

Analysis: The Notion of Civilians in International Criminal Law

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Introduction

The traditional and long held view has been that there a number of fundamental differences between war crimes and crimes against humanity. They are in general:

- for war crimes, there is no systematic or widespread commission required, as is the case for crimes against humanity; even one incident of criminal activity can amount to a war crime;
- crimes against humanity can be committed during times of war and times of peace while war crimes can only be carried during an armed conflict;
- war crimes can be committed against property;
- war crimes can involve the use of weapons;
- crimes against humanity can be only committed against any civilians in general, while war crimes only against civilians belonging to the other party in the armed conflict;

- the number of recognized war crimes is much larger than crimes against humanity; the Rome Statute, which can still be considered the most authoritative (although not exhaustive) enumeration of such crimes list 11 crimes against humanity and 53 war crimes (although there is overlap between these crimes in that all the 17 war crimes applicable in non-international armed conflict are also mentioned in the list pertaining to international armed conflicts).

Of these six essential elements of war crimes and crimes against humanity, the second last, defining the category of crime by category of victim, has undergone a drastic change in 2017 in both the area of war crimes and crimes against humanity. This has been the result of judicial decisions at both the International Criminal Court (ICC) and the Extraordinary Chamber in the Courts of Cambodia (ECCC). The ICC addressed the issues of whether war crimes can be committed against soldiers belonging to the same party to the conflict while the ECCC examined whether soldiers can also be victims of crimes against humanity.

Civilians and crimes against humanity

Most of the jurisprudence in respect of what constitutes a civilian population in crimes against humanity comes from the International Criminal Tribunal for Yugoslavia (ICTY). Originally this concept as it related to members of the armed forces was interpreted broadly by only excluding such personnel if they were actually engaged in combat. However, starting in 2004 the ICTY Appeals Chamber restricted the notion of civilian population by further excluding members of the armed forces who were *hors de combat* (i.e. not involved in combat) from being treated as part of the civilian population. This jurisprudence has been consistently followed by the ICTY, of which the cases of *Blaški?*[1], *Marti?*[2] and ***Mrkši?***[3]

The International Criminal Tribunal for Rwanda (ICTR) has added another dimension to the notion of civilian population, specifically when these crimes occurred during times of peace (an approach, which was followed by the ECCC). In such a situation, it was held that:

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.[7]

The ICTR has also said that unarmed peacekeepers are also civilians by saying:

Considering their status as United Nations peacekeepers and that they were disarmed, the Chamber is satisfied that the victims could not be considered as combatants. The fact that the peacekeepers were able to obtain a weapon during the course of the attack in order to defend themselves against a

mob of soldiers intending to kill them can in no way alter this conclusion.[8]

The ICC interpretation of civilian population also includes the following statements, the first one of which was already set out in the ICTY jurisprudence, while the second provides a clarification to this concept by saying:

'Finally, it is noted that, despite the requirement that the attack be directed against a civilian population, there is no requirement that the individual *victims* of crimes against humanity be "civilians". Indeed, 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'[9]

'any civilian population' is not limited to groups distinguishable by nationality, ethnicity or other distinguishing features.[10]

Whether soldiers can also be victims of crimes against humanity

This restricted vision of what constitutes a civilian population specifically in the context of soldiers as victims was addressed in a decision by the co-investigative judges of the ECCC in February 2017.[11] The judges came to the conclusion that the notion of civilian population can include members of a state's own armed forces who were victimized along with civilians during the time period pertaining to the jurisdiction of the ECCC, namely between 1975 and 1979. The decision starts out by commenting on the fact that post-WWII jurisprudence applied the notion of crimes against humanity without further inquiring into the formal status of the persons who had been victimized resulting in a broad interpretation of this concept,[12] which is confirmed by pre-1975 international instruments, such as the Genocide Convention and the Apartheid Convention.[13]

The co-investigative judges of the ECCC rejected the reasoning of the *Blaški?* Appeal's Chamber judgment as well as all other decisions following this judgment, including the other chambers of the ECCC because of the fact that the narrower interpretation of civilian population in *Blaški?* had been premised on the notion of civilian population in international humanitarian law (IHL), which regulates the conduct of armed forces in armed conflict. In the view of co-investigative judges, this reliance on IHL was misguided for crimes against humanity, which can be committed both in times of war and peace.[14] Instead they favoured an interpretation, which is not based on the status of the person but on the activities. that that person is engaged in; if a soldier is not participating in combat, (s)he should receive the same human rights protection as civilians.[15]

Whether war crimes can be committed against soldiers belonging to the same party to the conflict

The Appeals Chamber of the ICC addressed the issue of whether war crimes can be committed by a party to a conflict against members of its own armed forces in June of 2017.[16] The question in this judgment was whether members of an armed group were categorically excluded from protection against the war crimes of rape and sexual slavery when committed by other members of that same

group.

