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## Crimes Against Humanity: Directing Attacks Against A Civilian Population

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### Abstract

*In international criminal law, to sustain a charge of crimes against humanity, the Prosecution must prove, among other elements, that the perpetrator was involved in an attack directed against a civilian population. In Prosecutor v Fofana and Kondewa, the Special Court for Sierra Leone found that the Prosecution failed to prove, beyond a reasonable doubt, that the civilian population was the 'primary object' of the attack and acquitted the accused on the counts of murder and other inhumane acts as crimes against humanity. The Appeals Chamber accepted this view. However, it reversed Trial Chamber I on the ground that the Prosecution evidence did establish that the civilian population had been the primary, as opposed to incidental, target of the attack. The author suggests that this is an error resulting from the undue jurisprudential pre-occupation with the meaning of 'primary' in relation to the notion of attack against a civilian population. Instead, the inquiry should focus on whether the civilian population was 'intentionally' targeted in the attack, notwithstanding that it may not have been the primary object of the attack. He submits that this approach would be consistent with the classic theory of mens rea in criminal law.*

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## I. Introduction

For a charge of crimes against humanity to succeed, the following five general elements are required to be proved: (i) there must have been an attack; (ii) the attack must have been directed against a civilian population; (iii) the acts of the perpetrator must have been part of the attack that was directed against a civilian population; (iv) the attack of which the perpetrator's act formed a part must, in turn, been part of a widespread or systematic pattern of attacks; and (v) the perpetrator must have been aware that his or her acts constituted part of the widespread or systematic attack.<sup>1</sup>

In the case of *Fofana and Kondewa*,<sup>2</sup> the Special Court for Sierra Leone had occasion to apply these elements. For the most part, their pronouncements were unremarkable—except in relation to the requirement that the attack must have been directed against a civilian population. The particular question raised by that case is how much sway should be given to the view that for purposes of crimes against humanity, to direct an attack against a civilian population is to make that population the 'primary' object of the attack. This essay is limited to this narrow question.

It might be helpful, however, to begin the discussion with a brief review of the idea of 'attack' as a general element of crimes against humanity. Typically, an attack would entail violence against the victims.<sup>3</sup> This, however, need not be so in all cases of crimes against humanity. The range of mistreatments recognised as crimes against humanity (such as enslavement, deportation, imprisonment, persecutions, apartheid) do not always connote the commission of violence against the victims,<sup>4</sup> although they most often do. It is for this reason that the case law has taken a view of 'attack' as encompassing 'any mistreatment' of the civilian population,<sup>5</sup> in the manner of the conduct listed in the relevant instrument.<sup>6</sup> More specifically, an attack need not involve the use of armed force.<sup>7</sup> For purposes of customary international law, the attack need not be part of an armed conflict. One notes, of course, the singular instance of the statute of the International Criminal Tribunal for the former Yugoslavia whose Statute uniquely indicates a nexus between crimes against humanity and armed conflict, purely for reasons peculiar to the events in the former Yugoslavia.<sup>8</sup>

There are some mixed messages in the jurisprudence regarding whether 'attack' in the sense of crimes against humanity requires a multiplicity of

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<sup>1</sup> *Prosecutor v Kunarac et al* (Appeal Judgment) IT-96-23 & IT-96-23/1-A (12 June 2002) [85].

<sup>2</sup> *Prosecutor v Fofana and Kondewa* (Trial Judgment) SCSL-04-14-T (2 August 2007); *Prosecutor v Fofana and Kondewa* (Appeal Judgment) SCSL-04-14-A (28 May 2008).

<sup>3</sup> *Prosecutor v Vasiljevic* (Trial Judgment) IT-98-32-T (29 November 2002) [29]; *Prosecutor v Kunarac et al* (Trial Judgment) IT-96-23 & IT-96-23/1-T (22 February 2001) [415].

<sup>4</sup> *Akayesu* (Trial Judgment) ICTR-96-4-T (2 September 1998) [581].

<sup>5</sup> *Kunarac* (Appeal Judgment) (n 1) [86].

<sup>6</sup> *Prosecutor v Kajelijeli* (Judgment and Sentence) ICTR-98-44A-T (1 December 2003) [867]; *Prosecutor v Semanza* (Judgment and Sentence) ICTR-97-20-T (15 May 2003) [327]; *Akayesu* (n 4) [581].

