

**Cour
Pénale
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**International
Criminal
Court**

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No. ICC-01/04-02/06 A2
Date: 18 September 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 PROSECUTOR V. BOSCO NTAGANDA

Public

Observations of Peta-Louise Bagott, pursuant to rule 103 of the Rules of Procedure and Evidence, 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)

Source: Peta-Louise Bagott

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

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A. Overview

1. On 24 July 2020, the Appeals Chamber issued an order inviting expressions of interest under rule 103 of the Rules of Procedure and Evidence (the 'Rules').¹ On 14 August 2020, leave was requested to submit *amicus curiae* observations on the definition of 'attack' in article 8(2)(e)(iv) of the Statute, in accordance with rule 103(1) and pursuant to the Appeals Chamber's Order of 24 July 2020.² On 24 August 2020, the Appeals Chamber granted leave to submit written submissions.³
2. These observations focus on the questions posed in Cluster B. They conclude that that 'attacks' does not have a special meaning in article 8(2)(e)(iv) such that it can be applied outside the conduct of hostilities, nor can it be broadened to include the pillaging of objects from within the buildings, monuments and/or hospitals or destruction of the same.⁴

B. What does 'attack' mean in article 8(2)(e)(iv) of the Statute?

1. 'Attacks' under article 8(2)(e)(iv) are defined in the same way as 'attacks' under international humanitarian law
3. 'Attacks' are not defined either by the Statute or the Elements of Crimes. The chapeau of Article 8(2)(e) explains that the acts in (i) – (xv) constitute "other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law". This is reiterated in the introduction to article 8 in the Elements of Crimes to the

¹ 'Order inviting expressions of interest as *amici curiae* in judicial proceedings (pursuant to rule 103 of the Rules and Procedure and Evidence)', ICC-01/04-02/06-2554, 24 July 2020.

² 'Request of Peta-Louise Bagott for leave to file observations, pursuant to the 'Order inviting expressions of interest as amici curiae in judicial proceedings' of 24 July 2020', ICC-01/04-02/06-2565, 14 August 2020.

³ 'Decision on requests for leave to file observations pursuant to rule 103 of the Rules of Procedure and Evidence' ICC-01/04-02/06-2569, 24 August 2020, para.10.

⁴ *Contra* 'Prosecution Appeal Brief', ICC-01/04-02/06-2432, 7 October 2019, paras.9-28 ('Prosecution Appeal Brief').

Rome Statute.⁵ It states that the elements of war crimes under article 8(2) “shall be interpreted within the established framework of the international law of armed conflict”. As such, recourse of international humanitarian law is required to define ‘attacks’ in accordance with the Statute and the Elements of Crimes.

4. The definition of ‘attacks’ in customary international humanitarian law reflects that of article 49(1) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts 1977 (‘API’) as: “acts of violence against the adversary, whether in offence or in defence”.⁶ The Commentary to article 49(1) emphasises that the acts of violence must amount to “combat action”.⁷ This is elaborated on as, “the use of armed force to carry out a military operation at the beginning or during the course of armed conflict”.⁸
5. The requirement that the acts of violence be committed against an ‘adversary’ prevents article 49(1) from being read to include attacks against the civilian population of any parties to the conflict.⁹ ‘Adversary’ is taken to refer to individuals or entities aligned with, or in an alliance with, a party to a conflict that is adverse or hostile to the perpetrator.¹⁰ This accords with the ordinary definition of the word. Consistent with this approach, the Court itself has defined ‘attacks’ in

⁵ International Criminal Court, Elements of Crimes (2011) *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002* (United Nations publication, Sales No. E.03.V.2 and corrigendum) part II.B (‘Elements of Crimes’).

⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, in force 7 December 1979) 1125 UNTS 3 (‘API’); Claude Pilloud and Jean Pictet, ‘Article 49’ in Yves Sandoz, Christine Swinarski and Bruno Zimmerman (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949: International Committee of the Red Cross* (Martinus Nijhoff 1987) 603 (‘Commentary on the Additional Protocols’); Knut Dörmann, *Elements of War Crimes Under the Rome Statute of the International Criminal Court, Sources and Commentary* (CUP 2003) 150-56, 169, 178-79, 350-51 (‘Dörmann’).

⁷ Commentary on the Additional Protocols, para.1880.

⁸ *ibid.*, para. 1882.

⁹ *ibid.*, para.1890.

