume 1 GAOR, 51st Session Supplement No 22 (A/51/22) p22; *Decisions Taken by the Preparatory Committee at its sessions held from 11 to 21 February 1997*, A/AC.249/1997/L.5 12, Annex I Report of the Working Group on the Definition of Crimes, p4 and Bassiouni, M. Cherif *The Legislative History of the International Criminal Court: An Article-by-Article Evolution of the Statute, Volume 2...*p46-54 containing the Zutphen Draft, the draft prepared by the Working Group at the 1997 Preparatory Committee session and the draft prepared by the 1996 Preparatory Committee.

⁶³ Draft Statute for the International Criminal Court A/CONF.183/2/Add1 14 April 1998 p 25-26

There was some discussion of the phrase “civilian population”. Greece, for example, favoured the first alternative in the *chapeau* of paragraph one (“any population”) as being less restrictive than the second.⁶⁴ The Republic of Korea was of the view that the reference to “civilian” population was confusing.⁶⁵ France felt that crimes against humanity could be committed in peace and in war against all populations.⁶⁶ Canada expressed the strongest view regarding the phrase “grounds for attack against a population” arguing that this was not part of the definition of crimes against humanity under customary international law and that any requirement regarding grounds would unnecessarily complicate the task of prosecution and may inadvertently exclude groups which could be victims of crimes against humanity.⁶⁷ This point does not seem to have been picked up by any of the other delegations.

However, by the beginning of July, the drafts of the *chapeau* being circulated only referred to “attack directed against any civilian population.”⁶⁸ It is difficult to pinpoint what happened within the interim period. Hwang notes that “the very limited discussion of “civilian population” failed to take into account the complex analysis that the ICTY had undertaken for this term”.⁶⁹ She notes that the delegations were concerned with two principal issues namely, the requirement of a nexus between crimes against humanity and armed conflict, and whether “widespread” and “systematic” should be alternative or cumulative.⁷⁰ She refers to a Canadian Proposal to the *chapeau* dated 1 July 1998 which required an “attack against any civilian population”.⁷¹ Referencing the notes which she had taken at the Conference, she states that the “introduction of the definition of “an attack against any civilian population”

⁶⁴ Bassiouni Volume 3 supra FN* p95

⁶⁵ Id. p 96

⁶⁶ Id., p 97

⁶⁷ Id., p 103

⁶⁸ For example Id., p 421 containing a copy of Bureau Discussion Paper regarding part 2, A/CONF.183/C.1/L.53 dated 6 July 1998 and Id., p 445 containing a copy of Recommendations of the Coordinator regarding Article 5 A/CONF.183/C.1/L.44 dated 7 July 1998

⁶⁹ Hwang, supra FN * p 496

⁷⁰ Id., p 496

⁷¹ Id., p 497

attracted a broad range of comments,”⁷² but it would seem that none of the comments related to issues such as the definition of “civilian” and whom the delegates envisaged being included as victims of crimes against humanity.

The text which was ultimately adopted as Article 7 of the Rome Statute requires that the acts be part of a “widespread and systematic attack against any civilian population”. No definition of ‘civilian’ or ‘civilian population’ is provided either in the Statute itself, or in the Elements of Crime.⁷³ However, notably, Darryl Robinson reports that during the negotiations held to formulate the Elements of Crime

the developing law on the status of combatants as victims of crimes against humanity [was discussed], and the fact that all persons are “civilian” when there is no armed conflict. Delegations agreed that the “civilian population” test was a flexible test. Most delegations quickly agreed that this was too complex a subject and an evolving area of law, better left for resolution in case law.⁷⁴

This seems to be a rather unsatisfactory conclusion.

5.4.4 *The International Convention for the Protection of All Persons from Enforced Disappearance*

Article 5 of this Convention has a different approach to defining Crimes against Humanity. It defines it as:

The widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law.

⁷² Id p 497-498

⁷³

⁷⁴ Robinson, D, The Context of Crimes against Humanity, in R.S. Lee (ed), *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers Inc 2001) p78

This definition is rather Spartan – it makes no reference to unlawful acts of widespread or systematic enforced appearance being carried out against a ‘civilian population’. However, the requirement that it be a crime against humanity ‘as defined in applicable law’ could arguably mean that the requirement that the act be against a civilian population is implied within the definition.

5.4.5 *The Proposed Convention for Crimes against Humanity*

The Proposed Convention for Crimes against Humanity⁷⁵ is an initiative by a group of distinguished experts to draft a Convention to act as a foundation upon which states can build a crimes against humanity convention, which some experts believe to be “a still-missing and essential piece of the framework of international humanitarian and international criminal law”.⁷⁶ The *chapeau* to the proposed Convention states:

For the purposes of the present Convention, “crimes 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...⁷⁷

The drafters have therefore chosen to follow the lead of the majority of the previous definitions of crimes against humanity in requiring that the attacks be directed against any civilian population. At the expert meetings which discussed the definition of the crime, several suggestions to amend the definition as found in Article 7 of the Rome Statute were made, including a proposal to drop the ‘civilian’ in ‘civilian population’.⁷⁸ However, ultimately the phrase was included within the proposed Convention.

