

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No. ICC-01/04-02/06 A2

Date: 1 August 2020

THE APPEALS CHAMBER

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF THE PROSECUTOR v. BOSCO NTAGANDA

Public document

Request by Professor Roger O’Keefe for leave to submit observations on the merits of the legal questions presented in ‘Order inviting expressions of interest as *amici curiae* in judicial proceedings (pursuant to rule 103 of the Rules of Procedure and Evidence)’ of 24 July 2020 (ICC-01/04-02/06-2554)

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Document to be notified in accordance with regulation 31 of the Regulations of the Court to:

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Registrar

Mr Peter Lewis

Request for Leave to Submit Observations on the Merits of the Legal Questions Presented in Ntaganda Appeal

1. This is a request by Professor Roger O’Keefe, pursuant to the order of the Appeals Chamber entitled ‘Order inviting expressions of interest as *amici curiae* in judicial proceedings (pursuant to rule 103 of the Rules of Procedure and Evidence)’ of 24 July 2020 (ICC-01/04-02/06-2554), for leave to submit observations on the merits of the legal questions presented in paragraph 15 of that order.

Particular Expertise of Professor O’Keefe in the Legal Questions Presented

2. Professor O’Keefe is Professor of International Law at Università Bocconi, Milan. He is the author of *The Protection of Cultural Property in Armed Conflict* (Cambridge University Press 2006, paperback reissue 2011) and of the respective chapters on the protection of cultural property in armed conflict in Fleck (ed.), *The Handbook of International Humanitarian Law* (3rd edn, Oxford University Press 2013, 4th edn forthcoming), Clapham and Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press 2014), and Francioni and Vrdoljak (eds), *The Oxford Handbook of International Cultural Heritage Law* (Oxford University Press 2020). He was the academic coordinator of the drafting team and principal drafter of *Protection of Cultural Property: Military Manual* (UNESCO 2016, updated 2017). He is also the author of *International Criminal Law* (Oxford University Press 2015) and joint General Editor of the Oxford University Press series *Oxford Monographs in International Law*. He has spoken on the international legal aspects of the protection of cultural heritage in fora from the Hague Academy of International Law, the European Society of International Law, and the American Society of International Law to UNESCO headquarters, NATO headquarters, and the UK House of Commons Select Committee on Culture, Media and Sport. In recognition of his standing in the field of international humanitarian law, Professor O’Keefe was elected in 2017 as a full member of the International Institute for Humanitarian Law, Sanremo.

Summary of Observations

Cluster (a) Questions

3. The definition of ‘attack’ as used in customary international humanitarian law comports with article 49(1) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts 1977 (‘1977 Additional Protocol I’), which defines ‘attacks’ as ‘acts of violence against the adversary, whether in offence or defence’. As is evident from this definition and even more evident in the light of articles 49(2) and (3), 51, 52, 54, 57, and 58 of 1977 Additional Protocol I, which also accord with customary international law, an ‘attack’ is an act of armed violence directed against military forces of an opposing party or civilians taking direct part in hostilities where those forces or civilians have not fallen into the power of the party directing the violence or against persons or objects under the control of an opposing party. An ‘attack’ does not relate to where property, for example, against which violence is directed is under the control of the party directing the violence. Even less does it relate to pillage, seizure, or other misappropriation of, rather than violence against, property, which are regulated by other rules of international humanitarian law using different terminology. Examples of an attack include the bombardment of a military formation of an opposing party or of a building in territory under an opposing party’s control.
4. The definition of ‘attack’ under international humanitarian law is the same regardless of who or what is attacked. An ‘attack’ against cultural property or a hospital is an act of armed violence against cultural property or a hospital under the control of an opposing party.
5. An ‘act of hostility’, as the term is used in article 4(1) of the Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954 and echoed in article 53(a) of 1977 Additional Protocol I and article 16 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts 1977, is broader than an ‘attack’. An ‘act of hostility’ directed against cultural property refers to an act of violence against cultural property not only where the property is under the control of an opposing party but also where it is under the control of the party

directing the violence. An ‘act of hostility’ against cultural property encompasses the property’s hands-on demolition, whether by explosives, bulldozers, or pickaxes and hoes. It does not, however, encompass pillage, seizure, or other misappropriation of cultural property.

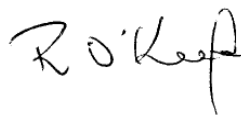
6. The term ‘conduct of hostilities’ is not found as such in any rule of international humanitarian law. Where it is used in the literature, it refers to any conduct of military operations against the adversary. It encompasses both ‘attacks’ and ‘acts of hostility’.
7. The term ‘combat action’ is unknown to international humanitarian law, although ‘combat’, as found in numerous relevant rules, refers to military operations against the adversary.

Cluster (b) Questions

8. The term ‘attacks’ (not ‘attack’) in article 8(2)(e)(iv) of the Rome Statute means what the term ‘attacks’ means in international humanitarian law, namely ‘acts of violence against the adversary, whether in offence or defence’. Specifically, it refers to acts of armed violence directed against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected while the latter are under the control of an opposing party. It does not relate to the destruction of such buildings, monuments, hospitals, and places while they are under the control of the party engaging in the destruction. Even less does it relate to the pillage, seizure, or other misappropriation of or from the same. Except in cases of armed violence directed against remaining pockets of resistance by military forces of an opposing party or civilians taking direct part in hostilities, the term ‘attacks’ would not apply to acts committed in the course of a *ratissage* operation conducted shortly after the takeover of a town.
9. That ‘attacks’ in article 8(2)(e)(iv) of the Rome Statute means what ‘attacks’ means in international humanitarian law is evident from both the Statute and the Elements of Crimes. Article 8(1) of the Statute states in relevant part that the Court ‘shall have jurisdiction in respect of war crimes’; the chapeau to Article 8(2) provides that, for the purposes of the Statute, the term ‘war crimes’ refers to the offences enumerated immediately below, in subparagraphs (a) to (f) of article 8(2), specifically in subparagraphs (a), (b), (c) and (e); and the chapeau to

article 8(2)(e) of the Statute speaks of '[o]ther serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law', the relevant international law being the international law of armed conflict, also known as international humanitarian law. For its part, the introduction to the Elements of Crimes for the war crimes in article 8(2) of the Statute provides that '[t]he elements for war crimes under article 8, paragraph 2, of the Statute shall be interpreted within the established framework of the international law of armed conflict'. The conclusion that the term 'attacks' in article 8(2)(e)(iv) of the Statute means what 'attacks' means in international humanitarian law is reinforced by the fact that this is equally what the term 'attacks' means in the other provisions of article 8(2) of the Statute in which it is found, the unrebutted presumption of treaty interpretation being that the same term means the same thing throughout a treaty and in particular throughout the same article of a treaty.

10. The fact that no provision of article 8(2)(e) of the Statute (or indeed of article 8(2)(b), relating to international armed conflict) grants the Court jurisdiction over a war crime in non-international armed conflict involving the destruction specifically of historic monuments or hospitals under the control of the party engaging in the destruction or involving pillage specifically of historic monuments or hospitals makes no difference to the correct interpretation of 'attacks' in article 8(2)(e)(iv). As it is, such destruction constitutes the war crime of '[d]estroying ... the property of an adversary unless such destruction ... be imperatively demanded by the necessities of the conflict' within the meaning of article 8(2)(e)(xii) of the Statute, while such pillage constitutes the war crime of '[p]illaging a town or place, even when taken by assault' within the meaning of article 8(2)(e)(v).



Professor Roger O'Keefe

Dated 1 August 2020

Done at Milan, Italy