No. 13-15503

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JANE DOE, *et al.*,
Plaintiffs/Appellants

v.

DRUMMOND COMPANY, INC., *et al*.,
Defendants/Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION
HON. R DAVID PROCTOR, JUDGE
Case No. 2:09-CV-01041-RDP

BRIEF OF *AMICI CURIAE* INTERNATIONAL CRIMINAL LAW SCHOLARS AND PRACTITIONERS IN SUPPORT OF PLAINTIFFS/APPELLANTS AND REVERSAL

MARCO B. SIMONS
RICHARD L. HERZ
BENJAMIN HOFFMAN
MARISSA VAHLSING
EARTHRIGHTS INTERNATIONAL
1612 K Street NW, Suite 401
Washington, DC 20006
Tel: 202-466-5188

Counsel for *amici curiae*

CERTIFICATE OF INTERESTED PERSONS

Jane Doe, *et al.*, v. Drummond Company, Inc., *et al.*, No. 13-15503

Pursuant to 11th Cir. R. 26.1-1, *Amici* hereby submit their Certificate of Interested Persons, incorporating the Certificate of Interested Persons submitted by Appellants Jane Doe *et. al.*, and adding the following:

Amici Curiae

Alston, Philip

Bassiouni, M. Cherif

D'Amato, Anthony

Luban, David

Novogrodsky, Noah B.

Ramji-Nogales, Jaya

Rashid, Rashid S.

Roht-Arriaza, Naomi

Sadat, Leila

Silk, James

Sloane, Robert D.

Whiting, Alex

Counsel to *Amici Curiae*

EarthRights International

Herz, Richard L.

Hoffman, Benjamin

Simons, Marco B.

Vahlsing, Marissa

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QUESTION ADDRESSED BY *AMICI CURIAE*[1]

Some of recent history's most vile atrocities have been committed against groups of civilians accused of collaborating with a military enemy. That motive (or pretext) for mass murder has never immunized the killers from responsibility for crimes against humanity. Until the decision below.

Under international law, and thus under the Alien Tort Statute, a crime against humanity is "a widespread or systematic attack directed against any civilian population." *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1161 (11th Cir. 2005). The district court found that the alleged attacks were widespread and systematic: hundreds of people were allegedly murdered and thousands displaced, in an organized campaign of violence. *Doe v. Drummond Co.*, 2010 U.S. Dist. LEXIS 145386, *31-33 (N.D. Ala. Apr. 30, 2010). And the district court recognized that Plaintiffs alleged that the decedents in this case were civilians and that none of the decedents were guerillas or guerilla supporters. *Id.* at *33-34.

Nonetheless, the court held that Plaintiffs did not state a claim for crimes against humanity. *Id*. According to the district court, Plaintiffs did not allege that such attacks were directed against a "civilian population," because the Complaint alleged the killers "regarded [their victims] . . . as military targets suspected of

[1] No counsel for a party authored this brief in whole or in part, and no persons other than amicus or its counsel made a monetary contribution to this brief's preparation or submission.

engaging in certain behavior" and thus they "were targeted *because of* their suspected connection with the [guerillas], not as general members of the population." *Id*.

The question *amici* address is whether a widespread or systematic attack against noncombatants is *not* a crime against humanity if the perpetrators killed their victims based on their suspicion that the victims had some connection with a military opponent.

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici are leading scholars and practitioners of international criminal law, including the law of crimes against humanity. *Amici* therefore have an interest in ensuring that the courts correctly apply that law. *Amici* seek leave to file this brief via motion. The *amici* and their qualifications are detailed below.

Philip Alston is the John Norton Pomeroy Professor of Law and Chair of the Center for Human Rights and Global Justice at New York University School of Law. He teaches international law and has published widely on international law and human rights, including co-authoring a leading textbook in this field. Alston has held a range of senior United Nations appointments for well over two decades, including, from 2004 to 2010, United Nations Special Rapporteur on extrajudicial, summary, or arbitrary executions.

M. Cherif Bassiouni is Emeritus Professor Law at DePaul University and President Emeritus of the International Human Rights Law Institute, which he helped found. He is the author of 24 and editor of 43 books on International Criminal Law, Comparative Criminal Law, Human Rights, and U.S. Criminal Law; and the author of 265 articles published in law journals and books in the U.S. and abroad. Some of these publications have been cited by the International Court of Justice, the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and the United States Supreme Court. He has served in numerous United Nations positions, including the United Nations Diplomatic Conference on the Establishment of an International Criminal Court and the Commission of Experts Established Pursuant to Security Council 780 to Investigate Violations of International Humanitarian Law in the Former Yugoslavia. His most recent book on crimes against humanity is *Crimes Against Humanity: Historical Evolution and Contemporary Application* (Cambridge University Press 2011).

