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War Crimes and the Nexus Requirement: Exploring the Nexus Requirement and Advocating for a Broader Definition and Application of the Nexus Requirement

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Introduction

International humanitarian law, the “law of armed conflict,” dictates international rules which govern the conduct of hostilities and punishable acts.¹ International humanitarian law serves to provide “rules in place defining acceptable behavior in armed conflict.”² In order to promote justice for the most amount of people during armed conflict, international humanitarian law provides a check on the crimes and conduct committed during armed conflict. International humanitarian law provides protection to all people, ensuring that even when there is a time of armed conflict, individuals do not act as though it is a free-for-all. There are still limits to conduct that can be done and potential crimes that can be committed, thus promoting a theory of justice. The potential prosecution of severe and heinous international crimes assists in delivering justice to victims. Specifically, “investigations and trials of powerful leaders (whether political or military) help strengthen the rule of law and send a strong signal that such crimes will not be tolerated in a rights-respecting society.”³ Further, “trials remain a key demand of victims. When conducted in ways that reflect victims’ needs and expectations, they can play a vital role in restoring their dignity and delivering justice.”⁴

International humanitarian law protects the general population from crimes committed during armed conflict. Additionally, international humanitarian law also informs individuals and leaders of acceptable and unacceptable actions and conduct during war time. This international system provides examples of individuals’ and leaders’ conduct that can be committed during armed conflict, and conduct that may constitute a crime.

¹ Beth Van Schaak & Ronald C. Slye, *International Criminal Law and Its Enforcement* 278 (4th ed. 2020).

² *Id.*

³ *Criminal Justice*, The Int’l Ctr. For Transitional Just. (last visited Nov. 28, 2020), <https://www.ictj.org/our-work/transitional-justice-issues/criminal-justice>.

⁴ *Id.*

As I will discuss in this paper, international tribunals and courts can indict individuals for war crimes. To determine individual criminal responsibility for offenses of international humanitarian law, contemporary courts have maintained that war crimes are international humanitarian law offenses that have been criminalized.⁵ Plainly, war crimes are violations of the law of war that has been criminalized.⁶ To qualify as a war crime, the conduct or crime must occur within an armed conflict, and the conduct or crime must have a sufficient nexus to the armed conflict. However, the definition and application of the nexus requirement varies. International tribunals have used at times narrow or at times broad interpretations and applications of the nexus requirement. In some instances of war crime indictments, international tribunals use a narrow interpretation of the nexus requirement. These tribunals have held that the nexus requirement must be a direct and definite link between the crime or conduct and the armed conflict. However, on the other hand, international tribunals have also held on other occasions that the nexus requirement should require a broader and more fluid application, considering and balancing many factors.

Preliminary Statement of the Issue

In determining whether a war crime has occurred, tribunals must determine whether there is a nexus between the conduct or crime and the armed conflict. The issue discussed in this paper will be whether the nexus requirement should be narrowly or broadly interpreted and applied. As you will see throughout this paper, I advocate for a broader and more fluid meaning and application of the nexus requirement. The nexus requirement, in regards to war crimes, should not be narrowly considered and applied. An example of narrow application of the nexus

⁵ Oana A. Hathaway et al., *What is a War Crime?*, 44 Yale J. of Int'l L. 54, 65 (2018).

⁶ *Id.*

requirement includes an international tribunal requiring the prosecution to prove beyond a reasonable doubt that there exists a direct and definite link between conduct or a crime and an armed conflict. This is an example of a narrow application because the link between the conduct and the armed conflict must be direct and definite. This type of application is strict and does not allow for a more lenient definition and application of the nexus requirement.

Limiting the nexus requirement and only permitting a narrow interpretation limits the scope of crimes that can be considered war crimes. The nexus requirement should be relaxed and applied broadly to allow for adjudication of serious or severe crimes to be classified as war crimes. This will help further strengthen the notion that certain crimes will not be tolerated in a rights-respecting society, furthering the goal of international humanitarian law. Relaxing the standard would allow for more opportunities for harmed groups to receive justice for heinous actions committed against them, even under the perpetrator's guise that it was acceptable because it was during an armed conflict.

