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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

Amicus Curiae Observations Pursuant to Rule 103 Of The Rules of Procedure and Evidence on the Merits of the Legal Questions Presented in the Appeal of the Prosecutor against the Judgment of Trial Chamber VI of 8 July 2019 (ICC-01/04-02/06-2359)

Source: Prof^a Dra Yolanda Gamarra

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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1. On 12 August 2020, Professor Yolanda Gamarra sought leave from the Appeals Chamber of the International Criminal Court (“the Court”), under Rule 103 (1) of the Rules of Procedure and Evidence, to submit observations as *amica curiae*¹ on the merits of the legal questions presented by the Prosecutor against the ‘Judgment’ of Trial Chamber VI of 8 July 2019 (ICC-01/04-02/06-2359).²
2. The *Prosecutor v. Bosco Ntaganda* case (ICC-01/04-02/06, “Ntaganda case”) offers an occasion to the Court to clarify the language of the article 8(2)(e)(iv) of the Rome Statute (“the Statute”) in the framework of Mr Ntaganda prosecution as responsible of war crimes and crimes against humanity for destroying of protected objects.
3. According to the *Decision on the requests for leave to file observations pursuant to rule 103 of the Rules of Procedure and Evidence, the request for leave to reply and further processes in the appeal* (ICC-01/04-06 A2), dated 24 August 2020, Professor Gamarra hereby submits legal arguments on the meaning of ‘attack’, ‘conduct of hostilities’ and ‘combat action’, and the differences of ‘attack’ and ‘act of hostility’ (Observation 1), and the scope of the concept of ‘attack’ under the article 8(2)(e)(iv) of the Statute (Observation 2).

Observation 1

A. Looking for a satisfactory definition of ‘attack’

4. ‘Attack’ is a concept under discussion in international law. It is not satisfactorily explained in Article 51 of the United Nations Charter or in Resolution 3314 (XXIX) of the United Nations General Assembly on the *Definition of Aggression*

¹ *Request by Professor Yolanda Gamarra for leave to file observations on the merits of the legal questions presented in the appeal of the Prosecutor against the ‘Judgment’ of Trial VI of 8 July 2019* (ICC-01/04-02/06-2359) dated 24 August 2020.

² Judgment, 8 July 2019, ICC-01/04-02/06-22359, with Annex A (ICC-01/04-02/06-2359-AnxA) and Annex B (ICC-01/04-02/06-2359-AnxB)

(although examples are provided).³ The term of ‘attack’ is also not clearly defined in the Hague Conventions of 1899 and 1907 or in the Geneva Conventions of 1949 and their Protocols of 1977, or in the Rome Statute. In particular, international humanitarian law recognised that an ‘attack’ is an ‘act of violence against the adversary, whether in offence or in defence’ as established in article 49 (1) of Protocol I to the Geneva Conventions of 12 of August 1949, and relating to the Protection of Victims of International Armed Conflicts. Nevertheless, this definition of ‘attack’ is not as precise as required in the present case.

5. To find a definition of ‘attack’ we must thus look at customary international law. The legality of an ‘armed attack’ is governed by the principles of necessity, immediacy and proportionality, conditions that need to be considered in the light of each particular case. Although immediacy may be interpreted in its broadest sense, and may be flexible depending on the circumstances of the threat, necessity and proportionality are conditions firmly founded in customary international law and must be complied with.
6. The ICTY defines ‘attack’ such as an act of violence committed during the course of an armed conflict (*Prosecutor v. Galic*, among other cases).⁴ The ICC dismissed this case law as well as the doctrinal interpretation of such as inconsistent. The ICC case law considers that the term ‘attack’ refers to any large-scale in nature combat action and targeted at a large number of persons (*Prosecutor v. Jean-Pierre Bemba Gombo*).⁵
7. The ‘attack’ is the act of ‘attacking’. It is a concrete military action governed by the principles of proportionality, necessity and immediacy. The legality of an ‘attack’ in international law does not lie in the causal explanation of the

³ Resolution 3314 (XXIX) of the United Nations General Assembly on the Definition of Aggression, 14 December 1974.

⁴ ICTY, *Prosecutor v. Stanislav Galic*, Judgment, 5 December 2003, paras. Case No IT-98-29-A, para. 52.