Anthony D'Amato is the Leighton Professor of Law at Northwestern University School of Law, where he teaches courses in international law, international human rights, analytic jurisprudence, and justice. He served as lead counsel for the defendant in *Prosecutor v. Kovacevic* before the International Criminal Tribunal for Former Yugoslavia (IT-97-24-T). He received his law

degree from Harvard Law School and a Ph.D. from Columbia University. He is admitted to practice before the U.S. Supreme Court, the U.S. Tax Court, and several U.S. Circuit Courts of Appeal, and is a member of the New York Bar. Professor D'Amato was the first American lawyer to argue (and win) a case before the European Court of Human Rights in Strasbourg, and he has litigated a number of human rights cases around the world. He is the author of over 20 books and over 110 articles. Biographies of Professor D'Amato can be found in Who's Who in America, Who's Who in American Education, and Who's Who in American Law as well as Who's Who in International Law.

David Luban is University Professor in Law and Philosophy at Georgetown University Law School. He is the co-author of *International and Transnational Criminal Law* (with Julie O'Sullivan and David P. Stewart, Aspen Publishing, second edition forthcoming 2014) and numerous articles on international criminal law including *A Theory of Crimes Against Humanity*, 29 Yale J. Int'l L. 85 (2002). He has held visiting professorships at Fordham, Harvard, Stanford, and Yale Law Schools, and is currently Distinguished Visitor in Ethics, Stockdale Center for Ethical Leadership, U.S. Naval Academy. His scholarship includes eleven books and 200 published articles. Luban has held a Guggenheim Fellowship and has been a fellow of the Woodrow Wilson Center and the Institute for Advanced Studies in Jerusalem. He has lectured in fifteen countries.

Noah Novogrodsky is a Professor of Law at the University of Wyoming College of Law. He has written extensively on international criminal law, including crimes against humanity and war crimes. He has also worked with the Special Court for Sierra Leone and the Khmer Rouge Tribunal in Phnom Penh, Cambodia. His publications on the SCSL include: *Speaking to Africa: The Early Legacy of the Special Court for Sierra Leone*, 5 Santa Clara J. Int'l L. 194 (2006) and *Litigating Child Recruitment Before the Special Court for Sierra Leone*, 7 San Diego Int'l L.J. 421 (2006).

Jaya Ramji-Nogales is Associate Professor of Law and Co-Director of the Institute for International Law and Public Policy at Temple University's Beasley School of Law. Her international criminal law publications include *Questioning Hierarchies of Harm: Women, Forced Migration, and International Criminal Law*, 11 International Criminal Law Review, Special Issue in Honor of Judge Patricia Wald on Women and International Criminal Law (Diane Marie Amann, Jaya Ramji-Nogales, and Beth Van Schaack, eds., 2011) and Bringing The Khmer Rouge To Justice: Prosecuting Mass Violence Before The Cambodian Courts (co-edited with Beth Van Schaack) (Mellen Press 2005). Since 1997, Prof. Ramji-Nogales has acted as a Legal Advisor to the Documentation Center of Cambodia, a non-governmental organization dedicated to research and preservation of documentation of crimes perpetrated under the Khmer Rouge.

Rashid S. Rashid is the Managing Partner of KNR Legal, a law firm he founded in Arusha, Tanzania. He was a Prosecutor at the United Nations International Criminal Tribunal for Rwanda from 1998 to 2008 and again from 2010-2012.

Naomi Roht-Arriaza is Distinguished Professor of Law at the University of California, Hastings College of the Law in San Francisco. She is the author of *The Pinochet Effect: Transnational Justice in the Age of Human Rights* (2005) and *Impunity and Human Rights in International Law and Practice* (1995), and coeditor of *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice* (2006). She is a coauthor of *The International Legal System: Cases and Materials* (Foundation Press 2010) and of numerous articles on accountability for international crimes, reparations, and corporate accountability. She recently guest-edited an issue of the International Journal on Transitional Justice on International Criminal Justice and Transitional Justice. She is the president of the Board of the Due Process of Law Foundation and a legal advisor to the Center for Justice and Accountability. She has advised prosecutors and judges in Latin America and elsewhere on international criminal law and international human rights law.

Leila Sadat is the Henry H. Oberschelp Professor of Law at Washington University School of Law and director of the Whitney R. Harris World Law Institute. In 2012, she was appointed Special Adviser on Crimes Against Humanity

by the International Criminal Court's Chief Prosecutor, and was elected to membership in the U.S. Council on Foreign Relations. In 2008, she launched the *Crimes Against Humanity Initiative*, an international effort to study the problem of crimes against humanity and draft a global treaty addressing their punishment and prevention. The draft treaty is now available in seven languages and is currently being debated by the U.N. International Law Commission and governments around the world. She is an internationally recognized human rights expert specializing in international criminal law and justice. She has published more than 75 books and articles in leading journals and academic presses.

James Silk is Clinical Professor of Law at Yale Law School, where he directs the Allard K. Lowenstein International Human Rights Clinic and the Orville H. Schell, Jr. Center for International Human Rights. He has written about international criminal law, and human rights, and has supervised numerous clinical projects applying international criminal law. He serves on the advisory board of the Forum for International Criminal and Humanitarian Law, and was formerly the director of the Robert F. Kennedy Memorial Center for Human Rights.

