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Memorandum [unofficial translation]

1 Introduction: protection under international humanitarian law

The law of war (international humanitarian law or IHL) aims to limit the effects of hostilities as much as possible to those who participate in the hostilities.[1] The interests of persons, organisations, and property not involved in hostilities should be spared as much as possible. Persons not taking part (i.e. civilians) or no longer taking part (i.e. prisoners of war, the wounded, etc.) in hostilities should be afforded the greatest possible protection.[2] IHL is thus designed to provide protection from the violence, chaos, and arbitrariness that armed conflict brings.[3]

2 The elements of war crimes

War crimes are violations of IHL that under international law – by treaty or customary law – are labelled as such and are related to a certain

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[1] H. Bevers, *T&C Internationaal Strafrecht en Strafrechtelijke Samenwerking* (10th ed., Wolters Kluwer, 2023), p. 2188.
[2] Cottier & Lippold, 'War Crimes', *in* Kai Ambos (ed.), *Rome Statute of the International Criminal Court, Article-by-Article Commentary* (4th ed., Beck/Hart/Nomos, 2022) p. 333; H. Bevers, *T&C Internationaal Strafrecht en Strafrechtelijke Samenwerking* (10th ed., Wolters Kluwer, 2023), p. 2188; A. Cassese, *International Criminal Law* (3rd ed., Oxford University Press, 2013), p. 79, footnote 33.
[3] F. Kalshoven, & L. Zegveld, *Constraints on the waging of war*, Geneva: ICRC 2001, p. 12: '[IHL] aims to restrain the parties to an armed conflict from wanton cruelty and ruthlessness, and to provide essential protection to those most directly affected by the conflict'. *See also*, The Hague Court of Appeal, 30 April 2015, ECLI:NL:GHDHA:2015:1082, at 10.4: "*The Court of Appeal holds that the existence of a situation of armed conflict is a prerequisite for the applicability and entry into force of international humanitarian law. International humanitarian law consists of a series of treaties and provisions that, in brief, are primarily aimed at protecting persons who do not or no longer take part in an armed conflict. In addition, it should limit and regulate means and methods of warfare, based on the idea that there is no state of lawlessness (even) during armed conflict.*"

armed conflict.[4] IHL thus only applies when an international or non-international armed conflict is ongoing. Conduct may therefore constitute a war crime if the following requirements are met:

- there is an ongoing armed conflict (international or non-international);
- there is a violation of IHL;
- this violation has been criminalised;
- there is a nexus between the conduct and the armed conflict.

For something to be considered a war crime, it must thus be established (and this must be done in this order): 1. that there exists an armed conflict, including the nature (international or non-international) of that armed conflict; 2. which crime has been committed (in other words, what is the underlying conduct?); and 3. that there is a link between 1. and 2., or, in other words, the nexus between the conduct and the armed conflict must be established. There are no examples - other than the present ruling of The Hague Court of Appeal - to be found in international or Dutch jurisprudence that do not follow this order or that assess the existence of a nexus without first establishing the existence and nature of the armed conflict and the underlying conduct. As will be evident from what follows below, it is even essential to follow this order because the facts and circumstances under which crimes were committed are important for establishing a nexus.

3 Nexus

3.1 Criteria and factors

The nexus distinguishes war crimes from offences under general criminal law, which, if unrelated to the armed conflict, should in principle only be prosecuted and tried under the applicable domestic law of the relevant

[4] Cottier & Lippold, 'War Crimes', *in* Kai Ambos (ed.), *Rome Statute of the International Criminal Court, Article-by-Article Commentary* (4th ed., Beck/Hart/Nomos, 2022) pp. 330-331.

state.[5] The Hague Court of Appeal explained this purpose of the nexus requirement as follows in the case against Joseph M.:

> *"The purpose of the nexus requirement is therefore essentially twofold. First, it serves to distinguish war crimes from purely offences under general criminal law. Second, the nexus requirement is necessary to exclude purely random or isolated criminal incidents that do not constitute war crimes under the international laws of war. Said random or isolated incidents are in principle sanctioned by domestic law."*[6]

Thus, not every crime that takes place during an armed conflict on the territory of a state party to that armed conflict is also a war crime. The deliberate killing of persons, for example, is prohibited in common Article 3 of the Geneva Conventions. Thus, the killing of a civilian who is not actively participating in hostilities can be a war crime. Yet a woman who, out of marital discontent during an armed conflict, poisons her husband, who is a civilian, is unlikely to have committed a war crime.

