Part II
– Developments in international law

Revisiting the Notion of '*Combat Action*' in the Context of the War Crime of Attack against Protected Historical Monuments and Buildings

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Abstract

A temple is the 'house of God 'and monuments are a very important part of the cultural, historical and national identity of the local population. UNESCO established the World Heritage List inventorying natural and man-made sites that are of paramount importance for mankind. The so called The Hague law and Geneva law related to the conduct of hostilities or to the protection of victims of armed conflicts contain special provision protecting these items from attack except when they are already being used for military purposes and contribute considerably to the military efforts of belligerents. The Rome Statute also contains special rules criminalizing the attack against such objects. However, the International Criminal Court (ICC) was confronted with challenges in those cases where the charge was brought for a crime that represented or contained inter alia the attack against this type of protected object. The paper seeks to shed light on the legal background of the doctrinal and jurisprudential controversy and endeavors to suggest an adequate solution.

Keywords: combat action, ICC, war crime, protected historical monuments, Rome Statute

1. William A. Schabas about the interpretation of 'attack' in the Al Mahdi judgment

Shortly after the delivery of the *Al Mahdi* judgment, Professor William A. Schabas, one of the best specialists of the legal system of the International Criminal Court established by the Rome Statute, published an article with

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a shocking title: 'Al Mahdi Has Been Convicted of a Crime He Did Not Commit'.[1]

Schabas's article pointed out that the charge formulated under Article 8(2)(e)(iv) *i.e.,* "intentionally directing attacks against […] historic monuments"[2] and admitted under guilty plea by Al Mahdi, whose liability was established by the trial chamber does not seem to correspond to the specific facts of the destruction of the mausoleums and other historic monuments of Timbuktu upon the order of the leaders of fundamentalist forces called *AlQueda du Magreb Islamique* (hereinafter: AQMI) and Ansar Dine when they took over the city and ruled it cruelly in 2012/2013. It is without any doubt that Al Mahdi – as appointed leader of the Hesbah, the 'moral police', one of three police forces established by the ruling 'islamic council' – executed the order through people under his authority. However, Schabas questioned the qualification of the destruction as an 'attack' *stricto sensu* because the destruction did not occur during the military takeover and the incursion of the AQMI and Ansar Dine into the city left without defense by the Malian army units. Instead, the attack took place a couple of weeks later, when Timbuktu lived under the cruel fundamentalist regime without being the area of an actual military operation.

Schabas cited the explanation given in the *Elements of crimes* and pointed out that whenever 'attack' as a war crime is mentioned in the Rome Statute or in the *Elements of crimes,* it should have the same content according to a well known principle of international law.[3] Following a deep analysis of the *travaux préparatoires* of the Rome Statute,[4] he concluded that upon the proposal of the US delegation, the drafters had agreed[5] to follow the formulation contained in the 4th Convention[6] of The Hague peace conference (1907) and its annex –commonly referred to as The Hague Regulation[7] –

1 William Schabas, 'Al Mahdi Has Been Convicted of a Crime He Did Not Commit', *Case Western Reserve Journal of International Law,* Vol. 49, Issue 1, 2017, pp. 75–102.

2 Full text of Article 8 (2)(e)(iv): "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."

3 Schabas 2017, pp. 78–79.

4 Id. pp. 84–88.

5 Id. pp. 86 and 88.

6 Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, at https://ihl-databases.icrc.org/assets/treaties/195-IHL-19-EN.pdf

7 Annex to the Convention. Regulations respecting the laws and customs of war on land.

and in particular that of Article 27[8] of the annex, disregarding however the formulation of Article 56[9] of the same annex. Although none of these articles contain the word 'attack', Article 27 indubitably refers to active military operations while Article 56 leaves the timing of destruction open. The agreed formula was inserted into the subsequent reports of the negotiations without real changes *in merito.*[10]

Schabas also examined the analysis of the notion of attack in the 1st additional protocol (1977) to the 1949 Geneva Conventions, and pointed out that according to the commentary to the protocol an attack means 'combat action'.[11]