⁷⁵ Proposed International Convention on the Prevention and Punishment of Crimes against Humanity drafted by the Washington University School of Law Whitney R. Harris World Law Institute Crimes against Humanity Initiative, August 2010, available at <http://law.wustl.edu/harris/cah/docs/EnglishTreatyFinal.pdf>

⁷⁶ Sadat, Leila Nadya, supra *** p xix. Also see: Bassiouni, M. Cherif; *Crimes against Humanity: The Need for a Specialized Convention*; 31 Colum. J. Transnat’l L. 457 (1993-1994) and Bassiouni, supra ***(2011) Chapter 10

⁷⁷ Supra *** Article 3(1)

⁷⁸ Washington University Law Whitney R. Harris World Law Institute, Crimes against Humanity Initiative, Final Report of the April Experts’ Meeting, April 12 – 15 2009, para 18

5.4.6 *Conclusions which can be drawn*

Almost all current definitions of crimes against humanity require that there be a widespread or systematic attack against a *civilian* population.⁷⁹ Let us analyse why this is so.

If we return to Article 6 (c) of the London Charter: the drafters of the Charter would not have considered the question of whether combatants could constitute victims of crimes against humanity to be much of an issue. The existing laws concerning war crimes would have appeared adequate to them to cover atrocities committed against combatants during the Second World War. The concept of crimes against humanity was developed specifically to cover atrocities committed by a state against its own civilians. Atrocities by a fellow citizen against combatants from the same state could be prosecuted under the domestic laws of the state concerned. It therefore made sense to require that the specified acts be carried out against a *civilian* population.

Since the very first attempt to draft a definition of crimes against humanity, effort has been made to provide some way of distinguishing crimes which are grave enough to constitute crimes against humanity, from other crimes which were suitable for prosecution at a domestic level. In the London Charter this was achieved, partly, by the insertion of a clause, which required that the specified act be committed ‘before or during the war’ and ‘in execution of or in connection with any crime in the jurisdiction of the Tribunal’, in other words, war crimes and crimes against peace. This clause became known as the ‘war nexus’. The ‘war nexus’ had several different functions, firstly, it shows the drafters of the London Charter attempting to reconcile two competing desires: the desire to uphold state sovereignty, with the desire to protect populations from severe violations of their human rights by their leaders.⁸⁰ Van

⁷⁹ The exception being the International Convention for the Protection of All Persons from Enforced Disappearance, which as I have argued may have an implied requirement that the act be carried out against a civilian population.

⁸⁰ Van Schaak, *supra* *** p 846

Schaak argues that the war nexus of the Charter operated to reconcile the tension between these two provisions by guaranteeing that

only when a state disturbed world order by engaging in aggressive acts would its sovereignty be challenged by the assignment of criminal liability to its leaders or other citizens who committed inhumane acts against their compatriots.⁸¹

Secondly, the war nexus was a way to link crimes against humanity with the well-established concept of war crimes:

at the time of the London Charter, the war-connecting element was the only connecting factor between crimes committed within the jurisdiction of a given state and an internationally regulated activity.....When the Charter was enacted, the war-connecting element was indispensable to link CAH to pre-existing conventional and customary international law prohibiting certain conduct in time of war, which CAH extended to the civilian population of states.⁸²

The war nexus was used to avoid challenges that crimes against humanity violated the principle of *nullum crimen sine lege*.⁸³

Thirdly, the war nexus was a way to limit the scope of crimes against humanity, Schabas describes it as

a careful, cynical choice intended to insulate the four 'great' powers from criminal liability for the racist, colonialist, and repressive policies of their own regimes⁸⁴

Finally, the war nexus operated as a way of limiting the scope of crime which could qualify as a crime against humanity: by ensuring that the crime was related to the war it ensured the

⁸¹ Van Schaak, supra *** p 847.

⁸² Bassiouni, M. Cherif, *Crimes against Humanity: Historical Evolution and Contemporary Application*, Cambridge University Press 2011, p 33

⁸³ Schabas, supra ***(Atrocities), p 58 - 61

⁸⁴ Schabas, supra ***(Atrocities) p 75

crime was of a certain gravity and excluded crimes which would more appropriately be the concern of national legal systems.

Over the following decades, the requirement that there be a nexus between crimes against humanity and armed conflict disappeared.⁸⁵ Crimes against humanity could now, according to customary international law, be prosecuted in times of peace as well as times of war. However, as we have seen, the requirement that the acts be carried out against a civilian population has remained. One reason for this is that ways are still needed to ensure that a definition of crimes against humanity only includes the worst atrocities, and does not include crimes which are more appropriately dealt with under domestic law. Definitions of crimes against humanity therefore contain other elements in an effort to ensure this happens: the requirement that the acts be ‘part of a widespread or systematic attack’⁸⁶ and the requirement that it be ‘directed against any civilian population’. The requirement that acts be directed against a *civilian* population acts in itself as a limiting factor to crimes against humanity, as it ensures that lawful acts of war carried out against combatants cannot be included within the definition of crimes against humanity.

However, we have seen drafters involved in drafting definitions of crimes against humanity do not appear to have paid too much attention to the fact that the acts are to be directed against a *civilian* population. The International Law Commission, as we saw, simply dropped the requirement, and made no comment as to why this was so in the accompanying Commentary. The Committee of Experts in their Report regarding the ICTY statute did make reference to it, following the lead taken by the case law of the day, which I shall be turning to shortly. The drafters of the Rome Statute, on the other hand, generally seem to have skirted the issue.