Only those violations of IHL that are closely related to the armed conflict are war crimes. The Explanatory Memorandum to the Dutch International Crimes Act identifies this connection as follows:

> *"Section 5 deals with the criminalisation of war crimes committed in the context of an international armed conflict. The introductory sentences of the offences each contain the element 'in the event of an international armed conflict' (in Section 6: 'in the event of a non-international armed conflict'). It is assumed that for a conviction for a war crime, there must be a connection between the existence of the (international or non-international) armed conflict on the one hand and the accused's acts on the other. An act, such as manslaughter or rape, that has no connection whatsoever with the armed conflict and would have taken place*

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[5] A. Cassese, *International Criminal Law* (3rd ed., Oxford University Press, 2013), p. 77.
[6] The Hague Court of Appeal 7 July 2011, ECLI:NL:GHSGR:2011:BR0686, at 16.3.2.

> *had the conflict not existed, does not constitute a war crime but will have to be treated as an 'ordinary' offence under general criminal law."*[7]

It should be noted that the line between war crimes and offences under general criminal law is not absolute. As The Hague Court of Appeal noted in the case against Joseph M:

> *"However, war crimes need not be so intertwined with war that if identical criminal conduct had occurred in peacetime, such offences cannot be considered war crimes committed at the time of war. The criminality of war overlaps a great deal with peacetime criminality and many of those acts that would qualify as war crimes (such as murder and rape) would often qualify as domestic offences, if committed in peacetime, so the fact that certain acts or conduct may fall into one category does not preclude that they would also fall into the other."*[8]

Or as worded by the ICTY Appeals Chamber in *Kunarac*:

> *"The Appellants' proposition that the laws of war only prohibit those acts which are specific to an actual wartime situation is not right. The laws of war may frequently encompass acts which, though they are not committed in the theatre of conflict, are substantially related to it. The laws of war can apply to both types of acts. The Appeals Chamber understands the Appellants' argument to be that if an act can be prosecuted in peacetime, it cannot be prosecuted in wartime. This betrays a misconception about the relationship between the laws of war and the laws regulating a peacetime situation. The laws of war do not necessarily displace the laws regulating a peacetime situation; the former may add elements requisite to the protection which needs to be afforded to victims in a wartime situation."*[9]

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[7] House of Representatives [the Netherlands] 2001-2002, 28 337, no. 3, p. 43.
[8] The Hague Court of Appeal 7 July 2011, ECLI:NL:GHSGR:2011:BR0686, at 16.3.2.
[9] ICTY, Kunarac et al. Appeal Judgement, 2002, para 60.

Whether there is a sufficiently close connection, or nexus, between conduct and an armed conflict should be assessed using the criteria as developed in the case law of international courts and tribunals.[10] The judgement of the Appeals Chamber in *Kunarac* should be regarded as leading in this respect.[11]

In that case, the Appeals Chamber first notes that establishing a nexus does not require that conduct took place in an area where actual fighting occurred. Citing the *Tadić Jurisdiction Decision*, it recalls that IHL applies to the entire territory under the control of the parties to the armed conflict. The Appeals Chamber also notes that a nexus may exist if the relevant conduct was remote in time and place from actual fighting, yet closely related to it.[12]

The *Kunarac* test is essentially this: "*if it can be established [...] that the perpetrator acted in furtherance of or under the guise of the armed conflict, it would be sufficient to conclude that his acts were closely*

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[10] The Hague District Court 23 March 2009, ECLI:NL:RBSGR:2009:BI2444, at 14.30; The Hague Court of Appeal, 7 July 2011, ECLI:NL:GHSGR:2011:BR0686, at 16.3.2; The Hague District Court 1 March 2013, ECLI:NL:RBDHA:2013:BZ4292, at 19.18; Den Bosch Court of Appeal 21 April 2017, ECLI:NL:2017:1760, at K.3; The Hague District Court 15 December 2017, ECLI:NL:RBDHA:2017:14782, at 14.4.

