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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 *with* Public Annexes A and B

Defence Response to Prosecution Appeal Brief, 7 October 2019 (ICC-01/04-02/06-2432)

Source: **Defence Team of Mr. Bosco Ntaganda**

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I. INTRODUCTION

1. Over the course of a 62 page Appeal Brief,[2] the Prosecution labours to persuade the Appeals Chamber that the term "attack" in article 8(2)(e)(iv) of the Rome Statute ("Statute") should not be accorded its ordinary meaning, as understood within the established framework of international law, but should instead be attributed "a special meaning […] which is different from its meaning elsewhere in article 8".[3] Specifically, the Prosecution argues that "an 'attack' for the purposes of article 8(2)(e)(iv) is *not* limited to the conduct of hostilities"[4] and may encompass the appropriation of moveable property.[5]

2. The Prosecution's convoluted arguments are not compelling. A straightforward analysis of article 8(2)(e)(iv), including by reference to its drafting history and the principles of the Vienna Convention on the Law of Treaties 1969 ("Vienna Convention"), establishes that the Trial Chamber correctly interpreted the term "attack" and properly acquitted Mr. Ntaganda of any responsibility for intentionally directing attacks against protected objects under count 17 in respect of the incidents concerning the church at Sayo and the hospital at Mongbwalu.[6] Accordingly, the Prosecution's appeal should be dismissed.

[2] OTP-Appeal-Brief.
[3] OTP-Appeal-Brief, para.19.
[4] OTP-Appeal-Brief, para.9.
[5] OTP-Appeal-Brief, para.128.
[6] TJ, paras.1141,1142,1144.

II. RESPONSE TO THE FIRST GROUND OF APPEAL: THE TRIAL CHAMBER CORRECTLY DEFINED THE TERM "ATTACK" IN ARTICLE 8(2)(E)(IV)

A. The Trial Chamber interpreted "attack" in article 8(2)(e)(iv) consistently with the case law, context and established framework of international law

3. Contrary to the Prosecution's extensive arguments under its first ground of appeal,[7] the Trial Chamber did not err in law when defining "attack" for the purposes of article 8(2)(e)(iv) of the Statute and, thus, in deciding not to consider the incidents at the Mongbwalu hospital and the church in Sayo for the purposes of a conviction under count 17 (attacking protected objects as a war crime).[8]

4. In considering the applicable law for count 17, the Trial Chamber correctly concluded that, in respect of the first legal element, "[t]he perpetrator directed an attack":

> "the term 'attack' is to be understood as an 'act of violence against the adversary, whether in offence or defence'. As with the war crime of attacking civilians, the crime of attacking protected objects belongs to the category of offences committed during the actual conduct of hostilities."[9]

5. Therefore, the fact that "the attack on the church in Sayo took place sometime after the assault, and therefore not during the actual conduct of hostilities" meant that "the first element of Article 8(2)(e)(iv) of the Statute is not met" and the incident was not further considered.[10] The appropriation of medical equipment from Mongbwalu hospital was also not considered by the Trial Chamber under count 17.[11]

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[7] OTP-Appeal-Brief, paras.14-106.
[8] TJ, paras.1141-1142.
[9] TJ, para.1136 (footnotes omitted). *Also* para.904.
[10] TJ, para.1142.
[11] TJ, para.1141.

This incident similarly took place after hostilities had ceased and in the "immediate aftermath of the takeover of Mongbwalu".[12]

6. In reaching the above conclusion, no error of law was made by the Trial Chamber in its interpretation of "attack". While none of the Court's legal texts define the term,[13] "attack" is defined in article 49(1) of Additional Protocol I ("API"). Recourse was properly made by the Trial Chamber to this definition in its consideration of both the article 8 crimes involving "attacks" with which Mr Ntaganda was charged, *i.e.*, article 8(2)(e)(i) and article 8(2)(e)(iv), and there was no basis on which to interpret "attack" in article 8(2)(e)(iv) differently as the following analysis demonstrates.[14]

7. *First*, article 8(2)(e)(iv) refers to a deliberately chosen term of art ("attack")[15] which has a well-established meaning "within the […] framework of international law".[16] Further, the *chapeau* of article 8(2)(e) directs that the "other serious violations", which that sub-article enumerates, be construed "within the established framework of international law".[17] API is a core component of international humanitarian law ("IHL"). Article 49 of API, which is entitled "Definition of attacks and scope of application", states at paragraph 1 that "'[a]ttacks' means acts of violence against the adversary, whether in offence or defence." The term "attack", thus, means "combat action".[18]

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[12] TJ, paras.512,514.
[13] TJ, para.916; OTP-Appeal-Brief, para.25.
[14] TJ, paras.904,916,1136.
[15] *See infra* regarding the drafting history of the provision which establishes that the term was deliberately chosen.
[16] Statute, article 8(2)(e).
[17] TJ, para.916.
[18] Commentary API, p.603, para.1880 ("The definition given by the Protocol has a wider scope since it – justifiably – covers defensive acts (particularly "counter-attacks") as well as offensive acts, as both can affect the civilian population. It is for this reason that the final choice was a broad definition. In other words, the term "attack" means "combat action.")

8. While API applies to international armed conflicts, the commentary of the International Committee of the Red Cross on article 13 of Additional Protocol II ("APII"), which concerns the "Protection of the Civilian Population" in the context of non-international armed conflicts, confirms by reference to article 49 of API that "[p]rotocol I defines attacks" and "[t]his term has the same meaning in Protocol II."[19] Therefore, IHL supports a consistent and coherent interpretation of the term "attack" across its rules, regardless of the nature of the conflict. There is no cogent reason to depart from this approach when interpreting the term when used in the Statute.

9. *Second*, the approach taken by the Trial Chamber to interpreting the term "attack" by reference to article 49 of API is consistent with the Court's own statutory rules of interpretation which require that recourse be made "where appropriate" to "applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict".[20] Such an approach to interpretation has the benefit of ensuring and promoting the above stated aim of consistency within IHL.

10. *Third*, other than in the relatively recent cases of *Al Mahdi* and *Al Hassan* (which it is argued below were wrongly decided), the Court's case law demonstrates that article 49(1) of API has been repeatedly used to construe the word "attack" as it is used in the various sub-paragraphs of article 8 of the Statute.[21] This approach is endorsed by respected commentators on the Statute and the Elements of Crimes, all of whom define "attack" in accordance with article 49(1) of API, including when

[19] Commentary APII, para.4783 ("Protocol I defines attacks. This term has the same meaning in Protocol II.") (footnotes omitted).
[20] Statute, article 21(1)(b).
[21] *Katanga*-Confirmation-Decision, paras.265-267 re article 8(2)(b)(i) ("Intentionally directing attacks against the civilian population […]"); *Abu-Garda*-Confirmation-Decision, paras.64-65 re article 8(2)(e)(iii) ("Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations […]"); *Banda*-Confirmation-Decision, para.61 re article 8(2)(e)(iii) ("Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations […]"); Confirmation-Decision-309, para.45 re article 8(2)(e)(i) ("an attack is directed against a civilian population […]").

used in both articles 8(2)(b)(ix) and 8(2)(e)(iv).[22] Again, the benefit of a coherent and consistent approach to the interpretation of the same term when used in the same article is self-evident.

