

**Cour
Pénale
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**International
Criminal
Court**

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**No. ICC-01/04-02/06 A2
Date: 17 September 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

Observations by Professor Roger O’Keefe, pursuant to rule 103 of the Rules of Procedure and Evidence, 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)

Source: Professor Roger O’Keefe
Professor of International Law, Università Bocconi
via Roentgen 1, Milano 20136, Italy
roger.okeefe@unibocconi.it

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

Legal Representatives of the Victims

Ms Sarah Pellet
Mr Dmytro Suprun

Counsel for the Defence

Mr Stéphane Bourgon
Ms Kate Gibson

Amici Curiae

Ms Yolanda Gamarra
University of Pretoria
Mr Michael A. Newton
The Antiquities Coalition, Blue Shield
International and Genocide Watch
ALMA - Association for the Promotion of
International Humanitarian Law
Ms Agnieszka Jacec-Neale
Mr Pearce Clancy and Mr Michael Kearney
of Al-Haq
Ms Polina Levina and Ms Kaveri Vaid
Public International Law & Policy Group
Ms Peta-Louise Bagott
Mr Geoffrey S. Corn, Mr Richard Jackson,
Mr Chris Jenks, Mr Eric Talbot Jensen
and Mr James A. Schoettler, Jr.

Registrar

Mr Peter Lewis

Introduction

1. These are observations by Professor Roger O’Keefe, pursuant to rule 103 of the Rules of Procedure and Evidence, on the merits of the legal questions presented in paragraph 15 of the ‘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).

Observations

Cluster (a) Questions

2. The definition of ‘attack’, as the term is used in the customary international humanitarian law of both international and non-international armed conflict, 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 (‘AP I’), which defines ‘attacks’ as ‘acts of violence against the adversary, whether in offence or defence’.¹ As is evident from this definition and even more evident in the light of articles 49(2)² and (3),³ 51, 52, 54, 57, and 58⁴ AP I,⁵ an ‘attack’ is an act of armed violence directed against military forces of an opposing party, provided those forces have not fallen into the power of the party directing the violence,⁶ or against persons or objects under the control of an opposing party.⁷ An ‘attack’

¹ See J.-M. Henckaerts & L. Doswald-Beck, *Customary International Humanitarian Law. Volume I: Rules* (2005), p. 4. See also F. Kalshoven, *Constraints on the Waging of War* (2nd edn 1991), p. 87; L.C. Green, *The Contemporary Law of Armed Conflict* (3rd edn 2008), p. 149 n. 20; Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (2nd edn 2010), p. 2; A.P.V. Rogers, *Law on the Battlefield* (3rd edn 2012), p. 31; S. Oeter, ‘Methods and Means of Combat’ in D. Fleck (ed.), *The Handbook of International Humanitarian Law* (3rd edn 2013), p. 115 at p. 166; G.D. Solis, *The Law of Armed Conflict. International Humanitarian Law in War* (2nd edn 2016), pp. 506–7; O. Triffterer & K. Ambos (eds), *Rome Statute of the International Criminal Court. A Commentary* (3rd edn 2016), para. 184; E. David, *Principes de Droit des Conflits Armés* (6e éd. 2019), p. 341.

² Art. 49(2) AP I necessarily implies that attacks are directed towards territory ‘under the control of an adverse Party’.

³ Art. 49(3) AP I underlines, through its reference to ‘attacks from the sea or air against objectives on land’, that attacks are directed against persons or objects that are not under the control of the attacking party.

⁴ Arts 51, 52, 54, 57, and 58 AP I all use the term ‘attack’ or ‘attacks’ as defined in art. 49(1) AP I.

⁵ These other articles form part of the context in which art. 49(1) AP I must be interpreted in accordance with the customary rule of treaty interpretation reflected in art. 31(1) Vienna Convention on the Law of Treaties 1969 (‘VCLT’).

⁶ Note that an attack could equally be directed against civilians taking direct part in hostilities, provided those civilians have not fallen into the power of the party directing the violence.

