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No.: **ICC-01/04-02/06**
Date: **24 January 2020**

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 Annex A

Defence Response to "Observations of the Common Legal Representative of the Victims of the Attacks on the Prosecution's Appeal against the Trial Judgment", 8 January 2020, ICC-01/04-02/06-2452

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

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

The Office of the Prosecutor
Mrs. Fatou Bensouda
Mr. James Stewart
Mrs. Helen Brady

Counsel for the Defence[1]
Me Stéphane Bourgon, *Ad.E.*
Me Christopher Gosnell
Me Kate Gibson
Me Leigh Lawrie
Me Mélissa Beaulieu-Lussier

Legal Representatives of Victims
Mrs. Sarah Pellet
Mr. Dmytro Suprun

Legal Representatives of 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
Mr. Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

[1] The Defence acknowledges the contribution of Mrs. Clémence Volle-Marvaldi.

I. INTRODUCTION

1. On 8 January 2020, the Common Legal Representative of the Victims of the Attacks ("CLR2") filed his "Observations of the Common Legal Representative of the Victims of the Attacks on the Prosecution's Appeal against the Trial Judgment" ("CLR2 Observations").[2] The CLR2 limited his observations to Ground 1 of the "Prosecution's Appeal Brief" ("OTP-Appeal-Brief").[3]

2. Pursuant to the Appeals Chamber Decision on victim participation,[4] the Defence for Mr. Bosco Ntaganda ("Defence") hereby files its response to the CLR2 Observations. In short, and for the reasons set out below, the CLR2's submissions focussing primarily on the temporal parameters of the term "attack" under article 8(2)(e)(iv) of the Rome Statute ("Statute") should be dismissed.

II. RESPONSE TO THE CLR2 OBSERVATIONS

3. The start end point of any consideration of the CLR2 Observations should be that the CLR2: (i) agrees that "(…) the Defence's position correctly reflects the drafting history and origins of article 8(2)(e)(iv) of the Statute (…)";[5] and (ii) disagrees with the Prosecution's position that "(…) the term 'attack' should be given a 'special meaning' for the purposes of article 8(2)(e)(iv) of the Statute (…)".[6]

4. The CLR2 thus agrees that the origin of article 8(2)(e)(iv) of the Statute, as expressly and deliberately determined by the Statute's drafters, is article 27 of the regulations annexed to the fourth Hague Convention of 1907 ("1907 Hague IV

[2] Observations of the Common Legal Representative of the Victims of the Attacks on the Prosecution's Appeal against the Trial Judgment, 8 January 2020, ICC-01/04-02/06-2452 ("CLR2 Observations").
[3] Prosecution Appeal Brief, 7 October 2019, ICC-01/04-02/06-2432 (OTP-Appeal-Brief).
[4] Decision on victim participation, 8 October 2019, ICC-01/04-02/06-2439, p.4, para.7.
[5] CLR2 Observations, para.10.
[6] CLR2 Observations, para.10.

Regulations"- Section II: Hostilities) and not article 56 found in Section III: Military Authority Over the Territory of the Hostile State.[7]

5. For the reasons set out in the Defence Response, article 27 of the 1907 Hague IV Regulations "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".[8] By properly and fairly acknowledging the limited origins of article 8(2)(e)(iv) of the Statute, the CLR2 reveals that, at core, the approach taken to the interpretation of this provision by both the Trial Chamber and the Defence is correct. The CLR2's conclusion on this point should mean that no further inquiry is necessary.

6. Nevertheless, the CLR2 criticises the Defence's approach as "too simplistic"[9] and "regressive"[10] and argues for a more expansive interpretation of article 8(2)(e)(iv), albeit not as expansive as the Prosecution's interpretation ("that the term 'attack' under article 8(2)(e)(iv) of the Statute should also extend to the entire period "*when the object was under the control of a party to the conflict*"").[11] The CLR2's concerns seem to address a perceived gap in the Statute concerning the protection of cultural objects, places of worship and similar institutions in non-international armed conflicts ("NIAC"), which occur: after an "attack";[12] following the "immediate and physical use of force";[13] after "combat action";[14] after the "launching military action";[15] after "the cessation of the act conduct in question";[16] in the "aftermath of the 'attack' – or [...] 'combat action'";[17] or in relation to "post attack destruction".[18]

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[7] Defence Response to Prosecution Appeal Brief, 7 October 2019 (ICC-01/04-02/06-2432), ICC-01/04-02/06-2449 ("Defence Response"), paras.16-28.
[8] Defence Response, para.19.
[9] CLR2 Observations, para.10.
[10] CLR2 Observations, para.11.
[11] CLR2 Observations, para.39.
[12] CLR2 Observations, para.13.
[13] CLR2 Observations, para.14.
[14] CLR2 Observations, paras.13,28.
[15] CLR2 Observations, para.13.