[11] The Hague District Court 23 March 2009, ECLI:NL:RBSGR:2009:BI2444, at 14.46; The Hague Court of Appeal, 7 July 2011, ECLI:NL:GHSGR:2011:BR0686, at 16.3.2 and 17.3; The Hague District Court 1 March 2013, ECLI:NL:RBDHA:2013:BZ4292, at 19.19; Den Bosch Court of Appeal 21 April 2017, ECLI:NL:2017:1760, at K.3; The Hague District Court 15 December 2017, ECLI:NL:RBDHA:2017:14782, at 14.4.

[12] ICTY, Kunarac et al. Appeal Judgement, 2002, para 57: "*There is no necessary correlation between the area where the actual fighting is taking place and the geographical reach of the laws of war. The laws of war apply in the whole territory of the warring states or, in the case of internal armed conflicts, the whole territory under the control of a party to the conflict, whether or not actual combat takes place there, and continue to apply until a general conclusion of peace or, in the case of internal armed conflicts, until a peaceful settlement is achieved. A violation of the laws or customs of war may therefore occur at a time when and in a place where no fighting is actually taking place. As indicated by the Trial Chamber, the requirement that the acts of the accused must be closely related to the armed conflict would not be negated if the crimes were temporally and geographically remote from the actual fighting. It would be sufficient, for instance, for the purpose of this requirement, that the alleged crimes were closely related to hostilities occurring in other parts of the territories controlled by the parties to the conflict*." The same line of reasoning is followed at the International Criminal Court, *see*, ICC, Al Hassan Trial Judgement, 2024, para 1099.

related to the armed conflict."[13] The issue, therefore, is whether the accused's conduct was in furtherance of (his own party's interest in) the armed conflict *or* under the 'guise' or 'cover' of the armed conflict (i.e. using the armed conflict as a front). This is summarily also known as an "*occasioned by*" standard;[14] there is no need for a judge to choose one or the other. So, for example, if a perpetrator refers to the armed conflict when committing the crimes, it does not have to be addressed whether he actually believed he was acting in the interest of a party to that armed conflict or whether he was merely using that armed conflict as an excuse to do what he wanted to do anyway.

In order to be able to establish a nexus, the Appeals Chamber formulated four criteria in the following manner:

> *"What ultimately distinguishes a war crime from a purely domestic offence is that a war crime is shaped by or dependent upon the environment - the armed conflict - in which it is committed. It need not have been planned or supported by some form of policy. The armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed. Hence, if it can be established, as in the present case, that the perpetrator acted in furtherance of or under the guise of the armed conflict, it would be sufficient to conclude that his acts were closely related to the armed conflict*." [15]

The Appeals Chamber of the Rwanda Tribunal (hereinafter ICTR) outlined the lower limit of the nexus requirement in the *Rutaganda* case:

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[13] ICTY, Kunarac et al. Appeal Judgement, 2002, para 58 [emphasis added].
[14] A. Cassese, 'The nexus requirement for war crimes', *Journal of International Criminal Justice*, Volume 10, Issue 5, December 2012, pp 1395-1417, pp 1397, 1406 and 1412 [hereinafter Cassese, Nexus]. This article had previously been submitted as a "*legal opinion*" by the Dutch prosecution during the prosecution's demand on appeal in the case against Joseph M.
[15] ICTY, Kunarac et al. Appeal Judgement, 2002, para 58 [emphasis added].