11. *Fourth*, and building on the foregoing, when the term "attack" is considered in the context of the Statute as a whole, there is no basis for arguing that, when it is used in article 8(2)(e)(iv), the term should be interpreted differently from its use in other sub-paragraphs of article 8 and as referring to acts which take place both *during* and *outside* the conduct of hostilities. Instead, such an analysis establishes that the word "attack" was deliberately chosen to describe conduct occurring *during* hostilities only – a conclusion which is reinforced by the Prosecution's Appeal Brief.

12. In paragraph 29 of its Appeal Brief, the Prosecution acknowledges that the term "attack" is generally used in the Statute to mean "combat action" and identifies the corresponding statutory provisions.[23] Further, the Prosecution observes that "in describing acts of violence *outside* the conduct of hostilities, it is also true that typically other terms are used" and lists examples of the relevant statutory provisions.[24] Finally, the Prosecution concedes that "[c]onduct which can occur *either* in the conduct of hostilities or outside the conduct of hostilities (such as when the victim is in the power of the perpetrator) is also generally described by other

[22] Dörmann, pp.216,459; Arnold and Wehrenberg, pp.419,560; Werle and Jessberger, paras.1316-1317.
[23] OTP-Appeal-Brief, para.29 and fn.30 which cites to articles 8(2)(b)(i) ("intentionally directing attacks against the civilian population […]"), 8(2)(b)(ii) ("intentionally directing attacks against civilian objects […]"), 8(2)(b)(iii) ("intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission […]"), 8(2)(b)(iv) ("intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects […]") , 8(2)(b)(xxiv) ("intentionally directing attacks against buildings, material, medical units, transport, and personnel […]"), 8(2)(e)(i) ("intentionally directing attacks against the civilian population […]"), 8(2)(e)(ii) ("intentionally directing attacks against buildings, material, medical units, transport, and personnel […]"), and 8(2)(e)(iii) ("intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission […]").
[24] OTP-Appeal-Brief, para.29 and fn.31 which cites to articles 8(2)(a) (*e.g.*, "killing", "torture"), 8(2)(b)(vi) ("killing" or "wounding"), 8(2)(b)(x) and 8(2)(e)(xi) ("physical mutilation"), 8(2)(b)(xxi) and 8(2)(c)(ii) ("outrages upon personal dignity"), 8(2)(b)(xxii) and 8(2)(e)(vi) ("rape, sexual slavery, enforced prostitution, forced pregnancy", "enforced sterilisation"), and 8(2)(c)(i) (*e.g.*, "violence", "murder", "mutilation, cruel treatment and torture").

terms."[25] In the Defence's submission paragraph 29 fatally undermines the first ground of appeal.

13. *Fifth*, any reliance placed on the use of the word "attack" in the context of article 7 to define crimes against humanity to demonstrate that the drafters of the Statute used the term "attack" for purposes other than conduct occurring in the conduct of hostilities is misplaced.[26] As Schabas observes, "the Elements of Crimes define in some detail the 'attack directed against a civilian population' of crimes against humanity, specifying that '[t]he acts need not constitute a military attack" and "provides confirmation of distinct meanings of the term 'attack,' depending upon whether article 7 or article 8 is being considered, and also suggests, *a contrario*, that 'military attack' is precisely what is contemplated by article 8."[27]

14. The foregoing arguments, therefore, establish that article 8(2)(e)(iv) forms part of the "series of war crimes for which one essential element is that the crime must be committed during the conduct of hostilities (commonly known as 'conduct of hostilities crimes')."[28] By approaching article 8(2)(e)(iv) in this way, the Trial Chamber ensured not only internal consistency within article 8 but consistency with IHL as a whole. Accordingly, it is submitted that the Trial Chamber correctly interpreted the term "attack", as it is used in article 8(2)(e)(iv) of the Statute, by reference to its ordinary meaning, as understood within its Statutory context, the Court's case law and the established framework of international law.

[25] OTP-Appeal-Brief, para.29 and fn.32 which cites to articles 8(2)(b)(vii) ("improper use […] resulting in death or serious personal injury"), 8(2)(b)(xi) and 8(2)(e)(ix) ("killing or wounding treacherously"), 8(2)(b)(xiii) and 8(2)(e)(xii) ("destruction or seizure"), 8(2)(b)(xvi) and 8(2)(e)(v) ("pillaging"), 8(2)(b)(xvii)-(xx) and 8(2)(e)(xiii)-(xv) ("employment" of certain proscribed weapons).
[26] OTP-Appeal-Brief, para.30.
[27] Schabas (2017), pp.80-81.
[28] *Katanga*-Confirmation-Decision, para.267 (footnotes omitted).

15. The above analysis is sufficient to dispose of the Prosecution's first ground of appeal. Nevertheless, the following additional arguments lend further support to the conclusion that the Trial Chamber's approach to the interpretation of the term "attack" was correct.

B. The Trial Chamber's interpretation of "attack" in article 8(2)(e)(iv) is supported by a consideration of the article's drafting history

16. In contrast to the foregoing, which benefits from simplicity and consistency, the Prosecution erroneously argues that the term "attack" should be severed from its well-known and well-understood IHL definition and should instead be read "to mean 'act[] of hostility' in the broader sense of the 1954 Hague Convention and Additional Protocols I and II."[29] In essence, the Prosecution argues that the drafters' use of the term "attack" in article 8(2)(e)(iv) should be treated as an aberration and that a completely different term of art ("act of hostility") should be read in its place, all of which has clear implications for the principle of foreseeability and legality (which is discussed more fully below).[30] The Prosecution's position does not withstand scrutiny.

17. The Prosecution's position hinges on the assertion that the use of the term "attack" in article 8(2)(e)(iv) constitutes "an exception" and reflects "a special meaning which is necessary to give effect to the broader prohibition in international humanitarian law which this crime was intended to implement."[31] Article 31(4) of the Vienna Convention provides that such a "special meaning shall be given to a term if it is established that the parties so intended." However, the *travaux préparatoires* of the Statute establish that there was no such intention. Rather, they evidence that the origin of article 8(2)(e)(iv) lies firmly and solely in article 27 of the regulations annexed to the fourth Hague Convention of 1907 ("1907 Hague Regulations").

[29] OTP-Appeal-Brief, para.27 (footnote omitted).
[30] OTP-Appeal-Brief, paras.16,21.
[31] OTP-Appeal-Brief, para.30.