⁷ See Y. Sandoz et al., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987), para. 1880 (‘In other words, the term “attack” means “combat action.”’); Kalshoven (n. 1), p. 87 (‘It should be explained that “acts of violence” [in the definition of “attack”] means acts of military violence involving the use of means of warfare’); Rogers (n. 1), pp. 31–4; Oeter (n. 1), p. 167 (‘the term “attack” is understood as a short

does not relate to where a person against whom or an object against which violence is directed is under the control of the party directing the violence.⁸ 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.⁹

3. The definition of ‘attack’ under international humanitarian law is the same regardless of who or what is attacked.¹⁰ 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. Conversely, wilful destruction of cultural property or a hospital under the control of the destroying party is not an ‘attack’ against the cultural property or hospital.¹¹
4. 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 in article 53(a) AP 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’.¹² 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

formula for any kind of “combat action”); S. Vöneky, ‘Implementation and Enforcement of International Humanitarian Law’ in Fleck (n. 1), p. 674 (‘The term “attacks” includes both offensive and defensive use of force against the opponent, whether by land, air, or sea, in the opponent’s state territory or in the territory of a party to the conflict controlled by the opponent (Article 49(1) AP I), that is any combat action.’); Triffterer & Ambos (n. 1), para. 184 (‘It refers to any combat action’).

⁸ See Sandoz et al. (n. 7), para. 1890; Oeter (n. 1), p. 167 (‘destructive acts by a belligerent on his own territory will often not ... constitute an “attack”, for they may be acts of violence which are not mounted “against the adversary”’).

⁹ See eg Regulations concerning the Laws and Customs of War on Land, annexed to Convention concerning the Laws and Customs of War on Land 1907, arts 23(g) (seizure), 28 (pillage), 47 (pillage), and 56 (seizure).

¹⁰ See n. 4. See also Sandoz et al. (n. 7), para. 1878.

¹¹ See R. O’Keefe, ‘Cultural Property Protection and the Law of War Crimes’ (2017) 38 *NATO Legal Gazette* 40 at 45; W. Schabas, ‘Al Mahdi Has Been Convicted of a Crime He Did Not Commit’ (2017) 49 *Case Western Res JIL* 75 at 76–93, 101–2; M. Sassòli, *International Humanitarian Law. Rules, Controversies, and Solutions to Problems Arising in Warfare* (2019), para. 10.182; David (n. 1), pp. 394–5.

¹² See M. Bothe et al., *New Rules for Victims of Armed Conflicts* (1982), para. 2.5.2; Sandoz et al. (n. 7), para. 2070 (‘An act of hostility must be understood as any act arising from the conflict which has or can have a substantial detrimental effect on the protected objects.’) and para. 4845 (‘An act of hostility means any act related to the conflict which prejudices or may prejudice the physical integrity of protected objects.’); J. Toman, *The Protection of Cultural Property in the Event of Armed Conflict: Commentary on the Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Protocol, signed on 14 May 1954 in The Hague, and on other instruments of international law concerning such protection* (1996), p. 389; R. O’Keefe, *The Protection of Cultural Property in Armed Conflict* (2006), p. 126 and ‘Protection of Cultural Property’ in Fleck (n. 1), pp. 439–40; Rogers (n. 1), pp. 196–7.

but also where it is under the control of the party directing the violence.¹³ An ‘act of hostility’ against cultural property encompasses the property’s hands-on demolition.¹⁴ It does not, however, encompass pillage, seizure or other misappropriation of cultural property.¹⁵

5. The term ‘conduct of hostilities’ is not found as such in any rule of international humanitarian law. Where found in the literature, it refers to any conduct of military operations against the adversary,¹⁶ encompassing both ‘attacks’ and ‘acts of hostility’. Nor is the term ‘combat action’ found as such in any rule of international humanitarian law. Where found in the literature, it is used as a synonym for ‘attack’.¹⁷

Cluster (b) Questions

6. The term ‘attacks’ (not ‘attack’) in article 8(2)(e)(iv) of the Rome Statute (‘RS’) means what the term ‘attacks’ means in international humanitarian law, namely ‘acts of violence against the adversary, whether in offence or defence’.¹⁸ 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 destruction of such buildings, monuments, hospitals, and places while they are under the control of the destroying party.¹⁹ Even less does it relate to the pillage, seizure or other misappropriation of or from the

¹³ See Bothe et al. (n. 12), para. 2.5.2; Sandoz et al. (n. 7), para. 2070 n. 27 (‘An act of hostility includes in particular the destruction of any specially protected object by any Party to the conflict, either by way of attack or by demolition of objects “under its control”’); Toman (n. 12), p. 389; Rogers (n. 1), pp. 196–7 (‘The term “acts of hostility” is wide enough to cover attacks, usually where the property is under the control of the adverse party, but also ... demolition, where the property is likely to be under the control of the ... demolishing party.’).

¹⁴ See Bothe et al. (n. 12), para. 2.5.2; Sandoz et al. (n. 7), para. 2070 n. 27; Toman (n. 12), p. 389; O’Keefe (2006) (n. 12), p. 126 and (2013) (n. 12), pp. 439–40; Rogers (n. 1), pp. 196–7.