The Appeals Chamber was of the view that such an exclusion was not warranted nor part of international criminal law. It recognized the unprecedented nature of its decision,[17] indicating that the Sierra Leone Special Court as well as another chamber of the ICC had reached contrary conclusions [18]. It provided detailed reasoning for its contrary determination. The starting point was that since the question dealt with war crimes, IHL is the main source of interpretation. IHL does not only governs actions of parties in relation to each other in armed conflict but also deals with vulnerable persons during such conflicts and provides fundamental guarantees to persons not taking an active role in the conflict.[19]

While the categories of victims of war crimes are civilians who are persons not taking an active role in an armed conflict belonging to the other party of the conflict as is reflected in the fourth Geneva Convention of 1949, or those who are no longer taking part in the conflict due their capture and becoming a prisoner of war as regulated by the third Geneva Convention, this restrictive approach is not universal. This can be deduced from the fact that the other two 1949 Geneva Conventions, the first dealing with the wounded and sick and the second regulating war at sea, provide protection in all circumstances, including to members of a party's own armed force.[20] As well, common article 3 of all four Geneva Convention, which applies to non-international armed conflicts (all the other provisions in the four conventions deal with international armed conflict), provides fundamental protection against inhumane treatment to all persons irrespective of that person's affiliation.[21] As such there is no general rule that a war crime can only be committed against persons who are members of the opposing armed group.[22]

In addition, under IHL there is no justification for engaging in sexual violence against any person whether or not such a person might be targeted or killed as a combatant in an armed conflict. As a result, the general rule that protects only civilians and persons *hors de combat* in the power of a party to the conflict (the subject matter of the third and fourth Geneva Conventions) there is no reason to limit such protection to these categories only and not extend it to victims of sexual violence by other members of the same armed group, or, in the words of the Appeals Chamber:

Accordingly, in the absence of any general rule excluding members of armed forces from protection against violations by members of the same armed force, there is no ground for assuming the existence of such a rule specifically for the crimes of rape or sexual slavery.[23]

Conclusion

These decisions of the ECCC and ICC represent an important development in an area of international criminal law, which has been relatively neglected in the jurisprudence, namely the status of soldiers as victims of war crimes and crimes against humanity. While the ECCC decision seeks to revive an approach espoused by early ICTY trial chamber decisions, the ICC judgment is, as indicated by the appeals chamber itself, rather radical if not revolutionary even though it is couched in the language of

precedent.

In terms in how far these decisions will be the start or restart of a new trend depends on the subject matter in question. With respect to the question whether soldiers can be victims of war crimes, the ICC decision has very strong precedential value as it originated from the highest judicial organ of the ICC, a very powerful voice in international criminal law. However, the impact of the decision should not be overstated as the chamber has only stated that in general the proposition that soldiers cannot be victims of war crimes is not sustainable while applying this general principle to only one group of persons, namely victims of sexual violence. It is not clear yet whether this will be extended to other groups, such as victims of torture or other forms in cruel treatment.

The situation with ECCC decision is rather different. First of all, the decision attempts to upend a long jurisprudential trend, which has been utilized over a dozen years by four different international criminal institutions. As well, unlike the Appeals Chamber of the ICC, the co-investigative judges at the ECCC are at lowest end of the hierarchy (although the first appeal of the decision was denied on procedural grounds)[24] and it is by no means certain that it will be followed by either other levels in its own institution or by other tribunals or the ICC. Last, while the ICC judgment is applicable from a temporal perspective since at least 2002, the ECCC decision might only apply only to the 1975-1979 period. It is possible and indeed desirable that this question could be clarified on November 22 when the ICTY Trial Chamber will render its judgment in the *Mladic* case.

However, from a legal perspective, the reasoning in both cases was sound, while from a humanitarian perspective it is timely and encouraging that the plight of soldiers who have been abused by fellow members of their armed forces has been given much needed attention and it is hoped that this trend will continue and hopefully be expanded.

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References

1. Judgment, *Blaški?* (IT-95-14-A), Appeals Chamber, 29 July 2004, §§ 103-116.
2. Judgment, *Marti?* (IT-95-11-A), Appeals Chamber, 8 October 2008, §§ 291-319.
3. Judgment, ***Mrkši? et al.*** (IT-95-13/1-A**), Appeals Chamber, 5** May 2009, §§ 28-44.[ref/] are the most important, while other ICTY judgments say the same but in fewer words.[ref]Judgment, ***Kordi? and ?erkez*** (IT-95-14/2-A), Appeals Chamber, 17 December 2004, §§ 95-97; Judgment, *Gali?* (IT-98-29-A), Appeals Chamber, 30 November 2006, §§ 135-139; Judgment, ***Miloševi?*** **(**IT-98-29/1-A), Appeals Chamber, 12 November 2009, §§ 50-61 and 139; Judgment, *Periši?* (IT-04-81-T), Trial Chamber, 6 September 2011, §§ 84-85; Judgment, *Gotovina et al.* (IT-06-90-T), Trial Chamber, 15 April 2011, §§ 1704-1705; Judgment, *Tolimir* (IT-05-88/2-T), Trial Chamber, 12 December 2012, §§ 694-697; Judgment, ***Staniši? and Župljanin*** **(IT-08-91-T), Trial Chamber, 27 March 2013, §§ 26-27;** Judgment, ***Prli? et al.*** **(IT-04-74), Trial Chamber, 29 May 2013, § 38;** Judgment, ***Staniši? and Simatovi?*** **(**IT-03-69-T), Trial Chamber, 30 May 2013, §§ 964-965; Judgment, *?or?evi?* (IT-05-87/1-A), Appeals Chamber, 27 January 2014, §§ 522-525 and 747; *Šainovi? et al.* (IT-05-87-A), Appeals Chamber, 23 January 2014, §§ 549-550; Judgment, ***Popovi? et al.*** (IT-05-88-A), Appeals Chamber, 30 January 2015, §§ 567-570; Judgment, *Tolimir* (IT-05-88/2-A), Appeals Chamber, 8 April 2015, § 142; Judgment, *Karadži?* (IT-95-5/18-T), Trial Chamber, March 24, 2016, § 475.

