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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

Observations of Professor Michael A. Newton on the merits of the legal questions presented by the Appeals Chamber in the Case of The Prosecutor v. Bosco Ntaganda

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

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ALMA - Association for the Promotion of International Humanitarian Law
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Observations on the Merits of the Legal Questions Presented by the Appeals Chamber in the Case of The Prosecutor v. Bosco Ntaganda

1. Further to the ICC Appeals Chamber's order inviting expressions of interest as *amici curiae* in judicial proceedings,[1] Professor Michael A. Newton sought 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.[2] On 24 August 2020, the Appeals Chamber granted Professor Newton leave to submit this written submission.[3] This brief is respectfully submitted pursuant to Rule 103 of the Rules of Procedure and Evidence.

2. This brief concludes that acceding to the Prosecutor's view of Article 8 would represent a fundamental realignment within international humanitarian law that would foreseeably result in deleterious consequences for the conduct of ground operations. Subsuming all aspects of hostilities under the prism of targeting law would not reflect the position of the drafters or the operational experiences of practitioners. Reimagining Article 8(2)(e)(iv) as suggested by the Prosecutor would necessitate a parallel amendment of Article 8(2)(b)(ix) applicable to armed conflicts of an international character. Such revision is inadvisable because military operations are complex circumstances that encompass many other phases than attacks directed against an enemy. It is also unnecessary because other provisions of Article 8 of the Rome Statute provide ample protections to cultural property and all other protected property.

3. Targeting principles do not apply at all phases of conflict nor do they properly encompass all interactions with property that is protected by international humanitarian law or other *lex specialis* provisions. The object and purpose of Article 8 is to provide comprehensive criminal prohibitions applicable to all phases of armed conflict. It should not be implemented as a self-standing island isolated from the larger definitional underpinnings of *jus in bello*. The text of

[1] *In the Case of The Prosecutor v. Bosco Ntaganda*, 'Order inviting expressions of interest as *amici curiae* in judicial proceedings (pursuant to rule 103 of the Rules of Procedure and Evidence), 24 July 2020.
[2] 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), 12 August 2020, ICC- 01/04-02/06-2558.
[3] *In the Case of The Prosecutor v. Bosco Ntaganda*, 'Decision on the requests for leave to file observations pursuant to rule 103 of the Rules of Procedure and Evidence, 24 August 2020, para. 10.

Article 8 is a complex commingling of *lex lata* hard law as implemented in the real world by experienced practitioners and informed by well-established state practice. The concept of 'attack' as used in Article 8 should not be expanded to make it coterminous with the concept of 'attack' as used in Article 7. The traditional law of targeting begins with the military mission and tempers the discretion of war-fighters based upon humanitarian considerations, whilst the body of Geneva law begins with core humanitarian imperatives which are constrained due to the necessities of the military mission. Close examination of the Rome Statute and its constituent elements of crimes reveals that the intent of the drafters was to build upon this baseline of state practice rather than obliterate preexisting precepts and replace them whole cloth with *sui generis* treaty-based constraints.

4. 'Attack' as used in Article 8(2)(e)(iv) means attack. In this vein, the experiences of expert practitioners and the established expectations arising from the conduct of ground operations remain highly relevant. The application of the *in dubio pro re* principle embodied in Article 22(2)[4] 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.

Observations on the Issues Presented in Cluster (a)

5. 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."[5] As used in the Statute, and in widespread state practice during ground operations, the concept of 'attack' is confined to the conduct of hostile action of one variety or another. This conception in customary international law builds upon the meaning reflected in the 1907 Hague Regulations[6]

[4] Article 22 of the Rome Statue states: "The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted."
[5] 1977 Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, 1125 U.N.T.S. 3, art. 49(1).
[6] Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.

Neither the term 'attack' as used in Article 25 of the Hague Regulations nor the term 'assault' as used in Article 26 needed definition. Their practical meaning incorporated the common sense notions drawn from the law of targeting.

6. By contrast to the concept of attack under the law of targeting, the 1907 Hague Regulations distinguished other facets of military interaction with protected property. Article 23(g) reflected the provisions of the 1899 Hague II Convention by restating that parties may not lawfully "destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war." The Rome Statute replicated that language in Articles 8(2)(b)(xiii) and 8(2)(e)(xii)(respectively applicable during international and non-international armed conflicts). Delegates at the ICC Preparatory Commission rejected views suggesting that the Elements of Crimes should incorporate the notion that any seizure of civilian property would be valid only if based on "imperative military necessity."[7] As reflected in the Elements for Articles 8(2)(b)(xiii) and 8(2)(e)(xii), there is no evidence in the *traveaux* that these offenses altered the preexisting fabric of the laws and customs of war.[8] The Prosecutor's position would make these provisions redundant.