Therefore, the Prosecution's argument that "[p]articularly material to the interpretation of the term "attack" in article 8(2)(e)(iv) is its origin in articles 27 and 56 of the 1907 Hague Regulations, and their predecessors, and the subsequent endorsement of that approach for the protection of cultural property in the 1954 Hague Convention and the 1977 Additional Protocols" is not borne out by the following analysis.[32]

18. The Statute's *travaux préparatoires* reveal that the early suggestions for a war crimes provision concerning attacks on or the destruction of certain types of protected objects were based on the wording of article 56 of the 1907 Hague Regulations (which relates to situations of occupation only)[33] and article 85(4)(d) of API.[34] Relevant extracts taken from the *travaux préparatoires* illustrating this point are provided in section A of Annex A to this filing.

[32] OTP-Appeal-Brief, para.32.

[33] Article 56 of the 1907 Hague Regulations which forms part of "Section III, Military Authority over the Territory of the Hostile State" provides:

> The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property.
>
> All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.

[34] Article 85 of API provides in relevant part:

> 4. In addition to the grave breaches defined in the preceding paragraphs and in the Conventions, the following shall be regarded as grave breaches of this Protocol, when committed wilfully and in violation of the Conventions or the Protocol:
>
> […]
>
> (d) making the clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization, the object of attack, causing as a result extensive destruction thereof, where there is no evidence of the violation by the adverse Party of Article 53, sub-paragraph (b) Link, and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives[.]

19. However, in February 1997, an alternative draft war crimes provision was produced by the United States, which included text criminalising attacks on cultural property in international conflicts, and was expressly identified as being "based on" article 27 of the 1907 Hague Regulations,[35] albeit that the wording was modernised to replace the more archaic "sieges and bombardments" with "intentionally directing attacks". It is well-recognised that article 27, which features in the section concerning "hostilities", is "clearly a 'battle-field' provision directed to the conduct of hostilities, and not one addressed to the treatment of civilians and their property once they have fallen into the hands of the adverse party."[36]

20. It was in February 1997 that the provision that resembled article 56 of the 1907 Hague Regulations appears to have been dropped by the drafters. When the Working Group on the definition of Crimes consolidated the text on 20 February 1997, it retained only the provisions based on article 85(4)(d) of API and article 27 of the 1907 Hague Regulations.[37] Thereafter, and by 14 July 1997, the *travaux préparatoires* show that the drafters dropped the provision based on article 85(4)(d) of API and retained only the provision based on article 27 of the 1907 Hague Regulations.[38] By this time, the provision had been amended so as to be applicable to non-international as well as international armed conflicts. Further, it was at this point in July 1997, that the United States proposed a change to the ending of this draft provision (from "unless such property is used in support of the military effort" to "provided they are not being used at the time for military purposes") in order to conform more fully to article 27 of the 1907 Hague Regulations. [39]

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[35] *See* Section B of Annex A hereto which provides the relevant extracts of: (i) February 1997 Proposals; (ii) Working group on the definition of crimes; (iii) Preliminary text, February 1997; and (iv) Preparatory Committee Decisions of February 1997.
[36] Schabas (2017), pp.86-87.
[37] *See* Section B of Annex A hereto which provides the relevant extract of the Working group on the definition of crimes.
[38] *See* Section C of Annex A hereto which provides the relevant extract of the Informal working paper on war crimes.
[39] *See* Section C of Annex A hereto which provides the relevant extract of the Informal working paper on war crimes.

21. The significance of the disappearance of the provision based on article 56 of the 1907 Hague Regulations from the options being considered by the drafters in February 1997 and, thus, well over a year prior to the adoption of the Rome Statute, is studiously ignored by the Prosecution in its Appeal Brief. Instead, in paragraph 40 of the Appeal Brief, and in the context of explaining why the drafters dropped article 85(4)(d) of API (which happened by July 1997 and, thus, after article 56 had been dropped), the Prosecution maintains that, in choosing a provision "loosely based on article 27", the drafters "would have necessarily […] understood that it reflected the scope of *both* provisions", *i.e.*, articles 27 and 56.[40] The support for this assertion is far from clear but appears to be based on a convoluted argument[41] concerning article 22(f) of the ILC's 1991 Draft Code of Crimes against the Peace and Security of Mankind which sought to criminalise "wilful attacks on property of exceptional religious, historical or cultural value."[42] In relation to the use of "attack" in this provision, the Prosecution notes that the ILC explained that "it still intended to preserve the approach in article 53 of Additional Protocol I – that is to say, an approach which applies both to the conduct of hostilities *and* occupation".[43] Reliance on the approach taken by the ILC in relation to article 22(f) of the1991 Draft Code of Crimes against the Peace and Security of Mankind to support any drafting decision made by the drafters of the Statute is misplaced. Rather, the drafting history of article 8(2)(e)(iv) expressly refers to article 27 of the 1907 Hague Regulations as being the source of the provision which was ultimately adopted in Rome and does not refer to either article 22(f) of the ILC's Draft Code or to article 53 of API.

22. The disappearance of the provision based on article 56 of the 1907 Hague Regulations from the drafting options has a further significance in terms of assessing the relevance, or otherwise, of ICTY case law. The provision which most closely

[40] OTP-Appeal-Brief, para.40.
[41] OTP-Appeal-Brief, fn.56 referring to OTP-Appeal-Brief, para.38.
[42] 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind, pp.104-105.
[43] OTP-Appeal-Brief, para.38 citing at fn.48 to 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind, p.106.

resembles article 8(2)(e)(iv) in the ICTY Statute is article 3(d).[44] This article criminalises the seizure of, destruction or wilful damage of cultural property. The wording of article 3(d) clearly shows that it derives from article 56 of the 1907 Hague Regulations. It is acknowledged that article 3(d) of the ICTY Statute does not require the Prosecution to prove that an attack was directed against a civilian object. An attack is not a legal element of the crime.[45] However, this fact does not undermine the present argument that article 8(2)(e)(iv) must be interpreted narrowly. In addition to article 8(2)(e)(iv)'s drafting history set out above, article 3 of the ICTY Statute includes "the opening formula ("such violations shall include but not be limited to…")" as compared to article 8 of the Statute which includes no such formula and is viewed as presenting "a closed and exhaustive list of the individual crimes."[46]

23. The origin of article 8(2)(e)(iv) in article 27 of the 1907 Hague Regulations (and not in any other provision) was further underlined in a subsequent synopsis of the proposal provided in December 1997.[47] It was the text circulated in December 1997 to the Preparatory Committee,[48] subject to minor amendments at that session and at the Rome Conference, which was ultimately adopted and became article 8(2)(e)(iv) of the Statute.[49]

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[44] Article 3 of the ICTY Statute provides in relevant part:

> The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:
> […]
> (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science.

[45] *Strugar*-Appeals-Judgment, para.328.
[46] Ambos, p.120.
[47] *See* Section C of Annex A hereto, which provides the relevant extract of the Synopsis on War Crimes.
[48] Schabas (2017) (above), p.87.
[49] Schabas (2017) (above), p.87.