¹⁵ In the 1954 Hague Convention, such acts are dealt with not in art. 4(1), which relates to, *inter alia*, acts of hostility against cultural property, but in art. 4(3), relating to ‘any form of theft, pillage or misappropriation’ of cultural property.

¹⁶ See eg Dinstein (n. 1), pp. 1–2.

¹⁷ See Sandoz et al. (n. 7), para. 1880; Oeter (n. 1), p. 167; Vöneky (n. 7), p. 674; Triffterer & Ambos (n. 1), para. 184.

¹⁸ See K. Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court. Sources and Commentary* (2004), p. 459, cross-referenced with p. 216; Triffterer & Ambos (n. 1), para. 933, cross-referenced with para. 420; O’Keefe (n. 11) at 45; Schabas (n. 11) at 76–93, 101–2. Everything said here with regard to art. 8(2)(e)(iv) RS applies equally, *mutatis mutandis*, to art. 8(2)(b)(ix), the corresponding provision for international armed conflict.

¹⁹ See O’Keefe (n. 11) at 45; Schabas (n. 11) at 76–93, 101–2; Sassòli (n. 11), para. 10.182 (‘The ICC misunderstood this in a much-applauded case on the destruction of cultural property in Timbuktu in Mali by forces that had control over the town.’); David (n. 1), p. 395 (‘Qualifier d’« attaque » la destruction par un belligérant de biens qui sont sous son contrôle alors que cette destruction ne s’inscrit nullement dans le cadre de la conduite des hostilités est une véritable

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’ in article 8(2)(e)(iv) RS would not apply to acts committed in the course of a *ratissage* operation conducted shortly after the takeover of a town.

7. That ‘attacks’ in article 8(2)(e)(iv) RS means what ‘attacks’ means in international humanitarian law is evident from the Statute more generally and from the Elements of Crimes. The chapeau to article 8(2)(e) RS, which introduces, *inter alia*, article 8(2)(e)(iv), 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’,²⁰ the relevant international law being international humanitarian law, also known as the international law of armed conflict. The introduction to the Elements of Crimes for the war crimes in article 8(2) RS provides further 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’. In short, where a term in article 8(2) RS and specifically article 8(2)(e) RS is drawn from international humanitarian law, as the term ‘attacks’ in article 8(2)(e)(iv) is, it is to be given the meaning that it bears in international humanitarian law. This conclusion is buttressed by article 22(2) RS, under which the Court’s applicable law includes, in the second place and where appropriate, ‘the established principles of the international law of armed conflict’.
8. That the term ‘attacks’ in article 8(2)(e)(iv) RS refers to acts of violence directed against the relevant buildings, monuments, hospitals, and places while the latter are under the control of an opposing party and not of the party directing the violence is all the plainer in the light of the rider ‘provided they are not military objectives’ at the end of the provision. Under international humanitarian law, an object can constitute a military objective only if it ‘make[s]

« attaque » contre le sens des mots’). But cf. *Prosecutor v. Al-Mahdi*, ICC-01/12-01/15-171, Trial Chamber, Judgment and Sentence, 27 September 2016, paras 11–12 and 15–16; *Prosecutor v. Al Hassan*, ICC-01/12-01/18-461-Corr-Red, Pre-Trial Chamber, Decision on Confirmation of Charges, 30 November 2019, para. 522.

²⁰ See equally, *mutatis mutandis*, the chapeau to art. 8(2)(b) RS, in relation to international armed conflict.

an effective contribution to [an adversary's] military action'.²¹ An object cannot make an effective contribution to an adversary's military action when it is under one's own control.²²

9. The conclusion that the term 'attacks' in article 8(2)(e)(iv) RS means what the term 'attacks' means in international humanitarian law is reinforced by the fact that this is equally what the term 'attacks' means in the eight other provisions of article 8(2) RS in which it is found.²³ It is a well-established presumption of treaty interpretation that the same term means the same thing throughout a single treaty,²⁴ a presumption all the stronger with respect to the same paragraph of the same article of that treaty. The presumption is not rebutted in this instance. It would be extraordinary to suppose that 'attacks' means something different uniquely in article 8(2)(e)(iv) RS, and there is nothing unique about article 8(2)(e)(iv) to support this supposition.
10. It would be even more extraordinary, indeed absurd, to suggest that the term 'attacks' in article 8(2)(e)(iv) RS means what the term means in international humanitarian law except in its application to 'cultural objects enjoying a special status'.²⁵ It is axiomatic that a treaty term—that is, the identical term in the identical provision of the treaty—must have a single meaning. It is irrelevant to interpreting 'attacks' in article 8(2)(e)(iv) RS, and only partly correct to say anyway, that the protection under international humanitarian law of 'cultural objects enjoying