Robert D. Sloane is Professor of Law and R. Gordon Butler Scholar in International Law at Boston University School of Law and Visiting Professor at Yale Law School. He has published in the fields of public international law, international human rights, the laws and customs of war and international criminal

law. His 2009 article "The Cost of Conflation: Preserving the Dualism of *Jus ad Bellum* and *Jus in Bello* in the Contemporary Law of War," published in the *Yale Journal of International Law*, received the Francis Lieber Prize, awarded by the American Society of International Law's Francis Lieber Society for outstanding scholarship in the field of the law of armed conflict by an author under the age of 35. In fall 2012, Professor Sloane was elected to the American Law Institute.

Alex Whiting is a Professor of Practice at Harvard Law School where he focuses on international and domestic prosecution issues. He is the author of *International Criminal Law: Cases and Commentary* (2011), co-authored with Antonio Cassese and two other authors, and "In International Criminal Prosecutions, Justice Delayed Can Be Justice Delivered," 50 Harv. Int'l L. J. 323 (2009). From 2010-13, he was the Investigation Coordinator and then Prosecution Coordinator in the Office of the Prosecutor at the International Criminal Court in The Hague, overseeing all of the ongoing investigations and prosecutions in the Office. From 2002-2007, he was a Trial Attorney and then a Senior Trial Attorney with the International Criminal Tribunal for the Former Yugoslavia, where he was lead counsel in several war crimes and crimes against humanity prosecutions.

SUMMARY OF ARGUMENT

A widespread or systematic attack directed against any civilian population is a crime against humanity. This is so even if the perpetrators suspect that the victims support an opposing armed group. The jurisprudence of the current international criminal tribunals and the history of the crime against humanity offense confirm that suspected collaborators, sympathizers, or supporters are part of the "civilian population" protected by the norm.

The district court's holding to the contrary ignores the customary international law definition of the "civilian population" element for crimes against humanity. Under customary international law, crimes against humanity are enumerated "predicate crimes" including murder that take place in the context of a widespread or systematic attack directed against any civilian population. The meaning of the term "civilian" is clear: only combatants can be legitimate military targets; everyone else is civilian. Those suspected of being rebel or enemy collaborators, sympathizers, or supporters, do not lose their civilian status because of the subjective suspicions of their attackers that these civilians support the enemy. The addition of the word "population" does not affect who is afforded civilian status, but serves to emphasize the exclusion of isolated or random attacks. Nothing in the customary international law definition of crimes against humanity

suggests that the suspected civilian base of support for opposing forces cannot be considered a "civilian population."

Indeed, the cases before international criminal tribunals that expressly concern attacks upon suspected collaborators confirm that such subsets of the population are included in the international law definition of "civilian population." For example, the Special Court for Sierra Leone held that "as a matter of law perceived or suspected collaborators with the rebels or juntas, as in the present case, are likewise part of a 'civilian population.'" *Prosecutor v. Fofana & Kondewa*, Case No. SCSL-04-14-A. Judgment, ¶ 264 (May 28, 2008). Similarly, the International Criminal Court confirmed crimes against humanity charges against the commander of the Movement for the Liberation of Congo (MLC) based on allegations that the MLC targeted "suspected rebel sympathizers." *See Prosecutor v. Bemba Gombo*, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ¶¶ 109, 115, 140 (June 15, 2009).

The district court's holding also ignores the history of the crimes against humanity offense. Far from excluding those crimes against civilians having an ostensible war motive – such as attacks against suspected enemy collaborators – crimes against humanity, in its origins, actually required a nexus to war. Thus, at the International Military Tribunal at Nuremberg, it was understood that crimes

against humanity would overlap with war crimes. The "nexus to war" requirement was soon abandoned. But this only *expanded* the reach of crimes against humanity. Nothing in the history of the offense suggests any intention to exclude acts that can also be considered war crimes.

Thus, in ruling that civilians suspected of supporting a rebel group could not be considered a "civilian population," the district court ran afoul of the history of the crimes against humanity offense, and the established principles and jurisprudence of customary international law.

ARGUMENT

I. Under customary international law, a "civilian population" is any sizable group comprised primarily of individuals who are not members of the armed forces or otherwise recognized as combatants, including those suspected of supporting the enemy.

The meaning of the term "civilian" is clear under customary international law. During times of armed conflict, only combatants can be legitimate military targets, and everyone else is considered a "civilian" and cannot be deliberately attacked. Suspected collaborators or sympathizers, or even the suspected support base for a rebel group, all retain their civilian status. The term "civilian population" fully incorporates that definition and distinction. The addition of the word "population" to the term "civilian" does not alter established international law regarding who merits civilian status. To the contrary, the word "population" serves to emphasize the exclusion of isolated or random attacks from the coverage of

crimes against humanity. In ruling that a suspected civilian support base of a rebel group did not benefit from civilian status, the district court ran afoul of established principles of international law.