In the light of the above considerations, Schabas concludes that as the destruction did not occur in 'combat action', but at a moment that cannot be considered as the time of active hostilities according to the Geneva law terms, one important element is missing from the criteria required by the *Elements of crimes.*

He also considered whether the 1954 The Hague Convention for the protection of cultural property in the event of armed conflict could be invoked to better fulfill the necessary criteria of Article 8(2)(e)(iv).[12] Schabas clearly condemns the destruction and enumerates several other crimes that could have been chosen by the prosecutor in the Rome Statute and in which the word 'attack' is not present, *e.g.,* Article 8(2)(e)(xii) on destroying the property of the adversary;[13] it is true, however, that in this case, other problems could emerge regarding the compatibility of the article with the given facts.[14]

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8 Article 27: "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."

9 Article 56: "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."

10 Schabas 2017, p. 87.

11 Id. pp. 79–80.

12 Id. pp. 91–92.

13 Full text in the Rome Statute: "Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;"

14 Schabas 2017, pp. 90–91.

2. The Appeals Chamber and Article 8(2)(e)(iv) in Ntaganda

Given the guilty plea, the Appeals chamber of the ICC did not need to pronounce on the issue of the interpretation of 'attack' in the context of the destruction of historical monuments in *Al Mahdi*. The issue resurfaced, however, in *Prosecutor v Bosco Ntaganda,* where both parties appealed different parts of the judgment of condemnation. The Office of the Prosecutor (hereinafter: OTP) was not satisfied that Ntaganda's criminal responsibility had not been established concerning the destruction of the church of Sayo in the Ituri region of the DRC, as the trial judgment did not consider this event as having occurred during an attack.[15] The Appeals Chamber approved the decision of the trial judgment by majority and several separate or partly dissenting opinions tried to clarify the meaning of the word 'attack' in the context of Article 8(2)(e)(iv).

The common separate opinion[16] written by judge Morrison and judge Hofmański was based on the in-depth analysis of the *travaux préparatoires* and the judges' conclusion was more or less the same as that of Schabas: in the context of war crimes, the word 'attack' should always have the same meaning[17] and destruction falling under Article 8(2)(e)(iv) presupposes 'combat action'.[18] Like Schabas, the judges also examined the impact of the

15 "1136. As set out above, the term 'attack' is to be understood as an 'act of violence against the adversary, whether in offence or defence'. As with the war crime of attacking civilians, the crime of attacking protected objects belongs to the category of offences committed during the actual conduct of hostilities. 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." "1142. In addition, given that the attack on the church in Sayo took place sometime after the assault, and therefore not during the actual conduct of hostilities, the Chamber finds that the first element of Article 8(2)(e)(iv) of the Statute is not met. This incident is therefore also not further considered." ICC-01/04-02/06–2359 08-07-2019, pp. 502 and 504.

16 Separate opinion of Judge Howard Morrison and Judge Piotr Hofmański on the Prosecutor's appeal , ICC-01/04-02/06–2666-Anx1 30-03-2021, (hereinafter: Morrison–Hofmański).

17 "8. We are of the view that, unless the Statute contains an indication to the contrary, such as in the above-mentioned Article 7, which includes a specific definition of the term in the context of crimes against humanity, a term appearing therein may be expected to have the same meaning each time it is used, in particular if it appears in the same provision. In all the above-quoted instances of the use of the term 'attacks' in Article 8, it should thus be presumed to have the same meaning, in particular since all the instances in which the term appears in that provision concern the definition of the various war crimes over which the Court has jurisdiction." Morrison–Hofmański, pp. 3–4.