7. For the following five reasons, the CLR2's concerns are not only misplaced, but the arguments relied on are misconceived.

8. *First*, there is no gap in the Statute regarding the protection afforded to cultural objects, places of worship and similar institutions in NIAC or in international armed conflicts ("IAC") for that matter. In relation to conduct during a NIAC, article 8(2)(e)(xii) of the Statute prohibits "destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict". This is a broadly drafted provision that is not limited to conduct during an "attack". Further, the elements of this war crime are identical to the elements of the corresponding war crime in an IAC (article 8(2)(b)(xiii)),[19] where the term property concerns all kinds of enemy property,[20] including both public and private property.[21] Hence, the specific buildings listed in article 8(2)(e)(iv) clearly fall within the scope of article 8(2)(e)(xii) as property "of an adversary". The CLR2's argument that buildings listed in article 8(2)(e)(iv) are not included in article 8(2)(e)(xii) is inapposite.[22] In fact, given the breadth of article 8(2)(e)(xii), and, thus, the scope of the protective coverage offered by the provision, it is unclear why the CLR2 seeks to dismiss any recourse to this article on the basis that it is not sufficiently specific.

9. As noted in the Defence Response, the combined scope of articles 8(2)(e)(iv) and 8(2)(e)(xii) has been acknowledged by the Prosecution in the *Yekatom and*

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[16] CLR2 Observations, para.25.
[17] CLR2 Observations, para.28.
[18] CLR2 Observations, para.27.
[19] Dörmann K., Elements of War Crimes under Rome Statute of the International Criminal Court (2002), Cambridge University Press ("Dörmann"), p.485 (*See* Annex A).
[20] As Dörmann observes at pp.485-486, "[a]lthough the wording used to define the crime in a non-international armed conflict is slightly different – the term 'property of an adversary' is used instead of 'enemy's property' […] – there are no indications in the ICC Statute or other sources that this offence has different constituent elements in an international or non-international armed conflict."
[21] Dörmann, p.251.
[22] CLR2 Observations, paras.25,32.

Ngaïssona case.[23] Indeed, the Prosecution's reliance on these provisions evinces an implied recognition that: (i) the scope of article 8(2)(e)(iv) is limited and does not cover acts which take place in the aftermath of hostilities; (ii) in light of this limitation, such conduct is covered by article 8(2)(e)(xii); and, more significantly (iii) its previous charging decisions in *Al Mahdi* and *Al Hassan* were wrong.

10. Notwithstanding the Prosecution's approach, it is acknowledged that in *Yekatom and Ngaïssona* Pre-Trial Chamber II confirmed the relevant charge under article 8(2)(e)(iv) alone, finding that "*attacks* against buildings dedicated to religion are specifically criminalised under article 8(2)(e)(iv) of the Statute and that such buildings do not constitute the 'property of an adversary' within the meaning of article 8(2)(e)(xii) of the Statute."[24] However, Pre-Trial Chamber II's finding is unsupported by any legal authority and no further reasoning is provided. Moreover, it is highly significant that neither party in that case nor the Chamber addressed the issue as to whether the destruction of the *Boeing mosque* took place during the conduct of hostilities as a result of an attack or not. Consequently, Pre-Trial Chamber II's bare non-binding finding is neither convincing nor impacts the detailed approach to the proper interpretation of article 8(2)(e)(iv) as set out in the Defence Response.

11. Further, as argued in the Defence Response, the decisions in *Al Mahdi* and *Al Hassan* are out of step with the Court's previous case law interpreting the term "attack" and, such reasoning as these decisions provide to support the difference in approach, is neither sufficient nor compelling.[25] Indeed, interpreting the term 'attack' in article 8(2)(e)(iv) differently from the term 'attack' used in articles 8(2)(e)(i),(ii) and (iii) does not stand scrutiny. Probably for this reason, the CLR2 underscores that the

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[23] Defence Response, para.36 citing to the *Yekatom-Ngaïssona*-Document-containing-the-Charges, para.254.