Alternatively, the opposing view to my argument would be that the nexus requirement should remain narrow and should not be applied more broadly. This view would suggest that the nexus requirement should remain narrow and should be applied narrowly. An advocate for this approach may support the position with the reasoning that a narrow nexus requirement ensures that the prosecution of war crimes remains serious and somewhat specific. A concern about expanding the definition of the nexus requirement may include that a broadening would lessen the seriousness of the definition of war crime. This advocate may say that the narrow application of the nexus requirement ensures that only serious crimes are prosecuted as war crimes since there is a strict and narrow standard the prosecution must meet. Further, this advocate may suggest that broadening the definition of the nexus requirement may broaden or expand the

definition of a war crime too far. We will continue to discuss and outline potential pushback later in this paper.

Problem

In order to classify conduct as a war crime, as followed by *Prosecutor v. Clement Kayishema*⁷, a prosecutor must prove the nexus between the conduct and the armed conflict beyond a reasonable doubt.⁸ Specifically, the prosecution must show that there is a “direct connection between the alleged crimes referred to the Indictment, and the armed conflict ... established factually.”⁹ However, this type of narrow formulation in regards to the nexus definition does not necessarily lead to results of justice. Developing a more fluid nexus test, such as the nexus tests used in *Prosecutor v. Kunarac* and *Prosecutor v. Semanza*, would undoubtedly change the opportunity for justice. A broader nexus test may allow for an increase in opportunities of justice. Since cases would not immediately fail upon trying to meet the nexus requirement, this broader requirement may potentially open the door to further opportunities of justice and adjudication. The narrow application of the nexus requirement in some cases severely impacts the administration of justice, as exemplified by *Prosecutor v. Clement Kayishema*.

Thesis Statement

In regards to war crimes, the nexus requirement should be broadened and extended beyond a direct connection between the alleged crimes and the armed conflict. The nexus requirement for war crimes varies. Although there is not necessarily a bright-line rule in regards to defining the nexus requirement, the definition and application generally rely on a narrow standard. This narrow standard, as we have seen, can negatively impact the outcome of cases.

⁷ *Prosecutor v. Kayishema & Ruzindana*, Case No. ICTR-95-1-T, Judgement (Int’l Crim. Trib. for Rwanda May 21, 1999).

⁸ *Id.*

⁹ *Id.*

There should be a broader test and standard for the nexus requirement in determining whether a war crime has occurred. The current narrow standard, which is implemented most often, is too narrow.

Roadmap

In order to show why I believe international tribunals should utilize a broader and more fluid application of the nexus requirement, my paper will include an in-depth analysis of the nexus requirement. First, I will provide some initial background information into armed conflict. This will include the definition of armed conflict and the criteria that tribunals use to determine if an armed conflict exists. Then, I will provide some initial background information into the definition of the nexus requirement. I will explain how sometimes tribunals have narrowly applied the nexus requirement, and I will explain how sometimes tribunals have used a broader application of the nexus requirement. In this introductory section I will also explain the function of the nexus requirement.

In the next section of my paper, I will provide a detailed explanation and analysis of the narrow applications of the nexus requirement. This will include examples and explanations of times international tribunals have narrowly defined and applied the nexus requirement. In this portion of my paper, I will use examples to show how the tribunals' use of the narrow application of the nexus requirement can be detrimental to achieving justice. In this section I will explain how a narrow interpretation of the nexus requirement usually includes a direct and definite link between the conduct or crime and the armed conflict. I will show how the international tribunals' reliance on this narrow interpretation of the nexus requirement often too severely limits what constitutes a war crime under international law.

Next, in the following section, I will discuss the broader applications of the nexus requirement in determining if a war crime has occurred. I will use cases and examples to show times that international tribunals have defined and applied the nexus requirement more broadly. I will explain how these broader and more detailed descriptions and applications of the nexus requirement allow for a greater opportunity of justice. I will show how the balancing of many factors to determine if there is a nexus between the conduct or crime and an armed conflict allows for more cases to be adjudicated and potentially charged as a war crime.

In the next section of my paper, I will discuss potential pushback and potential drawbacks of a broader application of the nexus requirement. I will discuss that opponents to my thesis may suggest that expanding and broadening the definition and application of the nexus requirement would broaden the definition too far. I will also discuss that opponents may suggest that broadening the definition could have a potential effect on the seriousness of prosecuting war crimes.

Finally, I will conclude my paper with final thoughts and a summary of my argument. The goal of my paper is to show that in regards to war crimes, the nexus requirement should be broadened and extended beyond a direct connection between the alleged crimes and armed conflict. Further, the nexus requirement should instead include a multitude of factors to be balanced.

