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THE APPEALS CHAMBER

Before: **Judge Howard Morrison, Presiding Judge**
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

Prosecution Appeal Brief

Source: **Office of the Prosecutor**

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Introduction

1. Trial Chamber VI convicted Bosco Ntaganda of all 18 counts of crimes against humanity and war crimes with which he was charged, including: murder; intentionally directing attacks against civilians; rape; sexual slavery; persecution; pillage; forcible transfer and ordering the displacement of the civilian population; conscripting and enlisting children under the age of 15 years into an armed group, and using them to participate actively in hostilities; intentionally directing attacks against protected objects; and destroying the property of the adversary.[1] These crimes were largely committed by UPC/FPLC troops—including personally by Mr Ntaganda[2]—in the course of two operations directed against the civilian population,[3] as part of a common plan among military leaders of the UPC/FPLC to attack and to expel persons of Lendu ethnicity from certain locations in Ituri.[4] In the Prosecution's submission, these convictions are not only entirely safe and reliable, but they are also just, and the Prosecution will defend them in these appeal proceedings.

2. Notwithstanding the quality and reliability of the Judgment overall, close analysis reveals that the Trial Chamber made two discrete errors of law when it considered Mr Ntaganda's responsibility for intentionally directing attacks against protected objects (count 17), under article 8(2)(e)(iv) of the Statute. As a consequence, it acquitted Mr Ntaganda of responsibility for the attack on the church at Sayo,[5] and the hospital at Mongbwalu.[6]

3. While these incidents may seem relatively minor given the gravity and variety of conduct for which Mr Ntaganda was otherwise found guilty, they illustrate important matters of legal principle. As such, confirming and clarifying the law on these points will not only be of general importance for the practice of this Court, but will contribute to the better protection of the victims of armed conflict around the world.

Submissions

4. Relevant to the purposes of this appeal, international humanitarian law recognises two categories of objects which must be given special respect, in addition to the general protection afforded to all civilian objects. These are 'cultural' objects (in the sense of

[1] Judgment, Disposition. For full citations of all references, *see* Public Annex A.
[2] Judgment, paras. 740, 749.
[3] Judgment, para. 1199. *See also* para. 690.
[4] Judgment, paras. 808-811.
[5] Judgment, paras. 1142, 1144.
[6] Judgment, paras. 1141, 1144.

buildings dedicated to religion, education, art, science and charitable purposes, and historic monuments),[7] and hospitals and places for the collection of the sick and wounded. Importantly, these obligations of respect—which have been recognised by States for well over a century—have come to include not only the obligation to refrain from targeting such objects in the conduct of hostilities, but *also* the obligation to refrain from deliberate harmful conduct when such objects fall under the control of a party to the armed conflict. While these obligations may initially have been seen as distinct, they have in the past 50 years been recognised as two sides of the same coin.

5. Likewise, these obligations must be understood in a manner which is consistent with the infinitely varied nature of armed conflict and which may be equally applied irrespective of the differing capabilities of potential belligerents. Consequently, there is no distinction in law between the harmful use of a missile or of a pickaxe. Nor can there be any distinction between obviously 'destructive' conduct of this kind and the demolition of an object by taking it apart, or indefinitely disabling it by destroying its ability to perform its function. What matters is the propensity of the conduct in question to destroy or otherwise damage the physical integrity or effective functioning of the object.

6. By failing to acknowledge these principles, the Trial Chamber misinterpreted article 8(2)(e)(iv) of the Statute in both its spheres of application—with respect to the protection it extends to 'cultural' objects (in this case, the church at Sayo), *and* the protection it extends to hospitals and places where the sick and wounded are collected (the hospital at Mongbwalu). While the protections of 'cultural' objects and hospitals have different antecedents in international law, as these submissions explain, they have nonetheless evolved to arrive at a similar legal position. It is thus unsurprising that they share a single provision of the Statute in article 8(2)(e)(iv), and in its counterpart applicable in international armed conflict, article 8(2)(b)(ix).

7. Indeed, by making article 8(2)(e)(iv) a single distinct offence, the drafters of the Statute not only gave effect to the established framework of international law but also ensured that

[7] For the purpose of this brief, as a matter of drafting convenience, the term "'cultural' object" will be used to refer to the various objects identified in article 8(2)(e)(iv) of the Statute which may be said to have cultural significance—this may include buildings dedicated to religion, education, art, science or charitable purposes and historic monuments. While these objects may all have cultural significance, the Prosecution acknowledges that this is broader than the concept of "cultural property" or "cultural heritage" developed for specific purposes such as the 1954 Hague Convention or the World Heritage Convention, respectively, which impose additional obligations upon States beyond those in the 1907 Hague Regulations. *See also below e.g.* paras. 31-32, 35, 42, 49, 51, 57, 67, 72-73, 79-81, 83, 88, 92-94, 96.

the distinct values underlying the protection of 'cultural' objects and hospitals were suitably enforced by the Statute. By this means, the drafters recognised the insufficiency of mere residual protection of these objects as civilian objects, or otherwise as protected property once under the control of the adverse party to the conflict. Such limited protection would fail adequately to stigmatise, and potentially to deter, conduct of this grave kind.

8. The hardships of modern warfare underline the vital importance of the broad obligations to respect 'cultural' objects and hospitals, and the need for their more consistent and clear application. Recent decades have seen widespread violence—in theatres of conflict around the world—against hospitals, schools, monuments, mosques and churches. Such 'cultural' objects may not always be famous; for example, they may not have a distinct aesthetic or cultural significance which extends beyond their local community. But this does not diminish the distinctive, crucial role that they play in the fabric of human society, even if only within the community in which they are situated, or their vulnerability to attack. Conversely, even if certain 'cultural' objects have come to be disdained by their immediate community, they may yet be of such value that they form part of the heritage of a people or even of the whole world. And attacks on healthcare providers have become so frequent, and are so deleterious, that they are now recognised as "one of the greatest humanitarian problems of contemporary armed conflict."[8]

9. For all these reasons, in its first ground of appeal, the Prosecution argues that the Trial Chamber failed to recognise that the term "attack" in article 8(2)(e)(iv) has a "special meaning", in the sense of article 31(4) of the Vienna Convention. As such, and unlike the majority of other provisions of article 8 using this term, an "attack" for the purpose of article 8(2)(e)(iv) is *not* limited to the conduct of hostilities. This is fully consistent with the established framework of international law concerning the protection of 'cultural' objects. While the Trial Chamber seemed to acknowledge the relevance of this law, it was misapplied. It thus erroneously reached a conclusion which would entail the meaning of the term "attack" in article 8(2)(e)(iv) *varying even within the provision*, depending on the particular object in question. In reaching this conclusion, the Trial Chamber also departed from the existing caselaw of the Court.

10. The Trial Chamber's misinterpretation of the meaning of the term "attack" led it to conclude that the UPC/FPLC's conduct at the church in Sayo did not satisfy the first element

[8] Heffes, p. 227.

of article 8(2)(e)(iv). For this reason, it terminated its analysis. However, if it had correctly interpreted the term "attack" for the purpose of article 8(2)(e)(iv), and had therefore proceeded to consider the remaining elements of this crime, as it should, it would also have convicted Mr Ntaganda for this incident.

11. In its second ground of appeal, the Prosecution argues that the special meaning of the term "attack" in article 8(2)(e)(iv) also applies to hospitals and other places where the sick and wounded are collected. Again, this interpretation is compelled by the established framework of international law concerning the protection of hospitals and similar places. The Trial Chamber further erred in this context by assuming that the conduct encompassed by the term "attack" cannot include the removal of critical items from an object which are essential to its ability to pursue its dedicated function—specifically, by assuming that a hospital can remain a hospital if the medical equipment is removed from it.

12. As a consequence of the Trial Chamber's misinterpretations of the term "attack", it concluded that the UPC/FPLC's conduct at the hospital in Mongbwalu did not satisfy the first element of article 8(2)(e)(iv). For this reason, it terminated its analysis. However, if it had correctly interpreted the term "attack" for the purpose of article 8(2)(e)(iv), and had therefore proceeded to consider the remaining elements of this crime, as it should, it would also have convicted Mr Ntaganda for this incident.

13. For all these reasons, the Prosecution requests the Appeals Chamber to confirm the applicable law, and to reverse the Trial Chamber's findings that the conduct of the UPC/FPLC concerning the church at Sayo and the hospital at Mongbwalu did not fall under the first element of article 8(2)(e)(iv). It should then exercise its powers under article 83(2)(a) to enter the additional and limited findings of fact required by article 8(2)(e)(iv) and convict Mr Ntaganda for these additional incidents. It should also adjust the sentence imposed upon him accordingly.

I. THE TRIAL CHAMBER ERRED IN LAW WHEN DEFINING AN "ATTACK" ON 'CULTURAL' OBJECTS UNDER ARTICLE 8(2)(E)(IV) (FIRST GROUND OF APPEAL)

14. On or about 24 November 2002, Mr Ntaganda oversaw the assault on Sayo,[9] in the aftermath of which UPC/FPLC fighters "set up a base inside the church in Sayo; […] broke the doors […], removed the furniture, dug trenches around the church, and started a fire inside to prepare their food".[10] The Trial Chamber terminated its legal analysis of this incident simply because it "took place sometime after the assault, and therefore not during the actual conduct of hostilities", which in its view meant that "the first element of Article 8(2)(e)(iv) is not met."[11]

15. The Trial Chamber concluded that conduct punishable under article 8(2)(e)(iv) must take place in the course of hostilities based on its view that "the term 'attack'" in article 8(2)(e)(iv) "is to be understood as an 'act of violence against the adversary, whether in offence or defence'.[12] As it had previously set out, and correctly for those other purposes, this definition of "attack" does indeed apply to *other* provisions of article 8(2)(e) which contain that term, such as article 8(2)(e)(i):

> Having regard to the established framework of international law, the Chamber notes that the crime as described in Article 8(2)(e)(i) of the Statute is based on Article 13(2) of Additional Protocol II. This protocol does not define attacks, but Additional Protocol I does, and the term is considered to have the same meaning in Additional Protocol II. 'Attack' must therefore be understood within the meaning of Article 49 of Additional Protocol I as 'acts of violence against the adversary, whether in offence or defence'.[13]

16. Yet the Trial Chamber was wrong to equate the term "attack" in articles 8(2)(e)(i) and (iv) in this way.[14] While it may be reasonable to presume that similar terms in a treaty *might* have similar meanings, such a presumption must nonetheless be approached critically, and confirmed by reference to factors such as the context and the object and purpose of the

[9] Judgment, para. 500.
[10] Judgment, para. 526.
[11] Judgment, para. 1142.
[12] Judgment, para. 1136.
[13] Judgment, para. 916.
[14] *See* Judgment, para. 1136 (fn. 3146, cross-referring to paragraph 916).

treaty.[15] To the extent the Trial Chamber sought to carry out this analysis—insofar as it did expressly recognise that specific and different rules apply to "cultural objects"—it nonetheless erred in doing so.

17. It is true that the Trial Chamber acknowledged, correctly, that it must take into account "the established framework of international law".[16] It not only took this into account in interpreting article 8(2)(e)(i) but, in the context of article 8(2)(e)(iv), it also expressly acknowledged the particular rules applying to the protection of 'cultural' objects, stating:

> In respect of the war crime of attacking protected objects, the Chamber's 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 the attack. It notes that the protection of such objects under IHL is based on different underlying rules.[17]

18. From this passage, it appears that the Trial Chamber understood article 8(2)(e)(iv) to allow for *two* different interpretations of the term "attack". For the objects expressly identified in article 8(2)(e)(iv), in *ordinary circumstances*, it considered that these are protected from an "attack" only in the same sense as article 8(2)(e)(i), that is, during the conduct of hostilities. But for a narrower category of objects in article 8(2)(e)(iv)—those enjoying a "*special status*"—it seemed to recognise that they were protected from "attacks" in a broader sense, beyond that in article 8(2)(e)(i) (the conduct of hostilities). In other words, the Trial Chamber understood article 8(2)(e)(i) to contain both *a general rule and a special rule*. It interpreted the term "attack" consistently with article 8(2)(e)(i) for the general rule, but allowed that this might be different for the special rule.

19. This reasoning was erroneous. There is no basis in the Statute or in the established framework of international law to consider that article 8(2)(e)(iv) contains two definitions of "attack", depending on whether or not the object in question might be said to have a "special status"—a concept which, indeed, the Statute doesn't mention at all. Rather, when properly interpreted, the *whole* of article 8(2)(e)(iv) constitutes a special rule insofar as the objects to

[15] *See e.g.* Gardiner, p. 209 (observing with reference to the *Rhine Chlorides* case that there is a non-absolute presumption—in other words, a rebuttable presumption—that a treaty is consistent in the way it uses its terms, and noting that "[i]n the absence of any specific indication in a treaty that a term has a particular meaning in a specific part of the treaty (such as a definition provision for a particular part), *it is both the immediate context and the wider context which will be significant determinants of the meaning*", emphasis added). *See further below e.g.* paras. 24-25, 29-31.
[16] *See further below* para. 24.
[17] Judgment, para. 1136 (fn. 3147, emphasis added).

which it refers enjoy a particular regime of protection which is different from civilian objects and property under the control of the adverse party. For this reason, it is unsurprising that the term "attack" in article 8(2)(e)(iv) must be accorded a special meaning, in the sense of the Vienna Convention, which is different from its meaning elsewhere in article 8, such as in article 8(2)(e)(i).

20. Consequently, the following paragraphs will first set out the principles leading to the correct interpretation of article 8(2)(e)(iv), including with reference to the established framework of international law. It will then address the distinct considerations informing the distinctions drawn in relevant treaties concerning particular kinds of cultural property, and explain why those distinctions are inapposite in determining criminal liability under the Statute.

I.A. Article 8(2)(e)(iv) prohibits directing acts of violence against 'cultural' objects, irrespective whether or not they occur in the conduct of hostilities

21. When interpreted properly according to the principles of the Vienna Convention,[18] as consistently required by the Appeals Chamber,[19] the Prosecution submits that article 8(2)(e)(iv) only requires that the perpetrator directed an act of violence against a protected object, irrespective of whether this occurred in the conduct of hostilities or when the object was under the control of a party to the conflict. In this way, the term "attack" in article 8(2)(e)(iv) is to be attributed a special meaning, in the sense of article 31(4) of the Vienna Convention, which is different from its meaning in other provisions such as article 8(2)(e)(i).

22. Article 8(2)(e)(iv) simply prohibits, "within the established framework of international law":

> Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives.

23. Likewise, the material Elements of Crimes state without qualification:

> 1. The perpetrator directed an attack.

[18] *See* Vienna Convention, art. 31.
[19] *See e.g.* *[Redacted]* Appeal Decision, para. 56; *Ruto* Summonses Appeal Decision, para. 105; *DRC* Extraordinary Review Appeal Decision, para. 33; *Lubanga* Appeal Judgment, para. 277.

2. The object of the attack was one or more buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals or places where the sick and wounded are collected, which were not military objectives.

24. Previously in this case, the Appeals Chamber held that the incorporation of the "established framework of international law" in the *chapeau* of article 8(2)(e) means that the Court may have "recourse to customary and conventional international law regardless of whether any lacuna exists [in the specific provision of article 8(2)(e)], to ensure an interpretation of article 8 […] that is fully consistent with, in particular, international humanitarian law."[20] The Court "cannot be precluded" from reference to general international humanitarian law in interpreting war crimes under article 8(2)(e) "irrespective of whether this requires ascribing to a term in the provision a particular interpretation or reading an additional element into it".[21]

25. Accordingly, while the Prosecution recognises that the relevant legal texts do not expressly define the concept of "attack" for the purpose of article 8(2)(e)(iv), nor provide any overt indication that it may differ from other usages in the Statute (such as article 8(2)(e)(i)), the Court is nonetheless required to consider this question in the context of the established framework of international law.

26. Indeed, this is just what the Trial Chamber did in *Al Mahdi*—the Court's leading case on the application of article 8(2)(e)(iv). In reasoning which was not addressed by the Trial Chamber in this case,[22] the *Al Mahdi* Trial Chamber considered that:

> The special protection of cultural property in international law can be traced back to Articles 27 and 56 of the 1907 Hague Regulations and to the 1919 Commission on Responsibility, which identified 'wanton destruction of religious, charitable, educational, and historic buildings and monuments' as a war crime. The Geneva Conventions also recognised the need for special protection of objects—like

[20] Jurisdiction Appeal Decision, para. 53.
[21] Jurisdiction Appeal Decision, para. 54. *See also* para. 55; Jurisdiction Decision, para. 45; *Abu Garda* Confirmation Decision, para. 64.
[22] *See* Judgment, para. 1136 (fn. 3147). The *Ntaganda* Trial Chamber was clearly aware of *Al Mahdi*, and its relevance, since it cited that case as authority for the less contentious proposition that article 8(2)(e)(iv) only requires the "launch[ing]" of an attack, and does not require proof of resulting damage or destruction: Judgment, para. 1136 (fn. 3148). The Prosecution also directed the Trial Chamber to *Al Mahdi* as an authority: Prosecution Response to Defence Closing Brief, para. 26. *See also* *Al Mahdi* Trial Judgment, para. 13 ("this is the first case in which the Court is applying [a]rticle 8(2)(e)(iv)").

