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International
Criminal
Court

Original: ***English***

No.: ***ICC-01/04-02/06***
Date: **8 January 2020**

THE APPEALS CHAMBER

Before: **Judge Howard Morrison, Presiding Judge**
Judge Chile Eboe-Osuji
Judge Piotr Hofmański
Judge Luz del Carmen Ibañez Carranza
Judge Solomy Balungi Bossa

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF
THE PROSECUTOR v. BOSCO NTAGANDA

Public

Observations of the Common Legal Representative of the Victims of the Attacks on the Prosecution's Appeal against the Trial Judgment

Source: **Office of Public Counsel for Victims (CLR2)**

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I. INTRODUCTION

1. The Common Legal Representative of the Victims of the Attacks (the "Legal Representative") hereby presents his observations on the Prosecution's Appeal against the Trial Judgment (the "Trial Judgment").[1] In particular, in the context of Ground 1 of the Prosecution's Appeal, the Legal Representative presents observations on the temporal parameters of the term 'attack' under article 8(2)(e)(iv) of the Rome Statute (the "Statute") and submits that this term has to be equally interpreted with regard to all protected objects covered by the provision, including churches and hospitals. He presents no further specific observations in relation to other matters litigated under Ground 2.

II. PROCEDURAL BACKGROUND

2. On 8 July 2019, Trial Chamber VI (the "Trial Chamber") rendered its judgment, whereby it found Mr Ntaganda guilty of all 18 counts of war crimes and crimes against humanity. Mr Ntaganda was subsequently sentenced to 30 years of imprisonment.[2]

3. On 9 September 2019, the Prosecution provided notice of two grounds of appeal in respect of the Trial Judgement.[3]

4. On 7 October 2019, the Prosecution filed its appeal brief.[4]

5. On 8 October 2019, the Appeals Chamber issued its "Decision on victim participation", wherein it, *inter alia*, set out that the victims who participated in the trial proceedings may, through their legal representatives, file observations not

[1] See the "Judgment" (Trial Chamber VI), No. ICC-01/04-02/06-2359, 8 July 2019 (the "Trial Judgment").
[2] See the "Sentencing Judgment" (Trial Chamber VI), No. ICC-01/04-02/06-2442, 7 November 2019.
[3] See the "Prosecution Notice of Appeal", No. ICC-01/04-02/06-2395, 9 September 2019.
[4] See the "Prosecution Appeal Brief", No. ICC-01/04-02/06-2432, 7 October 2019 (the "Prosecution Brief").

exceeding 25 pages within 30 days of the notification of the Defence's response to the Prosecutor's appeal brief.[5]

6. On 9 December 2019, the Defence filed its "Response to the Prosecution Appeal Brief, 7 October 2019 (ICC-01/04-02/06-2432)"[6] It opposed both grounds of appeal and requested that the Appeals Chamber dismiss them accordingly.[7]

III. SUBMISSIONS

7. The Prosecution submits that the Trial Chamber erred in law "*when defining* an 'attack on 'cultural' objects under article 8(2)(e)(iv)'" of the Rome Statute (the "Statute"), which constitutes its first ground of the Prosecution's Appeal (hereinafter "Ground 1").[8] In particular, the Prosecution takes issue with the Trial Chamber "*terminat*[ing] *its legal analysis of this incident simply because it 'took place sometime after the assault, and therefore not during the actual conduct of hostilities', which in its view meant that 'the first element of Article 8(2)(e)(iv) is not met.'*"[9] It avers that the Trial Chamber erred by equating the term 'attack' in articles 8(2)(e)(i) and 8(2)(e)(iv),[10] and thereby failed to give effect to the special protection of cultural property contained within article 8(2)(e)(iv) of the Statute.