24. As evidenced by the above analysis, there is no basis for any argument that article 8(2)(e)(iv) was intended to reflect both articles 27 and 56 of the 1907 Hague Regulations.[50] Contrary to the Prosecution's position, and in light of the disappearance of the provision based on article 56 from the options being considered by the States, the drafting history provides a "clear indication that the drafters intended to limit article 8(2)(e)(iv) to the scope of just *one* (article 27) of the two pivotal provisions of the 1907 Hague Regulations".[51] Moreover, given that the dropping of the provision based on article 56 was part of the drafting process summarised above, this limitation was "the *collective intention* of the drafters."[52]

25. In short, article 8(2)(e)(iv) was expressly identified by the drafters as being based on article 27 of the 1907 Hague Regulations. This fact repudiates any argument that the States Parties intended that the term "attack" should be afforded a "special meaning" for the purposes of article 31(4) of the Vienna Convention.

26. Notwithstanding the clearly expressed intention of the drafters, the Prosecution also erroneously argues that article 8(2)(e)(iv) must be read in light of the holistic protection afforded to "cultural" objects by the 1954 Convention, API and/or APII.[53] However, notably all these instruments refer to the term "act of hostility", which is itself a term with a defined meaning, namely "any act arising from the conflict which has or can have a substantial detrimental effect on the protected objects."[54] The Prosecution's argument that, one term of art ("attack"), can be read as meaning another, with a completely different meaning and ("act of hostility") in the absence of any express direction, must be rejected as illogical. To find otherwise, would be to inject a considerable element of confusion and incoherence into the proper interpretation of the Statute and to IHL as a whole. While the Prosecution

[50] OTP-Appeal-Brief, paras.33-41.
[51] OTP-Appeal-Brief, para.37.
[52] OTP-Appeal-Brief, para.37.
[53] OTP-Appeal-Brief, paras.42-61.
[54] Commentary API, p.645, para.2070 (footnote omitted).

may be intent on broadening its conviction under count 17, this should not be at the cost of undermining the system of IHL, which depends in large part on predictability and certainty for its practical operation and legitimacy.

27. No answer to this criticism is to be found in any argument that article 8(2)(e)(iv) is to be interpreted broadly and in accordance with "the established framework of international law" which includes the 1954 Convention, API and APII. It is acknowledged that the Appeals Chamber determined in this case that reference to the "established framework of international law" permits: (i) "recourse to customary and conventional international law regardless of whether any lacuna exists, to ensure an interpretation of article 8 of the Statute that is fully consistent with, in particular, international humanitarian law";[55] and (ii) "the introduction of additional elements to the crimes listed in article 8(2)(b) and (e)."[56] However, the Appeals Chamber did not determine that a term of art such as "attack", which is itself a part of the established framework of international law through article 49(1) of API, could either be ignored or accorded a completely different meaning which, as argued above, contradicts the clear and express intention of the drafters. Nor did it determine that the fact that the 1907 Hague Regulations, equally a part of the established framework of international law, contain two separate provisions dealing with the protection of specified categories of property could also simply be ignored. As Schabas observes, the drafters of the Regulations "are not presumed to be like the man who wears both a belt and braces, as if to emphasise a point by stating it twice."[57]

28. The drafting history of article 8(2)(e)(iv) clearly shows that a deliberately narrow course was taken by the drafters. This course was expressly stated to be based on only one of the provisions (article 27) of the 1907 Hague Regulations. This deliberately charted course cannot be jettisoned *ex post facto* under the auspices of

[55] Appeal-Judgment-1962, para.53.
[56] Appeal-Judgment-1962, para.55.
[57] Schabas (2017), p.83.

interpreting the provision "within the established framework of international law" when that framework was well-known but rejected by the drafters. Indeed, it was not so jettisoned by the Trial Chamber. Accordingly, the Prosecution's argument that the term "attack" in article 8(2)(e)(iv) should be read to mean an act of hostility is legally unfounded and must be rejected.[58]

C. The Prosecution's approach undermines the drafters' requirement for certainty & the principle of legality

29. The drafting history of article 8 more generally also supports the Trial Chamber's approach to the interpretation of article 8(2)(e)(iv). This drafting history shows that article 8 was intended to present as "a closed and exhaustive list of the individual crimes".[59] The purpose was to preclude "judicial interpretation beyond *legem* to fill alleged lacunae in the codification of war crimes, especially with regard to the ones committed in non-international conflict."[60] Specifically, during the drafting negotiations, the parties wished to "define the specific content or constituent elements of the violations in question".[61] Further, "[t]here was general agreement that the crimes within the jurisdiction of the court should be defined with the clarity, precision and specificity required for criminal law in accordance with the principle of legality."[62] Such an approach has obvious benefits in practice in terms of foreseeability and proper implementation. Crucially, if States are to achieve the laudable aims outlined in the Statue's preamble, which aims include contributing to the prevention of the most serious international crimes, then the Statute's provisions must be capable of clear interpretation and application by those operating at all levels on the battlefield and not just by those theorising at leisure in the courtroom.

[58] OTP-Appeal-Brief, para.27.
[59] Ambos, p.120.
[60] Ambos, p.120.
[61] Report of the *Ad Hoc* Committee, No. 22, paras.57,76.
[62] Summary of the Preparatory Committee, May 1996, p.9.

Arguing that one well-known term of art ("attack"), should actually be read as meaning another ("act of hostility") runs counter to such an aim.

30. In this context, therefore, "any alleged shortcoming of Article 8 […] compared to customary international law may only be remedied by amendments to the ICC treaty according to Articles 121-123 of the Statute".[63] These legislative procedures should not be circumvented under the guise of interpreting a provision "within the established framework of international law". Indeed, in so far as any erroneously expansive approach to interpreting article 8(2)(e)(iv) may be motivated by plugging perceived gaps in the ICC legal system, it is to be recalled that it is widely recognised that "there exists a series of *lacunae* of criminal responsibility in non-international armed conflict when compared to an international one."[64] However, as stated above, the proper way to address those *lacunae* is via the statutory mechanisms provided to States Parties, as the Court's legislature, should they so wish. A very recent example of this process is the unanimous decision taken at the 18th session of the Assembly of States Parties to amend the Statute to make the starvation of civilians a war crime, not only in international armed conflicts under article 8(2)(b)(xxv), but also in non-international armed conflicts.

31. In addition to being in line with the above stated intention of the drafters, the Trial Chamber's approach to the interpretation of article 8(2)(e)(iv) complies with the principle of legality enshrined in article 22 of the Statute. Article 22(2) states not only that "[t]he definition of a crime shall be strictly construed and shall not be extended by analogy" but also that "[i]n case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted." This principle must be accorded "the greatest importance" and be properly applied in the present case. Judge Van den Wyngaert's observations on the importance of this article are worth setting out in full:

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[63] Ambos, p.120 (footnote omitted).
[64] Ambos, p.162 (footnote omitted).