Analysis

In order to begin the analysis portion of this paper, I will first discuss initial background information into war crimes and armed conflict. To qualify as a war crime, conduct must be committed within an armed conflict and have a sufficient connection – or nexus – to the armed conflict. Under *Tadic*, an armed conflict “exists whenever there is a resort to armed force

between States or protracted armed violence between governmental authorities or organized armed groups or between such groups within a state.”¹⁰ Specifically, two criteria emerge for armed conflicts: (1) the intensity of the conflict, and (2) the organization of the parties of the conflict, as a way to distinguish an armed conflict “from banditry, unorganized or short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law.”¹¹

The factors for determining intensity include, but are not limited to: (1) the seriousness of the attacks, (2) whether there has been an increase in armed clashes, (3) the spread of clashes over the territory and over a period of time, (4) any increase in the number of government forces and mobilization, (5) the distribution of weapons among both parties to the conflict, (6) whether the conflict has attracted the attention of the United Nations Security Council, and (7) whether any resolutions on the matter have been passed.¹²

Further, the organization requirement is determined by a number of factors, including: (1) factors signaling the presence of a command structure, (2) factors indicating that the group could carry out operations in an organized manner, (3) factors indicating a level of logistics, (4) factors relevant to determining whether an armed group possessed a level of discipline and the ability to implement basic obligations of Common Article 3, and (5) factors indicating that the armed group was able to speak with one voice.¹³

In order for conduct to be categorized as a violation in which international criminal law applies to violence of armed forces, there must be a “sufficient nexus between the conduct at issue and the relevant armed conflict.”¹⁴ The nexus requirement “serves to distinguish war

¹⁰ Schaak & Slye, *supra* note 1, at 331.

¹¹ *Prosecutor v. Boškoski & Tarčulovski*, IT-04-82-T, Judgement para. 175 (Int’l Crim. Trib. for the Former Yugoslavia (July 10, 2008)).

¹² *Id.* ¶177.

¹³ *Id.* ¶199-203.

¹⁴ Hathaway, *supra* note 5, at 112.

crimes from purely domestic crimes over which international criminal courts and tribunals have no jurisdiction.”¹⁵ Further, the nexus requirement distinguishes war crimes from ordinary criminal conduct.¹⁶ Specifically, this nexus requirement acts to establish a connection between the conduct of the individual or group and a violation of international humanitarian law.¹⁷ However, tribunals differ on their definition and application of the nexus requirement. While some tribunals narrowly apply the nexus requirement, demanding a direct link between the conduct and the armed conflict, other tribunals broaden the definition and application. The broadened definition and application of the nexus requirement allows for a wider scope of activity and conduct to be categorized as war crimes in the international community.

Regardless of whether tribunals adopt and apply a broad or a narrow definition of the nexus requirement, the function of the nexus requirement is a matter of public debate. While some commentators believe the nexus requirement should be utilized and treated as an independent requirement for a war crime charge, other commentators support the notion that the nexus requirement works as a trigger of the application of international humanitarian law.¹⁸

The nexus requirement is best understood as “triggering the application of international humanitarian law to particular acts of misconduct by individual defendants.”¹⁹ The purpose is most commonly explained as holding individual defendants accountable for harmful misconduct. This purpose extends to holding individual defendants accountable on an international scale. Furthermore, the crime and action must actually violate the law of war, and the inquiry begins as to whether the accused party has committed a violation under international humanitarian law.

¹⁵ Guénael Métraux, *The Oxford Companion to International Criminal Justice* 435-436 (Antonio Cassese ed., 2009).

¹⁶ *Id.*

¹⁷ Hathaway, *supra* note 5, at 84.

¹⁸ *Id.* at 85.

¹⁹ *Id.*

Additionally, there is a consensus that “the fact that an abuse would not have occurred but for the existence of an armed conflict is not sufficient to make an act a war crime.”²⁰ For example, if an officer harms a subordinate during an armed conflict, but the harm is unrelated to the armed conflict, this would not satisfy the requirement. Just because the officer had the opportunity and was exposed to the subordinate because of the armed conflict, does not mean this satisfies the requirement. The officer may not have been exposed to the subordinate but for the armed conflict. The armed conflict may have provided the officer with the opportunity to both meet and harm the subordinate. However, this does not mean that the connection is sufficient to show the action constitutes a war crime. This is not enough to show a nexus requirement. In this case, the requirement would not be satisfied.

With that being said, the nexus requirement is not always defined or applied in the same way. International tribunals at times use narrow applications and at times use broader applications of the nexus requirement. In the next section, I will discuss the narrow applications of the nexus requirement.