8. The Prosecution further contends that "*article 8(2)(e)(iv) only requires that the perpetrator directed an act of violence against a protected object, irrespective of whether this occurred in the conduct of hostilities or when the object was under the control of a party to the conflict*."[11]

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[5] See the "Decision on victim participation" (Appeals Chamber), No. ICC-01/04-02/06-2439, 8 October 2019, paras. 4-6.
[6] See the "Defence Response to Prosecution Appeal Brief, 7 October 2019 (ICC-01/04-02/06)", No. ICC-01/04-02/06-2449, 9 December 2019 (the "Defence Response").
[7] See the Defence Response, *supra* note 6, para. 73.
[8] See the Prosecution Brief, *supra* note 4, p. 9.
[9] *Idem*, para. 14.
[10] *Ibid*., para. 16.
[11] *Ibid*., para. 21.

9. The Defence opposes this reading and submits that the term 'attack' has only one meaning within international humanitarian law, namely that recalled by the Trial Chamber in its judgment. It submits that the Trial Chamber therefore correctly applied the law and did not commit an error when it considered that the facts of the destruction of Sayo Church did not fulfil the required criteria.[12]

10. The Legal Representative cannot entirely agree with the Prosecution's position that the term 'attack' should be given a 'special meaning'[13] for the purposes of article 8(2)(e)(iv) of the Statute,[14] as the Prosecution seems to be arguing that the scope of the term 'attack' is meant to also include extended periods of occupation,[15] or as formulated by the Prosecution "*when the object was under the control of a party to the conflict*".[16] At the same time, the Legal Representative can also not agree with the Defence's overly restrictive interpretation of the provision. In this regard, it is submitted that article 8(2)(e)(iv) of the Statute cannot merely be limited to the interpretation of the term 'attack' as set out by the Trial Chamber, namely that act of 'launching' an attack. This would unduly limit the specific protection of cultural property. The Defence's argument that article 8(2)(e)(iv) of the Statute finds its origins in article 27 of the Hague Regulations of 1927 and was ultimately adopted as such[17] is too simplistic and also fails to take account of case law developed by the ICTY and the Court, and, more generally, recent developments in international law after the adoption of the Rome Statute. While the Defence's position correctly reflects the drafting history and origins of article 8(2)(e)(iv) of the Statute, it fails to look beyond the textual similarities with the Hague Regulations and the ensuing, unchallenged, jurisprudence of the Court. The Statute is a living legal instrument that develops through its interpretation and application to concrete cases and situations. Most importantly, it must be interpreted in a manner that is faithful to its overall

[12] See the Defence Response, *supra* note 6, paras. 7-8.
[13] See the Prosecution Brief, *supra* note 4, para. 30.
[14] *Idem*, para. 30.
[15] See *supra*, para. 8.
[16] See the Prosecution Brief, *supra* note 4, para. 21.
[17] See the Defence Response, *supra* note 6, paras. 21 and 25.

objective. Narrowly defining the temporal scope of the prohibition contained in article 8(2)(e)(iv) of the Statute hinders the realisation of its objective to protect a specific and special category of buildings that goes beyond ordinary civilian property.

11. The adoption of the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict of 1999 (the "Second Hague Protocol"), in particular illustrates the development of international law and the shift towards greater and more comprehensive protection and respect for cultural property. It effectively created a second, higher level of protection complimentary to the 1954 Convention[18] and equally applies to armed conflicts not of an international character.[19] This development should be understood as a clear indication of on-going efforts to enhance protection meaningfully and comprehensively, which stands in clear contrast with the Defence's regressive approach of returning to the strict origins of the protection regime of cultural property dating back almost one century. It must be remembered that the Second Hague Protocol was developed and adopted with the benefit of evolving case law, such as cases before the ICTY, and, in any event, post-dates the adoption of the Rome Statute.

12. What is particularly notable in relation to the Second Hague Protocol of 1999 is that it refers to the concept of "*making cultural property* […] *the object of attack*".[20] It is submitted that this approach stands in clear contrast to a limited and narrow application of the term 'attack' by confining it to the act of 'launching an attack' in the context of the protection of cultural property.

