

## The Expansive Definition of “Protected Persons” in War Crime Jurisprudence

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*While previously wars were primarily between well-established States, in modern inter-ethnic armed conflicts such as that in the former Yugoslavia, new States are often created during the conflict and ethnicity rather than nationality may become the grounds for allegiance . . . . Under these conditions, the requirement of nationality is even less adequate to define protected persons.<sup>1</sup>*

### I. Introduction

In August 2006 Mounthir Abbas Saud, a Sunni Iraqi, was evacuated to a Baghdad hospital after having his jaw and arm ripped off by a car bomb.<sup>2</sup> A few days after arriving at the hospital, Shiite militiamen burst into Mr. Saud’s room, tore intravenous tubes out of his nose and arms, and dragged him down the hall.<sup>3</sup> At the end of the hall, the Shiite militiamen repeatedly fired their automatic weapons into Mr. Saud.<sup>4</sup> Like Mr. Saud, the Shiite militiamen were Iraqi nationals, yet, despite their common nationality, the militiamen slaughtered Mr. Saud solely because of his Sunni beliefs.<sup>5</sup>

Increasingly, conflicts are defined not by nationality or geographical boundaries but instead by ethnicity and religious affiliation.<sup>6</sup> It is questionable whether these religious, ethnic, and tribal wars are internal or international armed conflicts and the specific facts of each conflict are dispositive in making this determination.<sup>7</sup> Assuming these conflicts are defined as international armed conflicts and thus the full protections of the Geneva Conventions apply,<sup>8</sup> the traditional definition of “protected persons” found within Geneva Convention IV (GC IV), Article 4 is clearly antiquated and outdated when discussing these complex forms of violence.<sup>9</sup> As a result, international jurisprudence is moving towards giving protected person status under Geneva Convention IV, Article 4 to ethnic, religious, or tribal groups that are victims at the hands of their

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<sup>1</sup> Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 166 (Oct. 2, 1995), *reprinted in* MARCO SASSOLI & ANTOINE A. BOUVIER, *HOW DOES LAW PROTECT IN WAR?* 1858 (2d ed. 2006).

<sup>2</sup> Amit R. Paley, *Iraqi Hospitals Are War’s New “Killing Fields,”* WASH. POST, Aug. 30, 2006, at A1 (detailing how Shiite militiamen are targeting Sunnis at medical facilities).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *See id.*

<sup>6</sup> *See, e.g., Tadic*, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *in* SASSOLI & BOUVIER, *supra* note 1, at 1858; Loius Chabonneau, *U.N. Council Demands End to Kenya Ethnic Violence*, CNN.com/politics, Feb. 6, 2008, available at <http://www.reuters.com/article/worldNews/idUSN0630699320080206> (discussing “ethnically motivated attacks” throughout Kenya); Lydia Polgreen, *Attacks Pushing Darfur Refugees Into Chad*, N.Y. TIMES, Feb. 11, 2008, available at <http://www.nytimes.com/2008/02/11/world/africa/11darfur.html> (“The morass of conflict engulfing the region has become more complex and difficult to control since it first grabbed the world’s attention in 2003, when the Arab-dominated government of Sudan unleashed tribal militias known as the janjaweed on non-Arab rebel groups in Darfur.”).

<sup>7</sup> *See, e.g., Tadic*, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *in* SASSOLI & BOUVIER, *supra* note 1. In *Tadic* the International Criminal Tribunal for the former Yugoslavia found that an international conflict occurred in the former Yugoslavia due to the “involvement of the Croatian Army in Bosnia-Herzegovina and by the involvement of the Yugoslav National Army (“JNA”).” *Id.* at 1812. Thus, the full protections of the Geneva Conventions applied despite the ethnic and religious overtones of the conflict. *See id.* at 1857. Similarly, the sectarian violence in Iraq between the Sunni and Shiite religious groups is arguably an international armed conflict due to support provided to the Shiite militiamen by Iran. *See, e.g., Report to Congress on the Situation in Iraq: Hearing Before the House Armed Service Committee*, 110th Cong. 2.4 (2007) (statement by General David H. Petraeus) (discussing the involvement of Iran in the sectarian violence in Iraq). Conversely, the current ethnic violence in Kenya is most likely an internal conflict due to the lack of any external state involvement. *See* David McKenzie & Kim Mortared, *New Doubts Over Flawed Kenyan Vote*, CNN (Nairobi, Kenya), Jan. 2, 2008 (discussing the internal political turmoil in Kenya and the resulting ethnic violence).

<sup>8</sup> *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 2, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV]; *see also* INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GENERAL’S LEGAL CTR. & SCH., U.S. ARMY, LAW OF WAR DOCUMENTARY SUPPLEMENT 235 (2008) (discussing when the Convention and all of its articles applies).