Narrow Applications of the Nexus Requirement

Now that the relevant background information to war crimes, armed conflict, and the nexus requirement have been discussed, I will now review narrow applications of the nexus requirement. Some international tribunals use a narrow and specific nexus requirement, looking for a direct and definite link between the perpetrator’s conduct and armed conflict. Specifically, in *Prosecutor v. Kayishema*, the International Criminal Tribunal for Rwanda used a narrow application of the nexus requirement when determining whether a war crime had occurred.

²⁰ *Id.*

The Trial Chamber II of the International Criminal Tribunal for Rwanda was established by the United Nations Security Council Resolution 955 on November 8, 1994.²¹ The Security Council established the Tribunal in response to “widespread violations of international law committed in Rwanda” which constituted a “threat to international peace and security.”²²

At the time, two groups in Rwanda, the Tutsis and the Hutus, were experiencing tension and power struggles within the country as a result of “manipulation of these ethnic identities by the colonial and post-colonial powers.”²³ Members of the Tutsi population were forced to flee from Rwanda upon experiencing extreme violence from the Hutu population.²⁴ As a result, members of the Tutsi population formed the Rwandan Patriotic Front (“RPF”). The RPF acted as a Tutsi resistance group to the ongoing Hutu domination.²⁵ Although the Arusha Accords attempted to achieve multiple cease-fires, the RPF began launching attacks against the Hutu government powers from neighboring countries.²⁶ In response to the Tutsi and RPF efforts to attack the Hutu powers, Hutu political groups began forming and training pseudo-military units.²⁷

On April 6, 1994, Rwandan President Juvenal Habyarimana’s plane was shot down by a pair of surface-to-air missiles.²⁸ Although the identity of the assassins is unknown, the assassination led to an end of the ceasefire, and the massacre of the Tutsi people began. Tutsi civilians began congregating in churches to protect themselves. However, members of the national police, commune police, and armed civilians began massacring the Tutsi population

²¹ Schaak & Slye, *supra* note 1, at 328.

²² *Id.*

²³ *Id.* at 329.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

with machetes and other agricultural tools in the churches and otherwise neutral and safe locations.²⁹

In response to the massacre of the Tutsi people, the International Criminal Tribunal of Rwanda (“ICTR”) indicted Clement Kayishema and Obed Ruzindana for war crimes in connection with massacres at four main sites, among other indictments.³⁰ Kayishema argued that “the acts for which he was charged did not constitute war crimes because they were unconnected with the war between the RPF and the Hutu-led government.”³¹

Relying on *Prosecutor v. Zejnil* and *Prosecutor v. Tadic*, the ICTR held that:

The term nexus should not be understood as something vague and indefinite. A direct connection between the alleged crimes referred to the Indictment, and the armed conflict should be established factually. No test, therefore, can be defined in abstracto. It is for the Trial Chamber, on a case-by-case basis to adjudge on the facts submitted as to whether a nexus existed. It is incumbent upon the Prosecution to present those facts and to prove, beyond a reasonable doubt, that such nexus exists.³²

The ICTR held that there must be a direct and definite link between the alleged crime and the armed conflict. Further, the ICTR found that the Prosecutor did not meet the burden of proof - beyond a reasonable doubt - to show that the crimes alleged in the Indictment “were committed in direct conjunction with the armed conflict.”³³ The lack of direct evidence presented by the Prosecutor in regards to the nexus element allowed the Tribunal to rule that Kayishema and Ruzindana could not be held liable for war crimes. Ultimately, in this case, Kayishema and Ruzindana did not incur criminal responsibility or liability for war crimes.

²⁹ *Id.* at 329-30.

³⁰ *Id.* at 330.

³¹ *Id.*

³² *Kayishema*, supra note 7.

³³ *Id.*

In this particular case, the ICTR viewed the nexus requirement strictly and narrowly. Since the Prosecutor failed to show a direct and definite link between the Defendants' actions and the specific armed conflict, the ICTR refused to hold the Defendants criminally responsible for their conduct. This case provides an example and representation of the narrow test for nexus requirement. In cases where tribunals use this narrow application for the nexus requirement, the Prosecution must prove, beyond a reasonable doubt, there exists a direct and definite link between the alleged crime or conduct and the armed conflict. This is a narrow interpretation and application which removes the possibility of a successful war crime charge if the nexus element is not met. In these indictments, if the Prosecution does not meet the nexus standard, the war crime case against Defendants is thrown away completely.