13. It is the Legal Representative's position that the term 'attack' under article 8(2)(e)(iv) of the Statute, while retaining its ordinary meaning should be interpreted

[18] See the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 26 March 1999.
[19] *Idem*, article 22.
[20] *Ibid*., article 15(1)(a).

with due regard to the object and purpose of the provision, and given the special status of the protected objects, it has to be interpreted in a way that accounts both for combat action and *its aftermath.* Limiting the temporal scope strictly to combat action or even the mere launching of military action, would interfere with the object and purpose of the provision. Moreover, the analysis of the facts must not end – as the Trial Chamber indeed did in the Trial Judgment – after the analysis of the 'attack'. Indeed, article 8(2)(e)(iv) of the Statute contains more than just this one crucial element. The main 'ingredients' of this provision are threefold: (i) the attack; (ii) the concept of protection, and (iii) most importantly, the special nature of the kind of property that is being sought to be protected.

14. This has, in fact, already been recognised by the Trial Chamber in the *Al Mahdi* case and the Legal Representative supports the interpretation of article 8(2)(e)(iv) of the Statute, given by the Trial Chamber in the *Al Mahdi* case,[21] namely that article 8(2)(e)(iv) of the Statute finds its origin in the prohibition of wanton destruction of religious, charitable, educational, and historic buildings and monuments.[22] As such, the provision is concerned with the *protection* of a *special category* of property from destruction. Whether the destruction is carried out in the immediate *attacking* during a military offensive or whether it occurs as part of a general attack (not temporarily limited by the physical act of firing a weapon) is not the central aspect of the protection that is being sought. Rather, the central prohibition lies in the aim of the conduct - the destruction of the protected property. This is illustrated by the specific requirement of "*the conduct* [taking] *place in the context of and* […] [being] *associated with an armed conflict not of an international character*".[23] These are the specific requirements that delineate the temporal limits of the conduct proscribed in article 8(2)(e)(iv), rather than artificially restricting the interpretation of the term 'attack', as done by the Trial Chamber in this case. To the contrary, the Trial Chamber imposed

[21] See the "Judgment and Sentence" (Trial Chamber VIII), No. ICC-01/12-01/15-171, 27 September 2016 (the "*Al Mahdi* Trial Judgment").
[22] See the *Al Mahdi* Trial Judgment, *supra* note 21, para. 14.
[23] See the Elements of Crimes of article 8(2)(e)(iv) of the Statute, para. 4.

an additional limit by excluding the destruction of the protected property in the *aftermath* of the immediate and physical use of force against Sayo. This approach is further flawed in that the aftermath of an attack has never been specifically excluded in war crimes cases[24] and can, in general, not exhaustively be defined but rather depends on the facts and circumstances of each case. Restricting limits of the prohibited conduct to periods of hostilities *stricto sensu* would not only be artificial but also hinder the application of article 8 of the Statute in an unjustified manner and set a dangerous precedent. Noticeably, the Trial Chamber itself consistently considered events that occurred in 'the immediate aftermath' of military assaults or in 'the aftermath' of other relevant events for the purpose of its determination.[25]

15. Just as it is sufficient for the nexus requirement of war crimes in general that the alleged crimes be closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict,[26] it is submitted that it suffices that the destruction of the protected property is *sufficiently closely related* to the conduct of hostilities in terms of the prohibition contained in article 8(2)(e)(iv) of the Statute.

16. This view was affirmed by Trial Chamber VIII in *Al Mahdi* when it stated that "*the element of 'direct*[ing]*' an attack' encompasses any acts of violence against protected objects*" and that it would "*not make a distinction as to whether it was carried out in the conduct of hostilities or after the object had fallen under the control of an armed group.*"[27] In particular, Trial Chamber VIII underlined that "[t]*he Statute makes no such distinction*",[28] which it rightly attributed to being reflective of the special status of religious, cultural, historical and similar objects.[29] It further found that it "*should not*