> hospitals—which are already protected as civilian objects. Subsequent international instruments reflect the enhanced protection of cultural property, including Additional Protocols I and II to the Geneva Conventions and the Second Protocol to the Hague Convention of 1954.
>
> 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.
>
> Moreover, existing case-law from other cases pertaining to attacks against civilian populations does not offer guidance. The Statute protects persons and cultural objects differently. Persons are protected by many distinct clauses that apply during hostilities, after an armed group has taken control, and against various and specific kinds of harm. However, cultural objects in non-international armed conflicts are protected as such, not generically as civilian objects, only in Article 8(2)(e)(iv), which makes no distinction between attacks made in the conduct of hostilities or afterwards. […][23]

27. Nor does the reasoning of the *Al Mahdi* Trial Chamber stand alone. The *Al Mahdi* Trial Chamber's approach was also consistent with the approach of the *Al Mahdi* Pre-Trial Chamber in confirming the charge in that case. Although its reasoning was concise, it had similarly interpreted the term "attack" to mean "act[] of hostility" in the broader sense of the 1954 Hague Convention and Additional Protocols I and II.[24] As the following paragraphs explain, the "act of hostility" concept is a term of art to indicate that cultural property may not be subject to *any* deliberate act of violence, building upon the broad protections established by the combination of articles 27 and 56 of the 1907 Hague Regulations and their predecessors.

[23] *Al Mahdi* Trial Judgment, paras. 14-16.
[24] *Al Mahdi* Confirmation Decision, para. 43 ("The Chamber is satisfied that acts of hostility such as those carried out […] were certainly adequate to result in destroying or at least severely damaging the targeted buildings. Accordingly, they constitute 'attacks' within the meaning and for the purpose of article 8(2)(e)(iv) of the Statute"). *See further below* paras. 43, 45, 50, 52-53.

28. More recently, *Al Mahdi* has been followed by the *Al Hassan* Pre-Trial Chamber. While the Pre-Trial Chamber noted the Judgment in this case,[25] it nonetheless concluded—and rightly—that an attack for the purpose of article 8(2)(e)(iv) includes all acts of violence against the protected objects irrespective whether they occur in the conduct of hostilities or once the object has come under the control of a party to the conflict.[26]

I.A.1. The term "attack" in article 8(2)(e)(iv) has a "special meaning" for the purpose of the Vienna Convention

29. As a starting point, the Prosecution acknowledges that, while the ordinary meaning of "attack" may imply any violent act,[27] international humanitarian law has generally come to define the term as an "act of violence against the adversary", as articulated in article 49(1) of Additional Protocol I,[28] or (informally) as a "combat action".[29] This is the sense in which "attack" is generally used in article 8 of the Statute.[30] Correspondingly, in describing acts of violence *outside* the conduct of hostilities, it is also true that typically other terms are used.[31] Conduct 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 terms.[32]

30. In the Prosecution's submission, however, the use of the term "attack" in article 8(2)(e)(iv) constitutes an exception to this general approach, reflecting a special meaning which is necessary to give effect to the broader prohibition in international humanitarian law which this crime was intended to implement.[33] Nor would this be the only occasion on which the drafters of the Rome Statute decided to use the term "attack" for purposes other than conduct occurring in the conduct of hostilities: for example, they also did so in articles 7(1)

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[25] *Al Hassan* Confirmation Decision (Confidential), para. 521. The Prosecution notes that the public redacted version of this decision has not yet been issued, but that the confirmation of the charge under article 8(2)(e)(iv) has been made public: *Al Hassan* Confirmation Press Release.
[26] *Al Hassan* Confirmation Decision (Confidential), para. 522.
[27] *See e.g.* *Merriam-Webster Dictionary*, 'attack, v'; *Oxford English Dictionary*, 'attack, v'.
[28] *See e.g.* Additional Protocol I, art. 49(1); *Katanga* Trial Judgment, paras. 797-798.
[29] AP Commentary, p. 603 (mn. 1880).
[30] *See* Statute, arts. 8(2)(b)(i), 8(2)(b)(ii), 8(2)(b)(iii), 8(2)(b)(iv), 8(2)(b)(xxiv), 8(2)(e)(i), 8(2)(e)(ii), 8(2)(e)(iii).
[31] *See e.g.* Statute, arts. 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").
[32] Statute, arts. 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).
[33] *See* Vienna Convention, art 31(4).

and 7(2)(a). In that context, the special meaning of the term "attack" in article 7 was subsequently clarified in the Elements of Crimes (stating that an "attack" in that context "need not constitute a military attack").[34] But the absence of such an express clarification with regard to article 8(2)(e)(iv) is not dispositive. Rather, the same conclusion can and must be drawn on the basis of the established framework of international law, as required by the *chapeau* of article 8(2)(e), and the context of the Statute more broadly, as well as its object and purpose. Only by attributing a special meaning to the term "attack" in article 8(2)(e)(iv) will the Court fulfil the intentions of the drafters of the Statute and interpret the provision consistently with the established framework of international law.

I.A.2. The statutory context confirms the special meaning of the term "attack" in article 8(2)(e)(iv)

31. Notwithstanding the apparent meaning of its plain terms, the special meaning to be afforded to the term "attack" in article 8(2)(e)(iv) is established by the established framework of international law and the context of the Statute more generally. As a provision which is intended to establish *additional* protection for certain objects under the Statute, including but not limited to cultural property and to hospitals (as further explained below[35]), it is necessary to ensure that this protection is meaningful in all relevant contexts. In particular, as such objects are protected under international law from deliberate acts of violence not only in the conduct of hostilities but also when under the control of a party to the conflict, it is necessary and appropriate to interpret the Statute accordingly. The existence of alternative general offences, which apply to all kinds of property, does not justify an unduly narrow interpretation of the scope of article 8(2)(e)(iv) since this would defeat its purpose in recognising the distinct nature of criminal interference with the objects to which the provision relates.

I.A.2.a. The established framework of international law requires a special meaning for the term "attack" under article 8(2)(e)(iv)

32. The chapeau of article 8(2)(e) specifically requires that all crimes under this provision are interpreted "within the established framework of international law", ensuring that these war crimes must be applied consistently with international humanitarian law more generally. Particularly 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

[34] Elements of Crimes, art. 7, Introduction, para. 3.
[35] *See below* paras. 114-126.

subsequent endorsement of that approach for the protection of cultural property in the 1954 Hague Convention and the 1977 Additional Protocols. This legal framework, as a whole, make clears that the objects listed in article 8(2)(e)(iv)—including but not limited to those objects which may be described as "cultural property" under international law—are protected not only from "attacks" which take place during the conduct of hostilities, but more widely.

I.A.2.a.i. The 1899 and 1907 Hague Regulations protect relevant objects both in the conduct of hostilities and while under occupation

33. The terms of article 8(2)(e)(iv) were principally based on articles 27 and 56 of the 1907 Hague Regulations, and of the 1899 Hague Regulations, which were materially similar.[36] Specifically, article 27 of the 1907 Hague Regulations, under a chapter headed "Hostilities", provides that:

> In sieges and bombardments, all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not being used at the time for military purposes.

34. Article 56 of the 1907 Hague Regulations, under a chapter headed "Military authority over the territory of the hostile State" (*i.e.*, occupation), 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.

35. These protections are distinct but complementary. They provide seamless protection at least for buildings dedicated to religion, art, science, and charity, and historic monuments—in other words, objects which may be termed 'cultural' objects, and which formed the basis for subsequent treaty-making with regard to certain kinds of "cultural property"—whether in the conduct of hostilities or when under the control of a party to the conflict.

[36] Al Mahdi Trial Judgment, para. 14. *See further* 1899 Hague Regulations; 1907 Hague Regulations.

36. While it is evident that the formulation of the particular terms of article 8(2)(e)(iv) was based on article 27 of the 1907 Hague Regulations,[37] it is accepted by the vast majority of commentators that article 8(2)(e)(iv) is "derived" from[38] or "based on"[39] or "originates in"[40] *both* articles 27 *and* 56 of the Hague Regulations, and at least consistent with the more specialised provisions of the Additional Protocols and the 1954 Hague Convention, as discussed below.[41] Dörmann states, in this context, that article 56 "must be read in connection with Art. 27".[42] Even Schabas, who seems now to be the leading proponent for reading article 8(2)(e)(iv) as giving effect only to article 27 of the 1907 Hague Regulations, wrote as recently as 2016 that he was of the view that article 8(2)(e)(iv) gives effect to *both* articles 27 and 56.[43]

37. The drafting history of article 8(2)(e)(iv) further tends to support the position that the prohibition was intended to be informed holistically by the approach of articles 27 *and* 56 of the 1907 Hague Regulations. By contrast, there is no 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, nor is there any obvious reason why they would have wished to do so. Even if it were to be established that an individual State had such a desire, for the sake of argument, this is not dispositive: what is material for the interpretation of the Statute is the *collective intention* of the drafters.[44]

38. The original 1994 draft of the Rome Statute produced by the International Law Commission ("ILC") drew upon the ICTY Statute and its own 1991 Code of Crimes against the Peace and Security of Mankind,[45] which are broadly reminiscent of articles 56 and 27 of the 1907 Hague Regulations, respectively. While the ICTY Statute prohibits the "seizure of,

[37] *See e.g.* Schabas (2017), p. 88; Fenrick, p. 214; Bothe, p. 409.
[38] Dörmann, pp. 216, 458; Arnold and Wehrenberg, p. 417.
[39] Pfirter, p. 162.
[40] Schabas (2016), p. 267. *See also* Achou.
[41] Pfirter, p. 162; Dörmann, p. 459; Arnold and Wehrenberg, pp. 417; Bothe, pp. 409, 422.
[42] Dörmann, pp. 217, 459.
[43] *Compare* Schabas (2016), p. 267 ("The prohibition originates in article 27 and 56 of the 1907 Hague Regulations", citing Achou), *with* Schabas (2017), p. 84 ("In finalising article 8, [the drafters] quite deliberately used article 27, *not* article 56, as the model [for articles 8(2)(b)(ix) and 8(2)(e)(iv)]", emphasis added).
[44] *See e.g. Ruto* Rule 68 Decision, para. 18. *See further Qatar v. Bahrain* (Jurisdiction and Admissibility), Opinion of Judge Schwebel, p. 27 ("'The intention of the parties', in law, refers to the common intention of both parties. It does not refer to the singular intention of each party which is unshared by the other. To speak of 'the' intention of 'the parties' as meaning the diverse intentions of each party would be oxymoronic"); *Iron Rhine* Arbitration, p. 63 (para. 48: declining to rely, for the purpose of interpreting a treaty, on material showing "the desire or understanding of one or other of the Parties at particular moments in the extended negotiations" but which "do not serve the purpose of illuminating a common understanding"). *See also* Gardiner, p. 113.
[45] *See* 1994 ILC Draft Statute, pp. 38-40, *especially* p. 39 (paragraphs (8)-(9)). *See also* 1991 ILC Draft Code, pp. 94-97.

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",[46] the Code of Crimes prohibits "wilful *attacks* on property of exceptional religious, historical or cultural value".[47] Perhaps in this way, the terminology of "attack" first entered the relevant lexicon, but in the context of a provision which was attempting to update the language of article 27 of the 1907 Hague Regulations (which referred to "sieges and bombardments"). Significantly, notwithstanding its use of the term "attack", the ILC explained that it still intended to preserve the approach in article 53 of Additional Protocol I[48]—that is to say, an approach which applies both to the conduct of hostilities *and* occupation, as explained below,[49] just like the combined effect of articles 27 and 56 of the 1907 Hague Regulations.

39. By 1996, while the ILC had indeed *dropped* the language of "attack" in preference for the formulation in article 56 of the 1907 Hague Regulations,[50] national delegations to the ICC Preparatory Committee continued to express the view that the Statute should include "sufficiently serious violations of the Hague law, with references being made to the 1907 Hague [Regulations] and the 1954 Hague Convention […]."[51]

40. Ultimately, in 1997, the Preparatory Committee advanced two alternative formulations.[52] One was expressly said to be based on the formulation of article 27 of the 1907 Hague Regulations (with somewhat updated language).[53] The other was based on the much more restrictive formulation of article 85(4)(d) of Additional Protocol I (which effectively seeks to apply the "special protection" regime of the 1954 Hague Convention).[54]

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[46] ICTY Statute, art 3(d).
[47] 1991 ILC Draft Code, pp. 94-97, art 22(f). Concerning the problematic notion of "exceptional" value, *see further below e.g.* paras. 42, 49, 65, 67, 73, 79-81, 83, 88, 92-93, 96.
[48] *See* 1991 ILC Draft Code, p. 106 (explaining in paragraph (11) that the proposed formulation "should be read in the light of […] the relevant rules of international law applicable in armed conflicts", and that "[i]t should be noted in this connection that article 53 of [Additional Protocol I] prohibits 'any acts of hostility […]', using 'such objects in support of the military effort' and making 'such objects the object of reprisals'", and that "[p]rotection of cultural property in an armed conflict is also a matter covered by the Hague Convention").
[49] *See below* paras. 50, 52-54.
[50] 1996 ILC Draft Code, p. 53 (art. 20(e)(iv): "[s]eizure of, destruction of, or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science"). *See also* p. 55 (explaining in paragraph (13) that this provision "would cover, *inter alia*, the cultural property protected by the [1954 Hague Convention]" and that the proposed formulation was "based on the Charter of the Nürnberg Tribunal […] and the statute of the [ICTY]").
[51] Preparatory Committee Proceedings (March-April 1996), para. 41. *See also* Preparatory Committee Report (1996), para. 81. On the approach of the 1954 Hague Convention, *see further below* paras. 42-48.
[52] *See e.g.* Preparatory Committee Decisions (February 1997), pp. 8-9, 11 (proposing in 'War Crimes', draft articles B(2)(d) and B(4)(1), two alternative formulations, both using the term 'attack').
[53] Preparatory Committee Decisions (February (1997), pp. 8-9 (fn 20). *See also* Schabas (2017), pp. 86, 88.
[54] Preparatory Committee Decisions (February (1997), p. 8 (draft article B(2)(d), first variant; *see also* fn. 18). On article 85(4)(d) of Additional Protocol I, *see further below* para. 55.

In this fashion, the word "attack" now featured in both alternatives. Yet the essence of the question for the drafters was whether the Statute should take the broader approach of the Hague Regulations or the narrow approach of the special protection regime of the 1954 Hague Convention. In choosing the broader approach,[55] the drafters were therefore *not* choosing between giving effect to article 27 *or* article 56 of the 1907 Hague Regulations. Rather, although the formulation was loosely based on article 27, it would have necessarily been understood that it reflected the scope of *both* provisions. Indeed, the only words taken directly from article 27 related to the objects to be protected—and the term "attack", as previously explained, seems not to have been intended in its typical 'in the conduct of hostilities' sense.[56]

41. In any event, and notwithstanding the implication of the drafting history that article 8(2)(e)(iv) was intended to reflect both articles 27 and 56 of the 1907 Hague Regulations, it is also important to observe the essentially fruitless nature of drawing a material distinction between them in light of the subsequent developments in international law. Illustrating this point, the ICTY has consistently interpreted article 3(d) of its Statute—which is modelled on article 56 of the 1907 Hague Regulations—to establish jurisdiction not only over conduct falling under article 56, but also conduct falling under article 27 of the Hague Regulations, and indeed article 4 of the 1954 Hague Convention. As such, even though article 56 of the 1907 Hague Regulations relates to situations of occupation, the ICTY has entered convictions under this provision for attacks in the conduct of hostilities.[57]

I.A.2.a.ii. The 1954 Hague Convention implements the holistic approach of the 1907 Hague Regulations by prohibiting any "act of hostility" against protected "cultural property"

42. As previously noted,[58] the drafters of the Statute were also mindful of the approach taken in the 1954 Hague Convention with respect to certain kinds of cultural property. Specifically, article 1 of the 1954 Hague Convention restricts its application to "cultural property" to include "movable or immovable property of great importance to the cultural

[55] This choice was perhaps unsurprising, given the significant and largely unexplained restrictions which were set on article 85(4)(d) of Additional Protocol I. These difficulties had clearly also been recognised by States since this appears to have been one of the factors contributing to the development of the 1999 Second Protocol to the Hague Convention: *see e.g.* Lostal (2017a), pp. 30-31.
[56] *See above* para. 38.
[57] *See e.g.* *Strugar* Trial Judgment, paras. 298-312, 317, 327-330, 446, 461. These findings were undisturbed on appeal: *Strugar* Appeal Judgment.
[58] *See above* para. 39.

heritage of every people".[59] As such, it relates to a subset of the immovable objects protected by the 1907 Hague Regulations: a restriction which the drafters did *not* choose to incorporate in the Statute. Yet in any event the subset is not necessarily very small—it has been convincingly argued that the cultural property included under article 1 of the 1954 Hague Convention is not to be understood as cultural property of universal importance (such as that which may qualify for the World Heritage List[60]) but rather that it is for States Parties themselves to define the objects they consider to constitute their cultural heritage.[61] This may be "tens of thousands of immovables and millions of movables in each state".[62] Moreover, since the 1954 Hague Convention refers to a "people", rather than for example to a "State" or "nation", it may be that States must also take this consideration into account.