A. "Civilian"

The meaning of "civilian" for the purpose of crimes against humanity is well established under international law. In the case of an armed conflict, the distinction between civilian and combatant largely tracks the laws of war.[2] Civilians are considered to be all persons who are not members of the armed forces or otherwise recognized as combatants.[3] This principle is accepted by the U.S. military. For example, the U.S. military's *Operational Law Handbook 2013* provides that the law of armed conflict:

> requires parties to a conflict to engage only in military operations that distinguish (or discriminate) between combatants and civilians not taking direct part in the hostilities, and direct attacks solely against combatants. . . . [T]he civilian population as such, as well as individual civilians, may not be made the object of deliberate attack.

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[2] *Amici* assume, as did the district court, that the facts at issue arose in a context of armed conflict. *See Drummond*, 2010 U.S. Dist. LEXIS 145386, at *25, 29 (finding plaintiffs contention sufficient to prove war crimes).

[3] *See Prosectuor v. Blaškić,* Case No. IT-95-14-A, Judgment, ¶¶ 110-113 (July 29, 2004); *Prosecutor v. Akayesu*, Case No. ICTR-96-4, Judgment, ¶ 582 (Sept. 2, 1998); *Prosecutor v. Blaškić*, Case No. IT-95-14, Judgment, ¶ 214 (Mar. 3, 2000); *Prosecutor v. Kunarac*, Case No. IT-96-23, Judgment, ¶ 425 (Feb. 22, 2001); *Prosecutor v. Fofana & Kondewa*, Case No. SCSL-04-14-A. Judgment, ¶ 258 (May 28, 2008); *see also* Guénaël Mettraux, *Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda*, 43 Harv. Int'l L.J. 237, 258 (2002).

The Judge Advocate General's Legal Center and School, International and Operational Law Dep't, *OPERATIONAL LAW HANDBOOK* 2013, V(B)(3), at 12 (Maj. William Johnson ed. 2013).

The international tribunals have thus looked to the laws of war to provide guidance on the meaning of the word "civilian" for purposes of crimes against humanity. *See, e.g.*, *Blaškić*, Case No. IT-95-14-A, ¶ 110; *Prosecutor v. Kordic and Cerkez*, Case No. It-95-14/2-A, Judgment, ¶ 97 (Dec. 17. 2004). In particular, these tribunals have found Article 50 of Additional Protocol I to the Geneva Conventions – whose provisions reflect customary law – to be the most instructive. *Blaškić*, Case No. IT-95-14-A, ¶ 110; *Kordic and Cerkez*, Case No. It-95-14/2-A, ¶ 97. Article 50(1) defines "civilian" as any person who does *not* belong to a set of clearly articulated and defined categories of combatants, including members of the armed forces, and members of all other organized armed groups (including militias, voluntary corps, and resistance movements). Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 50(1), June 8, 1977, 1125 U.N.T.S. 3 (incorporating by reference Article 4 A(1), (2), (3) and (6) of the Third Geneva Convention and Article 43 of Protocol I). Article 50(1) concludes with a presumption in favour of inclusion, stating: "In case of doubt whether a person is a

civilian, that person shall be considered to be a civilian." *Id.*; *accord Prosecutor v. Galic*, Case No. IT-98-29-T, Judgment, ¶ 50 (Dec. 5, 2003).

A civilian may only be targeted if he takes direct part in hostilities, and even then only for such time as he does so. Protocol I, art. 51; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 13, June 8, 1977, 1125 U.N.T.S. 609. International law has "dispense[d] with the concept of quasi-combatants." *Blaškić*, Case No. IT-95-14-A, ¶ 114.

Significantly, even perceived "collaborators" are accorded civilian status under international law. *Prosecutor v. Fofana & Kondewa*, Case No. SCSL-04-14-A, Judgment, ¶260 (May 28, 2008) ("[A]s a matter of law perceived or suspected collaborators with the rebels or juntas, as in the present case, are likewise part of a 'civilian population.'"); *accord Prosecutor v. Sesay, Kallon, & Gbao*, Case No. SCSL-04-15-T, Judgment, ¶ 86 (March 2, 2009). As the Special Court for Sierra Leone explained, persons accused of "collaborating" with armed forces "would only become legitimate military targets if they were taking part in the hostilities." *Sesay, Kallon, & Gbao*, Case No. SCSL-04-15-T, Judgment, ¶ 86. By contrast,

> [i]ndirectly supporting or failing to resist an attacking force is insufficient to constitute such participation. In addition, even if such civilians could be considered to have taken direct part in the hostilities, they would only qualify as legitimate military targets during the period of their direct participation. If there is any doubt as

> to whether an individual is a civilian he should be presumed to be a civilian and cannot be attacked merely because he appears dubious.

Id. (*citing* Protocol I art 50(1); Jean-Marie Henckaerts and Louise Doswald-Beck, eds., *Customary International Humanitarian Law, Volume 1: Rules* 23-34 (Cambridge: Cambridge University Press: 2005)).

In all cases, "civilian" is to be defined broadly, "regardless of the existence of an armed conflict at the time and place of the act." Mettraux at 258; *see also Prosecutor v. Kupreškić*, Case No. IT-95-16, Judgment, ¶ 547 (Jan. 14, 2000). 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 . . . [which] are intended to safeguard basic human values by banning atrocities directed against human dignity." *Id*.