> "18.[…] I believe that this article overrides the conventional methods of treaty interpretation, as defined in the Vienna Convention on the Law of Treaties, particularly the teleological method. Whereas these methods of interpretation may be entirely adequate for interpreting other parts of the Statute, I consider that for interpreting articles dealing with the criminal responsibility of individuals, the principles of strict construction and *in dubio pro reo* are paramount.
>
> 19.As far as the latter is concerned, I believe that the express inclusion of the *in dubio pro reo* standard in Article 22(2) of the Statute is a highly significant characteristic of the Statute. By including this principle in Part III of the Statute, the drafters wanted to make sure that the Court could not engage in the kind of 'judicial creativity' of which other jurisdictions may at times have been suspected. Moreover, this principle is an essential safeguard to ensure both the necessary predictability and legal certainty that are essential for a system that is based on the rule of law.
>
> 20.Individuals must have been in a position to know at the time of engaging in certain conduct that the law criminalised it […]"[65]

32. Accordingly, the Trial Chamber was correct to interpret article 8(2)(e)(iv), which criminalises certain conduct as a war crime, strictly and in accordance with the principle *in dubio pro reo*.

D. The reasoning in *Al Mahdi* and *Al Hassan* should not be followed

33. The Trial Chamber in the present case correctly did not follow the decisions of Trial Chamber VIII in *Al Mahdi* and Pre-Trial Chamber I in *Al Hassan*.[66] Not only was the Trial Chamber not required to follow these decisions,[67] the lack of detailed reasoning in these decisions means that there was no compelling basis on which to view them as persuasive. Separately, the decision in *Al Mahdi* (which was simply followed without further critical analysis in *Al Hassan*) can be distinguished from the present case because it proceeded on the basis of a guilty plea and, thus, should not be followed.

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[65] Concurrent opinion of Judge Christine Van den Wyngaert, paras.18-20.
[66] *Al-Mahdi*-Judgment, paras.15-16; *Al-Hassan*-Confirmation-Decision, para.522.
[67] Statute, article 21(2): "The Court may apply principles and rules of law as interpreted in its previous decisions" (emphasis added).

34. In *Al Mahdi*, Trial Chamber VIII's reasoning on the interpretation of the first element of article 8(2)(e)(iv) is encapsulated in the following single paragraph:

> "The Chamber considers 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 out in the conduct of hostilities or after the object had fallen under the control of an armed group. The Statute makes no such distinction. This reflects the special status of religious, cultural, historical and similar objects, and the Chamber should not change this status by making distinctions not found in the language of the Statute. Indeed, international humanitarian law protects cultural objects as such from crimes committed both in battle and out of it."[68]

35. As evident from the foregoing, the only explanation provided by Trial Chamber VIII for expanding the scope of article 8(2)(e)(iv) to cover conduct during hostilities and in situations of occupation is that "[t]he Statute makes no such distinction." This bare statement ignores: (i) the fact that the term "attack" has a well-established meaning within the established framework of international law and the case law of the Court; (ii) any consideration of the term in the context of the Statute as a whole and, specifically, that the word "attack" is used in several sub-paragraphs of article 8; (iii) the drafting history of article 8(2)(e)(iv) and of article 8 more generally; and (iv) the principle of legality, all of which are addressed above.

36. As regards Trial Chamber VIII's final comment, that IHL protects cultural objects both in battle and out of it, reference should be made to Schabas' observation that this fact "is hardly an argument to support the application of a provision that is clearly directed at acts perpetrated during a battle to those that take place 'out of it.'"[69] In addition, while IHL does provide cultural objects with certain protections both *during* and *after* the conduct of hostilities, this does not mean that such protections must automatically be provided under the Stature or that article 8(2)(e)(iv) is the appropriate provision to deliver such protections, at least not

[68] *Al-Mahdi*-Judgment, para.15.
[69] Schabas (2017) (above), pp.81-82.

without further considered legal analysis regarding the scope and purpose of the provision. As outlined above, such protections cannot be afforded *via* article 8(2)(e)(iv) where the conduct at issue takes place *after* the cessation of hostilities. Other provisions such as article 8(2)(e)(xii) may be used to cover such situations, a position the Prosecution now appears to wish to hedge against in the *Ngaïssona* and *Yekatom* case.[70]

37. In essence, it is submitted that Trial Chamber VIII's conclusion is wrong and the Trial Chamber in the present case did not err when it failed to follow the approach taken in *Al Mahdi* to article 8(2)(e)(iv).

38. The circumstances in which the *Al Mahdi* judgment was reached also mean that the Trial Chamber was correct to view it as a precedent it was not required to follow. In *Al Mahdi*, the accused pleaded guilty to a single charge based on article 8(2)(e)(iv) of the Statute. Accordingly, there was "no vigorous defense challenge[] [to] the claims of the Prosecutor".[71] These circumstances differ markedly from the present case.

39. In short, it is submitted that the Trial Chamber did not err when it diverged from the interpretation of article 8(2)(e)(iv) given in the decisions in *Al Mahdi* and *Al Hassan*.[72]

E. The Trial Chamber's reference to "cultural objects enjoying a special status" played no meaningful role in the interpretation of "attack"

40. It is acknowledged that the Trial Chamber stated that its findings:

> "do not relate to the interpretation of an 'attack' under Article 8(2)(e)(iv) when cultural objects enjoying a special status are the

[70] *Yekatom-Ngaissona*-Document-containing-the-Charges, para.254. *Cf.* Schabas (2017), pp.90-91.
[71] Schabas (2017), p.101.
[72] OTP-Appeal-Brief, paras.26-28.

> object of the attack. It notes that the protection of such objects under IHL is based on different underlying rules."[73]

41. It is unclear exactly what the Trial Chamber meant by this statement. It would appear that it was possibly referring to the "special protection conferred by Article 53 of Additional Protocol I […] to three categories of objects: historic monuments, works of art, and places of worship, provided they constitute the cultural or spiritual heritage of peoples."[74]

42. Regardless of what the Trial Chamber intended to convey, the statement is the foundation of the Prosecution's claim that:

> "the Trial Chamber's interpretation of "attack" in article 8(2)(e)(iv) hinged on its conclusion that article 8(2)(e)(iv) provides two different standards of protection – a narrow prohibition of "attacks" in the conduct of hostilities for all the objects enumerated in article 8(2)(e)(iv), and a broader prohibition of "attacks" in a wider sense for "cultural objects *enjoying a special status*"".[75]

43. The Prosecution builds on this claim to argue that the Trial Chamber's "interpretation of article 8(2)(e)(iv) is [therefore] premised on a clear error."[76] This argument is without merit.

44. It is *prima facie* evident from the terms of the Judgment that, whatever was meant by the Trial Chamber in this brief footnote, it played no meaningful role in the Chamber's interpretation of "attack" in article 8(2)(e)(iv) and its decision not to consider the incidents at the Mongbwalu hospital and the church in Sayo for the purposes of a conviction under count 17.[77] Indeed, the Prosecution is equally unclear

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[73] TJ, fn.3147.
[74] *Kordić*-Appeals-Judgment, para.90 citing to Commentary API, p.646.
[75] OTP-Appeal-Brief, para.65 (footnote omitted).
[76] OTP-Appeal-Brief, para.68.
[77] The Trial Chamber expressly stated that its findings "do not relate to the interpretation of an 'attack' under Article 8(2)(e)(iv) when cultural objects enjoying a special status are the object of an attack" (emphasis added) (TJ, fn.3147).

as to what was meant by the Trial Chamber and their arguments on the issue are, therefore, speculative.[78]

45. Further, the Trial Chamber was not required to consider "cultural objects enjoying a special status" including "places of worship, provided they constitute the cultural or spiritual heritage of peoples."[79] Instead, all that was required was a straightforward analysis of the terms of article 8(2)(e)(iv) as they applied to the items at issue in this case, which included an ordinary building "dedicated to religion" and a hospital, both of which are expressly referred to in article 8(2)(e)(iv) and did not depend on any special status.