[24] See e.g. ICTY, *Popović* et al., Case No. IT-05-88-T, Judgement (Trial Chamber), 10 June 2010, para. 745 *et seq*.
[25] See the Trial Judgment, *supra* note 1, paras. 282, 512, 518, 526, 536, 540, 741, 749, 889, 940, 942, 945, 947, 996, 998, 1002, 1018, 1022, 1025, 1037-1038, 1053, 1055, 1061, 1064, 1071, 1078.
[26] See ICTR, *Setako*, Case No. ICTR-04-81-A, Judgement (Appeals Chamber), 28 September 2011, para. 249.
[27] See the *Al Mahdi* Trial Judgment, *supra* note 21, para. 15.
[28] *Idem*, para. 15.
[29] *Ibid*.

change this status by making distinctions not found in the language of the Statute",[30] and pointed out the differences in international humanitarian law between the protection afforded to persons and that afforded to 'cultural objects' which are protected *per se*, namely no temporal distinction is made between "*the conduct of hostilities and afterwards*".[31]

17. In *Al Hassan*, Pre-Trial Chamber II expressly endorsed the interpretation of the Trial Chamber VIII.[32]

18. In *Yekatom & Ngaïssona*, Pre-Trial Chamber II also followed Trial Chamber VIII's legal interpretation which places the emphasis on the nature of the protected building rather than the conduct or parameters of the term 'attack' contained in article 8(2)(e)(iv) of the Statute. In particular, Pre-Trial Chamber II considered "*that attacks against buildings dedicated to religion are specifically criminalized under article 8(2)(e)(iv) of the Statute* […] *Therefore, the Chamber is of the view that the destruction of Boeing mosque must be qualified as 'intentionally directing attacks against buildings dedicated to religion' considering there is no evidence indicating that it constituted a military objective*."[33]

19. Moreover, it should be recalled that Pre-Trial Chamber II that confirmed the charges against Mr Ntaganda did so on the basis of the same legal interpretation of article 8(2)(e)(iv) of the Statute as the respective Chambers in *Al Mahdi* and *Al Hassan*.

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[30] *Ibid*.

[31] *Ibid*., para. 16.

[32] See the "Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud" (Pre-Trial Chamber II), No. ICC-01/12-01/18-461-Corr-Red, 13 November 2019 (the "*Al Hassan* Confirmation Decision"), para. 522: "*La Chambre souscrit à l'analyse de la Chambre de première instance VIII dans l'affaire Al Mahdi, qui a considéré que « l'élément consistant à 'diriger une attaque' inclut tous les actes de violence commis contre des biens protégés » et qu'il n'y a pas lieu de faire de distinction selon le fait que ces actes « aient été commis lors de la conduite des hostilités ou après le passage du bien sous le contrôle d'un groupe armé ». La Chambre de première instance VIII a souligné que « cela [sic] reflétait la qualité spéciale reconnue aux biens religieux, culturels, historiques ou de nature similaire », et rappelant que le Statut ne faisait pas cette distinction, elle a estimé que « la Chambre ne devrait pas revenir sur cette qualité en opérant des distinctions qui ne ressortent pas du texte du Statut ».*"

[33] See the "Decision on the confirmation of charges against Alfred Yekatom and Patrice-Édouard Ngaïssona" (Pre-Trial Chamber II), No. ICC-01/14-01/18-403-Red, 20 December 2019, para. 96.

Referring to the evidence before it, it recalled that "[i]*n Sayo, UPC/FPLC troops together with Mr. Ntaganda attacked the church known as 'Mungu Samaki' by pillaging goods therein and damaging the infrastructure*."[34] It then considered, without any qualification as regards the *conduct* that "*the evidence placed before it does not indicate that the protected objects targeted in the course of the* First Attack *and* Second Attack *constituted military objectives, as there is no information about their use related to the armed conflict by the opposing party*."[35]

20. By departing from the interpretation of Trial Chamber VIII, the Trial Chamber adopted a much more restrictive reading of the prohibition contained in article 8(2)(e)(iv) of the Statute, which, in effect, diminishes the categorical protection of buildings dedicated to religion and other protected objects. The Legal Representative opposes this approach on three grounds. First, this approach disregards the consistent practice of other Chambers of this Court and, in particular, the confirmed charges; second, the approach introduces legal uncertainty at a crucial time of the Court's developing jurisprudence in relation to this war crime; and third, the Trial Chamber's finding factually deprives protected objects that would ordinarily fall within the ambit of the charges and convictions in this case of their protection by artificially erasing distinctions between different forms of prohibited conduct.