The District Court did not apply these principles when it erroneously determined that suspected supporters of the FARC rebels were "military targets," rather than civilians. *See Drummond Co.*, 2010 U.S. Dist. LEXIS 145386, *34.

B. "Population"

Established international law also counsels that the term "population" is to be interpreted broadly for the purposes of crimes against humanity. *Prosecutor v. Tadic*, Case No. IT-94-1, Judgment, ¶ 643 (May 7, 1997); *Kupreškić*, Case No. IT-95-16, Judgment, ¶ 547. A "population" is a sizeable group of people that is more than a limited and randomly selected number of individuals. *Prosecutor v.*

Kunarac, Case No. IT-96-23-A, Judgment, ¶ 90 (June 12, 2002). An attack that is widespread or systematic satisfies the "population" requirement since it establishes that the attack was not "against a limited and randomly selected number of individuals." *See id.*

Thus, the use of the word "population" and the phrase "directed against any civilian population," reflect the requirements of "widespread" (as opposed to a limited number of individuals) or "systematic" (as opposed to randomly or arbitrarily selected individuals) attacks. The word "population" does not require that "the entire population of the geographical entity in which the attack is taking place must have been subjected to that attack." *Kunarac*, Case No. IT-96-23-A, Judgment, ¶ 90. It is sufficient that "enough individuals were targeted in the course of the attack, or that they were targeted in such a way [that] the attack was in fact directed against a civilian 'population', rather than against a limited and randomly selected number of individuals." *Id*. Indeed, it was "the desire to exclude isolated or random acts from the notion of crimes of humanity that led to the inclusion of the requirement that the acts must be directed against a civilian 'population'," and accordingly, "either a finding of widespreadness, which refers to the number of victims, or systematicity, indicating that a pattern or methodical plan is evident, fulfills this requirement." *Prosecutor v. Tadic*, Case No. IT-94-1, Judgment, ¶ 648; *see also Prosecutor v. Kunarac*, Case No. IT-96-23, Judgment, ¶ 422 (Feb. 22,

2001) (noting that "the expression 'directed against any civilian population' ensures that generally, the attack will not consist of one particular act but of a course of conduct").

The ICTY Trial Chamber's decision in *Limaj* confirms this point. *Limaj* held that perceived collaborators were entitled to civilian status. *Prosecutor v. Limaj*, Case No. IT-03-66-T, Judgment, ¶ 224 (Nov. 30, 2005). The Trial Chamber explained that, although "the targeted killing of a number of political opponents" could not satisfy the requirements of a "population," it "is sufficient to show that enough individuals were targeted in the course of the attack, or that they were targeted in such a way as to satisfy the Chamber that the attack was in fact directed against a civilian 'population,' rather than against a limited and randomly selected number of individuals." *Id.* at ¶ 187. Thus, *Limaj* makes clear that "population" refers to the requirements of numerosity and systematicity: "the requirement that a 'civilian population' be the target of an attack may be seen as another way of emphasising the requirement that the attack be of large scale or exhibit systematic features." *Id.* at ¶ 218. It does not impose any new limitations on the definition of "civilian" under international law so as to exempt the killing of those suspected of supporting opposing groups. Unlike in this case, the Trial Chamber in *Limaj* did not find the attack to be widespread; thus the crimes were not "on a scale or

frequency such that the attack could be considered to have been directed against a civilian population." *Id.*at ¶ 225.

C. "Directed against any civilian population"

Plaintiffs in this case alleged that none of their decedents were, in fact, FARC members or even sympathizers, and nothing in the complaint suggests that there were any FARC members killed in the attack on the civilian communities of Cesar and Magdalena. But even if some of those killed were FARC members or supporters, it would not change the conclusion that the attack was directed against a "civilian population." Although a population must be predominantly civilian in nature, the presence within a population of members of resistance groups or even the presence of combatants within the population does not change the civilian nature of the population. *Blaškić,* Case No. IT-95-14-A, ¶ 113.[4]

Rather, when assessing whether the attack was directed against a civilian population as opposed to combatants, courts can consider a variety of factors.

[4] *See also Prosecutor v. Mrkšić*, Case No. IT-95-13/1-A, Judgment, ¶ 32 (May 5, 2009); *Prosecutor v. Galic*, Case No. IT-98-29-A, Judgment, ¶ 144 (Nov. 30 2006); *Prosecutor v. Galic*, Case No. IT-98-29-T, Judgment, ¶ 50 (Dec. 5, 2003); *Prosecutor v. Sesay, Kallon, & Gbao*, Case No. SCSL-04-15-T, Judgment, ¶ 83 (March 2, 2009); *Prosecutor v. Fofana & Kondewa*, Case No. SCSL-04-14-A. Judgment, ¶ 259 (May 28, 2008); *Prosecutor v. Kupreškić*, Case No. IT-95-16-T, Judgment, ¶ 549 (Jan. 14, 2000) ("the presence of those actively involved in the conflict should not prevent the characterization of a population as civilian and those actively involved in a resistance movement can qualify as victims of crimes against humanity."); Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, ¶ 291 (2005) (collecting authorities from the ICTR).