<sup>7</sup> *Kunarac* (Appeal Judgment) (n 1) [86].

<sup>8</sup> *Ibid.*

offensive acts. A series of judgments from the International Criminal Tribunal for Rwanda<sup>9</sup> has consistently repeated the thought, first expressed in the *Akayesu* trial judgment, that an ‘attack’ comprises ‘an unlawful act, event or series of events.’<sup>10</sup> Given that the *Akayesu* Trial Chamber had expressed the thought as part of an explanation of what generally amounts to an ‘attack’,<sup>11</sup> it does not appear then that this line of case law may truly be viewed as a conscious departure from the ICTY Trial Chambers pronouncement in a pre-trial decision in the *Tadić* Case that an attack must ‘not be one particular act but, instead, a course of conduct’.<sup>12</sup> In view of the requirement that the attack be ‘widespread or systematic’, it is tempting to take the view that one unlawful act or event may not meet the test of ‘attack’ as a general element of crimes against humanity. In fact, that suggestion is made in the ICC Statute where ‘attack directed against any civilian population’ is defined as ‘a course of conduct involving the multiple commission of acts’ against any civilian population, ‘pursuant to or in furtherance of a State or organizational policy to commit such attack.’<sup>13</sup> That, however, will be to take a very restrictive view of the notion of ‘widespread’. A fuller view of the notion is one that focuses on the multiplicity of victims affected rather than the number of acts or events involved. There is no clear reason in principle why a single massive act or event, such as a single deployment of a weapon of mass destruction, affecting a multiplicity of victims should not qualify as an attack for purposes of crimes against humanity. The better view then will be that whether or not a single act could qualify as an attack for purposes of crimes against humanity will depend on the nature of the act(s) in question.

## **II. An Attack Directed against a Civilian Population**

Having reviewed the idea of attack as a general element of crimes against humanity, attention will now focus on the subject of the present essay—i.e. what it means to direct an attack against a civilian population. As indicated earlier, the need for a closer look at the notion was occasioned by the SCSL judgments in *Fofana and Kondewa*. In the indictment, the accused were charged with two counts of crimes against humanity—namely, murder<sup>14</sup> in Count One and other

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<sup>9</sup> *Prosecutor v Muvunyi* (Trial Judgment) ICTR-2000-55A-T (12 September 2006) [512]; *Kajelijeli* (n 6) [867]; *Semanza* (n 6) [327].

<sup>10</sup> *Akayesu* (n 4) [581].

<sup>11</sup> According to the *Akayesu* Chamber: ‘The concept of attack may be defined as a unlawful act of the kind enumerated in Article 3(a) to (I) of the Statute, like murder, extermination, enslavement etc. An attack may also be non violent in nature, like imposing a system of apartheid, which is declared a crime against humanity in Article 1 of the Apartheid Convention of 1973, or exerting pressure on the population to act in a particular manner, may come under the purview of an attack, if orchestrated on a massive scale or in a systematic manner’. *Ibid*.

<sup>12</sup> *Prosecutor v Tadić* (Decision on the Form of the Indictment) IT-94-1-A (14 Nov 1995) [11]: ‘The very nature of the criminal acts in respect of which competence is conferred upon the International Tribunal by Article 5, that they be “directed against any civilian population”, ensures that what is to be alleged will not be one particular act but, instead, a course of conduct.’

<sup>13</sup> Rome Statute of the International Criminal Court, UN Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 UNTS 90 (ICC Statute) art 7(2)(a).

<sup>14</sup> *Prosecutor v Norman, Fofana and Kondewa* (Indictment) SCSL-03-14-I [8].

inhumane acts<sup>15</sup> in Count Three. For purposes of these Counts, it fell on the Trial Chamber to consider, among other things, whether the attacks, of which the actions of the accused had formed a part, were directed against a civilian population.<sup>16</sup> In the trial judgment, the Trial Chamber identified attacks occurring in at least five different locales on at least 10 different dates.<sup>17</sup> On the basis of these events, the Trial Chamber held that the requirement of a widespread attack had been established in this case, considering the broad geographical area over which these attacks occurred.<sup>18</sup>

Next, the Trial Chamber passed on to the question whether the Prosecution had established that the attacks had been directed against a civilian population. On that issue, the Trial Chamber held that the 'evidence adduced [did] not prove beyond reasonable doubt that the civilian population was the primary object of the attack.'<sup>19</sup> Rather, held the Chamber, 'these attacks were directed against rebels or juntas that controlled towns, villages, and communities throughout Sierra Leone.'<sup>20</sup> Consequently, the Chamber acquitted the accused on Count 1 (Murder as a Crime against Humanity) and Count 3 (Other Inhumane Acts as Crimes against Humanity).