43. Significantly, article 4 provides for broad obligations to respect and protect cultural property, including materially:

> (1) The High Contracting Parties undertake to respect cultural property situated within their own territory as well as within the territory of other High Contracting Parties by refraining from any use of the property and its immediate surroundings […] which are likely to expose it to destruction or damage in the event of armed conflict; and by refraining from any act of hostility directed against such property.
>
> (2) […]
>
> (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 refrain from requisitioning movable cultural property situated in the territory of another High Contracting Party.
>
> (4) […].[63]

44. This broad provision—which applies equally in international and non-international armed conflict[64]—is significant in a number of respects.

[59] 1954 Hague Convention, art. 1.
[60] *See below* para. 92.
[61] *See generally* O'Keefe (1999), *especially e.g.* p. 55 ("Under the 1954 Hague Convention […], the term 'cultural property' refers to the full gamut of each high contracting party's national cultural heritage, as defined by that party itself"). *See also* O'Keefe (2006), pp. 103-111, 143; Chamberlain, pp. 24-25.
[62] O'Keefe (1999), p. 55.
[63] 1954 Hague Convention, art. 4.

45. First, the term "act of hostility" is a broad term which is not limited to the conduct of hostilities, but encompasses all acts of violence.[65] This is consistent with the general obligation in article 4(1) of the 1954 Hague Convention for States Parties to "respect cultural property situated within their own territory as well as within the territory of other High Contracting Parties", as well as the prohibition on any use of cultural property which may expose it to danger. In this context, it makes abundant sense that *all* violent acts against cultural property are prohibited. The reference to "hostility" conveys the notion that such acts must factually "aris[e]" from the armed conflict[66]—rather than constituting a legal qualification to the nature of the act itself, it is at most similar to the nexus to the armed conflict which is required for liability under article 8 of the Statute.

46. Second, article 4(3) imposes positive obligations on States Parties to prevent the "vandalism" of cultural property. Necessarily, such a positive obligation implies that States are no less prohibited—under article 4(1)—from carrying out such acts themselves.

47. Third, article 4 applies not only in the conduct of hostilities, but also when a State Party has become an occupying power over the territory of another State Party. This is implied by article 4(3), which prohibits the requisitioning of cultural property in the territory of another State Party—a course of action which could only arise in the context of occupation. This interpretation is confirmed by article 5, which addresses details concerning the practical exercise of a State's obligations under the 1954 Hague Convention, in the circumstances of occupation, but does not itself address in primary terms what those obligations may be.[67] Such obligations are contained in article 4.[68]

48. The approach of the 1954 Hague Convention therefore underlines, in the context of cultural property, that international law prohibits all acts of violence against such property, with a nexus to an armed conflict, irrespective whether they occur in the conduct of hostilities or not. It thus confirms and is consistent with the broad nature of the obligations under

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[64] *See* 1954 Hague Convention, art. 19(1).
[65] *See also below* para. 53.
[66] AP Commentary, p. 647 (mn. 2070). *Contra* Chamberlain, p. 29.
[67] *See also* 1999 Second Protocol to the Hague Convention, art. 9.
[68] *See also* O'Keefe (2006), p. 259 ("Every obligation of respect mandated by the [1954 Hague] Convention and Second Protocol is applicable as much to belligerent occupation as to active hostilities"); Forrest, p. 89 (under article 4(1) of the 1954 Hague Convention, "States Parties […] have a primary obligation to refrain from any act of hostility against cultural property situated within their own territory as well as within the territory of other States Parties").

articles 27 and 56 of the 1907 Hague Regulations (applying to a broader range of objects), with which it may overlap in material part.

I.A.2.a.iii. The Additional Protocols implement the holistic approach of the 1907 Hague Regulations and the 1954 Hague Convention by prohibiting any "act of hostility" against cultural property and places of worship

49. The Additional Protocols further confirm the approach of the 1907 Hague Regulations and the 1954 Hague Convention. Not only do they establish similar prohibitions on acts of violence to cultural property, which are not limited to the conduct of hostilities, but they also illustrate that these do not only apply to cultural property but other objects identified in articles 27 and 56 of the 1907 Hague Regulations, such as places of worship. They also confirm that such obligations apply equally in international and non-international armed conflict.

50. Notwithstanding the general definition of "attack" (confined to the conduct of hostilities) which is set out in article 49(1) of Additional Protocol I, article 53 of the same Protocol (emphasis added) provides that:

> Without prejudice to the provisions of the [1954 Hague Convention] and of other relevant instruments, it is prohibited:
>
> a) to commit any *acts of hostility* directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples;
>
> b) […].[69]

51. Like the 1954 Hague Convention, article 53 of Additional Protocol I does not apply to all of the objects enumerated in article 27 of the 1907 Hague Regulations, but only those which meet a certain threshold of importance.[70] Notwithstanding minor differences in

[69] Additional Protocol I, art. 53.
[70] AP Commentary, p. 646 (mn. 2064: "objects whose value transcends geographical boundaries, and which are unique in character and are intimately associated with the history and culture of a people"). *See also* pp. 647 (mn. 2067: recalling that the diplomatic conference "rejected the idea which was put forward by some delegations of including any and all places of worship, as such buildings are extremely numerous and often only have a local renown of sanctity which does not extend to the whole nation"), 1469 (mn. 4840).

terminology with the 1954 Hague Convention, "the basic idea" is said to be "the same".[71] Additionally, however, article 53 introduces the notion of "spiritual heritage" (with regard to places of worship) in addition to "cultural heritage", with the result that the factors material to these assessments may be somewhat different from one another.[72] Again, similar to the 1954 Hague Convention, this assessment is not intended to reflect any kind of universal value but rather the assessment of value for a "people".[73]

52. The prohibition of "acts of hostility" in article 53 of Additional Protocol I is highly significant. If the drafters had intended to say "attack" (which they had defined as relating to the conduct of hostilities just four articles earlier), they presumably would have done so. Instead, by using a different term, they appear to have consciously *rejected* limiting this provision to the conduct of hostilities. By selecting the term "act of hostility", it is also apparent that they understood the 1954 Hague Convention to have similar import.

53. The ICRC commentary to article 53 confirms this understanding, and considers that the term "act of hostility" refers to "any act arising from the conflict which has or can have a substantial detrimental effect on the protected objects".[74] It also cites with approval three academic commentators, who write:

> With respect to subpara. (a), the use of the term 'acts of hostility' instead of 'attacks' indicates that the prohibition is applicable to a Party's *own* very important cultural and spiritual objects. Thus, [Article 53 of Additional Protocol I] prohibits the destruction of any specially protected object, by any Party to the conflict, either by way of attack *or by demolition of objects under its control*.[75]

54. The broad effect of article 53 is also illustrated by the fact that, unlike the 1954 Hague Convention, the drafters did not see any need to make any reference to occupation at all in this context. Clearly, article 53 was regarded as sufficiently comprehensive in its own right.

55. It must be acknowledged that, in article 85(4)(d), Additional Protocol I only makes it a grave breach for a person to "attack" cultural property "to which special protection has been given by special arrangement". This reflects the special protection regime of the 1954 Hague

[71] AP Commentary, p. 646 (mn. 2064); *Kordić* Appeal Judgment, para. 91; *Strugar* Trial Judgment, para. 307. *See also* O'Keefe (2006), pp. 209-210.
[72] *See* Lostal (2012), pp. 464-465, 471-472.
[73] *See* Lostal (2012), p. 463. *See also* O'Keefe (2006), pp. 210-211.
[74] AP Commentary, p. 647 (mn. 2070).
[75] Bothe et al, p. 375 (mn. 2.5.2, emphasis added).

Convention, even though this has now fallen into disuse as being essentially unworkable.[76] Yet, it is not clear whether the use of the term "attack" in article 85(4)(d) is advertent, considering that the 1954 Hague Convention does not use the term in this context, but again prohibits any "act of hostility".[77] In any event, the drafters of the Statute consciously rejected the approach of article 85(4)(d) as a model for liability at this Court.[78]

56. Article 16 of Additional Protocol II, applying to non-international armed conflict, is almost identical to article 53,[79] and similarly adopts the language of the 1954 Hague Convention in prohibiting "any acts of hostility".[80]

57. With respect to both articles 53 of Additional Protocol I and article 16 of Additional Protocol II, it should also be stressed that neither provision sought to replace or prejudice the existing regime of protection under international law,[81] including the protection afforded under the 1907 Hague Regulations to a broader range of objects. This is further confirmed by Resolution 20 adopted by the Diplomatic Conference.[82] In fact, the original ICRC draft of Additional Protocol I made no provision for the protection of cultural property at all, as it was felt that the topic had been sufficiently addressed by the 1954 Hague Convention.[83] However, the Diplomatic Conference considered that a cultural property provision should nonetheless be included to recognise the importance of protecting cultural heritage, and to compensate for the non-universal membership of the Hague Convention.[84] Thus, article 53 was included, but deliberately limited to only a few essential points,[85] emphasising the enduring significance of the Hague instruments and their scope to any future protective regime—including, for the purposes of this Court, the Statute.

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[76] *See below* paras. 82, 85.
[77] *See* 1954 Hague Convention, art. 9 ("The High Contracting Parties undertake to ensure the immunity of cultural property under special protection by refraining, from the time of entry in the International Register, from any *act of hostility* directed against such property", emphasis added).
[78] *See above* fn. 55.
[79] *See* Additional Protocol II, art. 16. The only difference is that article 16 omits the final sentence of article 53 of Additional Protocol I, prohibiting reprisals against cultural property.
[80] AP Commentary, p. 1470 (mn. 4845).
[81] AP Commentary, p. 641 (mns. 2045-2046). *See also* O'Keefe (2006), pp. 208-209.
[82] Diplomatic Conference on IHL: Resolution 20 (1977) (acknowledging the Hague Convention as "an instrument of paramount importance for the international protection of the cultural heritage of all mankind against the effects of armed conflict and that the application of this Convention will in no way be prejudiced" by Additional Protocol I, and urging "States which have not yet done so to become Parties to" the Hague Convention). *See also* Ehlert, p. 67 (fn. 245).
[83] AP Commentary, p. 640 (mn. 2039).
[84] The drafting history of Additional Protocol II indicates that article 16 was similarly 'aimed at highlighting the importance of safeguarding the heritage of mankind', bearing in mind that not all States were yet parties to the Hague Convention: AP Commentary, p. 1466 (mn. 4827).
[85] AP Commentary, pp. 640-641 (mn. 2040-2046).

I.A.2.b. Article 8(2)(e)(iv) is the only provision applicable in non-international armed conflict which specifically protects 'cultural' objects

58. Consistent with the importance attributed within the established framework of international law to the holistic protection of cultural and spiritual property—as well as other objects listed in articles 27 and 56 of the 1907 Hague Regulations—the Statute must also be read more broadly in that light.

59. Article 8(2)(e)(iv) is the only provision applicable in non-international armed conflict which grants such objects protection because of their particular nature, and not by means of their residual status as property of any generic kind. While such objects could theoretically be protected under article 8(2)(e)(xii) as "property of an adversary", this provision is not an adequate substitute for the protection in article 8(2)(e)(iv).

60. First, the Statute only expressly proscribes "attacks" on civilian objects in international armed conflict, whereas in non-international armed conflict it is the *destruction* of "property of the adversary" that is prohibited. The latter places an additional result requirement on the act of violence which does not exist for merely *directing* an attack, nor does it protect property belonging to the same party to the conflict as the perpetrator. Thus, it would be more onerous to bring a charge for violence outside the conduct of hostilities against civilian objects *and* cultural objects in a non-international armed conflict.

61. Second, as recognised in the general framework of international law, 'cultural' objects fundamentally differ from the other objects, persons or property which receive special protection from "attack" in article 8,[86] such as the emblems of the Geneva Conventions,[87] and peacekeepers or humanitarian assistance workers.[88] It makes sense that these other 'special' offences are intrinsically related to the conduct of hostilities because they have no foreseeable application beyond that context.[89] Yet in contrast, 'cultural' objects remain in need of special protection in broader circumstances, as demonstrated in the *Al Mahdi* case.[90] Indeed, if article 8(2)(e)(iv) were read so narrowly as to *exclude* the intentional destruction or damage to 'cultural' objects under the control of a party to the armed conflict, this would be inconsistent

[86] *Al Mahdi* Trial Judgment, para. 16.
[87] Statute, arts. 8(2)(b)(vii), 8(2)(e)(ii).
[88] Statute, arts. 8(2)(b)(iii), 8(2)(e)(iii).
[89] *See also below* paras. 120-121.
[90] *See e.g. Al Mahdi* Trial Judgment, paras. 34-37.

with the established framework of international law,[91] including the treaty obligations of most States Parties.[92]

I.A.3. The object and purpose of the Rome Statute demands a broad interpretation of the term "attack" in article 8(2)(e)(iv) to extend beyond the conduct of hostilities

62. The object and purpose of the Rome Statute strongly supports the view that the term "attack" in article 8(2)(e)(iv) was intended to have a special meaning, not confined to the conduct of hostilities. The importance of 'cultural' objects is stated in the Preamble to the Rome Statute, which emphasises that "all peoples are united by common bonds, their cultures pieced together in a shared heritage", and that "this delicate mosaic may be shattered at any time".[93] Culture, including not only "cultural property" in the sense of relevant international treaties but also other 'cultural' objects, forms part of the intangible links between individuals which establish human communities, and so its protection is one of the core objectives of this Court.[94] This objective is given effect firstly by the drafters' decision to establish distinct crimes relating to the protection of 'cultural' objects.

63. The drafters manifestly did not consider it sufficient for 'cultural' objects to be protected merely incidentally, as a result of its status as public or private enemy property.[95] If they had, article 8(2)(e)(iv) would serve no purpose.[96] Rather, enumerating article 8(2)(e)(iv) as a separate crime confers two unique advantages that are consistent with the Rome Statute's

[91] *See* Hector, p. 74 (noting the apparent omission of an offence under article 8 relating to the "destruction or wilful damage of cultural property as such").
[92] 70% of ICC States Parties have now ratified the Additional Protocols *and* the 1954 Hague Convention. These (86) States are: Afghanistan, Albania, Argentina, Australia, Austria, Bangladesh, Barbados, Belgium, Benin, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Bulgaria, Burkina Faso, Cambodia, Canada, Chad, Chile, Colombia, Costa Rica, Cote d'Ivoire, Croatia, Cyprus, Czech Republic, Democratic Republic of Congo, Denmark, Djibouti, Dominican Republic, Ecuador, El Salvador, Estonia, Finland, France, Gabon, Georgia, Germany, Ghana, Greece, Guatemala, Guinea, Honduras, Hungary, Ireland, Italy, Japan, Jordan, Latvia, Liechtenstein, Lithuania, Luxembourg, Madagascar, Mali, Mauritius, Mongolia, Montenegro, the Netherlands, New Zealand, Niger, Nigeria, North Macedonia, Norway, Palestine, Panama, Paraguay, Peru, Poland, Portugal, the Republic of Moldova, Romania, San Marino, Senegal, Serbia, the Seychelles, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Tajikistan, Tunisia, the United Kingdom, the United Republic of Tanzania, Uruguay, and Venezuela. In addition, Mexico has ratified the 1954 Hague Convention and Additional Protocol I, but not Additional Protocol II. A further 26% of ICC States Parties, while not having ratified the 1954 Hague Convention, have nonetheless still ratified the Additional Protocols. These (32) States are: Antigua and Barbuda, Belize, Cabo Verde, the Central African Republic, the Union of the Comoros, Congo, Cook Islands, Dominica, Fiji, Grenada, Guyana, Iceland, Kenya, Lesotho, Liberia, Malawi, the Maldives, Malta, Namibia, Nauru, the Republic of Korea, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, Sierra Leone, Suriname, Timor-Leste, Trinidad and Tobago, Uganda, Vanuatu and Zambia. Just 2 States Parties (the Marshall Islands and Andorra) have only ratified the Statute, but not any of these other treaties.
[93] Statute, Preamble.
[94] *See also* O'Keefe (2010), p. 392 (noting "what states see as the central role to be played by international criminal law […] in the protection of cultural property from destruction and damage").
[95] *See* Statute, article 8(2)(e)(xii).
[96] *See* Bothe, p. 410.

overall function and purpose. Firstly, it reflects the principle of 'fair labelling', which the Court has cited as a priority in charging on a number of occasions.[97] Consistently separating crimes not only reflects the distinct gravity of each,[98] but, particularly in the case of 'cultural' objects, also demonstrates that conduct violating this prohibition infringes a distinct protected value.[99] Secondly, distinguishing the protection of 'cultural' objects ensures that they are not only protected from destruction, but also from being intentionally made the object of violent acts, no matter the result. This reduces the risk that violence against 'cultural' objects will go uncharged at the pre-trial stage or not found for conviction at trial.