As the research included reflects, the ICTR may have relied too heavily on the narrow interpretation of the nexus requirement. Developing and utilizing a broader definition and application of the nexus requirement could allow for a more expansive definition of war crimes. For example, in the case of *Prosecutor v. Kayishema*, the Prosecutor made attempts to show a nexus between the Defendants' conduct and armed conflict. Specifically, the Prosecutor made reference to "in the context of non-international armed conflict."³⁴ Although the Prosecutor did not specify the meaning of the words, the Tribunal found the words to be "too general in character" and found that the words "[did] not clarify the situation in a proper way."³⁵ As a result, the Tribunal concluded that: "When the country is in a state of armed conflict, crimes committed in this period of time could be considered as having been committed in the context of

³⁴ *Id.*

³⁵ *Id.*

this conflict. However, it does not mean that all such crimes have a direct link with the armed conflict.”³⁶

The ICTR was able to make the nexus determination on the basis of the lack of a direct link between the conduct or crime committed and the armed conflict. Additionally, the ICTR found the Prosecutor’s proof to not meet the burden of proof necessary to convict for war crimes. There are issues with this specific determination. For example, the Prosecutor’s burden of proof did involve further evidence beyond “in the context.” The Prosecutor did explain contextually what was occurring within Rwanda during this time, as well as the Defendants’ involvement with the country’s ongoing present conflict and violent environment. By considering and understanding all relevant facts, one could determine that the Defendants’ conduct was causally connected to the ongoing armed conflict in Rwanda. However, using the direct and narrow application of the nexus requirement, the Tribunal determined that the Prosecutor did not provide enough evidence to meet the beyond a reasonable doubt standard.

Another point to consider is the obvious facts a reasonable person could gather from the *Kayishema* case. A reasonable person would likely look at the facts of this case and assume and have sincere reason to believe the Defendants’ actions were motivated by the ongoing armed conflict between the Tutsi and the Hutu people. Any reasonable person taking a step back from the law would read the set of facts in the case, understand the political and cultural conflict taking place in Rwanda, and likely come to the realization and judgement that the Defendants’ crimes in this case were directly related to the ongoing armed conflict. This is why such a narrow and strict test becomes problematic for these types of determinations. The results of a case may deviate from an obvious understanding of the events that took place. In the tribunal’s attempt to

³⁶ *Id.*

comply with a strict and narrow interpretation of the nexus requirement, the tribunal may forgo a more just and obvious result. This can lead the tribunal to make a decision on a case that they would have otherwise continued to review and consider as a war crime, merely because the case does not fit the narrow nexus requirement.

The tribunal making a judgement about the nexus requirement based on a limited and narrow scope provides the Prosecutor with a near-impossible obstacle to overcome. Especially in cases like *Kayishema*, where there is a severe and tragic slaughter of the Tutsi people, it is hard to understand how the Tribunal did not reach a conclusion that the inhumane slaughter was related to and likely motivated by and closely related to the Rwandan conflict. Crimes like those committed by the Defendants in *Kayishema* seem emotionally and culturally motivated to any reasonable person. It can seem as though the Tribunal only made the finding it did because the nexus requirement was not met with the very specific and narrow nexus application used. This is the problem with the narrow application of the nexus requirement being limited to a direct and definite link between the conduct or crime committed and the armed conflict.

In regards to the indictment on war crimes, this case may have had a different result if the Tribunal considered the nexus requirement differently. The entire case and its result rested on this determination, which could be damning as we saw in this case. Future cases relying on this precedent will have to stop inquiry and analysis once it is determined there is not a direct and definite nexus between the perpetrator's conduct and the armed conflict. This nexus definition and application should be relaxed to an extent to allow for more potential justice and further adjudication. The inquiry into guilt for war crimes should not rest on this direct and definite link. Tribunals should relax this necessary connection to allow for the further adjudication of cases that may otherwise fit the credentials for a war crime.

In another example, the International Criminal Tribunal for Rwanda uses alternative formulations of the required nexus element on a case-by-case basis. For example, in *Prosecutor v. Semanza*, the Trial Chamber found that the nexus requirement relies on whether the conduct was either “closely related to the hostilities” or “committed in conjunction with them.”³⁷ However, the *Semanza* Chamber ultimately followed *Kayishema*’s narrow interpretation of the nexus requirement.

In a slightly different approach, the *Akayesu* Trial Chamber found that only acts “committed in conjunction with the armed conflict” will qualify as war crimes.³⁸ In *Prosecutor v. Akayesu*, the Trial Chamber ultimately held that “it [was not] proven beyond reasonable doubt that the acts perpetrated by Akayesu ... were committed in conjunction with the armed conflict.”³⁹ Ultimately, the Tribunal found that Akayesu did not incur criminal responsibility for the Indictment. Although once again the tribunal uses different language in regards to the nexus requirement for this specific Indictment, when examining the judgment in its totality, it is clear the tribunal is following a similar nexus requirement to that of *Kayishema*.