21. As will be argued *infra*, academic writings on the concept of the protection of cultural property focus almost exclusively on the second and third element of article 8(2)(e)(iv) of the Statute, that are the objective of the protection prescribed by the provision and the nature of the buildings covered by it.

22. It has, for instance, been argued that "*contrary to the Statute of the ICTY, the provisions of the Rome Statute do not demand the destruction of or wilful damage to protected properties.* […] *even lesser attacks, or acts of vandalism, can reach the degree of war crime.*

[34] See the "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda" (Pre-Trial Chamber II), No. ICC-01/04-02/06-309, 9 June 2014 (the "*Bosco Ntaganda* Confirmation Decision"), para. 69.
[35] *Idem*, para. 71.

According to the provisions of the Rome Statute, intentionally directing attacks, even if not successful, fulfil the elements of the crime."[36] However, even that tribunal's jurisprudence clearly endorses the *protection* approach, rather than focusing on the timing of the wrongful act. In *Strugar*, the ICTY Appeals Chamber underlined the (uncontested) interpretation of the trial chamber in that case. The latter had held that "*an act fulfils the elements of* [the crime of destruction of, or wilful damage to property which constitutes the cultural or spiritual heritage of peoples] *if (a) it has caused damage or destruction to property which constitutes the cultural or spiritual heritage of peoples; (b) the damaged or destroyed property was not used for military purposes at the time when the acts of hostility directed against these objects took place; and (c) the act was carried out with the intent to damage or destroy the property in question.*"[37] In the case of *Hadžihasanović and Kubura*, the ICTY Trial Chamber found that vandalising religious institutions, including writing graffiti and damaging or destroying paintings, statues, steles, frescos, windows and musical instruments, was sufficient damage to constitute a crime under article 3(d) of the ICTY Statute.[38]

23. The rationale of the protection contained in article 8(2)(e)(iv) of the Statute is the same as that underlying article 3(d) of the ICTY Statute and the latter's legal interpretation throughout the developing jurisprudence of that Tribunal. Indeed, it has been argued that "[a]*s the ICC Statute's provisions are substantially similar to the ICTY Statute, it may be expected that the same approach can be adopted by the ICC*."[39] This was rightly recognised by Trial Chamber VIII in *Al Mahdi*. The distinction between the core of the provision being the special status of the object rather than the temporal parameters of the prohibited conduct.

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[36] See WIERCZYŃSKA (K.) and JAKUBOWSKI (A.), "Individual Responsibility for Deliberate Destruction of Cultural Heritage: Contextualizing the ICC Judgment in the *Al Mahdi* Case", *Chinese Journal of International Law*, Vol 16, 2017, pp. 702-703 (Emphasis added).
[37] See ICTY, *Strugar*, Case No. IT-01-42-A, Judgement (Appeals Chamber), 17 July 2008, para. 326.
[38] See BRAMMERTZ (S.) et al., Attacks against Cultural Heritage as a Weapon of War, Journal of International Criminal Justice 14 (2016), p. 1155. See also ICTY, *Hadžihasanović and Kubura*, Case No. IT-01-47-T, Judgement (Trial Chamber), 15 March 2006, paras. 1998-2005 and 2012-2014.
[39] *Idem*, p. 1154.

24. Perhaps this point is even better illustrated when looking at the remainder of the listed buildings and structures contained within the prohibition of article 8(2)(e)(iv) of the Statute, such as hospitals and places where the sick and wounded are collected, rather than churches or mosques used as places of worship.

