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THE **NEZZAR** CASE BEFORE THE **FCC**

TRANSLATED EXCERPTS FROM THE ORIGINAL DECISION OF THE SWISS FEDERAL CRIMINAL COURT (FCC)

DECISION | 30 May 2018
TRANSLATION | 30 May 2019

TRIAL International translated the decision of the Appeals Chamber of the Swiss Federal Criminal Court in the case against former Algerian Defense Minister Khaled Nezzar. The original decision, dated 30 May 2018, can be found by following this link (in French).

DECISION OF THE 30 MAY 2018 APPEALS CHAMBER OF THE SWISS FEDERAL CRIMINAL COURT (EXCERPTS)

[...]

6.

6.2 Nezzar is accused of facts that took place between 14 January 1992 and 31 January 1994 in Algeria, during which he served within the HCE. Henceforth applicable in this case are Articles 108 and 109 aCPM which, until 31 December 2010, in their version then in force, penalised violations of humanitarian law (Judgment of the High Military Appeals Court of 27 April 2001 in the case F.N. recitals 3a and 3b, published in "Procès de criminels de guerre en Suisse", Ziegler/Wehrenberg/Weber [edit.], 2009, p. 359 et seq.). In the wording of Article 109 aCPM "that whom contravenes the provisions of international conventions on the conduct of war and the protection of persons and assets, the one that will have violated other recognised laws and customs of war will be, unless more severe provisions are applicable, punished by prison. In serious cases, the sentence will be a life sentence (paragraph 1)". In principle, the provisions of Articles 108 et seq. aCPM were applicable in cases of declared wars and other armed conflicts between two or several States (Article 108 paragraph 1 aCPM). Article 108 paragraph 2 aCPM provided however that the violation of international agreements was also punishable if the agreements provided for a wider scope of application. As a result, the "provisions of international conventions on the conduct of war and the protection of persons and assets" that apply to conflicts not of an international character – which therefore have a more extensive scope of application than those of conventions applicable solely to international conflicts – were also referred to in Article 109 paragraph 1 aCPM. This mainly involves the Geneva Conventions of 1949 (as well as their two additional Protocols of 1977) and in particular Common Art. 3 to the said conventions (hereinafter: Common Art. 3). The latter notably forbids "*violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture.*" (Article 3 paragraph 1 sub-paragraph 1 letter a) and "*outrages upon personal dignity, in particular humiliating and degrading treatment*" (Article 3 paragraph 1 sub-paragraph 1 letter c). Common Article 3 however requires an "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties (ANCELLE in "Droit pénal humanitaire" [Humanitarian criminal law], Moreillon/Bichovsky/ Massouri [édit.], 2e éd. 2009, Série II Volume 5, p. 121).

6.2.1 According to the "Guidance" of the Swiss Federal Council relating to the modification of federal laws in view of the implementation of the Rome Statute of the International Criminal Court, there is an armed conflict when States fight each other by using weapons or when there is an ongoing armed fight between governmental units and organised armed groups or between several of these armed groups inside a State's borders. The scale of the conflict plays no role (FF 2008 3461, 3528; see also International Criminal Tribunal for the former Yugoslavia [hereinafter ICTY], *Tadic Case*, ruling relating to the appeal of the defence concerning the preliminary plea of lack of jurisdiction, paragraph 70). On the other hand, situations of internal disturbances and tensions such as riots, isolated and sporadic acts of violence and other acts of a similar nature are considered to be armed conflicts (Article 1 paragraph 2 of Protocol II]; see also Article 8 paragraph 2 letter f of the Rome Statute of the International Criminal Court of 17 July 1998 [RS 0.312.1], that came into force in Switzerland on 1 July 2002; hereinafter: the Rome Statute).

