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Putting Peacetime First: Crimes Against Humanity and the Civilian Population Requirement

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PUTTING PEACETIME FIRST: CRIMES AGAINST HUMANITY AND THE CIVILIAN POPULATION REQUIREMENT

*Leila Nadya Sadat**

ABSTRACT

Unlike the ad hoc international criminal tribunals, the International Criminal Court (ICC) may often exercise its jurisdiction in peacetime as well as during armed conflict. Article 7 of the Rome Statute, on Crimes Against Humanity, reflects this development, but does not address how to resolve the interpretive difficulties that flow from it, particularly as regards the requirement that the crime requires an attack directed against a “civilian” population. This Article analyzes Article 7’s “civilian population” requirement, and argues it should be understood from the perspective of peacetime, rather than as an outgrowth of international humanitarian law (IHL). It is the first comprehensive and systematic treatment of this issue. The Article rejects ICC Chambers’ reliance upon Article 50 of Protocol I as the relevant test and instead proposes a three-part inquiry to establish whether or not an individual or population is “civilian” in character: first, the situation is evaluated depending on whether it involves crimes committed during or outside of armed conflict; second, if the crimes have been committed during an armed conflict, IHL (applicable in NIAC or IAC) should apply to a limited degree as a lex specialis to assist with the determination; finally, the specific situation of the victims must be considered and not just their formal status.

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INTRODUCTION

The establishment of the International Criminal Court (ICC) in 1998 worked an “uneasy revolution” in international law.¹ Although resting on the experience of the Nuremberg, Tokyo, and *ad hoc* international criminal tribunals,² the ICC, being both *permanent* and created outside the United Nations (U.N.) system—but in relationship to it—is different in nature and kind than prior international criminal tribunals. Most significantly, perhaps, is the Court’s ability to exercise jurisdiction over situations taking place early in an “atrocities cascade”—that is, in peacetime prior to the onset of war.³

In some ways, this should not be surprising. International criminal law instruments are generally “peacetime” conventions,⁴ and the discipline as a whole is fundamentally concerned with the cooperation of States in the investigation and prosecution of international and transnational crimes.⁵ Yet because only a handful of international crimes have ever been made justiciable before international courts and tribunals, and these have generally been adjudicated in the context of war, there has been an understandable and growing tendency to assume international criminal law is part of the laws of war, functioning as a kind of subspecies of international humanitarian law (IHL).

¹ Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court, An Uneasy Revolution*, 88 GEO. L.J. 381, 387–88 (2000).

² See generally *id.*

³ See Leila Nadya Sadat, *Genocide in Syria: International Legal Options, International Legal Limits, and the Serious Problem of Political Will*, 5 IMPUNITY WATCH L.J. 1, 13 (2015).

⁴ M. Cherif Bassiouni has identified 323 international criminal law instruments elaborated between 1815 and 1996. These instruments deal with topics as broad as crimes against humanity, theft of nuclear materials, and unlawful use of the mail. See M. CHERIF BASSIOUNI, *INTERNATIONAL CRIMINAL LAW CONVENTIONS AND THEIR PENAL PROVISIONS* (2d rev. ed. 1996).

⁵ *Id.*

This assumption is demonstrably incorrect. Even amongst the three crimes currently justiciable before the International Criminal Court—genocide, war crimes, and crimes against humanity⁶—two are applicable in peacetime, during which IHL does not apply.⁷ The genocide convention of 1948 envisages the possibility of genocide being committed in war or in peace in Article 1 of the text,⁸ but genocidal intent is so difficult to establish that it has been rendered relatively ineffective as a tool of prevention and punishment.⁹ Not so, however, for crimes against humanity.

Although prior to the adoption of the Rome Statute, it was not clear whether crimes against humanity could be committed in peacetime, or whether a nexus to armed conflict was required,¹⁰ this doubt was eliminated by the negotiators of the Rome Statute, with startling results: As of 2013, thirty percent of the cases brought at the ICC were “crimes against humanity only” cases, because no “armed conflict” was in play regarding either the particular crimes at issue or the situation more generally.¹¹ This is in opposition to 1–2% of the cases brought at the *ad hoc* international tribunals.¹² This means that the ICC can truly—and to a significant degree—exercise its jurisdiction in peacetime. This is new, and has important juridical and normative consequences.

As a legal matter, the fact that crimes against humanity law applies in peacetime suggests that the legal framework surrounding this crime needs a divorce—or at least a legal separation—from international humanitarian law. Although Article 7(1) of the Rome Statute defines crimes against humanity as the commission of certain acts when “committed as part of a widespread or

⁶ *How the Court Works*, INT’L CRIM. CT., <https://www.icc-cpi.int/about/how-the-court-works> (last visited Jan. 8, 2017).

⁷ See *What is International Humanitarian Law?*, ICRC ADVISORY SERV. ON INT’L HUMANITARIAN L. (July 2004), https://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf. IHL is premised “in its entirety” on a “subtle equilibrium between two diametrically opposed impulses: military necessity and humanitarian considerations.” YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 16 (1st ed. 2004). International criminal law, however, has much broader goals, including defining a wide variety of international offenses and establishing procedures for interstate cooperation regarding their prevention and prosecution. *Id.*

⁸ Convention on the Prevention and Punishment of the Crime of Genocide art. 1, *adopted* Dec. 9, 1948, 78 U.N.T.S. 277.

⁹ See David L. Nersessian, *Contours of Genocidal Intent: Troubling Jurisprudence from the International Criminal Tribunals*, 37 TEX. INT’L L.J. 231, 267 (2002).

¹⁰ See I M. CHERIF BASSIOUNI, *INTERNATIONAL CRIMINAL LAW* 457–61 (3d ed. 2008); see also Yoram Dinstein, *Crimes Against Humanity After Tadić*, 13 LEIDEN J. INT’L L. 373, 383–84 (2000).

¹¹ Leila Nadya Sadat, *Crimes Against Humanity in the Modern Age*, 107 AM. J. INT’L L. 334, 356, 363 (2013).

¹² *Id.* at 356–57.

systematic attack directed against a civilian population,”¹³ IHL provisions about when it is lawful (or not) to attack “civilians” would appear both inapplicable and confusing during peacetime, during which time every person is a “civilian.” This Article is the first comprehensive effort to address this conceptual and juridical problem, proposing an autonomous meaning for the term “civilian population” in Article 7 that is both supported by and consistent with existing customary and conventional international law.

Scholars have long debated the meaning and utility of the “civilian population” requirement.¹⁴ Many have observed the difficulties of merely “transposing” IHL notions onto Article 7,¹⁵ offering instead a human rights-centered approach,¹⁶ which would be explicitly linked to human rights law and its protections, which grant positive rights to all individuals regardless of status or circumstances.¹⁷ Others have hypothesized that the “‘civilian’ reference serves a rational purpose, which is simply to *exclude military actions against legitimate military objectives in accordance with international humanitarian*

¹³ Rome Statute of the International Criminal Court art. 7, ¶ 1, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute]; see also Assembly of State Parties to the Rome Statute of the International Criminal Court, *Elements of Crimes*, at 108, U.N. Doc. ICC-ASP/1/3, U.N. Sales No. E.03.V.2 (2002) [hereinafter Elements of Crimes].

¹⁴ See, e.g., Egon Schwelb, *Crimes Against Humanity*, 23 BRIT. Y.B. INT’L L. 178, 190 (1956). This debate has continued since the Nuremberg Tribunal was established and issued its judgment. See *id.*

¹⁵ Mario Bettati, *Le crime contre l’humanité*, in DROIT INTERNATIONAL PÉNAL 115, 115–16 (H. Ascencio, E. Decaux & A. Pellet eds., 2012) (suggesting a more “nuanced” approach is required in the case law of the *ad hoc* international criminal tribunals, and observing that this continues to *soulever de redoutables difficultés*); see also, WILLIAM A. SCHABAS, THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE 154 (2010) (taking note of these difficulties and suggesting that “the concept of ‘civilian population’ should be construed liberally, in order to promote the principles underlying the prohibition of crimes against humanity, which is to safeguard human values and protect human dignity”).

¹⁶ Payam Akhavan, *Reconciling Crimes Against Humanity with the Laws of War*, 6 J. INT’L CRIM. JUST. 21, 24–25 (2008).

¹⁷ *Id.* at 27–28; see also, ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 104 (3d ed. 2013) (“if crimes against humanity may now be committed *in time of peace* as well, it no longer makes sense to require that such crimes be perpetrated against the civilian population alone”). The author poses the question, “[w]hy should members of military forces be excluded, since they in any case would not be protected by [international humanitarian law] in the absence of any armed conflict?” *Id.* He wrote:

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

Id. (emphasis in original); see also, David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT’L L. 85, 93 (2004) (discussing the distinctive purposes behind the inclusion of this crime in the Nuremberg Charter).

law.”¹⁸ Some of the early judgments of the *ad hoc* international criminal tribunals recognized this possibility, such as the Separate Opinion of Judges McDonald and Vohrah in *Erdemović*, which opined that “crimes against humanity . . . constitute egregious attacks on human dignity [and] consequently affect . . . each and every member of mankind,”¹⁹ regardless of their circumstance.

As a normative matter, the question arises, what is peacetime? Although there are many possible definitions of peace,²⁰ for purposes of this Article, “peacetime” is defined in the negative—as the absence of war, or to put it another way, as the paradigm governing national and international relations in the absence of armed conflict.²¹ The traditional approach of public international law considers peace as the rule, with special rules regarding armed conflict as the exception.²² More recently, prominent U.S. scholars have suggested the need to eliminate the peacetime paradigm in favor of a state of “perpetual war,”²³ on the grounds that this realist approach will lead to greater protections for human

¹⁸ ROBERT CRYER, HÅKAN FRIMAN, DARRYL ROBINSON & ELIZABETH WILMSHURST, AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 242 (2d ed. 2010) (emphasis in original).

¹⁹ Prosecutor v. Erdemović, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶ 21 (Appeals Chamber Oct. 7, 1997).

²⁰ Black’s Law Dictionary, for example, defines peace as “[a] state of public tranquility; freedom from civil disturbance or hostility.” *Peace*, BLACK’S LAW DICTIONARY 1244 (10th ed. 2014). The United Nations, on the other hand, defines the human right to peace as “life without war.” G.A. Res. A/RES/39/11, annex, Declaration of the Right of Peoples to Peace (Nov. 12, 1984).

²¹ See generally STEVEN R. RATNER, THE THIN JUSTICE OF INTERNATIONAL LAW 98 (2015); Alfred de Zayas, Independent Expert on the Promotion of a Democratic and Equitable International Order, U.N. Human Rights Council, Opinion on Occasion of the First Session of the Open-Ended Working Group on the Right to Peace (Feb. 14, 2013) (transcript available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12997&LangID=E>). The International Criminal Tribunal for the former Yugoslavia (ICTY) Appeals Chamber defined “armed conflict” as existing “whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.” Prosecutor v. Tadić, Case No. IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Appeals Chamber Oct. 2, 1995) [hereinafter *Prosecutor v. Tadić*, Decision on Def. Motion for Interlocutory Appeal on Jurisdiction]. The ICC Trial Chamber has cited this definition, noting that “armed conflict” is not defined in the Rome Statute or the Elements of Crimes. Prosecutor v. Lubanga Dyilo, ICC-01/04-01/06-2842, Judgment Pursuant to Article 74 of the Statute, ¶¶ 531–33 (Trial Chamber I Mar. 14, 2012) [hereinafter *Prosecutor v. Lubanga*, Trial Judgment].

²² Oppenheim’s classic treatise on international law, divided into two volumes (the first dealing with peace and the second with war), reflects this distinction. See 1 OPPENHEIM’S INTERNATIONAL LAW (Robert Jennings & Arthur Watts eds., 9th ed. 1996); 2 OPPENHEIM’S INTERNATIONAL LAW (Robert Jennings & Arthur Watts eds., 9th ed. 1996).

²³ See Rosa Brooks, *There’s No Such Thing as Peacetime*, FOREIGN POL’Y (Mar. 13, 2015), <http://foreignpolicy.com/2015/03/13/theres-no-such-thing-as-peacetime-forever-war-terror-civil-liberties/> [hereinafter Brooks, *There’s No Such Thing as Peacetime*]; see also ROSA BROOKS, HOW EVERYTHING BECAME WAR AND THE MILITARY BECAME EVERYTHING (2016); Monika Hakimi, *International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide*, 33 YALE J. INT’L L. 369, 370 (2008).

rights,²⁴ or a more sensible balance between human rights and the demands of national security in the “war on terror.”²⁵ Under this view, government actions involving the use of military force are properly viewed through the lens of IHL, particularly as regards the legality of targeting, even if those military operations are carried out in peacetime, outside of armed conflict.

This attempted conceptual re-framing of the international legal order reinforces the modern tendency to consider international criminal law part of international humanitarian law. One consequence is that it encourages States to accord themselves increasing authority to use military force as a response to terrorist acts. As Naz Modirzadeh has written, this view of a “boundary-less battlefield” could push IHL rules on targeting to the breaking point, making everyone, everywhere, liable to be killed as “collateral damage” because it would be impossible to know if:

relaxing in a café in the capital city of a country apparently at peace, one is sitting next to someone who has been identified by some State somewhere as a commander of a terrorist group that poses an imminent threat, a threat that such a State has determined the territorial government is unwilling to address.²⁶

This dystopian perspective has been rejected by other scholars, who have emphasized the fundamental importance of peace as the presumptive framework for international relations. Hewing to classic understandings of war and peace, these authors emphasize the existence of a clear “human right to peace,”²⁷ warn

²⁴ Brooks, *There's No Such Thing as Peacetime*, *supra* note 23.

²⁵ *Id.* Brooks uses the language “war on terror” in her writings, although the Obama Administration prefers the moniker “countering violent extremism.” See, e.g., *Remarks by President Obama at the Leaders' Summit on Countering ISIL and Violent Extremism*, WHITE HOUSE (Sept. 29, 2015), <https://www.whitehouse.gov/the-press-office/2015/09/29/remarks-president-obama-leaders-summit-countering-isil-and-violent> (transcript of speech given at the U.N. headquarters in New York).

²⁶ Naz Modirzadeh, *International Law and Armed Conflict in Dark Times: A Call for Engagement*, 96 INT'L REV. RED CROSS 737, 746 (2014). This, of course, is precisely the problem with much of the U.S. drone strike campaign. See, e.g., Leila Nadya Sadat, *America's Drone Wars*, 45 CASE W. RES. J. INT'L L. 215 (2012); Kevin Jon Heller, *'One Hell of a Killing Machine': Signature Strikes and International Law*, 11 J. INT'L CRIM. JUST. 89, 119 (2013); Brian J. Egan, Legal Advisor, State Dep't, Keynote Address at the 110th ASIL Annual Meeting: International Law, Legal Diplomacy, and the Counter-ISIL Campaign (Apr. 1, 2016), <http://www.state.gov/s/l/releases/remarks/255493.htm>.

²⁷ See, e.g., DOUGLAS ROCHE, THE HUMAN RIGHT TO PEACE (2003); Anwarul K. Chowdhury, *Human Right to Peace: The Core of the Culture of Peace*, in CONTRIBUTIONES REGIONALES PARA UNA DECLARACIÓN UNIVERSAL DEL DERECHO HUMANO A LA PAZ 125 (Carlos Villán Durán & Carmelo Faleh Pérez eds., 2010).

against the consequences of “declar[ing] the world a war zone,”²⁸ and suggest that the first pillar of an ethical standard of global justice is whether a norm promotes the advancement of peace.²⁹ As Steven Ratner recently argued in *The Thin Justice of International Law*:

War has unparalleled catastrophic consequences for overall human welfare. More than any other activity over which humans have control, war undermines the possibility of people to live decent lives. As an initial matter, its death toll is staggering . . . War also creates an atmosphere of havoc, fear, irrationality, and aggressive human behavior that facilitates the commission of horrible acts against individuals. Once armies and militias begin fighting, it does not take long for forcible displacements of populations, sexual assaults, and other actions against the innocent to begin—actions that many governments and their opponents would not commit in peacetime.³⁰

Ratner is surely right as an empirical matter; although proposals for a radical rethinking of the need for “perpetual war” are seductive, they have not established either empirically or normatively that theirs is the better—or more acceptable—view. Indeed the notion of “perpetual war” as the appropriate framework for international relations runs afoul of Article 2(4)’s prohibition on the use of force in the U.N. Charter,³¹ often referred to as the “Constitution” of the international legal order.³² For this reason, this Article, which explores the understanding of crimes against humanity in peacetime as well as during armed conflict, adheres to traditional understandings of the demarcation between the two and the traditional definition of “armed conflict” in international law.³³

The fact that crimes against humanity law applies in peacetime and wartime and the laws of war do not presents an interesting challenge to the interpretation of the ICC Statute. For crimes against humanity first emerged as a matter of positive law during World War II, which meant a peacetime understanding of

²⁸ Mary Ellen O’Connell, *The Future of Peace, Weapons, and War*, ATLANTA COUNCIL ON INT’L REL. (Nov. 3, 2015), <http://atlantacir.org/tfpwwoconnell/>; see also Mary Ellen O’Connell, *Erring for Peace: Illegal War, Human Rights, and Humanitarian Law*, in SEEKING ACCOUNTABILITY FOR THE UNLAWFUL USE OF FORCE (Leila Nadya Sadat ed., forthcoming 2017).

²⁹ RATNER, *supra* note 21, at 67.

³⁰ *Id.*

³¹ U.N. Charter art. 2, ¶ 4.

³² See, e.g., BARDO FASSBENDER, *THE UNITED NATIONS CHARTER AS THE CONSTITUTION OF THE INTERNATIONAL COMMUNITY* (2009); David S. Law, *Constitutional Archetypes*, 95 TEX. L. REV. 153 (2016) (discussing the simultaneous and complementary trends of the “constitutionalization of international law” and the “internationalization of constitutional law,” and identifying the emergence of a hybrid “universalist” model of constitutionalism that combines elements of public international law and domestic constitutional law).

³³ See BASSIOUNI, *supra* note 10.

crimes against humanity law was largely absent from the jurisprudence of the *ad hoc* international criminal tribunals, especially the International Military Tribunal at Nuremberg and the International Tribunal for the former Yugoslavia (ICTY).³⁴ Indeed, the ICTY Statute requires a specific connection between the commission of crimes against humanity and armed conflict.³⁵ Although ICTY Chambers recognized that the armed conflict requirement was not part of crimes against humanity's definition in customary international law,³⁶ and early case law thus argued for a broad understanding of the "civilian population" requirement of Article 5,³⁷ over time the Chambers clearly felt more comfortable relying upon IHL to define the elements of the crimes in its Statute, even crimes against humanity. As Part I(A)(1) *infra* explores, this jurisprudence was followed by the Special Court for Sierra Leone (SCSL), which although lacking an explicit reference to armed conflict in its definition of crimes against humanity, was also adjudicating war time cases, and was in any event mandated by its Statute to follow the decisions of the ICTY Appeals Chamber.³⁸ As Part I(A)(2) *infra* explores, the Rwanda Tribunal (ICTR) and the Extraordinary Chambers in the Courts of Cambodia (ECCC) recognized the need to develop an autonomous definition of crimes against humanity but did not actually produce one.³⁹

Given the silence of the Rome Statute, the lack of a treaty on crimes against humanity,⁴⁰ and the absence of any clear customary international law rule emerging from the *ad hoc* international criminal tribunals, this remains an open and difficult interpretive question for judges of the International Criminal Court, who have been tasked with this question of first impression.

³⁴ M. Cherif Bassiouni, *Crimes Against Humanity: The Case for a Specialized Convention*, 9 WASH. U. GLOBAL STUD. L. REV. 575, 575 (2010). It is worth observing, however, that the *drafters* of the Nuremberg Charter clearly envisaged the possibility that crimes against humanity could take place prior to the onset of war, as Article 6(c) refers to their occurrence taking place "before or during the war." See Charter of the International Military Tribunal art. 6(c), in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 58 Stat. 1544, 82 U.N.T.S. 279.

³⁵ Akhavan, *supra* note 16, at 22.

³⁶ *Prosecutor v. Tadić*, Decision on Def. Motion for Interlocutory Appeal on Jurisdiction, *supra* note 21, ¶ 141.

³⁷ See *infra* Part I.A.1(a) for a discussion of the *Tadić* decision.

³⁸ S.C. Res. 1315, Statute of the Special Court for Sierra Leone art. 20, ¶ 3, Jan. 16, 2002, 2178 U.N.T.S. 137 [hereinafter SCSL Statute].

³⁹ See *infra* Parts I.A.1(b) and I.A.3.

⁴⁰ The movement for a new convention on crimes against humanity has accelerated in recent years. See FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY 30, 36 (Leila Nadya Sadat ed., 2011); see also ON THE PROPOSED CRIMES AGAINST HUMANITY CONVENTION (Morten Bergsmo & Song Tianying eds., FICHL 2014); Bassiouni, *supra* note 34; *Summaries of the Work of the International Law Commission—Crimes Against Humanity*, INT'L LAW COMM'N, http://legal.un.org/ilc/summaries/7_7.shtml (last visited Jan. 8, 2017).

Thus far, however, ICC judges have largely followed the jurisprudence of the ICTY without reflecting upon the differences between the definitions of crimes against humanity in the ICC and ICTY statutes, or even the diverse jurisprudential solutions of the ICTR and the ECCC. ICC Chambers have held that the definition of “civilian” set forth in Article 50 of Additional Protocol I (AP I) to the Geneva Conventions (on the laws of war) sets forth the relevant test for understanding the meaning of the word “civilian” in Article 7 (on crimes against humanity).⁴¹ Yet this definition is fraught with difficulties, particularly in two specific aspects: The operation of the “principle of distinction”⁴² and the notion of limiting the protections of IHL to “protected persons” who do not share the nationality of the offender, as defined in the Geneva Conventions.⁴³

This Article proposes a resolution of these conceptual difficulties. It suggests that the words “any civilian population” in Article 7 have an autonomous meaning, beginning with the understanding that crimes against humanity *as an international criminal law offense*, is decidedly *not* an offshoot of IHL (if it ever has been). In other words, it proposes that the ICC puts “peacetime first” in order to give content to Article 7(1), then move on to its meaning and application during armed conflict. This means that everyone is a civilian—or a member of

⁴¹ See, e.g., *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgement, ¶ 110 (July 29, 2004) [hereinafter *Prosecutor v. Blaškić*, Appeals Judgement].

⁴² The “principle of distinction” requires that parties to a conflict at all times distinguish between civilians and combatants. Attacks may only be directed against the latter, and must not be directed against civilians. 1 JEAN MARIE HENCKAERTS & LOUISE DOSWOLD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 3–4 (ICRC, 2005).

