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Amicus Curiae Brief of Professors Robinson, deGuzman, Jalloh and Cryer on Crimes Against Humanity (Cases 003 and 004)

Filed by:
Darryl ROBINSON

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INTRODUCTION

Procedural Background

1. On 19 April 2016, Michael Bohlander, International Co-Investigating Judge, invited submissions from scholars in international criminal law on the interpretation of "civilian" in crimes against humanity, particularly in the context of attacks on members of one's own armed forces.[1] Accordingly, Professors Darryl Robinson, Margaret deGuzman, Charles Jalloh and Robert Cryer (hereafter, "the Amici") hereby respectfully submit the present brief. The Amici are four professors with established expertise in international criminal law, and in particular on crimes against humanity.[2] The Amici have previously submitted *amicus curiae* observations on crimes against humanity to the International Criminal Court Appeals Chamber.[3]

Summary of Argument

2. There are two views on the interpretation of "civilian" in crimes against humanity. One may be called the "status-based" view, which excludes all members of any armed force. The other may be called the "legitimate target" view, which excludes attacks against lawful targets, ie. combatants of hostile parties to conflict. The "legitimate target" view properly reflects the principle of distinction, harmonizes crimes against humanity with humanitarian law, and fits with precedent including post-World War II cases. The "status-based" view arose in thinly-reasoned cases, lacks a rationale and has problematic effects. One such effect is that violence or persecution against members of one's own army would generally be neither a war crime (since they are not adverse parties) nor a crime against humanity. Thus it would arbitrarily deprive persons of the protection of international criminal law because of their occupation. While early ICTY cases followed the traditional "legitimate target" view, more recent ICTY cases departed without adequate analysis. The Amici urge the ECCC to adhere to the original dichotomy between civilians and combatants (ie legitimate targets).

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[1] "Call for Submissions by the Parties in Cases 003 and 004 and Call for Amicus Curiae Briefs", 19 April 2016.
[2] See Annex (Amici credentials).
[3] ICC Doc. ICC-02/11-01/11-516, 1 October 2013 (Appeals Chamber); ICC Doc. ICC-02/11-01/11-534, 10 October 2013 (Amicus Curiae Observations).

SUBMISSIONS

3. On any interpretation of "civilian population", crimes against humanity can cover incidental crimes against military personnel, as long as they are part of a broader attack.[4] But there is an important prior issue of the meaning and scope of the "civilian" requirement. Can a widespread or systematic attack on current or former members of armed forces (eg. prisoners of war or fellow servicemembers) constitute a crime against humanity in its own right? Under the correct, "legitimate target" approach, "civilian" is interpreted in accordance with the principle of distinction. Such attacks are impermissible and can constitute crimes against humanity.

A. The rationale of the "civilian" requirement is to exclude lawful attacks on military targets.

4. International law permits widespread and systematic attacks against hostile combatants, if committed during armed conflict and in accordance with international humanitarian law. Thus, "the 'civilian' reference serves a functional purpose, which is to exclude military actions against legitimate military objectives in accordance with international humanitarian law."[5]

5. This understanding of the term "civilian" has long permeated the jurisprudence. The term "civilian" in crimes against humanity has been understood, in accordance with the principle of distinction,[6] in contrast with legitimate military targets – ie. combatants of a hostile party. Thus, Yoram Dinstein, writing in 2000, wrote that the term "civilian" in crimes against humanity "need not raise too many questions" as "it has traditionally and consistently been regarded as the antonym of combatants." [7]

6. Kai Ambos and Steffen Wirth accurately summarize the longstanding jurisprudence on crimes against humanity as follows:

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[4] See eg *Martic,* IT-95-11-A, Appeal judgment, 08.10.2008 para 313.
[5] Cryer et al, *An Introduction to International Criminal Law and Procedure*, 3d ed. (Cambridge, 2014), p. 241.
[6] On the principle of distinction between combatants and non-combatants as a "cardinal principle" see *Legality of the Threat or Use Nuclear Weapons,* ICJ Reports 1996, para 78.
[7] Dinstein, "Crimes Against Humanity After Tadic", 13 LJIJ (2000) 373 at 388.

