



The  
University  
Of  
Sheffield.

School  
Of  
Law

Name: Professor. Nicholas Tsagourias

Address:  
Bartolomé House  
Winter Street  
Sheffield  
S3 7ND  
United Kingdom

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**Telephone:** +44 (0) 114 222 6805

**Fax:** +44 (0) 114 222 6832

**Email:** Nicholas.Tsagourias@sheffield.ac.uk

### ***Amicus Curiae for International Co-Investigating Judge***

*Whether, under customary international law applicable between 1975 and 1979, an attack by a state or organization against members of its own armed forces may amount to an attack directed against a civilian population for the purpose of Article 5 of the ECCC Law (crimes against humanity)*

#### **Interest of the *Amicus Curiae***

*Amicus Curiae* is **Nicholas Tsagourias**, Professor of International Law at the University of Sheffield, UK and currently Fellow to the Stockton Centre for the Study of International Law, US Naval War College. I am an expert in the laws of armed conflict and international criminal law having researched and published extensively in these fields

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### A. Nature and definition of crimes against humanity

1. Crimes against humanity are heinous attacks on human dignity and as such affect all humanity.<sup>1</sup> This has been emphasized in the *Weller* case where the Supreme Court for the British Zone identified crimes against humanity as attacks on human dignity.<sup>2</sup> Because crimes against humanity are egregious affronts to human dignity, their prosecution and, generally, their repression is an obligation of the whole of humanity.
2. Crimes against humanity were defined for the first time in the Charter of the International Military Tribunal at Nuremberg. Pursuant to Article 6 (c) of the Charter, crimes against humanity are defined as ‘murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.’
3. Control Council Law No. 10 which enabled trials in the occupied zones contains a similar definition<sup>3</sup> as did the Tokyo Charter.<sup>4</sup>
4. Since the post-World War II trials, the customary status of the prohibition of crimes against humanity is not in doubt.<sup>5</sup>
5. The ECCC has jurisdiction over crimes against humanity which are defined in Article 5 of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia as follows: ‘Crimes against humanity, which have no statute of limitations, are any acts committed as part of a widespread or systematic attack directed against any civilian population, on national, political, ethnical, racial or religious grounds, such as: • murder; • extermination; • enslavement; • deportation; • imprisonment; • torture; 2 • rape; • persecutions on political, racial, and religious grounds; • other inhumane acts.’
6. Although there is no specific treaty on crimes against humanity, one can clearly glean certain common elements in their definition that are traced back to the Nuremberg Charter: a common set of criminal acts ranging from acts of violence to persecution; a contextual element of attacks on a civilian population; and a policy element.
7. It should be noted that crimes against humanity do not require a nexus to an armed conflict. Although the Nuremberg Charter linked the prosecution

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<sup>1</sup> ICTY, *Prosecutor v. Erdemović*, Case No. IT-96-22-A, Appeals Chamber Judgment, Oct. 7, 1997, para. 21.

<sup>2</sup> ICTY, *Prosecutor v. Kupreškić et al*, Case No. IT-95-16-T, Trial Chamber II, Judgement 14 January 2000, para .555.

<sup>3</sup> Article II(1)(c) Control Council Law No.10.

<sup>4</sup> Article 5(c) International Military Tribunal for the Far East (IMTFE) Charter.

<sup>5</sup> Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal, G.A. Res. 95(I), (Dec. 11, 1946); ICTY, *The Prosecutor v. Dusko Tadić*, IT-94-1-T, Trial Chamber II, Judgement, 7 May 1997, para. 623.

of crimes against humanity to an international armed conflict, Control Council Order No 10 did not require such a nexus. The connection of crimes against humanity to an armed conflict in the ICTY Statute<sup>6</sup> needs to be viewed in context namely, that the Tribunal was established to prevent and repress atrocities committed in the course of the armed conflict in the former Yugoslavia. The ECCC, ICTR as well as the ICC Statutes do not require a link to an armed conflict. Consequently, it can be reasonably concluded that such a link is not a customary law requirement but, merely, a jurisdictional threshold in the law of certain tribunals.<sup>7</sup>

