Cour
Pénale
Internationale

International
Criminal
Court

Original: ***English***

No.: ***ICC-01/04-02/06***
Date: **14 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 to Act as Amicus Curiae Pursuant to Rule 103 of the Rules of Procedure and Evidence

Source: **Mr Pearce Clancy and Dr Michael Kearney, Al-Haq**

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
Ms Stéphane Bourgon
Ms Kate Gibson

Legal Representatives of the Victims
Ms Sarah Pellet
Mr Dmytro Suprun

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants (Participation/Reparation)

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States' Representatives

Amicus Curiae

REGISTRY

Registrar
M. Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

Mr Pearce Clancy and Dr Michael Kearney of Al-Haq 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 the case of *the Prosecutor v. Bosco Ntaganda*.

Dr Kearney is author of *The Prohibition of Propaganda for War in International Law* (OUP, 2007), awarded the 2008 Francis Lieber Prize Certificate of Merit by the American Society of International Law. Further publications include *Propaganda in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia* in Dojčinović (ed) Propaganda, War Crimes Trials and International Law (Routledge, 2012), *'Any Other Contribution': Ascribing Liability for Cover-Ups of International Crimes* 24 Criminal Law Forum 3 (2013) 331–370, *Palestine and the International Criminal Court: Asking the Right Question,* republished in Steinberg (ed) *Contemporary Issues Facing the International Criminal Court* (Brill Njijhoff, 2016), and *The Situation in Palestine and the War Crime of the Transfer of Civilians into Occupied Territory* 28 Criminal Law Forum 1 (2017) 1-34. Dr Kearney was formerly senior lecturer in law, including at the University of Sussex, where he convened an LL.M programme in international criminal law.

Pearce Clancy, BCL, LL.M, Irish Centre for Human Rights, National University of Ireland, Galway, is a legal researcher with Al-Haq. He has previously contributed to *amici curiae* submissions to the Court in the Situation in the State of Palestine, has authored reports published by Al-Haq, and has published in online and print publications, including *Arise, Sleeping Beauty: What PESCO Means for Ireland* in the *Irish Yearbook of International Law 2018* (2020) 79-89.

Al-Haq is an independent Palestinian non-governmental human rights organisation based in Ramallah, Palestine. Established in 1979 to protect and promote human rights and the rule of law in the Occupied Palestinian Territory (OPT), the organisation has special consultative status with the United Nations Economic and Social Council. Al-Haq, in partnership with other human rights organisations, on 16 March 2020 submitted an *amicus curiae* brief, pursuant to Rule 103. to Pre-Trial Chamber I in the Situation in the State of Palestine.

Expression of Interest

Part One: Pillage

There appears to be a significant gap in the Rome Statute concept of pillaging as a war crime. The Elements of Crimes' provisions on pillage, for both international and non-international

armed conflicts, require that a perpetrator intended to appropriate property for "private or personal use", thereby appearing to exclude incidents of appropriation of property with the intent to put it to public use. As such, the unlawful appropriation of a cultural object belonging to an adversary during an armed conflict, for display in a state museum, might not satisfy the elements of pillaging as a war crime.

While such conduct is otherwise prohibited and liable to prosecution under alternative provisions of the Rome Statute, we agree with the Prosecutor's observation that as a matter of stigma and deterrence (para 6), ''cultural' objects remain in need of special protection in broader circumstances' (para 61). The International Criminal Tribunal for the Former Yugoslavia held that article 3(e) of its Statute gave the Tribunal jurisdiction over the war crime of 'plunder of public or private property', plunder encompassing: 'all forms of unlawful appropriation of property in armed conflict for which individual responsibility attaches under international law, including those acts traditionally described as 'pillage'.[1] The Special Court for Sierra Leone held 'that the requirement of "private or personal use" is unduly restrictive and ought not to be an element of the crime of pillage.'[2]

The ICC's Trial Chamber in the *Bemba* judgment, as followed in the *Ntaganda* judgment (para 1030), affirms that for the Rome Statute, pillaging requires that the perpetrator intended to appropriate the items for "private or personal use" (para 123). Our analysis will argue that as a particular type of property, cultural objects require the level of protection as was provided for in the jurisprudence of the ICTY in its construct of 'plunder', and by the SCSL in its exclusion of the motivation element. Notwithstanding that unlawful appropriation may be a war crime under additional provisions, we will consider whether it is within the competence of the Court to read any act of unlawful appropriation of cultural objects, not justified by military necessity, as constituting pillage, and in the alternative propose that the apparent lacunae be considered and appropriately addressed at the Assembly of States Parties.