These include, for example, the civilian status of the victims, the number of civilians, and the proportion of civilians within a civilian population. *Prosecutor v. Mrkšić*, Case No. IT-95-13/1-A, Judgment, ¶ 32. And in assessing whether the civilians themselves may have been the target, courts can consider factors such as

> the means and method used in the course of the attack, the number of victims, 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.

Mrkšić, IT-95-13/1-A, Judgment, ¶¶ 29-30.

The district court ignored all of these factors when examining the allegations in the complaint. Instead, the court seized only upon the allegation that the decedents were targeted for their suspected connection with the FARC. *See Doe v. Drummond Co.*, 2010 U.S. Dist. LEXIS 145386, at *34.

Moreover, allowing such a holding to stand would immunize killers based on their *motive*. But international law is clear that motive is irrelevant. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 226 F.R.D. 456, 481 n. 26 (S.D.N.Y. 2005) (citing *Kordic and Cerkez*, Case No. It-95-14/2-A, ¶ 99); *Kunarac*, Case No. IT-96-23-A, ¶ 103; *Blaskić*, Case No. IT-95-14-A, ¶ 124.

II. Cases before international criminal tribunals expressly concerning attacks upon suspected collaborators, supporters or sympathizers confirm that such subsets of the population are included in the "civilian population."

Drawing upon the jurisprudence of the ICTY and the ICTR, both the Special Court for Sierra Leone and the International Criminal Court (ICC) have determined that attacks were directed against the "civilian population" for the purpose of crimes against humanity, when the specific subset of the population targeted were those suspected of supporting, collaborating with or sympathizing with opposing armed forces.

The case against the Civil Defense Forces (CDF) before the Special Court for Sierra Leone contains the most direct and detailed treatment of the issue. There, the court considered whether an attack against "civilians who were perceived collaborators of the enemy" – including "unlawfully killing suspected collaborators, often in plain view of friends and relatives, [and] illegal arrest and unlawful imprisonment of collaborators" – amounted to crimes against humanity. *Prosecutor v. Fofana & Kondewa*, Case No. SCSL-04-14-A. Judgment, ¶¶ 256, 266 (May 28, 2008). The defendant Kondewa admitted that perceived collaborators were deliberately targeted, but argued that they were targeted as individuals rather than as members of a larger civilian population. *Id.* at ¶ 254. He asserted that the civilians must be targeted based on "some distinguishable

characteristic of a civilian population," and not based on "suspected affiliation with the fighting forces." *Id.*

The Appeals Chamber directly rejected the defendant's position, holding that "as a matter of law perceived or suspected collaborators with the rebels or juntas, as in the present case, are likewise part of a 'civilian population.'" *Id.* at ¶ 264. What matters is the civilian status of the suspected collaborators, not the reason for which those civilians were purportedly targeted: "[W]hen the target of an attack is the civilian population, the purpose of that attack is immaterial." *Id*. at ¶ 300. The Appeals Chamber refused to create a new requirement of targeting based on some set of enumerated discriminatory grounds (as is the special case for persecution-based crimes against humanity), and instead affirmed that the prohibition on crimes against humanity extends to the targeting of the civilian population on *any* basis, including suspected support for, or collaboration with, opposing forces. *See id.* at ¶ 263.

Thus, examining the facts – and paying particular attention to the absence of military operations at the time of the crimes against the suspected collaborators – the Appeals Chamber reached the conclusion that the civilians were not "collateral victims" of military operations, nor were the attacks "random or isolated," but rather that the attacks were specifically directed against a civilian population. *Id.* at ¶¶ 303, 306-07.

The Appeals Chamber's finding that those suspected of supporting the opposing armed forces can constitute a "civilian population" is consistent with the Special Court for Sierra Leone's general approach. For example, the Trial Chamber found crimes against humanity resulting from attacks against the civilian population that "aimed broadly at quelling opposition to the regime and punishing civilians suspected of supporting CDF/Kamajors[5]" with the aim to "eradicate support for the Kamajors." *Prosecutor v. Brima, Kamara, & Kanu*, Case No. SCSL-04-16-T, Judgment, ¶¶ 225, 231 (June 20, 2007); *see also*, *Prosecutor v. Sesay, Kallon, & Gbao,* Case No. SCSL-04-15-T, Judgment, ¶¶ 950, 958 (March 2, 2009) (finding that attacks against civilian population were a "fundamental feature of their war effort, utilised amongst other purposes to punish those who provided support for the CDF/ECOMOG," and that "civilians alleged to be Kamajors were savagely beaten and executed").