8. Finally, since the Nuremberg trials, it is accepted that the perpetrators and victims of crimes against humanity may have the same nationality.<sup>8</sup>
9. Following these preliminary observations, I will now examine the question of whether attacks against members of the armed forces could amount to attacks directed against a civilian population and whether that was also the law between 1975 and 1979.
10. As was noted, the customary law definition of crimes against humanity contains a contextual element of ‘an attack directed against any civilian population’. This contextual element distinguishes crimes against humanity from ordinary crimes.<sup>9</sup> The term ‘attack’ refers to any prohibited conduct, for example, murder, rape, torture and so on as well as to a combination of such acts. It alludes to a ‘campaign or operation’ against a civilian population.<sup>10</sup> The word ‘any’ indicates that various members of the civilian population are targeted whereas the word ‘population’ refers to multiple victims in a quantifiable sense.<sup>11</sup> The contextual element thus excludes random, unconnected, isolated, single or incidental attacks on civilians.<sup>12</sup> It demonstrates that crimes against humanity are collective crimes as far as perpetrators and victims are concerned.
11. The definition of the term ‘civilian’ is thus critical. The use of the term ‘civilian’ in the definition of crimes against humanity echoes the distinction between civilians and combatants in international humanitarian law and, for this reason, the rationale behind this distinction as well

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<sup>6</sup> Article 5 ICTY Statute.

<sup>7</sup> ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Chamber, Judgment, July 15, 1999 paras. 249-51; Case File No. 003-D87 12/1.711, *Decision on Meas Muth's Request for Clarification concerning Crimes against Humanity and the Nexus with Armed Conflict*, 5 April 2016.

<sup>8</sup> J. and R Germany, Supreme Court in the British Occupied Zone, Judgement of 16 November 1948, 167-171; *Enigster Case*, Israel District Court of Tel Aviv, Judgement of 4 January 1955, 42; SCSL, *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Case No. SCSL-04-15-T, Judgement, 2 March 2009, para 84.

<sup>9</sup> ICTY, *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, IT-96-23 & IT-96-23/1-A, Appeals Chamber, Judgement, 12 June 2002, para. 91.

<sup>10</sup> Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, para. 75.

<sup>11</sup> Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Pre-Trial Chamber, ICC-01/09, para 77.

<sup>12</sup> ICTY, *Tadić* Trial Chamber Judgement, supra, para 648.

developments in international humanitarian law should be taken into account when defining ‘civilians’ for the purposes of crimes against humanity.

## B. The definition of ‘civilians’ in armed conflict

12. The principle of distinction is one of the oldest principles of international humanitarian law whose roots can be found in the just war theory but also in other traditions and religions.<sup>13</sup> It was mentioned for the first time in the Lieber Code of 1863.<sup>14</sup> Its modern articulation is found in Article 50 of Additional Protocol I to the 1949 Geneva Conventions which at the time of its adoption in 1977 represented customary law.<sup>15</sup>
13. In the context of an international armed conflict, civilians are those who are not combatants, including those that have laid down their arms, left the army as well as those who are *hors de combat*.<sup>16</sup> Enforcement agencies such as the police that maintain internal order are considered civilians for purposes of international humanitarian law unless they directly participate in hostilities or they are incorporated into the armed forces.<sup>17</sup>
14. In a non-international armed conflict, civilians are those who are not members of the state’s armed forces.<sup>18</sup> The definition of armed forces is quite broad to include also ‘those not included in the definition of the army in the national legislation of some countries (national guard, customs, police forces or any other similar forces)’.<sup>19</sup> Excluded from the category of civilians are also persons who take direct part in hostilities individually or as members of an organized armed group. The latter will be treated as civilians when they no longer take direct part in hostilities or if they are *hors de combat*.
15. In the *Kayishema* case, the ICTR Trial Chamber opined that ‘a wide definition of civilian is applicable and, in the context of the situation of

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<sup>13</sup> Michael Walzer, *Just and Unjust Wars*, 2nd ed. (New York: Basic Books, 1992); and Terry Nardin, ed., *The Ethics of War and Peace: Religious and Secular Perspectives* (Princeton: Princeton University Press, 1996).