6.2.2 With regard more specifically to non-international armed conflicts, Common Art. 3 states that they are conflicts in which at least one of the parties involved is not governmental. This article is the only binding provision on a global scale that governs all non-international armed conflicts (Commentary of the ICRC relating to Article 3 of the Geneva Convention I, 2018; hereafter: ICRC Commentary 2018). It assumes that at least one of the warring parties is not a State and that the situation reaches a level that distinguishes it from other forms of violence to which international law does not apply, such as situations of internal disturbances and tensions like riots, isolated and sporadic acts of violence and other acts of a similar nature. The threshold required in this case is higher than for an international armed conflict (VITÉ, Typology of armed conflicts in international humanitarian law: legal concepts and actual situations, article published in English in the International Review of the Red Cross, Vol. 91, no. 873, March 2009, pp. 69-94, and cited reference notably *Tadic Case*, aforementioned, recital 70). Common Art. 3 refers in fact to any "conflicts which are in many respects similar to an international war, but take place within the confines of a single country", in other words, "hostilities" pitting "armed forces" on both sides against one another (ICTY, *Boskoski & Tarculovski Case* of 10 July 2008 [hereinafter: *Boskoski & Tarculovski Case]*, recital 185). This therefore involves a conflict contained within the territory of a State (AIVO, "Le statut de combattant dans les conflits armés non internationaux" [The status of combatant in non-international armed conflicts], 2013, p. 22). In practice, a government cannot deny the existence of a non-international armed conflict in the meaning of Common Art. 3 when it is confronted with a collective armed action, that ordinary means of repression, in other words police forces and the

ordinary application of criminal law, are not enough to stifle, by specifying that the use of armed forces and the bringing into force of a legislation and exceptional procedures will constitute in most cases conclusive proof as to the existence of an armed conflict under the meaning of Common Art. 3 (BUGNION, The International Committee of the Red Cross and the Protection of war victims, Geneva 1994, p. 333).

6.2.3 For the definition of non-international armed conflict, it is necessary to also refer to Article 1 of the Protocol II (ICRC Commentary 2018 no. 431). This provision defines this notion in a more restrictive way; it requires a conflict that takes place in the territory of a High Contracting Party between its armed forces and dissident armed forces or organised armed groups that exercise control on a part of its territory that allows them to carry out ongoing military operations (judgement of the Swiss military court division 2 of 26 August 1999 published *in Procès de criminels de guerre en Suisse*, [Ziegler/Wehrenberg/Weber, edit], 2009, p. 324). So if Common Art. 3 refers to internal armed conflicts of low intensity requiring a minimum level of military organisation, Protocol II applies to internal conflicts of high intensity in which the armed groups are well organised, control part of the national territory and carry out ongoing military operations under a command. There are therefore two degrees of internal armed conflict. While due to its lower application threshold, Common Art. 3 can also apply to the field of application of Protocol II, the reverse is not true (AIVO, *op. cit.*, p. 23). However, recent practice attempts to bring the applicable conditions of Protocol II towards those of Common Art. 3 as much as possible. To this end, it restrictively interprets the additional conditions set out in Article 1 of Protocol II (KOLB/SCALIA, Droit international pénal, Précis, 2e éd. 2012, p. 138). It is also advisable to point out that although the application threshold of Common Art. 3 is lower, it only applies once an armed fight within a government entity takes such forms as it stops being a simple case of law enforcement (AIVO, *ibidem*).

6.3 In practice, notably that of ICTY, the existence of an internal armed conflict must be analysed in light of two fundamental accumulative criteria: the intensity of the conflict and the organisation of the parties to the conflict (ICTY, *Affaire Boskoski & Tarculovski*, par. 175; KOLB/SCALIA, *op. cit.*, p.137; FIOLKA/ZEHNDER, Commentaire bâlois, Droit pénal II, 3e éd. 2013, n° 23 *ad* art. 264b CP; ICRC Commentary 2018 no. 422). These two components cannot be described in the abstract but must be assessed on a case by case basis by weighing a number of indicative criteria (VITÉ, *op. cit.* and cited references, notably ICTY, *Haradinaj, Balaj & Brahimaj Case*, judgment of 3 April 2008 [hereinafter: *Haradinaj Case*]). Moreover, they are relatively flexible in nature and have mainly been established to be differentiated from internal disturbances that do

not lead to the application of the rules of international humanitarian law (ANCELLE, *op. cit.*, p. 127-128). "Internal disturbances and internal tension" can be defined as situations of confrontation and violence inside a State and to a degree of intensity which can be contained and suppressed by law enforcement officers. By resorting to significant military means and armed forces by a State, and in holding back insurgents, the situation is transformed from one of internal disturbance into an internal armed conflict (AIVO, *ibidem;* ICRC Commentary 2018 no. 425).