> *"It is only necessary to explain two matters. First, the expression 'under the guise of the armed conflict' does not mean simply 'at the same time as an armed conflict' and/or 'in any circumstances created in part of the armed conflict'. For example, if a non-combatant takes advantage of the lessened effectiveness of the police in conditions of disorder created by an armed conflict to murder a neighbour he has hated for years, that would not, without more, constitute a war crime under Article 4 of the Statute.*"[16]

So what matters is whether the existence of the armed conflict played a substantial role in:

- the accused's ability to commit the crime;
- the manner in which the crime was committed;
- the accused's decision to commit the crime *or*
- the purpose for which the crime was committed.

Subsequently, the Appeals Chamber in *Kunarac* provided a number of factors (non-exhaustive) that can be taken into account, among others, to determine whether the above test has been met:[17]

- the accused is a combatant (or analogously in the case of a non-international armed conflict: a member of the armed forces of one of the warring parties);
- the victim is a protected person;
- the victim belongs to the other party;

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[16] ICTR, Rutaganda Appeal Judgement, 2003, para 570.
[17] ICTY, Kunarac et al. Appeal Judgement, 2002, para 59: "*In determining whether or not the act in question is sufficiently related to the armed conflict, the Trial Chamber may take into account, inter alia, the following factors: the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed as part of or in the context of the perpetrator's official duties*."

- the crime can be seen as serving the ultimate goal of the military campaign;
- the crime was committed as part of or in connection with the perpetrator's official duties.[18]

Regarding this last point, the following should be noted. Nowhere in case law is it implied that these official duties must be military duties or that these duties must be precisely ascertained as if there were a job description describing the commission of the alleged conduct. Moreover, to date this factor has not generated any discussions in criminal cases in the international courts and tribunals, and there is thus no jurisprudence dissecting it further. Therefore, we must interpret the phrase as it appears in jurisprudence ("*whether the crime is committed as part of, or in the context of, the perpetrator's official duties*")[19] and take it to mean that there is a difference between, on the one hand, committing a crime in the private sphere, or on the other hand, in the execution of or related to one's job or work, and that in the latter case, that circumstance *may be* a factor in determining a nexus.

Subsequent jurisprudence[20] of the ICTY and the ICTR has also taken other factors into account:

- the participation of (armed) forces in the crime (in case the perpetrator is a civilian);[21]
- the existence of a relationship between perpetrators and combatants (in Rwanda, for example, the relationship between the *Interahamwe* and the Rwandan government and army);[22]

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[18] Ibid.
[19] *See for example*, ICC, Al Hassan Trial Judgement, 2024, para 1100.
[20] Although the ICTR and the ICTY were separate institutions, formally with each having its own Appeals Chamber, there is one body of jurisprudence, partly because due to a union of personnel, the senior judges of both UN tribunals were the same. Members of the ICTY Appeals Chamber also served on the ICTR Appeals Chamber and vice versa.
[21] ICTR, Rutaganda Appeal Judgement, 2003, paragraphs 569-570 and ICTR, Semanza Trial Judgement, 2003, paragraph 519.
[22] ICTR, Rutaganda Appeal Judgement, 2003, para 579.

- the presence of victims who fled the armed conflict;[23]
- references to the armed conflict when committing the crime, for example, the perpetrator asking a question about the other party in the armed conflict;[24]
- labelling victims as accomplices of the other side in the armed conflict; [25]
- the influence of the course of the armed conflict on the commission of the crime (in Rwanda, for example, the coinciding of the start of the armed conflict and the crimes and intensification of killings as the Rwandan Patriotic Front (or: RPF, the Rwandan rebel group that was in armed conflict with the government) approached a place.[26]

In simplified form, the *Kunarac* test is also found in the jurisprudence of the International Criminal Court (ICC), which, relying on that ICTY ruling, uses the formulation that:

> "*[T]he armed conflict must play a major part in the perpetrator's decision, in his or her ability to commit the crime or the manner in which the crime was ultimately committed.*"[27]