<sup>14</sup> Article 22 of the 1863 Lieber Code.

<sup>15</sup> Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Volume I: Rules (2005), at Rule 5. ICTY, *Prosecutor v Tihomir Blaškić*, Case No IT-95-14-A, Appeals Chamber Judgement, 29 July 2004, paras 110 and 113 to 114; ECCC, Case 002/01 *Nuon and Khieu* Trial Chamber, Judgment, 7 August 2014, para. 185.

<sup>16</sup> ICTY, *Prosecutor v. Kunarac*, Case No. IT-96-23, Trial Chamber, Judgment, Feb. 22, 2001 para. 428; ICTR, *The Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, Trial Chamber I, Judgement, 2 September 1998, para 582. Henckaerts and Doswald-Beck, *supra*, at Rules 3, 25, 27 to 31, 33 to 34, 47 to 48, 111, and 134 to 138.

<sup>17</sup> SCSL, *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Case No. SCSL-04-15-T, Judgement, 2 March 2009, paras 87 and 88; ICTY, *Prosecutor v. Oric*, Case IT-03-68-T, Judgement, 30 June 2006, paras 187-188 and 215-221; ICTY, *Prosecutor v Blaškić*, IT-95-14-T, Trial Chamber Judgment, 3 March 2000, paras 453-456.

<sup>18</sup> Common Article 3 to Geneva Conventions; Articles 1, 4 and 13 of Additional Protocol II to the Geneva Conventions of 1949; ICTY, *Blaškić*, Trial Chamber Judgment, *supra*, para 214

<sup>19</sup> *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of Aug. 12, 1949*, at 1352.

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<sup>20</sup>

16. This statement needs to be read in conjunction with the following statement: 'in the present case, all material requirements existed to consider the situation in Rwanda, during April, May, June and July 1994, as an armed conflict, not of an international character'.<sup>21</sup>
17. The Trial Chamber's definition of civilians thus relates to a situation of a non-international armed conflict and not to situations where no armed conflict exists. Alternatively, it can be interpreted as setting out a generic definition of civilians with exclusions and inclusions depending on the circumstances. Accordingly, police forces or the military will be excluded from the definition of civilians only when they intervene in an international or non-international armed conflict.

### **C. Military personnel as 'civilians' in peacetime and wartime**

18. No distinction between civilians and combatants exists in peacetime but everyone is subject to the same protections under the law. Members of the armed forces in peacetime have no additional privileges and are subject to the same criminal law as other citizens, although they may be subject to service jurisdiction. The classic statement of the position of the soldier in English law is by Chief Justice Sir James Mansfield who, referring to the duty of soldiers to play their part as citizens in repressing breaches of the peace said in 1802 "Since much has been said about soldiers, I will correct a strange mistaken notion which has got abroad, that because men are soldiers they cease to be citizens; a soldier is gifted with all the rights of other citizens..." Having discussed the duty of soldiers to prevent crime he then went on: "It is therefore, highly important that the mistake should be corrected, which supposes that an Englishman, by taking upon him the additional character of a soldier, puts off any of the rights or duties of an Englishman."<sup>22</sup>
19. The non-differentiation between different segments of the population in peacetime can be explained by the fact that the principle of distinction in international humanitarian law has been introduced in order to offer protection and mitigate the suffering of people during military operations when ordinary legal protections break down. In peacetime, the moral, ethical, practical and legal exigencies that underpin the principle of distinction do not apply.