64. The *mens rea* requirement applicable to article 8(2)(e)(iv) indicates a broad interpretation of the term 'attack', in light of the culpability principle. While the Statute otherwise only establishes liability for directing attacks in the conduct of hostilities, without a requirement to prove damage,[100] the *mens rea* for article 8(2)(e)(iv) requires not only the intent and knowledge of the perpetrator to direct an "attack" against an object which is not a military objective,[101] but also intent and knowledge as to the relevant facts establishing its cultural status. This reflects the "particular seriousness" of the prohibited conduct,[102] which in turn may further underline the importance of correctly interpreting the conduct falling within the term 'attack'—according to the established framework of international law—in order to ensure the effectiveness of the protection of 'cultural' and other objects.

I.B. Article 8(2)(e)(iv) does not vary in the degree of protection which it affords

65. Rather than addressing any of the previous considerations in detail, the Trial Chamber's interpretation of the term "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*".[103] In this way, the Trial Chamber left open the possibility that it might agree with the preceding reasoning for *some kinds* of 'cultural' objects—but without explaining what it meant in this

[97] *See e.g.* *Bemba* Appeal Judgment, Opinion of Judge Eboe-Osuji, para. 200; *Al Mahdi* Trial Judgment, para. 60; Lubanga Appeal Judgment, para. 462; *Ngudjolo* Trial Judgment, Opinion of Judge Van den Wyngaert, paras. 28-29.
[98] Zawati, p. 4.
[99] *See also* Lostal (2017), p. 65 (referring to "the fundamental distinction between civilian objects and cultural property"). *See also below* fn. 114.
[100] *See e.g.* Statute, art 8(2)(b)(ii).
[101] *See e.g.* Statute, art 8(2)(b)(ii).
[102] Pfirter, p. 162.
[103] Judgment, para. 1136 (fn. 3147, emphasis added).

context by "cultural objects", or whether it considered all such objects to have "special status" as such, or whether it only referred to a subset of 'cultural objects which also have special status'. What is clear, however, is that it did not consider this qualification to apply to objects such as the church at Sayo.[104]

66. Any suggestion that the nature of the prohibition in article 8(2)(e)(iv) varies due to some kind of "special status" is unknown to the Statute. It also presents serious challenges in equal application, both to the objects expressly enumerated in article 8(2)(e)(iv) and across cases heard by this Court. It is also inconsistent with this Court's prior caselaw, and the drafters' intentions in the particular rule of international humanitarian law which they chose to implement in the Statute, as explained above.

67. While it is true that international law has developed several regimes which distinguish cultural property of particular importance (such as the 1954 Hague Convention and the World Heritage Convention), these regimes serve distinct purposes and should not be imported into the Statute unadvisedly. To the contrary, the drafters consciously elected *not* to introduce the distinctions contained in these regimes—which, indeed, are not even the same as one another—but rather to adhere to an older formulation (from the 1907 Hague Regulations) which was based on relatively clear and objective criteria (the nature and function of the object). Such an approach is thus *more protective* of cultural property of all kinds from the point of view of criminal law than the specialised regimes which apply only to cultural property meeting thresholds of particular importance. As such, the drafters' approach better serves the object and purpose of the Statute. This is without prejudice, however, to recognising the importance of particular objects (including with reference to considerations in the 1954 Hague Convention and World Heritage Convention) in the context of gravity assessments by the Court, such as in sentencing.

68. Accordingly, the Trial Chamber's interpretation of article 8(2)(e)(iv) is premised on a clear error, which led it into error by terminating its analysis of the attack on the church at Sayo.

[104] Judgment, paras. 1136, 1142.

I.B.1. A "special status" test is unsupported by the Statute, and is contradicted by other jurisprudence of this Court

69. There is simply no mention of a "special status" test applicable to article 8(2)(e)(iv) anywhere in the Statute, the Elements of Crimes, the Rules of Procedure and Evidence, or the Regulations of the Court. To the contrary, on their face, the plain terms of article 8(2)(e)(iv) suggest that there is no qualification at all in the degree of protection provided to the enumerated objects—and, consequently, no distinction in the nature of the conduct from which individuals must refrain in order to avoid criminal liability.

70. The Prosecution is, of course, mindful of the possibility that a "special status" test might apply because of the reference in the *chapeau* of article 8(2)(e) to the "established framework of international law".[105] Yet the total absence of recognition in the Court's legal texts for a significant distinction in the application of a crime should, at least, be treated by chambers of this Court as a warning that particular caution is required. While the drafters wished to ensure that the provisions of articles 8(2)(b) and (e) are interpreted consistently with the established framework of international law, they also sought whenever possible to assist this process by making the cardinal principles explicit in the Statute or the Elements. Their apparent failure to do so suggests at least that the relevant rules of international law call for careful analysis. However, no such analysis is included in the Judgment, where the Trial Chamber's "special status" distinction is contained in a single footnote.[106]

71. Furthermore, in conducting this analysis, it is of crucial importance to establish *which* aspects of the established framework of international law are *germane* to the criminal law prohibitions in the Statute. In particular, the fact that States may have chosen to embrace more stringent obligations for "cultural property" under treaties such as the 1954 Hague Convention—applying to a *narrower* category of objects than those protected under articles 27 and 56 of the 1907 Hague Regulations—does not mean that States abrogated the residual obligations they accepted for that *broader* category of objects (under articles 27 and 56 of the 1907 Hague Regulations). To the contrary, these remain good as a matter of both treaty and customary international law,[107] and it was to these broad obligations that the drafters sought to give effect in the Statute.

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[105] *See above* para. 24.
[106] Judgment, para. 1136 (fn. 3147).
[107] *See also above* paras. 20, 42, 57, 67.

72. Indeed, review of the drafting history of the Statute strongly suggests that there was no intention to differentiate the content of article 8(2)(e)(iv) according to the "special status" of the object in question, or to reduce the scope of article 8(2)(e)(iv) only to those objects which merit protection as "cultural property" under treaties such as the 1954 Hague Convention.

73. Thus, immediately before the Diplomatic Conference at Rome, Spain had proposed an amendment to the text of what would become article 8(2)(e)(iv) so that it referred to "*ataques contra bienes culturales internacionalmente protegidos*" ("attacks against internationally protected cultural property").[108] Yet this suggestion "garnered only modest support", and was not pursued.[109] Instead, the language of articles 27 and 56 of the 1907 Hague Regulations was retained,[110] which adopts a comprehensive and objective approach based on the nature of the object rather than any assessment of its relative 'importance'. For this reason, commentators seem to agree that the Statute does *not* "require[] that cultural and religious institutions meet a threshold of relevance", similar to that required under the 1954 Hague Convention,[111] and that consequently the Statute "makes an important improvement towards widening the category of prohibited conduct that generates individual criminal responsibility".[112] While this may be seen as somewhat 'old-fashioned'—harking back to the formulation of an earlier treaty[113]—it remains not only more protective in its result (from a *criminal law* perspective[114]) but also highly practical,[115] as the following paragraphs show.[116] Subsequent

[108] Spanish Proposal.
[109] Schabas (2016), p. 268 (text accompanying fns. 369-370). *See also above* paras. 40, 55(concerning the drafters' decision not to pursue an approach based on article 85(4)(d) of Additional Protocol I).
[110] *See above* para. 40.
[111] Lostal (2017a), p. 39.
[112] Hector, p. 74. *See further above* para. 40.
[113] *But see also above* paras. 42-57 (arguing that, nonetheless, the types of *conduct* prohibited in article 8(2)(e)(iv) can and should be read, to an appropriate extent, consistently with the 1954 Hague Convention and the Additional Protocols, in relevant part).
[114] Of course, for the *wider* purposes of international humanitarian law with regard to the protection of cultural property, the 1954 Hague Convention, the Additional Protocols, and the 1999 Second Protocol to the Hague Convention remain extremely important, in particular for the obligations on parties to the conflict to refrain from making use of cultural property for military purposes, and thus significantly reducing the risk that they might ever lawfully be made the object of attack. But since there is no criminal prohibition in the Statute of 'making use of protected objects for military purposes', these broader aspects of the protection of cultural property in international humanitarian law are only of indirect relevance to criminal prosecutions. Likewise, while it is true that the approach of the 1907 Hague Regulations—as expressed in articles 8(2)(b)(ix) and 8(2)(e)(iv) of the Statute—is not readily amenable to distinguishing *between* 'cultural objects' and other objects meriting special protection (such as educational, scientific, or medical buildings), nor to distinguishing between 'cultural' objects of different relative importance, such specificities may be addressed as a matter of the factual gravity of the alleged conduct (for example, in sentencing): *see also below* paras. 101-102. *Cf.* Lostal (2017a), pp. 65, 67-68, 107-108, 119-120, 145, 157, 163-166 (arguing for the importance of "fourth-order" distinctions).
[115] *See also* Lostal (2012), p. 472 (noting the "'complex web of conventional structures and provisions' that, despite having been drafted with the same goal, have made uncertain what is meant by 'cultural property' and what the concept of 'protection' entails", quoting Forrest, p. xxi).
[116] *See below* paras. 97-100.

international practice likewise illustrates that the creators of international tribunals appear to distinguish between these various approaches quite deliberately.[117] None of these considerations were apparently canvassed by the Trial Chamber when referring to its concept of "special status".

74. The Trial Chamber's approach is also unsupported by caselaw. It failed to address the judgment in *Al Mahdi*,[118] which in its reasoning is inconsistent with any distinction in the meaning of "attack" based on "special status". Nor was such a distinction supported by either of the two alternative references upon which it did rely. In particular:

- The Confirmation Decision in this case, at the paragraph cited, analyses the requirements of article 8(2)(e)(i) (war crime of attacking civilians), not article 8(2)(e)(iv).[119] By contrast, in the Pre-Trial Chamber's analysis of article 8(2)(e)(iv)—which was not acknowledged by the Trial Chamber—it confirmed the charge of directing an attack on the church in Sayo based on conduct which was apparently outside the conduct of hostilities ("pillaging goods" and "damaging the infrastructure").[120] As such, this is inconsistent with the Trial Chamber's analysis which, at most, would consider such conduct to be prohibited if the church had "special status".

- The *Katanga* Confirmation Decision, in the paragraph cited, analyses the requirements of article 8(2)(b)(i), which is the counterpart of article 8(2)(e)(i) for international armed conflicts.[121] It makes no reference to article 8(2)(e)(iv) at all, or its equivalent in international armed conflict (article 8(2)(b)(ix)), nor does any other part of this decision.

75. By contrast, in *Al Mahdi*, the Trial Chamber entered a conviction under article 8(2)(e)(iv) for attacks on 10 protected objects in Timbuktu.[122] Although nine of these objects were designated by UNESCO as World Heritage sites, one was not.[123] The Trial Chamber made no material distinction between them for the purpose of liability under article

[117] *Compare e.g.* ECCC Law, art. 7 (providing for criminal responsibility for violations of the 1954 Hague Convention), *with* KSC Law, art. 14(1)(b)(ix), 14(1)(d)(iv) (providing for criminal responsibility under customary international law for intentionally directing attacks against buildings dedicated to religion, education, act, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives).
[118] *See* Judgment, para. 1136 (fn. 3147); *above* para. 26.
[119] Judgment, para. 1136 (fn. 3147: citing Confirmation Decision, para. 45).
[120] Confirmation Decision, para. 69.
[121] Judgment, para. 1136 (fn. 3147: citing *Katanga* Confirmation Decision, para. 267).
[122] *Al Mahdi* Trial Judgment, paras. 38, 63-64, 109.
[123] *Al Mahdi* Trial Judgment, para. 39. *See also* paras. 46, 80.

8(2)(e)(iv). Indeed, while the Trial Chamber observed that article 8(2)(e)(iv) "govern[s] the directing of attacks against special kinds of civilian objects, reflecting the particular importance of international cultural heritage",[124] it also acknowledged the "special status of religious, cultural, historical and similar objects" listed in article 8(2)(e)(iv) and considered that "the Chamber should not change this status by making distinctions not found in the language of the Statute."[125]

76. Consequently, the *Al Mahdi* judgment is directly relevant to the reasoning of the Trial Chamber in this case on several points. First, by applying the same standard to objects falling under article 8(2)(e)(iv)—irrespective of their other characteristics, such as whether or not they were World Heritage sites—*Al Mahdi* contradicts the "special status" distinction proposed in the Judgment in this case. Second, *Al Mahdi* explains that *all* of the objects listed in article 8(2)(e)(iv) enjoy a "special status" as such, in the sense that article 8(2)(e)(iv) itself is *lex specialis* to other provisions concerning civilian objects in general. This same view was also recently endorsed by the Pre-Trial Chamber in *Al Hassan*.[126]

77. The approach in *Al Mahdi* and *Al Hassan* is consistent with the established framework of international law. This demonstrates that, while a complex web of treaties seek to regulate the protection of various kinds of cultural property and indeed to distinguish between their relative importance, these approaches are as yet far from universally accepted. They also serve particular purposes, and thus make distinctions which are not necessarily relevant or helpful for the purpose of establishing liability under the Statute. The better place for this Court to take such considerations into account is in its assessments of gravity.

I.B.2. The gradations in "status" of cultural property under general international law are not amenable to the application of article 8(2)(e)(iv)

78. The Judgment also offers no explanation how the Court—let alone a person affiliated to a party to an armed conflict—might be expected to determine whether or not a particular object has a "special status", which may distinguish the types of conduct prohibited under article 8(2)(e)(iv). The difficulties inherent in such a determination further illustrate that this interpretation of article 8(2)(e)(iv) is incorrect.

[124] *Al Mahdi* Trial Judgment, para. 17.
[125] *Al Mahdi* Trial Judgment, para. 15.
[126] *Al Hassan* Confirmation Decision (Confidential), para. 522. *See also above* fn. 25.

79. In the Prosecution's submission, there is no clear objective standard by which a 'cultural' object under article 8(2)(e)(iv) can be identified as having a "special status" for the purpose of the Statute. Nor is there any impartial and independent third-party certification or listing which can simply be adopted by the Court. Neither the special protection regime of the 1954 Hague Convention, the enhanced protection regime of its 1999 Second Protocol, nor the World Heritage List will adequately or properly serve. This leaves the Court with the challenge of making a case-by-case assessment, which will be essentially subjective (or externally perceived as subjective), even if it can be supported by some degree of expert (opinion) evidence.

80. The established framework of international law in fact acknowledges (at least) a triple hierarchy[127] of 'cultural objects' which may, albeit in different ways, *all* be said to be entitled to "special" protection, including:

- objects which *by their nature* have a 'cultural' or 'spiritual' *function* in society, as described in express terms in article 8(2)(e)(iv), building upon the broad and objective approach of the 1907 Hague Regulations;

- objects which may be regarded as the cultural heritage of *a people*, as recognised in the general regime of the 1954 Hague Convention and the 1999 Second Protocol, and the Additional Protocols; and

- objects which may be regarded as the cultural heritage of the world, in the sense that they have *universal* value under the World Heritage Convention.[128] (and, as such, may qualify for the enhanced protection regime of the 1999 Second Protocol to the Hague Convention).

81. As previously explained, the drafters of the Statute consciously rejected any reference to the higher thresholds which have been set for the distinct purpose of international treaty regimes, and these should not now be re-introduced 'through the back door'. While the gradations in status may be valuable within the broader framework of international law more generally (mindful of the various obligations associated with the protection of cultural

[127] *See also* Lostal (2012), pp. 461-463; Lostal (2017a), pp. 65, 163-164. *Cf. Al Mahdi* Reparations Decision, paras. 15-20.
[128] Such cultural heritage of universal value may also, for States Parties to the 1999 Second Protocol to the Hague Convention, qualify for acceptance into the enhanced protection regime: *see below* para. 88. *See also* Lostal (2017a), p. 166; Chamberlain, p. 141.

property and cultural heritage, beyond armed conflict), they are not amenable to the practice of this Court.