⁸⁵ Control Council Law No 10 of 20 December 1945 did not require there to be a nexus between an armed conflict and a crime against humanity, at that time Germany had unconditionally surrendered to the Allies, who therefore exercised German sovereignty in that territory, see Bassiouni, *supra* *** (2011) p 33 – 34. Cassese is of the view that it was not until the late 1960s that a general rule gradually began to evolve which accepted that crimes against humanity could be committed in times of peace, see Cassese, Antonio, *Balancing the Prosecution of Crimes against Humanity and Non-Retroactivity of Criminal Law, The Kolk and Kislyiy v Estonia case before the ECHR*, 4 J. Int’l Crim. Just. 410 (2006) at p 413

⁸⁶ Article 3, ICTR Statute and Article 7 Rome Statute. Although this requirement is not contained in Article 5 of the ICTY Statute, it has been held by the ICTY to be implied, see Tadic *****

Let us now turn to case law to examine whether it has been more successful in resolving the issue of whether combatants can be victims of crimes against humanity.

5.5 *What contribution has case law made on the matter?*

The issue of whether combatants can be victims of crimes against humanity has been considered by both national and international courts.

5.5.1 *National cases*

The French Court of Cassation has had cause to consider the issue on two occasions, both cases concerned crimes alleged to have been committed during the Second World War.⁸⁷

In *Barbie*, the accused, Klaus Barbie, the former head of the Gestapo in Lyons, was accused of, among other things, crimes against humanity involving victims who had been members of the Resistance movement. The examining magistrate had held that:

The prosecution is barred by statutory limitation to the extent that it related to unlawful imprisonment without judgement, torture, deportation and death of combatants who were members of the Resistance, or persons whom Barbie supposed to be members of the Resistance, even if they were Jewish. Even if such acts were committed in violation of human dignity and the laws of war, they could only constitute war crimes...⁸⁸

⁸⁷ Also see Singh, *supra* ***, p 275 – 277, who cites a case from the Estonian Supreme Court, *Prosecutor v Karl-Leonhard Paulov*, where the Court affirmed the finding of the Appellate court that a group of resistance fighters in the Second World War could be victims of crimes against humanity, together with a case from the federal Court of Canada, *Harb v Minister of Citizenship and Immigration*, Federal Court of Canada, Trial Division, Montreal, Quebec, 2002 Fed. Ct. Trial Lexis 1192, 18 April 2002, 6 May 2002, where one of the matters under consideration was whether members of the military could be considered “civilians” for the purposes of crimes against humanity. They held “the term ‘civilian population’ should be given a broad interpretation that includes any person who does not take part in hostilities at the time that person is a victim of inhumane acts, since, in a situation of that kind, that person is no less vulnerable a victim than any other civilian and deserves to be protected from atrocities against him or her. That interpretation appears to me to be consistent with the spirit of the Convention” (at para 31).

⁸⁸ *Fédération Nationale des Déportés et Internés Résistants et Patriotes and Others v Barbie*, Court of Cassation (Criminal Chamber) 20 December 1985 reported in 78 ILR 125 at 139. Also see Wexler, Leila Sadat; *The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again*; 32 Colum. J. Transnat'l L. 289 1994-1995 at p 338 - 339

Wexler describes the absurdity of the court's analysis, using the example of one of the alleged victims, Professor Marcel Gompel, who was both Jewish and a member of the Resistance, and had been arrested and tortured to death by Barbie. The lower court held that as it was unclear whether he had been arrested in his capacity as a Jew or in his capacity as a member of the Resistance, Barbie would be given the benefit of the doubt, and could not be charged with the offence as it had prescribed.⁸⁹

The *Court of Cassation* overturned this verdict, holding

Neither the driving force which motivated the victims, nor their possible membership of the Resistance, excludes the possibility that the accused acted with the element of intent necessary for the commission of crimes against humanity.⁹⁰

This was confirmed by the same Court in the case of *Touvier*, when it stated:

Jews and members of the Resistance persecuted in a systematic manner in the name of a State practising a policy of ideological supremacy, the former by reason of their membership of a racial or religious community, the latter by reason of their opposition to that policy, can equally be the victims of crimes against humanity.⁹¹

Of course, a finding that members of the Resistance movement can be victims of crimes against humanity, is far from a finding that all those who fight can be victims. Indeed it begs the question of why members of Resistance movements can be victims of crimes against humanity, when other fighters cannot be.

5.5.2 *The International Tribunal for the former Yugoslavia*

⁸⁹ Wexler, *supra* ***, p 339

⁹⁰ *Ibid* at p 140

⁹¹ *Touvier*, Court of Cassation (Criminal Chamber), 27 November 1992 reported at 100 ILR 338

The ICTY has spent most time determining the issue of whether or not combatants can be victims of crimes against humanity. The early cases tended to place a liberal interpretation on the phrase ‘civilian population’, whereas later cases read it more restrictively.