⁵ ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment, 21 March 2016, para. 163. (ICC-01/05-01/08).

behavior. It is expressed in the practice of the institutional justification that allowed the analysis and criticism of the decisions adopted by reference to the UN, ICTY, or ICC guidelines.

B. The link between the concepts of ‘attack’, ‘conduct of hostilities’ and ‘combat action’

8. In international humanitarian law, the term ‘conduct of hostilities’ regulates and limits the methods and means of warfare, establishing rules regarding permissible targets, restrictions on permissible weapons, and rules on allowable methods or warfare. Its purpose is to strike a balance between legitimate military action and the humanitarian objective of reducing human suffering, particularly of civilians.
9. ‘Conduct of hostilities’ is different from ‘attack’ as is recognized in the article 4(1) of 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (HC)⁶ and the article 6(a) of the Second Protocol (1999) to the HC.⁷ ‘Conduct of hostilities’ involves the rules governing the ‘attack’.
10. Three general principles can be observed in accordance with article 52(2) and article 51(5)(b) of the First Protocol (of 8 June 1977) to the Geneva Conventions of 12 of August 1949: i) the choice of means and methods of warfare is not unlimited; ii) the use of means and methods of a nature to causer unnecessary suffering or superfluous injury are prohibited; and iii) the only legitimate object of war is to overpower or weaken the enemy forces in order to compel the surrender of the enemy, not to destroy and kill as many members of the opposing forces as possible. In the *Al Mahdi* case, the ICC considered that the element of direct(ing) an ‘attack’ encompasses any ‘acts of violence against protected objects and will not make a distinction as to whether it was carried

⁶ Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1954.

⁷ Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Even of Armed Conflict, The Hague, 26 March 1999.

out in the conduct of hostilities or after the object had fallen under the control of an armed group'.⁸ So, although some proportionate collateral damage is considered unavoidable and therefore not illegal the most basic rule of international humanitarian law is that civilians and civilian objects are not to be made the objects of direct attack.

11. 'Combat action' refers to the military acts in the framework of a war directed to the enemy until causing their defeat and dispersion. 'Combat action' is a broader act than the act of attacking.

C. Differences and similarities between 'attack' and 'act of hostility'

12. 'Act of hostility' is an unfriendly act on the part of one belligerent toward another. An 'act of hostility' involves abusive and aggressive behavior that can be reflected in emotional or physical violence, at the hands of a single person, a small group or a large number of people and be directed at one or more subjects. When a hostile act is in progress there is a right to use proportional force, including armed force.
13. The Second Protocol (1999) to the HC⁹ imposes a higher standard of protection concerning the prohibition of acts of hostility against cultural properties. The HC and particularly the Second Protocol (1999) has sought to reinforce the protection of cultural heritage by encouraging the marking of such property with a blue and white shield,¹⁰ but also by limiting the lawfulness of attacks to very exceptional situations where a waiver can be invoked in case of 'imperative military necessity'.¹¹

⁸ ICC, *Prosecutor v. Ahmad Al Faqi Al Madhi*, Judgment, 27 September 2016, par. 15. (ICC-01/12-01/15).

⁹ Ibid.

¹⁰ Article 6 and 16 of the Hague Convention of 1954 for the Protection of Cultural Property in the Even of Armed Conflict, The Hague, 26 March 1999.

¹¹ Article 4(2) of the Hague Convention of 1954 for the Protection of Cultural Property in the Even of Armed Conflict, The Hague, 26 March 1999.

14. To conclude, an ‘act of hostility’ can be equated with an act of aggression.¹² The lack of precision in the definition of the act of aggression and its proximity to legal figures such as legitimate self-defense requires that the Prosecutor of the Court improve its analysis.¹³ The politics plays an important role in determining the legality of the attack.¹⁴ The difference between ‘acts of hostility’ – which comprise demolitions as well – and ‘attack’ seems to be narrow. Demolitions cannot be assessed on the basis of the definition of a military objective, since the latter applies to attacks, as distinct from the broader concept of ‘acts of hostility’ by which article 4(1) of the 1954 Hague Convention encompasses demolitions.¹⁵

Observation 2

Scope of the concept of ‘attack’ under the article 8(2)(e)(iv) of the Statute and the acts such as pillaging, destruction or acts committed in the course of a *ratissage* operation

15. The article 8(2)(e)(iv) of the Statute stresses that intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes or historic monuments is a war crime ‘provided they are not military objectives’. Religious objects remain in need of special protection in broader circumstances.