18 "43. We find that, viewed in the light of the established framework of international law of armed conflict and the drafting history of the Statute, Article 8(2)(e)(iv) of the Statute

1954 The Hague Convention for the protection of cultural property in the event of an armed conflict and whether it could be invoked to support the necessary criteria of Article 8(2)(e)(iv). However, they concluded that the text of the 1954 Convention refers only to properties 'of great importance to the cultural heritage of every people', and the small church of Sayo did not fall under this category.[19]

Although in her separate opinion Judge Solomy Bossa[20] was *in abstracto* open to accepting a more elastic interpretation of the attack in the context of the destruction of monuments and religious buildings, but *in concreto,* and taking into account the lack of precision regarding the timeframe of the given 'attack', she was inclined to follow the principle *in dubio pro reo.*[21]

In her dissenting points inserted into the judgment, Judge Luz Ibáñez Carranza advocated against the "narrow interpretation of the attack" emphasizing that in the light of the object and the purpose of the Rome Statute, the proper interpretation of this notion should cover "combat action and immediate aftermath thereof".[22]

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is based on Article 27 rather than on Article 56 of the 1907 Hague Regulations. The choice of the word 'attacks', rather than 'acts of hostility' or 'seizure of, destruction of or wilful damage done to', shows the drafters' intention to apply a narrow definition of that word. In that sense, the term 'attack' must be understood in the same way as it is defined in article 49(1) of Additional Protocol I: it is an 'act of violence against the adversary, whether in offence or in defence'. It is narrower than the term 'acts of hostilities' used in, among other provisions, article 16 of Additional Protocol I. It follows that the term 'attack' means 'combat action', or, if used as a verb, 'to set upon with hostile action'." Morrison–Hofmański, p. 13.

19 Morrison–Hofmański, pp. 11–12.

20 Separate Opinion of Judge Solomy Balungi Bossa on the Prosecutor's Appeal, ICC-01/04-02/06–2666-Anx4 30-03-2021 (hereinafter: Bossa).

21 "2. For the reasons that follow, I agree with Judges Eboe-Osuji and Ibáñez, who consider that the interpretation assigned by the Trial Chamber to the meaning of the word "attack" is narrow, in the particular circumstances of this case. (…) However, for the same reasons as Judge Eboe-Osuji […] I also agree that the appellant should be acquitted on the count relating to the attack on the church in Sayo for the same reasons. […] 14. Regarding the church in Sayo, it was attacked by UPC/FLPC soldiers sometime after the initial assault. The Trial Chamber accepted that the church was actually damaged, its doors were broken and furniture strewn all over the place, after being taken over by soldiers and turned into a kitchen. However, it was not possible for the Trial Chamber to situate the attack in time, except that it occurred sometime after the initial assault. Since it was not possible from the evidence to situate the attack in time, it is not possible to say whether it took place during the ratissage operation. I would therefore resolve this uncertainty in favor of the appellant and acquit him of the charge of attacking protected objects as a war crime, against the church in Sayo." Bossa, pp. 2 and 5.

22 "1167. In the view of Judge Ibáñez Carranza, the narrow interpretation of attack adopted by the Trial Chamber is contrary to the object of the provision, namely to prevent attacks

Judge Chile Eboe-Osuji referred to different English Legal Dictionaries, scholarly works and international jurisprudence, as well as the similarities between crimes against humanity and war crimes within the Rome Statute in order to substantiate why he is unable to accept the Trial Chamber's reasoning that "the actions of the UPC/FPLC troops against the Mongbwalu hospital and the church in Sayo do not amount to 'attacks' for purposes of Article 8(2)(e)(iv), merely because they occurred after actual combat operations to capture those locations and 'not during the actual conduct of hostilities."[23]

3. The Decision on the Confirmation of Charges and the First Instance Judgment in Al Hassan

The Pre-Trial Chamber and the Trial Chamber acting in the case of *Prosecutor v Al Hassan* – former deputy leader of the Islamic Police, *i.e.,* another police force established by the AQMI/Ansar Dine power – had to deal with the question of an attack against historical monuments and buildings. The Prosecutor charged Al Hassan as co-perpetrator of the destruction, since several members of the Islamic Police could be seen on the video footages capturing the events where they had to secure the site during the destruction.

The Pre-Trial Chamber[24] indicated that it was aware of the doctrinal debate launched by Schabas's criticism[25] and studied the first instance judg-

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against protected buildings in the context of non-international armed conflicts. Such interpretation is also at odds with the object and purpose of the Rome Statute to put an end to impunity for the perpetrators of the most serious crimes of concern to the international community as a whole, including for acts that are undoubtedly serious violations of international humanitarian law. Finally, the interpretation proposed would not be in line with the 'established framework of international law' as stipulated in the chapeau of article 8(2)(e) of the Statute. 1168. In line with the above considerations, Judge Ibáñez Carranza is of the view that the term 'attack' includes the preparation, the carrying out of combat action and the immediate aftermath thereof, including criminal acts committed during ratissage operations carried out in the aftermath of combat action." Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled 'Judgment', ICC-01/04-02/06–2666-Red 30-03-2021, pp. 424–425.