5.5.2.1 *The early cases*

The ICTY began interpreting the phrase ‘directed against any civilian population’ in its very first cases. In the *Vukovar* Rule 61 decision, Trial Chamber I held

Although according to the terms of Article 5 of the Statute of this Tribunal combatants in the traditional sense cannot be victims of a crime against humanity, this does not apply to individuals who, at one point in time, carried out acts of resistance.⁹²

In *Tadić*,⁹³ the Trial Chamber explained the challenges in interpreting the phrase ‘civilian population’ thus:

that the prohibited act must be committed against a “civilian” population itself raises two aspects: what must the character of the targeted population be and how is it to be determined whether an individual victim qualifies as a civilian such that acts taken against the person constitute crimes against humanity?⁹⁴

With regard to the first aspect, it held that the targeted population must be of a predominantly civilian nature and that the presence of those actively involved in the conflict does not prevent the characterisation of a population as civilian.⁹⁵ However, it found it more problematic to

⁹² *Prosecutor v Mrksic et al* IT-95-13-R61, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 3 April 1996, para 29

⁹³ *Prosecutor v Tadić*, case no IT-94-1-T, Trial Judgement 7 May 1997

⁹⁴ *Id.*, para 636

⁹⁵ *Id.*, para 638

determine the second aspect.⁹⁶ The Tribunal considered the definition of ‘civilian’ found in Common Article 3 of the Geneva Conventions which includes:

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,

together with the definition of ‘civilian’ found in Article 50(1) of AP I.⁹⁷ The Tribunal noted that these provisions formed part of international humanitarian law, and could therefore only be applied by analogy.⁹⁸ It then made reference to other sources, including those which I have cited above, such as the UN War Crimes Commission report, the *Barbie* case and the Secretary General’s Report. It concluded that a wide definition of the term ‘civilian population’ was justified, and that, following *Barbie* and *Touvier*,

those actively involved in a resistance movement could qualify as victims of crimes against humanity”, together with those “resistance fighters who had laid down their arms.”⁹⁹

Finally it observed that:

it is the desire to exclude isolated or random acts from the notion of crimes against humanity that led to the inclusion of the requirement that the acts must be directed against a civilian ‘population’.¹⁰⁰

⁹⁶ Id., para 639

⁹⁷ Article 50(1) states: A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.

⁹⁸ Id., para 639

⁹⁹ Id., para 643

¹⁰⁰ Id., para 648

The issue was next considered by the Trial Chamber in *Jelsić*, where it stated that, following the letter and spirit of Article 5, the term ‘civilian population’ should be interpreted broadly and “reference to a civilian population would seek to place the emphasis more on the collective aspect of the crime than on the status of the victims.”¹⁰¹ The Trial Chamber held that all those persons placed *hors de combat* when the crime was perpetrated were included within the notion of ‘civilian population’ in Article 5 of the Statute.¹⁰²

In *Kupreskić*,¹⁰³ the Trial Chamber made reference to the distinction between ‘murder-type’ and ‘persecution-type’ crimes against humanity, which some had thought to exist after the Second World War, when it stated:

one fails to see why only civilians and not also combatants should be protected by these rules (in particular by the rule prohibiting persecution), given that these rules may be held to possess a broader humanitarian scope and purpose than those prohibiting war crimes.¹⁰⁴

Faced with the explicit limitations within Article 5, requiring that the attack be directed against a civilian population, the Chamber once again found that a broad interpretation should be placed on ‘civilian’,¹⁰⁵ and held, following *Barbie* and the *Vukovar* Rule 61 Decision,¹⁰⁶ that those actively involved in a resistance movement can qualify as victims of crimes against humanity.¹⁰⁷

Another significant case to consider the issue was *Blaškić*, in which the Trial Chamber held that:

¹⁰¹ *Prosecutor v Jelsić*, IT-95-10-T, Trial Chamber, 14 December 1999, para 54

¹⁰² *Id.*, para 54

¹⁰³ *Prosecutor v Kupreskić*, IT-95-16-T, Trial Chamber, 14 January 2000

¹⁰⁴ *Id.*, para 547

¹⁰⁵ *Id.*

¹⁰⁶ *Prosecutor v. Mrksic et al*, Review of Indictment Pursuant to Rule 61

¹⁰⁷ *Id.*, para 549

the contention that acts of violence perpetrated systematically or on a widespread basis against a population must not be characterised as a crime against humanity on the sole ground that the victims were soldiers and regardless of the fact that they were not combatants when the crimes were perpetrated is not in conformity with either the letter or spirit of Article 5 of the Statute. the specificity of a crime against humanity results not from the status of the victim, but the scale and organisation in which it must be committed.¹⁰⁸

The Chamber concluded :

Crimes against humanity therefore do not mean only acts committed against civilians in the strict sense of the term, but include also crimes against two categories of people: those who were members of a resistance movement and former combatants - regardless of whether they wore wear uniform or not – but who were no longer taking part in hostilities when the crimes were perpetrated because they had either left the army or were no longer bearing arms or, ultimately, had been placed *hors de combat*, in particular, due to their wounds or their being detained. It also follows that the specific situation of the victim at the moment the crimes were committed, rather than his status, must be taken into account in determining his standing as a civilian. Finally, it can be concluded that the presence of soldiers within an intentionally targeted civilian population does not alter the civilian nature of that population.¹⁰⁹

Thus, in the early cases before the Tribunal, it favoured a wide definition of the term “civilian population”, which included members of a resistance movement and combatants who were *hors de combat*. Greater emphasis was placed upon the collective aspect of the crime rather than the status of the victims themselves. It is notable however, that none of these cases, apart from the *Vukovar* Rule 61 decision, actually involved combatant victims.

