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Court

Original: ***English***

No.: ***ICC-01/04-02/06***
Date: **21 September 2020**

THE APPEALS CHAMBER

Before: **Judge Howard Morrison, President**
Judge Chile Eboe-Osuji, Judge
Judge Piotr Hofmański, Judge
JudgeLuz del Carmen Ibáñez Carranza, Judge
Judge Solomy Balungi Bossa, Judge

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF
THE PROSECUTOR v. BOSCO NTAGANDA

Public Document
With Annex

Corrected Version of "Amicus Curiae Submission Pursuant to Rule 103 of the Rules of Procedure and Evidence" (18 September 2020) ICC-01/04-02/06-2592

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That the Acts took place in the Context of 'Conduct of Hostilities' is Not a Legal Element: The 'humanisation of international humanitarian law', a key influence in the drafting of the Rome Statute, recognised that justice required criminalisation and prosecution of war crimes perpetrated during armed conflict, international, including occupation, or non-international. Divergence in the jurisprudence of the Court as to whether particular war crimes can be committed only during a 'conduct of hostilities' phase of armed conflict raise concerns that the application of international criminal law, premised on the acceptance 'that norms of international humanitarian law were not intended to protect State interests; they were primarily designed to benefit individuals qua human beings',[1] might be undermined.

The Pre-Trial Chamber in *Al-Hassan*, emphasising that rebel soldiers in Mali didn't 'occupy' in the legal sense, but 'managed' (*gérée*) territory,[2] has reiterated the fundamental position that the term 'international armed conflict' includes military occupation.[3] Colloquial use of the term occupation in the context of non-international armed conflict, such as during the *Al Mahdi* proceedings, gives rise to confusion, including in the present proceedings, where sources are drawn from rules of non-international and international armed conflict. For example, the Defence Brief, summarising the finding in *Al Mahdi* that the Rome Statute makes no distinction as to whether an attack 'was carried out in the conduct of hostilities or after the object had fallen under the control of an armed group', states that the Trial Chamber expanded the scope of article 8(2)(e)(iv) 'to cover conduct during hostilities and in situations of occupation'.[4]

Michael Cottier explains that the 'lack of conciseness and logical order' in the Rome Statute list of War Crimes can be understood by the drafting history, and specifically by time restraints towards the end of the Rome Conference, which resulted in the reproduction of 'lists and formulations contained in the different treaty sources'.[5] The Prosecutor accepts the existence of a category of 'conduct of hostility crimes', but argues, contrary to the Trial Chamber,[6] that the concept of attack found in article 8(2)(e)(iv), encompasses all acts of violence directed against protected objects, 'irrespective of whether they occur in the conduct

[1] ICTY, *Prosecutor v. Kupreskic*, Case No. IT-95-16-T, Judgment, 14 January 2000, para. 518.
[2] 'Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, *Affaire le Procureur c. Al Hassan Agabdoul Aziz Ag Mohamed Ag Mahmoud*, ICC-01/12-01/18, 13 novembre 2019, para 225.
[3] Elements of Crimes, Article 8(2)(a), fn 34.
[4] Defence Response to Prosecution Appeal Brief, 7 October 2019 (ICC-01/04-02/06-2432), The Prosecutor v. Bosco Ntaganda, ICC-01/04-02/06, 9 December 2019, para 35; also, Observations of the Common Legal Representative of the Victims of the Attacks on the Prosecution's Appeal against the Trial Judgment, *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06, 8 January 2020, paras 10 & 39.
[5] Michael Cottier, 'War Crimes' in Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court Observers' Notes, Article by Article* (Beck/Hart, 2008: 2nd ed) 296.
[6] Trial Chamber Judgment, *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06, 8 July 2019, para 1142.

of hostilities or after the object in question has come under the control of a party to the conflict.'[7] The Prosecutor also presents a second category 'describing acts of violence *outside* the conduct of hostilities', and a third, *status mixtus*, category of Rome Statute War Crimes, 'which can occur *either* in the conduct of hostilities or outside the conduct of hostilities (such as when the victim is in the power of the perpetrator)'.[8]