⁴³ Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 4, Aug. 12, 1949, 6 U.S.T. 3516 [hereinafter Fourth Geneva Convention]. The International Committee of the Red Cross’s (ICRC) new commentary to Common Article 3 suggests that its requirement of humane treatment applies to all civilians and a party’s own armed forces. ICRC Commentary of 2016: Conflicts Not of an International Character, ¶¶ 545, 546, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6C DFA490736C1C1257F7D004BA0EC#293_B [hereinafter ICRC 2016 Commentary]. The ICC has not yet taken on board this principle, *pref.* The ICRC notes that civilians and a party’s own forces are protected by Common Article 3, because of the provision’s “no adverse distinction,” requirement. *Id.* It is not clear whether the ICC will ultimately take this view as in cases like *Lubanga*, see *Prosecutor v. Lubanga*, Trial Judgment, *supra* note 21, and *Ntaganda*, *infra* notes 49–50, 170, the Prosecutor did not pursue charges on this basis. More recently, however, in the *Dominic Ongwen* case, the Office of the Prosecutor (OTP) has alleged (and the Pre-Trial Chamber has confirmed) charges of crimes against humanity of enslavement, forced marriage, torture, sexual slavery, rape, and forced pregnancy under Article 7(1) of the Statute. *Prosecutor v. Dominic Ongwen*, Decision on the Confirmation of the Charges, ¶¶ 110–112 (Pre-Trial Chamber II Mar. 23, 2016). The OTP has also alleged the war crimes of torture, sexual slavery, rape, and forced pregnancy under Article 8(2)(c) (incorporating the provisions of Common Article 3) and 8(2)(e) (war crimes in non-international armed conflict) as well as outrages on personal dignity pursuant to Article 8(2)(c)(iii) of the Statute. *Id.* ¶¶ 110–112, 117. The confirmation of these charges by the Pre-Trial Chamber suggests that the ICC may be moving in the direction suggested by this Article and the 2016 ICRC new commentary to Common Article 3.

a civilian population—if they cannot lawfully be the subject of an attack involving or potentially involving their loss of life. They are thus protected by the human right to life.⁴⁴ The Court should therefore look not only to a victim’s (or victim population’s) formal status (as civilian within the meaning of IHL) but the actual situation of the individual or population targeted for abuse, as well as assess whether the “attack” takes place in peacetime or during armed conflict, whether International Armed Conflict (IAC) or Non-International Armed Conflict (NIAC). As a practical matter, this will eliminate the operation of the principle of distinction in peacetime, and abolish the artificial divide between protected and non-protected persons during war and peace.

This methodology is admittedly more complex than the ICC Chambers’ current approach. However, this nuanced interpretation of the ICC Statute is justified—and even required—by looking to the object and purpose of the ICC Statute, as well as the drafting history of the text.⁴⁵ During the Statute’s negotiation, many delegations proposed deleting the word “civilian” as confusing and unnecessary.⁴⁶ It was retained, but without definition, because the negotiators felt that the definition of civilian population, in particular, was “too complex a subject and an evolving area in the law, better left for resolution in case-law.”⁴⁷ Thus they were aware that this complexity existed as a function of the three scenarios presented by the situations referred to the Court (peacetime, NIAC and IAC) and their separate evolution in customary international law and treaties, but were unsure how to resolve the difficulty as a drafting matter.

A nuanced approach also has the advantage of aligning the provisions of Articles 7 and 8 in cases of crimes against humanity committed during armed

⁴⁴ See Rome Statute, *supra* note 13, art. 7. This Article focuses on the human right to life as protected by the ICC Statute; however, the principles applicable to this right apply equally to the rights enshrined in the other crimes listed in Article 7(1).

⁴⁵ See, e.g., GERHARD WERLE & FLORIAN JEBBERGER, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW, ¶ 888 (3d ed. 2014); see also Kai Ambos, *Crimes Against Humanity and the ICC*, in FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY 279, 279, 283 (Leila Nadya Sadat ed., 2d ed. 2013); Kai Ambos, *Selected Issues Regarding the “Core Crimes” in International Criminal Law*, in 19 INTERNATIONAL CRIMINAL LAW: QUO VADIS? 219, 245, 257 (Nouvelles Études Pénales, 2004); KAI AMBOS, INTERNATIONALES STRAFRECHT. STRAFANWENDUNGSRECHT, VÖLKERSTRAFRECHT UND EUROPÄISCHES STRAFRECHT, marginal numbers ¶¶ 189 et seq. (3d ed. 2011).

⁴⁶ Int’l Law Comm’n, Rep. on the Work of Its Forty-Third Session, U.N. Doc. A/46/10, ¶ 176 (1991); Int’l Law Comm’n, Rep. on the Work of Its Forty-Eighth Session, U.N. Doc. A/51/10, ¶ 50 (1996). It is worth noting that the International Law Commission deleted it from both its 1991 and 1996 Draft Code of Crimes Against the Peace and Security of Mankind. *Id.* See generally Kai Ambos & Steffen Wirth, *The Current Law of Crimes Against Humanity: An Analysis of UNTAET Regulation 15/2000*, 13 CRIM. L.F. 1, 7 (2002).

⁴⁷ Darryl Robinson, *The Elements of Crimes Against Humanity*, in THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 57, 78 (Roy S. Lee ed., 2001).

conflict, but recognizes the autonomous nature of crimes against humanity when committed in peacetime.⁴⁸ Moreover, it will have the advantage of filling gaps in the application of Article 7 that makes its operation seem otherwise arbitrary or uncertain.

Two examples may be useful in this regard. In many non-international armed conflicts, rebel organized armed groups attack villages and abduct or conscript men and women, boys and girls, into their forces.⁴⁹ Some of those abducted are forced to fight; if under the age of 15, they are protected by the laws of war, which forbid the enlistment, conscription and use of child soldiers, and may also be protected from rape and sexual abuse as children.⁵⁰ But if fifteen or older, under the traditional view they lost the protection of the laws of war once taken into an organized armed group, because the laws of war do not protect attacks

⁴⁸ The careful reader will observe that this Article focuses upon *one* specific crime against humanity, murder, under Article 7(1)(a). In such case, the alignment of IHL with crimes against humanity law during armed conflict makes sense as the question becomes “who may lawfully be the object of attack.” With respect to other crimes under Article 7, such as persecutions and apartheid, for example, the alignment of crimes against humanity law with war crimes law may become less and less important, and even inappropriate. For example, genocide does not have a “civilian population requirement” meaning that it might be *unlawful* under the crime of genocide to attack a military unit (because one intended to exterminate them on racial grounds) even though under IHL the target might be permissible. *See* Rome Statute, *supra* note 13, art. 6. Perhaps this should also be the rule for the crime against humanity of persecution? This Article does not attempt to resolve all the possible conflicts and relationships between IHL and Article 7 of the Rome Statute, but establishes a general framework to undertake a specific analysis in each case.

⁴⁹ *See, e.g.*, Prosecutor v. Bosco Ntaganda, ICC-01/04-02/06-458-AnxA, Updated Document Containing the Charges, ¶¶ 4, 100–08 (Counts 6, 9, 14, 15 & 16) (Pre-Trial Chamber II Feb. 16, 2015).

⁵⁰ This appears to be the view taken in the *Ntaganda* case, in which Bosco Ntaganda, a former military commander and Deputy Chief of Staff of the UPC/FPLC, a militia operating in the Democratic Republic of the Congo, is currently awaiting trial at the ICC. Prosecutor v. Bosco Ntaganda, ICC-01/04-02/06-458-AnxA, Updated Document Containing the Charges, ¶¶ 4, 100–08 (Counts 6, 9, 14, 15 & 16) (Pre-Trial Chamber II Feb. 16, 2015). He has been charged with conscription, enlistment and use of children under the age of fifteen to participate actively in hostilities, under Articles 8(2)(e)(vii) of the Rome Statute, as well as subjecting them to rape and sexual slavery, also charged as war crimes under Article 8(2)(e)(vi) of the Statute. *Id.* The charges also include rape and sexual slavery of civilians as a crime against humanity (and a war crime) in counts 4, 5, 7, and 8. *Id.* However, according to the Document Containing the Charges, these charges relate to activities of the militia during their attacks on the villages set forth in paragraphs 67, 71, 72, 74, 77, 79, 84, and 89 of the DCC, not to the acts of Ntaganda and his militia after abducting the individuals in question into his forces. *Id.* Although there are still many gaps in the protection of the Statute as evidenced by the fact that individuals fifteen and older who are taken into or by the militias remain unprotected under both Articles 8 and 7 of the Rome Statute, the charging document has nonetheless been lauded by the Prosecutor’s Special Advisor for Gender Based Crimes for the “broader approach to gender-based crimes . . . and . . . much more advanced conceptualization of these crimes by the ICC than in their earlier case against Thomas Lubanga.” Press Release, Int’l Crim. Ct., ICC Commencement of the Confirmation of Charges Hearing: The Prosecutor vs. Bosco Ntaganda, (Feb. 10, 2014), <http://www.iccwomen.org/documents/Ntaganda-Press-Statement-February-2014.pdf> (quoting Brigid Inder, Executive Director of the Women’s Initiatives for Gender Justice and Special Advisor to ICC Prosecutor Fatou Bensouda).

upon individuals in one group being victimized by individuals from the same group⁵¹—hence the need for the creation of crimes against humanity as a category of crimes in 1945.

But what if those individuals either do not become fighters at all, or when not “directly participating in hostilities,” are tortured, subjected to sexual or gender-based violence, or are otherwise mistreated, as was alleged (but not charged) in the *Lubanga* case decided in 2012?⁵² If they have lost their “civilian” status, and no longer form part of a “civilian population” it would appear that they are not protected under Article 7—crimes against humanity—because as a formal matter, IHL no longer considers them civilians.⁵³ Were the ICC to take this position—that it is the formal status of the individuals abducted and “taken in” to the rebel forces that matters, as opposed to the context—what they are actually enduring—those individuals who are suffering terrible harm will receive no protection at all from the Court under either Article 8 (war crimes) or Article 7 (crimes against humanity). This suggests that adopting the Article 50 definition of civilian that rests upon *formal status* in an *international* armed conflict⁵⁴ to determine the test for who can be the victim of a crime against humanity during a non-international armed conflict, or even in peacetime, is not appropriate, and indeed, in the most recent case confirmed at the court, *Prosecutor v. Ongwen*, both the Prosecutor and the Pre-Trial Chamber appear to agree, having confirmed charges of sexual violence, torture, and outrages upon personal dignity as both war crimes and crimes against humanity against women and girls abducted and taken by Ongwen’s troops.⁵⁵ This would appear to be the

⁵¹ See Rome Statute, *supra* note 13, art. 8. Common Article 3—unlike the grave breaches regime of the Geneva Conventions—could be read as protecting such individuals, but at least in current practice at the ICC, the OTP has not charged individuals with such crimes under Article 8 of the Statute.

⁵² The ICC’s OTP was heavily criticized by scholars and civil society alike for failing to bring gender-based and sexual violence charges against Lubanga Dyilo. See, e.g., K’Shaani O’Smith, *Prosecutor v. Lubanga: How the International Criminal Court Failed the Women and Girls of Congo*, 54 *HOW. L.J.* 467, 468–69 (2011); Joint Letter from Avocats Sans Frontiers et al. to Luis Moreno Ocampo, Chief Prosecutor of the Int’l Criminal Court (July 31, 2006), http://www.iccnw.org/documents/DRC_joint_letter_eng.pdf.

⁵³ The Special Court for Sierra Leone has held that the “forced marriage” of both women and girls by organized armed groups constitutes a crime against humanity under Article 7. See *Prosecutor v. Brima et al. (The AFRC Case)*, Case No. SCSL-04-16-A, Judgment, ¶¶ 175–203 (Appeals Chamber Feb. 22, 2008) (overturning the findings of Trial Chamber II that “forced marriage” was subsumed by the “sexual slavery” charge, but declining to enter fresh convictions); *Prosecutor v. Sesay (The RUF Case)*, Case No. SCSL-04-15-T, Judgment, ¶¶ 1291–97 (Trial Chamber Mar. 2, 2009) (entering convictions for “forced marriage” as a crime against humanity for the first time).

⁵⁴ See Rome Statute, *supra* note 13, art. 50.

⁵⁵ See *supra* note 43. It is unclear whether this is because the women and girls in those cases are clearly *not* part of the fighting forces, and therefore never “lost” their civilian status, which seems to be the case on the facts, or because OTP and/or the Pre-Trial Chamber is relying upon a broad understanding of the term civilian

right result, certainly as regards the charges of crimes against humanity which are the subject of this Article—after all, the *raison d'être* of including crimes against humanity as a category of offenses at Nuremberg was to protect individuals attacked by the Nazi regime—such as German Jews—who were not otherwise protected by the laws of war.⁵⁶

A second example may be helpful as well. Suppose that a country's leader ruthlessly suppresses all political opposition, subjecting individuals suspected of dissent to torture, enforced disappearance, arbitrary detention, enslavement, or even death. The North Korean example comes to mind.⁵⁷ The crimes committed aim not only at "civilians" (in the IHL sense of the term) but members of the armed forces as well, who are subject to successive purges that often involve the commission of Article 7 crimes. There is simply no reason why the membership of an individual in the armed forces—or the police—should deprive them of Article 7's protective mantle simply by virtue of their rank or formal status. Rather, they are clearly "civilians" for purposes of Article 7.⁵⁸

The ECCC faced this question, and decided that although members of the armed forces were not "civilians" they could nonetheless be the victims of a crime against humanity.⁵⁹ This work-around solution, which was also the solution adopted by the Yugoslavia Tribunal, had the benefit of providing all the victims of the Pol Pot regime with legal protection, but seems less satisfactory than simply understanding that the word "civilian" during peacetime includes everyone, for it requires others to be attacked first to establish the "attack against

along the lines suggested by this Article or even the new ICRC Commentary on Common Article 3. This is obviously an issue that will be more fully examined as the case proceeds.

⁵⁶ See generally Katie A. Welgan, *The Nuremberg Trials and Crimes Against Humanity*, YOUNG HISTORIANS CONF. (2014), <http://pdxscholar.library.pdx.edu/cgi/viewcontent.cgi?article=1048&context=younghistorians>.

⁵⁷ See Jeong Kwang-il, 'There Are Two Legal Ways to Kill Prisoners' – Life in North Korea's Yodok Prison Camp, *GUARDIAN* (Dec. 16, 2014, 5:32 AM), <https://www.theguardian.com/world/2014/dec/16/north-korea-yodok-prison-camp>. The worrisome trend in Turkey also comes to mind. See Josh Keller et al., *The Scale of Turkey's Purge Is Nearly Unprecedented*, *N.Y. TIMES* (Aug. 2, 2016), http://www.nytimes.com/interactive/2016/08/02/world/europe/turkey-purge-erdogan-scale.html?_r=0. As of early August 2016, 10,012 Turkish soldiers had been detained, the equivalent of taking nearly one in sixty members of the U.S. military into custody. *Id.*; see also Samia Nakhoul et al., *Erdogan Says Turkey's Military to Be Restructured After Abortive Coup*, *REUTERS* (July 22, 2016), <http://www.reuters.com/Article/us-turkey-security-erdogan-idUSKCN1012TD>.

⁵⁸ For a discussion of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea see *infra* Part II.C.4(b).

⁵⁹ See *Prosecutor v. Kaing Guek Eav alias Duch*, Case No. 001/18-07-2007/ECCC/TC, Judgement, ¶¶ 322, 325 (July 26, 2010) [hereinafter *Case 001*, Judgement].

the civilian population,” before the armed forces or the police can receive the protection of Article 7.⁶⁰

It would be *possible* for the ICC to take the view that Article 7 is *completely* autonomous from Article 8, and eliminate the word “civilian” from Article 7 of the Statute as a legal element entirely, but this approach raises significant difficulties. Clearly a majority of delegations in Rome thought that it was important to include the modifier “civilian” before “population” for consistency with prior instruments; and the *ad hoc* Tribunals developed an extensive jurisprudence regarding it, law that was applied to more than two hundred accused in cases decided by those courts. It could therefore unduly fragment international criminal law to set aside this jurisprudence entirely, and, as a normative matter, could have the effect of rendering military operations that are lawful under Article 8 potentially *unlawful* under Article 7. This result does not appear to be *mandated* by the Statute, and could work unfair prejudice to the accused.⁶¹

This Article is the first comprehensive treatment of this question. Part I explores the jurisprudence of the *ad hoc* international criminal tribunals on this issue. Part II briefly discusses the early jurisprudence of the ICC and then suggests a methodological approach for addressing this open-ended question in the ICC Statute, applying my Seven Canons of ICC treaty interpretation to the question at issue.⁶² Finally, the Conclusion asserts that the proper solution involves a three-part test: First, the situation is categorized depending upon whether or not it involves crimes committed during or outside of armed conflict. If the crimes have been committed during peacetime, all individuals are presumptively civilians, and are part of the “population” protected by Article 7, even members of the armed forces and the police other than those actually perpetrating the attacks.

Second, if the crimes have been committed during an armed conflict, the Court must then consider whether the conflict is international or non-

⁶⁰ *See id.*

⁶¹ Rogier Bartels, *Two Cheers for the ICTY Popovic et al. Appeals Judgment: Some Words on the Interplay Between IHL and ICL*, EJIL: TALK! (Feb. 4, 2015), <http://www.ejiltalk.org/two-cheers-for-the-icty-popovic-et-al-appeals-judgement-some-words-on-the-interplay-between-ihl-and-icl/>.

⁶² *See generally* Leila Nadya Sadat & Jarrod M. Jolly, *Seven Canons of ICC Treaty Interpretation: Making Sense of Article 25's Rorschach Blot*, 27 LEIDEN J. INT'L L. 755 (2014).

international in nature, which brings IHL in as a *lex specialis*,⁶³ as a “technique for the resolution of normative conflicts.”⁶⁴ Under traditional understandings of humanitarian law, civilians in non-international armed conflict are those not “directly participating in hostilities;”⁶⁵ and during international armed conflict, they are indeed defined in Article 50 of Protocol I, as those not entitled to prisoner of war (POW) status under the Third Geneva Convention.⁶⁶ In either case, the targeted victim population’s formal status is assessed under the relevant provisions of international humanitarian law. However, the inquiry does not stop there.

Finally, rather than mechanically transferring rules of IHL to Article 7, the Court must assess the specific situation of the victims, in context. In practical terms, this means that the soldiers “attacked” by their own regime are part of the “civilian population” protected by the law of crimes against humanity because the provisions of IHL that do not protect individuals from attacks by their own nationals should not apply to the application of Article 7 of the Rome Statute in peacetime or wartime. This is also true for the individuals allegedly abducted and cruelly mistreated by rebel organized armed groups who do not “lose” their civilian status when taken into an armed group, except during and to the extent that they are actually directly participating in hostilities. In this case they may be made the object of attack under Protocol II, but are still protected from cruel treatment and various forms of criminal abuse by their captors under Article 7. This is a common sense result, and one that, interestingly, the International Committee for the Red Cross (ICRC) appears to be now embracing for IHL as a matter of customary international law as well.⁶⁷ To take a domestic example, if

⁶³ The legal maxim ‘*lex specialis derogat legi generali*’ requires that law governing specific factual matters must override law that governs only general factual matters when those two laws conflict. See Dorota Marianna Banaszewska, *Lex Specialis*, MAX PLANCK ENCYCLOPEDIA PUB. INT’L L., at MPEPIL 2171 (2015).

⁶⁴ Int’l Law Comm’n, Rep. of the Study Group of the Int’l Law Comm’n, finalized by Chairman Martii Koskeniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, ¶ 56, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006) [hereinafter Koskeniemi Report].

⁶⁵ See, e.g., Protocol Additional to the Geneva Convention of 12 August, 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 13, ¶ 3, adopted June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II]; NILS MELZER, ICRC INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 27 (ICRC, 2009) [hereinafter ICRC INTERPRETIVE GUIDANCE]; S. Bosch, *The International Humanitarian Law Notion of Direct Participation in Hostilities—A Review of the ICRC Interpretive Guide and the Subsequent Debate*, 17 POTCHEFSTROOM ELECTRONIC L.J. 998, 999 (2014).

⁶⁶ See *infra* Part I.A.1(a).; Geneva Convention Relative to the Treatment of Prisoners of War art. 4(A), adopted Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention].

⁶⁷ ICRC 2016 Commentary, *supra* note 43. The ICRC appears to agree that individuals in armed forces are protected at least from inhumane treatment by their own troops under Common Article 3. Whether the ICC will

a group of terrorists abduct and hold a group of persons for ransom, the hostages have not become part of the terrorist gang and liable for their crimes simply by virtue of their abduction; for that to happen, they would have to actively support the terrorist group and undertake violent actions on their behalf. And even then, they would have a defense as to whether they were acting under compulsion.

Although this three-part test is more complex than cutting and pasting language found in Additional Protocol I to the Geneva Conventions into Article 7 of the ICC Statute, its adoption could enhance the expressive function of the ICC Statute by making it clear that the definition of civilian population in Article 7 is premised, in the first instance, not upon the formal rules of international humanitarian law, but upon a peacetime understanding of the crime that takes into account the actual situation of the victim population. It also squares with our common sense understanding, underscored by the examples given above, about who is deserving of Rome Statute protection, and it avoids creating gaps in the Statute's protective mantle. Finally, as this Article explains, this complexity is inherent in the international legal order in which the Rome Statute is embedded. It does not arise from an artificial or strained reading of the Statute but is a natural consequence of the manner in which international law has developed over time.

I. THE INTERPRETATION OF THE CIVILIAN POPULATION REQUIREMENT BY THE *AD HOC* INTERNATIONAL CRIMINAL TRIBUNALS

It was not until the establishment of the *ad hoc* international criminal tribunals that a substantial jurisprudence developed regarding the meaning of the term "civilian population" in the contextual elements of crimes against humanity. This Part considers the development of that jurisprudence and considers its potential contribution to customary international law, a question also taken up again in Part II(C)(4)(b), *infra*.

adopt this view, given the codification of its Statute in 1998 when the law was different, remains to be seen and is beyond the scope of this Article.

A. *The Civilian Population Requirement in Armed Conflict*

1. *The Narrowing Interpretations of the International Criminal Tribunals for the former Yugoslavia and the Special Court for Sierra Leone*

a. *The International Criminal Tribunal for the former Yugoslavia*

Under Article 5 of its Statute, the ICTY has jurisdiction to prosecute crimes against humanity “when committed in armed conflict” and “directed against any civilian population.”⁶⁸ Given this explicit connection between crimes against humanity and armed conflict in the ICTY Statute, it is not surprising that the Tribunal turned to IHL to define the elements of Article 5, although early cases admitted the difficulties involved in doing so.

In its first judgment, *Prosecutor v. Tadić*, issued one year prior to the Rome Statute’s adoption, the Tribunal observed that the IHL definition of civilian “is not immediately applicable to crimes against humanity because it is a part of the laws or customs of war and can only be applied by analogy,”⁶⁹ and noted that authorities were not uniform on the meaning of civilian status.⁷⁰ It therefore suggested that “a broad definition of the term ‘civilian’”⁷¹ was appropriate, as IHL reflected “elementary considerations of humanity.”⁷²

Three years later, the Tribunal concluded that “those actively involved in a resistance movement can qualify as victims of crimes against humanity.”⁷³ In reaching this conclusion, the Trial Chamber observed:

⁶⁸ Statute for the International Criminal Tribunal for the Former Yugoslavia art. 5, S.C. Res. 827, annex, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter ICTY Statute].

⁶⁹ *Prosecutor v. Tadić*, Case No. IT-94-1-T, Opinion and Judgement, ¶ 639 (May 7, 1997) [hereinafter *Prosecutor v. Tadić*, Trial Judgement]. The Trial Chamber made reference to Common Article 3 because it believed the conflict to be non-international in nature. *Id.*

⁷⁰ *Id.* ¶ 640 (see internal citations) (contrasting the U.N. War Crimes Commission position that civilians are not members of the armed forces, with the ruling of the Supreme Court of the British zone that crimes against humanity are applicable in all cases in which the perpetrator and the victim shared the same nationality, regardless of whether the victim was civilian or military).

⁷¹ *Id.* ¶ 626.

⁷² *Id.* ¶ 639 (citing *Prosecutor v. Tadić*, Decision on Def. Motion for Interlocutory Appeal on Jurisdiction, *supra* note 21, ¶¶ 102–03).

⁷³ *Prosecutor v. Kupreškić, et al.* (The “Lašva Valley” Case), Case No. IT-95-16-T, Judgement, ¶ 540 (Jan. 14, 2000). It should be noted that this case was not published at the time the Switzerland commentary was submitted to the Working Group on the Elements of Crimes. *See generally id.*; Commentary submitted by Switz. on Art. 7 of the Statute of the Int’l Criminal Court, submitted at the Preparatory Comm’n for the Int’l Criminal Court, Working Group on Elements of Crimes, New York, 16–26 Feb., 26 July–12 Aug., 29 Nov.–17 Dec. 1999, <http://www.iccnw.org/documents/3rdSesProposalArticle7.pdf> [hereinafter Switzerland Commentary].