¹⁰⁸ *Prosecutor v Blaškić*, case no IT-95-14-T, Trial Judgement, 3 March 2000, para 208

¹⁰⁹ *Id.*, para 214

5.5.2.2 *A Change of tone*

The liberal interpretation of the phrase ‘civilian population’ was put into doubt by the Appeals Chamber’s Judgement in the *Blaskić* case.¹¹⁰ It held that “both the status of the victim as a civilian and the scale on which it [the crime] is committed or the level of organisation involved characterise a crime against humanity”.¹¹¹ In determining the scope of ‘civilian population’, it considered Article 50 of AP I and Article 4 A of GC III to find that, read together, these establish that members of the armed forces; members of militias or volunteer corps forming part of such armed forces, and members of organised resistance groups, cannot claim civilian status.¹¹² It found that the Trial Chambers’ finding that the specific situation of the victim at the time the crimes were committed must be taken into account in determining his standing as a civilian, was misleading,¹¹³ and that, on the contrary, the specific situation of the victim at the time the crimes were committed may not be determinative of his civilian or non-civilian status.¹¹⁴

The Appeals Chamber agreed with the Trial Chamber that the presence of soldiers within a civilian population does not deprive it of its civilian nature, and found that to determine whether the presence of combatants deprives a population of its civilian character, the number of soldiers, as well as whether they are on leave must be examined.¹¹⁵

The Judgement states that the Trial Chamber “erred in part” in its characterisation of ‘civilian population’ and ‘civilian’,¹¹⁶ but it does not state clearly whether it overrules the Trial Chamber’s finding that combatants who are no longer taking part in hostilities due to being *hors de combat*, could be victims of crimes against humanity. The case did not in fact involve combatant victims and so the matter was not at issue.

¹¹⁰ *Prosecutor v Blaškić*, IT-95-14-A, Appeal Chamber, 17 December 2004

¹¹¹ Para 107

¹¹² *Prosecutor v Blaškić*, IT-95-14-A, Appeal Chamber, 17 December 2004, para 113

¹¹³ *Id.*, para 114

¹¹⁴ *Id.* Para 114

¹¹⁵ *Id.*, para 115

¹¹⁶ *Id.* para 116

A few months after the *Blaskić* Appeals Chamber decision, the Appeals Chamber considered the issue again in the case of *Kordić and Čerkez*. This case involved forty three combatants who had been killed after they had been arrested, although there seems to have been uncertainty regarding how many of those killed were combatants and how many were civilians.¹¹⁷ The Appeals Chamber stated that the

soldiers were killed after their arrest, after being placed *hors de combat*. These persons, wilfully killed by Croat forces, were without doubt “protected persons” in the sense of Article 2 of the Statute and “civilians” in the sense of Article 5 of the Statute.¹¹⁸

And further that

There is no doubt that these acts were also part of the widespread attack conducted at that time against the civilian Muslim population¹¹⁹

The accused were found guilty of both murder, as a crime against humanity, and wilful killing, as a war crime, in respect of these crimes. In reading the Judgement, it is unclear whether the finding that Kordić was guilty of the crime of murder as a crime against humanity was limited to those who had the status of a civilian. The Appeals Chamber confined itself to determining whether there had been attack against the civilian population as a whole, and set little importance regarding who the actual victims of the specific crimes were, beyond ensuring that they were a combatant who was *hors de combat*.¹²⁰

However, in the same case, they overturned the conviction of the defendants in relation to charges of murder (a crime against humanity) and wilful killing (a war crime) in the case of two people who were shot in an apartment, where the evidence indicated that they may have been combatants rather than protected persons¹²¹ and stated ‘as TO members, the

¹¹⁷ *Prosecutor v Kordić and Čerkez*, IT-95-14/2-A, 17 December 2004, para 421

¹¹⁸ Id 421

¹¹⁹ Id. 421

¹²⁰ Id para 95-97 and 421

¹²¹ Id., para 458 -461

two victims are to be considered as ‘combatants’ and cannot claim the status of civilians’.¹²²

In *Galić*, the Trial Chamber found the definition of ‘civilian’ to be expansive, including individuals who at one time performed acts of resistance, as well as persons who were *hors de combat* when the crime was committed.¹²³ Upon appeal, the defence challenged the Trial Chamber’s definition of “civilians” as including members of a resistance movement and those who are *hors de combat*.¹²⁴ The Appeals Chamber stated that the Trial Chamber’s assessment did not intend to give a definition of an individual civilian, but rather they intended to reiterate well established jurisprudence regarding the *chapeau* element of ‘civilian population’ which holds that the presence of members of soldiers within a population does not necessarily deprive it of its civilian character.¹²⁵ It relied on the *Blaskić* Appeals Chamber decision to argue that combatants who are *hors de combat* are not civilian. It made no findings however as to whether the individual victims of crimes against humanity can include such persons.