23 Partly concurring opinion of Judge Chile Eboe-Osuji, ICC-01/04-02/06–2666-Anx5 30-03-2021, para. 132, p. 53.

24 *Corrected Version of "Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud"*, ICC-01/12-01/18–461-Corr-Red-tENG 03–05-2024, date of the original decision: 30 September 2019 (hereinafter: Al Hassan confirmation decision).

25 "518. The Chamber refers to the definition of the crime of "attacking protected objects" as set out in Article 8(2)(e)(iv) of the Statute and in the Elements of Crimes. The Prose-

ment delivered in *Ntaganda*[26] as well. Nevertheless, it decided to follow the *Al Mahdi* approach.[27]

The Trial Chamber condemned Al Hassan, but not on all charges. After presenting the chain of the events and the respective roles of the three police formations (Hesbah, Islamic Police and Security Battalion),[28] the judges – relying on the principle *in dubio pro reo* – acquitted him *inter alia* from the charge of attack against historical monuments and buildings.[29] The Trial Chamber did not enter into the analysis of the notion of 'combat action'.

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cutor seeks confirmation of the charge relating to the demolition of the mausoleums (count 7) under the legal characterization provided for in Article 8(2)(e)(iv) of the Statute. 1399 The Chamber nonetheless notes that the suitability of this characterization is a matter of dispute between the parties. 1400" (Then, in the rather long paras. 519 and 520, the standpoints of the prosecution and defence are recapitulated also with the use of citations.) Footnote 1400 says: "DCC, paras. 687–715; Prosecutor's Final Written Submissions, paras. 143–155; Defence Written Submissions, paras. 136–137; Defence Final Written Submissions, paras. 37–44. See also: William Schabas, Al Mahdi Has Been Convicted of a Crime He Did Not Commit, Case Western Reserve Journal of International Law 49 (2017)." *Al Hassan confirmation decision,* para. 518, p. 244.

26 "521. The category of attacking protected objects (Article 8(2)(e)(iv) of the Statute) was chosen in *Al Mahdi,* first by this Chamber in its previous composition1411 and later by Trial Chamber VIII. In Ntaganda, Trial Chamber VI recalled that the crime of attacking protected objects belonged to the category of offences committed during the actual conduct of hostilities but noted that this interpretation did not find application in cases where protected cultural objects enjoying a special status were the object of the attack." *Al Hassan confirmation decision,* para. 521, p. 246.

27 "522. The Chamber subscribes to the analysis of Trial Chamber VIII in *Al Mahdi,* which held that "the element of 'direct[ing] an attack' encompasses any acts of violence against protected objects" and that no distinction need be made as to whether these acts "w[ere] carried out in the conduct of hostilities or after the object had fallen under the control of an armed group". Trial Chamber VIII highlighted that "[t]his reflect[ed] the special status of religious, cultural, historical and similar objects" and, recalling that the Statute made no such distinction, it considered that "the Chamber should not change this status by making distinctions not found in the language of the Statute." *Al Hassan confirmation decision,* para. 522, p. 246.

28 *The Prosecutor v Al Jassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud,* Trial Judgment, ICC-01/12-01/18–2594-Red 26-06-2024 (hereinafter: Al Hassan trial judgment), paras. 1030–1055, pp. 505–525.