It would seem that a wide definition of “civilian” and “population” is intended. This is warranted first of all by the object and purpose of the general principles and rules of humanitarian law, in particular by the rules prohibiting crimes against humanity. The latter are intended to safeguard basic human values by banning atrocities directed against human dignity. *One fails to see why only civilians and not also combatants should be protected by these rules (in particular by the rule prohibiting persecution), given that these rules may be held to possess a broader humanitarian scope and purpose than those prohibiting war crimes.* However, faced with the explicit limitation laid down in Article 5, the Trial Chamber holds that a broad interpretation should nevertheless be placed on the word “civilians,” the more so because the limitation in Article 5 constitutes a departure from customary international law.⁷⁴

A few months later, in the *Blaškić* case, Trial Chamber I again interpreted the notion of civilian population “broadly,”⁷⁵ concluding:

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 [sic] 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* *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.*⁷⁶

This was partially reversed on appeal.

⁷⁴ *Id.* ¶ 547 (emphasis added). In the *Kunarac* case, which followed *Tadić*, the ICTY casually noted that the civilian population requirement can be understood by looking at “all persons who are civilians as opposed to members of the armed forces and other legitimate combatants,” citing by way of passing a commentary to both AP I and AP II without distinction. *Prosecutor v. Kunarac, et al.*, Case No. IT-96-23 & IT-96-23/1-A, Judgement, ¶ 425 (Trial Chamber Feb. 22, 2001) (citing ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, 611, 1451–52 (Yves Sandoz et al. eds., 1987)) [hereinafter *Prosecutor v. Kunarac*, Trial Judgement]. Both the Trial Chambers in *Kunarac* and *Tadić* proceeded on the basis that the crimes against humanity alleged to have been committed took place in the context of a non-international armed conflict. *See id.*; *Prosecutor v. Tadić*, Trial Judgement, *supra* note 69.

⁷⁵ *Prosecutor v. Blaškić*, Case No. IT-95-14-T, Judgement, ¶¶ 209–10 (Int’l Crim. Trib. for the Former Yugoslavia, Mar. 3, 2000) [hereinafter *Prosecutor v. Blaškić*, Trial Judgement].

⁷⁶ *Id.* ¶ 214 (emphasis added). The holding relied upon the Final Report of the Commission of Experts, chaired by Professor M. Cherif Bassiouni, which had investigated the Bosnian War. Final Rep. of the Comm. of Experts Established Pursuant to Sec. Council Res. 780 (1992), transmitted by Letter Dated 24 May 1994 from the Secretary-General to the President of the Security Council, ¶ 78, U.N. Doc. S/1994/674 (May 27, 1994).

By July 2004, when the *Blaškić* Appeals Judgment was handed down,⁷⁷ the Appeals Chamber of the Tribunal had begun moving towards a law of war understanding of crimes against humanity, although the ICTY had not yet decided to rely upon Article 50 of AP I as the relevant text. It relied upon a 2002 Appeals Chamber ruling in the *Kunarac*⁷⁸ case, which asserted “[t]o the extent that the alleged crimes against humanity were committed in the course of an armed conflict, the laws of war provide a benchmark against which the Chamber may assess the nature of the attack and the legality of the acts committed in its midst.”⁷⁹ The judgment has no other reference to humanitarian law in discussion of the Chapeau elements for crimes against humanity, and carefully notes that the “attack” for purposes of Article 5 (on crimes against humanity) need not be a military attack,⁸⁰ and may precede, coincide or even outlast the military attack.⁸¹

Nonetheless, in 2003 the ICTY Appeals Chamber accepted the invitation to make further reference to the laws of war.⁸² It concluded, for the first time, that in the context of an international armed conflict, it was appropriate to use Article 50 of Additional Protocol I to the Geneva Conventions of 1949 to define the notion of “civilians” and “civilian populations” as a matter of customary international law, not only for Articles 2 and 3 of the ICTY Statute (war crimes) but for Article 5 (crimes against humanity) as well.⁸³ Article 50 provides:

Article 50: Definition of Civilians and Civilian Population

1. 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.
2. The civilian population comprises all persons who are civilians.

⁷⁷ See *Prosecutor v. Blaškić*, Appeals Judgement, *supra* note 41.

⁷⁸ *Prosecutor v. Kunarac et al.*, Case No. IT-96-23/1-A, Judgement (June 12, 2002) [hereinafter *Prosecutor v. Kunarac*, Appeals Judgement].

⁷⁹ *Id.* ¶ 91.

⁸⁰ *Id.* ¶ 86 (stating that an “attack” encompasses any mistreatment of the civilian population).

⁸¹ *Id.*

⁸² It is not obvious why this shift in ICTY jurisprudence occurred. There were changes in personnel during this time, which could potentially account for the differences, including Judge Theodor Meron’s election as President in 2003, as he is known as a “strict constructionist.” See, e.g., *Prosecutor v. Nahimana, Barayagwiza and Ngeze*, Case No. ICTR-99-52-A, Judgement, Partly Dissenting Opinion of Judge Meron (Nov. 28, 2007). At the same time, it may be that the shift occurred for other reasons.

⁸³ *Prosecutor v. Blaškić*, Appeals Judgement, *supra* note 41.

3. The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.⁸⁴

Article 4 A of the Third Geneva Convention, referred to in Article 50 provides, in relevant part:

Article 4: Prisoners of War

- 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 volunteers 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 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

⁸⁴ Protocol Additional to the Geneva Convention of 12 August, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 50, *adopted* June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I].

regular armed units, provided they carry arms openly and respect the laws and customs of war.⁸⁵

The combination of Article 50 and Article 4 results in a negative definition of “civilian;” it becomes, for the purposes of the Geneva Conventions, a subset of individuals who do not belong to fighting forces entitled to POW treatment under the Third Geneva Convention. Relying upon these texts, the Appeals Chamber in *Blaškić* characterized the Trial Chamber’s view 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 as potentially “misleading.”⁸⁶ Instead, the Chamber concluded that, read together, “Article 50 of Additional Protocol I and Article 4 A 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.”⁸⁷

The *Blaškić* Appeals Chamber’s decision on this question is anything but comprehensive. It simply imports the definition of “civilian” applicable in international armed conflict (via Protocol I) into Article 5 of the ICTY Statute (on crimes against humanity) without any explanation other than the fact that these provisions “constitute . . . the core of the customary law applicable in international armed conflicts.”⁸⁸ Although the decision is short and relatively opaque, it has had great “stickiness” influencing not only subsequent cases at the ICTY and the other *ad hoc* tribunals, but the early case law of the ICC. Indeed, it is probably the judgment most cited on this question,⁸⁹ serving as

⁸⁵ Third Geneva Convention, *supra* note 66.

⁸⁶ *Prosecutor v. Blaškić*, Appeals Judgement, *supra* note 41, ¶ 114. The Appeals Chamber did not say erroneous, which compounds the confusion. *Id.* It concluded that:

the specific situation of the victim at the time the crimes are committed may not be determinative of his civilian or non-civilian status. If he is indeed a member of an armed organization, the fact that he is not armed or in combat at the time of the commission of crimes, does not accord him civilian status.

Id.

⁸⁷ *Id.* ¶ 113; *see also* *Prosecutor v. Milošević*, Case No. IT-98-29/1-A, Judgement, ¶ 50 (Nov. 12, 2009) [hereinafter *Prosecutor v. Milošević*, Appeals Judgement] (“[T]he term ‘civilian population’ generally refers to a population that is predominantly civilian . . . [and] the civilian status of the population ‘may change due to the flow of civilians and combatants.’”). *Accord*, *Prosecutor v. Kordić & Čerkez*, Case No. IT-95-14/2-T, Judgment, ¶ 180 (Trial Chamber Feb. 26, 2001) (adopting a “wide definition of what constitutes a civilian population”).

⁸⁸ *Prosecutor v. Blaškić*, Appeals Judgement, *supra* note 41, ¶ 113.

⁸⁹ *See, e.g., Case 001*, Judgement, *supra* note 59, ¶ 304; *Prosecutor v. Chea*, Case No. 002/19-09-2007/ECCC/TC, Judgment, ¶¶ 184–86 (Aug. 7, 2014) [hereinafter *Case 002*, Judgement] (noting the approach taken by the *Blaškić* Appeals Chamber but declining to follow it); *Prosecutor v. Fofana (The CDF Case)*, Case No. SCSL-04-14-T, Judgement, ¶ 116 (Aug. 2, 2007) [hereinafter *Fofana Trial Judgment*]; *Prosecutor v. Fofana*, Case No. SCSL-04-14-A, Judgment, ¶¶ 258–59 (May 28, 2008); *Prosecutor v. Sesay (The RUF Case)*, Case No.

precedent not only for other cases at the ICTY but at other international criminal courts and tribunals, including the ICC.

This definition created conceptual difficulties for the ICTY including gaps in protection that were problematic for the Tribunal, such as the question of whether persons *hors de combat* can be the victims of crimes against humanity. As noted earlier, in *Blaškić*, the Appeals Chamber appeared to overturn part of the Trial Chamber’s judgment that the definition of civilian population under crimes against humanity included former combatants and persons no longer taking part in hostilities when the crimes were perpetrated,⁹⁰ holding instead that it is not the specific situation of the victim at the time the crimes are committed that determines his civilian status, but whether they are “indeed a member of an armed organization.”⁹¹ In *Martić*, an ICTY Trial Chamber following this lead held that the term “civilian population” must be narrowly defined,⁹² declining to allow persons *hors de combat* to qualify for civilian status. The Appeals

SCSL-04-15-T, Judgement, ¶ 82 (Mar. 2, 2009); Prosecutor v. Đorđević, Case No. IT-05-87/1-A, Judgement, ¶ 522 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 27, 2014); Prosecutor v. Gotovina, Case No. IT-06-90-T, Judgement, ¶ 1705 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 15, 2011); Prosecutor v. Kordić, Case No. IT-95-14/2-A, Judgement, ¶ 97 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 17, 2004); Prosecutor v. Krajišnik, Case No. IT-00-39-T, Judgement, ¶ 706(c) (Int’l Crim. Trib. for the Former Yugoslavia Sept. 27, 2006); Prosecutor v. Martić, Case No. IT-95-11-T, Judgement, ¶¶ 49(2), 52, 71 (Int’l Crim. Trib. for the Former Yugoslavia June 12, 2007) [hereinafter *Prosecutor v. Martić*, Trial Judgement]; Prosecutor v. Martić, Case No. IT-95-11-A, Judgement, ¶ 292 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 8, 2008) [hereinafter *Martić Appeals Judgement*]; *Prosecutor v. Milošević*, Appeals Judgement, *supra* note 87, ¶ 941; Prosecutor v. Mrkšić, Case No. IT-95-13/1-A, Judgement, ¶ 35 (Int’l Crim. Trib. for the Former Yugoslavia May 5, 2009) [hereinafter *Prosecutor v. Mrkšić*, Appeals Judgement]; Prosecutor v. Popović, Case No. IT-05-88-T, Judgement, ¶ 755 (Int’l Crim. Trib. for the Former Yugoslavia June 10, 2010) [hereinafter *Prosecutor v. Popović*, Trial Judgement]; Prosecutor v. Šainović, Case No. IT-05-87-T, Judgement, ¶ 146 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 26, 2009) (acknowledging but not directly following the approach taken by the *Blaškić* Appeals Chamber); Prosecutor v. Stanišić and Simatović, Case No. IT-03-69-T, Judgement, ¶ 965 (Int’l Crim. Trib. for the Former Yugoslavia May 30, 2013); Prosecutor v. Stanišić and Župljanin, Case No. IT-08-91-T, Judgement, ¶ 27 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 27, 2013); Prosecutor v. Tolimir, Case No. IT-05-88/2-T, Judgement, ¶ 695 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 12, 2012); Prosecutor v. Tolimir, Case No. IT-05-88/2-A, Judgement, ¶ 46 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 8, 2015); Prosecutor v. Bemba, ICC-01/05-01/08, Judgment Pursuant to Article 74 of the Statute, ¶ 152 (Mar. 21, 2016) [hereinafter *Prosecutor v. Bemba*, Trial Judgment].

⁹⁰ *Prosecutor v. Blaškić*, Trial Judgement, *supra* note 75, ¶ 214.

⁹¹ *Prosecutor v. Blaškić*, Appeals Judgement, *supra* note 41, ¶ 114 (“[T]he specific situation of the victim at the time the crimes are committed may not be determinative of his civilian or non-civilian status. If he is indeed a member of an armed organization, the fact that he is not armed or in combat at the time of the commission of crimes, does not accord him civilian status.”). See also *Prosecutor v. Galić*, Case No. IT-98-A, Judgement, ¶ 144 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 30, 2006) (noting that the notion of “civilian population” is expansive, but appearing to suggest that it is the formal status of the victim, not his or her situation at the time the crimes are committed, that determines his or her civilian status.).

⁹² *Prosecutor v. Martić*, Trial Judgement, *supra* note 89, ¶ 55.

Chamber reversed, holding that “nothing in the text of Article 5 . . . require[d] that individual victims of crimes against humanity . . . be civilians.”⁹³

In *Mrkšić*, decided two years later, the ICTY Appeals Chamber held that the attack on a “civilian population” is jurisdictional in nature,⁹⁴ meaning that once established, non-civilians could be the victims of a crime against humanity. *Mrkšić* involved the attack on the Vukovar Hospital in Croatia, during which, among other things, 194 men were removed from the hospital and murdered.⁹⁵ 181 of those killed were known to be members of the Croatian armed forces, but were *hors de combat* as they had been detained by Serb forces.⁹⁶ The Trial Chamber, looking to the question of the victim’s *status* as members of the armed forces, acquitted the accused of crimes against humanity.⁹⁷ The Appeals Chamber reversed, finding:

Whereas the civilian status of the victims, the number of civilians, and the proportion of civilians within a civilian population are factors relevant to the determination of whether the *chapeau* requirement of Article 5 of the Statute that an attack be directed against a “civilian population” is fulfilled, there is no requirement nor is it an element of crimes against humanity that the victims of the underlying crimes be “civilians.”⁹⁸

Thus, although the ICTY has in recent years clearly aligned its case law on crimes against humanity with international humanitarian law in defining the term “civilian population,” it has also taken the approach that once the jurisdictional element of the attack is fulfilled, all those victimized by a widespread or systematic attack on a civilian population may be victims of a crime against humanity, regardless of their original status.

The final case worth considering on this point is *Popović*, a sprawling case decided relatively recently, involving five accused and charges relating to the

⁹³ *Prosecutor v. Martić*, Appeals Judgement, *supra* note 89, ¶ 307; *see also Prosecutor v. Mrkšić*, Appeals Judgement, *supra* note 89, ¶ 29.

⁹⁴ *Prosecutor v. Mrkšić*, Appeals Judgement, *supra* note 89, ¶ 30–31.

⁹⁵ *Id.* ¶ 3.

⁹⁶ *Id.* ¶ 36 n.114.

⁹⁷ *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1-T, Judgement, ¶ 83 (Int’l Crim. Trib. for the Former Yugoslavia Sept. 27, 2007) [hereinafter *Prosecutor v. Mrkšić*, Trial Judgement].

⁹⁸ *Prosecutor v. Mrkšić*, Appeals Judgement, *supra* note 89, ¶ 32. *See generally* Hansdeep 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*, 8 L. & PRAC. INT’L CTS. & TRIBUNALS 247, 248 (2009). The Appeals Chamber nonetheless upheld the acquittals, arguing that the killings were not connected to the overall attack as they happened subsequent to the attack against the civilian population of Vukovar. *Prosecutor v. Mrkšić*, Appeals Judgement, *supra* note 89, ¶¶ 36–43.

attacks on Srebrenica and Žepa.⁹⁹ Although the opinion was generally unremarkable in its discussion of the civilian population requirement from a doctrinal perspective, some commentators have praised the reliance of the Appeals Chamber in that case on IHL notions of “civilian” to limit the ambit of crimes against humanity.¹⁰⁰ The Appeals Chamber in *Popović* found that although civilians had fled the area at issue in the week prior to the events in question, there was no evidence that the group of men that were the subject of the forcible transfer charge included any civilians.¹⁰¹ Because the forced transfer of enemy soldiers is lawful under IHL, the Appeals Chamber therefore declined to allow activity that is *lawful* under IHL to be *unlawful* under the law of crimes against humanity, and held that the Trial Chamber had erred in finding that a widespread and systematic attack had taken place against a civilian population.¹⁰²

Due to the complex nature of the conflict in the former Yugoslavia, which had a “mixed” character, the ICTY chambers were faced with cases in which crimes against humanity were committed both in the context of international and non-international armed conflict. The Trial Chamber in *Mrkšić* attempted to reconcile Article 50 of AP I, applicable in international armed conflict, with situations of non-international armed conflict by equating the term “combatant” to “fighter” as the contrast to “civilian.”¹⁰³

The Chamber observed:

The formal status of “combatant” does not apply in non-international armed conflicts. This does not, however, mean that the principle of distinction, the cornerstone of international humanitarian law, is not applicable to non-international armed conflicts. The principle applies, but is conceptualised in a different manner in non-international armed conflicts. Whereas the term “civilian” is used for both types of conflict, the term “fighter” now seems to be the appropriate term to be used as the equivalent for “combatants” in non-international armed conflict.¹⁰⁴

⁹⁹ See *Prosecutor v. Popović*, Trial Judgement, *supra* note 89; *Prosecutor v. Popović et al.*, Case No. IT-05-88-A, Judgement (Int’l Crim. Trib. of the Former Yugoslavia Jan. 30, 2015) [hereinafter *Prosecutor v. Popović*, Appeals Judgement]. The trial involved seven accused. *Id.* Following the Trial Judgment, one defendant died and another did not appeal his conviction. *Id.*

¹⁰⁰ See, e.g., Bartels, *supra* note 61.

¹⁰¹ *Prosecutor v. Popović*, Appeals Judgement, *supra* note 99, ¶¶ 773–74.

¹⁰² *Id.* ¶ 774.

¹⁰³ *Prosecutor v. Mrkšić*, Trial Judgement, *supra* note 97, ¶ 457.

¹⁰⁴ *Id.*

It is not clear, however, that this is entirely correct. At least some have suggested that in the context of non-international armed conflicts, “fighters,” unlike formal members of the armed forces, may not have the “status” of combatants at all times and for all purposes, because there is no “combatant” status in NIAC. The ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities employs the notion of “continuous combat function” to describe individuals for purposes of the principle of distinction in non-international armed conflict. The ICRC study concludes:

In non-international armed conflict, organized armed groups constitute the armed forces of a non-State party to the conflict and consist only of individuals whose continuous function it is to take a direct part in hostilities (“continuous combat function”).¹⁰⁵

As discussed in Part II(C)(4)(a)(iii), Article 50 carefully balances the need for POW protections for combatants with the need to protect the civilian population in a given conflict, and was heavily negotiated to strike a balance between them. In non-international armed conflicts, however, that balance may be quite different. AP II uses the notion of direct participation in hostilities, although it may simply be more useful to employ the term “fighter” in both cases to distinguish both which individuals can be targeted and which individuals have the “combatant’s privilege,” as the Rwanda Tribunal has suggested.¹⁰⁶

b. The Special Court for Sierra Leone

Article 2 of the SCSL Statute addresses crimes against humanity.¹⁰⁷ Like the ECCC, the ICTR, and the Rome Statute, it does not include a reference to armed conflict, presumably because it was adopted in 2002 after the establishment of the International Criminal Court. Pursuant to Article 20(3) of its Statute, which requires the judges of the Appeals Chamber to be “guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda,”¹⁰⁸ the SCSL drew much of its crimes against humanity jurisprudence from ICTY precedents, and for this reason, a detailed study is not required here.¹⁰⁹ In its early jurisprudence, the Court seemed to be inclined

¹⁰⁵ ICRC INTERPRETIVE GUIDANCE, *supra* note 65, at 36.

¹⁰⁶ I am indebted to Professor Laurie Blank for this insight.

¹⁰⁷ SCSL Statute, *supra* note 38, art. 2.

¹⁰⁸ *Id.* art. 20, ¶ 3.

¹⁰⁹ *Id.* The SCSL found that the armed conflict in that country was a “complex civil war” (NIAC). *See, e.g.,* Prosecutor v. Taylor, Case No. SCSL-03-01-T, Judgement, ¶ 19 (May 18, 2012) [hereinafter *Prosecutor v. Taylor*, Trial Judgement]. The SCSL also found that “the Statute was drawn up with an internal armed conflict in mind.” *See* Prosecutor v. Fofana, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion on

towards a broad definition, but retreated from it in the face of ICTY precedent. Thus, in the *Brima* case, the Court asserted the need for a broad definition of the term “civilian population” that would encompass not only those who have taken no active part in hostilities, but those who are no longer doing so, including members of the armed forces who laid down their arms and persons placed *hors de combat* by sickness, wounds, detention, or any other reason.¹¹⁰ Nonetheless, the Court concluded that the *Blaškić* and *Galić* cases required the term to be “narrowly defined,” so as to exclude soldiers *hors de combat* either through surrender, sickness, wounds, detention, or any other cause.¹¹¹

Trial Chamber II in the *Taylor* case narrowed the definition even further. Of note, the Defense and the Prosecution had both agreed to the following definition of civilian:

The terms “civilian” and “civilian population” throughout the Indictment refer to “persons who took no active part in the hostilities, or who were no longer taking an active part in the hostilities, including combatants rendered *hors de combat* by virtue of injury or wounds, capture or surrender.”¹¹²

The Trial Chamber disagreed, finding this definition to be “overly broad and inconsistent with customary international law,” referring to IHL and ICTY case law.¹¹³ Instead, the Trial Chamber suggested that a humanitarian law definition was required to “ensure a distinction in an armed conflict between civilians and combatants no longer participating in hostilities.”¹¹⁴ The Chamber concluded that “this distinction is particularly important in a case where the Prosecution alleges that crimes against humanity were committed in a situation of armed conflict.”¹¹⁵

Lack of Jurisdiction Materiae: Nature of the Armed Conflict, ¶ 18 (May 25, 2004). The decision held that the provisions of Common Article 3 and AP II would apply regardless of whether the conflict was international or non-international in nature, as they are “mandatory minimum rules.” *Id.* ¶¶ 19, 26, 30.

¹¹⁰ Prosecutor v. Brima et al. (The AFRC Case), Case No. SCSL-04-16-T, Judgment, ¶ 216 (June 20, 2007).

¹¹¹ *Id.* ¶ 219.

¹¹² *Prosecutor v. Taylor*, Trial Judgement, *supra* note 109, ¶ 508.

¹¹³ *Id.*

¹¹⁴ *Id.* ¶ 510.

¹¹⁵ *Id.*

2. *Broader but Less Influential: The Jurisprudence of the Rwanda Tribunal and the Extraordinary Chambers in the Courts of Cambodia*

a. *The International Criminal Tribunal for Rwanda*

The Yugoslavia and Rwanda Tribunals share a common Appeals Chamber but different statutory definitions of crimes against humanity. Article 3 of the ICTR Statute¹¹⁶ has no armed conflict requirement, and thus more closely resembles customary international law—and the Rome Statute—than the parallel provision at the ICTY.¹¹⁷ The Rwanda Tribunal immediately recognized that the meaning of the term “civilian population” might be different in a NIAC because it is regulated by Common Article 3 and Protocol II rather than Protocol I.¹¹⁸ Thus in *Prosecutor v. Jean-Paul Akayesu*, the Trial Chamber observed:

Members of the civilian population are people who are not taking any active part in the hostilities, including members of the armed forces who laid down their arms and those persons placed *hors de combat* by sickness, wounds, detention or any other cause. Where there are certain individuals within the civilian population who do not come within the definition of civilians, this does not deprive the population of its civilian character.¹¹⁹

In a footnote, the Chamber stated that this definition drew upon Common Article 3 of the Geneva Conventions.¹²⁰ This definition has been routinely cited at the ICTR,¹²¹ and was picked up during the Preparatory Commission discussions as evidenced by its inclusion in Switzerland’s Commentary on Article 7,¹²² discussed in Part II(C)(3).