I.B.2.a. The special protection regime of the 1954 Hague Convention

82. In addition to the fundamental obligation which it imposes to respect all cultural property,[129] the 1954 Hague Convention provides for a regime of "special protection". However, this cannot plausibly be a model for the "special status" distinction relied upon by the Trial Chamber. Indeed, the "special protection" regime has been described by leading commentators as a "dead letter",[130] an "abject failure", [131] and a "white elephant" which is "hardly worth the effort".[132]

83. The special protection regime applies only to "a limited number of refuges intended to shelter movable cultural property in the event of armed conflict" and "centres" (*i.e.*, places) "containing monuments and other immovable cultural property of very great importance".[133] Special protection only becomes effective when a qualifying object is entered onto an international register.[134] Not only is there a limitation on the number of such objects of special protection, but they must also be located "an adequate distance from any large industrial centre or from any important military objective constituting a vulnerable point" or be "in all probability" of bomb-proof construction.[135]

84. Importantly, objects within the special protection regime receive virtually the same degree of material immunity from intentional harmful conduct as cultural property which is not within the special protection regime.[136] This is in marked distinction to the reasoning of the Trial Chamber, which seemed to contemplate distinctions in the nature or degree of protection afforded to objects of a certain (undefined) special status.

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[129] 1954 Hague Convention, art. 4(1). *See further above* paras. 42-48.
[130] Lostal (2017a), p. 26.
[131] Forrest, p. 102.
[132] O'Keefe (2006), p. 141. *See also* Henckaerts, p. 31 ("very limited success"); Chamberlain, pp. 37 ("not been one of the success stories"), 139 ("very limited success").
[133] 1954 Hague Convention, art. 8(1). On the definition of cultural property in this context, *see further above* para. 42.
[134] 1954 Hague Convention, art. 8(6).
[135] 1954 Hague Convention, art. 8(1)-(2). *See also* Lostal (2017a), pp. 26-27; Henckaerts, p. 32.
[136] *Compare* 1954 Hague Convention, art. 4(1) (obligation to refrain from any "act of hostility"), *with* art. 9 (obligation to refrain from any "act of hostility"). *See also* O'Keefe (2006), pp. 140 ("The difference between the standards imposed during armed conflict by the regime of special protection and the respect owed to cultural property under general protection is extraordinarily minor"), 157 ("[t[he term 'act of hostility' in article 9 bears the same meaning as it does in article 4(1), extending beyond attacks to encompass demolitions"). On the significance of the term "act of hostility", *see further above* paras. 45, 53.

85. Perhaps unsurprisingly in light of the stringent restrictions of the special protection regime, and despite the relatively lengthy period in which the 1954 Hague Convention has been in force, the number of objects which have qualified for special protection by entry on to the international register is very small. At present, just two States (Mexico and the Holy See) have obtained special protection for "centres containing monuments", and two States (Germany and the Netherlands) have obtained special protection for refuges for movable cultural property.[137]

86. In this context, and particularly given the extremely limited utilisation of the special protection regime and its normative impact, it is inconceivable that the Trial Chamber could have intended this as the basis for its concept of "special status". Furthermore, such a view would be obviously inconsistent with the conviction in *Al Mahdi*, where none of the objects in question were subject to the special protection regime and yet, by this Trial Chamber's standard, were apparently regarded as having "special status".

I.B.2.b. The enhanced protection regime of the 1999 Second Protocol to the 1954 Hague Convention

87. Given the problems with the special protection regime of the 1954 Hague Convention,[138] the Second Protocol to the Convention sought to create an alternative model, known as the enhanced protection regime. 82 States are currently States Parties to the 1999 Second Protocol,[139] out of 133 States which are currently States Parties to the 1954 Hague Convention.[140]

88. The enhanced protection regime requires, among other conditions, that the property in question qualifies as "cultural heritage of the greatest importance for humanity", and that it is "protected by adequate domestic legal and administrative measures recognising its exceptional cultural and historic value and ensuring the highest level of protection".[141] Property is only granted enhanced protection if it is agreed by the Committee for the

[137] 1954 Hague Convention (Special Protection Register). Mexico has designated nine centres containing monuments, and the Holy See has designated one centre containing monuments. Germany has designated one refuge, and the Netherlands has designated three refuges (but withdrawn others). In addition, Austria previously obtained special protection for one refuge, but then withdrew this refuge from the special protection regime.
[138] O'Keefe (2006), pp. 141 (fn. 195), 236, 241, 263; Forrest, p. 117; Lostal (2017a), p. 33; Henckaerts, p. 33; Van Woudenberg, pp. 51-52; Ehlert, pp. 82, 88.
[139] 1999 Second Protocol to the Hague Convention (States Parties).
[140] 1954 Hague Convention (States Parties).
[141] 1999 Second Protocol to the Hague Convention, art. 10. *See also* O'Keefe (2006), p. 263 (noting that "[e]nhanced protection, unlike special protection and inclusion on the World Heritage List, is available for immovable and movable cultural property alike").

Protection of Cultural Property in the Event of Armed Conflict,[142] and entered on to the material international list.[143] At present, only 10 States have sought and been granted enhanced protection for cultural property on their territory (17 objects or places in total).[144]

89. Again, however, contrary to the reasoning of the Trial Chamber, cultural property within the enhanced protection regime is subject, at most, to marginal differences in the circumstances by which it may lose its immunity.[145] It does not receive protection of a different or wider nature than under the general regime. This contrasts with the position implied by the Judgment for objects with "special status". It has been pointed out, indeed, that "[t]he term '*enhanced* protection' is […] misleading"—rather, the "essence" of the system is merely that it "concerns some form of 'registered' or 'certified protection'".[146] States Parties to the 1999 Second Protocol—and indeed the 1954 Hague Convention—are already limited in their ability to direct an "act of hostility" against any cultural property (encompassing both "attacks" and "demolitions", in the words of one commentator), and the enhanced protection regime applies broadly the same substantive principles but with only incremental adjustments to their particular application. Thus:

- Attacks on cultural property under enhanced protection are subject only to additional technical limitations, such as in the manner of determining when cultural property has lost its immunity.[147]

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[142] 1999 Second Protocol to the Hague Convention, art. 11(5).
[143] 1999 Second Protocol to the Hague Convention, art. 27(1)(b).
[144] 1999 Second Protocol to the Hague Convention (Enhanced Protection List). The ten States are: Armenia (the Monastery of Geghard and the Upper Azat Valley), Azerbaijan (the Walled City of Baku and the Gobustan archaeological site), Belgium (the House and Workshop of Victor Horta, the Neolithic flint mines at Spiennes, and the Plantin-Moretus complex and the business archives of the Officiana Plantiana), Cambodia (Angkor), Cyprus (Choirokoitia, the Painted Churches in the Troodos region, and Paphos), Czechia (the Tugendhat Villa in Brno), Georgia (the historical monuments of Mtskheta), Italy (Castel del Monte, the National Central Library of Florence, and the Villa Adriana), Lithuania (the Kernavé archaeological site), and Mali (the Tomb of Askia: provisional entry into the list). Two of these States (Belgium and Mali) have also indicated their intention to submit further property for consideration: *see* 1999 Second Protocol to the Hague Convention (Tentative Enhanced Protection List).
[145] *See* Henckaerts, p. 34 ("A common misunderstanding is that there is a difference in the levels of protection afforded cultural property under general and enhanced protection—and the names indeed do suggest that such a difference exists. But there is, in fact, no lower or higher level of protection. […] There are minor differences in the level of command at which an order has to be ordered, the warning to be given, and the requirement that a reasonable time be given to the opposing forces to redress the situation […] but these differences do not change the basic loss of protection"); Van Woudenberg, p. 53 (paraphrasing Henckaerts as suggesting that "the difference does not lie in the obligations resting on the attack but in those resting on the holder of the cultural property"); Ehlert, pp. 91-92.
[146] Henckaerts, p. 34 (emphasis added).
[147] *Compare e.g.* 1999 Second Protocol to the Hague Convention, arts. 6-7, *with* arts. 12-14. For example, if cultural property has become a military objective, the decision to authorise an attack (on the basis of imperative military necessity) may only ordinarily be taken by an officer at least of middle rank (*see* art. 6(c)), whereas a

- The enhanced protection regime seems to provide a better (*i.e.*, entirely unqualified) prohibition of demolitions of cultural property, although this depends on a narrow reading of the extent of the prohibition under the general regime.[148]

90. Consequently, whereas the Trial Chamber envisaged "special status" as meaning that conduct of a different *nature* would be prohibited for the purpose of article 8(2)(e)(iv), the enhanced protection regime only affects, at most, the *degree* to which property under the regime may be regarded as a lawful military objective at all.[149]

91. In this context, again, it is highly unlikely that the Trial Chamber could have intended the enhanced protection regime as the basis for its concept of "special status". First, the enhanced protection regime is almost as limited in utilisation as the special protection regime.[150] Second, it was created *after* the Statute and this could not have been contemplated by the drafters of article 8(2)(e)(iv). Furthermore, since the enhanced protection regime only applies in relations between States Parties to the 1999 Second Protocol (and States accepting and applying the provisions of the protocol *ad hoc*),[151] and cannot yet be suggested to be customary international law,[152] it is also not capable of consistent application in all cases before this Court. For example, while Mali is a State Party to the 1999 Second Protocol, the

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similar decision with regard to cultural property under enhanced protection must ordinarily be taken by an officer "at the highest level of operational command": *see* art. 13(2)(c)(i). *See further* O'Keefe (2006), pp. 256-257, 274; Forrest, pp. 119-120; *above* fn. 145.

[148] *See* O'Keefe (2006), pp. 130 (noting "the broader concept of 'acts of hostility' by which article 4(1) encompasses demolitions" but reasoning that, as such conduct is not "amenable to an analysis based on the definition of a military objective", "[o]ne must revert to the unvarnished words of article 4(2) of the [1954 Hague] Convention so that the demolition of cultural property […] including during belligerent occupation, is permissibly only in cases where military necessity imperatively requires it—that is, where there is no feasible alternative for dealing with the situation"), 264 (noting in passing that cultural property under the enhanced protection regime "may never be subject to demolitions" and that it remains "protected by article 4(1) of the [1954 Hague] Convention to the extent that the expression 'act of hostility' used in that provision is more compendious than the term 'attack' used in articles 12 and 13 of the [1999 Second] Protocol"), 272 (in article 12 of the [1999 Second Protocol], "[f]or no obvious reason, the phrase 'by refraining from making such property the object of attack' is used in preference to the more compendious 'by refraining […] from any act of hostility directed against such property', the latter being employed in […] *mutatis mutandis* […] article 4(1) of the [1954 Hague] Convention and article 6 of the [1999] Second Protocol (general protection) and in article 53 of Additional Protocol I and article 16 of Additional Protocol II. As a result of its more restrictive formulation, article 12 does not encompass demolitions").

[149] The protocol also provides for States Parties to exercise their criminal jurisdiction over persons responsible for attacking cultural property, including but not limited to cultural property under enhanced protection, or for theft, pillage or misappropriation of, or acts of vandalism directed against, cultural property: *see e.g.* 1999 Second Protocol to the Hague Convention, arts. 15-18.

[150] *See above* fn. 144. *See also* Gonzalez, p. 60 ("the regime of enhanced protection still has to prove its effectiveness […] There is […] a growing uneasiness that the expectations generated by enhanced protection may have been too great"); Lostal (2017a), p. 73 ("the attempts of the 1954 Hague Convention and the 1999 Second Protocol to award a heightened regime of protection to property of special importance have so far been notable only for their failure").

[151] 1999 Second Protocol to the Hague Convention, art. 3(2).

[152] O'Keefe (2006), p. 322.

Democratic Republic of the Congo is not. Finally, understanding the Trial Chamber's reference to "special status" to mean the enhanced protection regime would again be inconsistent with the verdict in *Al Mahdi*, where none of the objects subjected to attack were entitled to enhanced protection.

I.B.2.c. The World Heritage Convention

92. Although not primarily intended to address circumstances of armed conflict,[153] the World Heritage Convention distinguishes between "cultural heritage"[154] and "cultural heritage […] having outstanding universal value" *as recognised by the World Heritage Committee*,[155] in the sense of "cultural […] significance which is so exceptional as to transcend national boundaries and to be of common importance for present and future generations of all humanity".[156] Cultural property with outstanding universal value of this latter kind is entered on the World Heritage List, based at present on the assessment by the World Heritage Committee whether it must be considered:

(i) to represent a masterpiece of human creative genius;

(ii) to exhibit an important interchange of human values, over a span of time or within a cultural area of the world, on developments in architecture or technology, monumental arts, town-planning or landscape design;

(iii) to bear a unique or at least exceptional testimony to a cultural tradition or to a civilization which is living or which has disappeared;

(iv) to be an outstanding example of a type of building, architectural or technological ensemble or landscape which illustrates (a) significant stage(s) in human history;

(v) to be an outstanding example of a traditional human settlement, land-use, or sea-use which is representative of a culture (or cultures), or human interaction

[153] *But see e.g.* Lostal (2017a), pp. 80-81 (arguing that the "World Heritage Convention *is* applicable in armed conflict", emphasis supplied), 111 (referring to article 6(3) of the World Heritage Convention).
[154] World Heritage Convention, art. 1 (including "monuments", "groups of buildings", and "sites" of "outstanding universal value from the point of view of history, art or science", or "from the historical, aesthetic, ethnological or anthropological point of view", respectively). *See also* Lostal (2017a), p. 70 ("[t]he World Heritage Convention is targeted at the most exclusive category of cultural heritage").
[155] World Heritage Convention, art. 11(2). *See also Al Mahdi* Reparations Decision, para. 20.
[156] UNESCO World Heritage: Operational Guidelines, para. 49. *See also* para. 77.

with the environment especially when it has become vulnerable under the impact of irreversible change; [or]

(vi) to be directly or tangibly associated with events or living traditions, with ideas, or with beliefs, with artistic and literary works of outstanding universal significance; […].[157]

93. Even satisfying one of these criteria does not mean that cultural property will automatically be entered onto the World Heritage List. For example, "a property must also meet the conditions of integrity and/or authenticity and must have an adequate protection and management system to ensure its safeguarding",[158] and considerations of national and geographic balance may also be taken into account.[159] In short:

> [T]he [World Heritage] Convention is not intended to ensure the protection of all properties of great interest, importance or value, but only for a select list of the most outstanding of these *from an international viewpoint*. It is not to be assumed that a property of national and/or regional importance will automatically be inscribed on the World Heritage List.[160]

94. Consistent with the necessary selectivity of the World Heritage List—based on concerns which extend beyond the property itself to factors such as its sustainability and location—the World Heritage Convention also contains an express qualification that the inscription or not of "a property belonging to the cultural […] heritage" onto the World Heritage List "shall in no way be construed to mean that it does not have an outstanding universal value" for purposes other than those of the World Heritage Convention.[161]

95. For all these reasons, the inscription of an object onto the World Heritage List again cannot serve as the basis for the Trial Chamber's conception of a "special status" which might distinguish between different types of conduct prohibited under article 8(2)(e)(iv) of the Statute. Not only would such a distinction expressly contradict article 12 of the World Heritage Convention—which precludes the non-inscription of an object as a basis to lessen its protection under general international law—but it is again inconsistent with the judgment in

[157] *See* UNESCO World Heritage: Criteria for Selection.
[158] *See* UNESCO World Heritage: Operational Guidelines, paras. 78-119.
[159] *See* UNESCO World Heritage: Operational Guidelines, para. 59.
[160] UNESCO World Heritage: Operational Guidelines, para. 52.
[161] World Heritage Convention, art. 12.

Al Mahdi, in which Mr Al Mahdi was convicted both with respect to objects on the World Heritage List and also to those which were not.[162]

96. Furthermore, the objective of the World Heritage List in preserving heritage of *universal* value means that property of national or even regional importance will not necessarily be listed—yet attacks on such property are no less deleterious to the particular communities in which they are located, and consequently of no less central importance to the object and purpose of the Statute.[163] In other words, the distinct interests underlying the selection of cultural property for inclusion on the World Heritage List make this an inappropriate source for any differentiation in the protection of 'cultural' objects for the purpose of the Statute.