For purposes of the present discussion, it is important to understand that the Trial Chamber had perceived the meaning of attacks 'directed against' a civilian population as requiring that the civilian population must be seen as the *primary* target of the attacks.<sup>21</sup> On appeal, all the judges of the Appeals Chamber approved of the Trial Chamber's view that the expression 'directed against' a civilian population requires that the civilian population (which is subjected to the attack) must be the primary rather than an incidental target of the attack.<sup>22</sup> Nevertheless, the Appeals Chamber (Judge King dissenting) reversed the Trial Chamber on the finding that the evidence did not establish that the civilian population had been the primary target of the attack. In the view of the Appeals Chamber that fact had been amply proved.<sup>23</sup> In particular, the majority of the Appeals Chamber observed that the Trial Chamber might have misdirected itself in confusing the *target* of the attack with the *purpose* of the attack. 'When the target of an attack is the civilian population,' observed the Appeals Chamber, 'the purpose of that attack is immaterial.'<sup>24</sup>

Purely as a question of evidence, the majority of the Appeals Chamber was correct to find that the evidence adduced had established beyond reasonable doubt that the civilian population was the *primary* object of the attack. The question, however, is whether the modifier 'primary' should be given the

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<sup>15</sup> Ibid [9].

<sup>16</sup> *Fofana and Kondewa* (Trial Judgment) (n 2) [690].

<sup>17</sup> Ibid [691].

<sup>18</sup> Ibid [692].

<sup>19</sup> Ibid [693].

<sup>20</sup> Ibid [693].

<sup>21</sup> Ibid [114].

<sup>22</sup> *Fofana and Kondewa* (Appeal Judgment) (n 2) [299]. See also the dissenting opinion of Judge King [10], [52] and [53].

<sup>23</sup> Ibid [307]—[309].

<sup>24</sup> Ibid [300].

prominence that it currently enjoys in the legal analysis as to whether an attack was directed at a civilian population. It is submitted that it should not.

### **III. An undue preoccupation with the modifier ‘primary’ object of attack**

The majority of the Appeals Chamber in the *Fofana and Kondewa* case might have ultimately prevented a miscarriage of justice by reversing the factual findings of the Trial Chamber. Yet, there is still a concern that the Trial Chamber’s error might have resulted from an undue pre-occupation with the modifier ‘primary’, with which jurisprudence now tends to visit the idea of attack against a civilian population. This pre-occupation with the word ‘primary’ is particularly evident in the dissenting opinion of Judge King in the Appeals Chamber in which he displayed a literal tendency to over-emphasise the word.<sup>25</sup> It is submitted that this pre-occupation may have resulted in a regrettable corruption of the jurisprudence in the relevant respect. Thus, the Appeals Chamber’s acceptance of that concept might still leave uncorrected the blighted thought process that resulted in the factual error made by the Trial Chamber. The better view is that the inquiry should concentrate on establishing whether the civilian population was *intentionally* targeted in the attack, notwithstanding that they may not have been the *primary* object of the attack. After all, to proceed in that way is consistent with the classic theory of *mens rea* in criminal law.

Beyond the classic theory of *mens rea*, however, there are other difficulties associated with a preoccupation with the modifier ‘primary’. To begin with, it might help to bear in mind that none of the instruments of international criminal law employs the modifier ‘primary’ in its formulation of the proscription of attacks against a civilian population as an element of crimes against humanity. For instance, the Rome Statute of the ICC proscribes a list of crimes as crimes against humanity ‘when committed as part of a widespread or systematic attack directed against any civilian population’.<sup>26</sup> The ICTY Statute forbids the same list of crimes ‘directed against a civilian population’ when those crimes are committed as part of a widespread or systematic attack.<sup>27</sup> The ICTR Statute forbids the same crimes ‘when committed as part of a widespread or systematic attack against a civilian population’.<sup>28</sup> The SCSL Statute gives the Court power to ‘prosecute persons who committed the same crimes as part of a widespread or systematic attack against any civilian population’.<sup>29</sup> These are different models expressing the same idea.