25. There would be little sense in the protected status of hospitals under the Statute, for instance, if it applied only to the very limited combat conduct of directing 'attacks' – defined by the Trial Chamber as "*an act of violence against the adversary, whether in offence or defence*", and interpreted as "*only require*[ing] *the perpetrator to have* launched *an attack*"[40], i.e. shelling or otherwise bombarding or capturing by force – if any other adverse conduct, such as destroying, vandalising, ransacking, or otherwise rendering the hospital unusable *after* the cessation of the act/conduct in question. Rather, as this example illustrates very well, the protection sought by the provision is the protection of the *integrity* of these buildings; all buildings enjoying this special status once the immediate launching of an 'act of violence against the adversary' has seized. This specific protection is *not* covered by another provision of article 8 of the Statute, such as for instance article 8(2)(e)(xii) because the buildings listed in article 8(2)(e)(iv) are not simple 'property'; they are buildings enjoying special status.

26. This is further illustrated by the text of article 12(1) of Additional Protocol I to the Geneva Conventions of 12 August 1949, which states that "*Medical units shall be respected and protected at all times and not be the object of attack*".[41] Article 13(1) of Additional Protocol I underscores this by stating that the protection "*shall not cease unless* [these medical units] *are used to commit, outside their humanitarian function, acts harmful to the enemy*."[42]

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[40] See the Trial Judgment, *supra* note 1, para. 1136.

[41] See the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977, , article 12(1). It should be noted that the term 'medical units' includes hospitals. See *idem*, article 8e). See also the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 2949, article 19.

[42] *Idem*, article 13(1). (Emphasis added).

27. Since 'buildings dedicated to religion' are listed, just as hospitals, in the list of protected buildings in article 8(2)(e)(iv) of the Statute, the same prohibition must apply equally to both. In other words, just as the provision must cover the post-launching of an attack destruction or vandalism of a hospital, it must also cover the post-attack destruction of a religious building, such as a church. This core concept was rightly recognised by Trial Chamber VIII and should act as a precedent for the interpretation of article 8(2)(e)(iv) of the Statute. The drawing of artificial distinctions between the conduct carried out during *hostilities* and in their *aftermath* not contained within the text of the Statute would not only be contrary to a good faith interpretation of its provisions, but it would equally offend the spirit of this provision which seeks to give effect to the protection of structures that serve a higher purpose than simple 'property of the adversary'. It is a *lex specialis* rule and must be applied accordingly.

28. The Legal Representative therefore disagrees with the Defence when it basis itself solely on the argument that "*article 8(2)(e)(iv) forms part of the 'series of war crimes for which one essential element is that the crime must be committed during the conduct of hostilities (commonly known as 'conduct of hostilities')*.'"[43] In this regard, the Legal Representative again underscores that the core prohibition of article 8(2)(e)(iv) is not confined to hostilities, as it would otherwise be deprived of its meaning should, as in the case at hand, the wrongful act be committed in the aftermath of the 'attack' – or as the Defence submits 'combat action'.[44] Academic commentary supports the view that "*the crime of attacking protected objects can only be committed during the conduct of hostilities and afterwards*."[45]

29. To give another example, it should be imagined that a large town would be attacked where churches and hospitals would incidentally not be located at the front line that is being bombarded. Then, after successfully defeating the enemy and

[43] See the Defence Response, *supra* note 6 para 14. (Internal references omitted).
[44] *Idem*, para. 7.
[45] See FERNÁNDEZ ARRIBAS (G.), The Narrow Protection of Cultural Properties and Historical Monuments in The Rome Statute: Filling the Gap, *International Community Law Review* 21 (2019), p. 140.

moving into the town, the attacker would proceed to destroy and vandalise the hospitals and churches that were earlier on not within the reach of his attacking forces. According to the approach of the Trial Chamber and supported by the Defence, these destructive acts would not be covered by article 8(2)(e)(iv) of the Statute. Would the town that is being attacked, however, have hospitals and churches or mosques located within the parameters of its frontline and the attacker were to destroy them during the offensive action, they would fall under article 8(2)(e)(iv) of the Statute.