> **A civilian is any individual who is not an active member of a hostile armed force**, or a combatant who has laid down arms or has been rendered hors de combat. The victim's formal status as a member of an armed force – hostile or not – bears no relevance."[8]

7. Similarly, Gerhard Werle and Florian Jessberger also conclude that, "what is crucial is *not formal status,* such as membership in specific military forces or units, but the person's *actual role* at the time of the crime."[9] Thus "civilian" includes combatants who have laid down arms, or are hors de combat, or are prisoners of war.[10]

8. This understanding of "civilian" (the "legitimate target" view) satisfies the purpose of the requirement, reflects the principle of distinction, avoids conflicts between crimes against humanity and war crimes law, and complies with past jurisprudence.

B. Post-World War II jurisprudence reflects the "legitimate target" approach.

9. As Ambos and Wirth note, the "broad" interpretation of civilian (the legitimate target approach)[11] is "strongly supported strongly supported by case law starting with the decisions of German courts under CCL10":

> In a case of the German Supreme Court in the British Occupied Zone, the defendants were convicted for having sentenced to death and ordered the execution of two (German) soldiers who had deserted in the last days of the war. The court noted that the crime against the soldiers was not committed against the civilian population but ruled this was not necessary since crimes against humanity can be committed against soldiers as well. In another case, the same court convicted a defendant for sentencing to death two (German) soldiers who had committed the "crime" of demoralisation of the armed forces (Wehrkraftzersetzung). Both decisions support the view that crimes against humanity can be committed against soldiers of the same nationality as the perpetrators.[12]

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[8] Ambos & Wirth, "The Current Law of Crimes Against Humanity: An Analysis of UNTAET Regulation 15/2000" (2002) 13 Crim. L. Forum 1 at 85. See also ibid at 25-26: "Thus, in sum, every individual, regardless of his or her formal status as a member of an armed force, must be regarded as a civilian unless the forces are hostile towards the perpetrator and the individual has not laid down his or her arms or, ultimately, been placed hors de combat."

[9] Werle & Jessberger, *Principles of International Criminal Law*, 3d ed. (Oxford, 2014) p 335 (emph added).

[10] Ibid.

[11] Ambos & Wirth, p 85.

[12] Ibid p. 23, discussing Case No. StS 111/48, Judgment, 7.12.1948 (German Supreme Court in the British Occupied Zone), 1 Entscheidungen des Obersten Gerichtshofes der Britischen Zone in Strafsachen 219 at 228; Case No. StS 309/49, 18.10. 2 Entscheidungen des Obersten Gerichtshofes der Britischen Zone in

10. Similarly, Antonio Cassese has reviewed post-World War II cases, concluding that while a few adopt the "status-based" approach, most take the "legitimate target" approach. In particular, relevant cases punished crimes by German nationals against German soldiers and officers, such as denouncing them or executing them for attempting to escape or for criticizing the regime.[13]

11. Henri Meyrowitz, reviewing WWII cases, concludes

> Du moment que la définition s'étend à des actes commis par des nationaux allemands à l'encontre d'autres nationaux allemands, en exclurait-on des victimes allemandes pour la raison qu'elles ont porté l'uniforme de l'armée allemande ? C'est à juste titre que la Cour suprême de la zone britannique a déclaré la qualification applicable à des faits dont les victimes et les auteurs ont été des militaires allemandes (103). En effet, pour les rédacteurs du statut du Tribunal militaire international comme pour ceux de la loi n° 10, il n'y avait aucune raison, sur le plan du droit international, de distinguer entre les Allemands, auteurs ou victimes de crimes contre l'humanité, suivant qu'ils étaient militaires ou civils.[14]

12. Several World War II cases implicitly treat mass crimes against prisoners of war as both war crimes and crimes against humanity, in both Germany[15] and Japan.[16]

13. Other national jurisprudence reaches similar results. In the *Barbie* case (France), the Court of Cassation overturned a lower court decision that adopted a "status-based" approach. The Court held that "it was wrong to exclude from the category of crimes against humanity all the acts...which had been committed against members or possible members of the resistance."[17] The *Touvier* case (France) also affirmed that

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Strafsachen 231.

[13] Cassese *et al*, *Cassese's International Criminal Law*, 3rd ed. (Oxford, 2013) p. 101-103.

[14] Unofficial translation. Henri Meyrowitz, *La répression par les tribunaux allemands des crimes contre l'humanité et de l'appartenance a une organisation criminelle en application de la loi n° 10 du Conseil de Contrôle Allié,* p. 282.