The formulation *furtherance or guise* of the armed conflict is thus omitted there. This appears to be a cosmetic change, not a substantive one, as does the absence of the purpose with which the crime was committed. One may wonder whether there is room to apply the purpose with which

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[23] ICTR, Semanza Trial Judgement, 2003, para 518.
[24] ICTR, Semanza Trial Judgement, 2003 para 521.
[25] ICTR, Ntagerura et al. Trial Judgement, 2004, para 793.
[26] ICTR, Semanza Trial Judgement, 2003, paragraphs 518 and 521.
[27] ICC, Al Hassan Trial Judgement, 2024, para 1099, *referring to:* ICC, Katanga Trial Judgement, 2014, para 1176: "*The Chamber further observes that a nexus must be established between the crimes and the armed conflict in question. [...] In this connection, the Chamber is of the view that the perpetrator's conduct must have been closely linked to the hostilities taking place in any part of the territories controlled by the parties to the conflict. The armed conflict alone need not be considered to be the root of the conduct of the perpetrator and the conduct need not have taken place in the midst of battle. Nonetheless, the armed conflict must play a major part in the perpetrator's decision, in his or her ability to commit the crime or the manner in which the crime was ultimately committed.*" [emphasis added] *See also*, ICC, Bemba Trial Judgement, 2016, para 142; *see earlier*, ICC, Lubanga, Pre-Trial Chamber decision on the confirmation of the indictment, 2007, para 287.

the crime was committed as a separate criterion. After all, the perpetrator's decision to commit the crime is also already included. Thus, the ICC also applies – essentially – the same assessment framework as the ICTY and ICTR.[28]

In doing so, ICC jurisprudence points out that it is not necessary for the armed conflict to be the sole cause of or at the root of the crime committed: "*The armed conflict alone need not be considered to be the root of the conduct of the perpetrator [...]*."[29]

3.2 Characteristics of perpetrators and victims

3.2.1 Perpetrators

The required close connection determined by the *Kunarac* nexus criteria and fine-tuned through the factors developed in later jurisprudence is the connection between the conduct and the armed conflict, *not* the connection between the perpetrator and the armed conflict or any of the warring parties.[30] In the 1990s, a development was discernable in the jurisprudence of the international courts and tribunals regarding the relationship between the perpetrator and the conflict, when a former line of reasoning (now also followed again by The Hague Court of Appeal) was abandoned after being corrected on appeal. In earlier years, judges at the Rwanda Tribunal struggled with the distinction between linking perpetrator and conflict (which is incorrect) and linking act and conflict (which is correct). Consequently, it was briefly thought that the

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[28] Some examples cited by the ICTY Trial Chamber of factors that can be used to further the test are also mentioned. *See*, ICC, Bemba Trial Judgement, 2016, para 143: "*In determining whether the crimes are sufficiently linked to the armed conflict, the Trial Chamber may take into account factors including: the status of the perpetrator and victim; whether the act may be said to serve the ultimate goal of a military campaign; and whether the crime is committed as part of, or in the context of, the perpetrator's official duties.*"

[29] ICC, Al Hassan Trial Judgement, 2024, paragraph 1099. *See also*, ICC, Katanga Trial Judgement, 2014, para 1176; ICC, Bemba Trial Judgement, 2016, para 142. This is in line with previous case law of the *ad hoc* Tribunals, *see*, ICTR, Kamuhunda, Trial Judgement, 22 January 2004, para 735. *See also*, The Hague Court of Appeal 7 July 2011, ECLI:NL:GHSGR:2011:BR0686, at 16.3.2.

[30] ICC, Bemba Trial Judgement, 2016, para 143 ("*It is noted in this regard that, although there is likely to be some relationship between a perpetrator and a party to the conflict, it is not necessarily the case that a perpetrator must him/herself be a member of a party to the conflict; rather, the emphasis is on the nexus between the crime and the armed conflict.*").

prosecutor had to prove that the perpetrator was actually part of the military in the sense of "*a member of the armed forces under the military command of either of the belligerent parties, or that he was legitimately mandated and expected, as a public official or agent or person otherwise holding public authority or de facto representing the Government, to support or fulfil the war* efforts"[31] , or in other words, the ICTR applied the "*public agent test*".