30. Besides the compelling rationale of the protection lying at the heart of the provision, the fact that States are also under the 'public duty' to protect and respect cultural property within their territory,[46] further militates in favour of not overly limiting the interpretation of intentional directing of an 'attack' within the context of article 8(2)(e)(iv) of the Statute. Similarly, the failure on the part of States to take adequate measures in peacetime and safeguard cultural property in war does not relieve other parties to the conflict of their obligation to respect cultural property.[47] Thus, non-State actors operating within the theatre of a conflict not of an international character are similarly bound in this way. In fact, "[t]*his primary obligation is supplemented by the equally important obligation on all parties to take special care to avoid damage to cultural property in the course of war*" which also applies in conflicts not of an international character.[48]

31. The Second Hague Protocol, besides requiring States to protect cultural property, also requires its high contracting parties to refrain from any acts that would interfere with the protected and enhanced protected status of cultural property and, additionally, to criminalise acts covered by it and the 1954 Hague

[46] See ARIMATSU (L.) and CHOUDHURY (M.), Protecting Cultural Property in Non-International Armed Conflicts: Syria and Iraq, *International Law Studies* 91 (2015), p. 637.
[47] *Idem*, p. 675.
[48] *Ibid*.

Convention within their respective domestic jurisdictions.[49] Seeking to ascribe individual criminal responsibility for offending acts is a core part of the Second Hague Protocol.

32. It would thus be illogical if the article 8(2)(e)(iv) prohibition would be so narrow as to exclude post-combat damage, even more so – as discussed *supra* – no other provision, such as article 8(2)(e)(xii) for example, is intended to otherwise cover the protection of religious buildings, hospitals, monuments or buildings dedicated to art or education in the course of war.

33. It is submitted that in order to ensure full effect of the protection of cultural property under article 8(2)(e)(iv) of the Statute, the term 'attack' does not need to be given a 'special' meaning. It merely requires a complete and fact-oriented understanding of the "act of violence against the adversary, whether in offence or defence"[50] so as to also cover the aftermath of combat action.

34. In divorcing the acts of destruction carried out in Sayo Church in the immediate aftermath of that village's takeover, the Trial Chamber employed an erroneously narrow and technical interpretation of only one term contained in article 8(2)(e)(iv) of the Statute. It erred in not extending its analysis to the remainder of the provision, namely, as argued *supra*, the *objective* of the protection of the listed categories of property and the *rationale* of including religious sites, hospitals, and buildings dedicated to art and religion within the same provision – yet distinct from others - and thus equating their protected status with the status of other protected values under the Statute.

[49] See the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, *supra* note 18, articles 15(2) and 21.
[50] See the Additional Protocol I to the Geneva Conventions of 12 August 1949, *supra* note 41, article 49(1).

35. To further illustrate this flawed and narrow understanding of the attack as simply signifying a more modern word for 'bombardment',[51] it even suffices to look to the second alternative term of 'siege' contained in the 1907 Hague Regulation that was being sought to be 'modernised' in the Rome Statute's provisions. A siege is not a one-off action, such as a bombardment. Rather, as defined by the Oxford English Dictionary, it is "[t]*he action, on the part of an army, of investing a town, castle, etc., in order to cut off all outside communication and in the end to reduce or take it; an investment, beleaguering*."[52] Clearly, what is at issue here is a more comprehensive view of the offensive or defensive action that constitutes the 'attack', thus, a one-off attack as well as an attack that may be drawn out, such as for instance an on-going offensive, takeover action or indeed a siege.

36. Academic commentary underlines the significant impact of the Court's decision in the *Al Mahdi* case as "*pav*[ing] *the way for similar future prosecutions, which is important given both the scope of atrocities* […] *as well as the reckless and indiscriminate destruction of cultural property occurring, in current ongoing armed conflicts*."[53] Upholding the Trial Judgment would result in the Appeals Chamber interpreting the law completely differently and more restrictively than all Pre-Trial Chambers who dealt with charges under this provision and most importantly Trial Chamber VIII in *Al Mahdi*.