¹¹⁶ Statute for the International Criminal Tribunal for Rwanda art. 3, S.C. Res. 99, U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute].

¹¹⁷ See ICTY Statute, *supra* note 68, art. 5.

¹¹⁸ Third Geneva Convention, *supra* note 66, art. 3.

¹¹⁹ *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement, ¶ 582 (Sept. 2, 1998) [hereinafter *Prosecutor v. Akayesu*, Trial Judgement] (internal citations omitted).

¹²⁰ *Id.* ¶ 582 n.146.

¹²¹ See, e.g., *Prosecutor v. Bisengimana*, Case No. ICTR 00-60-T, Judgement and Sentence, ¶ 48, (Apr. 13, 2006) [hereinafter *Prosecutor v. Bisengimana*, Trial Judgement]; *Prosecutor v. Seromba*, Case No. ICTR 2001-66-I, Judgement, ¶ 358 (Dec. 13, 2006); *Prosecutor v. Muvunyi*, Case No. ICTR 2000-55A-T, Judgement and Sentence, ¶ 513 (Sept. 12, 2006) [hereinafter *Prosecutor v. Muvunyi*, Trial Judgement]; *Prosecutor v. Kamuhanda*, Case No. ICTR 99-54A-T, Judgement and Sentence, ¶ 667 (Jan. 22, 2003); *Prosecutor v. Kajelijeli*, Case No. ICTR 98-44A-T, Judgment and Sentence, ¶¶ 873–74 (Dec. 1, 2003); *Prosecutor v. Musema*, Case No. ICTR 96-13-T, Judgement and Sentence, ¶ 207 (Jan. 27, 2000); *Prosecutor v. Rutaganda*, Case No. ICTR 96-3-T, Judgement and Sentence, ¶ 72 (Dec. 6, 1999) [hereinafter *Prosecutor v. Rutaganda*, Trial Judgement].

¹²² See Switzerland Commentary, *supra* note 73.

Like the ICTY, and despite its formal inapplicability to non-international armed conflict, the ICTR, in its jurisprudence, also relies upon Protocol I in defining “civilian population” although it generally does so in connection with exploring the war crimes provisions of the ICTR Statute, *not* the crimes against humanity provisions of the text.

Thus the *Kayishema* case referenced Article 50 of AP I and concluded that civilians are those who do not fall into the “categories of persons referred to in Articles 4(A)(1), (2), (3), and (6) of the Third Convention and Article 43 of [Protocol I],” all of whom are types of “combatants.”¹²³ This holding was incorporated into subsequent cases like *Rutaganda*, which, relying upon Common Article 3 and Additional Protocol II, defined the civilian population for purposes of crimes against humanity as “people who were not taking any active part in the hostilities.”¹²⁴ Even when discussing the meaning of “civilian” in the context of war crimes, the *Rutaganda* court found that Common Article 3(1) affords protection to “persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those placed *hors de combat*,” language picked up in Article 4 of Additional Protocol II.¹²⁵

The Trial Chamber stated that to take a “direct” part in hostilities “means acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces,” and went on to distinguish “civilians” not from “combatants” or “fighters,” but from “perpetrators.”¹²⁶ It reasoned, “there is no concise definition of ‘civilian’ in the Protocols,”¹²⁷ so, “a definition has evolved through a process of elimination, whereby the civilian population is made up of persons who are not combatants or persons placed *hors de combat*, in other words, who are not members of the armed forces.”¹²⁸ The Chamber concluded that “a ‘civilian’ is anyone who falls outside the category of ‘perpetrator’”¹²⁹ and with “[t]he class of civilians thus

¹²³ Prosecutor v. Kayishema, Case No. ICTR-95-1-T, Judgement, ¶ 179 (May 21, 1999) [hereinafter *Prosecutor v. Kayishema*, Trial Judgement]. The *Kayishema* case was one of the first cases to explicitly acknowledge the fact that crimes against humanity could be committed in times of “relative peace,” as noted in Part I.B *infra*. *Id.* ¶ 127. The Trial Chamber held “[i]t is generally known that the civilian population is unarmed and is not in any way drawn into the armed conflict.” *Id.* ¶ 181.

¹²⁴ *Prosecutor v. Rutaganda*, Trial Judgement, *supra* note 121, ¶ 72.

¹²⁵ *Id.* ¶ 99 (emphasis added).

¹²⁶ *Id.* ¶ 100–01.

¹²⁷ *Id.* ¶ 100.

¹²⁸ *Id.* (emphasis added).

¹²⁹ *Id.* ¶ 101.

broadly defined, it will be a matter of evidence on a case-by-case basis to determine whether a victim has the status of civilian.”¹³⁰

Several ICTR cases cite the holding of the *Blaškić* Trial Chamber Judgment 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.”¹³¹ This is so even after the case was partially overturned on appeal,¹³² with some ICTR Trial Chambers continuing to opine that “the specific situation of the victim at the moment the crimes were committed, rather than his status”¹³³ is the relevant test.¹³⁴

b. *The Extraordinary Chambers in the Courts of Cambodia*

The ECCC has generally taken the view that the crimes committed by the Khmer Rouge took place during or were associated with an international armed conflict.¹³⁵ However, like the ICTR Statute, Article 5 (on crimes against humanity) of the ECCC Law does not require a nexus to armed conflict.¹³⁶ Thus it is perhaps unsurprising that the ECCC takes a broader approach than the ICTY on this question, perhaps even more so because there was not the kind of connection between the international nature of the armed conflict and the

¹³⁰ *Id.*

¹³¹ *Prosecutor v. Blaškić*, Trial Judgement, *supra* note 75, ¶ 214; *see, e.g., Prosecutor v. Bisengimana*, Trial Judgement, *supra* note 121, ¶ 49.

¹³² *See Prosecutor v. Blaškić*, Appeals Judgement, *supra* note 41, ¶ 115.

¹³³ *Prosecutor v. Muvunyi*, Trial Judgement, *supra* note 121, ¶ 513 (citing *Prosecutor v. Ignace Bagilishema*, Case No. ICTR-95-1A-T, Judgment, ¶ 79 (June 7, 2001) (citing *Prosecutor v. Blaškić*, Trial Judgement, *supra* note 75, ¶ 214). The Trial Chamber found Muvunyi not guilty of the crimes against humanity charge of rape. *Prosecutor v. Muvunyi*, Trial Judgement, *supra* note 121, ¶ 531. The conviction for crimes against humanity for other inhumane acts was overturned on appeal. *Prosecutor v. Muvunyi*, Case No. ICTR-2000-55A-A, Judgment, ¶ 158 (Aug. 29, 2008). Neither of those decisions addressed this broad understanding of the civilian population requirement.

¹³⁴ Like *Martić*, the ICTR held in *Ndindiliyimana* that a person “*hors de combat* may be the victim of an act amounting to a crime against humanity, provided that all other necessary conditions are met, in particular that the act in question is part of a widespread or systematic attack against any civilian population.” *Prosecutor v. Ndindiliyimana*, Case No. ICTR-00-56-T, Judgment and Sentence, ¶ 2095, n.3804 (May 17, 2011). These findings were not disturbed on appeal, although the Appeals Chamber did reverse several of the convictions entered by the Trial Chamber. *See Prosecutor v. Ndindiliyimana*, Case No. ICTR-00-56-A, Judgment, ¶ 449 (Feb. 11, 2014).

¹³⁵ *Case 001*, Judgment, *supra* note 59, ¶ 322.

¹³⁶ Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea art. 5, ECCC Doc. No. NS/RKM/1004/006), (as amended 27 Oct. 2004), http://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf. The chapeau of Article 5 provides: “Crimes against humanity, which have no statute of limitations, are any acts committed as part of a widespread or systematic attack directed against any civilian population, on national, political, ethnical, racial or religious grounds . . .” *Id.*

atrocities committed in Cambodia under the Khmer Rouge regime,¹³⁷ whereas the crimes against humanity allegations before the ICTY were explicitly linked to the excesses of war.¹³⁸

The Trial Chamber in the Court's first case, *Kaing Guek Eav alias Duch* (*Duch*), relied on Article 50 of AP I and Article 4(A) of the Third Geneva Convention to define civilians as "all persons who are not members of the armed forces or otherwise recognized as combatants,"¹³⁹ and differentiated them from those who cannot claim civilian status as "members of the armed forces and other combatants (militias, volunteer corps and members of organized resistance groups)."¹⁴⁰ The *Duch* case drew heavily from ICTY jurisprudence to define the term "civilian population,"¹⁴¹ and found that so long as the civilian population is the primary object of the attack, where some combatants are affected, or indiscriminate acts target military and civilian objects equally, these acts may also constitute crimes against humanity.¹⁴² The Chamber determined that the attacks needed only to be primarily directed at civilians, who were those not taking an active part in the conflict, but victims could include non-civilians as well.¹⁴³ The Trial Chamber found that crimes directed against the Cambodian population did not differentiate between military and civilian personnel, and that because the acts were "all-encompassing, engulfing both civilian and military elements without distinction," the attacks were directed against a civilian population.¹⁴⁴

Of particular interest, the Trial Chamber decided that members of the military forces interrogated and executed by the Khmer Rouge could be considered the victims of crimes against humanity¹⁴⁵ and concluded that crimes committed against former Revolutionary Army of Kampuchea (RAK) soldiers

¹³⁷ See *Case 001*, Judgement, *supra* note 59, ¶ 322. This was the first case before the Extraordinary Chambers. *Id.* The Trial Chamber noted that the attack on the Cambodian population occurred in parallel with an international armed conflict, but was primarily targeting Cambodian nationals. *Id.* The Trial Chamber found that the attacks were perpetrated "[a]gainst the backdrop of an international armed conflict," and that armed hostilities existed between Cambodia and Vietnam from 17 April 1975 through 6 January 1979. *Id.* ¶ 320, 402. These findings were implicitly affirmed on appeal. See Prosecutor v. Kaing Guek Eav alias Duch, Case No. 001/18-07-2007/ECCC/SC, Appeal Judgement (Feb. 3, 2012) [hereinafter *Case 001*, Appeal Judgement] (taking the failure to address these findings as implicit affirmation).

¹³⁸ *Case 001*, Judgement, *supra* note 59, ¶ 420.

¹³⁹ *Id.* ¶ 304.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* See generally *id.* ¶¶ 304–12.

¹⁴³ *Id.* ¶¶ 303–05.

¹⁴⁴ *Id.* ¶ 325.

¹⁴⁵ See *id.*

at S-21 constituted crimes against humanity.¹⁴⁶ Noting that the detainees at S-21 were drawn from all parts of the country and all sectors of Cambodian society,¹⁴⁷ the judgment found that they were targeted because they were considered “enemies of the regime,” a category that included foreigners, civilians, members of the Lol Nun government, and RAK military personnel.¹⁴⁸ Thus, the Trial Chamber concluded that the crimes were aimed at a civilian population, which included former RAK soldiers,¹⁴⁹ findings that were affirmed on appeal.¹⁵⁰

In Case 002 before the ECCC, *Nuon Chea and Khieu Samphan*, the Trial Chamber addressed the situation of Khmer Republic soldiers who had fought against the Khmer Rouge until April 17, 1975 when the Khmer Republic forces surrendered.¹⁵¹ The Court found that the Khmer Rouge had committed a widespread and systematic attack against the civilian population of Cambodia, and that after their surrender in 1975, the “Khmer Republic soldiers not taking a direct part in hostilities” were “civilians or, at minimum, *hors de combat*, thereby enjoying the same protection as civilians.”¹⁵²

The Trial Chamber found that “the civilian population included all persons who were not members of the armed forces or otherwise recognised as combatants.”¹⁵³ Somewhat confusingly, the Trial Chamber noted that “[a] member of an armed organization is not accorded civilian status by reason of the fact that he or she is not armed or in combat at the time of the commission of the crimes,” suggesting that formal status, as opposed to the person’s actual situation, is the relevant test.¹⁵⁴ This led the Chamber to conclude that “soldiers *hors de combat* do not qualify as ‘civilians’ for the purposes of Article 5.”¹⁵⁵ This did not prevent them from becoming the victims of a crime against humanity as “there is no requirement nor is it an element of crimes against

¹⁴⁶ *Id.* ¶ 322. Ex-Khmer Rouge officials and others considered enemies were executed by military personnel answering to zone secretaries acting on orders from the Standing Committee in Phnom Penh. Prosecutor v. Nuon Chea, et al., Case No. 002/19-09-2007-ECCC-OCIJ, Closing Order, ¶¶ 146–49 (Sept. 15, 2010). The soldiers of RAK Division 502 were executed, interrogated, subjected to forced labor, or persecuted in a series of purges—or any combination thereof—from 1975–1979. *Id.*

¹⁴⁷ *Case 001*, Judgement, *supra* note 59, ¶ 322.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* ¶ 324.

¹⁵⁰ *See Case 001*, Appeal Judgement, *supra* note 137.

¹⁵¹ *Case 002*, Judgement, *supra* note 89, ¶ 9–11.

¹⁵² *Id.* ¶ 194.

¹⁵³ *Id.* ¶ 185.

¹⁵⁴ *Id.* ¶ 186.

¹⁵⁵ *Id.*

humanity that the *victims* of the underlying crimes be civilians.”¹⁵⁶ The Chamber added that as a general matter, “the armed law enforcement agencies of a State are considered to be civilians for purposes of international humanitarian law.”¹⁵⁷

B. *The Civilian Population Requirement in Peacetime*

The ICTY and the ICTR have, on occasion, briefly considered the question of the commission of crimes against humanity in the absence of armed conflict.¹⁵⁸ In the *Kayishema* case, the ICTR noted that the armed conflict had not yet reached the *Prefecture* in which genocide and crimes against humanity were taking place.¹⁵⁹ The Chamber mused:

Traditionally, legal definitions of ‘civilian’ or ‘civilian population’ have been discussed within the context of armed conflict. However, under the Statute, crimes against humanity may be committed inside or outside the context of an armed conflict. Therefore, the term civilian must be understood within the context of war as well as relative peace. The Trial Chamber considers 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 force. Non-civilians would include, for example, members of the FAR, the RPF, the police and the Gendarmerie Nationale.¹⁶⁰

The Chamber advocated for a broad definition of “civilian,” although it nuanced this by listing those who do not qualify as civilians, including those who participated as members of the “armed forces” during the Rwandan genocide.¹⁶¹

Finally, in one of its most recent cases, *Prosecutor v. Šainović*, the ICTY noted that the concept of an “attack” for purposes of crimes against humanity is not the same as it is for war crimes.¹⁶² Rather, it found:

The concept of an “attack” is not identical to that of an “armed conflict”, seeing as an attack can precede, outlast, or continue during an armed conflict, but need not be a part of it. “Attack in the context

¹⁵⁶ *Id.* ¶ 187.

¹⁵⁷ *Id.* ¶ 186.

¹⁵⁸ See *Prosecutor v. Kayishema*, Trial Judgement, *supra* note 123, ¶ 621–23.

¹⁵⁹ *Id.* ¶ 125–26.

¹⁶⁰ *Id.* ¶ 127 (emphasis in original).

¹⁶¹ *Id.* It may also be of importance that “[a]s Prefect, Kayishema was a State actor.” *Id.* ¶ 126. As such, Kayishema falls into the category of non-civilian identified by the Trial Chamber. *Id.* ¶ 127.

¹⁶² *Prosecutor v. Šainović*, Case No. IT-05-87-T, Judgement, ¶ 144 (Trial Chamber Feb. 26, 2009).

of a crime against humanity can be defined as a course of conduct involving the commission of acts of violence. It is not limited to the use of armed force; it encompasses any mistreatment of the civilian population.”¹⁶³

The Trial Chamber endorsed the view that “[i]n order to give full effect to the object and purpose of customary international law prohibiting crimes against humanity, it is necessary to adopt a broad definition of the key terms that extends as much protection as possible.”¹⁶⁴ This view appears to be a return to the original position of the Tribunal articulated in the *Tadić* case many years prior.¹⁶⁵

II. THE INTERPRETATION OF THE CIVILIAN POPULATION REQUIREMENT BY THE ICC

A. *The Early Jurisprudence of the Court*

The ICC’s Chambers have noted that neither the Statute itself, nor the Elements of Crimes, defines the term “civilian population.”¹⁶⁶ Following ICTY precedent, Chambers have relied upon the definition in Article 50 of AP I as the appropriate standard,¹⁶⁷ even though none of the cases have involved a situation involving international armed conflict.

In the *Bemba* case, Pre-Trial Chamber I observed that “the term ‘civilians’ or ‘civilian population’ is not defined in the Statute.”¹⁶⁸ However, 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.”¹⁶⁹ This formulation has been cited with approval in other Pre-Trial Chamber decisions, such as the Confirmation of Charges decision in *Ntaganda*.¹⁷⁰

¹⁶³ *Id.* (footnote omitted) (quoting Prosecutor v. Blagojević & Jokić, Case No. IT-02-60-T, Judgement, ¶ 543 (Trial Chamber I Jan. 17, 2005)).

¹⁶⁴ *Id.* ¶ 147.

¹⁶⁵ See *Prosecutor v. Tadić*, Trial Judgement, *supra* note 69; *supra* notes 69–72 and accompanying text.

¹⁶⁶ Prosecutor v. Bemba, ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b), ¶ 76 (June 15, 2009) [hereinafter *Bemba*, Confirmation of Charges].

¹⁶⁷ *Id.* ¶ 78; see also *Case 001*, Judgement, *supra* note 59, ¶ 322.

¹⁶⁸ *Bemba*, Confirmation of Charges, *supra* note 166, ¶ 78.

¹⁶⁹ *Id.* ¶ 78 (quoting *Prosecutor v. Kunarac*, Trial Judgement, *supra* note 74, ¶ 425) (omission in original).

¹⁷⁰ Prosecutor v. Bosco Ntaganda, ICC-01/04-02/06-309, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, 65 n.22 (Pre-Trial Chamber II June 9, 2014).

Likewise, in its decision confirming the charges against Germain Katanga, Pre-Trial Chamber II found that a civilian is:

“any person who does not belong to any 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 civilian, that person shall be considered to be a civilian.” For the purpose of this Decision, whenever the Chamber refers to “civilians”, “civilian population”, “protected persons”, “protected civilians”, or “persons protected” under the Geneva Conventions, it considers that this also encompasses the relevant provisions of the AP I.¹⁷¹

Trial Chamber II recently concurred in its judgment convicting Katanga of crimes against humanity, explicitly endorsing the definition of civilian in AP I.¹⁷² A similar position was taken by Trial Chamber III in the *Bemba* case handed down early in 2016, when it both endorsed the AP I definition of “civilian population” and stated that it considered the definition to be “customary in nature.”¹⁷³

The Pre-Trial Chambers have even referred to the laws of war in defining the elements of crimes against humanity in peacetime—in the Kenya situation, for example—citing an assortment of humanitarian law provisions to support the assertion that that “[t]he term ‘civilian population’ refers to persons who are civilians, as opposed to members of armed forces and other legitimate combatants.”¹⁷⁴ Upon close reading, however, the opinions, which contain little substantive analysis, suggest that the Pre-Trial Chambers may not have considered the issues involved in depth as they inserted language from ICTY and ICTR cases (and earlier ICC cases) into their decisions. This is also evidenced by the judgments in *Katanga*¹⁷⁵ and *Bemba*,¹⁷⁶ as well as earlier

¹⁷¹ Prosecutor v. Germain Katanga, ICC-01/04-01/07-717, Decision on the Confirmation of Charges, ¶ 266 n.366 (Pre-Trial Chamber I Sept. 30, 2008) (quoting Article 50 of AP I).

¹⁷² Prosecutor v. Germain Katanga, ICC-01/04-01/07-3436-tENG, Judgment Pursuant to Article 74 of the Statute, ¶ 1102 (Trial Chamber II Mar. 7, 2014) [hereinafter *Prosecutor v. Katanga*, Trial Judgment].

¹⁷³ *Prosecutor v. Bemba*, Trial Judgment, *supra* note 89, ¶ 152.

¹⁷⁴ Situation in the Republic of Kenya, ICC-01/09-19, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ¶ 82 (Pre-Trial Chamber II Mar. 31, 2010).

¹⁷⁵ *Prosecutor v. Katanga*, Trial Judgment, *supra* note 172.

¹⁷⁶ *Prosecutor v. Bemba*, Trial Judgment, *supra* note 89. The Trial Chamber relied on its earlier decision in *Katanga* as well as the *Blaškić*, *Kordić*, and *Mrkšić* Appeal Judgments at the ICTY and the *Case 002* Trial Judgment at the ECCC in finding that the AP I definition of “civilian population” was customary international law. *Id.* ¶ 152, n.342.

Confirmation decisions of the Court.¹⁷⁷ Pre-Trial Chamber II declined to discuss the contextual elements of crimes against humanity in-depth in the *Kenyatta* case, instead finding, without analysis, that “they are well settled in the jurisprudence of the Court.”¹⁷⁸

If this jurisprudence is indeed “settled,” it would be unfortunate. The Court has not yet had the opportunity to grapple neither with the complexities of the definition nor with the important differences between the ICC Statute and the Statutes of the *ad hoc* tribunals regarding crimes against humanity, because none of the cases have really squarely presented the issue. Given, however, that these issues are likely to surface in future cases, consideration of this question is particularly timely at this juncture. Moreover, it is interesting that the new ICRC commentary appears to be nudging customary IHL towards greater and more comprehensive protection from the guarantees of Common Article 3 from inhumane treatment for all individuals, even members of a party’s armed forces. It would be unfortunate if, just as IHL is potentially moving towards broader protections for members of the armed forces, the ICC, using case law developed under earlier and more formal interpretations of the Geneva Conventions and the Protocols thereto, was pushing crimes against humanity law (erroneously, in the view of this author) to comply with an IHL paradigm that may ultimately be abandoned in the future.¹⁷⁹

On a final note, it is interesting that to the extent that the Court’s Pre-Trial Chambers have been presented with or considered the issue in more depth, they have employed the analysis suggested here. Thus, in the *Abu Garda* case, in considering the status of peacekeepers, Pre-Trial Chamber I followed the SCSL and held that peacekeepers are entitled to the protections enjoyed by civilians, except when they directly participate in hostilities or combat related activities.¹⁸⁰ This suggests that a functional, as opposed to a formal, status-based approach may be acceptable to Chambers, at least in certain circumstances.¹⁸¹

¹⁷⁷ See Prosecutor v. Muthaura, Kenyatta and Ali, ICC-01/09-02/11-381-Red, Public Redacted Version—Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ¶ 109 (Pre-Trial Chamber II Jan. 23, 2012).

¹⁷⁸ *Id.* The Pre-Trial Chamber did add that “any civilian population” could refer to groups distinguishable by their (perceived) political affiliation, as well as their nationality or ethnicity. *Id.* ¶ 110.

¹⁷⁹ As noted earlier, it is beyond the scope of this Article to engage fully with the current fluidity in IHL. The new ICRC Commentary, while highly authoritative, has not yet been relied upon in case law due to its recent vintage and defendants will undoubtedly be challenging its application before the ICC.

¹⁸⁰ Prosecutor v. Abu Garda, ICC-02/05-02/09, Public Redacted Version—Decision on the Confirmation of Charges, ¶ 71 (Pre-Trial Chamber I Feb. 8, 2010) [hereinafter *Prosecutor v. Abu Garda*, Decision].

¹⁸¹ *Id.* Another possibility is that they may be clarifying the *status* of the peacekeepers based upon functional realities, since peacekeepers do not, *per se*, fall into the category of “combatants.”