The view that ‘directed against’ a civilian population requires seeing the civilian population as the primary object of the attack is based on

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<sup>25</sup> See dissenting opinion of Judge King [10], [50], [52], [53].

<sup>26</sup> ICC Statute, art 7.

<sup>27</sup> Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended) SC res. 827, UN SCOR 48th sess., 3217th mtg. at 1-2 (1993); 32 ILM 1159 (1993) art 5.

<sup>28</sup> Statute of the International Criminal Tribunal for Rwanda, SC res. 955, UN SCOR 49th sess., 3453rd mtg, U.N. Doc. S/Res/955 (1994); 33 ILM 1598 (1994) art 3.

<sup>29</sup> Statute of the Special Court for Sierra Leone 2178 UNTS 138, 145; 97 AJIL 295; UN Doc. S/2002/246, appendix II, art 2.

pronouncements from earlier jurisprudence, such as the judgment of the ICTY in the *Kunarac* case.<sup>30</sup> There, the ICTY Appeals Chamber wrote as follows:

[T]he expression ‘directed against’ is an expression which ‘specifies that in the context of a crime against humanity the civilian population is the primary object of the attack’. In order to determine whether the attack may be said to have been so directed, the Trial Chamber will consider, *inter alia*, the means and method used in the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes committed in its course, the resistance to the assailants at the time and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war. To 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.<sup>31</sup>

Notably, before the ICTY Appeals Chamber adopted it in the *Kunarac* case, the language of ‘primary’ object of attack had earlier been introduced into the jurisprudence by the Trial Chamber in *Kunarac* without analytical fanfare. It came in this simple statement: ‘The expression “directed against” specifies that in the context of a crime against humanity the civilian population is the primary object of the attack.’<sup>32</sup> There was no reference for the proposition, nor was there further discussion to show that the adjective ‘primary’ had been a conscious choice of language and why.

In view of the foregoing genesis of the language of ‘primary’ object of attack, the risk arises that a different adjudicator, in the position of the judges of the SCSL, may grasp an incomplete view of what the Trial Chamber and Appeals Chamber had in mind in *Kunarac* when they wrote that the expression ‘directed against’ is an expression which ‘specifies that in the context of a crime against humanity the civilian population is the primary object of the attack.’ For instance, the text of paragraph 693 of the SCSL trial judgment in *Fofana and Kondewa*, where the Trial Chamber disposed of the point at issue, shows that the Trial Chamber focused only on this first part of the *Kunarac* dictum; for the Trial Chamber did not go beyond saying as follows:

The Chamber finds, however, that the evidence adduced does not prove beyond reasonable doubt that the civilian population was the primary object of the attack. By contrast, there is evidence that these attacks were directed against the rebels or juntas that controlled towns, villages, and communities throughout Sierra Leone. In this regard the Chamber recalls

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<sup>30</sup> See *Kunarac* (Appeal Judgment) (n 1) [92].

<sup>31</sup> *Ibid* [91]. See also *Semanza* (n 6) [330] and *Prosecutor v Naletilić* (Trial Judgment) IT-98-34-T (31 March 2003) [235].

<sup>32</sup> *Kunarac* (Trial Judgment) (n 3) [421].

the admission of the Prosecutor that “the CDF and the Kamajors fought for the restoration of democracy”.<sup>33</sup>

It would appear that the Trial Chamber had not fully considered the import of the rest of the *Kunarac* dicta, in context, which do aid in a better appreciation of whether an attack was ‘directed against’ a civilian population. Nor did the Trial Chamber consider the factors which the ICTY Appeals Chamber said ought to be considered in *Kunarac*<sup>34</sup> ‘in order to determine whether the attack may be said to have been so directed.’<sup>35</sup> As indicated in the fuller version of the *Kunarac* appeal judgment quoted earlier, these factors (referred to as ‘the *Kunarac* factors’) include the following:

- the means and method used in the course of the attack
- the status of the victims
- the number of victims
- the discriminatory nature of the attack
- the nature of the crimes committed in the course of the attack
- the resistance to the assailants at the time, and
- the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war.<sup>36</sup>

As an aside, it is submitted that these factors must not be viewed as a cumulative tally of factors all of which must be proven before a determination can be made as to whether or not an attack was directed against a civilian population. They serve rather as a guide which should assist a court in satisfying itself beyond reasonable doubt that the attack was *intended* to target the civilian population. As such, they need not all be established in every case once the Trial Chamber finds any of these factors or a combination thereof helpful in clearing any doubt in its mind that an attack was intended to target the civilian population. What is more, the Trial Chamber may need to look no further than evidence showing the declared intent of the attackers to target the civilian population.

