

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 11 August 2020

THE APPEALS CHAMBER

Before: Judge Howard Morrison, Presiding
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 Michael A. Newton 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:**

The Office of the Prosecutor

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Legal Representatives of the Victims

Ms Sarah Pellet

Mr Dmytro Suprun

Registrar

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**Request for Leave to Submit Observations on the Merits of the Legal Questions Presented
by the Appeals Chamber in the Case of The Prosecutor v. Bosco Ntaganda**

1. This is a request by Professor Michael A. Newton, 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 Newton on the Legal Questions Presented

2. Professor Newton is currently serving as Professor of the Practice of Law at Vanderbilt University Law School, Nashville, Tennessee. He previously taught International Law at the United States Military Academy at West Point, New York and the U.S. Army Legal Center and School, Charlottesville, Virginia. He has published more than 90 articles, books, and shorter case comments in the field, and is most recently the editor of *The United States Department of Defense Law of War Manual: Commentary and Critique* (Cambridge University Press, 2019). He conceived and co-authored the definitive interdisciplinary treatment entitled *Proportionality in International Law* (Oxford University Press, 2014), and authored many book chapters at the request of peers, *inter alia*, 'The Interoperability of the Laws of Armed Conflict,' in *The Legal Pluriverse Surrounding Multinational Military Operations* (Robin Geiß and Heike Krieger, eds., Oxford University Press, 2020) and 'Charging War Crimes: Policy & Prognosis,' in *The Law and Practice of the International Criminal Court* (Carsten Stahn ed., Oxford University Press, 2015). Professor Newton has received both the Book of the Year and Article of the Year Awards from the American Branch of International Association of Penal Law. He is a graduate of the United States Military Academy who has advised commanders during operations. Professor Newton served as the Senior Advisor to the United States Ambassador-at-Large for War Crimes. He helped negotiate the Elements of Crimes for the Court, and helped gain consensus agreement on their text. He has advised judges around the world and provided expert advice upon request from governments and non-governmental organizations. Professor Newton is an elected member of the International Institute for Humanitarian Law, Sanremo and has coordinated its annual competition for Military Academies. He is a widely requested speaker.

Summary of Observations

Cluster (a) Observations

3. Close examination of the Rome Statute and its constituent elements of crimes reveals that the intent of the drafters was to build upon the baseline of *lex lata* rather than obliterate preexisting legal precepts. Article 49(1) of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts 1977 (Protocol I) defines ‘attack’ as ‘acts of violence against the adversary, whether in offence or in defense.’ As used in the Statute, the concept of ‘attack’ is consistently situated amidst conduct of hostile action directed against an adversarial armed force and in furtherance of military objectives in conformity with the international law of armed conflict. The ICRC Commentary notes without caveat that the term ‘attack’ means ‘combat action.’ An ‘attack’ is an act of violence against an opposing party.
4. Destructive acts that are not undertaken against an adversary do not constitute attacks as understood by experts and state practitioners. This is in no small measure due to the absence of military necessity. Numerous provisions of the Rome Statute mirror customary international law by limiting ‘attack’ to acts of violence directed against legitimate military objectives, meaning persons or objects under the control of an opposing party that contribute to the military efforts of the adversary and offer ‘a definite military advantage.’ De facto control over an area or over persons taking no active part in hostilities obviates the concept of an ‘attack.’ The ICRC Commentary on Protocol I observes in this light that a control nexus means that offenses committed against civilians or protected places under the control or authority of a party to the conflict are ‘carried out by very different means from those used in an attack.’
5. An ‘act of hostility’, as used in article 4(1) of the Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954 and echoed in articles 53 of Protocol I and 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 (Protocol II), is broader than an ‘attack’. An ‘act of hostility’ directed against cultural property refers to any act of violence against cultural property either when under the control of an adversary or the party conducting the conflict. Pillage or seizures absent military necessity constitute theft or unlawful misappropriation.

6. In the context of cultural property, article 52(3) of Protocol I presages the language of 8(2)(e)(iv) by linking the concept of 'attack' to military objectives. Article 54 states 'It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population...' The plain meaning of the language comports with state practice by limiting the concept of 'attack' to the context of ongoing military efforts. Making 'attack' synonymous with 'destroy, remove, or render useless' would denude those words of any practical meaning and represent wholesale revision of existing understandings.
7. Article 11, Protocol II reflects the limitation of 'attack' in the context of healthcare to valid military purposes. Medical units and transports are protected 'at all times' unless they are 'used to commit hostile acts outside their humanitarian function.' The adversary is entitled to 'a reasonable time limit' to respond to warnings prior to any lawful 'attack.'

Cluster (b) Observations

8. The concept of 'intentionally directing attacks' in article 8(2)(e)(iv) of the Rome Statute does not encompass acts of pillage or theft. There is broad agreement amongst experts that the appropriate charges for destroying or dismantling cultural property (including medical facilities and schools) in the control of a party to a non-international armed conflict lie with article 8(2)(e)(xii), which is itself the analog to the Grave Breach provision found in article 8(2)(a)(iv). The prohibition on 'destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict' properly describes the conduct alleged by the Prosecution in this case. The Revised ICRC Commentary on the First Geneva Convention supports this premise.
9. 'Attacks' as used in article 8(2)(e)(iv) means 'acts of violence against the adversary, whether in offence or defence'. 'Intentionally directing attacks' extends neither to acts of pillage, theft, or other unlawful misappropriation, nor to destruction or damage caused to buildings, monuments, hospitals, and places while they are under the control of the party engaging in the destruction. Acts committed in the course of *ratissage* operations conducted in the immediate aftermath of driving the adversary from a town do not constitute the crimes proscribed by article 8(2)(e)(iv).

10. The concept of 'intentionally directing attacks' as used in article 8(2)(e)(iv) mirrors the usage of the same phrase in articles (8)(2)(e)(i) to 8(2)(e)(iv), and parallels seven other provisions of article 8(2)(b). These provisions instantiate the principle of distinction, which is rightly regarded as the cornerstone of the entire field of international humanitarian law. The protections accorded to cultural property build on this baseline but contain a number of *lex specialis* dimensions. The application of the *in dubio pro re* principle embodied in Article 22(2) mitigates against the commingled interpretation advanced by the Prosecution on these facts. Interpreting the plain language of article 8(2)(e)(iv) in light of the object and purpose of the entire fabric of article 8 should serve to enhance the clarity and precision of the Statute against the backdrop of existing customary international law and the patterns of state practice. Attack means attack.

The whole respectfully submitted:

A handwritten signature in black ink that reads "Michael A. Newton". The signature is written in a cursive style and is positioned above a horizontal line.

Professor Michael A. Newton

Dated 11 August 2020

Done at Nashville, Tennessee