6.3.1 Concerning the intensity criterion, the ICTY retained different symptomatic elements such as the seriousness of attacks and whether there has been an increased in armed clashes, the spread of clashes over territory and over a period of time, any increase in the number of government forces and mobilisation, the distribution of weapons among both parties to the conflict, as well as whether the conflict has attracted the attention of the UN Security Council and whether any resolutions on the matter have been passed. It also took into account the number of civilians forced to flee the combat zones; the type of weapons used, in particular the use of heavy weapons and other military equipment, such as tanks and other heavy vehicles; the blocking or besieging of towns and the heavy shelling of these towns; the extent of destruction and the number of casualties caused by shelling or fighting; the quantity of troops or units deployed; the existence and change of front lines; the occupation of territory, and towns and villages; the deployment of governmental forces to the crisis area; the closure of roads; the existence of cease fire orders or agreements and the attempt of representatives from international organisations to broker and enforce cease fire agreements (*Boskoski & Tarculovski Case*, recital 177 and cited reference). On a structural level, the way that organs of the State, such as the police and military, use force against armed groups is a revealing element of the existence of an internal armed conflict. The ICTY has highlighted that if necessary, it can be interesting to analyse the use of force by governmental authorities and in particular, the interpretation that was made of certain fundamental rights, such as the right to life and the right to be free from arbitrary detention, in order to appreciate if the situation is one of armed conflict (*Boskoski & Tarcuovski Case*, recital 178). Finally, it recalled in the latter case that to assess the intensity of an internal armed conflict, it is also necessary to take into account protracted armed violence (*Boskoski & Tarculovski Case*, recital 175). However, these are assessment factors that allow us to say whether the intensity threshold has been reached on a case by case basis and not conditions that are cumulative (VITÉ, *op. cit.*, p. 7). The fact remains that according to the circumstances, it is possible to draw certain conclusions from either of these criteria. For example, the existence of high intensity armed confrontations between

governmental authorities and a non-state armed group or between several non-state armed groups can indicate whether these groups have reached a level of organisation required from a party to a non-international armed conflict (ICRC Commentary 2018 no. 434).

6.3.2 Concerning the second criterion (organisation of the parties), the actors of armed violence must have reached a minimal level of organisation. Concerning governmental forces, they are presumed to satisfy this requirement even if it is necessary to proceed with an assessment in each case (ICTY, *Haradinaj Case,* recital 60). As for non-governmental armed groups, the indicative elements coming under consideration include five categories of indices. However, none are in themselves essential to establish that the "organisation" criterion is fulfilled (*Haradinaj Case*, *ibidem*).

The first category includes elements that indicate the presence of a command structure, such as the establishment of a general staff or high command, which appoints commanders and gives them directions, disseminates internal regulations, organises the weapons supply, authorises military action, assigns tasks to individuals in the organisation, issues political statements and communiqués and and which is informed by the operational units of all developments within the unit's area of responsibility. Other elements fall within this category such as the existence of internal regulations setting out the organisation and structure of the armed group, the assignment of an official spokesperson, the communication through communiqués reporting military actions and operations undertaken by the armed group, the existence of headquarters, internal regulations establishing ranks of servicemen and defining duties of commanders and deputy commanders of a unit, company platoon or squad, creating a chain of military hierarchy between the various levels of commanders and the dissemination of internal regulations to the soldiers and operational units. (*Boskoski & Tarculovski Case,* recital 199).

Secondly, some factors taken into consideration indicating that the group could carry out operations in an organised manner, notably the group's ability to determine a unified military strategy and to conduct large scale military operations, the capacity to control territory, raising the question of whether there is territorial division into zones of responsibility in which the respective commanders are responsible for the establishment of Brigades and other units and appoint commanding officers for such units, the capacity of operational units to coordinate their actions, and the effective dissemination of written and oral orders and decisions. (*Boskoski & Tarculovski Case,* recital 200).

