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## Amicus Curiae Observations by Public International Law & Policy Group, Situation in the Democratic Republic of the Congo

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**Cour  
Pénale  
Internationale**

**International  
Criminal  
Court**



Original: English

**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  
*THE PROSECUTOR V. BOSCO NTAGANDA***

**Public Document**

***Amicus Curiae* Observations by Public International Law & Policy Group**

**Source:** Public International Law & Policy Group

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

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**The Office of Public Counsel for the  
Defence**

**States' Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

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**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

1. The Public International Law & Policy Group (“**PILPG**”) offers the following *amicus curiae* observations pursuant to the Decision No. ICC-01/04-02/06-2569. PILPG is willing to appear before the Court if it would assist. Prof. Paul R. Williams, Dean Michael P. Scharf, Prof. Milena Sterio, Dr. Brianne McGonigle Leyh, Dr. Julie Fraser, Jonathan Worboys, Eian Katz, Raghavi Viswanath, Nicole Carle, Alexandra Koch, Isabela Karibjanian, and Olivia Wang contributed to these observations.

### 1. Questions (A) (Definitions and Distinctions)

2. While not limited to a single meaning in international law, “*attack(s)*” is defined in Article 49(1) of Additional Protocol I (API) as “*acts of violence against the adversary, whether in offence or in defence.*” The same definition applies to non-international armed conflicts.<sup>1</sup> It is traditionally thought that “*attacks*” occur during the “*conduct of hostilities,*”<sup>2</sup> or the period of armed conflict during which “*combat action*” (the “*methods and means of warfare*”) takes place.<sup>3</sup> However, the meaning of “*attack(s)*” is broader in the context of hospitals and cultural property and, as the Common Legal Representative of the Victims (CLR2) submits,<sup>4</sup> must account for the conduct of hostilities *and* its aftermath. This would include a *ratissage* operation, which is a series of acts committed outside the conduct of hostilities that may include the abduction, assault, or killing of civilians and the ransacking or looting of their dwellings.<sup>5</sup>

3. Rather than the term “*attack(s),*” protections for cultural property in international humanitarian law (IHL) are often defined by reference to “*act(s) of hostility.*”<sup>6</sup> An “*act*

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<sup>1</sup> International Committee of the Red Cross (“ICRC”), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987), ¶ 4783 (“ICRC Commentary of 1987”).

<sup>2</sup> ICRC, *Commentary of 1987*, ¶ 1880.

<sup>3</sup> ICRC, *International Law on the Conduct of Hostilities: Overview* (2010). *See also* ICRC, *Handbook on International Rules Governing Military Operations*; Robert Kogod Goldman, *International Humanitarian Law: Americas Watch’s Experience in Monitoring Internal Armed Conflicts*, 9 Am. U. Int’l. L. Rev. 49, 73 (1993).

<sup>4</sup> Observations of the Common Legal Representative of the Victims of the Attacks on the Prosecution’s Appeal against the Trial Judgment, ¶ 15 (“CLR2 Brief”).

<sup>5</sup> Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06, Summary of Trial Chamber VI, Judgment, ¶ 34 (Jul. 8, 2019).

<sup>6</sup> Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict art. 4, May 14, 1954 (“1954 Hague Convention”); APII art. 16.

of hostility” is broader in temporal and substantive scope than an “attack,” limited neither by the adversarial element nor the ordinary association with the conduct of hostilities,<sup>7</sup> and thus inclusive of *ratissage* operations.

## 2. Questions (B) (Meaning of Article 8(2)(e)(iv))

### **Sub-question (1): the term “attack(s)” in Article 8(2)(e)(iv) of the Statute extends further in time than in other Articles and includes *ratissage* operations.**

4. Four compelling reasons support an interpretation of “attack(s)” that extends beyond the conduct of hostilities and includes *ratissage* operations.

5. *First*, the “established framework of international law,” which shapes the meaning of all subparagraphs in Article 8(2)(e),<sup>8</sup> protects hospitals and cultural property<sup>9</sup> well beyond the hostilities phase of armed conflict. Under IHL, such properties are protected “at all times”<sup>10</sup> and against all “act[s] of hostility,”<sup>11</sup> meaning all substantially detrimental “act[s] arising from the conflict.”<sup>12</sup> The drafters of Additional Protocol II (APII) were especially concerned to prevent retaliatory action taken against hospitals or cultural property during post-hostilities *ratissage* operations, as illustrated by an earlier version of Article 16 stating that such properties “must not be made the object of reprisals.”<sup>13</sup> This same concern is reflected in the final language of Article 16, which broadly protects cultural property against “acts of hostility,” as opposed to the narrower protection against “attacks” granted to other forms of property in APII.<sup>14</sup>

<sup>7</sup> ICRC, *Commentary of 1987*, ¶ 2070 (“An act of hostility must be understood as any act arising from the \* conflict which has or can have a substantial detrimental effect on [ ] protected objects”).