In *Martić*, the Trial Chamber paid particular attention to the question of whether victims under Article 5 of the ICTY Statute have to be civilians.¹²⁶ It cited the finding by the *Blaskić* Appeals Chamber that this was the case¹²⁷ and agreed that combatants who are *hors de combat* do not fall within the definition of civilian.¹²⁸ The Chamber noted the distinction made in international humanitarian law between combatants and non-combatants

to allow for the term “civilians” to include all persons who were not actively participating in combat, including those who were *hors de combat*, at the time of the crime would impermissibly blur this necessary distinction¹²⁹

¹²² Id., para 458

¹²³ *Prosecutor v Galić*, IT-98-29-T 5 December 2003, para 143

¹²⁴ *Prosecutor v Galić*, IT-98-29-A, 30 November 2006 para 144

¹²⁵ *Galic AC* para 144

¹²⁶ *Prosecutor v Martić*, IT-95-11-T 12 June 2007 para 51

¹²⁷ Id and see above (*Blaskic* para 107)

¹²⁸ Id para 55, referring to *Blaskic AC* para 114 and *Galic AC* para 437

¹²⁹ Id, para 56

At around the same time as the *Martić* case, the *Mrškić* case was underway. It concerned two hundred and sixty four individuals, all non-Serb males of military age, who were removed from Vukovar Hospital by Serbian forces on 20 November 1991, under suspicion of being involved in the Croat resistance against the Serb forces.¹³⁰ Approximately two hundred people were then executed. Of the 194 who were later identified, 181 were known to have been active members of the Croatian forces.¹³¹ The Trial Chamber found that the perpetrators acted in the knowledge or belief that the victims were part of the Croat forces, and that their awareness of the factual circumstances was that the victims were prisoners of war, not civilians.¹³² The Trial Chamber stated:

the jurisprudence of the Tribunal has not yet been called upon to pronounce on the question whether the notion of crimes against humanity is intended to apply to crimes listed in Article 5 when the *individual victims* of such crimes are not civilians.¹³³

It carried out a review of the relevant jurisprudence to find that it supported a definition of ‘civilian’ based on Article 50 of AP I, as opposed to one based on Common Article 3 as the Prosecution were advocating.¹³⁴ The Chamber agreed with the *Martić* Trial Chamber’s finding that those who are *hors de combat* cannot be included as civilians under Article 5 of the ICTY Statute. It went on to state:

It has been argued that the distinction between civilians and combatants in Article 5 is obsolete and that it would be contrary to the whole spirit of modern international human rights law and humanitarian law to limit to civilians (especially in times of peace) the international protection of individuals against horrendous and large-scale atrocities. The point has been made that, if crimes against humanity may be committed in times of

¹³⁰ *Prosecutor v Mrškić* IT-95-13/1_T 27 September 2007 para 476

¹³¹ *Id.*, para 479

¹³² *Id.*, para 480

¹³³ *Id.*, para 443. This was not in fact strictly true, for the matter had been considered in *Kordić* (see above ***) as the Trial Chamber later noted itself, see p 194, Footnote 1717

¹³⁴ *Id.*, para 449-454

peace as well (*i.e.* outside armed conflicts) it no longer makes sense to require that such crimes can be perpetrated against civilians alone. Why, the argument goes, should members of military forces be excluded, since they would not be protected by international humanitarian law?

It is important to observe that failing to consider atrocities against fighters *hors de combat* as crimes against humanity does not mean that these acts will go unpunished. If committed in the context of an armed conflict, they are likely to qualify as war crimes, as will be the situation in the typical case before the ICTY. If committed in peacetime, they will be punishable under national law. There may perhaps be a “protection gap” in those situations, as crimes of this nature would fall outside the jurisdiction of international criminal courts and national authorities may not always be willing to prosecute. However, it is not for this Tribunal to fill this gap through its case law.¹³⁵

The Chamber concludes that “there is insufficient evidence in support of the proposition that the notion of crimes against humanity has expanded, under customary international law, so as to include crimes against combatants,”¹³⁶ and that “civilian” in Article 5 does not include combatants or fighters *hors de combat*.¹³⁷ The victims of crimes against humanity must be civilians, and that if they are non-civilians then the more appropriate charge is war crimes.¹³⁸ As a consequence, the Chamber found that the victims at Vukovar Hospital, comprising mainly of combatants, did not qualify as ‘civilians’ under Article 5 and that, accordingly, the crimes committed against them could not constitute crimes against humanity.¹³⁹

5.5.3 *A satisfactory resolution of the problem?*

Both *Martić* and *Mrškić* were appealed. The *Martić* appeal was heard first.