I.B.2.d. A fact-sensitive "special status" test cannot be applied equally to all the objects enumerated in article 8(2)(e)(iv)

97. In the absence of any external, objective legal certification or registration which may be appropriately relied upon by this Court in determining whether 'cultural objects' may be assessed to have "special status", the Trial Chamber's approach can only be otherwise understood as requiring this Court to conduct its own assessment, on the facts, as to whether a given object merits heightened protection. But this approach is also problematic. It is not only obviously inconsistent with the drafters' choice not to incorporate such a standard into the Statute,[164] but also leads to significant problems of consistency, coherence, and equal application. It introduces significant ambiguity into a rule which is otherwise clear.

98. First, any such assessment of this kind of "special status" test would be necessarily case-sensitive, and would require chambers of the Court to decide on the specific facts of each case whether particular objects qualify or not. This is likely to mean hearing expert evidence on the matter, and would require the Court to make technical assessments (on the cultural value of given objects, either within the context of a particular society or within the global context, depending on the test employed) for which it is not obviously qualified.

99. Second, to the extent that international criminal law is intended to deter criminality by allowing potential perpetrators to foresee the illegal nature of their intended conduct, any "special status" distinction will make this very difficult. While it is clear (at the very least)

[162] *See above* para. 76.
[163] *See above* paras. 62-64.
[164] *See above* paras. 40, 72-73.

that none of the objects in article 8(2)(e)(iv) may be made the object of attack in the conduct of hostilities, unless they constitute military objectives, it will be much less clear which objects are entitled to heightened protection (prohibiting any violent conduct, regardless of result or whose control the object may be under) as objects with 'special status'.

100. Third, even if the Trial Chamber's reference to "special status" meant the (general) test for "cultural property" in article 1 of the 1954 Hague Convention[165]—which is, still, "to a large extent […] a matter of subjective judgment",[166] if the object has not been registered in some way under national law—then this cannot in any event be applied equally to all the objects enumerated in article 8(2)(e)(iv). In particular, while buildings dedicated to art and religion, and historic monuments, may be amenable to some kind of "special status" assessment, this is very difficult to conceive for buildings dedicated to education, science or charitable purposes, or to hospitals and places where the sick and wounded are collected, which are entitled to special protection because of their social function rather than their cultural importance, as such.

I.B.3. The "special status" of an object may be relevant to assessments of the gravity of conduct prohibited under article 8(2)(e)(iv)

101. The conclusion that the Court should not attempt to condition the scope of an object's protection under article 8(2)(e)(iv) on some kind of further determination of its "special status" does not mean that the Court may never take account of such questions. It only means that the Court should be careful to distinguish between questions of liability and questions of gravity. Thus, while it would not be correct, in the Prosecution's submission, to vary the application of article 8(2)(e)(iv) based, for example, on whether the object in question is on the World Heritage List, such matters obviously should be taken into account in assessing the gravity of a case featuring such conduct, or in sentencing.

102. In this context, it is also emphasised that while interruptions to the function that a cultural object has within the context of its society may constitute an important aspect of the harm caused by violations of article 8(2)(e)(iv),[167] the gravity of such violations is not always *solely* limited to such anthropocentric concerns.[168] As such, and consistent with the

[165] *But see* O'Keefe (2006), p. 102 (recalling that, "[a]s the chapeau to [article 1 of the 1954 Hague Convention] states, the definition is strictly for the purposes of the Convention").
[166] Chamberlain, p. 25.
[167] *See e.g.* Dijkstal, pp. 393-400.
[168] *Cf.* Lostal (2017b).

established framework of international law, objects which may also qualify as cultural property in the meaning of the 1954 Hague Convention and Additional Protocols, or even as world heritage in the sense of the World Heritage Convention, also merit protection in and of themselves, irrespective of the regard in which they may be held by their immediate society at the material time.[169] Consequently, these factors may also elevate the gravity of cases in which attacks are directed against such objects under article 8(2)(e)(iv) of the Statute.

I.C. The Trial Chamber's error materially affected the Judgment

103. The Trial Chamber's error materially affected the Judgment insofar as it led the Trial Chamber to conclude that it was necessary for the Prosecution to have proved that the events at Sayo church occurred in the conduct of hostilities, in order to qualify as an "attack" under article 8(2)(e)(iv).

104. If the Trial Chamber had not made this error, and not required the material conduct to have been committed "during the actual conduct of hostilities",[170] it would have reached different conclusions as to whether the incident at Sayo church satisfied the requirements of article 8(2)(e)(iv), and it would not have terminated its analysis under count 17 in this regard.[171]

- With respect to the first element (the perpetrator "directed" an "attack"), the Trial Chamber would have found that the acts of the UPC/FPLC soldiers at Sayo church constituted acts of violence, insofar as they resulted in actual damage to the church (including breaking the doors and starting a fire) as well as impeding its use according to its function (removing furniture, digging trenches).[172] This surpasses the requirement for directing an attack, insofar as article 8(2)(e)(iv) "only requires the perpetrator to have *launched* an attack against a protected object and it need not be established that the attack caused any damage or destruction to the object in question".[173] Consistent with the Trial Chamber's finding that Mr Ntaganda is responsible for the shelling of the health centre in

[169] *See e.g.* Lostal (2017b), pp. 53-58; *Al Mahdi* Reparations Decision, para. 16 (noting that "[c]ultural heritage is important not only in itself, *but also* in relation to its human dimension", emphasis added). As such, it is not always true, at least in an immediate sense, that "the victim of the crime of destroying or damaging cultural heritage is not the building, object or site, but humans whose rights have been violated": *contra* Dijkstal, p. 397.
[170] Judgment, para. 1142.
[171] Judgment, para. 1144.
[172] Judgment, para. 1138. *See also* para. 526 (fn. 1566).
[173] Judgment, para. 1136 (emphasis supplied). *See also* paras. 744, 917 (the conduct involved in directing an attack is "selecting the intended target and deciding on the attack").

Sayo by UPC/FPLC soldiers, the Trial Chamber would likewise have attributed the conduct of the UPC/FPLC soldiers at the church in Sayo to Mr Ntaganda.[174]

- With respect to the second element (the object of the attack was, materially, a building dedicated to religion, which was not a military objective), the Trial Chamber would have found that the church at Sayo satisfied this requirement. There is no doubt that a church is a building dedicated to religion,[175] and there is no indication that it had become a military objective—to the contrary, the very fact that the church was susceptible to the treatment it received from the UPC/FPLC soldiers,[176] and that this occurred "sometime after the assault",[177] is entirely inconsistent in these circumstances with its status as a military objective.

- With respect to the third element (the perpetrator intended, materially, a building dedication to religion, which was not a military objective, to be the object of attack), the Trial Chamber would have found that the incident at the church at Sayo satisfied this requirement. The UPC/FPLC soldiers who deliberately broke into the church, removed its furniture, lit a fire within it, and set up a base inside it, could not have failed to have appreciated the nature and function of the building.[178]

- With respect to the fourth and fifth elements (nexus to the armed conflict, and the perpetrator's awareness of the factual circumstances establishing the existence of the armed conflict), the Trial Chamber's existing findings for other war crimes apply equally to the church at Sayo.[179]

105. The Prosecution therefore submits that, but for its error in interpreting the meaning of "attack" under article 8(2)(e)(iv), the Trial Chamber would have convicted Mr Ntaganda for directing an attack against the church at Sayo. It would consequently also have taken this additional conduct into account in sentencing Mr Ntaganda.

106. Consequently, for all the preceding reasons, the Appeals Chamber should confirm that the term "attack" in article 8(2)(e)(iv) has a special meaning for 'cultural objects' which, consistent with the established framework of international law, encompasses all acts of

[174] *See* Judgment, paras. 1140, 1145-1148, 1169, 1173-1175, 1177-1189, 1199.
[175] *Cf.* Judgment, para. 1146.
[176] Judgment, para. 1138. *See also* para. 526 (fn. 1566).
[177] Judgment, para. 1142.
[178] Judgment, para. 1138. *See also* para. 526 (fn. 1566).
[179] *See* Judgment, paras. 1148, 1173, 1177-1189.

violence directed against those objects and is not limited to the conduct of hostilities. It should then exercise its power under article 83(2)(a) of the Statute to amend the Judgment consistent with the correct interpretation of the law, and to enter findings leading to Mr Ntaganda's conviction for the attack on the church at Sayo. It should further ensure that this additional conduct attributed to Mr Ntaganda is appropriately reflected in the sentence imposed.

II. THE TRIAL CHAMBER ERRED IN LAW WHEN DEFINING AN "ATTACK" ON HOSPITALS UNDER ARTICLE 8(2)(E)(IV) (SECOND GROUND OF APPEAL)

107. On or about 20 November 2002, Mr Ntaganda commanded the attack on Mongbwalu,[180] in the course of which he directly ordered an indiscriminate attack on "the Lendu" who were present.[181] In the immediate aftermath of the takeover of Mongbwalu, members of the UPC/FPLC carried out a *ratissage* operation which enabled them to "proceed with the widespread commission of crimes against the targeted groups of civilians, as planned".[182] In the course of doing so, they "looted medical equipment from the Mongbwalu hospital."[183] However, the Trial Chamber terminated its legal analysis of this incident, for the purpose of article 8(2)(e)(iv), because it:

> [did] not consider that pillaging of protected objects, in particular in this case of the Mongbwalu 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.[184]

108. Within this finding, it is unclear whether the Trial Chamber only excluded the incident at Mongbwalu hospital because it did not consider that the "pillaging" of a protected object may constitute an "act of violence" for the purpose of article 8(2)(e)(iv), or because in any event—consistent with its approach to the church at Sayo—it would also have excluded this incident because it occurred in the immediate aftermath of the takeover and thus did not occur

[180] Judgment, paras. 486, 491, 854.
[181] Judgment, paras. 493, 845. *See also* paras. 499, 847 (Mr Ntaganda met with his commanders after the takeover of Mongbwalu and congratulated everyone present on a successful operation).
[182] Judgment, para. 854. *See also* para. 512. While Hema civilians were also involved in the *ratissage* operation in Mongbwalu, and in some cases carried out the material elements of certain crimes (murder and pillage), the Trial Chamber found that these civilians functioned as a tool in the hands of the co-perpetrators and were controlled through soldiers of the UPC/FPLC: Judgment, paras. 821, 824.
[183] Judgment, paras. 514, 1138. *See also* paras. 1032, 1041. The Prosecution notes that the cross-reference at footnote 3150 of the Judgment appears to be a typographic error.
[184] Judgment, para. 1141. *See also* para. 761.

in the conduct of hostilities (*i.e.*, it was not directed "against the adversary"). Nonetheless, in the submission of the Prosecution, both of these conclusions are erroneous, and should be reversed.

109. First, consistent with the reasoning under Ground One,[185] and in light of the established framework of international law, all acts of violence against hospitals (and other places where the sick and wounded are collected) are prohibited under article 8(2)(e)(iv) of the Statute, irrespective of whether they occur in the conduct of hostilities or after the object in question has come under the control of a party to the conflict. While the special protections afforded to 'cultural objects' and hospitals have different antecedents, they have nonetheless evolved to reach the same ultimate conclusion in this respect. In this regard, as with Ground One, the Trial Chamber should not only have sought to interpret article 8(2)(e)(iv) according to the principles of the Vienna Convention,[186] but it should also have considered the particular nature of the protection afforded to hospitals under international humanitarian law. It failed to do so.

110. Second, the established framework of international law also makes clear that the protection of hospitals against deliberate acts of violence not only encompasses conduct which tends to destroy or damage their physical integrity as such but also encompasses conduct which tends to destroy or damage their ability to perform the function to which they are dedicated. This is also consistent with military doctrine, which recognises that an effective attack may (in appropriate circumstances) equally result in the physical destruction of the target (a so-called "hard kill") or in otherwise eliminating its ability to function, either permanently or temporarily (a so-called "soft kill" or "mission kill").[187] In other words, removing medical equipment from a hospital—or indeed interfering with its medical staff—no less constitutes a prohibited act of violence (an "attack", for the purpose of article 8(2)(e)(iv)) against the hospital itself, given that such conduct is no less capable of impairing the functioning of the hospital than the infliction of physical destruction or damage.

111. Again, the Trial Chamber dismissed such considerations in the Judgment without reasoning.[188] It did so without even acknowledging previous authority of this Court—in this

[185] *See above* paras. 21-64.
[186] *See above* para. 21.
[187] *See e.g.* Miller, p. 110 (recalling that, during its campaign in Kosovo, NATO employed both "'soft kill'" and "'hard kill'" capabilities in attacking military objectives).
[188] Judgment, para. 1141.

case—which recognised that it may be possible to "direct[] an attack against protected objects […] by pillaging property […] found in those buildings".[189] For all the reasons in the following paragraphs, the Pre-Trial Chamber's conclusion in this regard was correct, and should not have been rejected by the Trial Chamber.

II.A. Article 8(2)(e)(iv) prohibits directing acts of violence against hospitals or such places, irrespective whether they occur in the conduct of hostilities

112. The Judgment does not expressly state that the Trial Chamber specifically considered that attacks on hospitals, for the purpose of article 8(2)(e)(iv), must take place in the conduct of hostilities.[190] However, any such view of the Trial Chamber would be consistent with its reasoning with regard article 8(2)(e)(iv) as a whole, as well as with regard to the church at Sayo.[191] Consequently, the Prosecution will proceed on the basis of this understanding.

113. As the following paragraphs explain, and for somewhat similar reasons to the Prosecution's view under Ground One, article 8(2)(e)(iv) of the Statute cannot be correctly interpreted to require attacks on hospitals to occur in the conduct of hostilities. This would not only be inconsistent with the context of the Statute—especially from the point of view of the internal consistency of article 8(2)(e)(iv), as well as to avoid duplication with other relevant provisions—but also, and even more fundamentally, with the established framework of international law.

II.A.1. The term "attack" should be interpreted consistently for both 'cultural' objects and hospitals within article 8(2)(e)(iv)

114. Within the framework of a single offence, article 8(2)(e)(iv) prohibits the intentional direction of attacks against a variety of specially protected objects, over and beyond any protection they may enjoy under the Statute or general international law as civilian objects or other forms of property. As previously explained, many of the objects enumerated in article 8(2)(e)(iv) may be considered as 'cultural objects' which benefit from a broad obligation of respect, applying not only in the conduct of hostilities but also while under the control of a party to the conflict. For this reason, in this context, the reference to "attack" in article 8(2)(e)(iv) must be given a special meaning.[192]

[189] Confirmation Decision, para. 69.
[190] *See* Judgment, para. 1141.
[191] Judgment, paras. 1136, 1142.
[192] *See above* paras. 29-31.

115. Yet in addition to these 'cultural' objects, article 8(2)(e)(iv) also applies to "hospitals and places where the sick and wounded are collected". In the Prosecution's submission, this must also necessarily suggest that a similar broad obligation of respect—and thus a similar special meaning for the term "attack"—also applies to these medical objects. This would promote the coherent and consistent interpretation of the Statute in two ways.

116. First, one implication of the *ejusdem generis* rule of statutory construction is that examples given in a provision may be presumed to have one or more qualities in common. Not only does this suggest that 'cultural' objects and hospitals are united in receiving special protection under the Statute, but also that the *nature* of the protection which they receive is also the same. Such an interpretation makes considerable sense as a matter of logic, and also avoids the otherwise unsatisfactory conclusion that the term "attack" in article 8(2)(e)(iv) varies according to the particular object to which it applies. Indeed, there is nothing in the plain terms of article 8(2)(e)(iv) to suggest that the meaning of the term "attack" is internally inconsistent in this way.

117. Accordingly, if it is accepted that the term "attack" must be given a special meaning due to the inclusion of 'cultural' objects in article 8(2)(e)(iv), as argued by the Prosecution under Ground One, then this itself strongly supports the view that the drafters likewise intended a special meaning insofar as the term "attack" in article 8(2)(e)(iv) also applies to hospitals and similar places.

118. Second, interpreting article 8(2)(e)(iv) to prohibit all acts of violence against hospitals and similar places, and not only attacks in the conduct of hostilities, would also avoid the apparent duplication between the crimes in articles 8(2)(e)(ii) and 8(2)(e)(iv). Notably, while article 8(2)(e)(iv) prohibits "[i]ntentionally directing attacks against […] hospitals and places where the sick and wounded are collected", article 8(2)(e)(ii) prohibits "[i]ntentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law".