We now return to the main question: what is the essence of the *Kunarac* factors which an adjudicator is required to consider for purposes of determining whether an attack was directed against a civilian population? It is this. The inquiry should focus on ascertaining whether any casualties suffered by the civilian population resulted from their having been *intentionally targeted*, rather than having only been victims of *unforeseen* and ‘unavoidable incidental civilian casualties and damage which may result from legitimate attacks upon military

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<sup>33</sup> *Fofana and Kondewa* (Trial Judgment) (n 2) [693].

<sup>34</sup> *Kunarac* (Appeal Judgment) (n 1) [91]. See also *Prosecutor v Blaškić* (Appeal Judgment) IT-95-14-A 29 (July 2004) [106] and *Prosecutor v Kordić and Čerkez* (Appeal Judgment) IT-95-14/2-A (17 December 2004) [96].

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

objectives.<sup>37</sup> That this is the gist of the *Kunarac* dictum is amply clear from both what the ICTY Appeals Chamber had gone on to say in the *Kunarac* judgment and in later judgments. For instance, in the very next paragraph following the *Kunarac* dictum, it becomes clearer that the notion of the civilian population as the *primary object* of that attack was meant as a contrast to the notion of the civilian population as the *incidental target* of the attack. As the ICTY Appeals Chamber put it:

The Appeals Chamber is satisfied that the Trial Chamber correctly defined and identified the ‘population’ which was being attacked and that it correctly interpreted the phrase “directed against” as requiring that the civilian population which is subjected to the attack must be the *primary* rather than an *incidental target* of the attack.<sup>38</sup> (emphasis added)

In the circumstances, it is submitted that the formulation of the test which introduced the word ‘primary’ into the equation is no more than extra verbiage borne out of an attempt to ensure clarity of meaning. The proposition was thus over-baked. But it might not have been necessary to go that far with language, if greater effort had been expended in making clear that the aim of the exercise was to stress intentional attack. And if the inquiry is to ensure that the civilian population were not merely incidental victims of the attack in question, the contrasting inquiry need not concentrate on whether or not the civilian population was the *primary* target of the attack. An inquiry into whether the civilian population had been *intentionally*—rather than *primarily*—targeted will still discount punishment of an accused for *incidental* injuries to the civilian population. On the other hand, the guilty may go free, if the contrasting inquiry were to be whether the civilian population was the *primary* object of attack. As appears in the next frame of the discussion, the clearest example of this danger appears in an intentional use of indiscriminate or disproportionate force against an armed opposition, without regard to the dictates of military necessity, where it is reasonably foreseeable that civilians would be injured.

Indeed, there is an overarching theme in the case law that the focus of the inquiry is this contrast between an attack that *intentionally targets* the civilian population and one in which the civilian population were *incidental or collateral* victims. This is apparent from the judicial reliance on the norms of international humanitarian law for determining the legitimacy of an attack against a civilian population in cases of crimes against humanity in the context of warfare. In this regard, it is worth recalling the following from the *Kunarac* dictum:

To 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.<sup>39</sup>

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<sup>37</sup> See UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford University Press, Oxford 2004) 23.

<sup>38</sup> *Kunarac* (Appeal Judgment) (n 1) [92].

<sup>39</sup> *Ibid* [91].