[24] *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona, 11 December 2019, ICC-01/14-01/18-403-Red, para.96.

[25] Defence Response, paras.10,33-39.

work 'attack' must retain "its ordinary meaning" despite putting forward a novel interpretation of the term.[26]

12. *Second*, even if, *arguendo*, there is a perceived gap in the Statute in the protection afforded to cultural objects, places of worship and similar institutions in a NIAC, then the CLR2's argument that the Statute is "a living legal instrument"[27] that should be interpreted – even in respect to matters directly engaging the criminal responsibility of individuals as opposed to matters of procedure - to give effect to "recent developments in international law",[28] must be dismissed.[29]

13. For the reasons previously set out in the Defence Response (but not addressed in the CLR2 Observations), the proper way to address any perceived *lacunae* is *via* the mechanisms provided to States Parties, as the Court's legislature, in the Statute.[30] Indeed, the whole *raison d'être* of the Working Group on Amendments is to review and consider amendments to the Statute designed "to accommodate the progressive nature of international criminal law".[31] It is through these existing mechanisms that the Statute was most recently amended to make the starvation of civilians a war crime, not only in international armed conflicts under article 8(2)(b)(xxv), but also in NIAC.[32]

14. Further, as also previously argued by the Defence (but not addressed by the CLR2), any interpretation of article 8(2)(e)(iv) must comply with the principle of legality enshrined in article 22 of the Statute.[33] This principle is directly engaged by arguments that statutory provisions dealing with core crimes should be interpreted

[26] CLR2 Observations, para.13.
[27] CLR2 Observations, para.10.
[28] CLR2 Observations, para.10.
[29] CLR2 Observations, para.11.
[30] Defence Response, para.30.
[31] Report of the Working Group on Amendments, Eighteenth session, 3 December 2019, ICC-ASP/18/32, para.10.
[32] Resolution on amendments to article 8 of the Rome Statute of the International Criminal Court, adopted at the 9th plenary meeting, on 6 December 2019, by consensus, Resolution ICC-ASP/18/Res.5.
[33] Defence Response, paras.31-32.

by protocols, such as the Second Hague Protocol, which "post-date[] the adoption of the Rome Statute."[34] The ICTY Appeals Chamber in *Hadžihasanović*, confirmed that "[a]n expansive reading of criminal texts violates the principle of legality, widely recognized as a peremptory norm of international law, and thus of the human rights of the accused."[35] Moreover, as underscored by Judge Van den Wyngaert in *Ngudjolo*, article 22(2)

> obliges the Court to interpret the definition of crimes strictly and prohibits any extension by analogy […]. Indeed, 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.[36]

15. In this regard, the CLR2's reliance on the Second Protocol to the Hague Convention of 1954 ("Hague 1954 Second Protocol") is misplaced. *First*, the Hague 1954 Second Protocol, entered into force on 9 March 2004, was ratified by 82 States, excluding, *inter alia*, the Democratic Republic of the Congo where the crimes in this case were committed. More importantly, the CLR2 fails to consider that articles 15(1)(a) and 15(1)(d) of the Hague 1954 Second Protocol specifically refer to the term 'attack' thereby criminalising the same conduct as that targeted by articles 8(2)(e)(iv) / 8(2)(b)(ix) while article 15(1)(c) criminalizes conduct targeted by articles 8(2)(e)(xii) / 8(2)(b)(xiii). Together, these provisions in the Statute and the Hague 1954 Second Protocol highlight the aim and the will to enhance the protection afforded to cultural objects, places of worship and similar institutions, through a clear prohibition on the launching of attacks as well as on the destruction of such property in other situations.

[34] CLR2 Observations, para.11.
[35] *Prosecutor v. Enver Hadžihasanović*, Case No. IT-01-47-AR72, Decision on interlocutory appeal challenging jurisdiction in relation to command responsibility, 16 July 2003, para.55 (footnote omitted).
[36] *The Prosecutor v. Mathieu Ngudjolo Chui*, Judgment pursuant to Article 74 of the Statute, Concurring Opinion of Judge Christine Van den Wyngaert, 18 December 2012, ICC-01/04-02/12-4, para.18.

16. *Third*, the CLR2's approach to the temporal parameters of the term "attack" under article 8(2)(e)(iv) is unclear and creates uncertainty. What can be discerned from the CLR2 Observations is that he does not agree with either the Prosecution or the Defence regarding the scope of article 8(2)(e)(iv).[37] The CLR2 thus posits that the term attack does *not* include extended periods of occupation or periods when the object was under the control of a party to the conflict *but* nonetheless includes some period following the end of the attack. Against this backdrop, an analysis of the CLR2 Observations reveals confusion and uncertainty as to the end point of an attack pursuant to article 8(2)(e)(iv).