The third group includes factors indicating a level of logistics have been taken into account, notably the ability to recruit new members, the providing of military training, an organised supply of military weapons, the supply and use of uniforms and the existence of communications equipment for linking headquarters with units or between units (*Boskoski & Tarculovski Case,* recital 201).

As for the fourth group, it gathers together the factors relevant to determining whether an armed group possessed a level of discipline and the ability to implement the basic obligations of Common Article 3, such as the establishment of disciplinary rules and mechanisms, proper training and the existence of internal regulations, and whether these are effectively disseminated to members (*Boskoski & Tarculovski Case,* recital 202).

Finally, the fifth group includes those factors indicating that the group was able to speak with one voice, notably its ability to act on behalf of its members in political negotiations with representatives of international organisations and foreign countries, and its ability to negotiate and conclude agreements, such as cease-fires and peace accords (*Boskoski & Tarculovski Case,* recital 203).

Case law of the ICTY however specifies that contrary to what prevails for the application of Protocol II, the application of Common Art. 3 to a party to a non-international armed conflict only requires a lower level of organisation. Henceforth, an armed group is considered organised in the light of this provision if it has a hierarchical structure and if its chief is capable of exercising his authority over the members of the said group (*Boskoski & Tarculovski Case,* recital 197).

6.3.3 The International Criminal Court (hereinafter: ICC) has for its part held that since Article 8 paragraph 2 letter f of the Rome Statute requires only that the armed group in question be "organised", some degree of organisation suffices to establish the existence of a non-international armed conflict. It also highlighted that exertion of control over part of the territory by the groups concerned is not required (ruling of Trial Chamber II of the ICC of 7 March 2014 in the Katanga proceedings ICC-01/04-01/07 [hereinafter: *Katanga Case*], recital 1186). To assess the intensity of the conflict, insofar as under the terms of Article 8 paragraph 2 letter f of the Rome Statute, "violence must go beyond isolated or sporadic acts", it specified adhering to the practice developed on this point by the ICTY (*supra* recitals 6.3.1; *Katanga Case*, paragraph 1187 and its referral to the ruling of Trial Chamber I of the ICC in the *Lubanga* proceedings [hereinafter: *Lubanga Case*] ICC-01/04-01/06 of 14 March 2012, recital 538).

In the *Katanga Case*, the ICC therefore retained the existence of a non-international armed conflict in the Democratic Republic of Congo (recital 1218). It considered in this respect that the different armed groups concerned (the Union of Congolese patriots, the Armed Forces of the Democratic Republic of Congo as well as the *Ngiti* militia) had a hierarchical structure and an internal discipline, occupied various military positions and had training facilities for their troops, that they also had the ability to obtain weapons and conduct military operations. Moreover, some of them had adopted a political programme and had official spokespeople (*Katanga Case*, recitals 1207-1211). With regards to the *Ngiti* militia in particular, the ICC considered that it had to be considered as an armed group while its constituent troops were spread among several camps placed under the authority of various commanders, that they had various means of communication and that weapons and ammunition were available to them. Finally, the members of this militia pursued common objectives and conducted joint military operations over a protracted period (*Katanga Case*, recital 1209). It retained furthermore that the fighting between the different groups was part of a cycle of violence that extended far beyond isolated acts insofar as the armed conflict was both protracted and intense owing notably to its duration and the volume of attacks perpetrated throughout the whole territory. It also noted that the UN Security Council recognised the existence of this armed conflict and adopted numerous resolutions on the matter (*Katanga Case*, recitals 1216-1218, see also *Lubanga Case*, recital 543).