¹³⁵ *Id.*, para 459 and 460

¹³⁶ *Id.*, 460

¹³⁷ *Id.*, 461

¹³⁸ *Id.*, para 463

¹³⁹ *Id.*, para 481

The prosecution in *Martić*, urged the Chamber to follow the reasoning in the *Kordić and Čerkez* Appeal Judgement, arguing that it set a binding precedent that those who are *hors de combat* constitute civilians under Article 5.¹⁴⁰ The Appeals Chamber rejected this argument, and looked rather to the *Blaskić* and *Galić* Appeal Judgements and their definition of ‘civilian’, based on Article 50 of AP I, to hold that the Trial Chamber had not erred in following that line of authority when interpreting ‘civilian’ under Article 5 of the Statute.¹⁴¹ It agreed with the Trial Chamber’s finding that the term ‘civilian’ in Article 5 does not include a person who is *hors de combat*.¹⁴²

However, the Chamber then proceeded to examine the question of whether the *chapeau* of Article 5, requiring there to be an attack against a civilian population, required that each and every victim of a particular crime under Article 5 be civilian.¹⁴³ The Appeals Chamber had regard to the *Kunarac et al* Appeal Judgement, to find that the *chapeau* requirement does not require that the individual criminal acts be committed only against civilians, but,

the *chapeau* rather requires a showing that an attack was primarily directed against a civilian population, rather than “against a limited and randomly selected number of individuals.”¹⁴⁴

The Chamber concluded that, providing that the *chapeau* requirement is fulfilled and, that there is a widespread or systematic attack against the civilian population, persons who are *hors de combat* can be victims of crimes against humanity.

The Appeals Chamber in *Mrškić* noted that the Trial Chamber had relied on the *Blaskić* Appeal Judgement to reach their conclusion that the individual victims of crimes against

¹⁴⁰ *Prosecutor v Martić*, IT-95-11-A, 8 October 2008 para 293

¹⁴¹ *Id.* para 296

¹⁴² *Id.* Para 302

¹⁴³ *Id.* para 303

¹⁴⁴ *Id.*, para 305 quoting *Kunarac* para 90

humanity have to be civilians.¹⁴⁵ It found that the findings in *Blaskić* that “the specificity of a crime against humanity results not from the status of the victim but the scale and organisation in which it must be committed”¹⁴⁶ and “both the status of the victim as a civilian and the scale on which it is committed or the level of organization involved characterize a crime against humanity”¹⁴⁷ both related to the jurisdictional requirement of Article 5 that crimes against humanity be committed as part of a widespread or systematic attack against a civilian population.¹⁴⁸ The Chamber confirmed however that the status of victims is important in determining whether or not the *chapeau* requirement has been met. The civilian status of the victims, the number of civilians and the proportion of civilians within the civilian population are important in determining whether the *chapeau* requirement has been fulfilled.¹⁴⁹ It therefore agreed with the Appeal Chamber’s finding in *Martić* in holding that there is no requirement that the individual victims of crimes against humanity be civilians, providing that there is a widespread or systematic attack against a civilian population.¹⁵⁰ However, on the facts of the case, the victims at the hospital were singled out due to their being suspected of being members of the Croatian forces and the Chamber found that there was no nexus between the attack against the civilian population and the crimes committed at the hospital.¹⁵¹

5.5.2.3 *The approach of the International Criminal Tribunal for Rwanda*

The ICTR has not had encountered so many difficulties with this issue as the ICTY. It was first considered by the Trial Chamber in the case of *Akayesu*.¹⁵² It cited with approval the *Barbie*¹⁵³ and *Touvier*¹⁵⁴ cases, and the ICTY *Vukovar* Rule 61 Decision.¹⁵⁵ It held that for

¹⁴⁵ *Prosecutor v Mrškić* IT-95-13/1-A 5 May 2009, para 27 and 28

¹⁴⁶ *Supra* FN * para 107 quoting *Blaškić* Trial Judgement para 208

¹⁴⁷ *Id.*, para 107

¹⁴⁸ *Mrškić* AC para 28

¹⁴⁹ *Id.* para., 32, and see para 30 and 31

¹⁵⁰ *Id.*, para 33

¹⁵¹ *Id.*, para 42-44

¹⁵² *Prosecutor v Akayesu*, ICTR-96-4-T, 2 September 1998, para 582

¹⁵³ *Id.*, para 569-570

acts to constitute crimes against humanity they must be directed against any civilian population. The Tribunal included within the definition of members of the civilian population those who are not taking any active part in the hostilities, including members of the armed forces who laid down their arms and those persons placed *hors de combat* by sickness, wounds, detention or any other cause.¹⁵⁶ The Trial Chamber noted that this definition accords with that given in Common Article 3 of the Geneva Conventions, an assimilation which the Tribunal did not find to be problematic.¹⁵⁷

In *Kayishema* the Trial Chamber considered:

that a wide definition of civilian is applicable and, in the context of the situation of Kibuye *Prefecture* where there was no armed conflict, includes all persons *except* those who have the duty to maintain public order and have the legitimate means to exercise force¹⁵⁸

The definition in *Akayesu* has consistently been applied by the ICTR in subsequent cases, and has not been the subject of dispute.¹⁵⁹

The case of *Ntuyahaga* is also interesting. The indictment contained a single count of murder as a crime against humanity for the murder of Mrs. Agathe Uwilingiyimana, then Prime Minister of Rwanda, and ten Belgian soldiers who had been part of the United Nations Assistance Mission for Rwanda. The indictment alleged that the murders were allegedly committed as part of a widespread or systematic attack against a civilian population on national or political grounds. The Indictment was later withdrawn by the

¹⁵⁴ Para 571-575

¹⁵⁵ Para 575

¹⁵⁶ Id. Para 582

¹⁵⁷ Id at FN 146

¹⁵⁸ *Prosecutor v Kayishema* ICTR-95-1-T 21 May 1999, para 127

¹⁵⁹ See for example: *Prosecutor v Bisengimana*, ICTR-2000-60-T, 13 April 2006, para 48-51; *Prosecutor v Seromba*, ICTR-2001-66-I, 13 December 2006, para 358

Prosecutor due to the fact that the acts had occurred out with the main three month period in 1994 when the genocide occurred.¹⁶⁰

5.5.2.4 *The approach taken by the ICC*

To date the ICC has considered the issue on two occasions.