Although the *Semanza* and *Akayesu* rulings use different language within their judgements, the test for the nexus requirement closely parallels and mirrors the *Kayishema* nexus test. Although *Semanza* and *Akayesu* at first glance have differing language from *Kayishema* to explain the nexus requirement, both tribunal rulings ultimately rely on the *Kayishema* nexus application in their final judgements. These tests are practically and ultimately the same, and in all three rulings the tribunal comes to very similar results utilizing this similar nexus application.

³⁷ *Prosecutor v. Semanza*, Case No. ICTR 97-20-T, Trial Chamber Decision para. 14 (May 15, 2003).

³⁸ Schaak & Slye, *supra* note 1, at 338.

³⁹ *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, Judgement para. 643 (Sept. 2, 1998).

As shown in this section, the narrow application of the nexus requirement severely limits cases that constitute war crimes. In the next section, I will discuss broader and alternative applications of the nexus requirement, using examples and approaches.

Alternative Applications of the Nexus Requirement

As I have shown in the last section, international tribunals have at times used narrow definitions and applications of the nexus requirement when determining if a war crime has been committed. However, international tribunals at times use broader applications of the nexus requirement to make this determination.

To determine whether a nexus between the crime and an armed conflict has been found, the international tribunal will evaluate the nexus in regards to a particular act.⁴⁰ In *Prosecutor v. Kunarac*, three Serbian military officials were prosecuted for alleged war crimes. The three officials were prosecuted for serious violations of international humanitarian law committed in the Foca territory of the former Yugoslavia.⁴¹ In this particular case, the Appeals Chamber found that the casual relationship and nexus requirement was not necessary.⁴² Specifically, the Chamber found:

What ultimately distinguishes a war crime from a purely domestic offense is that a war crime is shaped by or dependent upon the environment in which it is committed... 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.⁴³

⁴⁰ *Id.*

⁴¹ *Prosecutor v. Kunarac*, Case No. IT-96-23 & IT-96-23/1-A, Judgement (June 12, 2002).

⁴² Schaak & Slye, *supra* note 1, at 280.

⁴³ *Kunarac*, *supra* note 40.

Further, the *Kunarac* Chamber held that in determining if the nexus requirement is met, the Trial Chamber may take into account the following factors:

(1) the fact that the perpetrator is a combatant; (2) the fact that the victim is a non-combatant; (3) the fact that the victim is a member of the opposing party; (4) the fact that the act may be said to serve the ultimate goal of a military campaign; (5) and the fact that the crime is committed as part of or in the context of the perpetrator's official duties.⁴⁴

Ultimately, the *Kunarac* Chamber found that the Trial Chamber had “identified and applied the proper test for establishing the required nexus between the acts of the accused and the attack.”⁴⁵ The *Kunarac* Chamber did not rely on a direct and definite link as a nexus between the accused's conduct and the armed conflict. Instead, the Chamber considered a number of factors when determining whether or not a nexus existed. The nexus requirement in *Kunarac* rested more heavily on the armed conflict and its influence on the perpetrator's ability and decision to commit the crime. The tribunal in *Kunarac* examined multiple factors to determine whether a nexus existed.

This broad and more detailed description and application of the nexus requirement allows for a greater opportunity for justice. The nexus requirement, under *Kunarac*, balances armed conflict with motives and abilities. This type of nexus requirement allows more room for adjudication because it is not as black and white as the narrower interpretation of the nexus requirement used in *Kayishema*. Specifically, the case is not ultimately ruled out because one requirement is not met. There is more room and ability for the Prosecutor to show there is a nexus, and there is not a heightened burden of proof which requires proving a direct connection

⁴⁴ *Kunarac*, *supra* note 40.

⁴⁵ *Id.*

beyond a reasonable doubt. Under this nexus requirement, more cases can continue without automatically ending due to a lack of nexus requirement.