119. In this respect, the Prosecution recalls the Appeals Chamber's observation earlier in this case that "the potential overlap between provisions may be of relevance to their interpretation" but that "little weight should be attached to this argument in the interpretation of article 8(2) of the Statute" because "States were aware of the potential overlap" and

"[t]here is no indication that the States intended to avoid such overlap".[193] While the Prosecution acknowledges that overlap in the scope of certain crimes under the Statute is inevitable, it also submits that—all other things being equal—the Court should avoid interpretations leading to a complete duplication between crimes. This latter possibility does not seem to have been contemplated by the drafters, who instead appear to have foreseen the potential for concurrence of offences based in particular on the fact that relevant conduct "may infringe two or more rules of international criminal law"[194]—but not that two apparently different criminal offences might in fact give effect to the *same* underlying rule of international law. Indeed, the drafters seemed to start from the view that "[e]ach conduct defined in article 8 constitutes an autonomous crime" representing "a different protected value".[195]

120. In this context, article 8(2)(e)(ii) is clearly of wider scope than article 8(2)(e)(iv) in terms of the range of medical objects that it protects, but it necessarily includes hospitals as buildings which may use the distinctive emblems of the Geneva Conventions in conformity with international law. Yet, the emphasis placed in article 8(2)(e)(ii) on the failure to respect the distinctive emblems of the Geneva Conventions—and the significance of those emblems in ensuring that protected objects are not targeted *in the conduct of hostilities*—strongly supports that the term "attack" in this provision bears its general meaning (confined to the conduct of hostilities), as in article 8(2)(e)(i) of the Statute.

121. If this interpretation of article 8(2)(e)(ii) is correct, then reading the prohibition of attacks on hospitals and similar places in article 8(2)(e)(iv) to be confined to the conduct of hostilities would make this aspect of article 8(2)(e)(iv) essentially redundant, catering only for those circumstances where a hospital was not displaying the distinctive emblem and was targeted.[196] By contrast, and much more convincingly, the inclusion of hospitals and similar places in article 8(2)(e)(iv) would retain an autonomous function if the prohibition of "attacks" in this context was *not* limited to the conduct of hostilities. This would distinguish article 8(2)(e)(iv) from article 8(2)(e)(ii), insofar as article 8(2)(e)(iv) would also prohibit acts of violence against hospitals once they had come under the control of a party to the conflict.

[193] Jurisdiction Appeal Decision, para. 48.
[194] *See e.g.* Informal Note on Concurrence of Offences (cited in Jurisdiction Appeal Decision, para. 48, fn. 114), p. 1.
[195] Informal Note on Concurrence of Offences, p. 6.
[196] *See also* Geneva Convention I, art. 42; Geneva Convention IV, art. 18; Additional Protocol I, art. 18; Additional Protocol II, art. 12; CIHL Study, rule 30. *See further* Dörmann, p. 448.

This would give effect to the established framework of international law in ensuring that medical care is not only protected in the conduct of hostilities but also that the civilian population continues to be ensured access to medical care at all times and in all circumstances of armed conflict, including when they have fallen under the control of a party to the armed conflict.

II.A.2. The established framework of international law requires parties to an armed conflict to respect hospitals at all times and in all circumstances

122. Since its inception, international humanitarian law has exhibited a particular concern to ensure the effective provision of medical care within the context of armed conflict. Consequently, it has attached fundamental importance to ensuring respect for medical establishments and medical personnel, not only in the conduct of hostilities but also when such objects are under the control of a party to the conflict. While this cardinal obligation has largely evolved in a different manner than the obligation to respect 'cultural objects'—despite sharing a common antecedent, in part, in article 27 of the 1907 Hague Regulations[197]—both medical and 'cultural' objects have come (by different paths) to enjoy a special status, distinct from civilian objects, which justifies the broad prohibition of all acts of violence directed at them.

123. The obligation to respect and protect hospitals under international humanitarian law is closely associated with what might be termed the 'principle of continued care'. In other words, the obligation of respect not only means refraining from attacking such objects in the conduct of hostilities but "also means not interfering with their work in order to allow them to continue to treat the wounded and sick in their care."[198] Early manifestations of this principle can be traced back at least as early as 1906.[199] They have come to apply both in international and non-international armed conflicts, and to both civilian and military establishments. Thus:

- *Within international armed conflict*, military medical establishments were entitled to respect and protection both in the conduct of hostilities and while under the control of a party to the conflict, from relatively early on. In particular, the 1906 Geneva Convention and the 1929 Geneva Convention, which were substantially similar in material part,

[197] This in turn explains why 'cultural objects' and hospitals are now conveniently reunited in provisions such as article 8(2)(e)(iv) of the Statute: *see further above* paras. 33-41.
[198] GCI Commentary (2016), p. 637 (mns. 1799-1800). *See also e.g.* Geneva Convention I, art. 33.
[199] *See e.g.* 1906 Geneva Convention, art. 15.

required belligerents to protect and respect mobile medical establishments.[200] If fixed establishments fell into the hands of the enemy, their buildings and materiel were subject to the laws of war but could not be "diverted from their use so long as they are necessary for the sick and wounded".[201] These principles were further reinforced in 1949 in Geneva Conventions I and II.[202] As the ICRC has explained, these provisions bind a party to the conflict not only with respect to enemy medical establishments but also its own,[203] and specifically "preclude[] the intentional destruction of medical establishments".[204]

- *Within international armed conflict*, civilian medical establishments were initially only entitled to protection from the conduct of hostilities by the enemy. Thus, while the 1899 and 1907 Hague Regulations prohibited attacks on civilian hospitals,[205] they did not include hospitals among the objects entitled to respect when they fell under the control of a party to the conflict (such as in a state of occupation).[206] By 1949, however, Geneva Convention IV provided that civilian hospitals must not only be immune from attack but "at *all times* be respected and protected by the Parties to the conflict".[207] This obligation is said to be "absolute and universal", subject only to a strictly limited power of requisition if the hospital is in occupied territory.[208] Notably, under article 57, such requisitions may only be temporary, must be justified by urgent military necessity for medical purposes, and are conditioned on suitable arrangements being made in due time for the care and treatment of existing patients, and the needs of the civilian population.[209] It is implicit in these provisions that an occupying power may not destroy or otherwise prevent a civilian hospital from carrying out its dedicated function in providing healthcare to the civilian population; to the contrary, the occupying power has a positive duty to *maintain* hospital establishments.[210] This was confirmed in 1977 by Additional Protocol I, which positively

[200] *See* 1906 Geneva Convention, arts. 6, 14; 1929 Geneva Convention, arts. 6, 14.
[201] *See* 1906 Geneva Convention, art. 15; 1929 Geneva Convention, art. 15.
[202] *See* Geneva Convention I, arts. 19, 33; Geneva Convention II, art. 22. *See also* GCI Commentary (2016), p. 827 (mn. 2335). Article 33 of Geneva Convention I is, perhaps, particularly notable since it prohibits a party to the conflict from destroying the stores even of its *own* medical establishments: *see further* GCI Commentary (2016), pp. 828-829 (mns. 2338-2341).
[203] GCI Commentary (2016), p. 637 (mn. 1798).
[204] GCI Commentary (2016), p. 637 (mn. 1800).
[205] *See* 1899 Hague Regulations, art. 27; 1907 Hague Regulations, art. 27.
[206] *See* 1899 Hague Regulations, art. 56; 1907 Hague Regulations, art. 56.
[207] Geneva Convention IV, art. 18 (emphasis added). *See also* arts. 19 (loss of protection only if hospitals are used to commit, outside their humanitarian duties, acts harmful to the enemy, and only after due warning and time for remediation), 20 (obligation of respect and protection for the personnel of civilian hospitals, including in "occupied territory").
[208] GCIV Commentary, p. 148.
[209] *See also* GCIV Commentary, pp. 316-317.
[210] *See* Geneva Convention IV, art. 56.

states that "[t]he Occupying Power has the duty to ensure that the medical needs of the civilian population in occupied territory continue to be satisfied".[211]

- *Within non-international armed conflict*, common article 3 has provided since 1949 that "[t]he wounded and sick shall be collected and cared for", without any qualification as to status. In the view of the ICRC, it is thus "implicit" that parties to the conflict are obliged to respect and protect medical personnel, units, transports, and facilities, including by refraining from attacking them, pillaging them, or destroying them.[212] The importance attached to the principle of 'continued care' is underlined by the ICRC's further observation that the mere entry of armed personnel to medical facilities—even for legitimate purposes—must be considered an "exceptional measure" which may only "be carried out in a manner that minimizes any negative impact on the provision of care."[213] Furthermore, the key principles of respect and protection which may be said to be implicit in common article 3 have since been confirmed expressly in Additional Protocol II.[214] While most obviously relevant to food, the prohibition in article 14 of the protocol on "attack[ing], destroy[ing], remov[ing], or render[ing] useless" objects "indispensable to the civilian population" might also arguably extend to medical stores and equipment, consistent with the parallel between "food and medical supplies" drawn in article 55 of Geneva Convention IV.

124. These authorities demonstrate that the established framework of international law requires the respect and protection of hospitals in all kinds of conflict, and in all circumstances. This not only includes a prohibition on attacking hospitals in the conduct of hostilities, but also destroying them or otherwise putting them out of action while under the control of a party to the conflict. This applies even in a State's own territory.

125. Consequently, article 8(2)(e)(iv) of the Statute can only be interpreted consistently with the established framework of international law if the notion of "attacking" a hospital is given a special meaning, encompassing both the conduct of hostilities but also acts of violence

[211] Additional Protocol I, art. 14(1). Article 12(1) also extends the obligation of respect and protection to civilian medical units, as well as hospitals. Notably, it has also been suggested in this context that the obligation of respect may require parties to the conflict to take positive measures to make sure that such objects are not put in jeopardy by third parties: AP Commentary, p. 166 (mn. 518).
[212] GCI Commentary (2016), pp. 262-263 (mns. 768-770). *See also* Dörmann, p. 462.
[213] GCI Commentary (2016), p. 263 (mn. 771). In the context of international armed conflict, under article 19 of Geneva Convention I, *see also e.g.* p. 638 (mns. 1801-1802).
[214] Additional Protocol II, arts. 7(1), 9(1), 11(1). *See also* Geneva Call Deed of Commitment (Health Care in Armed Conflict), para. 4; Heffes, pp. 239-241, 243.

when the hospital is under the control of a party to the armed conflict. Indeed, the universal ratification of the 1949 Geneva Conventions, and the very wide ratification of Additional Protocol I among States Parties to the Statute, further supports the view that the drafters of the Statute could not have intended to substantially limit the protection afforded to hospitals under article 8(2)(e) in comparison to international humanitarian law more broadly.

126. As a result, while the values and norms which underlie the protection of 'cultural' objects and hospitals are distinct within the established framework of international law, they dictate the same broad interpretation of the term "attack" in article 8(2)(e)(iv).

II.B. Article 8(2)(e)(iv) prohibits directing acts of violence of all kinds against hospitals

127. In addition to its narrow view of the scope of an "attack" for the purpose of article 8(2)(e)(iv), the Trial Chamber also considered that "pillaging of protected objects" cannot in any event "constitute an attack within the meaning of Article 8(2)(e)(iv) of the Statute."[215] This was also incorrect. To the contrary, since an "attack" for the purpose of article 8(2)(e)(iv) need not occur in the conduct of hostilities, the term simply refers to an "act of violence"—in other words, conduct which may lead to the destruction or damage of the hospital.

128. Importantly, both as a matter of logic and consistency with the established framework of international law, this destruction or damage is not confined to physical harm to the fabric of the building, but must also extend to the ability of the building to carry out the function which it serves. As such, since the retention and availability for use of medical stores and equipment is inherent to the effective functioning of a hospital, the appropriation of that property may constitute an act of violence for the purpose of article 8(2)(e)(iv).

129. Nor is it required that such appropriations must necessarily be capable of constituting the crime of pillage in their own right. What is important is the potential impact on the functioning of the hospital, rather than the subsequent use of the property by the person who appropriated it.

130. Finally, and in any event, since article 8(2)(e)(iv) is a crime of conduct, not result, the nature or degree of violence which was ultimately inflicted on a protected object can be of no

[215] Judgment, para. 1141.

more than evidentiary significance. What matters is that the perpetrator "*directed*" an act of violence against the protected object—in the sense of an act that could destroy or damage the object, or impair its ability to function according to its dedicated purpose. Consequently, the *actus reus* can either be satisfied by the perpetrator directly performing an action which sets a potentially harmful force in motion (launching a missile, wielding a pickaxe), or by the perpetrator using another person as a tool to carry out acts of violence against the protected object. In this latter scenario, even if the tool merely appropriates property from the object, and assuming for the sake of argument that this cannot be considered an act of violence in and of itself, this still does not preclude characterisation of the sending of the tool as *directing* an act of violence against the hospital, even if this did not come to pass.

II.B.1. Acts of violence not only encompass conduct which may destroy or damage the fabric of the hospital building but also conduct which may impair its ability to function according to its dedicated purpose

131. For the purpose of article 8(2)(e)(iv), since an "attack" need not occur in the conduct of hostilities and therefore need not be carried out against the adverse party,[216] it may be defined simply as an "act of violence".[217]

132. In its ordinary meaning, the concept of violence may often be considered to entail "[t]he deliberate exercise of physical force against a person [or] property".[218] However, within the specific context of international humanitarian law, an act of violence *may* entail the use of physical force. But not necessarily so. Rather, the closest definition identified in the *Commentary to the Additional Protocols* is "to set upon with hostile action".[219] That an act of violence is not limited merely to the use of physical force, in a narrow sense, is further confirmed by article 52(2) of Additional Protocol I, which contemplates such an act (as part of an "attack") as a means to achieve the "total or partial destruction, capture or neutralization" of an object.

133. If an act of violence may be defined as a hostile action capable of achieving the total or partial destruction, capture or neutralisation of an object, this suggests that the scope of this term may not be limited exclusively to conduct leading to the destruction or damage of the object's physical fabric. Indeed, an attack which "captures" an object may not harm the fabric

[216] *See above* paras. 21-64, 114-126.
[217] *See* Additional Protocol I, art. 49(1).
[218] *OED*, "violence, n.", 1.a.
[219] AP Commentary, p. 603 (mn. 1879).

of the object at all, even though it may put the object beyond the use of the party which formerly had control of it.

134. Furthermore, in its own terms, and with the possible exception of "historic monuments" article 8(2)(e)(iv) protects buildings which are "*dedicated*" to a particular purpose—in other words, which fulfil a protected function of some kind, even if passively as an object of veneration or place for spiritual contemplation. Likewise, while a "hospital" is not described as a "building dedicated to healing the wounded and sick", this is the meaning which is implicit in the very term itself.[220] Consequently, conduct which prevents such a building from carrying out its dedicated function might be said to have at least an equivalent effect to the physical destruction or damage of that building. To take a simple example, burning all the books in a library, or looting all the art from an art gallery, leaves the fabric of the buildings intact, but impairs (or even destroys) the function of the buildings as a library and art gallery, respectively. Yet it would be ludicrous in these circumstances to suggest that the library or the art gallery had not itself been the object of an act of violence—especially since, unlike instruments such as the 1954 Hague Convention, the Statute makes no express reference to movable cultural property.[221]

135. Similar considerations apply to hospitals, which are characterised in their healing function by the retention and availability for use of medical equipment and stores, and medical staff. If this equipment is appropriated, or the staff interfered with, then the hospital is effectively impaired in carrying out its dedicated purpose, just as much as if it had been destroyed altogether. A hospital with no medicine, no equipment, or no medical staff is, in effect, no hospital at all. Moreover, since article 8(2)(e)(iv) requires neither actual destruction nor even damage, it is not necessary that this in fact comes to pass—it is sufficient merely that harm of this nature *could* have resulted.[222]

136. The Trial Chamber apparently took none of these considerations into account. Since it provided no reasoning on this point, it is impossible to say why it considered the appropriation of medical equipment to be incapable, in principle, of amounting to an attack under article 8(2)(e)(iv). To the contrary, as non-consensual, hostile action impairs, if not

[220] *See e.g.* *OED*, "hospital, n.", 3.a.
[221] *See also* Gerstenblith, p. 376 (arguing that, in appropriate circumstances, "the looting of archaeological sites should be characterized as simply another form of destruction of cultural property").
[222] *See* Judgment, paras. 744, 917, 1136.

incapacitates, the functioning of the hospital as a hospital, the Trial Chamber should have considered this conduct to fall within the special meaning of attack in article 8(2)(e)(iv).

II.B.2. The established framework of international law recognises that the retention of medical stores and equipment is inherent to the effective functioning of a hospital

137. The established framework of international law further illustrates the close connection between the retention and availability of medical stores and equipment, and the functioning of a hospital. This strongly supports the view that an "attack" on a hospital, for the purpose of article 8(2)(e)(iv), must include the appropriation of medical stores and equipment.