46. On this basis, the Prosecution's lengthy arguments focusing on the Trial Chamber's passing reference to "special status" as being supportive of an error in the interpretation of article 8(2)(e)(iv), must be dismissed as being speculative and, more crucially, as not being dispositive of the central issue, namely the interpretation of the term "attack" in the context of the case brought against Mr Ntaganda.[80]

F. Conclusion

47. For all the foregoing reasons, the Appeals Chamber should reject the Prosecution's argument under its first ground of appeal that the term "attack" in article 8(2)(e)(iv) has a special meaning for 'cultural objects' which encompasses all acts of violence directed against those objects and is not limited to the conduct of hostilities.[81] Consistent with the established framework of international law, the term should be interpreted in accordance with article 49(1) of API and so limited to acts committed during the actual conduct of hostilities. This approach is also consistent with the drafting history of article 8(2)(e)(iv), with a consideration of the Statute as a whole, with the Court's case law and with the principle of legality.

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[78] OTP-Appeal-Brief, para.65.
[79] *Kordić*-Appeals-Judgment, para.90 citing to Commentary API, p.646.
[80] OTP-Appeal-Brief, paras.65-102.
[81] *Contra* OTP-Appeal-Brief, para.106.

III. RESPONSE TO THE SECOND GROUND OF APPEAL: THE TRIAL CHAMBER CORRECTLY DEFINED THE TERM "ATTACK" IN ARTICLE 8(2)(E)(IV) IN RELATION TO MONGBWALU HOSPITAL

48. The Trial Chamber did not err when it decided not to consider the incident at Mongbwalu hospital for the purposes of a conviction under count 17.

A. The Trial Chamber correctly held that article 8(2)(e)(iv) prohibits directing acts of violence against the adversary during the actual conduct of hostilities

49. In so far as the Trial Chamber's determination under count 17 regarding Mongbwalu hospital was reached on the basis that this incident took place after hostilities had ceased[82] and, therefore, on the basis that the first element of article 8(2)(e)(iv) of the Statute (the perpetrator directed an attack) was not met, reference is made to the arguments presented above in response to the Prosecution's first ground of appeal. These arguments apply with equal force to refute the Prosecution's arguments under this second ground of appeal.[83]

50. In relation to the Prosecution's additional arguments made under this second ground in Sections II.A.1 and II.A.2, these are neither compelling nor convincing.

51. In Section II.A.1, the Prosecution makes the unduly complicated argument that the same "special meaning" outlined under the first ground of appeal must be given to the term "attack" when applied to both 'cultural' objects and hospitals within article 8(2)(e)(iv) based on the application of the *ejusdem generis* rule and the need to avoid duplication between the crimes in articles 8(2)(e)(ii) and 8(2)(e)(iv).[84] This argument should be dismissed.

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[82] The incident took place in the "immediate aftermath of the takeover of Mongbwalu" (TJ, paras.512,514).
[83] OTP-Appeal-Brief, paras.112-126.
[84] OTP-Appeal-Brief, paras.114-121.

52. In the first place, the argument relying on the *ejusdem generis* rule ignores the simple and obvious point that the protected objects listed in article 8(2)(e)(iv) mirror exactly those listed in article 27 of the 1907 Regulations (as compared to article 56)[85] save for the addition of "education" – an addition which stems from options first circulated to the drafters in December 1997 and which was retained in the text adopted at the Rome Conference.[86] Thus, there is no need for any reference to be made to the *ejusdem generis* rule to ensure an internally consistent interpretation of the term "attack" within article 8(2)(e)(iv) when applied to 'cultural' objects and hospitals.[87] Article 8(2)(e)(iv) simply requires to be read in light of the fact that it originates in article 27 of the 1907 Hague Regulations and, therefore, "attack" refers to acts of violence committed during the actual conduct of hostilities. This approach ensures that "the *nature* of the protection" which 'cultural' objects and hospitals receive under article 8(2)(e)(iv) is the same.[88]

53. It is noted that, in arguing that the term "attack" should not be given an internally inconsistent meaning in article 8(2)(e)(iv) depending on whether it is being applied to 'cultural' objects or hospitals, the Prosecution appeals to logic and the need to avoid an unsatisfactory conclusion.[89] This is particularly ironic in light of the arguments made by the Prosecution in ground one of the Appeal Brief that the term "attack" in article 8(2)(e)(iv) should be given a meaning which is not only different from its meaning elsewhere in article 8 but depends on a definition taken from a completely different term of art, "act of hostility".

[85] Article 56 does not refer to hospitals or places where the sick and wounded are collected.
[86] Schabas (2017), p.87 citing to War Crimes, pp.4,9 and Decisions, Preparatory Committee, December 1997, pp.6,11.
[87] *Contra* OTP-Appeal-Brief, para.116.
[88] OTP-Appeal-Brief, para.116.
[89] OTP-Appeal-Brief, para.116.

54. As regards duplication, the Prosecution's concerns are unfounded.[90] The Prosecution itself acknowledges the Appeals Chamber's observation that the potential overlap between provisions should be accorded very little weight in the interpretation of article 8(2) of the Statute.[91] In addition, when faced with two laws governing the same factual situation, international courts are well experienced in applying the *lex specialis* rather than the *lex generalis*. But, more importantly, any perceived duplication between articles 8(2)(e)(ii) and 8(2)(e)(iv) is minimal and relates only to buildings and hospitals displaying the distinctive emblems of the Geneva Conventions. In addition to such hospital buildings, article 8(2)(e)(ii) covers "material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions". Article 8(2)(e)(iv) does not cover any of those objects or persons. Instead, in addition to hospitals (a term which when used in this article does not depend on the display of any emblem), it refers to 'cultural' objects plus "places where the sick and wounded are collected".

55. Turning to the argument raised by the Prosecution in Section II.A.2 of the second ground of appeal, the crux of the submission is that "international law requires parties to an armed conflict to respect hospitals at all times in all circumstances".[92] However, the argument that to ensure this aim, article 8(2)(e)(iv) must be interpreted so that it extends beyond the scope originally intended by the drafters to cover acts committed when a hospital is under the control of a party to the armed conflict is misguided.

56. In non-international armed conflicts, **articles 8(2)(e)(ii)** ("Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law") and **8(2)(e)(iv)** in combination with **articles 8(2)(e)(v)** ("Pillaging a town or place, even when taken by assault") and **8(2)(e)(xii)**

[90] OTP-Appeal-Brief, paras.118-121.
[91] OTP-Appeal-Brief, para.119.
[92] OTP-Appeal-Brief, p.49.