[15] *USA v. Greifeldt et al* ('RuSHA Case'), 5 Trials of War Criminals Before the Nuernberg Military Tribunals at 88. *USA v. Hermann Göring et al*, 1 Trial of the Major War Criminals Before the International Military Tribunal 171 – p. 292, refers to "a widespread program of war crimes and crimes against humanity. These crimes included the murder and mistreatment of prisoners of war". The *Milch* case considered crimes against prisoners of war (p. 779) to be both war crimes (p. 790) and crimes against humanity (p. 791). *USA v. Milch* ('Milch Case'), 2 Trials of the War Criminals Before the Nuernberg Military Tribunals (TWCNMT) at 773. The *Justice* case regarded crimes against resistance members ("the Night and Fog Decree") as crimes against humanity (1032, 1055-57). *USA v. Altstoetter et al* ('Justice Case'), 3 TWCNMT at 954.

[16] Extract from Trial of Takashi Sakai, Case No. 83, 14 Law Reports of Trials of War Criminals 1 at 7.

[17] *Crim, 20 décembre 1985, Bull. n°407, Cour de cassation (chambre criminelle), M. Barbie*, translated and reprinted in 78 I.L.R. 141 at 147.

the notion of crimes against humanity applies to crimes against former members of the resistance.[18]

14. International bodies have also followed the "legitimate target" approach. The Commission of Experts on former Yugoslavia interpreted "civilian" in Article 5 as "meaning people who are not combatants. This, however, should not lead to any quick conclusions concerning people who at one particular point in time did bear arms."[19]

C. ICTY/ICTR jurisprudence initially followed the "legitimate target" approach.

15. Ad hoc Tribunal jurisprudence also initially followed the "legitimate target" approach. For example, the ICTR, interpreting crimes against humanity in *Akayesu,* held that:

> 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.[20]

The Chamber correctly noted, "this definition assimilates the definition of 'civilian' to the categories of person protected by Common Article 3 of the Geneva Conventions; an assimilation which would not appear to be problematic."[21]

16. In *Tadic*, the Chamber and both parties agreed that "civilian" means "non-combatant".[22] As in *Akayesu*, the Chamber held that the term corresponds to the common Article 3 formula of "persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat...".[23] *Jelisic* likewise adopted the understanding of "civilian" as an antonym for military targets, holding that "the notion of civilian population as used

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[18] *Crim. 27 novembre 1992, Bull. n°394, Cour de cassation (chambre criminelle), M. Touvier*, translated and reprinted in 100 I.L.R. 351 at 352.
[19] *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, UN Doc S/1994/674 Annex (1994), para 78.
[20] *Akayesu*, ICTR-96-4-T, Trial judgment, 2.09.1998, para. 582 (emph added)
[21] Ibid.
[22] *Tadić*, IT-94-1-T, Trial judgment, 7.05.1997, para 637-639.
[23] *Ibid,* para 639.

in Article 5 of the Statute includes, in addition to civilians in the strict sense, all persons placed hors de combat when the crime is perpetrated."[24]

17. Early Tribunal cases also noted that crimes against humanity may be directed against members of armed forces when they are not legitimate targets (ie hostile combatants). For example, the *Tadic* Trial Chamber recalled that "the possibility of considering members of the armed forces as potential victims of crimes against humanity was recognized as early as 1946."[25] In *Kupreskic*, the Trial Chamber emphasized that combatants should not be excluded by virtue of their status (ie. having worn uniforms), as they too can be persecuted, and that "civilian" must be interpreted accordingly.[26] Similarly, in *Blaskic,* the Trial Chamber rejected the idea that service members are ipso facto excluded from the "civilian population".[27] The Chamber held that "civilian population" includes

> former combatants …who were no longer taking part in hostilities when the crimes were perpetrated because they had either left the army or were no longer bearing arms or, ultimately, had been placed hors de combat, in particular, due to their wounds or their being detained. It also follows that the **specific situation of the victim at the moment the crimes were committed, rather than his status**, must be taken into account in determining his standing as a civilian.[28]

This understanding correctly reflects the basic bifurcation of the principle of distinction. Protection from widespread or systematic attacks extends to prisoners of war, former combatants, members of one's own army, and also members of armed forces during peacetime.