B. *Seven Canons of ICC Treaty Interpretation*

Interpreting the ICC Statute partakes as much of art as of science.¹⁸² In prior writings, I have suggested a methodology applying seven canons in addressing interpretative questions relating to the substantive law of the Statute based upon Articles 21 and 22 of the Statute, which are briefly summarized as follows:¹⁸³ First, a plain reading of the text of the ICC Statute is required (Article 21(1)(a)), using ordinary principles of treaty interpretation such as good faith and consideration of context;¹⁸⁴ second, the reading must be faithful to the object and purpose of the ICC Statute and consistent with the legality principle embodied in Article 22(2);¹⁸⁵ third, where the meaning of a particular provision remains ambiguous or obscure or leads to a result that is manifestly absurd or unreasonable, the *travaux préparatoires* may be consulted;¹⁸⁶ fourth, if gaps remain in the interpretation of a particular provision, the Court should look to Article 21(1)(b) sources of law, which include “applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict,” and, failing that, Article 21(1)(c) sources that are “general principles of law derived by the Court from national laws of legal systems of the world. . . .”¹⁸⁷ fifth, all provisions should be construed with the objective of protecting the rights of the accused and ensuring that the application of the Statute is consistent with internationally recognized human rights (Article 21(3)).¹⁸⁸

In addition, I have suggested two additional canons that should guide any consideration of open questions in the ICC Statute: The interpretation adopted should enhance judicial efficiency and the effectiveness of the ICC trial system, without compromising the values expressed in Canon 5 above (Canon 6);¹⁸⁹ and the interpretation of a particular provision should enhance the expressive and normative function of international criminal law by rendering it transparent and comprehensible and reduce opportunities for fragmentation (Canon 7).¹⁹⁰ As we shall see, using this methodology (which is largely required by the ICC Statute

¹⁸² See generally Sadat & Jolly, *supra* note 62.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*; Vienna Convention on the Law of Treaties art. 32, *opened for signature* May 23, 1969, 1115 U.N.T.S. 331 (entered into force Jan. 27, 1980).

¹⁸⁷ Sadat & Jolly, *supra* note 62.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

itself as well as general international law), assists considerably in finding the meaning of Article 7's reference to "civilian population."¹⁹¹ Although Article 21 establishes an interpretative hierarchy,¹⁹² it is important to view these provisions and the canons articulated here in a holistic way rather than in a strictly linear matter, as they inform each other. Thus, as others have written of Article 38(1) of the Statute of the International Court of Justice, "they are listed in the order that they would normally present themselves to the mind of an international judge, and in this way form a practical methodology."¹⁹³

C. *Interpreting Article 7 of the Rome Statute*

I. *A Textual and Contextual Analysis of Article 7 (Canon 1)*

The inquiry into the meaning of the term "civilian population" in Article 7(1)¹⁹⁴ begins with the text of the Statute and the Elements of Crimes, looking for plain meaning in context, and consistent with the object and purpose of the Rome Statute. Although it is not typically useful to look for dictionary definitions of terms of art, the ICC has done so in the past,¹⁹⁵ as have other courts.¹⁹⁶ Thus, I do so here for the sake of completeness, although the effort is not particularly helpful.

The Oxford English Dictionary refers to a civilian as "a person who is not professionally employed in the armed forces; a non-military person."¹⁹⁷ Merriam-Webster and other American references suggest that civilians are "person(s) . . . not on active duty with a military, naval, police, or fire fighting

¹⁹¹ See generally Rome Statute, *supra* note 13, art. 7.

¹⁹² See generally *id.* art. 21.

¹⁹³ The Permanent Court of International Justice [PCIJ], Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee: June 16th—July 24th 1920 (with Annexes)*, at 333 (2006); see also, Sadat & Jolly, *supra* note 62, at 764.

¹⁹⁴ This Article does not address the "population" element as this part of the locution is relatively uncontroversial. See Rome Statute, *supra* note 13, art. 7(1).

¹⁹⁵ Prosecutor v. Matthew Ngudjolo, ICC-01/04-02/12, Decision, ¶ 41 (Trial Chamber II Dec. 16, 2015).

¹⁹⁶ To take just one example, the United States Supreme Court often references the dictionary to define terms in federal statutes or international treaties. See Jeffrey L. Kirchmeier & Samuel A. Thumma, *Scaling the Lexicon Fortress: The United States Supreme Court's Use of Dictionaries in the Twenty-First Century*, 94 MARQ. L. REV. 77, 85 (2010) (noting that Supreme Court justices have referenced dictionary definitions to define 295 words or phrases in 225 opinions between 2000 and 2010).

¹⁹⁷ *Civilian*, OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/33577?redirectedFrom=civilian&> (last visited Jan. 8, 2017).

organization.”¹⁹⁸ If one consults a specialized dictionary, the combined term is defined with reference to humanitarian law, with the definition in AP I most commonly referred to.¹⁹⁹

An immediate question arises whether police and firefighters are excluded or included. The early jurisprudence of the ICTR addressed this by using a negative definition, stating that “a civilian is anyone who falls outside the category of a perpetrator” as defined “as a matter of evidence on a case-by-case basis.”²⁰⁰ Although the ICTY Appeals Chamber departed from this perspective in *Blaškić*, it seems more appropriate to look at the function of a particular group in determining whether its members are part of the population under attack or potential perpetrators. The ICRC survey of customary international law defines “civilians” as individuals who are “not members of the armed forces,”²⁰¹ and notes that “[t]he civilian population comprises all persons who are civilians.”²⁰² This tautological definition evolved to distinguish those who could be lawfully targeted by hostile forces from those who could not.²⁰³ The combination of specialized and non-specialized texts suggests that in international armed conflict, a “civilian” is everyone not a member of the armed forces on active duty; in non-international armed conflict the text of Protocol II refers to those persons who “do not take a direct part in hostilities,”²⁰⁴ or, as the Rwanda Tribunal has found, those who are not “fighters” or perpetrators of the crimes alleged.²⁰⁵

However, what about in peacetime? Is it sensible to exclude members of the armed forces from the class of individuals who are potential victims of crimes against humanity? Moreover, even during armed conflict, what about those *hors de combat* who are no longer able to fight? What about U.N. Peacekeepers, military contractors, or civilian police forces? These are not merely hypothetical questions but have come up at the *ad hoc* international criminal tribunals and at

¹⁹⁸ *Civilian*, DICTIONARY.COM, <http://dictionary.reference.com/browse/civilian> (last visited Jan. 8, 2017); see also *Civilian*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/civilian> (last visited Jan. 8, 2017) (defining “civilian” as “a person who is not a member of the military or of a police or firefighting force”).

¹⁹⁹ See, e.g., CLIVE PARRY & JOHN P. GRANT, ENCYCLOPEDIA OF INTERNATIONAL LAW 82 (John P. Grant & J. Craig Barker eds., 2d ed. 2004). A brief survey of French sources revealed no significant differences from English language sources, so they are not included here.

²⁰⁰ *Prosecutor v. Rutaganda*, Trial Judgement, *supra* note 121, ¶ 71.

²⁰¹ *Customary IHL: Rule 5. Definition of Civilians*, INT’L COMM. RED CROSS [ICRC], https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter1_rule5 (last visited Jan. 12, 2017).

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ Additional Protocol II, *supra* note 65, art. 4, ¶ 1.

²⁰⁵ *Prosecutor v. Kayishema*, Trial Judgement, *supra* note 123, ¶ 127.

the ICC. The Framers of the Rome Statute did not consider these questions in depth, either during the elaboration of the Rome Statute itself, or in formulating the Elements of Crimes, leaving open this provision for the judges of the ICC to interpret (keeping in mind the legality principle).²⁰⁶ Given then that the “plain meaning” of the text is not entirely obvious,²⁰⁷ one turns to the object and purpose of the ICC Statute and Article 7 more generally in understanding the notion of civilian population in context.

2. *Object and Purpose of the ICC Statute (Canon 2)*

The term “civilian population” first appeared in the text of Article 6(c) of the Nuremberg Charter on crimes against humanity, which criminalizes “murder . . . and other inhumane acts against any civilian population.”²⁰⁸ However, it was not defined.²⁰⁹ In early drafts, what would become crimes against humanity was referred to as “atrocities and persecutions and deportations on political, racial or religious grounds.”²¹⁰ It was not until July 31, 1945 that the term “crimes against humanity” appeared in the draft.²¹¹ A note by Robert Jackson indicated that the intention was to make sure that “we are reaching persecution, etc., of Jews and others in Germany as well as outside of it, and before as well as after commencement of the war.”²¹²

The Nuremberg Tribunal did not elaborate upon the meaning of civilian population, but scholars writing contemporaneously have noted the importance of the word ‘any’ modifying civilian, which permitted the Tribunal to reach not only crimes committed in Axis-occupied Europe (which would have been reachable as war crimes for the most part), but crimes committed on Axis territory.²¹³ According to Egon Schwelb—one of the leading authors published on the question at the time—“the term ‘crime against humanity’ is restricted to

²⁰⁶ See Robinson, *supra* note 47, at 78.

²⁰⁷ See Rome Statute, *supra* note 13, art. 7.

²⁰⁸ Charter of the International Military Tribunal art. 6(c), *adopted* Aug. 8, 1945, 82 U.N.T.S. 280, *reprinted in* 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 10, 11 (1947).

²⁰⁹ *Id.*

²¹⁰ Revised Draft of Agreement and Memorandum Submitted by American Delegation, June 30, 1945, *reprinted in* REPORT OF ROBERT H. JACKSON, U.S. REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS, at 119, 121 (U.S. Dep’t. of State, 1949).

²¹¹ Revised Definition of “Crimes,” Submitted by American Delegation, July 31, 1945, *reprinted in* REPORT OF ROBERT H. JACKSON, U.S. REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS, at 395 (U.S. Dep’t. of State, 1949) (the London Conference convened on June 26, and the Charter was signed on August 8, 1945). *Id.*

²¹² *Id.* at 394.

²¹³ Schwelb, *supra* note 14, at 188–91.

inhumane acts committed against civilian populations as distinguished from members of the armed forces.”²¹⁴ Schwelb postulated, however, that perhaps even the armed forces could be subject to persecutions.²¹⁵ Others have noted the importance of the word “population,” which suggests a large-scale as opposed to an isolated attack.²¹⁶

The *object* then, was to reach cases in which the laws of war did not apply; the *purpose* was to provide protection for individuals from attack in the form of widespread or systematic human rights abuses perpetrated by States (and later, by organizations),²¹⁷ as well as to condemn the gravity and perniciousness of the harm. During armed conflict, Article 7 of the ICC Statute expands the protections offered by the laws of war by addressing acts not specifically covered by those texts (such as persecution) and by extending their application to acts against a State’s (or by analogy, an organization’s) own citizens or members.²¹⁸ During peacetime, Article 7 has perhaps its most revolutionary application: It renders criminal widespread or systematic attacks by a State or organization that involve the commission of the crimes in Article 7(1), so long as the attack is carried out pursuant to a policy²¹⁹ and directed against any “population” (not just individuals). The only individuals seemingly excluded would be those actually perpetrating the attacks. In other words, the term “civilian population” appears to be defined in the negative—as the ICTR suggested in *Kayeshima*²²⁰—as everyone not involved in perpetrating the attack.

To the extent that a textual analysis and consideration of object and purpose are inconclusive, we next turn to the *travaux préparatoires* of the Rome Statute.

²¹⁴ *Id.* at 190.

²¹⁵ *Id.* (noting that the Berlin Protocol, which removed the semi-colon from Article 6(c) before the phrase “or persecutions” and replaced it with a comma, may have eliminated this possible interpretation).

²¹⁶ *Id.* at 191.

²¹⁷ See Draft Code of Offences Against the Peace and Security of Mankind art. 18, *reprinted in* Int’l Law Comm’n, Rep. on the Work of Its Forty-Eighth Session, U.N. Doc. A/51/10, ¶ 50 (1996) (including organizations and groups as instigators of crimes against humanity for the first time).

²¹⁸ See Rome Statute, *supra* note 13, art. 7.

²¹⁹ *Id.* Although the policy element was rejected by the *ad hoc* international criminal tribunals, it was specifically added to Article 7 of the Rome Statute.

²²⁰ *Prosecutor v. Kayishema*, Trial Judgement, *supra* note 123, ¶ 127.

3. *The Travaux Préparatoires of the Rome Statute (Canon 3)*

The term “civilian” appears in the Rome Statute twenty times, seven of which are part of the phrase “civilian population,” which appears twice in Article 7.²²¹ It is not defined.

At the beginning of the Rome Conference, the inclusion of a reference to the “civilian population” in the chapeau for crimes against humanity was not a foregone conclusion. The Report of the Preparatory Committee suggested a wide array of options:

For the purpose of the present Statute, 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] [committed on a massive scale] [in armed conflict] [on political, philosophical, racial, ethnic or religious grounds or any other arbitrarily defined grounds].²²²

Discussions in the Preparatory Committee between March 25, 1996 and April 12, 1996 reveal divisions between delegations as to whether a civilian population criterion should be included in the Rome Statute.²²³ Many delegations favored the criterion as it emphasized that “crimes against humanity could be committed against *any* civilian population.”²²⁴ Others, however, thought the phrase “attack on a civilian population” “was vague, unnecessary and confusing since . . . the term ‘civilian’ was often used in international humanitarian law and was unnecessary in the current context.”²²⁵ The phrase was retained “to avoid significantly changing the existing definition of these crimes.”²²⁶

²²¹ See Rome Statute, *supra* note 13, art. 7.

²²² U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rep. of the Preparatory Comm. on the Establishment of an Int’l Crim. Court, at 20, U.N. Doc. A/Conf.183/2 (Apr. 14, 1998), as reprinted in 3 OFFICIAL RECORDS 5, <http://legal.un.org/icc/rome/proceedings/contents.htm>. Citations to OFFICIAL RECORDS refer to the Official Records of the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court.

²²³ Preparatory Comm. on the Establishment of an Int’l Crim. Court, Summary of the Proceedings of the Preparatory Committee During the Period 25 March–12 April 1996, ¶ 46, U.N. Doc. A/AC.249/1 (May 7, 1996).

²²⁴ *Id.* (emphasis added).

²²⁵ *Id.*

²²⁶ *Id.*

During the Diplomatic Conference, the definition of crimes against humanity was considered in the Committee of the Whole during its third and fourth meetings on June 17, 1998.²²⁷ References to the civilian population criterion in the Summary Records of the Committee of the Whole are scarce and the word “civilian” only appears a few times in connection with crimes against humanity in the summary records of these meetings.²²⁸

In the Committee’s third meeting, Djibouti, Malta, and Slovenia observed that crimes against humanity were “directed against a civilian population but did not otherwise comment on the meaning of the term.”²²⁹ The Republic of Korea remarked that “the reference to ‘civilian’ population [is] confusing” and supported adopting the proposal of the Preparatory Committee without this language.²³⁰ Spain remarked that “[p]rosecution of crimes against humanity should not be confused with international humanitarian law, as otherwise the victims of atrocities might be left unprotected.”²³¹

In the Committee’s fourth meeting, Russia expressed its view that the Statute should require the attack against the civilian population to be “widespread and systematic,” but did not comment directly on the civilian population element.²³² Israel opined that “[t]he concept of crimes against humanity should be differentiated from that of war crimes by specifying that they were crimes committed on a massive scale against any civilian population on political, racial or other grounds to be defined.”²³³

²²⁷ U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Summary Records of the 3d Plenary Meeting of the Committee of the Whole, ¶ 40, U.N. Doc. A/CONF.183/13 (June 17, 1998), *reprinted in* 2 OFFICIAL RECORDS 146 [hereinafter U.N. Diplomatic Conference, Third Plenary Meeting]; U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Summary Records of the 4th Plenary Meeting of the Committee of the Whole, ¶ 5, U.N. Doc. A/CONF.183/13 (June 17, 1998), *reprinted in* 2 OFFICIAL RECORDS 154 [hereinafter U.N. Diplomatic Conference, Fourth Plenary Meeting].

²²⁸ *See generally* U.N. Diplomatic Conference, Third Plenary Meeting, *supra* note 227; U.N. Diplomatic Conference, Fourth Plenary Meeting, *supra* note 227.

²²⁹ *See* U.N. Diplomatic Conference, Third Plenary Meeting, *supra* note 227, ¶¶ 40, 109, 142 (statements of Malta, Slovenia, and Djibouti respectively).

²³⁰ *Id.* ¶ 77 (statement of Korea).

²³¹ *Id.* ¶ 147 (statement of Spain).

²³² U.N. Diplomatic Conference, Fourth Plenary Meeting, *supra* note 227, ¶ 5 (statement of Russia).

²³³ *Id.* ¶ 25 (statement of Israel).

By July 6, 1998, the current text of Article 7 was settled.²³⁴ The definition of crimes against humanity in the July 6 Bureau Discussion Paper on Jurisdiction, Admissibility and Applicable Law is practically identical to the Rome Statute²³⁵ and does not mark it as unsettled or needing further discussion,²³⁶ with the exception of the text regarding crimes of sexual violence and other inhumane acts.²³⁷ In debate, delegates characterized this definition of crimes against humanity as having wide support.²³⁸ This is reflected in the Report of the Committee of the Whole.²³⁹

It therefore seems that whether to include a civilian population requirement in the Rome Statute was solved in working group or informal consultations. As records of these discussions are not available, the formal *travaux* offer little guidance.²⁴⁰

In Roy S. Lee's edited volume on the negotiation of the Rome Statute, Herman von Hebel and Darryl Robinson reported that "several delegations made clear that the term 'attack directed against any civilian population' was . . . a term of art as explained in sub-paragraph 2(a) and in the relevant jurisprudence."²⁴¹ They add:

[S]ome delegations would have preferred to refer to "any population" rather than "any civilian population", [sic] but as part of the

²³⁴ U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Bureau Discussion Paper, at 1, U.N. Doc. A/CONF.183/C.1/L.53 (July 6, 1998), *reprinted in* 3 OFFICIAL RECORDS 204 [hereinafter Bureau Discussion Paper].

²³⁵ The inverted commas in the chapeau of Article 7(1) are missing. *Compare* Bureau Discussion Paper, *supra* note 234, with Rome Statute, *supra* note 13, art. 7(1).

²³⁶ Bureau Discussion Paper, *supra* note 234.

²³⁷ *Id.*; see Rome Statute, *supra* note 13, art. 7(1)(g), (k).

²³⁸ U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Summary Records of the Twenty-Fifth Plenary Meeting of the Committee of the Whole ¶ 4, U.N. Doc. A/CONF.183/13 (July 8, 1998), *reprinted in* 2 OFFICIAL RECORDS 267 (statement of the Netherlands).

²³⁹ This iteration includes the inverted commas. U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rep. of the Committee of the Whole, U.N. Doc. A/CONF.183/8 (July 17, 1998), *reprinted in* 3 OFFICIAL RECORDS 93.

²⁴⁰ Andreas Zimmermann, *The Creation of a Permanent International Criminal Court*, in 2 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 169, 178 (Jochen A. Frowein & Rüdiger Wolfrum, eds. 1998). Whether members of the armed forces could be the victims of crimes against humanity proved to be a difficult issue. *Id.* Part of this question concerns whether the relevant rules of IHL must be referenced as the exclusive source for the legal status of members of the armed forces. However, there was little discussion of it at the Diplomatic Conference. *Id.*

²⁴¹ Herman von Hebel & Darryl Robinson, *Crimes within the Jurisdiction of the Court*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 79, 97 (Roy S. Lee ed., 1999).

compromise the latter term was maintained, as it was consistent with customary international law.²⁴²

Finally, they noted that some delegations pointed out that the term has been judicially interpreted in a “flexible manner, so that combatants do not necessarily lose all protection (making reference to the *Barbie* decision of the French *Cour de Cassation* and the *Tadić Opinion and Judgement*).”²⁴³

Following the adoption of the ICC Statute, delegates addressed the questions left open in Rome as work began on the Elements of Crimes. During the meetings of the Preparatory Commission convened for this purpose,²⁴⁴ Switzerland submitted a commentary concerning Article 7 for the Working Group on the Elements of Crimes that summarized the jurisprudence available to date on crimes against humanity, including discussion of the “civilian population” element.²⁴⁵

The Swiss paper set forth the holdings of the *Akayesu*,²⁴⁶ *Kayishema*,²⁴⁷ and *Tadić*²⁴⁸ cases, discussed *supra* in Parts I(A)(1) and (2), which presumably informed the discussions, although it is not clear that the term “civilian population” was the subject of much debate.

From *Akayesu*, Switzerland quoted the following language:

Members of the civilian population are people who are not taking any active part in the hostilities, including members of the armed forces who laid down their arms and those persons placed hors de combat by sickness, wounds, detention or any other cause. Where there are certain individuals within the civilian population who do not come within the definition of civilians, this does not deprive the population of its civilian character.²⁴⁹

The Commentary observed that “this definition assimilates the definition of ‘civilian’ to the categories of person protected by Common Article 3 of the

²⁴² *Id.* at 97 n.54.

²⁴³ *Id.*

²⁴⁴ See Preparatory Comm’n for the Int’l Criminal Court, Proceedings of the Preparatory Commission at its first, second and third sessions (16-26 February, 26 July-13 August and 29 November-17 December 1999), U.N. Doc. PCNICC/1999/L.5/Rev.1.

²⁴⁵ Switzerland Commentary, *supra* note 73.

²⁴⁶ *Prosecutor v. Akayesu*, Trial Judgement, *supra* note 119.

²⁴⁷ *Prosecutor v. Kayishema*, Trial Judgement, *supra* note 123.

²⁴⁸ *Prosecutor v. Tadić*, Trial Judgement, *supra* note 69.

²⁴⁹ Switzerland Commentary, *supra* note 73 (citing *Prosecutor v. Akayesu*, Trial Judgement, *supra* note 119, ¶ 582) (emphasis omitted).

Geneva Conventions; an assimilation which would not appear to be problematic.”²⁵⁰ It also noted the *Akayesu* Chamber’s reliance upon the earlier *Mrkšić* judgment, which recognized that “crimes against humanity could be committed where the victims were captured members of a resistance movement who at one time had borne arms, who would thus qualify as persons placed hors de combat by detention.”²⁵¹ As Part I noted,²⁵² these findings were later set aside, in part, on appeal. Nonetheless, since the appeals decisions were not yet available during the negotiation of the Elements of Crimes, these cases and their positive mention in the Commentary prepared by Switzerland seem relevant to an understanding of the Elements of Crimes and Article 7 more generally.

The Swiss Commentary also drew language from *Kayishema & Ruzindana* to the effect that “the term civilian must be understood within the context of war as well as relative peace.”²⁵³ Finally, Switzerland noted that Trial Chamber II in *Tadić*²⁵⁴ confirmed that “crimes against humanity can be committed against civilians of the same nationality as the perpetrator or those who are stateless, as well as those of a different nationality.”²⁵⁵ Switzerland also noted the statement by the Trial Chamber that the laws and customs of war only apply to crimes against humanity “by analogy” and not directly.²⁵⁶

Commentators have noted that the Swiss paper was “helpful” to the discussions on the Elements of the chapeau for Article 7.²⁵⁷ However, there is little mention of any discussion of the meaning of “civilian population” either in the leading commentary on the discussion of the Elements,²⁵⁸ or during the discussions of the Preparatory Commission in June 2000 during which the Elements of crimes against humanity were finalized.²⁵⁹

²⁵⁰ *Id.* (quoting *Prosecutor v. Akayesu*, Trial Judgement, *supra* note 119, ¶ 582 n.146).

²⁵¹ *Id.*

²⁵² See *supra* Part I.

²⁵³ Switzerland Commentary, *supra* note 73 (quoting *Prosecutor v. Kayishema*, Trial Judgement, *supra* note 123, ¶ 127). For the full quote see *supra* Part I.B.

²⁵⁴ *Prosecutor v. Tadić*, Trial Judgement, *supra* note 69.