138. In particular, for example, the ICRC has observed that the obligation to respect and to protect medical units (including hospitals) in article 19 of Geneva Convention I not only "precludes the intentional destruction of medical establishments" but also "plunder of their medical equipment".[223] In this context, it appears to contemplate liability under the Statute as principally arising under article 8(2)(e)(iv).[224]

139. Likewise the strict limits even on the ability to requisition civilian hospitals and medical stores in occupied territory, under article 57 of Geneva Convention IV, illustrate the importance attached to ensuring that hospitals remain properly equipped in order to carry out their functions.[225] The ICRC has likewise opined that common article 3 forbids the appropriation of medical property, as part of the implicit obligation to respect and protect hospitals and medical staff.[226]

II.B.3. The appropriation of medical equipment need not be capable of constituting the crime of pillage in its own right

140. With respect to the crime of pillage under article 8(2)(e)(v) of the Statute (count 11), the Trial Chamber observed that the appropriation of "medical equipment[] could potentially serve a military purpose" and therefore considered that it could not find that its "appropriation was intended for private and personal use".[227] For the reasons which follow, the Prosecution considers this reasoning to be erroneous, insofar as the established framework of international law imposes strict limits on the requisition of medical equipment, and therefore the appropriation was not for a military purpose (at least, not a *lawful* one). While the

[223] GCI Commentary (2016), p. 637 (mn. 1800).
[224] GCI Commentary (2016), p. 640 (mn. 1811).
[225] *See above* fn. 209.
[226] GCI Commentary (2016), p. 263 (mn. 770). *See also above* fn. 212.
[227] Judgment, para. 1041.

Prosecution has not directly appealed this finding (in the interest of judicial economy), and consequently does not seek this conduct to be additionally taken into account as part of Mr Ntaganda's conviction for pillage, it reserved the right to identify this error insofar as it was material to the Trial Chamber's further error concerning the characterisation of the incident at Mongbwalu hospital under article 8(2)(e)(iv).[228]

141. Indeed, for the purpose of article 8(2)(e)(iv), where the appropriation of medical equipment is relevant only to the extent that it impairs the ability of a hospital to function according to its dedicated purpose, the *motivation* behind the appropriation of the medical equipment (which is relevant for the crime of pillaging under article 8(2)(e)(v)) is irrelevant. What is important is the disabling effect of the appropriation on the hospital. Consequently—and notwithstanding the Trial Chamber's characterisation of the appropriation of medical stores from Mongbwalu hospital as "pillage"—it is not necessary for the Prosecution to establish the intention to appropriate medical property for private or personal use (the requirements of pillage) in order to establish that the same conduct might amount to an attack. Unlawful appropriation in any sense is sufficient.

142. What is necessary for article 8(2)(e)(iv), instead, is for the Prosecution to show that the object 'attacked' by the UPC/FPLC was not a lawful military objective. This cannot, even for the sake of argument, be established by the Trial Chamber's view that the appropriation of medical equipment might have served a military purpose. As the Trial Chamber considered, "medical facilities […] enjoy enhanced protection which 'shall not cease unless they are used to commit hostile acts, outside their humanitarian function'".[229] This means that, notwithstanding the recognition in article 8(2)(e)(iv) that protected objects may permissibly be subject to attack if they constitute military objectives, a heightened threshold applies to hospitals before they may properly be considered as such[230]—as a matter of law, they may not be subjected to *any* attack unless they have not only been used to commit hostile acts, outside their humanitarian function, but also have received a warning and time for remediation. Otherwise, they are immune in all circumstances. Consequently, even a claimed "military purpose" for seizing medical property offers no relevant justification for the purpose

[228] Prosecution Notice of Appeal, para. 5 (fn. 6).
[229] Judgment, para. 1146 (citing Additional Protocol I, art. 13(1); Additional Protocol II, art. 11(2); CIHL Study, rule 28).
[230] In the same way, for relevant cultural property under the enhanced regime of the 1999 Second Protocol to the Hague Convention, for example, the Court should apply the provisions of that treaty to determine at what point the object in question could lawfully be treated as a military objective: *see above* fn. 147.

of article 8(2)(e)(iv), if that property is seized from a hospital. Nor is there any freestanding justification of military necessity which may be applied to article 8(2)(e)(iv), if it is not incorporated in the elements of a crime as a negative element.[231]

143. Nor in any event could the UPC/FPLC soldiers in this instance be said to have lawfully requisitioned medical equipment from Mongbwalu hospital. This too prevents the conclusion that the appropriation of property was pursuant to a lawful "military purpose", in the Trial Chamber's terms. Not only are the principles governing requisitions and similar authorised appropriations well established in the law of international armed conflict—and subject to important restrictions and due process requirements—but any such analogous rules in non-international armed conflict would have to follow similar principles.[232] Moreover, the equipment and supplies of hospitals are subject to further specific protections against requisition, unless it can be established that the civilian population will not be adversely affected. For example:

- Article 33 of Geneva Convention I, similar to the 1906 and 1929 Geneva Conventions, permits the appropriation of stores of *military* hospitals and medical establishments, provided they are no longer "required for the care of the wounded and sick", or in the case of urgent military necessity if previous arrangements have been made for the welfare of the wounded and sick in question.

- Article 57 of Geneva Convention IV provides, absolutely, that "[t]he materials and stores of *civilian* hospitals cannot be requisitioned so long as they are necessary for the needs of the civilian population" (emphasis added).

- Article 14(2) of Additional Protocol I provides that the equipment and stores of civilian medical units likewise cannot be requisitioned "so long as these resources are necessary for the provision of adequate medical services for the civilian population and for the continuing medical care of any wounded and sick already under treatment."

[231] *See e.g.* *Hostages* Case, pp. 1256, 1296; *Von Manstein*, pp. 512-513; Cryer et al, p. 348; Dörmann, p. 81; UK MoD Manual, p. 23 (mn. 2.3); Hayashi, p. 91; Hosang, p. 171.
[232] *See* Dörmann, p. 465 ("it must be emphasised that there are no specific rules of international humanitarian law allowing requisitions, contributions, seizure or taking of war booty in a non-international armed conflict"); *Hadžihasanović* Trial Judgment, paras. 51-52; *Naletilić* Trial Judgment, para. 616 (citing 1907 Hague Regulations, arts. 51-53); *Martić* Trial Judgment, para. 102; *Simić* Trial Judgment, para. 100. *See also* *Bemba* Appeal Judgment, Dissenting Opinion of Judges Monageng and Hofmański, para. 560 (fn. 1220).

144. Although not spelled out, it is submitted that similar principles are established in non-international armed conflict under common article 3, and supplemented by Additional Protocol II.[233] These provisions illustrate that, in the absence of any assurance that the appropriated medical equipment was not required for the civilian population, the appropriation by the UPC/FPLC was necessarily unlawful.

145. Applying these legal principles, the circumstances of the appropriation of medical property from Mongbwalu hospital are inconsistent with any possibility that the UPC/FPLC soldiers had any justification under international humanitarian law for their conduct.

II.B.4. Article 8(2)(e)(iv) is a crime of conduct, not result

146. Finally, and in any event, it must be recalled that liability under article 8(2)(e)(iv) inheres in the unlawful "*directing*" of an attack against a protected object—and not in any resulting damage or destruction, which need not be established at all.[234] As such, the Trial Chamber also seemed to err by confusing the actual appropriation of medical equipment from the hospital at Mongbwalu with the *actus reus* of the crime. While this was one way of analysing the facts, it was not the only way, depending on whether the Trial Chamber conceived the perpetrators as the soldiers who attended the hospital or the soldiers who sent them there for the purpose of attacking it. As the Trial Chamber had itself recalled, the *actus reus* of directing an attack means that the perpetrator selects the target and decides that the attack will occur,[235] in the sense that the perpetrator initiates some action which is capable of leading to an act of violence on the target. For the purpose of liability, it is thus immaterial whether the attack actually comes to pass in the way that the perpetrator may contemplate at the time that the attack is launched.

147. Following this principle, the hostile presence of UPC/FPLC soldiers at the Mongbwalu hospital (their hostility illustrated by their appropriation of property) could also be conceived as mere *evidence* of unlawful conduct by any UPC/FPLC member (Mr Ntaganda, or an intermediate perpetrator) who had deployed those soldiers to that location for the purpose of attacking it. In this sense, the UPC/FPLC soldiers at the hospital were not the direct physical perpetrators of the crime under article 8(2)(e)(iv), but rather tools of the perpetrator, just as much as a missile or a pickaxe may be a tool for would-be perpetrators of crime. The

[233] *See above* para. 123 (third bullet point).
[234] Judgment, para. 1136. *See also above* fn. 173.
[235] Judgment, paras. 744, 917.

principal question for the Trial Chamber, therefore, was whether the UPC/FPLC soldiers had been "directed" to the hospital for the purpose of destroying, damaging, or impairing its ability to carry out its function. Their actual conduct was relevant and probative in answering that question, but not necessarily dispositive of it—the hostile purpose of the deployment to the hospital could, for example, be established by other evidence.

148. Accordingly, while the Trial Chamber was entitled to take into account the nature of the soldiers' conduct at the hospital—specifically, their appropriation of property, as opposed to more overt acts of destruction—in assessing what inferences it could draw about the conduct of the UPC/FPLC member who "directed" them, it was not entitled to treat the nature of their conduct as an absolute legal bar to finding that an "attack" was "directed" at the hospital. Yet this is what the Trial Chamber seems to have done.[236] Such an approach amounts, impermissibly, to transforming article 8(2)(e)(iv) from a crime of conduct into a crime of result—which the Trial Chamber itself recognised that it could not do.[237] Even if the appropriation of property cannot be considered to amount to an "attack" under article 8(2)(e)(iv), therefore, the Trial Chamber should still have considered whether the soldiers had been deliberately sent there and, if so, for what purpose.

149. If the Trial Chamber had not made this error, the UPC/FPLC soldiers' conduct was in fact entirely sufficient—in the context of all the other evidence[238]—to establish that they were sent by another UPC/FPLC soldier (whether Mr Ntaganda himself or an intermediate perpetrator) to attack the hospital as being the *only* reasonable inference available on the evidence.

II.C. The Trial Chamber's errors materially affected the Judgment

150. The Trial Chamber's errors materially affected the Judgment insofar as they led the Trial Chamber to conclude that it was necessary for the Prosecution to prove that the events at Mongbwalu hospital occurred in the conduct of hostilities, and that the conduct of the UPC/FPLC soldiers who were physically present at the hospital had to have been of a nature to physically destroy or damage the fabric of the hospital building.

[236] Judgment, para. 1141. *See also* para. 761 (remarking that, "[a]s a matter of law," the Trial Chamber did not consider that "pillaging of protected objects constitutes an attack").
[237] Judgment, para. 1136. *See also above* fn. 173.
[238] *See e.g. above* fns. 182-183.

151. If the Trial Chamber had not made these errors, it would have reached different conclusions as to whether the incident at Mongbwalu hospital satisfied the requirements of article 8(2)(e)(iv), and it would not have terminated its analysis under count 17 in this regard.[239]

- With respect to the first element (the perpetrator "directed" an "attack"), the Trial Chamber would have found *either*: that the *acts* of UPC/FPLC soldiers at Mongbwalu hospital constituted acts of violence on the basis that the appropriation of medical equipment from a hospital is itself conduct of a nature which impedes or prevents the ability to function properly according to the building's dedicated purpose;[240] *or* that the *sending* of UPC/FPLC soldiers to the hospital (with the purpose of destroying it, damaging it, or otherwise impairing its ability to function properly according to its dedicated purpose) was itself an act of violence. Consistent with the Trial Chamber's finding that Mr Ntaganda and the other co-perpetrators "planned" the *ratissage* operation in Mongbwalu, the Trial Chamber in either scenario would have likewise attributed the conduct of the relevant UPC/FPLC soldiers concerning the hospital at Mongbwalu to Mr Ntaganda.[241]

- With respect to the second element (the object of the attack was, materially, a hospital or a place where the sick and wounded were collected, which was not a military objective), the Trial Chamber would have found that the hospital at Mongbwalu satisfied this requirement. There is no doubt of its function as a hospital at the material time,[242] and there is no indication that it had become a military objective. Indeed, as the Trial Chamber recalled with respect to the Sayo health centre, hospitals enjoy enhanced protection which shall not cease unless they are used to commit hostile acts, outside their humanitarian function, and in any event shall not cease until suitable warning has been given to terminate those acts and that warning has not been heeded.[243] The UPC/FPLC soldiers' ability to access the Mongbwalu hospital without challenge, and the occurrence

[239] Judgment, para. 1141.
[240] Judgment, para. 1138. *See further e.g.* DRC-OTP-2109-4426, para. 37 (statement of P-824, admitted for the purpose of sentencing, who arrived in Mongbwalu two months after the attack: "*Je me suis aussi rendu à l'hôpital de Mongbwalu qui ne fonctionnait pas vraiment car il n'y avait une pénurie en médicament et en personnel. Les lits et les machines avaient été pillés au moment de la prise de la ville par l'UPC*"). *See also* Judgment, paras. 516 (fn. 1530: declining to find that MrNtaganda *personally* looted the Mongbwalu hospital, but apparently accepting the evidence of P-0017 and P-0768 that medicine and medical equipment were in his house: T-33, p. 59:5-15; T-58, p. 82:8-17), 762.
[241] Judgment, paras. 491, 493, 512, 854.
[242] Judgment, paras. 514, 1032, 1041, 1138.
[243] Judgment, para. 1146.

of this incident after the takeover of Mongbwalu, are entirely inconsistent with any notion that the hospital might have been used for hostile acts.

- With respect to the third element (the perpetrator intended, materially, a hospital, which was not a military objective, to be the object of attack), the Trial Chamber would have found that the incident at Mongbwalu hospital satisfied this requirement. The UPC/FPLC soldiers who appropriated medical equipment could not in the circumstances have failed to appreciate the medical function of the building from which they appropriated that equipment.[244] Nor could Mr Ntaganda and the other co-perpetrators who planned the *ratissage* operation in Mongbwalu have been unaware that this would have encompassed the hospital.[245]

- With respect to the fourth and fifth elements (nexus to the armed conflict, and the perpetrator's awareness of the factual circumstances establishing the existence of the armed conflict), the Trial Chamber's existing findings for other war crimes apply equally to the hospital at Mongbwalu.[246]

152. The Prosecution therefore submits that, but for its errors in interpreting the meaning of "attack" under article 8(2)(e)(iv), the Trial Chamber would have convicted Mr Ntaganda for directing an attack against the hospital at Mongbwalu. It would consequently also have taken this additional conduct into account in sentencing Mr Ntaganda.

153. Consequently, for all the preceding reasons, the Appeals Chamber should confirm that the term "attack" in article 8(2)(e)(iv) has a special meaning for hospitals and places where the sick and wounded are collected which, consistent with the established framework of international law, encompasses all acts of violence and is not limited to the conduct of hostilities. It should also confirm that the appropriation of medical equipment from a hospital is itself conduct of a nature which impedes or prevents the further ability of the hospital to function properly according to its dedicated purpose, and therefore is no less an act of violence than a more overtly destructive act. Further, or in the alternative, it should confirm that the sending of soldiers to a protected object (with the purpose of destroying it, damaging it, or otherwise impairing its ability to function properly according to its dedicated purpose) itself amounted to directing an act of violence for the purpose of article 8(2)(e)(iv).

[244] Judgment, paras. 514, 1032, 1041, 1138.
[245] Judgment, paras. 491, 493, 512, 805, 808, 810, 854, 1177.
[246] *See* Judgment, paras. 1148, 1173, 1177-1189.

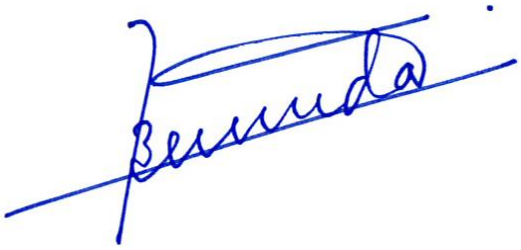
154. The Appeals Chamber should then exercise its power under article 83(2) of the Statute to amend the Judgment consistent with the correct interpretation of the law, and to enter findings leading to Mr Ntaganda's conviction for the attack on the hospital at Mongbwalu. It should further ensure that this additional conduct attributed to Mr Ntaganda is appropriately reflected in the sentence imposed.

Conclusion

155. For all the reasons above, the Appeals Chamber should confirm the applicable law, and reverse the Trial Chamber's findings acquitting Mr Ntaganda of responsibility for:

- the attack on the church at Sayo; and
- the attack on the hospital at Mongbwalu.

156. Having reversed these findings, the Appeals Chamber should amend the Judgment accordingly and enter the necessary findings leading to Mr Ntaganda's additional conviction for these incidents. It should further ensure that this additional conduct is appropriately reflected in the sentence imposed.



Fatou Bensouda, Prosecutor

Dated this 7th day of October 2019
At The Hague, The Netherlands