In the *Bemba* case, the ICC also acknowledged the existence of an armed group made up of rebels, while these men were not paid, were undisciplined and received minimal, if any, training. In fact it considered that they had a command structure and military equipment, notably communication devices and weapons. from its point of view, in view of the extent, seriousness and intensity of their military involvement in the conflict, it was necessary to conclude that they had the ability to plan and carry out military operations, which had enabled them to take control of sizeable territory and regularly intervene in hostilities (ruling of the Trial Chamber III of the ICC of 21 March 2016 in the Bemba proceedings ICC-01/05- 01/08, recitals 659-660).

6.3.4 In the *Akayesu* case, Trial Chamber I of the International Criminal Tribunal for Rwanda (hereinafter: ICTR) specified that armed conflicts could be distinguished from mere acts of banditry or unorganized and short-lived insurrections, the term "armed conflict" suggesting the existence of hostilities between organised forces (Judgment of Trial Chamber I of the ICTR of 2 September 1998 in proceedings ICTR-96-4-T, recital 620; see also judgment of Trial Chamber I of the ICTR of 6 December 1999 in the *Rutaganda* proceedings Case n° ICTR-96-3-T, recital 93). It has acknowledged the

existence of an internal armed conflict by considering that a conflict opposed "two armies" during the proceedings of the acts under investigation, that one of them had soldiers systematically deployed, under a command structure (hierarchical structure) and that these two armies controlled different territories of a clearly demarcated demilitarised zone (*ibidem*, recital 174). During the period where the acts took place, one of the armies had significantly increased its control over the Rwandan territory and carried out continuous and sustained military operations. Its troops were disciplined and possessed a structured leadership which was answerable to authority (*ibidem*, recital 627).

[...]

7.1 In its ruling abandoning proceedings, the Federal Prosecutor's Office specifies that the charges filed against the accused and subject of the examination primarily concern extrajudicial executions, forced disappearances of alleged opponents and acts of torture (BB.2017.9 - BB.2017.10 - BB.2017.11 act. 2.1 p. 11). It points out that the said acts of torture corresponded to offences punishable under Article 264a paragraph 1 letter f CP, that came into force on 1 January 2011 within the framework of the new criminal provisions in view of the implementation of the Rome Statute, but that the acts under investigation would have taken place in the years 1992 to 1994 in Algeria. The Federal Prosecutor's Office therefore dismisses the application of Article 264a CP based on the criminal law principle of non-retroactivity.

7.2

7.2.1 According to Article 264a paragraph 1 letter f CP (under the heading "Torture"), the penalty is a custodial sentence of no less than five years for any person who, as part of a widespread or systematic attack directed against any civilian population inflicts severe pain or suffering or serious injury, whether physical or mental, on a person in his or her custody or under his or her control.

According to Article 101 paragraph 1 letter b CP, there is no limitation of the right to prosecute the offences of crimes against humanity in the meaning of Article 264a paragraphs 1 and 2 of the Criminal Code. If the issue of non-applicability of statutory limitations provided for by Article 101 paragraph 1 CP makes no doubt that it involves crimes against humanity committed after the coming into force in 2011 of the new criminal provisions in view of the implementation of the Rome Statute, the fate of the acts prior to the said revision remains to be determined.

7.2.2 Article 2 CP determines the conditions of the application of the criminal law over time. It invokes the general principle of non-retroactivity (Article. 2 paragraph 1 CP) but it also provides for the exception known as *lex mitior*, namely, the application of the new law to acts committed before its coming into force if it is more favourable to the perpetrator (Article 2 paragraph 2 CP). Articles 388 to 390 CP complement Article 2 CP and regulate, according to the same principles of non-retroactivity and the application of *lex mitior,* enforcement of judgements, punishments and measures, prescription and the complaint (GAUTHIER, Commentaire romand, Code pénal I [hereinafter: Commentaire romand CP I], 2009 no. 9 *ad* art. 2 CP). Therefore, with particular regards to provisions of the new law concerning the prescription on criminal proceedings and punishment and in accordance with Article 389 paragraph 1 CP, they are also applicable to perpetrators of acts committed or judged before the coming into force of the new law if they are more favourable to them than the former law. Article 389 CP expressly reserves any contrary provision of the law.