²¹ Art. 52(2) AP I, as consonant with customary international law. See eg *Prosecutor v Kordić and Čerkez*, IT-95-14/2-A, Appeals Chamber, Judgment, 17 December 2004, paras 52–4 and 59; *Western Front, Aerial Bombardment and Related Claims, Eritrea's Claims 1, 3, 5, 9–13, 14, 21, 25 & 26 (Eritrea/Ethiopia)*, Partial Award (2005) 135 ILR 565, para. 113; Henckaerts & Doswald-Beck (n. 1), p. 29, rule 8.

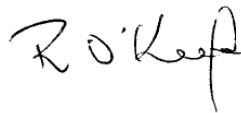
²² See also Sassòli (n. 11), para. 10.182 ('Norms prohibiting the destruction of ... cultural property through demolition ... by the party in whose power it is must be distinguished from the rules that prohibit such destruction by an attack in the conduct of hostilities because, in the former case, such property cannot possibly constitute a military objective for the destroying party. As this party has control, the object can never contribute to its enemy's military action.')

²³ For interpretations to this effect of arts 8(2)(e)(i) and (iii) RS respectively, both relating to 'attacks' during non-international armed conflict, see *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-717, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 30 September 2008, paras 266–9 and *Prosecutor v. Katanga*, ICC-01/04-01/07-3436, Trial Chamber II, Judgment pursuant to article 74 of the Statute, 7 March 2014, paras 797–8 (art. 8(2)(e)(i) RS); *Prosecutor v. Ntaganda*, ICC-01/04-02/06-309, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, 9 June 2014, para. 45 and *Prosecutor v. Ntaganda*, ICC-01/04-02/06-2359, Trial Chamber VI, Judgment, 8 July 2019, para. 904 (art. 8(2)(e)(i) RS); *Prosecutor v. Abu Garda*, ICC-02/05-02/09-121-Corr-Red, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 8 February 2010, paras 64–5 (art. 8(2)(e)(iii) RS).

²⁴ See eg R.K. Gardiner, *Treaty Interpretation* (2nd edn 2015), p. 209. This is again an aspect of the context in which art. 31(1) VCLT requires that a treaty term be read.

²⁵ See *Ntaganda*, Judgment (n. 22), para. 1136 n. 3147.

a special status' is 'based on different underlying rules'.²⁶ Nor does the fact that no provision of article 8(2)(e) RS grants the Court jurisdiction over a war crime in non-international armed conflict involving destruction specifically of 'cultural objects' while they are under the control of the destroying party²⁷ or, for that matter, involving pillage specifically of such objects make any difference as a matter of treaty interpretation to the meaning of 'attacks' in article 8(2)(e)(iv) RS. As it is, the destruction during non-international armed conflict of a 'cultural object' while it is under the control of the destroying party constitutes the war crime in article 8(2)(e)(xii) RS of '[d]estroying ... the property of an adversary unless such destruction ... be imperatively demanded by the necessities of the conflict',²⁸ while the pillage of such an object during non-international armed conflict constitutes the war crime in article 8(2)(e)(v) RS of '[p]illaging a town or place, even when taken by assault'.²⁹ Each act is still punishable under the Statute; and, just as unlawfully bombarding children would be no less condemnable for the fact that the relevant war crime refers to the victims as 'civilians',³⁰ not 'children', so too destroying a cultural object while it is under the control of the destroying party and pillaging a cultural object are no less condemnable for being prosecuted as the war crimes respectively of unnecessarily destroying the property of an adversary and pillaging a town or place. The particular gravity of the conduct owing to the cultural character of the object can be appropriately accounted for at sentencing.³¹



Professor Roger O'Keefe

Dated 17 September 2020

Done at Milan, Italy

²⁶ Ibid.

²⁷ See *Al-Mahdi*, Judgment and Sentence (n. 19), para. 16.

²⁸ See O'Keefe (n. 11) at 45; Sassòli (n. 11), para. 10.182; David (n. 1), p. 395.

²⁹ See Dinstein (n. 1), p. 199.

³⁰ See arts 8(2)(b)(i) and (e)(i) RS.

³¹ See also David (n. 1), p. 395.