Furthermore, the Appeals Chamber in *Prosecutor v. Rutaganda*, further elaborates on the *Kunarac* nexus application. In *Rutaganda*, the Indictment charged Rutaganda with participating in crimes committed in Rwanda, including murder.⁴⁶ The Trial Chamber acquitted Rutaganda on the ground that the “Prosecution failed to establish the required nexus beyond a reasonable doubt.”⁴⁷ The Trial Chamber found that the Prosecution did not show how the individual acts of Rutaganda during the massacres were committed in conjunction with the armed conflict.⁴⁸ However, the Appeals Chamber disagreed and found that the Prosecution met the nexus requirement.⁴⁹

Specifically, the *Rutaganda* Appeals Chamber held that:

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 by 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 neighbor he has hated for years, that would not, without more, constitute a war crime ... By contrast, the accused in *Kunarac*, for example, were combatants who took advantage of their positions of military authority to rape individuals whose displacement was an express goal of the military campaign in which they took part. Second ... the determination of a close relationship between particular offenses and an armed conflict will usually require consideration of several factors, not just one.⁵⁰

⁴⁶ *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-A, Judgement, para. 558 (May 26, 2003).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

The *Rutaganda* Chamber found that the nexus application requires a consideration of several factors. The determination of whether a nexus between conduct and armed conflict is found depends and rests on multiple factors. According to the *Rutaganda* Chamber, the nexus requirement is not black and white and does not depend solely on a direct and definite nexus between conduct and the armed conflict. The *Rutaganda* Chamber developed a deeper analysis, following the *Kunarac* nexus application, which allows for a broader interpretation of the nexus application.

In *Rutaganda*, the appeal and guilt of Rutaganda depended on whether or not the nexus requirement was met. The Appeals Chamber found that “no reasonable trier of fact could have concluded ... that the Prosecution failed to establish a nexus between the acts committed by Rutaganda and the armed conflict.”⁵¹ In fact, the Appeals Chamber held that the nexus requirement was met by the Prosecution, by showing Rutaganda’s participation in the killings at Nyanza and the armed conflict.⁵² As a result, the Appeals Chamber held that it was established, beyond a reasonable doubt, that Rutaganda was individually reasonable for the crimes committed.⁵³ Ultimately, the Appeals Chamber found Rutaganda guilty of multiple counts of the Indictment.⁵⁴

As we can see in *Rutaganda*, there would have been a different outcome if the Appeals Chamber tribunal stayed with and utilized the narrower application of the nexus requirement. Just as it occurred in the Trial Chamber, Rutaganda would have been exonerated from guilt in relation to multiple counts on an international scale if the Appeals Chamber utilized the narrower nexus requirement. This is a perfect example of a case where the decision rested on the nexus

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* ¶ 580.

⁵⁴ *Id.*

requirement. Rutaganda committed serious and heinous crimes under international criminal law. Yet, if the tribunal utilized the narrower application, he would have not been held accountable for multiple charges of the Indictment. However, once the Appeals Chamber utilized the broader construction of the nexus requirement, the Chamber found Rutaganda guilty for multiple counts.

As we can see, a broader test to determine if there is a nexus between conduct (a crime committed) and an armed conflict better suits the international criminal law goal of justice and holding those who commit war crimes accountable. A broader application of the nexus requirement is the better option when determining if a war crime has been committed. However, there may be pushback and drawbacks of a broader definition application of the nexus requirement when determining if a war crime has been committed, as I will examine in the next section.

Potential Pushback and Drawbacks of Broader Applications of the Nexus Requirement

As shown, the international tribunals have used both narrow and broader applications of the nexus requirement when determining whether a war crime has been committed. Although I advocate for a broader application to allow for more opportunities for justice, there may be potential pushback to this expansion. Specifically, there are potential drawbacks to the use of a broader application of the nexus requirement. First and foremost, a potential drawback or pushback against a broader application of the nexus requirement could be that the definition becomes expanded and broadened too far.

Taking an example from earlier: if an officer were to harm a subordinate during an armed conflict, under the narrow definition and application of the nexus requirement this action would not necessarily alone constitute a war crime. The reason it would not constitute a war crime, under a narrow nexus requirement, is because the crime and conduct did not have a direct or

definite link to the armed conflict. In this example, the officer did not harm or attack the subordinate because of or motivated by or even related to the armed conflict. The armed conflict in this case could be entirely unrelated to the crime. This is potentially harmful because the expansion of the definition of war crime may then include too much. Parties then may attempt to prosecute individuals under war crimes for crimes or conduct that are almost entirely unrelated to the armed conflict. This is also potentially harmful because this could bring in countless other cases against individual defendants that flood the international tribunals. It would be harmful to overwhelm the tribunals with countless potential cases that likely do not constitute war crimes because we favor a broader application of the nexus requirement. These are sincere potential consequences that must be considered.