¹² M. Lostal Becerril, “The Meaning and Protection of ‘Cultural Objects and Places of Worship’ under the 1977 Additional Protocols”, 59 *Netherlands International Law Review* (2012), pp. 455-472.

¹³ The act of aggression has been considered as ‘the most serious and dangerous form of illegal use of force’, ICC, Assembly of States Parties, Resolution RC/RES.6, 11 June 2010, available at <https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf>. See, K. J., Heller, “The uncertain legal status of the aggression understandings”, *Journal of International Criminal Justice*, vol. 10 (2012), pp. 229-248, and E. Peralta Losilla, “La agresión en el Estatuto de Roma. Requisitos jurídicos, políticos y administrativos”, in A. Salinas and E. Petit (eds.), *La Corte Penal 20 años después: integridad del Estatuto y universalidad*, Valencia, Tirant lo Blanch, 2020, pp. 113 - 138.

¹⁴ D. Wippman, “The International Criminal Court”, in C. Reus-Smit, *The politics of international law*, Cambridge, Cambridge University Press, 2004, pp. 151-188

¹⁵ R. O’Keefe, *The Protection of Cultural Property in Armed Conflict*, Cambridge, Cambridge University Press, 2006, p. 130.

16. According to the article 34 (1) of the Vienna Convention of the Law of Treaties (1969), a treaty shall be interpreted in good faith having in mind its object and purpose. Following the article 34(4) of the same instrument 'a special meaning shall be given to a term if it is established that the parties so intended'. The object and purpose of the Statute is to end impunity as stated in its preamble when it declares that 'the most serious crimes of concern to the international community as a whole must not go unpunished and their effective prosecution must be ensured'.
17. Having in mind the scope of the article 8(2)(e)(iv) of the Statute (similar to other situations stated in this article), a broad interpretation of 'attack' applying to religious properties and hospitals would be a violation of the principle of legality. Any 'attack' aimed at a cultural property (as a civilian object) with a special nature is unlawful *per se*, unless it has been turned into a military object.
18. Military objectives, according to article 52 (2) of the First Protocol (1977) to the Geneva Conventions (1949), are 'limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offer a definite military advantage'. Article 52 (3) of the same instrument states that: '(i)n case of doubt whether an object which is normally dedicated to civilian purposes, such as places of worship, a house or other dwelling (...), is being used to make an effective contribution to military action, it shall be presumed not to be used'. Therefore, the protection for those objects continues unless its military use is beyond any doubt.
19. The protection of churches and hospitals from 'indiscriminate' attacks must be guaranteed. The minimum standard of protection included in international humanitarian law recognizes that the concept of 'military objective' is more stringent than that of 'imperative military necessity'.

20. Article 8(2)(e)(iv) of the Statute remains a work in progress. The article's ability to punish wartime damage to protected objects is undermined by a number of problems, from the vagueness of its key terms to its overly deferential proportionality test to a *mens rea* requirement that is impossible to satisfy.
21. It is not acceptable either that commanders who negligently overestimate the military advantage of an attack might come out rewarded. Military advantage is an indeterminate concept without a clear and precise meaning. The language cannot be an excuse to underestimate the damage caused. It is necessary to work towards defining more objectively the article 8(2)(e)(iv)'s *mens rea*.
22. In any 'attack', including a *ratissage* operation, there is not justification for not respecting the protected objects. Every military operation is governed by the rules of customary international law, in particular by the principles of proportionality and necessity.

CONCLUSION

23. For all of these legal arguments, the Trial Chamber VI of the Court was erroneous in not considering that the church of Sayo and hospitals and places where the sick and wounded are collected are under the protection of the article 8(2)(e)(iv) of the Statute. At the end of the day, the recognition of individual responsibility for the commission of war crimes and crimes against humanity for destroying of protected objects could be a positive step on the way to an international society based on the law.



Profª Dra Yolanda Gamarra

Dated this 17 September 2020

At Zaragoza, Spain