Neither the Statute nor the Elements of Crimes make reference to conduct of hostilities, nor is there any indication as to a positive category of 'conduct of hostilities crimes.' Reference to such a category in the ICC jurisprudence appears to stem from a 2007 decision, noting that the crime set out at article 8(2)(b)(i) and (2)(e)(i) is committed by an attack against civilians 'who have not fallen yet into the hands of the attacking party.'[9] The subsequent Confirmation of Charges described as an 'essential element' of article 8(2)(b)(i) that an 'attack' occur during 'conduct of hostilities'.[10] Franck, cited as authority for this assertion, notes only that this provision is the first 'covering a set of crimes, the elements of which were negotiated for reasons of shared elements in a basket dealing with conduct of hostilities. The other crimes of this basket are set forth in article 8(2)(b)(ii)-(v), (xxiii), (xxiv), and (xxv). The common context of these crimes is an attack against civilians and civilian objects or other protected persons or objects.'[11] Franck, as with many commentators, uses Conduct of Hostilities as a general term to reference the cluster of war crimes which find their antecedent in 'Hague Law', but makes no suggestion that the concept is an element of a crime.

Neither is there explicit reference to a positive category of 'conduct of hostilities crimes' in the academic sources cited in the *Ntaganda* Pre-Trial Chamber finding that: 'The war crime of attacking civilians belongs to the category of offences committed during the actual conduct of hostilities by resorting to prohibited methods of warfare.'[12] The Chamber cites the *Katanga* Judgment, which, in setting out the elements of Article8(2)(e)(i), notes that the prohibition on directly attacking civilians is 'absolute and applies both to international and non-international

[7] Prosecution Appeal Brief, ICC-01/04-02/06, *Prosecutor v. Bosco Ntaganda* 7 October 2019, para 109.
[8] OTP Appeal Brief, para 29.
[9] Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga, ICC-01/04-01/07-55, 5 November 2007, para 37.
[10] Decision on the confirmation of charges, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, 30 September 2008, para 267.
[11] Franck D, 'Article 8(2)(b)(i[i]) - Attacking Civilians', in Lee (ed) *The International Criminal Court: Elements of the Crimes and Rules of Procedure and Evidence* (Transnational Publishers, 2001) 140.
[12] Footnote 169 cites: 'G. Werle, Principles of International Criminal Law, The Hague, Asser (2009), at 426-428; A. Cassese, International Criminal Law, Oxford, Oxford University Press (2013), at 73; See A. Cassese, G. Acquaviva, M. Fan, A. Whiting, International Criminal Law. Cases and Commentary, Oxford, Oxford University Press (2011), at 138.' Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06, 9 June 2014, para 45.

armed conflict',[13] and that 'the conduct took place in the context of and was associated with an armed conflict not of an international character'.[14] No reference is made to 'conduct of hostilities' nor to a requirement that an attack need occur before civilians fall into the hands of an adverse party.

The facts in *Ntaganda*[15] suggest that the violations perpetrated during *ratissage* can be interpreted as meeting the war crimes nexus, distinguishing 'war crimes from crimes that ought to be treated as purely domestic'. The Chamber affirmed that that 'the perpetrator's conduct need not have taken place as part of hostilities, or at a time or place where fighting was actually taking place, but must have been closely linked to the hostilities or be related to the control carried out over a certain part of the territory by the relevant party to the conflict.'[16] The Chamber also states that 'conduct that is geographically removed from the battlefield, even across a border, may still fulfil the nexus.'[17]

Contrary to *Al Mahdi*[18] and *Al Hassan,*[19] *Ntaganda* held that, 'As with the war crime of attacking civilians, the crime of attacking protected objects belongs to the category of offences committed during the actual conduct of hostilities,'[20] and as such must be committed before such objects or civilians 'have fallen into the hands of the attacking party'.[21] This approach runs counter to the finding that 'provided there is a nexus to the armed conflict', members of the same armed force 'are not *per se* excluded as potential victims of the war crimes of rape and sexual slavery under Article 8(2)(e)(vi)'.[22] This conclusion, relied on the peremptory status of prohibitions against rape and sexual slavery.[23] While a precise list of jus cogens norms remains unsettled, even controversial, among the 'most frequently cited candidates for the status of jus cogens' is the prohibition of hostilities directed at civilian population ("basic rules of international humanitarian law").[24]