17. Specifically, in the first place, the CLR2 argues that the provision "has to be interpreted in a way that accounts both for combat action and *its aftermath.*"[38] No further explanation is given as to what is meant by the aftermath of the hostilities and how long such period might last, nor is such explanation provided by the jurisprudence referred to in paragraph 39 of the CLR2 Observations. It appears to extend beyond the cessation of combat action but does not "include an undetermined period of control or occupation."[39] The only additional information put forward by the CLR2 in his observations is that the proposed period would somehow be pegged to being "*sufficiently closely related* to the conduct of hostilities".[40]

18. Regardless of what time frame is exactly being proposed, uncertainty is the direct result in so far as the temporal parameters of the term "attack" go beyond that determined by the Trial Chamber. Further, the CLR2's proposal is subject to the same criticisms made in the Defence Response in relation to the Prosecution's interpretation of the term "attack" when used in article 8(2)(e)(iv). Accordingly, the CLR2's approach to interpreting the term "attack" under article 8(2)(e)(iv) by taking into consideration temporal parameters, must be rejected.

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[37] CLR2 Observations, para.39.
[38] CLR2 Observations, para.13.
[39] CLR2 Observations, para.39.
[40] CLR2 Observations, para.15 (emphasis in original). *See also* para.14.

19. *Fourth*, the CLR2 Observations misunderstand the elements of article 8(2)(e)(iv), seeking to side-step the first element of the crime - namely that the perpetrator directed an attack - and move straight to a consideration of the second and third elements under the guise of seeking to give effect to the crime's object and purpose.[41] Such an approach is clearly incorrect. The first essential element of the crime cannot simply be ignored. It must be satisfied before there is any further consideration of the evidence, else a Chamber will engage in a pointless judicial exercise.

20. Further, the arguments which the CLR2 advances in support are based on misunderstandings. It is significant in this regard that Trial Chamber VIII in *Al Mahdi* did not expressly find that the origin of article 8(2)(e)(iv) lies "in the prohibition of wanton destruction of religious, charitable, educational, and historic buildings and monuments."[42] No such analysis was undertaken. Rather, Trial Chamber VIII simply noted the wider legal framework governing the protection of cultural property of which article 8(2)(e)(iv) forms part.[43] In addition, the Trial Chamber's references to "events that occurred in 'the immediate aftermath' of military assaults or in 'the aftermath' of other relevant events for the purpose of its determination"[44] was simply, and properly, in the context of its factual findings or in the context of legal findings for crimes which are not "conduct of hostilities crimes". These findings of the Trial Chamber are, therefore, perfectly explicable and do not support the CLR2's position.

21. *Fifth*, the CLR2 relies to a significant extent on jurisprudence from the ICTY.[45] For the reasons set out in the Defence Response, this jurisprudence is of limited

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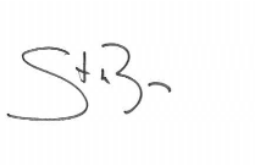
[41] CLR2 Observations, paras.13,21.
[42] CLR2 Observations, para.14.
[43] *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Judgment and Sentence, 27 September 2016, ICC-01/12-01/15-171 ("*Al Mahdi*-Trial-Judgment-171"), para.14.
[44] CLR2 Observations, para.14.
[45] CLR2 Observations, paras.22,23.

relevance.[46] Further, and contrary to the CLR2's assertion,[47] Trial Chamber VIII in *Al Mahdi* expressed identical views, holding that "the jurisprudence of the ICTY is of limited guidance given that, in contrast to the Statute, its applicable law does not govern 'attacks' against cultural objects but rather punishes their 'destruction or wilful damage'. [48] The legal contexts thus differ.

III. CONCLUSION

22. For the reasons set out above, the CLR2 Observations should be dismissed.

RESPECTFULLY SUBMITTED THIS 24TH DAY OF JANUARY 2020



Me Stéphane Bourgon, *Ad.E* Counsel representing Bosco Ntaganda
The Hague, The Netherlands

[46] Defence Response, para.22.
[47] CLR2 Observations, para.23.
[48] *Al Mahdi*-Trial-Judgment-171, para.16.