Cour
Pénale
Internationale

International
Criminal
Court

Original: ***English*** *No.: **ICC-01/04-02/06***
Date: **06 October 2020**

THE APPEALS CHAMBER

Before: **Judge Howard Morrison, President**
Judge Chile Eboe-Osuji
Judge Piotr Hofmański
JudgeLuz del Carmen Ibáñez Carranza
Judge Solomy Balungi Bossa

SITUATION IN DEMOCRATIC REPUBLIC OF CONGO

IN THE CASE OF
THE PROSECUTOR v.BOSCO NTAGANDA

Public Document

Amicus Curiae Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence on Behalf of Prof. Christof Heyns, Prof. Stuart Casey-Maslen, Dr Thomas Probert & Mr Fikire Tinsae Birhane (Centre for Human Rights, University of Pretoria)

Source: **Centre for Human Rights, University of Pretoria**

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

The Office of the Prosecutor
Ms. Fatou Bensouda, Prosecutor
Ms. Helen Brady

Counsel for the Defence
Mr. Stéphane Bourgon
Ms. Kate Gibson

Legal Representatives of the Victims
Ms. Sarah Pellet
Mr. Dmytro Suprun

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants (Participation/Reparation)

The Office of Public Counsel for Victims
Ms. Paolina Massidda

The Office of Public Counsel for the Defence

States' Representatives

Amicus Curiae
Mr Roger O'Keefe
Ms Yolanda Gammarra
Centre for Human Rights (University of Pretoria)
Mr Michael A. Newton
The Antiquities Coalition, Blue Shield International and Genocide Watch
ALMA - Association for the Promotion of International Humanitarian Law
Ms Agnieszka Jachec-Neale
Mr Pearce Clancy and Mr Michael Kearney of Al-Haq
Ms Polina Levina and Ms Kaveri Vaid
Public International Law & Policy Group
Ms Peta-Louise Bagott
Mr Geoffrey S. Corn, Mr Richard Jackson, Mr Chris Jenks, Mr Eric Talbot Jensen and Mr James A. Schoettler, Jr.

REGISTRY

Registrar M. Peter Lewis	**Counsel Support Section**
Victims and Witnesses Unit	**Detention Section**
Victims Participation and Reparations Section Mr. Philipp Ambach	**Other**

I. Introduction to arguments

1. In this amicus curiae brief, the Amici sustain the following propositions. First, that the notion of an "attack" in international humanitarian law has a broader meaning when it occurs outside the conduct of hostilities than that stipulated in Article 49 of the 1977 Additional Protocol I.[1] Second, that this broader meaning applies specifically to civilian objects that are specially protected from attack under international humanitarian law (namely, hospitals and cultural property), reflecting the nature of that special protection. Third, that this broader meaning is a longstanding customary rule and that it applies in armed conflict not of an international character as it does in international armed conflict. Fourth and in conclusion, that this customary law definition is duly reflected in Article 8(2)(e)(iv) of the 1998 Rome Statute of the International Criminal Court.

II. The definition of an attack in the conduct of hostilities

2. It is generally accepted that, under international humanitarian law, the definition of "attacks" during the conduct of hostilities is that set out in Article 49(1) of the 1977 Additional Protocol I. Thus: "'Attacks' means acts of violence against the adversary, whether in offence or in defence." This provision is included in Part IV of the Additional Protocol entitled "Civilian population". It is the second of two parts in the Protocol that are devoted to Hague Law, the strand of international humanitarian law that regulates the conduct of hostilities.[2]

[1] Art. 49(1), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I); adopted at Geneva, 8 June 1977; entered into force, 7 December 1978.
[2] Hague Law is found primarily in the instruments of *jus in bello* adopted at the 1899 and 1907 Hague Peace Conferences; in parts of the two 1977 Additional Protocols; and in the 1980 Convention on Certain Conventional Weapons and its annexed Protocols.