<sup>9</sup> GC IV, *supra* note 8, art. 4 (“Persons protected by the Convention are those [that fall under the control] of a Party to the conflict or Occupying Power of which they are not nationals.”). Therefore, groups abused by their own governments do not seem to fall within this definition of protected persons and must rely upon the general protections offered to all civilians in GC IV. *But see infra* Section III (discussing why this definition of protected persons is too narrow).

own nation.<sup>10</sup> This expansion of the definition of protected persons results in a greater pool of possible victims of grave breaches of international law and therefore an increasing number of state actions being defined as war crimes.<sup>11</sup>

## II. The Problem: Who Is Protected from “Grave Breaches”?

Article 147 of GC IV states, “Grave Breaches . . . shall be those involving any of the following acts, if committed against persons or property protected by the present Convention . . . .”<sup>12</sup> This raises the question: who is a person “protected” by the present Convention and thus shielded from the war crimes listed in Article 147?<sup>13</sup> Article 4 clearly limits the definition of protected persons and expressly excludes from protected person status those individuals that are nationals of the occupying state or nationals within their own state.<sup>14</sup> Exclusion from protected person status means that a national within the geographic boundaries of his home nation will not receive the full penumbra of civilian protections in time of war but instead may only rely upon the limited protections offered in Part II of GC IV.<sup>15</sup> It is unclear whether Part II is a stand-alone section, but a plain reading of GC IV in its entirety supports the contention that the only protections a national has in reference to his home nation are those discussed within the parameters of Part II.<sup>16</sup> This traditional interpretation of protected persons seemingly gives a government the ability to commit an atrocity listed in Article 147 against their own nationals without consequence or international criminal culpability.<sup>17</sup> Further, a national that is victimized by his own government does not have an avenue to seek redress<sup>18</sup> or the ability to hold his government accountable for war crimes.

The traditional definition and interpretation of protected persons does not provide adequate protections to certain oppressed groups and, at a minimum, the question is left open whether a government that commits atrocities upon a religious or ethnic group within their own geographic boundaries are culpable under international law.<sup>19</sup> Clearly, in the context of contemporary hybrid conflicts that include traits of both internal and international conflicts the traditional definition of

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<sup>10</sup> See *infra* Section III (discussing the *Tadic* case and the movement towards expanding the definition of protected persons).

<sup>11</sup> See *Tadic*, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, in SASSOLI & BOUVIER, *supra* note 1, at 1857 (noting that the status of protected person makes an individual a possible victim of a grave breach of international law).

<sup>12</sup> GC IV, *supra* note 8, art. 147. Article 147, in its entirety, states:

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or willfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

*Id.*

<sup>13</sup> *Id.*

<sup>14</sup> See *id.* art. 4. Article 4 also expressly excludes from the definition of protected persons those that are from a state which is not bound by the conventions, nationals from a neutral state, or co-belligerent state, that still has normal diplomatic representation with the occupying state, and those that are protected by the other enumerated Geneva Conventions. See *id.*

<sup>15</sup> See *id.* art. 13 (“The provisions of Part II cover the whole of the populations of the countries in conflict, without any adverse distinction based, in particular, on race, nationality, religion or political opinion, and are intended to alleviate the sufferings caused by war.”).

<sup>16</sup> See *generally id.* Article 13 specifically states that Part II covers the whole population of the countries in conflict and clearly incorporates more individuals than simply those that are protected persons. See *id.* However, Part III only refers to protected persons. See *id.* art. 27 (referring specifically to the entitlements of protected persons). Part IV refers generally to protected persons. See *id.* arts. 142, 143.

<sup>17</sup> Another possibility is that Article 147 is referring to all persons mentioned in the Convention, thus including nationals within the geographic boundaries of their own nation receiving protections under Part II. See *generally id.* However, this argument seems unlikely since Article 147 repeatedly refers to protected persons which is clearly defined in Article 4 as excluding nationals within their own State. See, e.g., *id.* art. 147. For example, Article 147 lists as a grave breach “compelling a protected person to serve in the forces of a hostile Power.” *Id.* It is difficult to envision this phrase not referencing “protected persons” as defined in Article 4. See *id.* art. 4.

<sup>18</sup> In theory, the national could attempt to use its domestic courts to pursue prosecution of the war crimes. In practice, this does not seem realistic. See *generally* GC IV, *supra* note 8, art. 10; Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, U.N. Doc. S/RES/827 (1993), available at <http://www1.umn.edu/humanrts/icty/statute.html> (noting the need of the international tribunal to try those whose war crimes had been deemed “ordinary crimes” ensuring that the domestic proceedings were not used to shield war criminals).