¹⁰ *ibid.*, para.1890. See further, *Prosecutor v Germain Katanga*, ‘Judgement pursuant to article 74 of the Statute’ ICC-01/04-01/07-3436-tENG, 7 March 2014, para.892.

article 8(2) with recourse to the definition in article 49(1) in both international and non-international armed conflicts.¹¹

2. 'Attacks' must occur during the conduct of hostilities against an adversary to fall within the ambit of article 8(2)(e)(iv)

6. The Commentary to article 49(1) confirms that 'attacks' undertaken by a perpetrator "on his own territory would not comply with the definition of attack given in paragraph 1" as "though they may be acts of violence, [they] are not mounted 'against an adversary'".¹²
7. Consistent with this, the *travaux préparatoires* highlights the drafters' clear intention to root article 8(2)(e)(iv) in article 27 of the regulations annexed to the fourth Hague Convention of 1907 ('1907 Hague Regulations').¹³ Unlike article 56,¹⁴ article 27 is enshrined in Section II, which relates to prohibited conduct during 'Hostilities'. The drafting history does not support the Prosecutor's contention that article 8(2)(e)(iv) amalgamates, or is derived from both, articles 27 and 54 such that it can read to span 'attacks' directed against buildings, monuments and/or hospitals

¹¹ For example, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, 'Decision on the Confirmation of the Charges', ICC-01/04-01/07, 30 September 2008, para. 267; *Prosecutor v Bahr Idriss Abu Garda*, 'Decision on Confirmation of Charges', ICC-02/05-02/09, 8 February 2010, para. 64; *Prosecutor v Abdullah Banda Abakear Nourain*, 'Corrigendum of the 'Decision on the Confirmation of Charges'', ICC-02/05-03/09, 7 March 2011, para. 61; *Prosecutor v Callixte Mbarushimana*, Decision on the confirmation of charges, ICC-01/04-01/10, 16 December 2011, para. 109.

¹² Commentary on the Additional Protocols, para.1890. See further article 49(2) and 49(3) of API.

¹³ Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) 75 UNTS 287 ('1907 Hague Regulations'). Article 27 is enshrined in Section II, which relates to prohibited conduct during 'Hostilities'. UNGA, 'Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume I,' UN Doc A/51/22 para. 81; Draft consolidated text, UN Doc A/AC.249/1997/WG.1/CRP.2, 4, fn 12; Decisions taken by the Preparatory Committee at its session held from 11 to 21 February 1997, UN Doc A/AC.249/1997/L.5, 4-10; UN Preparatory Committee, Informal Working Paper on War Crimes, UN Doc A/Ac.249/1997/WG.1/CRP.7; UN Preparatory Committee, Informal Working Paper on War Crimes, UN Doc A/AC.249/1997/WG.1/CPR.8; UN Preparatory Committee, Decisions taken by the Preparatory Committee at its session held from 1 to 12 December 1997, UN Doc A/AV.2491997/L9/Rev.1.

¹⁴ Note that article 56 is in Section III, which relates to prohibited conduct in the context of exercising 'Military Authority over the Territory of the Hostile State'.

during the conduct of hostilities *and* once they are under a perpetrators' control.¹⁵ The crime is limited to 'attacks' directed against an adversary during the conduct of hostilities, which is supported by the fact that there must be a nexus between the alleged crime and the conflict.¹⁶

3. 'Attacks' in article 8(2)(e)(iv) does not have a 'special meaning'

8. The drafting history does not support, nor establish, that state parties *intended* 'attacks' to have a "special meaning" within article 8(2)(e)(iv), as distinct from other crimes under article 8(2), such that article 31(4) of the Vienna Convention on the Law of Treaties can be relied on to interpret it.¹⁷ In the absence of a specific indication in either the Statute or the *travaux préparatoires* that the definition of 'attacks' depends on which crime it relates to under article 8(2), there is an un rebutted presumption that 'attacks' in article 8(2)(e)(iv) is interpreted consistently with 'attacks' in other provisions.¹⁸
9. The fact that article 8(2)(e)(iv) protects cultural property does not give rise to an enhanced (special) level of protection for all relevant buildings.¹⁹ Given that the buildings, monuments and/or hospitals referred to can be military objects,²⁰ such that attacks can be justified, any assertion that article 8(2)(e)(iv) affords a special

¹⁵ *Contra* Prosecution Appeal Brief, para.36.