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<sup>20</sup> ICTR, *Prosecutor v. Kayishema*, Case No. ICTR-95-1 Trial Chamber, Judgment, May 21, 1999, para. 127

<sup>21</sup> *Ibid*, para 172

<sup>22</sup> Clode, *Mil Forces*, i,144; ii.143 in *Manual of Military Law* (War Office, 1894), 286

20. As was also noted above, crimes against humanity protect human dignity; they protect people from massive violations of their human rights. The aim behind their criminalization since the Nuremberg Charter is to enable prosecutions of crimes committed by a state or an organization against its own citizens or generally against people in situations of armed conflict but also in peacetime. This is because the protections of humanitarian law do not apply during peacetime but also because, when they apply in a situation of armed conflict, they apply in relation to enemy soldiers or civilians thus leaving the population of the state that carries out the attack unprotected.
21. It is thus submitted that in peacetime members of the armed forces form part of the civilian population that can become the object of an attack.
22. To claim otherwise would lead to the absurd situation where widespread or systematic attacks on military personnel in peacetime would not constitute a crime against humanity whereas similar attacks on any other segment of the population will amount to a crime against humanity.
23. Even in the context of an armed conflict, members of the army can be part of the attacked civilian population. First, as was noted above, the distinction between civilians and combatants applies only with regard to the 'enemy' population and not with regard to a state's own population. If a state attacks members of its own army, it satisfies the contextual element of crimes against humanity. Secondly, the targeted population should be 'predominately' civilian; its character does not thus change because of the presence of servicemen in their midst.<sup>23</sup> The critical element is whether the attack was aimed at civilians.
24. Moreover, if the contextual element of an attack against a civilian population is fulfilled, the victims of the underlying crime can be military personnel irrespective of whether they satisfy the definition of combatant according to international humanitarian law, provided that there is a nexus between the individual attack and the contextual attack on a civilian population. This is a reasonable inference from the fact that only the contextual attack should target a civilian population. A number of cases based on Control Council Order 10 support the view that crimes against humanity can be committed against soldiers.<sup>24</sup> Also in the *Mrkšić* case, it was the fact that the POWs were targeted for being members of the enemy army that de-linked that attack from the contextual attack against a civilian population and disqualified it from being categorized as a crime against

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<sup>23</sup> ICTY, *Tadić* Trial Judgment, supra, 638-643; ICTY, *Blaškić*, Appeals Judgment, supra, paras 113, 115.

<sup>24</sup> German Supreme Court in the British Occupied Zone, Judgment, Case no. StS 111/48, 7 December 1948, in 1 ENTSCHIEDUNGEN DES OBERSTEN GERICHTSHOFES DER BRITISCHEN ZONE IN STRAFSACHEN 219, 228 (1948); German Supreme Court in the British Occupied Zone, judgment, Case no. StS 309/49, 18 October 1949, in 2 ENTSCHIEDUNGEN DES OBERSTEN GERICHTSHOFES DER BRITISCHEN ZONE IN STRAFSACHEN 231 (1948).

humanity.<sup>25</sup> If the attacks on POWs were motivated by the same animus as the contextual attack, the fact that they were soldiers would not have changed the qualification of the crime as a crime against humanity.

#### **D. Conclusions**

25. In conclusion, attacks on members of the armed forces committed by their own state or by an organization can satisfy the contextual element of crimes against humanity in peacetime. In the context of an armed conflict the definition of civilian albeit expansive will not include members of the army who are combatants or members of the population who are involved in hostilities. It will however include the population of the attacking state or of the enemy state who is not involved in hostilities.
26. The determination of whether the attack is directed against a civilian population should be done on a case by case in light of all surrounding circumstances. It should also take into consideration the protected values and the spirit of the law which is to protect human dignity.



Professor Nicholas Tsagourias

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<sup>25</sup> ICTY, *The Prosecutor v. Mile Mrkšić and Veselin Šljivančanin*, IT-95-13/1-A, Appeals Chamber, Judgement, 5 May 2009, para 35-45