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Original: ***English***

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

Date: **12 August 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

Expression of Interest as Amici Curiae in Judicial Proceedings

Source: **University of Pretoria, Pretoria, Republic of South Africa**

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

The Office of the Prosecutor

Ms Fatou Bensouda, Prosecutor

Ms Helen Brady

Counsel for the Defence

Mr Stéphane Bourgon

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Legal Representatives of the Victims

Ms Sarah Pellet

REGISTRY

Registrar

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The following, from the University of Pretoria in South Africa, would like to request leave to submit observations on the merits of the legal questions presented in Order No. ICC-01/04-02/06 A2 of 24 July 2020, in particular in relation to the notion of "attack" under international humanitarian law (IHL).

Amici

Professor Christof Heyns, the Director of ICLA at the University of Pretoria, is a former UN Special Rapporteur on extrajudicial, summary or arbitrary executions (2010–2016) and a member of the United Nations (UN) Human Rights Committee and. He recently served as rapporteur for the Committee on General Comment No. 37 on the right of peaceful assembly under the Covenant on Civil and Political Rights. The Comment, published in July 2020, addresses the use of force against participants in assemblies during situations of armed conflict.

Dr Stuart Casey-Maslen is Honorary Professor at the Centre for Human Rights of the University of Pretoria. He holds a doctorate in IHL from the University of Tilburg in The Netherlands and master's degrees in international human rights law and forensic ballistics from the University of Essex and Cranfield University, respectively, in the United Kingdom (UK). He has published widely on use of force and IHL. His edited work on the classification of armed conflicts around the world, *The War Report: Armed Conflict in 2013*, published by Oxford University Press, was cited by both the UK Court of Appeals and the UK Supreme Court in their respective judgments in the *Serdar Mohammed* case. His 2018 work on the conduct of hostilities under the law of armed conflict, *Hague Law Interpreted*, published by Hart in Oxford, addresses directly, in its Chapter 3, several of the issues raised in the Order, including the definitions of the terms "attack" and "hostilities".

Dr Thomas Probert is the Head of Research of the international collaboration "Freedom from Violence" at the University of Pretoria, a research network that brings together researchers from across Africa focusing on evidence-based and human-rights based approaches to the problem of violence. He holds a doctorate in history from the University of Cambridge.

Fikire Tinsae Birhane is a doctoral student at the University of Pretoria. His thesis considers the right to life of children in armed groups. He holds a master's degree in IHL from the Geneva Academy of International Humanitarian Law and Human Rights. He served as Editor of the *Hawassa University Journal of Law* in Ethiopia.

Methodology and Key Sources

The term "attack" is of course defined formally in the 1977 Additional Protocol I,[1] a treaty that combines both Geneva Law and Hague Law elements.[2] It does so within Section I of Part IV of the Protocol, which concerns the general protection of the civilian population against the effects of hostilities. But the notion was already incorporated in the 1949 Geneva Convention I,[3] including with respect to the prohibition in Article 19 on attacking "[f]ixed establishments and mobile medical units of the Medical Service". This is one of the few occasions in the Geneva Conventions where Hague Law rules were incorporated.

The meaning of the term in these normative instruments will need to be considered carefully. The 1952 and 2016 commentaries by the International Committee of the Red Cross (ICRC) on the relevant provisions elucidate little on the meaning of attack therein, other than to imply that it is to be understood in line with Hague Law, including by encompassing aerial bombardment. In the context of elaborating its Interpretive Guidance on direct participation in hostilities, one of the expert meetings the ICRC convened discussed briefly the relevant notions.[4]

State practice with respect to the interpretation of an attack is also limited. The United States does not directly address the notion in its *Department of Defense Law of War Manual*, although certain findings may be drawn implicitly from its discussion of the definition of a military objective, as mentioned below. The United Kingdom (UK), in its corresponding Manual on the Law of Armed Conflict, merely reproduces the definition set out in the 1977 Additional Protocol I.[5] France does likewise in its *Manuel de Droit des Conflits Armés*.[6]

Moreover, relatively few academic works have addressed the issue of "attacks" and "hostilities" in any detail. Yoram Dinstein is one of these, addressing both concepts in the last edition of his work, *The Conduct of Hostilities under the Law of International Armed*

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[1] Art. 49(1), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts; adopted at Geneva, 8 Jun. 1977; entry into force, 7 Dec. 1978.
[2] It is not, as has been suggested, a "fusion" of the two branches of IHL. See, e.g., Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 3rd Edn, Cambridge University Press, 2017, para. 66.
[3] Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; adopted at Geneva, 12 Aug. 1949; entry into force, 21 Oct. 1950.
[4] ICRC, "Third Expert Meeting on the Notion of Direct Participation in Hostilities, Geneva, 23–25 October 2005", Report, pp. 17–18.
[5] UK, *Manual on the Law of Armed Conflict*, Ministry of Defence, London, 2004, para. 5.20.
[6] France, *Manuel de Droit des Conflits Armés*, Ministry of Defence, Paris, 2012, pp. 22–23.