At the ICTR, for example, this test was used in 1998 by the Trial Chamber in the *Akayesu* case, which held that criminal liability for war crimes is limited to the warring parties and those in close relationship with one of the parties.[32] The Trial Chamber in *Kayishema and Ruzindana* made the same mistake six months later.[33]

However, the *Akayesu* Appeals Chamber rectified this in 2001 and considered as follows:

> *"This nexus between violations and the armed conflict implies that, in most cases, the perpetrator of the crime will probably have a special relationship with one party to the conflict. However, such a relationship is not a condition precedent to the application of common Article 3 and, hence of Article 4 of the Statute. In the opinion of the Appeals Chamber, the Trial Chamber erred in requiring that a special relationship should be a separate condition for triggering criminal responsibility for a violation of Article 4 of the Statute.*"[34]

With that, the '*public agent test*' was permanently off the table in international courts and tribunals. Nevertheless, this incorrect path was later also briefly followed in the Netherlands. The Hague Court of Appeal similarly corrected the district court's acquittal in the case against Joseph M.:

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[31] ICTR, Akayesu Trial Judgement, 1998, para 640.
[32] ICTR, Akayesu Trial Judgement, 1998, para 643.
[33] ICTR, Kayishema and Ruzindana Trial Judgement, 1999, para 169.
[34] ICTR, Akayesu Appeal Judgement, 2001, para 444. This has been followed in subsequent judgements, *see for example*, ICTR, Semanza Trial Judgement, 2003, para 361.

> *"Moreover, as considered above, it is irrelevant that no actual combat operations took place between the FAR and the RPF and related combat groups or militias in the prefecture where the accused lived during the relevant period. This also applies to the circumstance that the accused had no military position and that the accused had no influence on the course of the combat operations nor did he otherwise have any special connection with the FAR*." [35]

Antonio Cassese, who had been a leading professor and judge at several international courts and tribunals, commented on this (temporarily) incorrect line of reasoning in ICTR jurisprudence as follows:

> "*While the link between the accused and the conflict can be seen as evidence supporting the existence of a nexus, it has at times been extracted from the nexus analysis and presented as an additional element that must be established in conjunction with a nexus between the crime and the armed conflict. Or, a link between the accused and the armed conflict has been presented as the determinative criterion for establishing a nexus between the crime and the armed conflict*."[36]

3.2.2 Victims

Regarding the characteristics of the victim, the following should be noted: victims do not have to formally or actually belong to the opposing party in the conflict. The designation by perpetrators of victims as *accomplices* of the opposing party in the armed conflict, or the mere suggestion by perpetrators of such an association, may be sufficient. The ICTR Trial Chamber established the nexus this way in the case against Ntagerura et al., in which perpetrators had questioned victims about possible links to the RPF. In this context, the Trial Chamber considered as follows:

> *"The evidence shows that, on 6 June 1994, soldiers arrested Witness MG and three other members of his family because of*

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[35] The Hague Court of Appeal 7 July 2011, ECLI:NL:GHSGR:2011:BR0686, at 17.3 [emphasis added].
[36] Cassese, Nexus, p. 1408 [emphasis in original].

> *their suspected ties to the RPF. Moreover, when soldiers subsequently beat and otherwise mistreated Witness MG and his co-detainees at the military camp, they questioned them concerning whether they were members of the RPF and accused them of collaborating with the enemy. Similarly, on 11 April 1994, soldiers presented Witness LI and the other refugees brought to the camp with him to Imanishimwe as "Inyenzi-Inkotanyi", a reference to those associated with the RPF. The Chamber finds that the soldiers' actions were motivated by their search for enemy combatants and those associated with them or, at least, that their actions were carried out under the pretext of such a search. As such, the Chamber considers that the soldiers were acting in furtherance of the armed conflict or under its guise.*"[37]

Subjective considerations necessarily play a role in assessing whether there is a nexus between conduct and the armed conflict: victims need not be objectively part of the opposing party in an armed conflict; the *subjective association* with that opposing party in the mind of the perpetrator may already be enough to say he is acting with the conflict as front and to assume a sufficient nexus with that conflict. Moreover, even in cases where the perpetrator did not actually associate the victim with the opposing party, but he did use such a perceived association as an excuse or justification for his actions, a nexus may exist because he was acting under *the guise* of the armed conflict.