<sup>8</sup> Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06, Judgment, ¶ 53 (Jun. 15, 2017).

<sup>9</sup> As the Prosecution observes, hospitals and cultural property must be treated identically under Article 8(2)(e)(iv). Prosecution Appeal Brief, No. ICC-01/04-02/06-2432, 7 October 2019 (the “Prosecution Brief”), ¶¶ 109, 116. Conclusions drawn as to the scope of protection afforded to one are therefore equally applicable to the other.

<sup>10</sup> APII art. 11. See also ICRC, *Customary IHL Database* Rule 28 (2005) (finding that hospitals are protected under customary IHL “in all circumstances”).

<sup>11</sup> 1954 Hague Convention art. 4; APII art. 16.

<sup>12</sup> ICRC, *Commentary of 1987*, ¶ 2070.

<sup>13</sup> Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, *Report on the Work of the Conference*, Second Session, vol. 1, ¶ 2494 (Jul. 1972).

<sup>14</sup> APII art. 15.

6. *Second*, a textualist study of the origins of Article 8(2)(e)(iv) and a review of the relevant drafting history lead to the conclusion that “*attack(s)*” was intended to include *ratissage* operations. The language of Article 8(2)(e)(iv) is sourced largely from two provisions of the 1907 Hague Regulations: Article 27, which applies during “*sieges and bombardments*,” and Article 56, which applies during occupation. While the Defence contends that by 1997 the drafters of the Statute had ceased considering Article 56,<sup>15</sup> an ICRC analysis presented by several States to the Preparatory Commission in 1999 acknowledges its continued influence on Article 8(2)(e)(iv).<sup>16</sup>

7. Even if it is accepted, *arguendo*, that Article 56 was “*dropped*” from the negotiations of Article 8(2)(e)(iv), the term “*attack(s)*” nonetheless extends further than the Defence asserts based on a close reading of the language of Article 27 alone. A key point not developed in the briefs is that “*sieges*<sup>17</sup> and *bombardments*”<sup>18</sup> are each subclasses of the umbrella category of “*attacks*.” The shift from “*sieges and bombardments*” in Article 27 to “*attacks*” in Article 8(2)(e)(iv) thus represents a conscious choice to expand the scope of protection beyond the conduct of hostilities. This interpretation is also bolstered by the conceptual similarity between “*sieges*” and *ratissage* operations, both of which connote continuous action in areas where hostile forces have assumed elements of effective control not necessarily amounting to an occupation.<sup>19</sup>

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<sup>15</sup> Defence Response to Prosecution Appeal Brief, 7 Oct. 2019 (ICC-01/04-02/06), No. ICC-01/04-02/06-2449, 9 Dec. 2019 (the “Defence Response”), ¶ 20.

<sup>16</sup> Preparatory Commission for the International Criminal Court, *Request from the Governments of Belgium, Costa Rica, Finland, Hungary, the Republic of Korea, South Africa and the Permanent Observer Mission of Switzerland to the United Nations regarding the text prepared by the International Committee of the Red Cross on article 8, paragraph 2 (e) (i), (ii), (iii), (iv), (ix) and (x), of the Rome Statute of the International Criminal Court*, Preparatory Commission for the ICC at 19, UN Doc. PCNICC/1999/WGEC/INF/2/Add.3 (Nov. 24, 1999).

<sup>17</sup> Gloria Gaggioli, *Are Sieges Prohibited under Contemporary IHL?*, EJIL:Talk! (Jan. 30, 2019); Emanuela-Chiara Gillard, *Sieges, the Law and Protecting Civilians*, CHATHAM HOUSE at 8 (Jun. 2019).

<sup>18</sup> That “*bombardment*” is a type of “*attack*” is evident from the phrase “*attack by bombardment*,” which appears in API art. 51(5)(a) and was proposed for adoption in APII but ultimately rejected. Draft APII submitted by the ICRC to the Diplomatic Conference leading to the Adoption of the Additional Protocols, art. 26(3)(a).

<sup>19</sup> Emanuela-Chiara Gillard, *Sieges, the Law and Protecting Civilians*, CHATHAM HOUSE at 8 (Jun. 2019) (commenting that a siege is defined by control over “entry and egress from a particular area, and thus movement in and out of weapons and ammunition, supplies and people”). See also CLR2 Brief, ¶ 35.