<sup>19</sup> See *supra* text and accompanying notes 12–18.

protected persons is grossly inadequate.<sup>20</sup> Recognizing this issue, international jurisprudence has begun to incorporate these underrepresented groups within the rubric of protected persons and in the process placed greater emphasis on human rights rather than state sovereignty.<sup>21</sup>

### III. The *Prosecutor v. Tadic*: The Move to Expand “Protected Person” Status

Similar to the current environments in Iraq, Sudan, and other contemporary conflicts,<sup>22</sup> the dissolution of the nation-state of Yugoslavia in the early 1990s quickly led to a brutal inter-ethnic and religious conflict.<sup>23</sup> As Yugoslavia disintegrated, ethnic Serbians, in a calculated plan to create a Greater Serbia, committed multiple inhumane acts including rape, kidnapping, and murder against the non-Serbian population.<sup>24</sup> Despite a common nationality between many of the aggressors<sup>25</sup> and the targeted victims, the ethnic and religious affiliation of the Serbian population trumped their national identity as prior citizens of Yugoslavia or as current nationals of Bosnia and Herzegovina.<sup>26</sup> In addition, numerous parties in the conflict were from neighboring states whose involvement was based solely upon ethnicity and religion versus traditional national alliances or treaties.<sup>27</sup> The result was violence that resembled both an internal and international conflict in which the application of the traditional interpretation of protected persons was not suitable to address the ethnic cleansing taking place.<sup>28</sup>

Recognizing numerous shortcomings with traditional application of the Geneva Conventions,<sup>29</sup> The International Criminal Tribunal for the former Yugoslavia (ICTY) determined the contemporary world environment required a progressive and expansive definition of protected persons.<sup>30</sup> The ICTY, in *Prosecutor v. Tadic*, noted that the complexities of modern international armed conflicts diminished the importance of nationality in defining an individual as a protected person under Article 4.<sup>31</sup> Rigid adherence to the traditional definition of protected persons in contemporary international conflicts, and specifically in the situation of the former Yugoslavia, had absurd results.<sup>32</sup> Notably, Bosnian non-Serbian civilians would be protected persons when attacked by Bosnian Serbians who were acting as agents of the Federal Republic of Yugoslavia (Serbia-Montenegro),<sup>33</sup> while Bosnian Serbian civilians would not be protected persons when attacked by the Bosnia-Herzegovina army.<sup>34</sup> Thus, the traditional protected person definition in context of the conflict in Bosnia and Herzegovina

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<sup>20</sup> See *Prosecutor v. Tadic*, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, in SASSOLI & BOUVIER, *supra* note 1, at 1814 (Oct. 2, 1995) (explaining that the U.N. Security Council purposely refrained from classifying the conflict in the former Yugoslavia as internal or international due to the limitations that would have been placed upon the tribunal and the illogical results that would have followed); see also *supra* note 7 (discussing the difficulty in defining the conflicts in Yugoslavia and Iraq as internal or international); *supra* text and accompanying notes 33–35 (detailing the absurd results that would result by applying the traditional definition of protected persons in the context of the former Yugoslavia).

<sup>21</sup> See *Tadic*, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, in SASSOLI & BOUVIER, *supra* note 1, at 1809.

<sup>22</sup> See *supra* text and accompanying notes 1–8.

<sup>23</sup> See *Tadic*, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, in SASSOLI & BOUVIER, *supra* note 1, at 1857–58.

<sup>24</sup> See *id.* at 1865 (“An aspect of this conflict was a policy to commit inhumane acts against the non-Serb civilian population of the territory in the attempt to achieve the creation of a Greater Serbia.”).

<sup>25</sup> Some of those that committed grave breaches against the non-Serbian population were not nationals of Bosnia. See *id.* at 1812.

<sup>26</sup> See *id.* at 1858 (“In the instant case the Bosnian Serbs, including the Appellant, arguably had the same nationality as the victims, that is, they were nationals of Bosnia and Herzegovina.”).

<sup>27</sup> See *id.* at 1812.

<sup>28</sup> See *id.* at 1812–13 (discussing the internal and international aspects of the conflict).

<sup>29</sup> In addition to expanding the definition of protected persons, the court also articulated the difficulty in defining a conflict as internal or international and noted that in the amicus curiae brief the United States’ opinion was that “the ‘grave breaches’ provisions of Article 2 of the International Tribunal Statute appl[ie]d to armed conflicts of a non-international character as well as those of an international character.” See *id.* at 1816 (citing U.S. Amicus Curiae Brief, at 35). Despite supporting this expansive application of grave breaches in *dicta*, the *Tadic* court determined that this statement was unsupported and thus grave breach provisions of the Geneva Conventions still only applied in international conflicts. See *id.*

<sup>30</sup> See *supra* note 7.

<sup>31</sup> See *Tadic*, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction in SASSOLI & BOUVIER, *supra* note 1, at 1858.

<sup>32</sup> See *id.* at 1814.