[13] Judgment pursuant to article 74 of the Statute, *Prosecutor v. Germain Katanga*, ICC-01/04-01/07, 7 March 2014, para 800.
[14] Katanga Judgment, para 803.
[15] Ntaganda Judgment, para 854.
[16] Ibid, para 731.
[17] Ibid, para 732, fn 2271.
[18] Judgment and Sentence, *Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15-171, 27 September 2016, paras 14-16.
[19] Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, paras 521-2.
[20] Ntaganda Judgment, para 1136.
[21] Ibid, para 904.
[22] Ibid, para 965.
[23] Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9, *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06, 4 January 2017, para 52.
[24] Study Group on fragmentation of international law: difficulties arising from the diversification and expansion of international law (finalized by Martti Koskenniemi) A/CN.4/L.682 (2006) para 374. Cited in International

The divergence in the ICC's jurisprudence as to which war crimes, and on what basis, are being interpreted so as include as an 'essential element', not specified in the Statute or Elements, that they can only be perpetrated during 'Conduct of Hostilities', presents a serious problem for the coherence of international criminal law. We consider it imperative that the Court retain the established understanding that for conduct to constitute a war crime, what is required is a nexus to armed conflict, not a narrower nexus to a 'conduct of hostilities'.[25]

The ICTY in *Strugar* made no distinction as to phases of conflict, 'According to the ICRC Commentary an attack is understood as a "combat action" and refers to the use of armed force to carry out a military operation at the beginning or during the course of armed conflict',[26] yet the Prosecutor notes that the Trial Chamber would have excluded the incident at Mongbwalu hospital 'because it occurred in the immediate aftermath of the takeover and thus did not occur in the conduct of hostilities (*i.e.*, it was not directed "against the adversary")'.[27] This statement raises additional uncertainty as to the concept of 'adversary'. The Commentary to API, from which the ICC takes its definition of article 8 attacks, highlights controversy about the term 'against the adversary', noting calls for the provision to include also, 'the civilian population of the party concerned'.[28] The decision to define attacks so as to include both defensive and offensive 'combat action', was necessary 'as both can affect the civilian population',[29] cumulatively affirming that the definition of attacks as violence against the adversary, encompasses both civilian and combatant.[30]

The suggestion of a category of 'conduct of hostilities crimes', has emerged against the backdrop of the occupations of Iraq and of Afghanistan,[31] and the ongoing prolonged occupation of Palestine, yet narrowing the application of war crimes to a 'conduct of hostilities' nexus would be significantly deleterious to the protection of civilians under occupation. The literature of international humanitarian law remains rooted in 'the assumption

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Law Commission Report on the work of the seventy-first session (2019) 'Chapter V - Peremptory norms of general international law (jus cogens)' A/74/10, 206.

[25] Knut Dörmann, 'War Crimes under the Rome Statute of the International Criminal Court, with a Special Focus on the Negotiations on the Elements of Crimes' 7 Max Planck YB UN Law (2003) 359; William Schabas, 'Al Mahdi Has Been Convicted of a Crime He Did Not Commit' 49 Case Western Reserve Journal of International Law 1 (2017) 95.

[26] ICTY *Prosecutor v. Strugar* Case No. IT-01-41-T, Trial Judgement, 31 January 2005, para. 282. Cited in *Katanga* Judgment, para. 798, in turn cited at *Ntaganda* Judgement, para 916.

[27] OTP Appeal Brief, para 108.

[28] Sandoz, Swinarski, and Zimmermann (eds) Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (Geneva, 1987) 1877.

[29] Commentary on the Additional Protocols of 8 June 1977, 1880.

[30] The Trial Chamber in *Ntaganda* interpreted 'adversary' so to include 'persons who had no stated or apparent allegiance to a party involved in the conflict'. Ntaganda Judgment, para 1160.

[31] Geiß and Siegrist, 'Has the armed conflict in Afghanistan affected the rules on the conduct of hostilities?' 98 IRRC 881 (2011).

that the use of force is inherent to waging war because the ultimate aim of military operations is to prevail over the enemy's armed forces.'[32] This fits with the linear framework of war, occupation, peace within which humanitarian law has been structured, yet fails to acknowledge that such a template does not reflect the 'infinitely varied nature of armed conflict',[33] nor, necessarily, the reality of the wars of any era.[34]