("Destroying or seizing property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict") provide the general protection which the Prosecution seeks, namely the protection of hospitals from attacks during the conduct of hostilities and from being destroyed or otherwise put out of action while under the control of a party to the conflict.[93]

57. Indeed, the IHL provisions underlying article 8(2)(e)(xii) ("Destroying or seizing property of an adversary…") include[94] article 34 of Geneva Convention I which concerns the property of aid societies[95] and article 57 of Geneva Convention IV which concerns the requisition of hospitals and their stores.[96] This fact supports the argument that article 8(2)(e)(xii) was also intended as a means of protecting hospitals and medical equipment under the Statute.

58. Given the foregoing, the term "attack" in article 8(2)(e)(iv) should not be interpreted beyond its well understood meaning.

B. The Trial Chamber correctly held that pillaging does not constitute an "attack" within the meaning of article 8(2)(e)(iv)

59. Equally, the Trial Chamber did not err when it held that it did "not consider that pillaging of protected objects, in particular in this case of the Mongbwalu

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[93] OTP-Appeal-Brief, para.124.

[94] Dörmann, pp.260,485. Given the identical elements of the crimes, Dörmann states that his conclusions under article 8(2)(b)(xiii) apply equally to article 8(2)(e)(iv).

[95] Geneva Convention I, article 34 provides:

> The real and personal property of aid societies which are admitted to the privileges of the Convention shall be regarded as private property.
> The right of requisition recognized for belligerents by the laws and customs of war shall not be exercised except in case of urgent necessity, and only after the welfare of the wounded and sick has been ensured.

[96] Geneva Convention IV, article 57 provides:

> The Occupying Power may requisition civilian hospitals only temporarily and only in cases of urgent necessity for the care of military wounded and sick, and then on condition that suitable arrangements are made in due time for the care and treatment of the patients and for the needs of the civilian population for hospital accommodation.
> The material and stores of civilian hospitals cannot be requisitioned so long as they are necessary for the needs of the civilian population.

hospital, is an 'act of violence against the adversary' and consequently, it does not constitute an attack within the meaning of Article 8(2)(e)(iv) of the Statute."[97] The Prosecution's arguments to the contrary should be dismissed on the basis of principle and also on a simple textual analysis of the Statute.[98]

60. In order to put the Prosecution's erroneous arguments in their proper context, two points require to be made at the outset. First, it is important to note that the true aim of the Prosecution's second ground of appeal appears to be to criminalise the appropriation of moveable property, *i.e.*, medical equipment, from Mongbwalu hospital regardless of whether such appropriation was achieved through violent or non-violent means or could arguably serve a military purpose. This aim is revealed by the repeated use of the terms "appropriate" and "appropriation" in this ground.[99]

61. Second, the Trial Chamber's findings in relation to the taking of medical equipment from Mongbwalu hospital are limited. While the Trial Chamber refers at paragraph 514 of the Judgment to the fact that "[t]he UPC/FPLC soldiers…looted medical equipment from the Mongbwalu hospital",[100] in light of the later finding that "[i]n the absence of evidence as to the manner in which these items were used, the Chamber is unable to conclude that their appropriation was intended for private and personal use",[101] the reference to "looting" is misleading and, in fact, incorrect. The Trial Chamber should have used a more neutral term which properly reflected the ultimate finding. In terms of the identity of those who took the items from the hospital, this is based on inference. The Trial Chamber found that "the fact that the UPC/FPLC soldiers were looting in Mongbwalu at the relevant time" means that "the only reasonable conclusion is that the UPC/FPLC also looted the Mongbwalu hospital."[102] No other findings are made regarding the circumstances in which the

[97] TJ, para.1141.
[98] OTP-Appeal-Brief, paras.127-149.
[99] *See, e.g.,* OTP-Appeal-Brief, paras.128,136,137,140,141.
[100] *See also* TJ, para.1032 ("looting of […] medical equipment from the Mongbwalu hospital").
[101] TJ, para.1041.
[102] TJ, fn.1525.

equipment was appropriated, nor what effect, if any, the taking of the equipment had on the hospital. For example, the Trial Chamber does not make any findings regarding who (if anyone) sent the UPC/FPLC to the hospital or why.[103] Nor does the Trial Chamber make any findings about whether the material and stores of Mongbwalu hospital were still necessary for the needs of the civilian population.[104]

62. The Prosecution fails to properly recognise the limited nature of the Trial Chamber's findings. Instead, the Prosecution founds its entire sub-argument in Section II.B.4 ("Article 8(2)(e)(iv) is a crime of conduct, not result") on a series of assertions which have no evidential basis.[105] Specifically, the Prosecution asserts that that the UPC/FPLC were sent to the hospital by Mr Ntaganda or an intermediate perpetrator for the purpose of attacking it, that their presence at the hospital was "hostile" and that the UPC/FPLC soldiers could not be said to have any lawful basis for taking the equipment.[106] None of these assertions are supported by any of the Trial Chamber's findings.[107] The Prosecution's arguments are, therefore, factually as well as legally unfounded.[108]

1. The Prosecution's arguments must be rejected on the basis of principle

63. By arguing that acts of appropriation (whether violent or non-violent) can constitute an "attack" for the purposes of article 8(2)(e)(iv), the Prosecution ignores "the fact that under international humanitarian law not every seizure…is prohibited."[109] In contrast to other provisions which are intended to cover the appropriation of property such as articles 8(2)(a)(iv),[110] 8(2)(b)(xiii)[111] and

[103] OTP-Appeal-Brief, para.146.
[104] This finding would be relevant in terms of assessing the situation under article 57 of Geneva Convention IV.
[105] OTP-Appeal-Brief, paras.146-149.
[106] OTP-Appeal-Brief, paras.143,146,147.
[107] OTP-Appeal-Brief, para.149 and fns.182-183.
[108] The arguments at OTP-Appeal-Brief, paras.146-149 are dependent on these erroneous assumptions.
[109] Dörmann, p.250.
[110] Statute, article 8(2)(a)(iv) criminalises the "[e]xtensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly".

8(2)(e)(xii),[112] article 8(2)(e)(iv) does not include any wording which recognises that under IHL property may lawfully be taken, seized, appropriated or requisitioned in certain circumstances including on the grounds of military necessity.[113] Instead, article 8(2)(e)(iv) only recognises that military objectives can be lawfully attacked. This is inapposite to the appropriation of property and fails to give sufficient recognition to the relevant defences available in IHL to these types of situation.

64. Further, as argued above, in non-international armed conflicts, the Statute currently already adequately protects the ability of hospitals to function according to their dedicated purpose through the combination of articles 8(2)(e)(ii), 8(2)(e)(iv), 8(2)(e)(v) and 8(2)(e)(xii). While article 8(2)(e)(xii), which relates to the destruction or seizure of an adversary's property, requires a result, any actual prejudice suffered by the civilian population as a result of this additional factor is in reality minimal. It relates purely to securing criminal sanctions for all acts of pillage.[114]

2. The Prosecution's arguments must be rejected on the basis of a simple textual analysis

65. Interpreting the term "attack", as it is used in article 8(2)(e)(iv), in the context of the Statute as a whole establishes that it does not extend to the appropriation of property.