<sup>33</sup> *Id.* (“[A]trocities committed by Bosnian Serbs against Bosnian civilians in their hands would be regarded as ‘grave breaches’, because such civilians would be ‘protected persons’ under the Convention, in that the Bosnian Serbs would be acting as organs or agents of another State . . .”).

resulted in disparate protections for civilians in the same geographic area dependent solely upon which group was committing the atrocity.<sup>35</sup>

Rejecting this legalistic application of the protected person definition in Article 4, the *Tadic* court instead stated the Geneva Conventions were intended “to protect those civilians in occupied territory who, while having the nationality of the Party to the conflict in whose hands they find themselves, are refugees and thus no longer owe allegiance to this Party and no longer enjoy its diplomatic protection.”<sup>36</sup> To support this expansive argument, the court referenced the situation of German Jews “who had fled to France before 1940, and thereafter found themselves in the hands of German forces occupying French territory.”<sup>37</sup> Instead of relying upon an individual’s nationality to determine their status as a protected person, the court referenced the object and purpose of the Geneva Conventions in offering a new test in which “allegiance to a Party to the conflict and, correspondingly, control by this Party over persons in a given territory, may be regarded as the crucial test” in determining protected person status.<sup>38</sup>

The *Tadic* opinion recognized that in modern international armed conflicts a national may lack “both allegiance to a State and diplomatic protection” by their State due to their ethnicity or religion.<sup>39</sup> Due to the evolution of the international armed conflict and the over-arching goal of Article 4 to “protect[] civilians to the maximum extent possible,” protected person status could no longer be determined based solely on legal relations between an individual and a State.<sup>40</sup> For this reason, the ICTY determined that Article 4, and the corresponding protections given to protected persons, should apply to those who possess the same nationality as the perpetrators of war crimes.<sup>41</sup>

#### IV. Conclusion

Contemporary international armed conflicts are more likely to resemble the inter-ethnic and religious conflicts of Yugoslavia and Iraq than the state-versus-state conflicts envisioned by the drafters of the Geneva Conventions.<sup>42</sup> This explosive rise of inter-ethnic and religious conflicts often means that ethnicity is “determinative of national allegiance” and in this environment “the requirement of nationality is [] less adequate to define protected persons.”<sup>43</sup> Therefore, the changing dynamics of international armed conflicts requires a more expansive definition of protected person which includes offering protections to those ethnic or religious groups that have grave breaches committed upon them by their own government.<sup>44</sup>

This inclusive interpretation of protected persons under GC IV, Article 4 coupled with the growing number of international ethnic and religious conflicts is expanding the reach of war crimes jurisprudence.<sup>45</sup> States no longer have the unfettered ability to commit atrocities against their own ethnic or religious minorities and previously immune state acts are

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<sup>34</sup> See *id.* The ICTY noted that “serious infringements of international humanitarian law committed by the government army of Bosnia-Herzegovina against Bosnian Serbian civilians would not be regarded as ‘grave breaches’” because the Serb civilians were nationals of Bosnia-Herzegovina. *Id.* The court went on to say, “This would be, of course, an absurd outcome, in that it would place the Bosnian Serbs at a substantial legal disadvantage vis-à-vis the central authorities of Bosnia-Herzegovina.” *Id.*

<sup>35</sup> See generally *id.*

<sup>36</sup> *Id.* at 1857.

<sup>37</sup> *Id.* The court noted that the situation of German Jews who fled to France and subsequently found themselves in the hands of the German state after occupation demonstrated that “the legal bonds of nationality was not regarded as crucial.” *Id.*

<sup>38</sup> *Id.* at 1858.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 1859 (“Hence, even if in the circumstances of the case the perpetrators and the victims were to be regarded as possessing the same nationality, Article 4 would still be applicable.”).

<sup>42</sup> See *id.* at 1858; see also *supra* text and accompanying notes 6–7.

<sup>43</sup> *Id.*

<sup>44</sup> This expansive definition of protected persons more fully complies with the spirit of the Geneva Conventions. The *Tadic* opinion notes that “Article 4 of Geneva Convention IV, if interpreted in the light of its object and purpose, is directed to the protection of civilians to the maximum extent possible. It therefore does not make its applicability dependent on formal bonds and purely legal relations.” *Id.* at 1858.

<sup>45</sup> See *supra* text and accompanying notes 22–40.

now likely to be defined as a war crime.<sup>46</sup> As noted by the ICTY in *Tadic*, “borders should not be considered as a shield against the reach of the law and as a protection for those who trample underfoot the most elementary rights of humanity.”<sup>47</sup> As contemporary international armed conflicts increasingly include inter-ethnic and religious violence, the definition of protected persons is seemingly evolving to reflect this new reality.

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<sup>46</sup> See *Tadic*, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, in SASSOLI & BOUVIER, *supra* note 1, at 1809 (“It would be a travesty of law and a betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights.”).

<sup>47</sup> *Id.*