²⁵⁵ Switzerland Commentary, *supra* note 73 (quoting *Prosecutor v. Tadić*, Trial Judgement, *supra* note 69, ¶ 635).

²⁵⁶ *Id.* (quoting *Prosecutor v. Tadić*, Trial Judgement, *supra* note 69, ¶ 639).

²⁵⁷ See Herman von Hebel & Darryl Robinson, *Crimes within the Jurisdiction of the Court*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 79, 97 (Roy S. Lee ed., 1999).

²⁵⁸ Robinson, *supra* note 47, at 78. Preparatory Comm’n for the Int’l Criminal Court, Report of the Preparatory Commission for the International Criminal Court: Part II: Finalized Draft of the Elements of Crimes (13-31 March and 12-30 June 2000), U.N. Doc. PCNICC/2000/1/Add.2 (Nov. 2, 2000).

²⁵⁹ Preparatory Comm’n for the Int’l Criminal Court, Report of the Preparatory Commission for the International Criminal Court: Part II: Finalized Draft of the Elements of Crimes (13-31 March and 12-30 June 2000), U.N. Doc. PCNICC/2000/1/Add.2 (Nov. 2, 2000).

4. *Article 21(1)(b) Sources: Treaties, Customary International Law, and General Principles (Canon 4)*

a. *Treaties*

Article 21(1)(b) of the Rome Statute permits the Court to make reference to “applicable” treaties where appropriate, which it has found include treaties embodying provisions of the laws of war,²⁶⁰ although we have seen Chambers depart from those treaties if they believe the Statute mandates a different result.²⁶¹ This Section therefore explores IHL treaties to consider the meaning of the term “civilian” in that body of law before turning to customary international law in Part II.C.4(b). As there is no international convention on crimes against humanity as of yet,²⁶² this section canvasses treaties on the laws of war for possible insight on the meaning of the term “civilian” in the context of Article 7 of the Rome Statute.

i. *Development of the Law Prior to 1949*

There are few direct references to the term “civilian” in the major texts codifying the laws of war which were elaborated during the twentieth century, and even fewer in the century prior. But the idea of distinguishing individuals who may lawfully be targeted by hostile forces and those protected from direct attack is a thread running through all these codifications of the laws of war.²⁶³ For example, the Lieber Code of 1863 distinguishes between combatants and noncombatants, the latter being “unarmed citizens of the hostile government,”²⁶⁴ and permits only the direct destruction of “armed enemies” suggesting that those who are unarmed may not be directly targeted.²⁶⁵ It also notes that “protection of the inoffensive citizen of the hostile country is the rule,” suggesting

²⁶⁰ These include the Genocide Convention and the two Additional Protocols to the Geneva Conventions. See *Prosecutor v. Bemba*, Trial Judgment, *supra* note 89, ¶ 70 (giving examples of treaties that have been applied by the Court).

²⁶¹ See, e.g., *Prosecutor v. Lubanga*, Trial Judgment, *supra* note 21, ¶¶ 534–36 (Trial Chamber I rejecting the Additional Protocol II requirement that organized armed groups have control over territory).

²⁶² See *supra* note 40 and accompanying text.

²⁶³ See generally Claire Garbett, *The Concept of the Civilian: Legal Recognition, Adjudication and the Trials of International Criminal Justice*, 8 INT’L J.L. CONTEXT 469 (2012).

²⁶⁴ Francis Lieber, General Orders No. 100 (Instructions for the Government of Armies of the United States in the Field), art. 155, ¶ 1 (Apr. 24, 1863), reprinted in DEPARTMENT OF WAR, THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES, SERIES III, VOL. III, H.R. Doc. No. 287, 148–64 (1899).

²⁶⁵ *Id.* art. 15.

(anachronistically and erroneously) that this is the “modern” approach of “The Europeans” as opposed to the practice of “barbarous armies.”²⁶⁶

The Hague Conventions of 1899 and 1907 and the Geneva Conventions of 1864 and 1929 also employed the term “civilian” sparingly (or not at all, in the case of the 1864 Convention), but each treaty incorporates the idea of individuals protected during war time from attack. For example, the Geneva Convention of 1864 addresses the wounded in war and does not use the term “civilian population.”²⁶⁷ Yet, like the Lieber Code, it carved out categories of persons—namely hospital and ambulance personnel, including administrative and transport services and chaplains²⁶⁸—and “inhabitants of the country who bring help to the wounded”—whose neutrality shall be respected or, in the latter case, who “shall remain free.”²⁶⁹ The Hague Convention of 1899 used the term “civilian” in Article 29, which provides that “civilians, carrying out their mission openly, charged with the delivery of dispatches destined either for their own army or for that of the enemy . . . are not considered spies.”²⁷⁰ This language is retained in the 1907 Convention, which confirmed the provisions of its 1899 predecessor.²⁷¹ Like the Third Geneva Convention of 1949,²⁷² the Hague Convention of 1907 provided that the “armed forces of the belligerent parties may consist of combatants and non-combatants,”²⁷³ both of which are entitled to protection if captured. Likewise, individuals who “follow an army without directly belonging to it, such as newspaper correspondents and reporters, sutlers and contractors,”²⁷⁴ are also entitled to POW treatment under certain circumstances. This sets up two categories of individuals governed by the conventions: those in the armed forces, some of whom are “combatants”; and

²⁶⁶ *Id.* art. 24.

²⁶⁷ See Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, adopted Aug. 22, 1864, 22 Stat. 940 (no longer in force).

²⁶⁸ *Id.* art. 2.

²⁶⁹ *Id.* art. 5.

²⁷⁰ Hague Convention (II) with Respect to the Laws and Customs of War of Land and its Annex: Regulation Respecting the Laws and Customs of War on Land art. 29, adopted July 29, 1899, 32 Stat. 1803.

²⁷¹ Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land art. 29, adopted Oct. 18, 1907, 36 Stat. 2277 [hereinafter H.C. IV].

²⁷² The Third Geneva Convention considers persons accompanying or in service to the armed forces to be civilians, but entitled to POW status if captured. Third Geneva Convention, *supra* note 66, arts. 4(A)(4) & (5); see also Hans-Peter Gasser & Knut Dörmann, *Protection of the Civilian Population*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW ¶ 501(4) (Dieter Fleck ed., 3d ed. 2013).

²⁷³ H.C. IV, *supra* note 271.

²⁷⁴ *Id.* art. 13.

those who are not part of the armed forces and are “civilians.”²⁷⁵ Each has rights set out in the treaties codifying the laws of war.

ii. The Geneva Conventions of 1949

The Geneva Conventions of 1949 adopted in the wake of the atrocities committed during World War II updated earlier instruments and added, for the first time, a convention specifically protecting civilians.²⁷⁶ These Conventions expanded the scope of international humanitarian law and extended broad explicit protection to civilians generally, not just specific categories of individuals, such as POWs or hospital workers.²⁷⁷ The Fourth Geneva Convention (on civilians) defines those persons that are protected by the Convention, stating that it covers “persons . . . who . . . find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”²⁷⁸ This proviso contains the important understanding that, as a textual matter, *the convention only applies during armed conflict or occupation.*²⁷⁹ These limits on the formal applicability of the

²⁷⁵ Certain persons are part of the armed forces but are not “combatants,” such as chaplains and medical personnel. See Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, *supra* note 267, art. 2; Third Geneva Convention, *supra* note 66, art. 38.

²⁷⁶ THE GENEVA CONVENTIONS OF 12 AUGUST 1949: COMMENTARY: IV GENEVA CONVENTION: RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR, 3 (Jean S. Pictet ed., Ronald Griffen & C. W. Dumbleton trans., 1958) [hereinafter COMMENTARY: IV GENEVA CONVENTION]. The absence of a specialized treaty protecting civilians was “explained by the fact that it was until quite recently a cardinal principle of the law of war that military operations must be confined to the armed forces and that the civilian population must enjoy complete immunity.” *Id.*; see New Zealand Red Cross, *The Red Cross and Geneva Conventions—60 Years On*, 41 VICT. U. WELLINGTON L. REV. 113, 113 (2010).

²⁷⁷ New Zealand Red Cross, *supra* note 276, at 114. The first three Conventions reference the term “civilian population” sparingly. In the First Geneva Convention “civilian population” is used only once, in Article 18, which requires that “[t]he civilian population . . . respect these wounded and sick, and in particular abstain from offering them violence.” Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *supra* note 267, art. 18. The Second Geneva Convention does not use the term at all. Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, *adopted* Aug. 12, 1949, 75 U.N.T.S. 971. The Third Convention (on Prisoners of War) uses the term in Article 23, which provides, in the relevant part, that “[p]risoners of war shall have shelters against air bombardment and other hazards of war, to the same extent as the local civilian population.” Third Geneva Convention, *supra* note 66, art. 23.

²⁷⁸ Fourth Geneva Convention, *supra* note 43, art. 4.

²⁷⁹ *Id.* (emphasis added). Subsequent Articles of the Fourth Geneva Convention employ the terms “civilian” or “civilian population,” including Article 49 (“The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.”); Article 55 (“The Occupying Power may not requisition foodstuffs . . . except for use by the occupation forces . . . and then only if the requirements of the civilian population have been taken into account.”); Article 57 (“The Occupying Power may requisition civilian hospitals . . . on condition that suitable arrangements are made . . . for the needs of the civilian population for hospital accommodations. The material and stores of civilian hospitals cannot be requisitioned so long as they

Conventions—which have generated difficulties in the war crimes jurisprudence of the *ad hoc* tribunals²⁸⁰—have no parallel in the law of crimes against humanity. They establish the notion of “protected” persons;²⁸¹ and have as their purpose to define the proper object of war—that it is “waged against an enemy’s armed forces, not against its civilian population.”²⁸²

The Fourth Convention brings the notions of “civilians” and “civilian population” into usage more clearly than any predecessor instrument. However, like the Rome Statute, it does not define these terms because the drafters could not agree upon a definition, and proposals to include one were rejected.²⁸³ Although it is generally agreed that the provisions of the Fourth Convention codified customary international law,²⁸⁴ the term “civilian population” was left undefined until the elaboration of AP I in 1977, when the negative definition of fighting forces entitled to POW protection as defined in Article 4 of the Third Geneva Convention was adopted.²⁸⁵ Thus, the meaning of the term in the Fourth Convention can only be understood in relationship to the Third Convention.

are necessary for the needs of the civilian population”); and Article 63 (requiring non-interference with organizations tasked with “ensuring the living conditions of the civilian population”). Fourth Geneva Convention, *supra* note 43, arts. 49, 55, 57, 63. The Convention also uses the term “civilian persons” in Articles 10 and 15. *Id.* arts. 10, 15.

²⁸⁰ The *ad hoc* tribunals have used a teleological understanding of the Statute to include attacks by Bosnian Serbs against Bosnian Muslims and Croats as war crimes. See *Prosecutor v. Tadić*, Decision on Def. Motion for Interlocutory Appeal on Jurisdiction, *supra* note 21, ¶¶ 72–78.

²⁸¹ See Heike Krieger, *Protected Persons*, in THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e979?rskey=tBT03Q&result=1&prd=EPIL> (last visited Jan. 12, 2017) (on the notion of “protected persons,” under the Geneva Conventions).

²⁸² Garbett, *supra* note 263, at 475 (citing DINSTEIN, *supra* note 7, at 114).

²⁸³ According to the *travaux préparatoires*, the Delegate from the United Kingdom suggested defining the term “civilian population,” but it was never discussed and the Committee moved onto other Articles. Official Records of the Diplomatic Conference of the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Committee III (Civilians Convention), Summary Rec. of the Second Mtg. 622, *as reprinted in* II-A F.R., 620–21, https://www.loc.gov/tr/frd/Military_Law/RC-Fin-Rec_Dipl-Conf-1949.html. Citations to F.R. refer to the Final Record of the Diplomatic Conference of Geneva of 1949. There was some discussion about dividing up those protected into allies, neutrals, and stateless persons, a discussion that was apparently tabled indefinitely. *Id.* at 620.

²⁸⁴ See, e.g., HENCKAERTS & DOSWOLD-BECK, *supra* note 42, at xxxi–xxxii (ICRC, 2005) (noting that the codification of customary international law relating to the laws of war began with the Lieber Code in 1863 and continued with the Geneva Conventions of 1949); Fausto Pocar, *To What Extent Is Protocol I Customary International Law?*, 78 INT’L L. STUD. 337, 337–38 (2002) (stating that Protocol I to the Fourth Geneva Convention both codifies and develops customary international law); Waldemar A. Solf, *The Protection of Civilians Against the Effects of Hostilities Under Customary International Law and Under Protocol I*, 1 AM. U.J. INT’L L. & POL’Y 117, 117–18 (1986) (setting out the history of the customary international law principle of distinction and the protection of civilians).

²⁸⁵ Garbett, *supra* note 263, at 476.

There were extensive debates on the content of the Third Geneva Convention on prisoners of war, particularly as regards the status of civilians who take up arms against occupying forces.²⁸⁶ Indeed, during the negotiations of both the Third and Fourth Conventions, the drafters were conscious of getting the balance between them to be correct. This is because to the extent the Third Convention *expanded* POW protection for groups of fighters other than regular armed forces under international humanitarian law under the Third Convention, it arguably *reduced* protection for those individuals (under the Fourth Convention) now considered combatants by making them legitimate military targets.²⁸⁷ Under IHL there is no gap between the two Conventions, creating a seamless web of protection.²⁸⁸

iii. The Adoption of Additional Protocol I

In 1973, sensing the need to further complete the work of 1949, the ICRC proposed the adoption of two Protocols to the Geneva Conventions, one for international armed conflict (Additional Protocol I) and a second for non-international armed conflict (Additional Protocol II).²⁸⁹ One of the texts submitted was a draft definition for AP I of “civilian population,” as well as “civilian.” The draft defined civilians as “all human beings who are on the territory of the Parties to the conflict and who do not form part of the armed

²⁸⁶ Committee II (Prisoners of War), Summary Rec. of the Third Mtg. of the Special Committee 420, *as reprinted in* II-A F.R. 420. *See* Amendment Proposed by Denmark, *reprinted in* III F.R. 58, (Denmark, for example, introduced an amendment that would have expanded POW status to civilians acting in self-defense against imminent threats to their persons or livelihoods and civilians who take up arms against a war of aggression); Committee II (Prisoners of War), Summary Rec. of the Third Mtg. of the Special Committee 425–26 (Statement of Denmark), *as reprinted in* II-A F.R. 425 (this proposal elicited significant objection and was withdrawn); Plenary, Verbatim Rec. of the Twentieth Mtg. 342 (Statement of the President), *as reprinted in* II-B F.R. 340. The Plenary Assembly adopted draft Article 3 with the text of the first paragraph (now paragraph 4A), the vote was passed by thirty-three votes to none, with three abstentions. *Id.*; *see generally* PAUL DE LA PRADELLE, *LA CONFÉRENCE DIPLOMATIQUE ET LES NOUVELLES CONVENTIONS DE GENÈVE DU 12 AOÛT 1949* 48–66 (1951).

²⁸⁷ The Third Geneva Convention applies, for example, to persons who accompany the armed forced without actually being members thereof (such as civilian members of military aircraft crews and war correspondents), and crew members of merchant vessels and civil aircraft who do not receive more favorable treatment under another provision of international law. Third Geneva Convention, *supra* note 66, art. 4(A)(4), (5).

²⁸⁸ *See* COMMENTARY: IV GENEVA CONVENTION, *supra* note 276, at 51; Prosecutor v. Delalić et al., Case No. IT-96-21-T, Judgement, ¶ 271 (Trial Chamber Nov. 16, 1998), http://www.icty.org/x/cases/mucic/tjug/en/981116_judg_en.pdf (“[T]here is no gap between the Third and Fourth Geneva Conventions. If an individual is not entitled to the protections of the Third Convention as a prisoner of war . . . he or she necessarily falls within the ambit of Convention IV . . .”).

²⁸⁹ *See* Additional Protocol I, *supra* note 84, and Additional Protocol II, *supra* note 65.

forces,”²⁹⁰ and listed the protections afforded the civilian population: It should not be the object of attack, or the subject of reprisals, and receives these protections until civilians take a direct part in hostilities.²⁹¹

The ICRC commentary to the draft attempts to answer the question as to what does taking direct part in hostilities actually mean:

The expression covers acts of war intended by their nature or purpose to strike at the personnel and matériel of enemy armed forces. *Thus, a civilian taking part in fighting, whether singly or in a group, becomes ipso facto a lawful target for such time when he takes a direct part in hostilities.*²⁹²

If a civilian who took direct part in hostilities is captured, he is still entitled to the protections of the Fourth Geneva Convention.²⁹³

The intent of the ICRC was to establish a definition of “‘civilians and civilian population’ which would be in harmony with, but more explicit than Article 13 of the Fourth Geneva Convention,”²⁹⁴ which applied the Convention to “the whole of the populations of the countries in conflict, without any adverse distinction based, in particular, on race, nationality, religion or political opinion.”²⁹⁵ The ICRC opined that “as wide as possible a definition . . . [of civilian] is justified by the purpose intended, namely, general protection against effects of hostilities.”²⁹⁶ After much negotiation, Article 50 was adopted by consensus²⁹⁷ although the term “armed forces” was deleted,²⁹⁸ and was instead

²⁹⁰ ICRC, *Draft Additional Protocols to the Geneva Conventions of August 12, 1949: Commentary* 55 (Oct. 1973) [hereinafter *Draft Protocols Commentary*] (internal citations omitted). The *travaux* states that the definition of civilian is not as a person alone, but as a member of the civilian population as well. *Id.*

²⁹¹ *Id.* at 56–59.

²⁹² *Id.* at 58 (emphasis added).

²⁹³ *Id.*

²⁹⁴ Committee III, Summary Rec. of the Fifth Mtg., ¶ 2, Doc. CDDH/III/SR.5 (Mar. 14, 1974), reprinted in XIV OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE 35, https://www.loc.gov/tr/frd/Military_Law/pdf/RC-records_Vol-14.pdf. Citations to the OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE refer to the Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts.

²⁹⁵ Fourth Geneva Convention, *supra* note 43, art. 13.

²⁹⁶ *Draft Protocols Commentary*, *supra* note 290, at 55.

²⁹⁷ Plenary, Summary Rec. of the Forty-First Mtg., at 161, Doc. CDDH/SR.41 (May 26, 1977), as reprinted in VI OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE 141, https://www.loc.gov/tr/frd/Military_Law/pdf/RC-records_Vol-6.pdf.

²⁹⁸ Compare Draft Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 45(1), reprinted in 1-3 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE 3, https://www.loc.gov/tr/frd/Military_Law/pdf/RC-records_Vol-1.pdf, with

defined in a separate Article (Article 43 of AP I) that is incorporated into Article 50 of AP I by reference.²⁹⁹ Even after the elaboration of Protocol I in 1977, however, the rules of humanitarian law “do not tell us who or what the protected persons . . . are” because they define them in the negative.³⁰⁰

iv. The Failed Attempt to Define “Civilian Population” in Additional Protocol II

During the 1974–1977 Geneva Conference, the ICRC proposed a draft of Additional Protocol II (on non-international armed conflicts) which included a provision defining the term “civilian” and “civilian population,” as those who were not members of the “armed forces.”³⁰¹ This provision was deleted³⁰² as part of a proposal submitted by Pakistan purporting to “simplify” the text.³⁰³ This has left the notion of “civilian population” unclear for non-international armed conflicts, particularly as regards the members of armed opposition groups.

With respect to non-international armed conflicts, the relevant text is Article 4(1) of AP II referring to persons not taking “a direct part or who have ceased to take part in hostilities” as the protected class. Article 13 operationalizes this provision by providing that “[t]he civilian population as such, as well as individual civilians, shall not be the object of attack,”³⁰⁴ “unless and for such time they take direct part in hostilities.”³⁰⁵ The Commentary specifies that to “not take direct part in hostilities” means “they must not become combatants.”³⁰⁶

Committee III, Rep., ¶ 41(1), Doc. CDDH/50/Rev.1, *reprinted in XV OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE 229*, https://www.loc.gov/rr/frd/Military_Law/pdf/RC-records_Vol-15.pdf.

²⁹⁹ Additional Protocol I, *supra* note 84, art. 50, ¶ 1.

³⁰⁰ Garbett, *supra* note 263, at 476 (citing DINSTEIN, *supra* note 7, at 114).

³⁰¹ Draft Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 25, *reprinted in I-3 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE 3*, https://www.loc.gov/rr/frd/Military_Law/pdf/RC-records_Vol-1.pdf.

³⁰² Plenary, Summary Rec. of the Fifty-Second Mtg., at 135, Doc. CDDH/SR.52 (June 6, 1977), *as reprinted in VII OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE 125*, https://www.loc.gov/rr/frd/Military_Law/pdf/RC-records_Vol-7.pdf.

³⁰³ Plenary, Summary Rec. of the Forty-Ninth Mtg., ¶¶ 10–11, Doc. CDDH/SR.49 (June 2, 1977) (Statement of Pakistan), *reprinted in VII OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE 59*, https://www.loc.gov/rr/frd/Military_Law/pdf/RC-records_Vol-7.pdf. The simplified proposal emerged as a consequence of “dissatisfaction with the length of the text as well as with the fact that it ventured into domains which [delegations] considered sacrosanct and inappropriate for inclusion in an international instrument.” *Id.* ¶ 10.

³⁰⁴ Additional Protocol II, *supra* note 65, art. 13, ¶ 2.

³⁰⁵ *Draft Protocols Commentary*, *supra* note 290, at 57; Additional Protocol II, *supra* note 65, art. 13, ¶ 3. The term “direct part in hostilities” is taken from Common Article 3, where it was first used. ICRC, *Commentary on the Additional Protocols of 8 June 1977*, *supra* note 74, at 1353.

³⁰⁶ *Draft Protocols Commentary*, *supra* note 290, at 158.

It further specifies that the phrase “direct part in hostilities” “covers acts of war intended by their nature or purpose to strike at the personnel and materiel of enemy armed forces.”³⁰⁷ Several delegates considered that the term “hostilities” also includes preparations for combat and returning from combat.³⁰⁸ However, the ICRC position is that from the moment a civilian ceases to take part in hostilities, they may no longer be the object of attack.³⁰⁹ Thus, it is not formal status, but actual situation, that provides the relevant test.³¹⁰

b. Customary International Law

Customary international law is comprised of widespread and consistent state practice accepted as law by States.³¹¹ Deriving its content and pinpointing its sources is often difficult.³¹² The sources of customary international law include evidence of actual State practice, including declarations and statements, and in the humanitarian law context “special importance” is attached to “military manuals and operational handbooks,”³¹³ as well as the work of the ICRC.³¹⁴ In

³⁰⁷ *Id.*

³⁰⁸ Rep. to Committee III on the Work of the Working Group, at 330, Doc. CDDH/III/224, as reprinted in XV OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE 327, https://www.loc.gov/frd/Military_Law/pdf/RC-records_Vol-15.pdf.

³⁰⁹ *Draft Protocols Commentary*, *supra* note 290, at 158.

³¹⁰ See Modirzadeh, *supra* note 26, at 741. States have argued that this definition allows individuals to take advantage of their civilian protections by becoming “farmer[s] by day, fighter[s] by night” and that allowing civilians to retain their protections even while being intricately involved in a conflict encourages disrespect for the laws of war on the part of combatants endangered by their activities. *Id.* Michael N. Schmitt, *Direct Participation in Hostilities and 21st Century Armed Conflict*, in CRISIS MANAGEMENT AND HUMANITARIAN PROTECTION: FESTSCHRIFT FÜR DIETER FLECK 505, 509–10 (H. Fischer et al. eds., 2004); David Heitner, *Civilian Social Media Activists in the Arab Spring and Beyond: Can They Ever Lose Their Civilian Protections?*, 39 BROOK. J. INT’L L. 1207, 1225–26 (2014) (noting that this more “functional” definition also takes into account a civilian’s military value—the more essential a civilian is to military success, the more likely they are to have crossed the threshold into direct participation in hostilities).