The need to rely upon norms of international humanitarian law for purposes of determining whether an attack, during an armed conflict, was directed against a civilian population, for purposes of crimes against humanity, is even more clearly asserted by the ICTY Appeals Chamber in *Blaškić*. Notable in that case is the ICTY Appeals Chamber's forceful observation that in customary international law the *targeting* of civilians is absolutely prohibited in an armed conflict. As the Appeals Chamber put it:

Before determining the scope of the term 'civilian population,' the Appeals Chamber deems it necessary to rectify the Trial Chamber's statement, contained in paragraph 180 of the Trial Judgement, according to which '[t]argeting civilians or civilian property is an offence when not justified by military necessity.' The Appeals Chamber underscores that there is an absolute prohibition on the *targeting* of civilians in customary international law.<sup>40</sup> (emphasis added)

Having made that preliminary observation, the ICTY Appeals Chamber proceeded to rely on norms of international humanitarian law to characterise who is a civilian for purposes of crimes against humanity in the context of armed conflicts:

In determining the scope of the term 'civilian population,' the Appeals Chamber recalls its obligation to ascertain the state of customary law in force at the time the crimes were committed. In this regard, it notes that the Report of the Secretary General states that *the Geneva Conventions 'constitute rules of international humanitarian law and provide the core of the customary law applicable in international armed conflicts.'* Article 50 of Additional Protocol I to the Geneva Conventions contains a definition of civilians and civilian populations, and the provisions in this article may largely be viewed as reflecting customary law. *As a result, they are relevant to the consideration at issue under Article 5 of the Statute, concerning crimes against humanity.*<sup>41</sup> (emphasis added)

Furthermore, since the determination of the prohibition against *targeting* the civilian population must necessarily take its bearing from international humanitarian law, it is helpful to recall that the classic statement of that norm was made by the International Court of Justice in the *Nuclear Weapons Case*. Describing the norm as 'the first' of the 'cardinal principles ... constituting the fabric of humanitarian law', the ICJ pronounced as follows:

*The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects and establishes the*

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<sup>40</sup> *Blaškić* (Appeal Judgment) (n 34) [109].

<sup>41</sup> *Ibid* [110].

*distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets. According to the second principle, it is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. In application of that second principle, States do not have unlimited freedom of choice of means in the weapons they use.*<sup>42</sup> (emphasis added)

Not only did the ICJ describe these principles as the 'cardinal principles ... constituting the fabric of humanitarian law', but also that they constitute 'intransgressible principles' of international customary law.<sup>43</sup> It is thus clear that the singular golden thread that runs through both international humanitarian law and customary international law (relating to crimes against humanity in the context of armed conflict) is this prohibition against *targeting* civilians during an armed conflict.

Given this prohibition, it is not helpful to dwell on the question of whether the targeted civilian population was the 'primary' object of the attack. That such a pre-occupation is unhelpful is clear from the *Nuclear Weapons Case*. First, the ICJ did not employ the modifier 'primary' in its observation that the principle of distinction, which forbids making the civilian population the 'object of attack' in an armed conflict is a cardinal and intransgressible principle of international humanitarian law. Second, and more importantly, the very question before the Court negates the value of such a modifier. The question before the Court was: 'Is the threat or use of nuclear weapons in any circumstance permitted under international law?' The ICJ's ultimate answer to that question was this: (a) from first principles, the threat or use of nuclear weapons would be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law; but (b) in an extreme circumstance of self-defence, in which the very survival of a State would be at stake, the Court could not conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful, in view of the current state of international law, and of the elements of fact at the Court's disposal.<sup>44</sup>

Clearly, the general rule against the use or threat of use of nuclear weapons, as stated by the ICJ in the *Nuclear Weapons Case*, is chiefly animated by the consideration that the use of nuclear weapons would, among other things, prove inconsistent with the principle of distinction which prohibits making civilians the object of attack in armed conflicts—including by way of indiscriminate or disproportionate attacks. This is notwithstanding that the *primary* object of the attack in question might not have been a civilian population, but a legitimate military target. This appears clear from the following words of the ICJ:

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<sup>42</sup> *Legality of Threat or Use of Nuclear Weapons* (Advisory Opinion) 1996 ICJ Rep 226 [78].

<sup>43</sup> *Ibid* [79].

<sup>44</sup> *Ibid* [105].