8. **Third**, the object and purpose of the Rome Statute supports an interpretation of “*attack(s)*” in Article 8(2)(e)(iv) that includes *ratissage* operations, even if the same term is interpreted otherwise elsewhere in the Statute. Counter to the Defence position,<sup>20</sup> the Court’s adoption of the API Article 49(1) definition of “*attack(s)*” with respect to other provisions of the Statute need not determine its approach to the specific instance of Article 8(2)(e)(iv). The Statute features many terms with contextually variant meanings, such as “*torture*,”<sup>21</sup> “*conduct*,”<sup>22</sup> and “*jurisdiction*.”<sup>23</sup> When competing interpretations exist, the principle of effectiveness counsels the selection of the one that best fulfils the treaty’s object and purpose,<sup>24</sup> which in this case is to safeguard the international-law protections for hospitals and cultural property.

9. **Fourth**, a broader conception of “*attack(s)*” is required in order to avoid leaving a chronological gap in IHL protections for hospitals and cultural property during the intermediate phase of conflict (during which *ratissage* operations frequently occur) between the conclusion of the conduct of hostilities and the formal onset of occupation. The ICTY has allowed that such a gap may exist for property generally, but not for civilians.<sup>25</sup> The heightened IHL protections afforded to hospitals and cultural property *vis a vis* other classes of property, though, suggest that this gap should not be permitted to persist under Article 8(2)(e)(iv) either. This argument is

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<sup>20</sup> Defence Response Brief, ¶¶ 10–11.

<sup>21</sup> Compare International Criminal Court, *Elements of Crimes* art. 7(1)(f) (2013) with International Criminal Court, *Elements of Crimes* art. 8(2)(a)(ii)-1, 8(2)(c)(i)-4 (2013).

<sup>22</sup> Michail Vagias, *The Territorial Jurisdiction of the International Criminal Court: Certain Contested Issues* (2011) (published Ph.D. thesis, Bynkers Hoek Publishing) at 113–14, 120 (commenting that Arts. 30–31 endorse the “act theory” understanding of “conduct” whereas Art. 12(2)(a) potentially admits the converse “ubiquity principle”).

<sup>23</sup> Britta Lisa Krings, *The Principle of ‘Complementarity’ and Universal Jurisdiction in International Criminal Law: Antagonists or Perfect Match?* 4 Goettingen J. Int’l. L. 737, 754–56 (2012) (commenting that the concept of “*jurisdiction*” as used in Art. 17 may be inclusive of universal jurisdiction whereas it is limited in Art. 12 to personal and territorial jurisdiction).

<sup>24</sup> International Law Commission, *Reports of the International Law Commission on the second part of its seventeenth session and on its eighteenth session*, vol. II, ¶ 6, UN Doc. A/6309/Rev.1 (1996).

<sup>25</sup> Prosecutor v. Naletilić, Judgment, Case No. IT-98-34-T, ¶¶ 216–22 (Mar. 31, 2003) (ruling that, unlike protections for individuals under the Geneva Conventions, protections for property under occupation do not apply until territory is “actually placed under the authority of the hostile army”).

substantively similar to the CLR2's "*sufficiently close[ ] relat[ion]*" test,<sup>26</sup> and offers further support for arriving at the same conclusion.

**Sub-question (2): the term "*attack(s)*" in Article 8(2)(e)(iv) covers acts such as pillaging and destruction.**

10. There are three significant grounds that support recognizing that the substantive scope of "*attack(s)*" under Article 8(2)(e)(iv) includes pillaging and destruction.

11. *First*, reading "*attack(s)*" to include pillaging and destruction comports with the object and purpose of the Rome Statute and the established framework of international law. The drafting history of Article 8(2)(e)(iv) of the Rome Statute is replete with evidence of the drafters' intention to incorporate the heightened protections accorded to hospitals and cultural property under the 1907 Hague Regulations and the 1954 Hague Convention.<sup>27</sup> The IHL prohibition of vandalism and demolition of cultural property,<sup>28</sup> which applies during non-international armed conflict under customary law,<sup>29</sup> forms an integral part of this protective regime, as the ICTY has recognized.<sup>30</sup>

12. *Second*, pillaging of cultural property as an "*attack*" under Article 8(2)(e)(iv) is categorically distinct from the crimes of pillaging and destruction of civilian objects under Articles 8(2)(e)(v) and 8(2)(e)(xii) and therefore recognized as *lex specialis*.<sup>31</sup> In contrast to Articles 8(2)(e)(v) and (xii), Article 8(2)(e)(iv) captures a different sort of

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<sup>26</sup> CLR2 Brief, ¶ 15.

<sup>27</sup> Preparatory Committee for the International Criminal Court Proceedings (Mar.-Apr. 1996), ¶ 41; UN Doc.A/CONF.183/C.1/SR.4, ¶¶ 44, 48, 62, 63, 64; UN Doc. A/CONF.183/C.1/L.4; UN Doc. A/CONF.183/C.1/SR.5, ¶¶ 66, 81. The drafters were careful not to confine the protections to only those properties designated by States. See UN Doc. A/CONF.183/C.1/SR.5, ¶ 66.