Given the nature of the four *Kunarac* criteria and the relevant factors developed in international jurisprudence, it goes without saying that the question of whether or not there is a nexus between conduct and an armed conflict is particularly pertinent in situations where the crime was committed by a civilian against a civilian at the time of a non-international armed conflict (where parties to the conflict are, in principle, all of the same nationality).[38] Even in these situations, however, civilians

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[37] ICTR, Ntagerura et al. Trial Judgement, 2004, para 793 (confirmed on appeal, see ICTR, Ntagerura et al. Appeal Judgement, 2006).
[38] A. Cassese, *International Criminal Law* (3rd ed., Oxford University Press, 2013), p. 77.

can commit war crimes against other civilians, as long as these crimes were committed at least "*in unison*" with the armed conflict.

3.3 The created situation and the crimes committed "in unison"

To qualify as a war crime, the armed conflict must have created the given situation and provided the opportunities for the commission of the offence, summarised as the "*occasioned by*" standard, which links the offence to the armed conflict, not the perpetrator to the armed conflict. In other words, "*the offence must be committed to pursue the aims of the conflict or, alternatively, it must be carried out with a view to somehow contributing to attain the ultimate goals of a military campaign or, at a minimum, in unison with the military campaign*."[39] The characteristics of perpetrators and victims are not decisive here. A clear example of how this conformity or interwovenness may be expressed is evident from the facts underlying the so-called *Medical Trial*, conducted under Control Council Law No. 10 in Nuremberg shortly after World War II. This case revolved around medical experiments that had been carried out by (civilian) doctors, among others, on non-German civilians, far away from the hostilities and without a close and direct link to how those hostilities were carried out. Yet these crimes were classified as war crimes because:

> "*[b]eginning with the outbreak of World War II criminal medical experiments on non-German nationals, both prisoners of war and civilians [...] were carried out on a large scale in Germany and the occupied countries. These experiments were not the isolated and casual acts of individual doctors and scientists working solely on their own responsibility, but were the product of coordinated policy-making and planning at high governmental, military, and Nazi Party levels, conducted as an integral part of the total war effort. They were ordered, sanctioned, permitted, or approved by persons in positions of authority who under all principles of law*

[39] Cassese, Nexus, p. 1397. [emphasis added]

> *were under the duty to know about these things and to take steps to terminate or prevent them.*"[40]

A case like this clearly reveals the interwovenness of an armed conflict with a policy of persecution running parallel. In such instances, where civilians are victims, there is no need to show that the victims were affiliated with the opposing side in the conflict or that the medical experiments were directly related to hostilities. The *existence* of the armed conflict, combined with the fact that the medical experiments were carried out "*in unison*" with the German government's persecution policy that would not in fact have been carried out had there been no war, is sufficient to classify the crimes in question as war crimes.[41]

Another example concerns a case at the ICTY. *Naletilić and Martinović* involved pillaging committed partly by civilians for personal gain, remote from hostilities. The Trial Chamber found that there was a nexus with the armed conflict because the pillaging had been committed as part of a purging campaign directed against Bosnian Muslims that was consistent with the aims of the armed conflict.[42]