3. Although the definition in Article 49(1) is not explicitly endorsed in the study of customary international humanitarian law by the International Committee of the Red Cross (ICRC), which was published in 2005, the Amici believe that it is, without doubt, reflective of custom. Furthermore, although the definition is not included in the section dealing with the conduct of hostilities in the 1977 Additional Protocol II,[3] it may reasonably be taken to apply also in situations of non-international armed conflict. In a similar way, the fundamental principle of distinction, as it pertains to objects, applies in non-international armed conflict as it does in international armed conflict. Thus, Rule 7 of the ICRC Customary Law Study holds that: "The parties to the conflict must at all times distinguish between civilian objects and military objectives. Attacks may only be directed against military objectives. Attacks must not be directed against civilian objects."[4] As the ICRC further specifies, "State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts."[5]

III. The definition of an attack outside the conduct of hostilities

4. The four Geneva Conventions of 1949 reflect Geneva Law, the strand of international humanitarian law that protects persons in the power of the enemy and objects that are under enemy control.[6] The Conventions, most of whose provisions apply only to situations of international armed conflict, do not regulate the conduct of hostilities.[7] Article 3 common to the four Geneva Conventions, which applies in situations of non-international armed conflict, similarly does not regulate the conduct of hostilities.[8]

5. But the notion of an attack applies also in situations regulated by Geneva Law. Specifically, Article 19 of the 1949 Geneva Convention I provides, in part, that: "Fixed establishments and mobile medical units of the Medical Service may in no circumstances be attacked, but shall at all times be respected and protected by the Parties to the conflict."[9] The *travaux préparatoires* for the Convention clarify that the prohibition on "attack", as employed

[3] Arts. 13–17, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II); adopted at Geneva, 8 June 1977; entered into force, 7 December 1978.
[4] Rule 7, ICRC Study of Customary International Humanitarian Law: "The Principle of Distinction between Civilian Objects and Military Objectives", at: bit.ly/2G8to2w.
[5] Ibid.
[6] Jean Pictet, *Humanitarian Law and the Protection of War Victims*, Henry Dunant Institute, Geneva, 1975, p. 16.
[7] Ibid.
[8] N. Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, 2009, p. 28; ICRC commentary on the 1949 Geneva Convention I, 2016, para. 389.
[9] Art. 19, Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; adopted at Geneva, 12 August 1949; entered into force, 21 October 1950.

in Article 19, was introduced in the Conference of Government Experts for the study of the Conventions for the protection of war victims of 14–26 April 1947. Prior to that, the text of the draft provision had only stipulated the duty to "respect and protect" medical establishments and units. But, as the relevant report on the discussions in the Conference explains, "The Commission also desired to state explicitly that medical units and fixed establishments may in no circumstances be attacked, as it was not considered sufficient to say that they should be respected and protected."[10]

6. It is clear, therefore, that the term "attack" was intended to offer the broadest possible protection to medical establishments and units. While the ICRC commentaries of 1952 and 2016 on Article 19 do not address the issue directly, the interpretation the organisation offers of the relevant provisions in Article 19 does reinforce the term's breadth. The 2016 commentary declares that "seizure [of a military medical unit] may impede the functioning of the facility and the continued provision of medical care for the wounded and sick."[11] In addition to the possible seizure of the facility, pillage of the contents of the facility must also fall within the scope of the protection, as this would similarly impede the functioning of the facility and the continued provision of medical care for the wounded and sick. Accordingly, any military action that unlawfully harms a medical unit, including theft of medical material, falls within the scope of a prohibited attack.

7. This broad interpretation is consonant with State practice with respect to Article 19. Switzerland's military manual, for instance, specifies that medical units "shall not be attacked, nor harmed in any way, nor their functioning … impeded, even if they do not momentarily hold any wounded and sick".[12] The military manuals of Benin,[13] Nigeria,[14] Senegal,[15] and Togo[16]

[10] ICRC, *Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims* (Geneva, April 14–26, 1947), Geneva, 1947, available at: bit.ly/2Hwn4Wv, p. 24. The First Commission reporting on the amended text was responsible for assisting the elaboration of the First Geneva Convention. Their recommendation was accepted in 1948 at the Stockholm conference without objection. Draft Article 15 submitted for consideration at the 17th International Conference of the Red Cross, Stockholm, 20–30 August 1948 provided that: "Fixed establishments and mobile hospital units of the Medical Service may in no circumstances be attacked, but shall at all times be respected and protected by the belligerents." Text available at: bit.ly/3jgPbH9.

[11] ICRC Commentary on Article 19, Geneva Convention I, 2016, para. 1800, at: bit.ly/2RJGZTJ.

[12] Swiss Armed Forces, *Lois et coutumes de la guerre*, Bern, 1987, Article 82.