If tribunals made the definition and application of the nexus requirement too broad, an occurrence like this could potentially fall under the war crime category. Although this would be an extreme example of the broadened nexus requirement reaching too far, this example would lead to problematic results because it may allow for too many unrelated crimes to be considered as war crimes. However, if tribunals were to consider the nexus requirement in a broader context, it would likely still only include crimes that were motivated by or related to the armed conflict. This far-reaching example would likely be nothing more than a fear of opponents of expanding the nexus requirement. There could be some validity to the pushback if the definition expanded further than the broader nexus tests under *Kunarac*. The best case scenario for all parties would be to follow the *Kunarac* nexus test for determining if a war crime has occurred.

Additionally, another point of contention with expanding the definition and application of the nexus requirement is the potential effect on the seriousness of prosecuting war crimes. A core

attribute of a war crime is that the violation of international humanitarian law must be serious.⁵⁵

As an important attribute of war crimes, “severity is consistently identified by tribunals and scholars as a requirement of war crimes.”⁵⁶ In fact, “severity is so central to defining a war crime that it has sometimes been treated by tribunals as a stand-in for ‘criminalization.’”⁵⁷

Seriousness holds great value in defining and prosecuting war crimes. The severity element is considered “essential” to a war crime.⁵⁸ Since severity and seriousness play an important and crucial role in prosecuting war crimes, tribunals will be resistant to accept war crimes that do not meet a level of severity. This works both in favor of and in conflict with the argument that the nexus requirement should be broadened.

The severity and seriousness requirement for war crimes may be impeded or affected if the nexus requirement becomes broader and more relaxed. If the tribunals broaden the nexus requirement, the severity and seriousness of the crimes considered for prosecution may lessen or weaken. If there is less required to show a nexus between crimes and armed conflict, this may reduce the severity of the crimes committed. This could potentially swoop in and allow for crimes that lack a severe or serious quality. Once again using the example of the officer harming the subordinate. If this example somehow passed a broader application of the nexus requirement, this example would also affect the severity requirement as well. Either the severity element would have to be broadened as well - and potentially weakened – or this example would pass the nexus requirement but not the severity element.

However, in direct contrast, the importance of the severity element strengthens the argument that the nexus requirement should be broadened because the severity element provides

⁵⁵ Hathaway, *supra* note 5, at 86.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

a check on the nexus requirement. If the nexus requirement becomes too broad and too relaxed, the severity element will still be there to provide a check. If a crime passes the nexus requirement, it still needs to meet the standard for severity and seriousness. This almost becomes a two-step process and allows for a second check if the nexus requirement becomes broadened.

Finally, an additional pushback against broadening the nexus requirement may be that other crimes, such as crimes against humanity, may serve to capture grave offenses that do not have a nexus requirement. My response to this would be that individuals, especially during armed conflict with emotions soaring, should and need to be held accountable for all of their actions and conduct. We should not limit definitions and applications of portions of these offenses, in the hope that other potential crime charges suffice. Crimes, such as crimes against humanity, should not be relied upon as a “catchall.” On an international scale, we should charge individuals for crimes committed during armed conflict using broader, yet fair definitions.

Similarly, another pushback may be that some crimes may still be prosecuted domestically, holding individuals accountable on a domestic level. My response to this point would be similar to the point immediately above. International tribunals were established to handle the most serious, intricate, and heinous crimes. These tribunals exist to handle crimes like war crimes, and the most serious crimes of concern to the international community. The nexus requirement should not be the only thing standing in the way.

In summary, at times, international tribunals have used a narrow definition and application of the nexus requirement when determining if a war crime has occurred. However, international tribunals should use a broader and more fluid definition and application of the nexus requirement to determine if a war crime has occurred. However, as shown in this section, advocates of a narrower interpretation of the nexus requirement may be concerned with

broadening the definition in fear that the expansion may lead to a potential effect on the seriousness of war crimes, or a concern that the definition may become expanded too far.

Conclusion

The nexus requirement used to determine if a war crime has been committed has proven to be too narrow and too strict. The tribunals' use of a narrow nexus requirement, which requires a direct and definite link between the conduct of the crime and the armed conflict, presents a serious problem of limiting the scope of cases that constitute war crimes. The narrow application too quickly eliminates a wide array of cases from being charged as war crimes, since it exonerates potentially guilty parties under international humanitarian law if the nexus requirement is not met. However, a relaxed, broader, and more expanded definition and application of the nexus requirement would allow for a larger amount and a wider net of serious crimes to be classified as war crimes.

Citation Page

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