¹⁶ Elements of Crimes, art 8(2)(e)(iv) paras 3, 36. Further, *Prosecutor v Germain Katanga*, 'Judgment pursuant to article 74 of the Statute', ICC-01/04-01/07, 7 March 2014, para. 1776; *Prosecutor v Jean-Pierre Bemba Gombo*, 'Judgment pursuant to article 74 of the Statute', ICC-01/05-01/08, 21 March 2016, para. 142; Guénaél Mettraux, 'Nexus with Armed Conflict' in Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice* (OUP 2009) 435.

¹⁷ *Contra* Prosecution Appeal Brief, paras.29-30.

¹⁸ See R. K. Gardiner, *Treaty Interpretation* (OPIL, 209), p.209.

¹⁹ *Contra* Prosecution Appeal Brief, paras. 69-102.

²⁰ This is defined in article 52(3) of API as objects which "make an effective contribution to military action and whose total or partial destruction, capture or neutralization in the circumstances ruling at the time, offers a military advantage".

status to these is contradicted.²¹ Had the drafters intended to create a regime that afforded enhanced protection, it would have expressly done so.²²

C. Does article 8(2)(e)(iv) cover acts such as pillaging and destruction?

1. Article 8(2)(e)(iv) does not cover pillaging

10. Pillaging is prohibited under article 8(2)(e)(v). The language used in article 8(2)(e)(iv) is consistent with a prohibition on attacks against the physical integrity of the 'buildings', 'monuments', 'hospitals' or 'places', not the pillaging of movables inside.²³ That pillaging has a different mental element supports the clear distinction between the crimes. As set out the Elements of Crimes at paragraph 2, the mental element for pillaging under article 8(2)(e)(v) is the special intent 'to deprive the owner of the property and to appropriate it for personal or private use'. The intent required under article 8(2)(e)(iv) bears no resemblance to this and cannot be read to include it without adopting an interpretation method that would broaden, and distort, the definition of the crime.

2. 'Attacks' under article 8(2)(e)(iv) does not cover acts of destruction

11. Destroying or seizing the property of an adversary is prohibited under article 8(2)(e)(xii). The difference between 'attacks' and 'destroying' in international humanitarian law support the clear distinction between these two words as a

²¹ Compare this with the distinction drawn between general and enhanced protection for objects in API in articles 52 and 53 respectively and 1999 Second Protocol to the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed in Chapters 2 and 3 respectively.

²² *Contra Prosecutor v Ahmad Al Faqi Al Mahdi*, Judgment and Sentence, ICC-01/12-01/15, 27 September 2016, paras. 15-17. See further, William Schabas, 'Al Mahdi Has Been Convicted of a Crime He Did Not Commit' (2017) 49 Case Western Reserve Journal of International Law 1.

²³ Mark Klamberg, 'Commentary on article 8(2)(e)(v)' in Mark Klamberg (ed), *Commentary on the Law of the International Criminal Court* (Torkel Opsahl Academic EPublisher Brussels, Series No.29, 2017) 132-134, fn129; Oscar Uhler and Henri Coursier, 'Commentary on the Geneva Convention relative to the prosecution of civilian persons in time of war of 12 August 1949, Volume IV' (International Committee of the Red Cross, 1958), pp.226-227.

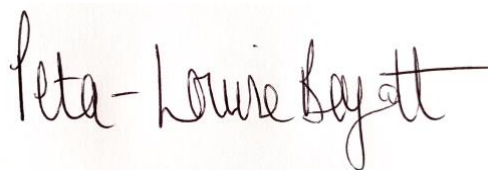
matter of law.²⁴ Article 8(2)(e)(iv) cannot be read to include acts of destruction without expanding the definition of the crime.

D. Would article 8(2)(e)(iv) cover acts committed in the course of a *ratissage* operation, conducted shortly after the takeover of a town?

12. For the reasons outlined above, acts committed in the course of a *ratissage* operation conducted shortly after the takeover of a town would fall outside of article 8(2)(e)(iv). After a town has been taken over and is under the control of the perpetrator, the objects are under their control, and any acts committed against these objects cannot be considered to be combat action against an 'adversary'.

E. Conclusion

13. The Prosecutor's interpretation of 'attacks' under article 8(2)(e)(iv) would require the definition of the crime to be expanded. This extends far beyond the permissible limits of interpretation, as set out in article 22(2), and would violate the principle of *in dubio pro reo*.



Peta-Louise Bagott

Dated this 18th September 2020

At London, United Kingdom

²⁴ Dörmann, pp.249-262; 485-486.