Certainly, as the Court has already indicated, the principles and rules of law applicable in armed conflict <at the heart of which is the overriding consideration of humanity> make the conduct of armed hostilities subject to a number of strict requirements. Thus, methods and means of warfare, which would preclude any distinction between civilian and military targets, or which would result in unnecessary suffering to combatants, are prohibited. In view of the unique characteristics of nuclear weapons, to which the Court has referred above, the use of such weapons in fact seems scarcely reconcilable with respect for such requirements.<sup>45</sup>

The logic of the matter then becomes this. If a *cardinal* and *intransgressible* principle of international humanitarian law forbids the use of ‘methods and means of warfare which would preclude any distinction between civilian and military targets’, it should not then matter that the civilian population was not the *primary* object of any attack in which such methods and means were employed, in the event of resulting injuries to civilians. The *transgression* of the *cardinal* principle is complete once it is established that the force used had been *intentionally* indiscriminate or disproportionate—let alone one that *deliberately* targeted the civilian population along with legitimate military targets. Indeed, this proposition is implicit in the jurisprudence of the Appeals Chamber of the ICTY. For instance, the *Kunarac* dictum lists the following among the factors to be considered:

- the discriminatory nature of the attack, and
- the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war.<sup>46</sup>

Another case that supports the foregoing submission is *Galić*. There, the ICTY Appeals Chamber had to deal with the war crime of terrorism. The Appeals Chamber observed that the crime of terrorism ‘falls within the general prohibition of attacks on civilians.’<sup>47</sup> This prohibition was alternatively described by the Appeals Chamber as ‘the unconditional obligation not to target civilians for any reason, even military necessity.’<sup>48</sup> As regards the scope of this prohibition, the Appeals Chamber observed that the rule is violated by indiscriminate or disproportionate attacks. In the words of the Appeals Chamber:

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<sup>45</sup> Ibid [95]. See also [78] where the Court observed as follows: ‘In conformity with the aforementioned principles, humanitarian law, at a very early stage, prohibited certain types of weapons either because of their indiscriminate effect on combatants and civilians or because of the unnecessary suffering caused to combatants, that is to say, a harm greater than that unavoidable to achieve legitimate military objectives. If an envisaged use of weapons would not meet the requirements of humanitarian law, a threat to engage in such use would also be contrary to that law.’

<sup>46</sup> *Kunarac* (Appeal Judgment) (n 1) [91].

<sup>47</sup> *Prosecutor v Galić* (Appeal Judgment) IT-98-21-A (30 November 2006) [102]. See also [87].

<sup>48</sup> Ibid [103].

The acts or threats of violence constitutive of the crime of terror shall not however be limited to direct attacks against civilians or threats thereof but may include indiscriminate or disproportionate attacks or threats thereof.<sup>49</sup>

To the extent then that the principle of distinction or the rule against indiscriminate or disproportionate attacks, as emphasised in the *Nuclear Weapons Case* and in *Kunarac and Galić*, has any application in any given case, it must necessarily displace the theory that an attack must have the civilian population as its 'primary' object, in order that such an attack may be seen as directed against the civilian population. To cast the inquiry as one in which the civilian population must be seen as the *primary* object of the attack risks unwittingly to induce the inquirer to take a monocular view of the purpose of the attack—one in which only one purpose of the attack is recognisable notwithstanding that the attack might have been *intended* for a multiplicity of purposes. Such a view might result in the negation of other reasons for the criminality of the attack, if a legitimate reason is found for the attack.

Hence, the intentional use of indiscriminate or disproportionate force to overcome enemy combatants, in circumstance in which foreseeable casualties will be occasioned among the civilian population, may escape punishment as a crime against humanity, simply because the attack was *primarily* directed at enemy combatants. This, it seems, was precisely the dilemma which the Trial Chamber in *Fofana and Kondewa* saw as confronting them. But if one limited the inquiry into whether the civilian population had been *deliberately* or *intentionally* targeted, then disproportionate use of force in circumstances in which civilian casualties were foreseeable would meet the test of 'directing attacks against a civilian population', although the primary object of the attack might have been enemy combatants or armed adversaries in an armed conflicts.

#### **IV. Conclusion**

The inquiry into whether an attack was directed at a civilian population needs to take into account a wider range of questions beyond narrow question of whether the civilian population was the *primary* object of the attack. Clearly, where the perpetrators targeted primarily the civilian population rather than enemy combatants or armed adversaries, this element would be satisfied. But that ought not to be the only scenario captured by the law of crimes against humanity. It is clear also that where perpetrators conduct an indiscriminate or disproportionate attack, mindful of, but undeterred by, the real potential for civilian casualties, a charge of crimes against humanity ought also to be sustained. It is argued that the more encompassing formulation of the test of directing attacks against a civilian population engages the question whether the civilian population was *intentionally* targeted. It should not be limited to asking whether they were *primarily* targeted.

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<sup>49</sup> Ibid [102].