Such an exemption results from Article 101 paragraph 3 CP regarding the prescription of war crimes and crimes against humanity. This provision in fact provides that the non-applicability of statutory limitations for genocide and war crimes notably apply if the criminal proceedings or the punishment was not prescribed on 1 January 1983 in virtue of the governing law on this date. Regarding crimes against humanity, non-applicability of statutory limitations is accepted if the criminal action or punishment was not prescribed on the coming into force of the modification of 18 June 2010 of this code, in virtue of the governing law on this date. Therefore, crimes against humanity, among them torture (Article 264a letter f *cum* Articles 101 paragraph 1 letter b and 101 paragraph 3 CP) are imprescriptible if they had not yet prescribed on 1 January 2011 (ZURBRÜGG, Commentaire bâlois, Droit pénal I, n° 23 *ad* art. 101 CP; cf. déclaration WIDMER-SCHLUMPF BO E 2009 p. 340). In these cases, the new provisions relating to the non-applicability of statutory limitations also apply to acts committed before the coming into force of the punishable conduct (TRECHSEL, Praxis Kommentar, Schweizerisches Strafgesetzbuch, 3rd ed. 2018, no. 2 *ad* art. 389 CP). Imprescriptible crimes under the meaning of art. 101 paragraph 3 CP constitute an exception to the principle of *lex mitior* and the rule henceforth applies independently of the prescription-related provisions more favourable to the perpetrator (DUPUIS / MOREILLON / PIGUET / BERGER / MAZOU / RODIGARI, Petit Commentaire Code pénal, 2e éd. 2017, n° 1 à 3 *ad* art. 389 CP).

Concerning the penalization of acts of torture committed between 26 June 1987 (date of the coming into force of the United Nations Convention Against Torture (UNCAT) for Switzerland) and 31 December 2006 (Article 6 paragraph 1 CP in its new content having come into force on 1st January 2007; RO (official compendium of federal law) 2006 3459), it is necessary to refer to the different provisions of common law such as serious assault (Article 122 CP), endangering the life or health of another (Article. 127 CP), coercion (Article 181 CP), False imprisonment and abduction (Article 183 CP), murder (Article 112 CP), etc. (MEMBREZ, La lutte contre l'impunité en droit suisse, compétence universelle et crimes internationaux, 2e éd. 2015, p. 8 and 166).

7.3 It therefore involves determining whether the jurisdiction of Switzerland was given to pursue acts of torture committed, as in this case, before 2011, abroad without the perpetrator or the victim being in Switzerland.

7.3.1 The principle of territoriality rooted in Article 3 CP and according to which the sovereignty of the State bases its right to submit to its penalizing power anyone that has committed an offence on its territory, constitutes the fundamental rule of the international criminal connection (HARARI/LINIGER GROS, Commentaire romand CP I, nos 2 et 3 *ad* art. 3 CP). When the act has been committed abroad and the jurisdiction of Swiss authorities cannot be based on Article 3 CP, Articles 4 to 7 CP also give rise to Swiss jurisdiction on the basis of other criteria (DUPUIS / MOREILLON / PIGUET / BERGER / MAZOU / RODIGARI, *op. cit.*, no. 9 *ad* rem. preliminary to Articles 3 to 8 CP). In particular, Article 6 CP governs the Swiss authorities' jurisdiction in the framework of crimes or offences committed abroad, prosecuted under an international agreement. Therefore, Article 6 CP of the Criminal Code is applicable to anyone who commits crimes or offences abroad and for which Switzerland has undertaken to prosecute under an international agreement if the act is also punishable in the State where it was committed or that the place where the act was committed does not fall under any criminal jurisdiction and (letter a) if the perpetrator is in Switzerland and will not be extradited to a foreign State (letter b).