<sup>28</sup> 1954 Hague Convention art. 4(3).

<sup>29</sup> ICRC, *Customary IHL Database* Rule 52 (2005). This is also a binding treaty obligation for 86 State parties to the Rome Statute who have signed the 1954 Hague Convention.

<sup>30</sup> UN Security Council, *Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended \* on 17 May 2002)* art. 3(d), 25 May 1993; Prosecutor v. Blaškić, Appeals Chamber, Judgment, Case No. IT-95-14-A, ¶ 533 (Jul. 29, 2004); Prosecutor v. Kordić & Čerkez, Trial Chamber, Judgment, Case No. IT-95-14/2-T (Feb. 26, 2001). In some cases, the ICTY has also characterized destructive acts against cultural property as "*attacks*." See Prosecutor v. Strugar, Trial Chamber, Judgment, Case No. IT-01-42-T, ¶¶ 446, 461 (Jan. 31, 2005).

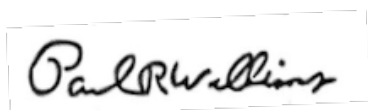
<sup>31</sup> Prosecutor v. Strugar, Appeals Chamber, Judgment, Case No. IT-01-42-A, ¶ 277 (Jul. 17, 2008); Prosecutor v. Al Mahdi, Judgment and Sentence, Case No. ICC-01/12-01/15, ¶ 16 (Sept. 26, 2016).



injury,<sup>32</sup> which the Court in *Al Mahdi* (Reparations Order) described as a “moral harm” in light of its effect on the human community at large.<sup>33</sup> In order to give effect to this “communal dimension”<sup>34</sup> inherent to cultural property, therefore, a wide reading of Article 8(2)(e)(iv) that includes pillaging and destruction should be given.

13. **Third**, an expansive reading of “attack(s)” is compatible with an evolutionary interpretation of international law. With the advent of cyber-attacks, there is increasing support for the view that attacks do not require violent physical effects,<sup>35</sup> provided they cause or intend to cause loss of functionality.<sup>36</sup> The ICRC has found that disabling communication functions of critical infrastructure or cutting off electricity supply from a hospital would qualify as “attacks.”<sup>37</sup> Analogously, acts that substantially inhibit hospitals and cultural property from performing their societal functions—such as pillaging and destruction—can qualify as “attacks.”

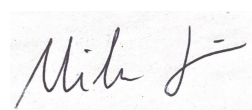
**For the Public International Law & Policy Group:**



Professor Paul R. Williams



Professor Michael P. Scharf



Professor Milena Sterio

Dated: 18 September 2020

Done at Washington D.C. and Cleveland, Ohio

<sup>32</sup> Consequently, cumulative charging under Art. 8(2)(e)(iv) and Art. 8(2)(e)(v) or 8(2)(e)(xii) will not breach the “fair labeling” requirements of the Rome Statute. See Glanville Williams, *Convictions and Fair \* Labelling*, 42 Cambridge L.J. at 85 (1983).

<sup>33</sup> Prosecutor v. Al Mahdi, Reparations Order, Case No. ICC-01/12-01/15, ¶¶ 14–15, 84–86 (Aug. 17, 2017). Compare Hadžihasanović & Kubura, Trial Chamber, Judgment, Case No. IT-01-47-T, ¶ 63 (Mar. 15, 2006) with Hadžihasanović & Kubura, Trial Chamber, Judgment, Case No. IT-01-47-T, ¶ 49 (Mar. 15, 2006).

<sup>34</sup> Serge Brammertz et. al., *Attacks against cultural heritage as a weapon of war*, 14 J. of Int’l. Crim. Just. 1143, 1154 (2016). See also UNESCO World Heritage Convention arts. 5(a), 6(1), Nov. 16, 1972.

<sup>35</sup> ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of \* the Wounded and Sick in Armed Forces in the Field*, ¶¶ 255–56 (2nd ed., Cambridge Univ. Press 2016) (on Common Article 2.); See *Tallinn Manual 2.0*, ¶¶ 10–12 at 417–18 (Cambridge Univ. Press 2017) (on Rule 92).

<sup>36</sup> ICRC, *International humanitarian law and the challenges of contemporary armed conflict* (Oct. 31, 2015) at 41; Law of War Manual, ¶ 16.5.1 (U.S. Department of Defense 2015).

<sup>37</sup> ICRC, *The potential human cost of cyber operations* (May 29, 2019) at 73; S.C. Res. 2286 (May 3, 2016); See \* also S.C. Res. 1988 (Jun. 17, 2011).