[13] Ministry of Defence of Benin, *Le Droit de la Guerre*, Cotonou, 1995, Part II, p. 8.

[14] Nigeria's 1994 Military Manual provides that: "Specifically protected … establishments … recognised as such must be respected…. Specifically protected establishments shall not be touched or entered". Nigeria, *International Humanitarian Law (IHL)*, Directorate of Legal Services, Nigerian Army, Abuja, 1994, p. 45, para. (f).

[15] Senegal's 1999 Manual on IHL stipulates that: "Medical establishments (hospitals) must be protected and armed persons may not enter them." Senegal, *Le DIH adapté au contexte des opérations de maintien de l'ordre*, Ministry of the Armed Forces, Dakar, 1999, p. 17.

[16] Togo's 1996 Military Manual lists the military and civilian medical services as specially protected objects, stipulating that: "Specially protected establishments shall remain untouched". Chief of Staff of the Armed Forces, *Le Droit de la Guerre*, Lomé, 1996, Part II, p. 8.

stipulate that medical units must remain "untouched". The United States (US) Department of Defense Law of War Manual of June 2015 provides that: "The respect and protection accorded by the [First Geneva Convention] to military medical units and facilities mean that they must not knowingly be attacked, fired upon, or unnecessarily prevented from discharging their proper functions."[17]

8. The broader interpretation of the notion of attack in Geneva Law as applied to specially protected objects is further supported by reference to the protection of cultural property. In its Rule 38 ("Attacks Against Cultural Property"), the ICRC determined that a customary rule applicable in all armed conflict was that: "Special care must be taken in military operations to avoid damage to buildings dedicated to religion, art, science, education or charitable purposes and historic monuments unless they are military objectives."[18] This notion of "military operations" encompasses action taken outside the conduct of hostilities.[19]

IV. The application of the broader definition to specially protected objects

9. The Geneva Law definition of an attack applies only to objects that are the subject of special protection under IHL, namely medical facilities and cultural property. The breadth of the definition is both a critical aspect of that special protection and reflective of it. This results from the humanitarian consequences that may occur as an outcome of theft of medical material from a hospital or of objects taken from a site of cultural heritage. Theft of medical material may lead inexorably to the death of a patient. Theft of a cultural item may engender its irremediable loss to humanity. But neither may necessarily be considered as acts of "violence" under IHL.

10. Considering such actions as an integral part of the Geneva Law definition of an attack is not only consistent with IHL but also with the ICC Trial Chamber's recognition in *Al Mahdi* of "the special status of religious, cultural, historical and similar objects."[20] In its judgment, the Trial Chamber held that "the element of 'direct[ing] an attack' encompasses any acts of violence against protected objects" and that there is no "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."[21]

[17] US Department of Defense, *Law of War Manual*, Washington DC, June 2015, Section 7.10.1.
[18] ICRC Customary IHL Rule 38A: "Attacks Against Cultural Property", at: bit.ly/2GjRKqp.
[19] See, e.g., Art. 3(b), 1977 Additional Protocol I.
[20] *Prosecutor* v. *Al Mahdi*, Judgment and Sentence (Trial Chamber) (Case No. ICC-01/12-01/15-171), 27 September 2016, para. 15. See also the Amicus Curiae brief submitted in the current proceeding by Antiquities Coalition, Blue Shield International, and Genocide Watch, 18 September 2020, para. 5 (of which the Amici had sight due to the extended time limit).
[21] *Prosecutor* v. *Al Mahdi*, Judgment and Sentence (Trial Chamber) (Case No. ICC-01/12-01/15-171), 27 September 2016, para. 15.

Subsequently Pre-Trial Chamber I adopted this definition of "attack" in confirming the charge against Mr Al Hassan under Article 8(2)(e)(iv) of the ICC Statute.[22]

V. The Geneva Law definition of attack as longstanding customary law

11. The broad definition of an attack in Geneva Law is, as has been recalled above, not a recent phenomenon. States negotiating the 1949 Geneva Convention I made clear in 1947 both the importance and the breadth of the prohibition on attacks perpetrated against a military medical unit. Moreover, all States are party to the 1949 Geneva Convention I (and the other three Conventions of 1949), treaties that are generally reflective of customary law.[23] Rule 28 of the ICRC Customary IHL Study holds that medical units "exclusively assigned to medical purposes must be respected and protected in all circumstances".[24]

12. This application of the customary rule prohibiting any form of attacks on medical units and establishments in non-international armed conflict is, as the ICRC has observed, implicit in Common Article 3 to the Geneva Conventions, which requires that the wounded and sick be collected and cared for. This is because the protection of medical units is a subsidiary form of protection afforded to ensure that the wounded and sick receive medical care.[25] The rule that medical units must be respected and protected at all times, and must not be the object of attack, is explicitly set forth in the 1977 Additional Protocol II,[26] a provision that was adopted at the 1977 diplomatic conference by consensus.