Conflict, published in 2016.[7] In *Hague Law Interpreted*, one of the proposed *Amici* compares and contrasts the notions of "hostilities", "attacks", and "means and methods of warfare" and considers in which situations Geneva Law and Hague Law rules apply.[8] This includes consideration of the ICC's adjudication of the distinction in its judgment in *Katanga*.[9]

Preliminary Findings

The notion of "hostilities" is both substantively and substantially narrower than is that of "attack". Individual attacks may certainly be perpetrated during and within the conduct of hostilities, as a number of participants opined in the 2005 ICRC Expert Meeting referred to above,[10] but attack is also subject to a broader notion. Thus, within an overall attack, the same situation can be regulated by both Hague Law and Geneva Law, but within that attack individual acts are covered by one branch of IHL or the other. This is consonant with the jurisprudence of the ICC, notably in the *Katanga* case.

The notion of attack was considered by the ICRC in its 1987 commentary on the definition set out in the 1977 Additional Protocol I. Therein, the ICRC suggested that the term was closest to one of a number of dictionary definitions: "to set upon with hostile action".[11] While formally applicable only in international armed conflict, the definition may be taken to apply *mutatis mutandis* to non-international armed conflict. The ICRC affirmed that the definition in the Protocol has a "wider scope" than merely destroying enemy forces and gaining ground "since it—justifiably—covers defensive acts (particularly 'counter-attacks') as well as offensive acts, as both can affect the civilian population. It is for this reason that the final choice was a broad definition."[12] "In other words", the ICRC asserted, "the term 'attack' means 'combat action'."[13] This latter understanding, the *Amici* would argue, is too narrow.

There is, however, potentially some support for this narrow understanding of the notion in State practice. The US Department of Defense, in its 2016 version of its *Law of War Manual*, considers that the definition of military objective in the Protocol "may also be applied outside the context of conducting attacks to assess whether the seizure or destruction of an object is

[7] Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 3rd Edn, pp. 2–3.
[8] S. Casey-Maslen, *Hague Law Interpreted:* The conduct of hostilities under the law of armed conflict, Hart, Oxford, 2018, pp. 76–80.
[9] *Prosecutor* v. *Katanga*, Judgment (Case No. ICC-01/04-01/07), 7 March 2014, paras. 878–89.
[10] ICRC, "Third Expert Meeting on the Notion of Direct Participation in Hostilities", Report, pp. 17–18.
[11] Claude Pilloud and Jean de Preu, "Article 49", in *Commentary on the Additional Protocols of 1977*, ICRC, Geneva, 1987, at: bit.ly/2Px2ENV, para. 1879.
[12] Ibid., paras. 1879–80.
[13] Ibid., para. 1880.

justified by military necessity".[14] This may be taken to imply that the US Department of Defense considers "attack" and "hostilities" to be closely related, if not synonyms.

In its 2019 judgment in the *Ntaganda* case, Trial Chamber VI appears to draw a distinction between "shelling" on the one hand, as an attack, and looting or pillaging.[15] This may be to misconstrue the protection of civilian objects as being limited to the conduct of hostilities, rather than during and in the context of a broader attack. The broader scope of protection is evidenced by the 1907 Hague Regulations: "The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited."[16] While formally 1907 Hague Convention IV is only applicable in international armed conflict, the principle that attack is a broad notion would pertain also to non-international armed conflict.

The ICRC study of customary IHL did not consider the definition of "attack". That said, in its Rule 38 ("Attacks Against Cultural Property"), the ICRC held that a customary rule applicable in all armed conflict was that: "Special care must be taken in military operations to avoid damage to buildings dedicated to religion, art, science, education or charitable purposes and historic monuments unless they are military objectives."[17] This notion of "military operations", which is broader than is that of "hostilities", is a more accurate rendition of the notion of an attack under IHL with respect to cultural objects and medical facilities.[18] The fact that objects are stolen rather than being destroyed or a building shelled is not determinant, given that the cultural or medical value demanding of protection may not be the building itself but the object or equipment it contains. As the Appeals Chamber has determined, reference to the "established framework of international law" permits "recourse to customary and conventional international law … to ensure an interpretation of article 8 of the Statute that is fully consistent with, in particular, international humanitarian law".[19]

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[14] US, *Department of Defense Law of War Manual*, Updated December 2016, Washington DC, 2016, §5.6.3.
[15] *Prosecutor* v. *Ntaganda*, Judgment (Case No. ICC-01/04-02/06), 8 July 2019, paras. 1140–41.
[16] Art. 25, Regulations concerning the Laws and Customs of War on Land, annexed to Convention (IV) respecting the Laws and Customs of War on Land; adopted at The Hague, 18 Oct. 1907; entry into force, 26 Jan. 1910.
[17] ICRC Customary Rule 38: "Attacks Against Cultural Property", at: bit.ly/2GjRKqp.
[18] While "attack" is used both with respect to crimes against humanity and in the crime of aggression, in neither case is the differing understanding of the term in these branches of international law relevant to the IHL discussion.
[19] *Prosecutor* v. *Ntaganda*, Judgment on appeal against the "Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9" (Appeals Chamber) (Case No. ICC-01/04-02/06 OA5), 15 June 2017, para. 53, citing *Prosecutor* v. *Lubanga*, Judgment (ICC-01/04-01/06 A 5), 1 Dec. 2014, para. 322.

Stuart Casey-Maslen, Honorary Professor, Centre for Human Rights

on behalf of

Christof Heyns, Thomas Probert, and Fikire Birhane

Dated this 12th day of August 2020

At Pretoria, South Africa