37. The *Al Mahdi* Judgment is a very significant precedent in its own right and must be recognised as authoritatively affirming the principles of international criminal law protection for cultural property that has begun to develop before the ICTY. Indeed, "[t]*he ICTY jurisprudence has progressively developed legal protection for*

[51] See the Defence Response, *supra* note 6, para. 19.
[52] See the Oxford English Dictionary.
[53] See PRATT (L.), Prosecution for the Destruction of Cultural Property – Significance of the *al Mahdi* Trial, *International Criminal Law Review* 18 (2018), p. 1066. See also e.g. FERNÁNDEZ ARRIBAS (G.), *supra* note 45, p. 145; CURCI (A.), The Prosecutor v. Al Mahdi and The Destruction of Cultural Heritage: Property Crime or Crime Against Humanity?, *UCLA Journal of International Law and Foreign Affairs* 159 (2019), p. 181; WIERCZYŃSKA (K.) and JAKUBOWSKI (A.), *supra* note 36, p. 697; DRUMBL (M.), From Timbuktu to The Hague and Beyond – The War Crime of Intentionally Attacking Cultural Property, *Journal of International Criminal Justice* 17 (2019), p. 82.

cultural property while leaving open the possibility for further development in future cases".[54] The *Al Mahdi* Judgment has continued this trend and so have the Pre-Trial Chambers in *Al Hassan*, and *Yekatom and Ngaïssona*, and even prior to that the Pre-Trial Chamber in *Bosco Ntaganda*. Upholding the Trial Chamber's overly narrow and limiting interpretation of article 8(2)(e)(iv) of the Statute would completely reverse this consistent trend and introduce a significant limiting factor into the prospective effectiveness of the Rome Statute's provision for the protection of cultural property, including religious buildings.

38. Moreover, given the coherent application of the provision in those cases before this Court that involved war crimes charges in relation to cultural property, endorsing the Trial Chamber's erroneously restrictive interpretation of article 8(2)(e)(iv) of the Statute will undermine the consistency of the Court's jurisprudence and will introduce significant legal uncertainty into the legal system under the Rome Statute.

39. Notwithstanding, it is the Legal Representative's position that contrary to what the Prosecution seems to be arguing it cannot be reasonably inferred from the above jurisprudence that the term 'attack' under article 8(2)(e)(iv) of the Statute should also extend to the entire period "*when the object was under the control of a party to the conflict*",[55] a meaning far beyond the end of the hostilities. In this regard, although Trial Chamber VIII in the *Al Mahdi* case indeed used in the first place a broader wording, namely "*the conduct of hostilities or after the object had fallen under the control of an armed group*" and "*in battle and out of it*",[56] it subsequently opted for "*the conduct of hostilities and afterwards*",[57] while the *Al Hassan* Pre-Trial Chamber used, with reference to the *Al Mahdi* Judgment, the wording "*la conduit des hostilités ou après le passage du bien sous le contrôle d'un groupe armé*".[58] The *Bosco Ntaganda* Pre-Trial

[54] See BRAMMERTZ (S.) *et al.*, *supra* note 38, p. 1156.
[55] See the Prosecution Brief, *supra* note 4, para. 21.
[56] See the *Al Mahdi* Trial Judgment, *supra* note 21, para. 15.
[57] *Idem*, para. 16.
[58] See the *Al Hassan* Confirmation Decision, *supra* note 32, para. 522.

Chamber found that there were substantial grounds to believe that crimes under article 8(2)(e)(iv) of the Statute were committed "*in the course of the First Attack and Second Attack*."[59] None of the above Chambers seems to recognise or otherwise be suggesting that the scope of the notion 'attack' under article 8(2)(e)(iv) of the Statute is meant to extend beyond *the aftermath of the hostilities* and to also include an undetermined period of control or occupation.

RESPECTFULLY SUBMITTED

Dmytro Suprun
Common Legal Representative of the Victims of the Attacks

Dated this 8th Day of January 2020

At The Hague, The Netherlands

[59] See the *Bosco Ntaganda* Confirmation Decision, *supra* note 34, paras. 69-71. It worth noting that the scope of the First Attack was defined as "[b]*etween* o*n or about 20 November 2002 and on or about 6 December 2002*", and of the Second Attack as "[b]*etween on or about 12 February and on or about 27 February 2003*". See *Idem*, para. 29.