13. That the prohibition in customary law applies also in non-international armed conflict is of great importance given that the areas of the conduct of hostilities in such an armed conflict are tightly circumscribed.[27] The International Criminal Tribunal for the former Yugoslavia (ICTY), which observed in respect of IHL that "some of the provisions are clearly bound up with the hostilities and the geographical scope of those provisions should be so limited",[28] rightly applied Geneva Law amid an armed conflict across the whole of the territory of a

[22] ICC, *Prosecutor* v. *Al Hassan*, Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (Pre-Trial Chamber I) (Case No. ICC-01/12-01/18-461-Corr-Red), 13 November 2019, para. 522.
[23] See, *inter alia*, Jean-Marie Henckaerts, "The Grave Breaches Regime as Customary International Law", *Journal of International Criminal Justice*, Vol. 7, No. 4 (September 2009), pp. 683–701.
[24] ICRC Customary IHL Rule 28: "Medical Units", at: bit.ly/2sFDvc0.
[25] Ibid.
[26] Art. 11(1), Additional Protocol II.
[27] This contrasts with the unrestrained scope of application of an international armed conflict. S. Casey-Maslen with Steven Haines, *Hague Law Interpreted: The Conduct of Hostilities under the Law of Armed Conflict*, Hart, Oxford, 2018, pp. 49–50.
[28] ICTY, *Prosecutor* v. *Dusko Tadic a/k/a "Dule"*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995, at: bit.ly/2YR8mzd, para. 68.

warring party. In this respect, it observed that: "the rules contained in [Common] Article 3 also apply outside the narrow geographical context of the actual theatre of combat operations".[29]

14. The customary rule prohibiting attacks against cultural property is similarly applicable in all armed conflicts.[30] As the ICRC recalls, the obligation to take special care to avoid damage to buildings dedicated to religion, art, science, education or charitable purposes and historic monuments, provided they are not used for military purposes, is set forth in many military manuals.[31] It is a rule that extends beyond the conduct of hostilities. It is also a longstanding rule. The Report of the Commission on Responsibility set up after the First World War identified the "wanton destruction of religious, charitable, educational and historic buildings and monuments" as a violation of the laws and customs of war subject to criminal prosecution.[32]

VI. Conclusion

15. The customary war crime codified in the Rome Statute of intentionally directing attacks against "historic monuments" and "hospitals and places where the sick and wounded are collected" should be interpreted in accordance with customary IHL rules. Outside the conduct of hostilities, customary rules dictate that attacks are to be defined broadly as encompassing all military operations in any armed conflict. A violation of the prohibition on attacks against cultural property or medical facilities occurs where, in the course of such operations, either the buildings themselves are damaged or their contents are damaged, stolen, or destroyed.

Prof. Christof Heyns Prof. Stuart Casey-Maslen Dr Thomas Probert Mr Fikire Tinsae Birhane

[29] Ibid., para. 69.
[30] ICRC Customary IHL Rule 38A: "Attacks Against Cultural Property".
[31] The ICRC provides a non-exhaustive list of the following military manuals: Argentina, Australia, Belgium, Burkina Faso, Cameroon, Congo, Dominican Republic, Ecuador, France, Germany, Indonesia, Israel, Republic of Korea, Mali, Morocco, New Zealand, Nigeria, Russian Federation, Senegal, Sweden, United Kingdom, and United States. Ibid., footnote 2.
[32] Annex I ("List of War Crimes"), Item XX, Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, text available at: bit.ly/34dtIc9. See also "Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties", *American Journal of International Law*, Vol. 14, Nos. 1/2 (January–April 1920), pp. 95–154.

Dated this sixth day of October 2020

At Pretoria, South Africa

At [place, country]