D. The ICTY departed from the "legitimate target" approach without justification.

18. In *Blaskic* and *Martic*, the ICTY Appeals Chamber abruptly departed from this established approach. The Chamber copied the definition of "civilian" from Article 50 of Additional Protocol I, which excludes members of armed forces.[29] However, Article 50 defines "civilian population" for the purpose of granting certain IHL protections to communities affiliated with an adverse party to conflict. It is

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[24] *Jelisic*, IT-9510-T, Trial judgment , 4.12.1999, para 54.
[25] *Tadic* para 640.
[26] *Kupreskic*. IT-95-16-T, Trial judgment, 14.01.2000, para 547.
[27] *Blaskic*, IT-95-14-T, Trial judgment, 3.03.2000, para 208.
[28] Ibid at 214.
[29] *Blaskic*, IT-95-14-A, Appeal judgment, 29.07.2004, para 110-13; *Martic,* IT-95-11-A, Appeal judgment, 08.10.2008 para 290-302.

inappropriate to transplant this definition into crimes against humanity. The Article 50 definition of "civilian" makes sense within the regulatory scheme of the Geneva Conventions, which provide detailed and separate protections for prisoners of war and for wounded and sick combatants. By contrast, "civilian" in crimes against humanity was adopted decades earlier, and relies on a simpler bifurcation between those taking part in hostilities and those who are not. The transplant would deprive persons of protection without justification. There is a rationale for excluding lawful battlefield actions, but not for excluding all servicepersons in other contexts.

19. The Appeals Chamber relied on the principle of distinction to justify its conclusion.[30] However, that principle supports the opposite conclusion. For example, under the principle, deliberate targeting of prisoners of war is prohibited. In a proportionality assessment of an attack, harm to prisoners of war would be included as "civilian" injuries, not military advantage.

20. In *Blaskic*, the Appeals Chamber argued, "If [a victim] 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."[31] This proposition is correct, in a different context: namely, a party to conflict may attack members of hostile armed forces even when they are not fighting at that moment. However, the argument is not at all germane to attacks on persons hors de combat, prisoners of war, members of one's own forces, or attacks on military personnel during peacetime.

21. Werle and Jessberger, after reviewing the approach established in the mainstream jurisprudence, observe that "in *Blaskic*, the Appeals Chamber departed from these principles". They note that the "mechanical transfer" of the Article 50 AP I definition "fails to acknowledge the object and purpose" of crimes against humanity "and must therefore be rejected".[32] For example, "present or former members of one's own armed forces, who are not protected by international humanitarian law, can become direct objects of a crime against humanity."[33] Similarly, Cryer, Friman, Robinson and Wilmshurst canvass the problems with the thinly-reasoned transplant from Article

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[30] *Martic,* footnote 806.
[31] *Blaskic*, para 114.
[32] Werle & Jessberger, p. 336.
[33] Ibid, p 337.

50, and urge, ""It may be hoped that other jurisdictions... will critically examine the Tribunal's reasoning before following the same path."[34] The current cases necessitate that critical examination.[35]

E. Concluding observations

22. The position of the Amici complies with the principles of interpretation, including strict construction. There are two common "ordinary meanings" for "civilian": (1) as an antonym for combatants (who may be attacked), and (2) persons not serving in armed forces. Both meanings have been invoked in jurisprudence. The principle of strict construction is pertinent only once other canons of construction are exhausted. Strong reasons militate against the narrower reading. The narrower reading is inconsistent with the broader jurisprudence, and with the rationale for the "civilian" restriction. It would also have problematic effects. It would mean that systematically torturing and killing thousands of prisoners of war would not constitute a crime against humanity. It would mean that one could kill members of one's own army on a widespread or systematic basis, and doing so would constitute neither a war crime nor a crime against humanity. Persons do not lose the protection of crimes against humanity by virtue of their occupation. The "legitimate target" approach reflects the person's actual situation in the context of the crimes.

23. The arguments here apply to the time period 1975-79, as the Amici submit that "civilian population" in crimes against humanity has always been based on the principle of distinction. The Amici urge fidelity to the original jurisprudence and the underlying rationale for the "civilian" limitation, ie to exclude lawful attacks on legitimate targets.

Darryl Robinson 17 May 2016

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[34] Cryer et al, p. 242.

[35] In *Bemba*, an ICC Trial Chamber echoed *Blaskic* and *Martic*, but the issues discussed here did not arise in that case and were not scrutinized. The decision listed relevant "factors", which actually conform to the "legitimate target" view. Commendably, the Chamber added, "considering the purpose of Article 7, it is the Chamber's view that the notion must be construed in a manner which does not exclude other protected persons." That point arose when discussing victims of such crimes, but the same consideration applies to the scope of crimes against humanity. *Bemba*, ICC Doc. ICC-01/05-01/08-3343 21.03.2016, Paras 152-56.