³¹¹ Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 59 Stat. 1031; see *The North Sea Continental Shelf Cases* (Fed. Rep. Germany v. Dk) (Fed. Rep. Germany v. Neth.), Judgment, 1969 I.C.J. 3, ¶ 77 (Feb. 20).

³¹² See generally *Filartiga v. Peña-Irala*, 630 F.2d 876, 880 (2d Cir. 1980) (quoting *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160–61 (1820)). U.S. courts have held that “[t]he law of nations ‘may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.’” *Id.*; MALCOLM N. SHAW, *INTERNATIONAL LAW* 72–93 (6th ed. 2008); MARK JANIS, *AN INTRODUCTION TO INTERNATIONAL LAW* 53–55 (4th ed. 2003). Janis warned of the “inelegance of Customary International Law,” pointing to the diversity of state practice; the possibility of different decision makers reaching different conclusions on customary international law issues; and its proclivity to stimulate, rather than diminish, conflict between states. JANIS, *supra*.

³¹³ DINSTEIN, *supra* note 7, at 6.

³¹⁴ See HENCKAERTS & DOSWOLD-BECK, *supra* note 42. The ICRC is responsible for a more than 9,000-page, two volume work setting out the Rules (Volume 1) and Practice (Volume 2) of customary international law. *Id.*

the context of international criminal law, the *ad hoc* international criminal tribunals were exhorted to apply customary international law,³¹⁵ and it has been argued that Article 7 of the Rome Statute either represents a codification of customary international law, or has become customary as more and more States have ratified the Statute.³¹⁶ These arguments make reference to *ad hoc* international criminal tribunal jurisprudence both appropriate and necessary in many cases. However, in certain cases the Statutes of the *ad hoc* international criminal tribunals deviated from customary international law, such as the ICTY's armed conflict nexus requirement for crimes against humanity, discussed above,³¹⁷ and in other cases the ICC Statute departs from earlier instruments and, arguably, customary international law, by including provisions such as the policy element in the text which were specifically rejected by the *ad hoc* tribunals.³¹⁸ In such cases, it may not be proper to apply *ad hoc* tribunal case law at the ICC, as both Judges Kaul and Van Den Wyngaert have observed on separate occasions.³¹⁹

With respect to the meaning of “civilian population” in Article 7 of the Rome Statute, as earlier noted, the most influential decision emanating from the *ad hoc* tribunals has been the *Blaškić* Appeals Judgment, which took the view that Article 50 of Protocol I provided the definitive standard.³²⁰ Whatever the merits of that decision at the time, it fits only uneasily with the work of tribunals adjudicating crimes against humanity committed either in non-international

³¹⁵ The ICTY, for example, was encouraged to “apply rules of international humanitarian law which are beyond any doubt part of customary law.” U.N. Secretary-General, *Report Pursuant to Paragraph 2 of Security Resolution 808 (1993)*, ¶ 34, U.N. Doc. S/5704 (May 3, 1993).

³¹⁶ This is a controversial point. Article 10 of the Rome Statute and the text of Article 7 itself suggest that the definition of crimes against humanity in Article 7 is “for the purpose of this Statute” only. See Leila Nadya Sadat, *Custom, Codification and Some Thoughts About the Relationship Between the Two: Article 10 of the ICC Statute*, 49 DEPAUL L. REV. 909, 911 (2000); see generally LEENA GROVER, *INTERPRETING CRIMES IN THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* (2014). However, as I have noted elsewhere, even if the Statute did not represent customary international law at the time of its adoption, as increasing numbers of States ratify the Rome Statute and adopt implementing legislation tracking it, it becomes more difficult to argue that it has not become customary international law. Sadat, *Crimes Against Humanity in the Modern Age*, *supra* note 11, at 373.

³¹⁷ See *supra* Part I.A.

³¹⁸ See Guénaél Mettraux, *The Definition of Crimes Against Humanity and the Question of a “Policy” Element*, in *FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY* (Leila Nadya Sadat ed., 2011).

³¹⁹ See *Situation in the Republic of Kenya*, ICC-01/09-19, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Dissenting Opinion of Judge Kaul, ¶ 30 (Pre-Trial Chamber II Mar. 31, 2010); *Prosecutor v. Mathieu Ngudjolo Chui*, ICC-01/04-02/12-4, Judgment Pursuant to Article 74 of the Statute, Concurring Opinion of Judge Wyngaert, ¶ 9 (Trial Chamber II Dec. 18, 2012).

³²⁰ *Prosecutor v. Blaškić*, Appeals Judgement, *supra* note 41, ¶ 110–13.

armed conflict situations or in peacetime. The focus on formal status has created difficulties at both the ECCC and the ICTY itself, which adopted work-around solutions to avoid inequitable results, finding that so long as the “attack” was against the “civilian population,” non-civilians could nonetheless be the victims of the attack and the accused charged with crimes against humanity for perpetrating crimes against them.

The *Blaškić* Appeals Judgment has not been consistently applied by the Rwanda Tribunal, and, in any event, was not available either in Rome in 1998 or when the Elements of Crimes were being drafted and adopted by the Preparatory Commission from 2000–2002.³²¹ One cannot say what the negotiators would have thought about it, but the Swiss paper and its reliance upon *Kayeshima*³²²—from the Rwanda Tribunal—suggest that the drafters thought that a broader approach was appropriate at the ICC. It is also worth observing that the 1991 and 1996 versions of the International Law Commission’s *Draft Code of Crimes* omitted the term “civilian population” from the text.³²³ Although not dispositive of the issue, it suggests some discomfiture with the limiting notion of the term “civilian” and support for the notion that it is a holdover from the past that may have been an accurate *description* of the criminal acts committed by the Nazi regime but was not intended to create a *legal element* of crimes against humanity.

It may be that the ICTY approach is appropriate during international armed conflict as, during armed conflict, the laws of war are applicable and Protocol I and the Geneva Conventions may serve as a *lex specialis* which would not entirely displace international human rights law,³²⁴ but contain rules prohibiting intentional (military) attacks on civilians³²⁵ that are widely considered part of customary international law. In these cases, it may be useful to align the provisions of Article 7 of the Rome Statute with those of Article 8 so that commanders, soldiers, and fighters do not find that they have complied with the

³²¹ See Rome Statute, *supra* note 13 (adopted in 1998); Elements of Crimes, *supra* note 13 (adopted in 2002).

³²² See Switzerland Commentary, *supra* note 73. The *Kayeshima* case is one of only two cases cited in the Commentary’s discussion of the “civilian population” requirement, the other being *Akayesu*. See *id.*

³²³ Ambos & Wirth, *supra* note 46, at 7. The 1991 *Draft Code of Crimes* also made no reference to “civilian population.” *Id.*

³²⁴ See Legal Consequences of the Construction of a Wall in the Occupied Palestine Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 106 (July 9).

³²⁵ AP I, for example, explicitly prohibits the intentional attacking of civilian targets. Additional Protocol I, *supra* note 84, arts. 48, 51, 52. This proscription applies in both international and non-international armed conflicts. HENCKAERTS & DOSWOLD-BECK, *supra* note 42, at 3.

laws of war in their organization and conduct of a particular military attack, only to discover that they have somehow committed a crime against humanity. Note, however, that this application of IHL as *lex specialis* would seem to be narrow, and limited to the military campaign itself; moreover, the limiting notion of “protected person” as an individual not sharing the nationality of the attacker, which is so deeply embedded in the Geneva law relating to IACs,³²⁶ appears to have no relevance to crimes against humanity law, which specifically aims at the protection of all persons.³²⁷

In cases involving non-international armed conflict and peacetime, the application of AP I and Article 4 of the Third Geneva Convention to this question is both formally inappropriate and problematic. This suggests that the approach of the ICTR is to be preferred in those cases, and that, in any event, judges at the ICC should treat the jurisprudence of the *ad hoc* tribunals—and particularly the ICTY and the SCSL—on this issue with caution to the extent that the case law proposes the transposition of terms relating to the application of IHL during international armed conflict to other scenarios. Although, as noted earlier, there is now a trend to expand the application of Common Article 3 of the Geneva Conventions to all conflicts, it is not yet clear how that trend might be operationalized under the ICC Statute, which at least for charging purposes appears to confine the application of Common Article 3 to cases of “an armed conflict not of an international character.”³²⁸

In peacetime, the international law applicable to determine who may be the victim of a crime against humanity is international human rights law, not IHL. The International Covenant on Civil and Political Rights guarantees all persons the right to life,³²⁹ and to be free from the acts listed in Article 7(1) of the Rome Statute.³³⁰ Even at the ICTY, it has been understood that the word “attack” in Article 7 clearly does not mean a military attack,³³¹ meaning that humanitarian

³²⁶ Heike Spieker, *Protected Persons*, CRIMES OF WAR, <http://www.crimesofwar.org/a-z-guide/protected-persons/> (last visited Jan. 12, 2017).

³²⁷ See generally Beth Van Schaack, *The Definition of Crimes Against Humanity: Resolving the Incoherence*, 37 COLUM. J. TRANSNAT'L L. 787 (2007).

³²⁸ Rome Statute, *supra* note 13, art. 8(2)(c).

³²⁹ International Covenant on Civil and Political Rights art. 6, ¶ 1, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

³³⁰ See, e.g., *id.* art. 7 (prohibiting torture); *id.* art. 8, ¶ 1 (prohibiting enslavement); *id.* art. 12 (allowing individuals to freely leave and re-enter their own country and to choose their residence within that country).

³³¹ See, e.g., *Prosecutor v. Kunarac*, Appeals Judgement, *supra* note 78, ¶ 86 (stating that an “attack” encompasses any mistreatment of the civilian population and is not limited to the use of armed force); *Prosecutor v. Akayesu*, Trial Judgement, *supra* note 119, ¶ 581 (defining “attack” as an unlawful act that can be non-violent in nature); *Bemba*, Confirmation of Charges, *supra* note 166, ¶ 75. The Court in *Bemba* rejected the notion that

law is not used to assess the meaning of this term. If IHL does not define the word “attack,” why should it define the group it is unlawful to attack? Instead, it may be more helpful for the ICC to look at the practice of human rights bodies and U.N. fact-finding bodies and commissions of inquiry as potential sources of customary international law.³³²

At the Inter-American Court, although many cases have addressed the commission of crimes against humanity in peacetime and during armed conflict,³³³ none provide specific assistance on the definition of “civilian population.” At the European Court of Human Rights (ECHR), however, several cases have addressed whether crimes against humanity can be committed in the absence of armed conflict. In *Kolk & Kislyiy v. Estonia*, the State had prosecuted one of its nationals and a Russian national for crimes against humanity.³³⁴ Article 61-1 § 1 of the Estonian Criminal Code, defining crimes against humanity, refers only to “groups” and “native population” and does not employ the term “civilian population.”³³⁵ They were charged with helping to deport the civilian population of the occupied Republic of Estonia to remote parts of the Soviet Union.³³⁶ The applicants argued that because the deportation had not occurred during a period of armed conflict, this act was not a crime within the meaning of the Nuremberg Charter of 1945.³³⁷ They then argued that they had

an “attack” must be military in nature and held that “[t]he commission of the acts referred to in Article 7(1) of the Statute constitute the ‘attack’ itself and, beside the commission of the acts, no additional requirement for the existence of an ‘attack’ should be proven.” *Id.*

³³² Human rights bodies often exercise “quasi-criminal jurisdiction,” in particular the Inter-American Court of Human Rights which has decreed and is actively monitoring prosecutions of international crimes in roughly fifty-one cases in fifteen states. Alexandra Huneus, *International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts*, 107 AM. J. INT’L L. 1, 2 (2013). The European Court of Human Rights has also considered questions relating to international crimes. *See, e.g.*, *Kononov v. Latvia* [GC], App. No. 36376/04, Eur. Ct. H.R. (2010); *Šimšić v. Bosnia & Herzegovina*, App. No. 51552/10, Eur. Ct. H.R. (2012); *Maktouf & Damjanovic v. Bosnia & Herzegovina*, App. Nos. 2312/08 & 34179/08, Eur. Ct. H.R. (2013).

³³³ *See, e.g.*, *Santo Domingo Massacre v. Colombia*, Preliminary Objections, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 259, ¶ 212 (Nov. 30, 2012). The Court discussed the traditional distinction between civilians and combatants under international humanitarian law in the context of a bombardment of civilians by the Colombian Air Force during an alleged confrontation with FARC guerillas. *See id.* Reaffirming that attacks can only be directed against military combatants, and not against civilians, the Court referenced customary international law as well as Article 13 of Additional Protocol II to the Geneva Conventions prohibiting the same. *Id.* The Court also acknowledged the traditional distinction between combatant and civilian in time of armed conflict. *Id.*

³³⁴ *See generally* *Kolk & Kislyiy v. Estonia*, 2006-I Eur. Ct. H.R. 399.

³³⁵ Criminal Code art. 61-1 § 1, *as modified* by *Eestis inimsusevastaseid kuritegusid või sõjakuritegusid toimepannud isikute kriminaalvastutuse seadus* [Act on the Criminal Liability of Persons Who Have Committed Crimes Against Humanity or War Crimes in Estonia], Nov. 9, 1994, R.T. I 1994, 83, 1447 (Est.).

³³⁶ *Kolk & Kislyiy*, 2006-I Eur. Ct. H.R. 399, 399.

³³⁷ *Id.* at 408–09.

no idea that this act would be construed as a crime against humanity six decades later.³³⁸

Although the ECHR held that deportation of the civilian population was not a crime under national law at that time, it found that this action was recognized as a crime against humanity under Article 6(c) of the Nuremberg Charter of 1945.³³⁹ The Court moreover held that by 1949, crimes against humanity, even committed during peacetime, were criminalized and prohibited “by general principles of law recognized by civilized nations.”³⁴⁰

In *Penart v. Estonia*, the applicant made a similar argument, asserting that murder committed in peacetime, in this case in 1953, was not a crime under the Nuremberg Charter of 1945, and thus could not constitute a crime against humanity.³⁴¹ The Court responded that “[a]fter the Second World War, tens of thousands of persons went into hiding in the forests to avoid repression by the Soviet authorities; part of those in hiding actively resisted the occupation regime.”³⁴² Like *Kolk & Kislyiy*, the Court held that murder was not only expressly recognized as a crime against humanity under the Nuremberg Charter but also under the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.³⁴³

Overall, human rights bodies, notably the Inter-American Court of Human Rights and the ECHR, have progressively expanded the individuals protected by the prohibition against crimes against humanity, whilst at the same time barring any amnesties or time limits on prosecution for those responsible for them.³⁴⁴

³³⁸ *Id.*

³³⁹ *Id.* at 410.

³⁴⁰ *Id.*

³⁴¹ *Penart v. Estonia*, App. No. 14685/04, Eur. Ct. H.R. (2006).

³⁴² *Id.* The Court went on to note that “[a]ccording to the data of the security organs, about 1,500 persons were killed and almost 10,000 arrested in the course of the resistance movement of 1944-1953.” *Id.*

³⁴³ *Id.* Crimes against humanity are also discussed in *Korbely v. Hung.*, App. No. 9174/02, Eur. Ct. H.R. (2008).

³⁴⁴ *See, e.g., Almonacid-Arellano et al. v. Chile*, Inter-Am. Ct. H.R. (ser. C) No. 154 (Sept. 26, 2006). In this case, an elementary school teacher and member of the Communist Party who opposed the coup d’état of September 11, 1973 by General Augusto Pinochet, was summarily arrested and shot by police and died the next day at a hospital. *Id.* The Court had to decide whether a single murder could constitute a crime against humanity and if so, whether amnesties could be given to the perpetrators. *Id.* The Inter-American Court held that “crimes against humanity include the commission of inhuman acts, such as murder, committed in a context of generalized or systematic attacks against civilians.” *Id.* ¶ 96. (citing *Prosecutor v. Tadić*, Decision on Def. Motion for Interlocutory Appeal on Jurisdiction, *supra* note 21). The Court also held that “[a] single illegal act as those mentioned above, committed within the described background, would suffice for a crime against humanity to arise.” *Id.* Finally, as the summary and extra-judicial execution of the civilian Almonacid-Arellano was a crime against humanity, any amnesty which would prevent the investigation, identification, and punishment of those

Although most of these cases occurred during periods of armed conflict, a few significant and precedential cases occurred during peacetime. This precedent must be treated with caution before the ICC as the standards in civil and criminal cases are quite different. The cases also do not specifically address the meaning of the term “civilian population.” Nonetheless, they suggest support for an application of Article 7 that includes a wide, situation-specific definition of “civilian.”

Another possible source of State practice may be human rights fact-finding commissions,³⁴⁵ and there have been many during the past decade since the Court was established. Most involve the commission of crimes against humanity during armed conflict including, for example, the Commissions on Gaza³⁴⁶ and Darfur,³⁴⁷ which used the ICRC Interpretive Guidance and Additional Protocol I definitions of “civilians,” respectively.³⁴⁸ A notable exception is the Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea (DPRK), which was established on March 21, 2013 to investigate the systematic, widespread, and grave violations of human rights in the DPRK.³⁴⁹

In February of 2014, the DPRK Commission published a 372-page report.³⁵⁰ The Commission took the definition of crimes against humanity from Article 7 of the Rome Statute, noting that crimes must be committed against the civilian

responsible must be deemed null and void, as it would violate international law by permitting the derogation of a non-derogable *jus cogens* norm. *Id.* ¶¶ 99–114.

³⁴⁵ For a discussion of the importance of these bodies as a source of practice see Larissa van den Herik & Catherine Harwood, *International Commissions of Inquiry and Jus ad Bellum*, in *SEEKING ACCOUNTABILITY FOR THE UNLAWFUL USE OF FORCE* (Leila Nadya Sadat ed., forthcoming 2017).

³⁴⁶ Human Rights Council Res. S-21/1, U.N. Doc. A/HRC/Res/S-21/1 (July 24, 2014) (establishing an independent, international commission of inquiry).

³⁴⁷ S.C. Res. 1564 (Sept. 18, 2005) (requesting the Security Council establish an international commission of inquiry).

³⁴⁸ See U.N. Human Rights Council, Rep. of the Detailed Findings of the Independent Comm’n of Inquiry Established Pursuant to Human Rights Council Resolution S-21/1, ¶ 37 n.30, U.N. Doc. A/HRC/29/CRP.4 (June 23, 2015); Rep. of the Int’l Comm’n of Inquiry on Darfur to the U.N. Secretary-General, Pursuant to Security Council Resolution 1564 of 18 September 2004, ¶ 166 n.77, U.N. Doc. S/2005/60 (Jan. 25, 2005). The Darfur Report does not define the term “civilian” but grounds the principle of distinction in Additional Protocols I and II. *Id.*

³⁴⁹ *Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea*, UNITED NATIONS HUMAN RIGHTS, OFFICE OF THE HIGH COMMISSIONER, <http://www.ohchr.org/en/hrbodies/hrc/coidprk/pages/commissioninquiryonhrindprk.aspx> (last visited Jan. 13, 2016). See also Rep. of the International Commission of Inquiry Mandated to Establish the Facts and Circumstances of the Events of 28 September 2009 in Guinea, transmitted by Letter Dated 18 December 2009 Addressed to the President of the Security Council by the Secretary-General, U.N. Doc. S/2009/693 (Dec. 18, 2009).

³⁵⁰ U.N. Human Rights Council, Rep. of the Detailed Findings of the Comm’n of Inquiry into Human Rights in the Democratic People’s Republic of Korea, U.N. Doc. A/HRC/25/CRP.1 (Feb. 17, 2014).

population.³⁵¹ The Report does not define “civilian population,” but notes that “the inhumane acts . . . must form part of a larger attack against a civilian population,” and addressed the plight of six categories of victims, including inmates of political prison camps, persons who try to flee the country, starving populations, and persons from other countries who become victims of international abductions and forced disappearances.³⁵²

The Report identified these groups of persons who comprised the civilian population largely without regard to precedent from the *ad hoc* tribunals.³⁵³ It found that the crimes alleged were perpetrated by the leader of “a single-party state dominated by a family dynasty which controls the party, the state and the military.”³⁵⁴ The situation in North Korea does not involve either an international or non-international armed conflict, and most closely resembles, if not peacetime, a situation in which armed conflict is absent. Therefore, the Report did not elaborate on the victims’ status as civilians, presumably since, in the absence of armed conflict, it would be difficult to categorize them as anything else.

c. General Principles of Law

Under Article 21(1)(c), the Court may consider:

[G]eneral principles of law derived by the Court from national laws of legal systems of the world . . . provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.³⁵⁵

A brief survey of national legislation and national case law on crimes against humanity could be helpful to assess whether there were relevant interpretations of the meaning of “civilian population” either in national legislation or case law. Generally speaking, States with legislation on crimes against humanity typically copy or incorporate by reference the text of the Rome Statute. Of the thirty-one countries surveyed for this Article, all used (without definition) the term “civilian,” “civilian population” or a similar locution.³⁵⁶ An exception is the

³⁵¹ *Id.* ¶ 1027.

³⁵² *Id.* ¶ 1024.

³⁵³ *See generally id.* (failing to address precedent from *ad hoc* tribunals).

³⁵⁴ *Id.* ¶ 85.

³⁵⁵ Rome Statute, *supra* note 13, art. 21(1)(c).

³⁵⁶ Benjamin Cohen, *Civilian Population in Crimes Against Humanity Charges Before National Courts* (Apr. 15, 2014) (Washington University School of Law) (on file with author).

Estonian law cited in the *Kolk* decision, discussed above.³⁵⁷ George Washington University Law School's Human Rights Clinic has recently conducted a comprehensive study of national legislation on crimes against humanity which arrives at a similar conclusion.³⁵⁸

The difficulty with relying upon national legislation as a source of general international law, is that, as with the Rome Statute, the term "civilian population" is not defined. It may therefore be useful to examine national case law, at least in some of the more prominent national cases on the question. The most often-cited is the *Barbie* case from France, which is most commonly referenced for its holding that members of Resistance groups may be the victims of crimes against humanity.³⁵⁹ The lower courts had dismissed counts involving Barbie's torture or murder of Jewish members of the Resistance on the grounds that, if the accused had tortured them because they were members of the Resistance (rather than because they were Jewish), these could "only" constitute war crimes as opposed to crimes against humanity.³⁶⁰ Under French law, this required dismissal as they would have prescribed under France's statute of limitations.³⁶¹

The Court of Cassation reversed, finding that "inhumane acts and persecutions . . . committed in a systematic fashion, not only against persons because they belong to a racial or religious group, but also against the adversaries of this [State] policy, whatever the form of their opposition" could be prosecuted.³⁶² This case may be less about who is a *civilian*, however, and more about who can be the *victim* of a crime against humanity during an attack on a civilian population.

Finally, the ICC has considered general principles of law on a number of occasions but appears resistant to applying such principles in cases heard before

³⁵⁷ See *supra* Part II.C.4(b).

³⁵⁸ Arturo J. Carrillo & Annalise K. Nelson, *Comparative Law Study and Analysis of National Legislation Relating to Crimes Against Humanity and Extraterritorial Jurisdiction*, 46 GEO. WASH. INT'L L. REV. 8, 9 (2013).

³⁵⁹ Cour de cassation [Cass.] [supreme court for judicial matters] crim., Dec. 20, 1985, Bull crim., No. 407 (Fr.). See 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, 340–42 (1994) (formerly Wexler).

³⁶⁰ Cour de cassation [Cass.] crim., Bull crim., No. 407, *supra* note 359.

³⁶¹ *Id.*

³⁶² *Id.*

it.³⁶³ Indeed, the Court has recalled that it is not bound by national law in any respect.³⁶⁴

5. *Construing the Provision with the Objective of Protecting the Rights of the Accused and Ensuring That the Application of the Statute Is Consistent with Internationally Recognized Human Rights (Canon 5)*

Thus far we have seen that no clear answer regarding the meaning of the term “civilian” or “civilian population” emerges from either a textual understanding of the ICC Statute, the Statute’s *travaux préparatoires*, customary international law, or international treaties. This brings policy considerations to the fore in considering the meaning of the term.