7. The ICRC Commentary notes without caveat that the term 'attack' means "combat action."[9] An 'attack' is an act of violence. With respect to the various provisions of article 8 that use the term 'attacks' as a legal term of art, experts agree that "[t]he concept of attack as defined in this provision refers to the use of armed force to carry out a military operation during the course of an armed conflict."[10] Consistent case law reflects this rather commonsense proposition.[11]

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[7] Knut Dörmann, *Elements of War Crimes Under the Rome Statute of the International Criminal Court* (Cambridge University Press 2003) 249.
[8] William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press 2010) 240-41(noting that Rome Statute provisions referencing military necessity were "quickly agreed" upon and that the concept may be invoked only when and to the extent provided by the laws of armed conflict).
[9] *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August* 1949, ¶ 1890 (Sandoz et al, eds 1987).
[10] Knut Dörmann, *Elements of War Crimes Under the Rome Statute of the International Criminal Court* (Cambridge University Press 2003) 150-151, 156, 178-179, 350-351.
[11] *Prosecutor v. Stanislav Galić*, Case No IT-98-29-T, Judgment, Trial Chamber I, 5 December 2003, para. 52; William Schabas, 'Al Mahdi Has Been Convicted of a Crime He Did Not Commit,' 49 *Case Western Reserve Journal of International Law* (2017) 75, 79 n.16 (citing to *Galić*, para. 52 and Kordić and Čerkez (IT-95-14/2-A), Judgment, 17 December 2004, para. 47; Strugar (IT-01-42-T), Judgment, 31 January 2005, para. 2ić82; Milošević, Dragomir (IT-98-29§1-T), Judgment, 12 December 2007, para. 943; Perišić (IT-04-81-T), Judgment, 6 September 2011, para. 91; Prlić et al. (IT-04-81-T), Judgment, 6 September 2011, para. 91; Karadžić (IT-95- 5/18-T), Public Redacted Version of Judgment Issued on 24 March 2016, 24 March 2016, para. 451).

8. 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."[12] De facto control over an area, or over persons taking no active part in hostilities, displaces the law of targeting as a practical matter because protections derive from other more pertinent provisions of international humanitarian law. The ICRC Commentary reinforces this bifurcation by noting that "destructive acts undertaken by a belligerent in his own territory would not comply with the definition of attack given in [Article 49(1)], as such acts, though they may be acts of violence, are not mounted 'against the adversary.'"[13]

9. 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. The *Al Mahdi* Trial Chamber provided no justification for the notion that protection of cultural property is appropriately subsumed within the law of targeting rather than the provisions expressly crafted to provide protections from the effects of ground operations.[14]

10. Article 49(2) of Protocol I reflects the definition of attack by clarifying the concept of a control nexus stating that an attack can happen on any territory to include the "national territory belonging to a party to the conflict *but under the control of an adverse party*."(emphasis added)[15] This emphasizes that attacks within "the provisions of this Protocol" are limited to acts

[12] Ibid.
[13] *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August* 1949, ¶ 1890 (Sandoz et al, eds 1987).
[14] Mark A. Drumble, 'From Timbuktu to the Hague and Beyond: The War Crime of Intentionally Attacking Cultural Property,'17 *Journal of International Criminal Justice* (2019) 77, 86-87.
[15] 1977 Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, 1125 U.N.T.S. 3, art. 49(2).

committed on territory under an adverse party's control. The expansive application of targeting principles is constrained by the pragmatic limitation that other provisions of international humanitarian law govern offenses committed on territory that is simultaneously under the attacking party's control. This definition does not change *vis-à-vis* destruction of cultural property and hospitals absent military necessity or other affirmative authority.

11. No responsible practitioner, nor any Party to this litigation, supports a legal position that would leave cultural property unprotected. The question is not whether cultural property need be protected but rather whether an 'attack' on cultural property transpired. 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 further states "It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population…" The plain meaning of this language comports with state practice by limiting the concept of 'attack' to the context of targeting. Making 'attack' synonymous with 'destroy, remove, or render useless' would denude those words of practical meaning and represent wholesale revision of existing understandings.

12. 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."

Observations on the Issues Presented in Cluster (b)

13. The concept of 'intentionally directing attacks' in article 8(2)(e)(iv) of the Rome Statute does not encompass acts of pillage or theft.[16] 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

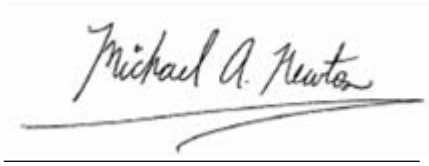
[16] Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* (Edward Elgar, 2019) 566, ¶ 10.182.

necessities of the conflict' properly describes the conduct alleged on the facts of this case.[17]

14. 'Attacks' as used in article 8(2)(e)(iv) is confined to acts of violence against the adversary. Further demonstrating the unambiguous understandings of drafters, the term of art "military objective" is also present. The reference to 'attack' is widely understood by its plain meaning and neither requires nor permits further interpretation. Retaining fidelity to the ordinary meaning buttresses the normative integrity of the Rome Statute because '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 the cornerstone of international humanitarian law. Other provisions build on this baseline to protect cultural property with tailored precision. The Prosecutor can identify no lacunae with respect to the protection of cultural property.

15. '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. By doctrine and universal military best practice, activities in the aftermath of an attack such as preparing fields of fire, digging trenches, and restocking medical supplies are undertaken in preparation for subsequent operations. These efforts are not a function of an 'attack,' but in preparation for a future attack. 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).

The whole respectfully submitted:



Professor Michael A. Newton

Dated: 17 September 2020

Done at Nashville, Tennessee

[17] ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Cambridge University Press, 2nd edn 2016) 1076-78, ¶¶ 3007-3013.