The Trial Chamber drew not only on attacks against Kamajor supporters as evidence for attacks directed against a civilian population, but also on attacks against those suspected of being Kamajors themselves. *See Prosecutor v. Brima, Kamara, & Kanu*, Case No. SCSL-04-16-T, Judgment, ¶ 228 (June 20, 2007) (discussing a "campaign code named 'Operation No Living Thing' which

[5] The Kamajors were a "civilian-led paramilitary group" fighting in opposition to the AFRC/RUF. The Kamajors would later combine with other armed groups to become collectively known as the CDF. *Prosecutor v. Sesay, Kallon, & Gbao,* Case No. SCSL-04-15-T, Judgment, ¶ 16 (March 2, 2009).

mandated the killing of civilians accused of being Kamajors"). In all of these cases, what was relevant was the civilian status of those targeted, not the suspicions or motives of those wielding the weapons.

The limited jurisprudence of the ICC supports the same conclusion.[6] For example, in the case of Jean-Pierre Bemba Gombo, alleged commander of the Movement for the Liberation of Congo (MLC), the Pre-Trial Chamber confirmed crimes against humanity charges based on the Prosecutor's allegations that the MLC targeted suspected rebel sympathizers. Specifically, the Prosecution presented evidence tending to show that, to establish control over "former rebel held territories," MLC troops conducted "house to house searches" and "sought to punish perceived rebel sympathizers," by "regularly threaten[ing] civilians for hiding rebels in their houses or commit[ing] crimes against civilians considered as rebels." *Prosecutor v. Bemba Gombo*, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ¶¶ 109, 115 (June 15, 2009). Reviewing the evidence of these types of attack, the Pre-Trial Chamber concluded

[6] While the Rome Statute of the ICC deviates in certain respects from customary international law in its definition of "crimes against humanity" in order to meet its unique mandate, its inclusion of the phrase "attack directed against any civilian population," (the portion relevant to the present analysis) uses the same language as, and has been interpreted in accordance with, customary international law. *See* Rome Statute of the International Criminal Court art. 7, *entered into force* July 1, 2002, 2187 U.N.T.S. 90.

that the MLC committed crimes against humanity against the civilian population. *Id.* ¶ 140.

The Pre-Trial Chamber rejected the defense's argument that, because the house-to-house searches were only intended to smoke out rebels, "the attack was not primarily targeting the [Central African Republic] civilian population." *Id.* ¶¶ 96-97. Rather, such tactics amounted to an attack primarily against the civilian population, focusing on the civilian status of those targeted, rather than their suspected collaboration with the rebels. In assessing the civilian status, the Pre-Trial Chamber looked to the prior withdrawal of opposing forces before the MLC's arrival and the lack of military opposition faced by the MLC troops upon entering each town. *Id.* at ¶ 98. The fact that suspected rebel sympathizers were singled out did not change the Pre-Trial Chamber's conclusion that the attack was directed against a civilian population; the Pre-Trial Chamber concluded that these attacks were intended to "terrorise the [] population and annihilate their ability to support the rebels." *Id.* ¶ 125.

The ICC has been consistent in this approach, and has considered attacks against those perceived as being close to armed groups as a "civilian population" for purposes of crimes against humanity. *See, e.g.*, *Prosecutor v. al-Bashir*, Case No. ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al-Bashir, ¶ 76 (Mach 4, 2009) (finding

reasonable grounds to believe crimes against humanity had been committed on basis of "unlawful attack on that part of the civilian population of Darfur . . . perceived by the [Government of Sudan] as being close to . . . armed groups opposing the GoS in the ongoing armed conflict in Darfur"); *see also Prosecutor v. Hussein,* Case No. ICC-02/05-01/12, Public redacted version of "Decision on the Prosecutor's application under article 58 relating to Abdel Raheem Muhammad Hussein," ¶ 18 (March 1, 2012) (same); *Prosecutor v. Ahmad Harun & Ali Kushayb,* Case No. ICC-02/05-01/07, Decision on the Prosecution Application under Article 58(7) of the Statute, ¶ 67 (April 27, 2007) (same).

With this jurisprudence in mind, the ICC Prosecutor, when submitting an interim report on the situation in Colombia, highlighted attacks against suspected FARC supporters in finding a reasonable basis to believe that Colombian paramilitaries committed crimes against humanity. Surveying attacks carried out against the civilian population "across different parts of Colombia," the Prosecutor determined that "specific categories of civilians have formed the target of such attacks," including civilians "targeted based on their suspected or perceived affiliation with other armed groups," as part of a plan "to break any real or suspected links between civilians and the guerrilla." Office of the Prosecutor, Interim Report on the Situation in Colombia, November 2012, ¶¶ 37-39, 42.

III. Crimes against humanity have always included crimes committed with a wartime motive.

The district court concluded that the abuses at issue were adequately alleged to be war crimes, and thus necessarily found that the victims were not proper military targets. *Drummond*, 2010 U.S. Dist. LEXIS 145386, *25-29. Yet it held that the killings could not be crimes against humanity, because they were allegedly perpetrated with the wartime motive of killing suspected collaborators. *Id.* at *34.