Part Two: Conduct of Hostilities Crimes

Our second Part will consider the meaning of attack in international humanitarian law generally, and specifically by reviewing how arbitrary lines, whether temporal or factual, between factual concepts such as conduct of hostilities or ratissage operations, and legal concepts such as occupation, have the potential to create confusion and legal uncertainty.

[1] ICTY, Mucić et al. ("Čelebići") Trial Judgment, 16 November 1998, para. 591.
[2] *The Prosecutor vs. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu (the AFRC Accused)*, SCSL-04-16-T, Special Court for Sierra Leone, 20 June 2007, para 754.

Contrary to the approach of the Trial Chamber in *Al Mahdi*, the Trial Chamber in *Ntaganda* has held that given 'the attack on the church in Sayo took place sometime after the assault, and therefore not during the actual conduct of hostilities, the Chamber finds that the first element of Article 8(2)(e)(iv) of the Statute is not met.' (para 1142)

In interpreting the term "attack" in article 8(2)(e)(iv), the Prosecutor argues that it includes additional protection for certain objects under the Statute, and that 'such objects are protected under international law from deliberate acts of violence not only in the conduct of hostilities but also when under the control of a party to the conflict'. (para 31)

The Defence Brief argues that 'while IHL does provide cultural objects with certain protections both during and after the conduct of hostilities […] such protections cannot be afforded via article 8(2)(e)(iv) where the conduct at issue takes place after the cessation of hostilities.' (para 36)

While otherwise supporting the Prosecutor's position, the OPCV concludes that none of the jurisprudence relied upon by the Prosecutor 'seems to recognise or otherwise be suggesting that the scope of the notion 'attack' under article 8(2)(e)(iv) of the Statute is meant to extend beyond the aftermath of the hostilities and to also include an undetermined period of control or occupation.' (para 39)

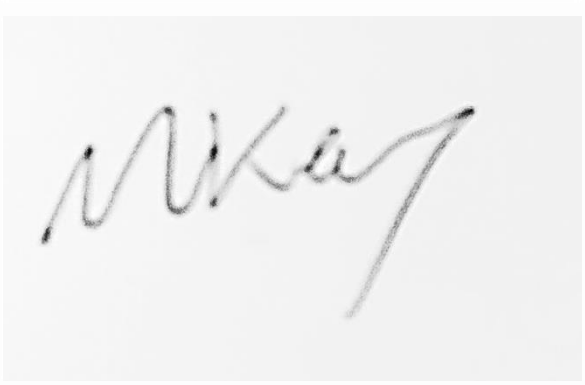
Among these decisions and opinions, differences of interpretation as to the meaning of 'attack' turn to a significant extent on what one understands as the end of 'conduct of hostilities', and the subsequent temporal and factual stages. Our submission will review these various approaches. In the context of occupation, where each of these factual situations may arise in a variety of overlapping and complex permutations, not least temporally and territorially, there is a clear potential for confusion and an undermining of legal certainty.

Our submission will provide a genealogy of ratissage as 'a method of warfare',[3] to countenance how such strategies have been applied in situations of armed conflict. As a military strategy, rather than a legal concept, the meaning of ratissage is context specific, which we will explain by considering its usage across several armed conflicts and its consideration before international tribunals.[4] The Trial Chamber noted that 'in the immediate

[3] Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, Situation in the Democratic Republic of The Congo in the Case of the Prosecutor v. Bosco Ntaganda, 9 June 2014, para 46.
[4] As examples: Kayishema et al. (ICTR-95-1) 21 May 1999, Judgement; Bagosora et al. (Military I) (ICTR-98-41), 18 December 2008, Judgement and Sentence; KAREMERA et al. (ICTR-98-44), 2 February 2012, Judgement and Sentence).

aftermath of the takeover of Mongbwalu, members of the UPC/FPLC and Hema 'civilians' conducted a ratissage operation during which they searched from house to house for items to loot, abducting, intimidating, and killing people who resisted.' (para 512) Additional examples of how ratissage has been interpreted include: manhunt, sweeping out, mopping up, *zachistka* ('cleansing'), and rounding up. Our analysis will argue that while ratissage in the jurisprudence has generally been observed and considered as discrete and contained events, in a situation of occupation such military operations may occur on a rolling basis, aimed at 'weeding out' opposition, whether political, military, or otherwise.

It is by interrogating the grey areas between various forms of military activity within and between the factual and legal concepts of conduct of hostilities, cessation of hostilities, ratissage operations, and occupation, that we aim to make a contribution to the development of international criminal law which we believe will have implications both for the present case and beyond.



Dr Michael Kearney
on behalf of
Mr Pearce Clancy

Dated this 14th day of August, 2020

At Cork, Ireland