7.3.2 Article 6 CP is only applicable to offences committed abroad and henceforth assumes a subsidiary role to Article 3 CP (POPP/KESHELAVA, Commentaire bâlois Droit pénal I, 3e éd. 2013, nos 2 et 12 *ad* art. 6 CP). It then supposes that Switzerland is engaged in punishing the relevant offence via an international agreement (DUPUIS / MOREILLON / PIGUET / BERGER / MAZOU / RODIGARI, *op. cit.*, no. 3 *ad* art. 6 CP). Furthermore Article 6 paragraph 1 CP provides the principle of double incrimination on the one hand and demands on the other the presence in Switzerland of the perpetrator and that his/her extradition is not possible (DUPUIS / MOREILLON /

PIGUET / BERGER / MAZOU / RODIGARI, *op. cit.*, no. 4 and 5 *ad* art. 6). These conditions do not require wider developments here and are fulfilled in this case (cf. decision of the Federal criminal court BB.2011.140 of 25 July 2012 recitals 3.1 and 3.4).

In this case, the acts under investigation took place exclusively in Algeria and only concern Algerian nationals, so that Article 6 CP appears to be applicable from this point of view. Considering the number of acts that can be taken into consideration in this case, torture should notably be included. Switzerland ratified on 26 June 1987 the Convention of 10 December 1984 against torture and other cruel, inhuman or degrading punishments or abuse (UNCAT; RS 0.105). As for Algeria, it has been subject to this Convention since 12 October 1989. Both Switzerland and Algeria were therefore linked by the UNCAT before the period of the acts under investigation.

7.3.3 In the wording of Article 1 of UNCAT, torture is defined as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions". Article 2 paragraph 1 of UNCAT provides that "Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction". Article 4 paragraph 1 of UNCAT provides that "Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture". It results from this that the UNCAT is not of direct applicability and the pursuit of acts on this basis is only possible by their connection to a provision of Swiss law that would allow the convention to be implemented (FF 1985 III 273 p. 287; MÖHLENBECK, Das absolute Folterverbot, 2007, p. 45).

[...]

7.3.4.1 Murder is an extreme form of intentional homicide and is distinguished by ordinary homicide governed by art. 111 CP, by the particularly reprehensible nature of the act (ATF 118 IV 122 recital 2b and cited references). In fact, in the wording of Article 112 CP, there is murder "where the offender acts in a particularly unscrupulous

manner, in which the motive, the objective or the method of commission is particularly depraved". However, these are only examples and generally speaking, a person acting in this way shows a significant lack of scruples as to the ethical aspect of his/her behaviour and acts with selfishness and disregard towards life (ruling of the Federal court 6B_355/2015 of 22 February 2016 recital 1.1 and cited references; HURTADO POZO/ILLANEZ, *in* Commentaire romand, Code pénal II [hereinafter: Commentaire romand CP II], 2017, nos 6 et 10 *ad* art. 112 CP). The Federal court found that that the following individuals significantly lacked scruples: an offender who murdered a judge with the sole aim of destabilising the State (ATF 117 IV 369), a mother who drowned her child in a bathtub to get revenge on her husband by depriving him of his son and to prevent him from having custody (ruling of the Federal Court 6B_719/2009 of 3 December 2009), and a group of youth who killed a man after having subjected him to atrocious suffering for several hours (rulings of the Federal Court 6B_762/2009 and 6B_751/2009 of 4 December 2009). Furthermore, a particularly depraved method of commission is notably characterised by the fact that the perpetrator tortures his/her victim before killing him/her and displays sadism or particular cruelty by inflicting acute physical or mental suffering (rulings of the Federal court 6P.49/2006 and 6S.102/2006 of 6 April 2006 recital 6.1 and cited references; DUPUIS / MOREILLON / PIGUET / BERGER / MAZOU / RODIGARI, *op. cit.*, no. 18 *ad* art. 112 CP). The method of commission concerns the circumstances and the means that the killer exploits to kill his/her victim and is for example, particularly depraved when the perpetrator tortures or betrays the victim (HURTADO POZO/ILLANEZ, *op. cit.*, no. 14 *ad* art. 112 CP).