Far from excluding crimes with a wartime motive, crimes against humanity originally *required* a nexus to war. The Charter of the International Military Tribunal (IMT), which set forth the crimes for which the Nazi leadership could be charged at Nuremburg, required that crimes against humanity be committed "in execution of or in connection with any crime within the jurisdiction of the Tribunal." Charter of the International Military Tribunal, Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement"), Art. 6(c) (Aug. 8, 1945) (emphasis added). Thus, the IMT held that crimes against humanity could be prosecuted only if they were committed "in execution of or in connection with" the *other* crimes set forth in the Charter, *i.e.* crimes against peace or war crimes. *See* 1 Trial of the Major War Criminals Before the International Military Tribunal 254-55 (1947).[7]

[7] *See also* M. Cherif Bassiouni, Crimes Against Humanity in International Criminal Law, 70 (2d. ed. 1999) (under Charter, CAH subject to condition that violation be

Indeed, war crimes and crimes against humanity under the Charter overlapped; an atrocity could be both a war crime and a crime against humanity. Bassiouni at 75. The predicate acts listed in Article 6(c) would, if committed during war by one state's forces against another state's citizens, also constitute war crimes. Bassiouni at 71, 75. But the Charter's definition of crimes against humanity also expanded the *type* of civilians receiving international law protections: while war crimes applied to acts committed during war against nationals of *other* states, crimes against humanity also included acts committed against nationals of the *same* state as the perpetrator. Bassiouni at 72.

These limitations on war crimes and crimes against humanity no longer apply, and have not since shortly after the drafting of the IMT Charter in 1945. Since at least 1949, the prohibition against war crimes has applied to atrocities committed against one's own nationals. *See e.g.* Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, art. 3(1), August 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. And customary international law does not require any nexus between a crime against humanity and either a war crime or a crime against peace.[8]

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linked to war); Lawrence Douglas, *The Memory of Judgment; Making Law and History in the Trials of the Holocaust*, 48-49 (2001).

[8] *See, e.g., Presbyterian Church of Sudan*, 226 F.R.D. at 479-80; Bassiouni at 70, 80. For example, the Rome Statute of the International Criminal Court, art. 7, *entered into force* July 1, 2002, 2187 U.N.T.S. 90, and the Statute of the

But what matters here is that "crimes against humanity" originated to include but also *extend* the protections afforded to civilians under norms regarding war crimes. Crimes against humanity continues to encompass that which it included at its outset, particularly acts that would constitute war crimes. No international tribunal has ever held that a prosecutor could not charge murder as a crime against humanity if the elements of a crime against humanity were met, merely because it also could be charged as a war crime. The district court's conclusion that crimes against humanity does not include attacks on civilians committed because the perpetrators believed the victims collaborated with an enemy simply ignores this history.

CONCLUSION

The district court accepted that the victims were civilians and that the alleged attacks were widespread and systematic. That is sufficient to state a crimes against humanity claim. No rule of international law suggests that victims lose their civilian status, and a perpetrator is absolved of crimes against humanity, simply because the killer suspects the victim of being sympathetic to a rebel group. The district court's conclusion that this subjective belief changes the victims'

International Criminal Tribunal for Rwanda, Art. 3, S.C. Res. 955, Annex art. 3, U.N. Doc. S/RES/955/Annex (8 November 1994), contain no nexus requirement. *See also Prosecutor v. Tadic*, No. IT-94-1-A, Judgment, ¶ 249 (July 15, 1999) (finding that, under customary international law there is no requirement that crimes against humanity have a connection to any armed conflict); *accord Prosecutor v. Krajisnik*, No. IT-00-39-T, Judgment, ¶ 704 (Sept. 27, 2006).

status under international law should be reversed.

Respectfully Submitted,

/s/ Marco B. Simons
Marco B. Simons
Richard L. Herz
Benjamin Hoffman
Marissa Vahlsing
EARTHRIGHTS INTERNATIONAL
1612 K Street NW, Suite 401
Washington, DC 20006
Tel: 202-466-5188

Counsel for *amicus curiae*

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. R. 32(a)(7)(C)

Jane Doe, *et al.,* v. Drummond Company, Inc., *et al*., No. 13-15503

I certify that, pursuant to Federal Rules of Appellate Procedure 32(a)(7) and 29(d) and 11th Cir. R. 29-2 and 28-1(m), the attached *amicus* brief is proportionally spaced, has a typeface of 14 points or more and contains 6644 words, according to Microsoft Word, the word processing program used to prepare the brief.

DATED: March 21, 2014

/s/ Marco Simons
Marco Simons
EARTHRIGHTS INTERNATIONAL
Counsel for *Amici Curiae*

CERTIFICATE OF SERVICE

I, Marco Simons, certify that, on March 21, 2014, a copy of this Brief of *Amici Curiae* International Criminal Law Scholars and Practitioners in Support of Plaintiffs/Appellants and Reversal was electronically filed with the Court using CM/ECF, and thus was served on counsel for the parties.

I further certify that, on March 21, 2014, copies of this Brief were sent to the Clerk of the Court by U.S. mail, postage prepaid.

DATED: March 21, 2014

/s/ Marco Simons
Marco Simons
EARTHRIGHTS INTERNATIONAL
Counsel for *Amici Curiae*