Canon 5 is meant to operationalize Article 22(1) of the ICC Statute, which provides: “The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favor of the person being investigated, prosecuted or convicted.”³⁶⁵ This provision incorporates the legality principle, protecting the accused from unforeseeable or retroactive applications of the Statute. Although gap filling and interpretation are inevitable, unjustified interpretative leaps risk destroying the legitimacy of the Court and run afoul not only of Article 22(1) but Article 21(3)’s admonition that the “application and interpretation of law pursuant to this Article must be consistent with internationally recognized human rights.”³⁶⁶

As noted earlier, the object and purpose of Article 7, and crimes against humanity as a category of offenses more generally, is to reach cases involving the commission of atrocity crimes to which the laws of war do not apply (either because there is a gap during armed conflict or the attack takes place in

³⁶³ See, e.g., Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-679, Decision on the Practices of Witness Familiarization and Witness Proofing, ¶¶ 35–42 (Pre-Trial Chamber Nov. 8, 2006) (using the absence of general principles of national law to reject the definition of “witness-proofing” advanced by the Prosecution); Prosecutor v. Mathieu Ngudjolo Chui, ICC-01/04-02/12-4, Judgment pursuant to Article 74 of the Statute, Concurring Opinion of Judge Wyngaert, ¶ 17 (Trial Chamber Dec. 18, 2012) (declining to use general principles of national law when defining modes of liability, stating that national law on the issue was fragmented); Situation in the Democratic Republic of Congo, Case No. ICC-01/04-168, Judgment on the Prosecution’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, ¶¶ 21–32 (July 13, 2006). The Appeals Chamber rejected the Prosecution’s argument that a supposed lacuna in the Rules of Evidence and Procedure could be filled by applying general principles of law as no general principle relevant to the proposed lacuna could be ascertained. *Id.* ¶ 32.

³⁶⁴ WILLIAM A. SCHABAS, *THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE* 394 (2010).

³⁶⁵ Rome Statute, *supra* note 13, art. 22(1).

³⁶⁶ *Id.* art. 21(3).

peacetime); and the purpose was to provide protection for individuals from attack (military or non-military) in the form of widespread or systematic human rights abuses perpetrated by States (or non-State actors).³⁶⁷

During armed conflict, there is a certain protection offered to the accused if the Statute's provisions on Article 7 and Article 8 are aligned, in that an attack which does *not* violate Article 8 because it *does not* involve "intentionally directing attacks against the civilian population or against individual civilians not taking direct part in hostilities," also will not violate Article 7.³⁶⁸ This means that if a commander complies with the laws of war in their targeting, they will not somehow nonetheless commit a crime against humanity. This is the approach taken at the ICTY³⁶⁹ and the SCSL.³⁷⁰

Although the ICTY could have taken a different course, making targeting and other strategic decisions more difficult for commanders during armed conflict but interpreting the scope of crimes against humanity law's application as broader than the protections offered by the laws of war, it is understandable that it did not, and, indeed, it is supported by Canon 5. It is worth noting, however, that the addition of the words "or against individual civilians not taking direct part in hostilities," may suggest a broader understanding of the term "civilian" in the ICC Statute than the definition found in Article 50 of AP I even for international armed conflicts, suggesting that individual status—not formal status—is the relevant criterion.³⁷¹

In terms of non-international armed conflict, Article 8(2)(e)(i) uses the same language, rendering criminal "intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities."³⁷² This language suggests that particularly in NIACs, the notion of "taking direct part in hostilities," should be the relevant test rather than the formalistic approach of Article 50 of AP I.³⁷³ This would be consistent with the jurisprudence of the Rwanda Tribunal, and therefore presumably neither unforeseeable nor unduly prejudicial to the accused.

³⁶⁷ See *supra* Part II.C.2.

³⁶⁸ Rome Statute, *supra* note 13, art. 8(2)(b)(i).

³⁶⁹ See *supra* Part I.A.1(a).

³⁷⁰ See *supra* Part I.A.1(b).

³⁷¹ Rome Statute, *supra* note 13, art. 8(2)(b)(i); Additional Protocol I, *supra* note 84, art. 50.

³⁷² Rome Statute, *supra* note 13, art. 8(2)(e)(i).

³⁷³ Additional Protocol I, *supra* note 84, art. 50. It is also consistent with the approach of the ICRC.

Finally, in peacetime, Article 8 has no application.³⁷⁴ Thus it cannot violate Article 21(3) to include all individuals as “civilians” during peacetime, as an accused could not reasonably harbor an expectation that an attack on anyone involving the widespread or systematic commission of Article 7 crimes was lawful given the egregious nature of those crimes, and the inapplicability of the laws of war as a formal matter. Although there is jurisprudence suggesting that members of the armed forces are not “civilians” for the purposes of crimes against humanity law,³⁷⁵ that jurisprudence does not unpack or address the fundamental differences between the ICC Statute and its predecessors, and has been criticized by scholars, including in a recent *amicus brief* filed before the ECCC.³⁷⁶

Finally, as a practical matter, if the ICC takes the position that the *victims* of an Article 7 violation need not themselves be civilians once the jurisdictional element of the “attack directed against any civilian population” has been established, which is the view propounded by the ICTY and the ECCC,³⁷⁷ the *result* of this Article’s methodology should not be very different than the *results* now being obtained before the *ad hoc* international criminal tribunals.

6. *Enhancing Judicial Efficiency and the Effectiveness of the ICC Trial System without Comprising the Values Expressed in Canon 4 (Canon 6)*

In my earlier writings I have criticized the ICC for producing overly complex and creative interpretations of the Rome Statute in its jurisprudence on modes of liability, and its early jurisprudence that forbade charging alternative modes of liability.³⁷⁸ I have argued that judges should seek to interpret the Rome Statute in a manner that does not promote fruitless litigation but furthers instead the efficiency and transparency of the ICC trial process.³⁷⁹ In this Article, however, I have urged Chambers to “complicate” Article 7 by taking a non-unitary approach to the notion of “civilian population” depending upon whether or not a situation involves the commission of crimes against humanity in peacetime,

³⁷⁴ Rome Statute, *supra* note 13, art. 8.

³⁷⁵ See, e.g., *Prosecutor v. Blaškić*, Appeals Judgement, *supra* note 41; *supra* notes 41, 77 and accompanying text.

³⁷⁶ See Brief of Professors Robinson, deGuzman, Jalloh, & Cryer on Crimes Against Humanity as Amici Curiae, Cases 003 and 004, No. 003/07-09-2009-ECCC-OCIJ (E.C.C.C. May 17, 1016).

³⁷⁷ *Prosecutor v. Kupreskic et al.*, Case No. IT-95-16-T, Judgement, ¶ 549 (Jan. 14, 2000).

³⁷⁸ Sadat & Jolly, *supra* note 62, at 768–69.

³⁷⁹ *Id.* at 768.

during non-international armed conflict, or during international armed conflict.³⁸⁰ This apparent inconsistency requires explanation.

As I have written elsewhere, in my view, the decision of the Court's judges to depart sharply from the jurisprudence of the *ad hoc* tribunals on modes of liability, and to insert instead the "control of the crime theory" into the ICC Statute violated not only Canon 5, but the other six Canons I have suggested as well.³⁸¹ It does not square with either the plain meaning or the object and purpose of the Statute, it was not supported by the *travaux préparatoires* or by a theory of general principles of law, and was arguably inconsistent with customary international law.³⁸² This is not so for my proposal regarding Article 7 and the meaning of "civilian population" which is both *consistent* with Canons 1–5 and 7, even if not mandated by them, and, moreover, is a complexity inherent in the structure of the Rome Statute itself as well as the laws of war and peace. It is Article 8 that makes the distinction between war and peace, and Article 8 that further distinguishes non-international and international armed conflicts from each other;³⁸³ and it is international law as a whole which has a presumption of peacetime application, with IHL applicable *only* in cases of armed conflict. Thus the complexity I am suggesting to the Court is not something *created by* the Rome Statute (or this Article), but is part of the international legal system in which the Rome Statute is embedded. This brings me to my final point below.

7. *Enhancing the Expressive and Normative Function of International Criminal Law by Rendering It Transparent and Comprehensible and Reducing Opportunities for Fragmentation (Canon 7)*

I have suggested a methodology that will not fragment international criminal law but will build upon existing jurisprudence while at the same time allowing the ICC the freedom to chart its own course in a manner more consistent with its Statute. It allows appropriate provisions of IHL to be overlaid over the peacetime understanding of crimes against humanity that this Article is premised upon as a *lex specialis*. This permits the jurisprudence of the ICTY using Article 50 of AP I and the jurisprudence of the ICTR using the notion of "direct

³⁸⁰ It may not be necessary to distinguish NIAC from IAC, although as a formal matter, the formal inapplicability of Protocol I, as well as the debates regarding the notion of "combatant" status in NIAC, suggest that the law is not completely clear in this regard. This Article continues to employ the distinction, as it is found in the ICC Statute, whilst recognizing the conceptual convergence of the law relating to these two different types of armed conflict.

³⁸¹ Sadat & Jolly, *supra* note 62, at 781–85.

³⁸² *Id.* at 781.

³⁸³ See Rome Statute, *supra* note 13, art. 8.

participation in hostilities” to be relied upon by the Court as it constructs its understanding of crimes against humanity committed during armed conflict.³⁸⁴ During peacetime, however, when IHL does not formally apply, it requires the Court to presumptively consider all individuals to be part of the “civilian population” if they are the object of attack. This is a break with the *Blaškić* Appeals Judgment’s emphasis on formal status, rather than actual situation, but it is a natural development of the law given the application of the ICC Statute to new situations.

Putting peacetime first also has a critically important normative component—it rejects the paradigm of “perpetual war,” promotes peace as a fundamental value, as well as justice, and gives crimes against humanity an autonomous meaning, separate from its linkage to war and its excesses, something many delegations emphasized in Rome during the Statute’s negotiation.

CONCLUSION

The drafters of the Rome Statute recognized that the definition of crimes against humanity in Article 7 needed amendment if they were to finally remove the armed conflict nexus that had troubled the crime since Nuremberg. But how much? They did not adopt AP I’s definition of “attack” in Article 49 (acts of violence against the adversary) but gave the word “attack” in Article 7 an autonomous meaning in the Statute and the Elements of Crimes (a course of conduct, which need not be a military campaign).³⁸⁵ It would have been helpful had they done the same thing for the term “civilian” but they did not. This lack of guidance has left the ICC Chambers, following the case law of the *ad hoc* tribunals, to borrow from international humanitarian law to define the term “civilian” in Article 7. This borrowing has been haphazard, however. The situation of the ICC is not the same as the situation at the *ad hoc* tribunals, particularly the ICTY, which had a clear linkage to armed conflict in its provision on crimes against humanity and therefore was more properly concerned about aligning crimes against humanity with the laws of war. Moreover, the *Blaškić* Appeals Judgment, while influential, has not been uniformly followed, giving rise to a question about its authoritativeness. It has also been criticized by distinguished scholars who have objected to the “mechanical transfer” of IHL provisions to crimes against humanity law, as

³⁸⁴ See *supra* Part I.

³⁸⁵ Rome Statute, *supra* note 13, art. 7(3); Elements of Crimes, *supra* note 13, art. 7, ¶ 3.

“fail[ing] to acknowledge the object and purpose of the latter, that is, the protection of individuals, and must therefore be rejected.”³⁸⁶

It therefore seems useful to treat this as a question of *de novo* interpretation, looking to the seven canons outlined above in Part II.C. The first and foremost consideration is the plain reading of the text of the Statute (Article 21(1)(a)), using ordinary principles of treaty interpretation and consideration of the context. In IHL, the term “civilian population” has a specific meaning in the context of armed conflict. “Civilians” are those who do not bear arms and therefore cannot be directly attacked. This meaning arguably changes depending upon whether a conflict is international or non-international. In peacetime, however, IHL does not apply, and the Statute itself notes that an attack need not be a military attack, thereby explicitly separating crimes against humanity from armed conflict.

In English, a “civilian” means a “non-military person,” or someone not a member of the armed forces on active duty. This definition is generally accepted at the *ad hoc* tribunals and when extended to “civilian population” appears to mean “a group of persons primarily composed of civilians.” In IHL, the term “civilian” evolved to distinguish individuals who may lawfully bear arms from those who cannot—and those who cannot are protected from direct attack.³⁸⁷ Since all “attacks” are presumptively unlawful in peacetime, several delegations properly wished to delete the term “civilian” during the negotiation of the Rome Statute.

How to square the circle? This is where principles two, three, and four may be useful. It may also be helpful to consider the question in light of the Statute’s object and purpose, applicable treaties, customary international law including—in a limited way—the jurisprudence of the *ad hoc* tribunals, and even general principles of law if no answer otherwise emerges. In terms of the ICC Statute’s object and purpose, historically, the *object* was to reach cases in which the laws of war did not apply; the *purpose* was to provide protection for individuals from attack in the form of widespread or systematic criminal activity which largely takes the form of human rights abuses perpetrated by states or qualifying organizations. Critically important at Nuremberg was the protection of the Aggressor State’s own nationals, who would not be deemed “protected” under international humanitarian law. Since IHL provides no protection in peacetime explicitly, Article 7 (and Article 6 on genocide) should arguably be construed

³⁸⁶ WERLE & JEBBERGER, *supra* note 45, ¶ 888.

³⁸⁷ See, e.g., *supra* Part II.C.4(a).

broadly to provide to the greatest number of individuals protection from the crimes listed in Article 7(1).

The *ad hoc* tribunals understood this and several of the ICTR cases and some of the jurisprudence from the ICTY explicitly suggests this. *Kayishema*, in particular, notes that the legal definition of “civilian” and “civilian population” must be discussed within the “context of war as well as relative peace”³⁸⁸ and should be broad. The Trial Chamber decisions in *Tadić* and *Blaškić* adopted a similarly broad reading of civilian and civilian population, aiming at providing the greatest protection possible to those not participating in the fighting and who could not be considered potential perpetrators.³⁸⁹ The *Blaškić* Trial Chamber suggested as well that it would be appropriate to focus upon the situation of the victim as opposed to the victim’s status, which had the effect again of aligning the interpretation of crimes against humanity with the origins of the term “civilian” in the laws of war, which was to protect persons not involved in fighting from attack.³⁹⁰ This would mean that former soldiers, captured soldiers, and those *hors de combat* due to injury or illness would presumably fall within the definition of civilian and civilian population, and would provide a useful way to determine when and if police and firefighters would be civilians (as the ICRC and the ECCC suggest)³⁹¹ or non-civilians (as the ICTR has suggested, based upon their status as perpetrators).³⁹²

This early case law was not available during the negotiation of the Rome Statute, but it was presented to the drafters during the elaboration of the Elements of Crimes. Thus, it is fair to assume that they *knew* about it. Subsequently, the ICTY narrowed its approach, taking verbatim Article 50 of AP I as the relevant test.³⁹³ This had the advantage—for that Tribunal—of completely aligning its provisions on war crimes and crimes against humanity so that an attack directed against the civilian population would not have a broader meaning in the context of crimes against humanity than it did for war crimes. Given the explicit requirement of a connection between crimes against humanity and armed conflict in the ICTY Statute, this may have been a logical

³⁸⁸ *Prosecutor v. Kayishema*, Trial Judgement, *supra* note 123, ¶ 127.

³⁸⁹ For a discussion of the *Blaškić* Trial Judgement see *supra* Part I.A.1(a).

³⁹⁰ *Prosecutor v. Blaškić*, Trial Judgement, *supra* note 75.

³⁹¹ *Case 002*, Judgement, *supra* note 89, ¶ 196; see *supra* notes 151–57 and accompanying text.

³⁹² See *supra* Part I.A.2(a).

³⁹³ See *supra* Part I.A.1(a).

development, although as others have noted, it is objectionable on both textual and policy grounds.³⁹⁴

While the policy behind this jurisprudence may be sensible, the importation of a strict humanitarian law definition into crimes against humanity was problematic even at the ICTY as it began to create problems based upon status. When the problem of individuals *hors de combat* subsequently arose, the ICTY Chambers struggled with the idea, and in *Martić*, the Trial Chamber found that they had no protection from crimes against humanity based upon their *status* as members of the armed forces.³⁹⁵ This is illogical, given that they could not be mistreated under the laws of war; why then deprive them of the additional protection of crimes against humanity given that most of the acts prohibited in Article 7(1) are also unlawful under the laws of war?³⁹⁶ Recognizing this, the Appeals Chamber in *Martić* devised an elegant solution to the problem generated by IHL's reliance upon status: It found that not all victims of an attack on a civilian population need be civilians once the attack on the civilian population was established, meaning that soldiers *hors de combat* could still be the *victims* of crimes against humanity even if they retained the *status* of non-civilians. The ECCC took this a step further to find that purges of members of the armed forces by the Khmer Rouge regime were crimes against humanity given that they were "civilians or, at a minimum, *hors de combat*, thereby enjoying the same protection as civilians."³⁹⁷

Thus, we see, in the context of armed conflict, two trends in the jurisprudence to align the protection of the laws of war with crimes against humanity: The first more directly examines the actual situation of the victim group to determine if it forms part of the population protected from attack under IHL; the second eschews examination of the actual situation in favor of looking at the *formal status* of the population involved as determined by Article 50 of AP I (which is applied equally to international and non-international armed conflicts by some of the case law in spite of its formal inapplicability to the latter), but then suggesting that they may still be the victims of crimes against humanity even though they are not civilians. Which solution is to be preferred?

³⁹⁴ See, e.g., WERLE & JEBBERGER, *supra* note 45, ¶ 888.

³⁹⁵ *Prosecutor v. Martić*, Trial Judgement, *supra* note 89.

³⁹⁶ Rome Statute, *supra* note 13, art. 7(1). The one exception is arguably imprisonment under Article 7(1)(e), which might be lawful; but since it is consistent with international law to detain soldiers *hors de combat*, this provision would not apply. *Id.*

³⁹⁷ *Case 002*, Judgement, *supra* note 89, ¶ 194. For further discussion see *supra* notes 152–57 and accompanying text.

It must initially be determined whether choosing one or another interpretation results in any prejudice to the accused, which is forbidden by Articles 21(3) and 22(2) of the Statute.³⁹⁸ These provisions require the human rights of the accused to be respected and the definition of crimes to be “strictly construed.”³⁹⁹ Given that this is an open question, and that either solution would be “foreseeable,” which is the test that the European Court of Human Rights has adopted for the principle of legality,⁴⁰⁰ it seems that either option is available to ICC Chambers in approaching this question. Indeed, both theories have been advanced at one time or another by the *ad hoc* tribunals. Where a clear answer does not appear, I have suggested some policy reasons to guide the Court: judicial efficiency, the effectiveness of the ICC trial system, the expressive and normative function of international criminal law, the transparency and comprehension of international criminal law and avoiding fragmentation if possible. There may be others, as well.

It may well be more *efficient* to take a “formal” and status-based approach to this question, defining civilian under AP I regardless of the actual scenario presented to the Court. Indeed, some of the early decisions of the ICC Chambers clearly did this, using AP I as the relevant definition even in peacetime. However, there are reasons to be concerned about this approach.

First, it undermines the object and purpose of Article 7 (and Article 6), which permit ICC prosecutions to go forward even in situations short of armed conflict. Broadening the concept of civilian in peacetime to protect individuals who are targeted for the crimes in Article 7(1) to include members of the armed forces attacked in a purge is both logical and consistent with the sparse case law considering this possibility. Second, the ICC has already accepted this as a possibility with respect to U.N. Peacekeepers, finding in *Abu Garda* that their situation, as opposed to their *status*, is the relevant test.⁴⁰¹

Third, during armed conflict, it may be necessary to layer IHL concepts on this peacetime conceptualization of “civilian population” due to IHL’s operation as the *lex specialis*. To the extent that the purpose, again, is to distinguish those protected from attack from those not protected from attack, it is important to note that the ICRC and the Protocols make distinctions between those protected in international and non-international armed conflict. In international armed

³⁹⁸ Rome Statute, *supra* note 13, art. 21(3).

³⁹⁹ *Id.* art. 22(3).

⁴⁰⁰ See *SW v. U.K.*, Merits & Just Satisfaction, 335-B & 335-C Eur. Ct. H.R. (ser. A) ¶¶ 34, 36 (1995).

⁴⁰¹ See *Prosecutor v. Abu Garda*, Decision, *supra* note 180 and accompanying text.

conflict, the emphasis is on formal status for operation of the principle of distinction; but individuals *hors de combat* are also protected, just under different provisions of the Third and Fourth Geneva Conventions. *For this reason, it seems consistent with IHL to adopt a situation-specific as opposed to formal status definition even in international armed conflict.*

In non-international armed conflict, the ICRC adopts the notion of “continuous combat function” to distinguish those individuals who can be targeted for purposes of the principle of distinction, from those who cannot. Although this is a contested area of IHL,⁴⁰² the ICRC’s work is highly authoritative. To the extent the goal is to align the provisions of Article 8 and Article 7 in terms of civilian protection, this approach should at least be given serious consideration, rather than the transposition of AP I Article 50 into the law of crimes against humanity.

We thus arrive at a three-part test for case-by-case resolution of these issues at the ICC: *First*, the situation is categorized depending upon whether or not it involves crimes committed during or outside of armed conflict. If the crimes have been committed during peacetime, all individuals are presumptively civilians, and are part of the “population” protected by Article 7, even members of the armed forces and the police assuming they are not perpetrating the attacks.

Second, if the crimes have been committed during an armed conflict, the question arises whether it is international or non-international in nature. In that case, the targeted victim population’s formal status is assessed under IHL as the *lex specialis*, although this does not end the inquiry.

Third, the specific situation of the victims is considered, while also taking into consideration, to the extent relevant, the provisions of IHL applicable in international and non-international armed conflict, but without mechanically transferring those provisions to Article 7, particularly as regards the notion of “protected person,” which can have no application in Article 7.⁴⁰³ In practical terms, this means that the soldiers attacked by the Khmer Rouge regime were

⁴⁰² Compare Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARV. NAT’L SEC. J. 5, 21–24 (2010) (arguing that the continuous combat function criterion “badly distorts the military necessity-humanitarian balance” of international humanitarian law), with Nils Melzer, *Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities*, 42 N.Y.U. J. INT’L L. & POL. 831, 846–51 (2010) (contending that the continuous combat approach “best reflects” current understandings of organized armed groups).

⁴⁰³ WERLE & JEBBERGER, *supra* note 45, ¶ 888. It also appears to have less and less relevance in IHL, at least as regards the applicability of Common Article 3. See *supra* note 43.

part of the “civilian population” protected by the law of crimes against humanity, as were the individuals allegedly abducted and cruelly mistreated by Thomas Lubanga Dyilo who did not “lose” their civilian status when taken into his armed group, except during and to the extent that they are actually directly participating in hostilities, and then only as regards the application of the principle of distinction, and not with respect to the commission of other Article 7 crimes.

Although this proposed three-part test is more complex than the simple formula of AP I, its adoption could enhance the expressive function of the ICC Statute by making it clear that the definition of civilian population in Article 7 is premised, in the first instance, not upon the formal rules of international humanitarian law, but upon a peacetime understanding of the crime that takes into account the actual situation of the victim population. It also squares with our common sense understanding, in the examples given above, about who is deserving of Rome Statute protection, and avoids creating gaps in the Statute’s protective mantle. Moreover, as noted above, this complexity is inherent in the international legal order in which the Rome Statute is embedded, and is not an artifact of the Statute but a consequence of the manner in which international law has developed over time. Finally, it honors the wishes of the Framers of the Rome Statute by adopting the kind of case-by-case approach they suggested would be appropriate for the resolution of this question during the Statute’s negotiation.