The ICTR has been pre-eminent in dealing with cases where it had to ascertain the relation between the (non-international) armed conflict between the RPF and the government army, and the Rwandan genocide in 1994. Two judgements are of interest here: *Semanza* and *Rutaganda*, both rendered after the leading *Kunarac* judgement at the ICTY. In *Semanza*, the Trial Chamber ruled that the armed conflict "*created the situation*" for killing and otherwise ill-treatment of Tutsi civilians.[43] Here, the judges looked at the connection between the crimes and the conflict, thus relinquishing the "*public agent test*". Despite the fact that Semanza was more than an ordinary civilian and had ties to militant groups, the Chamber based the nexus not on Semanza's characteristics, but on how the armed conflict was misused to commit the crimes: "*[i]n the*

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[40] *United States v. Karl Brandt et al*, Judgement US Nuremberg Military Tribunals, 19 August 1947, Vol. II, TWC, 181 [emphasis added].
[41] Cassese, Nexus, p. 1401.
[42] ICTY, Naletilić and Martinović Trial Judgement, 2003, para 615-626.
[43] ICTR, Semanza Trial Judgement, 2003, para 518.

Chamber's opinion, certain civilian and military authorities, as well as other important personalities, exploited the armed conflict to kill and mistreat Tutsi".[44]

In *Rutaganda*, the Appeals Chamber convicted the previously acquitted Rutaganda of war crimes. The crimes committed by the *Interahamwe*, a group where Rutaganda held an influential position, were linked to the armed conflict in part because "*[t]he government's civil defence mobilisation of April 1994, in which the Interahamwe played a central role, was aimed at ensuring the success of the campaign against the supposed internal enemy*."[45] The crimes committed against the Tutsi "enemy", committed not by the military apparatus, were nevertheless committed *in furtherance of* and *in unison* with the aims of the military campaign against the opposing party in the armed conflict.

As already noted, in case of a non-international armed conflict, the perpetrators and victims are usually of the same nationality. In such instances, it will be a matter of assessing whether the armed conflict created the context and opportunity for the crime, "*which was thus committed in pursuance of or in unison with the aims of the conflict*".[46] In such circumstances, there must be compelling reasons to deny the existence of a nexus.[47]

4 Protection under IHL and a proper application of the nexus requirement

The nexus requirement determines when a crime can be considered a war crime, and therefore, affects the scope of IHL protection – after all, when there is no nexus, IHL cannot be applied and there is no war crime. This requires careful consideration of the facts and circumstances under which crimes were committed, held against the criteria and factors developed in jurisprudence. This can only be done in a fixed order. For establishing a link between A (armed conflict) and B (underlying conduct), without first establishing A and B, is a faulty exercise. However, the criteria and

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[44] ICTR, Semanza Trial Judgement, 2003, para 519.
[45] ICTR, Rutaganda Appeal Judgement, 2003, para 563.
[46] Cassese, Nexus, p. 1404.
[47] Cassese, Nexus, p. 1404.

associated factors are designed in such a way as to determine when a nexus *may* exist, not as to determine when a nexus *does not* exist. The above has also shown that there is no all-encompassing definition of what constitutes a nexus; it depends on the circumstances of the case. Therefore, the intended effect of the law of war – the broadest possible protection against the violence, chaos, and arbitrariness that armed conflict brings – must be kept in mind when determining whether or not there is a nexus:

> "*As no international rule clearly and explicitly defines the nexus under discussion, the contours and content of such nexus must be inferred from the whole spirit of international humanitarian law and international criminal law (ICL) as well as the object and purpose of the relevant international rules.*"[48]

The interpretation of the nexus requirement thus requires a teleological approach. To view the persecution of certain persons for ideological or political reasons (such as in a typical Cold War conflict for anything that is considered anti-communist or counter-revolutionary) separately from an armed conflict that is going on at the same time for the same ideological or political reasons is therefore not in line with the jurisprudence discussed above and the purpose and spirit of IHL. After all, *war is the continuation of politics by other means*,[49] and vice versa.

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[48] Cassese, Nexus, p. 1397.
[49] Karl von Clausewitz, *On War*, (1832-4) book 8, chapter 6, section B (the original text reads: "*Der Krieg ist eine bloße Fortsetzung der Politik mit anderen Mitteln*").