7.3.4.2 The United Nations Committee against torture (hereinafter: CAT) has been confronted with the issue of moral compensation for the relatives of victims tortured to death. In an Argentinian case, the acts took place before the coming into force of the UNCAT for Argentina. The CAT did not study the matter and henceforth did not judge the issue on the merits (ruling of the Committee against torture O.R., M.M., and M.S. c. Argentina, CAT Communication no. 1, 2 and 3/1988 of 22 November 1988 recital 2.4). In the case of the death penalty, the CAT considered that the method of execution could be compared to torture or abuse in the meaning of the Convention, notably with stoning as a method of execution (Association for the Prevention of Torture and Center for Justice and International Law, Torture in international law, guide to the case law, https://www.apt.ch/content/files_res/jurisprudenceguide.pdf, 2009, p. 41; ruling of the Committee against torture A.S. c. Sweden, CAT Communication no. 149/1999 of 24 November 2000).

7.3.4.3 For its part, the Federal court retained murder under the meaning of Article 112 CP against a mother who killed her own child by torturing the child, qualifying the facts as extremely serious, heinous and revolting (ruling of the Federal court 6S.145/2003 of 13 June 2003 recital 4.3). Such was also the case when the perpetrator lashed out at a very old woman and attacked her in an heinous and cruel way for several minutes, having hit her several times and severely torturing her before strangling and suffocating her with a cushion (ruling of the Federal court 6B_1307/2015 of 9 December 2016 recital 2.2). In some cases, Swiss jurisprudence has also granted the right to seek an appellate remedy to a private claimant, when the denounced acts are likely to fall under provisions prohibiting acts of torture and other cruel or degrading punishments or treatments, citing notably the UNCAT (ruling of the Federal court 1B_729/ 2012 of 28 May 2013 recital 2.1). It therefore retained that such was notably the case when the person concerned died following allegedly inappropriate treatment (ATF 138 IV 86 recitals 3.1.1 and 3.1.2).

7.3.4.4 It results from the foregoing that while all murders do not result from acts of torture and that inversely all acts of torture do not lead to death, some behaviour also punishable from the viewpoint of murder also constitute acts of torture. Hence, when victims die as a result of torture inflicted by the perpetrator, the crime of murder could be retained as an ultimate form of torture, owing to the particularly depraved method of commission (*supra* recital 7.3.4.1).

[...]

7.4

7.4.1 In the wording of Article 264a CP, the offences listed in paragraph 1 constitute crimes against humanity provided that they have been committed as part of a widespread or systematic attack directed against any civilian population (FF 2008 3461, p. 3516). Such an attack generally proceeds from a strategy, the policy of a State or an organisation (DUPUIS/MOREILLON/PIGUET/BERGER/MAZOU/RODIGARI, *op. cit.*, no. 7 *ad* art. 264a CP). The attack must be general, in other words it is characterised by its extent or systematic nature, in which case it is characterised by its degree of organisation (FF 2008 3461, p. 3517; DUPUIS/MOREILLON/PIGUET/BERGER/MAZOU/RODIGARI, *op. cit.*, no. 8 *ad* art. 264a CP). This attack is directed against the civil population. In other terms, it suffices that the perpetrator has made a single victim independently of his/her nationality, as long as the action is part of a wider context of a widespread or systematic attack (FF 2008 3461, p. 3515; DUPUIS / MOREILLON / PIGUET / BERGER / MAZOU / RODIGARI, *op. cit.*, no. 9 *ad* art. 264a CP).

[...]

7.4.4 Regarding the subjective aspect of the said offence, it is generally accepted that any individual who has committed a crime against humanity must have acted in knowledge of the attack (GARIBIAN, Commentaire romand CP II, n° 18 *ad* art. 264a CP). In this case, there is no doubt that Nezzar was aware of the acts committed under his orders. It notably emerges from the hearing of appellant C. that "Nezzar was everywhere. For example, when he went to Germany to see H., he asked him to murder two leaders of the Islamic Salvation Front, which indeed shows that it was he who made the decisions" (exhibit MPC 12-11-0021).

7.5 As noted above (recitals 7.3.4.1 et seq.), when victims die as a result of torture inflicted by the perpetrator, one cannot exclude that in that case the crime of murder took place. Such is also the case when these acts have not been committed in our country but that universal jurisdiction of Switzerland is based on Article 6 CP in connection with the UNCAT.

[...]