   Judgment, Kordi? and ?erkez (IT-95-14/2-A), Appeals Chamber, 17 December 2004, §§ 95-97; Judgment, Gali? ...continue
4. The same approach has been used by the Sierra Leone Special Court (most recently in the Taylor case)[ref]Judgment, *Taylor* (SCSL-03-01-T), Trial Chamber, 18 May 2012, §§ 509-510.
5. Judgement, *Kaing Guek Eav alias Duch* (Case File 001/18-07-2007/ECCC/TC), Trial Chamber, 26 July 2010, §§ 302-312; Judgement, *Case 002/01* (Case File No. 002/19-09-2007/ECCC/TC), Trial Chamber, 7 August 2014, §§ 185-186; Judgment, *Case 002/01* (Case File No. 002/19-09-2007-ECCC/SC), Supreme Court Chamber, November 23, 2016, §§ 737-740.
6. Judgment, *Bemba* (ICC-01/05-01/08), Trial Chamber, March 21, 2016, § 152.
7. Judgment, *Kayishema and Ruzindana*, (ICTR-95-1-T), Trial Chamber, 21 May 1999, § 127.

Judgment, *Bagosora*, *Kabiligi, Ntabakuze and Nsengiyumva* (ICTR-98-41-T), Trial Chamber, 18 December 2008, § 2175; crimes against peacekeepers are considered war crimes in the ICC
8. Statute in both international and non-international armed conflicts, see articles 8.2(b)(iii) and 8.2(e)(iii)). Police forces during an armed conflict were considered civilians in Judgment*, Sesay, Kallon and Gbao ('RUF'*), (SCSL-04-15-T), Trial Chamber, 25 February 2009, §§ 87-88.

9. Judgment, *Bemba* (ICC-01/05-01/08), Trial Chamber, March 21, 2016, § 156.

10. Decision on the Confirmation of Charges, *Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (CC-01/09-02/11), Pre-Trial Chamber II, 23 January 2012, § 110; Decision on the Confirmation of Charges, *William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* (ICC-01/09-01/11), Pre-Trial Chamber II, 23 January 2012, § 164; Judgment, *Katanga* (ICC- ICC-01/04-01/07), Trial Chamber, March 7, 2014, § 1103; Judgment, *Bemba* (ICC-01/05-01/08), Trial Chamber, March 21, 2016, § 155.

11. Notification on the Interpretation if 'Attack against the Civilian Population' in the Context of Crimes against Humanity with regard to a State's or Regime's Own Armed Forces, Case File No. 003/09-09-2009-ECCC-OCIJ), Office of the Co-investigative Judges, February 17, 2017 (Notification). Eleven amici curiae submission were filed with respect to this question, see paragraphs 4 and 7-14 of the decision. See also R. Killean, E. Dowds, A. Kramer, "Soldiers as Victims at the ECCC: Exploring the Concept of 'Civilian' in Crimes Against Humanity" (2017), 30 *Leiden J. Intl. L.*685, at https://www.cambridge.org/core/journals/leiden-journal-of-international-law/article/soldiers-as-victims-at-the-eccc-exploring-the-concept-of-civilian-in-crimes-against-humanity/2935CCA28F3CF0BA819A6BBC31407F96.

12. Idem, paragraphs 25-43.

13. Idem, paragraphs 44-45.

14. Idem. Paragraphs 51-54.

15. Idem, paragraphs 55-65.

16. Judgment on the Appeal of Mr. Ntaganda against the "Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9" (ICC-01/04-02/06 OA5), Appeals Chamber, June 15, 2017.

17. Idem, paragraph 67.

18. Idem, paragraph 61.

19. Idem, paragraph 57.

20. Idem, paragraph 59.

21. Idem, paragraphs 60-61.

22. Idem, paragraph 62.

23. Idem, paragraph 65.

24. Decision on … Appeal against Notification on the Interpretation if ‘Attack against the Civilian Population’ in the Context of Crimes against Humanity with regard to a State’s or Regime’s Own Armed Forces (Case File No. 003/07-09-2009-ECCC/OCIJ (PTC32), Pre-Trial Chamber, July 18, 2017.