In the case of *Katanga and Chui*¹⁶¹ the Court noted that ‘the drafters in Rome...left the meaning of the term “any civilian population” undefined.’¹⁶² In the case, combatants attacked a village. The Court found that there were substantial grounds to believe that the village contained a military camp. It held that the attack was directed not only at the military target, but also against the civilian population of the village. It did not examine who the victims of the attack had been, and what the legal consequences would have been if some of the victims had not been civilians.¹⁶³

In the case of *Bemba*,¹⁶⁴ the court again observed that neither ‘civilian’ nor ‘civilian population’ are defined within the Statute. However, it stated 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.¹⁶⁵

Again the court did not determine whether the status of the victims was of importance in determining whether they could qualify as victims of crimes against humanity.

¹⁶⁰ *Prosecutor v Ntuyahaga*, ICTR-98-40-T, Decision on the Prosecutor’s Motion to Withdraw the Indictment 18 March 1999

¹⁶¹ *Prosecutor v Germain Katange and Mathieu Ngudjolo Chui*, Decision on Confirmation of Charges, Case no ICC-01/04-01/07, Pre trial Chamber I, 30 September 2008

¹⁶² *Id.*, para 399

¹⁶³ See Joakim Dungel, *Defining victims of crimes against humanity: Martić and the International Criminal Court*, L.J.I.L. 2009, 22(4) 727-752 at p 741

¹⁶⁴ *Prosecutor v Jean-Pierre Bemba Gombo*, Decision on Confirmation of Charges, Case no ICC-01/05-01/08, Pre Trial Chamber II, 15 June 2009

¹⁶⁵ *Id.*, para 78 referring to *Prosecutor v Kunarac et al*, Case No. IT-96-23 & IT-96-23/1-A, Trial Judgment, 22 February 2001, para. 425; Also see Dungel, *id.* FN *** p 742

5.5.2.5 *The Special Court of Sierra Leone*

The SCSL has also had occasion to examine the matter. In the case of *Sesay et al* it held

the Chamber concurs with the ICTY Appeals Chamber in the *Maritć* case that where a person is *hors de combat* is the victim of an act which objectively forms part of a broader attack directed against a civilian population, this act may amount to a crime against humanity¹⁶⁶

The court proceeded to find that the killing of a soldier who had been *hors de combat* constituted a crime against humanity.¹⁶⁷

5.6 *Why does it matter whether or not combatants can be victims of crimes against humanity?*

It is important that those who fight are also capable of being deemed to have been victims of crimes against humanity. During armed conflict, the laws of war do not cover crimes committed by a state or armed group against their own combatants. In modern conflicts, such atrocities are becoming more and more frequent- one only has to look to the events of the Arab Spring to find examples of combatants being shot for refusing to fire upon protestors.¹⁶⁸ It is also notable that labelling a crime as a ‘war crime’ does not have as much weight as labelling it a ‘crime against humanity’.¹⁶⁹

¹⁶⁶ *Prosecutor v Sesay et al* (SCSL-04-15-T) 2 March 2009 para 82

¹⁶⁷ *Id.* Para 1448

¹⁶⁸ <http://www.independent.co.uk/news/world/africa/body-bags-reveal-fate-of-soldiers-who-refused-to-fire-on-their-own-people-2228512.html>

¹⁶⁹

During peacetime, why should it be that an attack must be against a *civilian* population for it to constitute a crime against humanity? Ambos and Wirth write

In times of peace, the prohibition against crimes against humanity is- apart from the very narrow law of genocide – the only applicable (criminal) law to protect human rights. Thus, in times of peace, the term “civilian” must be interpreted even more broadly than in time of war, when humanitarian law provides some protection.¹⁷⁰

Some tribunals, particularly the ICTY, have tried, and failed, to stretch the concept of ‘civilian’ to include combatants who are *hors de combat*. Others have been more accommodating, such as the ICTR. However, it is important that the concept of ‘civilian’ is not stretched to such an extent that the principle of distinction is put at risk.

It seems, from my analysis of the drafting of the various definitions of crimes against humanity that there is little desire to remove the requirement that the acts be directed against a ‘*civilian* population’.

It is to be hoped that the solution arrived at by the Appeals Chamber of the ICTY in the *Martić* and *Mrškić* cases will help to resolve the matter. By separating the requirement that the overall attack be against the civilian population from the requirement that the status of the victims also be civilian, the Tribunal has ensured that combatants can be found to be victims of crimes against humanity. However, the ICTY Judgements, although persuasive, are not directly applicable in other courts.¹⁷¹ It is to be hoped that other courts will choose to follow the Judgements- this certainly seems to be the case in SCSL, and it is to be hoped that the ICC, and other courts, will follow their lead.

¹⁷⁰ Ambos and Wirth, *supra* *** p 24

¹⁷¹