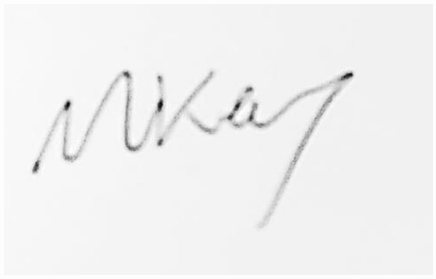
In particular, means and methods of warfare, and as such the meaning ascribed to the notion of conduct of hostilities, may be less akin to 'traditional conceptions' of the European battlefield, if the 'ultimate aim' of military operations are unlawful goals of annexation and colonialism. The concept of *ratissage*, as a military strategy, rooted in France's colonial war in Algeria, referred to the 'weeding out' of opponents by way for example of house to house searches, referred to as *Zachistka* during Russian military operations in Chechyna.[35] The ICTR noted that "*rattiser*" has a specific military meaning, closer to 'raking' or 'methodically searching' an area.[36] Contemporary occupations, even if punctuated by armed clashes, may also manifest an advanced form of institutionalised *ratissage*, characterised by a military infrastructure of walls and checkpoints, military policing, permit regimes, administrative detention, and the monitoring of cyberspace for dissent. We propose that in countenancing the meaning of attacks for the purpose of the Rome Statute, the Court can consider conduct beyond 'classic methods of warfare' such as shelling and sniping,[37] so as to incorporate in its analysis conduct directly endangering a civilian population, including endangerment, analogous to the endangerment posed by the laying of mines,[38] arising from structural infrastructure established among, and directed against, a civilian population.

The adoption of general concepts of international humanitarian law, such as conduct of hostilities, and their apparent transposition as specifically delineated and precise elements of international criminal law appears to be contributing to a lack of clarity as to the scope of Rome Statute war crimes. A fundamental function of the Rome Statute's war crimes provisions is the protection of civilians from attack, a function underpinned by human rights. Restrictions on the application of such protections, through the application of elements not included in the Statute are to be cautioned against. There is no support for such an approach in

[32] Gloria Gaggioli (ed) 'The Use of Force in Armed Conflicts: Interplay Between the Conduct of Hostilities and Law Enforcement Paradigms (ICRC, 2013) 6.
[33] OTP Appeal Brief, para 5.
[34] Georg Schwarzenberger 'Jus Pacis Ac Belli? Prolegomena to a Sociology of International Law' 37 AJIL (1943) 460.
[35] Cornelia Klocker, *Collective Punishment and Human Rights Law: Addressing Gaps in International Law* (Routledge, 2020) 107.
[36] Judgement and Sentence, *Prosecutor v. Bagosora et al*, ICTR-98-41-T, 18 December 2008, fn 1970.
[37] Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, para 46.
[38] Commentary on the Additional Protocols of 8 June 1977, 1881.

the drafting history of the Rome Statute nor in any provision of international humanitarian law.

Pillaging: We concur with the observation that as a matter of deterrence, ‘‘cultural’ objects remain in need of special protection in broader circumstances’.[39] The SCSL held ‘that the requirement of “private or personal use” is unduly restrictive and ought not to be an element of the crime of pillage’.[40] ICC jurisprudence affirms pillaging requires objects be appropriated for “private or personal use”, since ‘appropriations justified by military necessity cannot constitute the crime of pillaging.’[41] *Katanga* held pillaging to comprise ‘all forms of appropriation, public or private’.[42] *Bemba* stressed the ‘absolute prohibition on pillaging’ as applying to items appropriated ‘for private use by another person or entity’, noting that such use was to be assessed in light of factors including ‘the nature, location and purpose of the items’.[43] *Bemba*, noting rules limiting the lawful ability of an occupying power to seize property, emphasised that military necessity pertains to conduct ‘lawful according to the modern law and usages of war’.[44] We propose, that to ensure the effectiveness of the pillaging provisions, ‘private use’ be interpreted so as to not exclude appropriation by, and for the use of, state entities, alongside corporate or individual actors.



Dr Michael Kearney
on behalf of
Mr Pearce Clancy

Dated this 21st day of September, 2020

At Cork, Ireland

[39] OTP Appeal Brief, paras 6 & 61.
[40] *The Prosecutor vs. Alex Tamba Brima at al (the AFRC Accused)*, SCSL-04-16-T, Special Court for Sierra Leone, 20 June 2007, para 754: ICTY, *Mucić et al. ("Čelebići")* Trial Judgment, 16 November 1998, para. 591.
[41] Ntaganda Judgment, para 1030.
[42] Katanga Judgment, para 905.
[43] Judgment pursuant to Article 74 of the Statute, *The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, 21 March 2016, paras 124-5.
[44] Bemba Judgment, para 123.