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[111] Statute, article 8(2)(b)(xiii) criminalises the "[d]estroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war". Note that the fifth element of the Elements of Crimes for this provision is in the following terms: "The destruction or seizure was not justified by military necessity."

[112] Statute, article 8(2)(e)(xii) criminalises the "[d]estroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict". Note that the fifth element of the Elements of Crimes for this provision is in the following terms: "The destruction or seizure was not justified by military necessity."

[113] *See also* articles 8(2)(b)(xvi) and 8(2)(e)(v) which concern pillage. A footnote in the Elements of Crimes for each of these articles states that "appropriations justified by military necessity cannot constitute the crime of pillaging."

[114] *Contra* OTP-Appeal-Brief, para.135.

66. *First*, unlike "attack", which as the Prosecution contends "refers to an 'act of violence'"[115] (and which the Defence additionally contends must take place *during* hostilities), a violent element need not be present in an act of appropriation. While "no provisions in the G[eneva] C[onventions]…specifically clarify the notion of [the] appropriation of property"[116], it appears to cover the "[t]he exercise of control over property; a taking of possession."[117] Moreover, terms such as "'plunder', 'pillage', 'spoilation', 'looting', 'sacking' and 'exploitation' have been used synonymously or at least interchangeably to refer to the appropriation of property during armed conflict."[118] The term can, therefore, cover various forms of unlawful appropriation but not all involving an element of violence, *i.e.*, plunder.[119] Therefore, the Prosecution is wrong to argue that "attack" – a term which according to article 49(1) of API involves violence and no notion of taking possession or control - can be equated with "appropriation" – a term which does not necessarily involve any element of violence and at core involves taking possession and/or control. The terms are very different.

67. The Prosecution's argument that "an act of violence *may* entail the use of physical force. But not necessarily so"[120] because article 52(1) of API contemplates "capture" as being covered within the term "attack"[121] collapses when it is recognised that the definition of "capture" is "to take someone as a prisoner, or to take something into your possession, *especially by force*".[122]

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[115] OTP-Appeal-Brief, para.127. *Also* para.131.
[116] Dörmann, p.89.
[117] Ambos, p.117.
[118] Ambos, p.117.
[119] *Delalić-et-al*-Trial-Judgment, para.591.
[120] OTP-Appeal-Brief, para.132.
[121] OTP-Appeal-Brief, paras.132-133.
[122] Cambridge Dictionary (available at: https://dictionary.cambridge.org/dictionary/english/capture) (emphasis added).

68. *Second*, when the drafters intended to cover an act of "appropriation", this term was expressly used in the Statute. In this regard, article 8(2)(a)(iv) criminalises the "[e]xtensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly".

69. *Third*, and in a similar vein, the Statute also expressly provides for the protection of moveable property by articles 8(2)(b)(xiii) ("[d]estroying or seizing the enemy's property"), 8(2)(b)(xvi) ("pillag[e]"), 8(2)(e)(v) ("pillag[e]") and 8(2)(e)(xii) ("[d]estroying or seizing the enemy's property").[123] These provisions all refer to "seizure" or "pillage".[124] These terms are more appropriately used to cover the appropriation of moveable property than the term "attack". However, they are not used in article 8(2)(e)(iv). This supports the conclusion that article 8(2)(e)(iv) was not intended to cover the appropriation of moveable items such as medical equipment.

70. This interpretation is supported by commentators on this article who observe that there is a "lack of any specific protection granted to moveable property" under article 8(2)(b)(ix) (which is the international armed conflict equivalent of article 8(2)(e)(iv)).[125] Instead, the commentators note that such protection is afforded via the other sub-paragraphs of article 8 identified above.[126] Indeed, had the drafters actually intended that article 8(2)(e)(iv) extend to the appropriation of moveable property, then provision could have been expressly made using the example of the 1954 Convention.[127] However, no such provision was made in this article.

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[123] Arnold and Wehrenberg, p.419.

[124] Statute, article 8(2)(a)(iv) ("[e]xtensive destruction and appropriation"); article 8(2)(b)(xiii) ("[d]estroying or seizing the enemy's property"); article 8(2)(b)(xiv) ("pillag[e]"); article 8(2)(b)(xxiv); article 8(2)(e)(ii) ("[i]ntentionally directing attacks against buildings, material […]"); article 8(2)(e)(v) ("pillag[e]"); article 8(2)(e)(xii) ("[d]estroying or seizing the property of an adversary […]").

[125] Arnold and Wehrenberg, p.419. *See also* p.560 which states that, due to the identical wording used in both provisions, the commentary provided for article 8(2)(b)(ix) applies equally to article 8(2)(e)(iv).

[126] Arnold and Wehrenberg, p.419.

[127] 1954 Convention, article 1 ("For the purposes of the present Convention, the term 'cultural property' shall cover, irrespective of origin or ownership: (a) movable or immovable property of great importance to the cultural heritage of every people […]"); and article 4.3 ("The High Contracting Parties further undertake to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property. They shall,

71. *Fourth*, contextual support is available for the argument that the term "attack" in article 8(2)(e)(iv) does not cover acts of pillage or appropriation of moveable items. Specifically, article 8(2)(e)(iv) refers to attacks on buildings (where the buildings are dedicated to specified purposes), monuments, hospitals and places. No other object of attack is listed. It is submitted that attacks against these objects must mean attacks on their structural fabric rather than their contents. Had it been the drafters' intention otherwise, it is clear from an analysis of the different terms used elsewhere in article 8 that the provision would have been more expansively drafted and would have included specific wording which made clear that the appropriation or seizure of moveable items was also to be covered. For example, articles 8(2)(b)(xxiv) and 8(2)(e)(ii) refer to "attacks against buildings, material, medical units, and transport, and personnel […]". Similarly, article 8(2)(e)(iii) refers to "attacks against personnel, installations, material, units or vehicles […]". These provisions illustrate that where it was intended that objects other than immoveable structures were to be covered by an article (*i.e.*, buildings and material) or specific moveable items (*i.e.*, material, units or vehicles), specific provision was made for same. In the absence of such precision in the drafting of article 8(2)(e)(iv), it must be assumed from the context that it was not intended to cover any attack against the general contents of the protected object in question.

C. Conclusion

72. In light of the foregoing, the Trial Chamber correctly determined that the incident at Mongbwalu hospital should not be considered for the purposes of a conviction under count 17.

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refrain from requisitioning movable cultural property situated in the territory of another High Contracting Party.")

IV. CONCLUSION

73. For the reasons set out above, the Prosecution's appeal should be dismissed.

RESPECTFULLY SUBMITTED THIS 9TH DAY OF DECEMBER 2019

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