29 "1053. Having regard to the aforementioned considerations and further noting that the heavy security deployment applied only to the first cemetery at which demolitions occurred and that it was Talha and the Security Battalion which undertook these measures, the Chamber cannot infer from Mr Al Hassan general role in relation to the security of the city, the patrols, and the assignment of Police members for these tasks, that he managed the security in relation to the demolition of the mausoleums. Taking all of the foregoing factors into account, the Chamber also cannot infer that Mr Al Hassan 'would have been responsible' for tasking specific members of the Police to participate in the demolition operations." […] "1055. In light of the foregoing, the Chamber finds that there is in-

4. The View of the Office of the Prosecutor

Apparently, there is no difference between Fatou Bensouda and her successor Karim Khan concerning the legal perception of the attack against protected monuments. In a policy paper issued in 2021, duly taking into account the analysis by Schabas and referring to the considerations of judges Morrison and Hofmański in the footnotes, the prosecutor confirmed that

> "the ICTY's recognition that customary international law prohibits intentional harm to specially protected objects – regardless of the degree to which they are controlled by a party to the conflict – is consistent with the approach of the Court in *Al Mahdi*. This took the view that "attack" under Articles 8(2)(b)(ix) and 8(2)(e)(iv) had a special meaning, including acts directed against protected objects under the control of a party to the conflict, and not merely those under the control of the adverse party. In this way, it would seem that "attack" for the purpose of Articles 8(2)(b)(ix) and 8(2)(e)(iv) may be defined differently from other 'conduct of hostilities' offences in Articles 8(2)(b) and (e). While the Ntaganda Trial Chamber declined to follow *Al Mahdi* on this point, and this led to a wide-ranging judicial discussion among members of the Ntaganda Appeals Chamber, the Appeal Judgment ultimately contains no majority overturning the legal principles recognised in *Al Mahdi*. While respectful of the judicial opinions which have been rendered, the Office therefore remains of the view that *Al Mahdi* was correctly decided. In the ordinary exercise of its mandate, and subject to judicial guidance, it will seek to clarify the law further in this respect."[30]

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sufficient evidence to establish that Mr Al Hassan took any particular action or had a specific role in relation to the demolition of the mausoleums. Therefore, in the absence of any factual findings on Mr Al Hassan's involvement, the Chamber considers it unnecessary to undertake any legal characterisation of the charged crime under Count 7 or the related criminal responsibility of Mr Al Hassan under Article 25(3)(d) of the Statute." […] "1181. In light of the Chamber's factual findings made above in which it found that the link between Mr Al Hassan's conduct and the demolition of the mausoleums has not been established to the required standard, the Chamber will not set out the applicable law for the war crime of attacking protected objects under Article 8(2)(e)(iv) of the Statute." *Al Hassan trial judgment,* paras. 1053, 1055 and 1181, pp. 524–525 and 580–581.

30 Office of the Prosecutor, Policy on Cultural Heritage, June 2021, para. 45, p. 16 (footnotes omitted).

5. The Notion of 'Combat Action' as a Problem to Overcome – Some Scholarly Reflections

The ideas voiced by Schabas sparked considerable debate in academia. The result of the reconstruction of the *travaux préparatoires* and the 'attack' = 'combat action' approach was not contested. However, those who were advocating for an enhanced protection of historical and cultural monuments tried, nevertheless, to attribute a special meaning[31] to the word 'attack' when directed against these artifacts *(lex specialis),* or they chose the *de lege ferenda* approach, *i.e.,* the need to add a special clause[32] to the crimes against humanity in Article 7 of the Rome Statute.

6. The Need to Add Subtleties to the Historical Interpretation on the Basis of the Travaux Préparatoires

The interpretative rule that 'a technical word should always have the same meaning in the same legal document' is certainly correct and logical. *In Abstracto,* it cannot be contested. However, if we do not only take the English version of the Rome Statute but also consider the equally authentic French text of the *Elements of crimes,* we might conclude that *in concreto,* the statement that the notion 'attack' is always used in the same way must be given some nuance. Minor as they may be, there are still differences, which are nevertheless embarrassing.

Among the enlisted war crimes, '*directing attacks*' is consistently translated as '*diriger [...] des attaques*' in the French version of the Rome Statu-

31 Emma A. O'Connell, 'Criminal Liability for the Destruction of Cultural Property: The Prosecutor v. Bosco Ntaganda', *DePaul Journal for Social Justice,* Vol. 15, Issue 1, 2022, pp. 54, 62–63; Samira Mathias, 'Prosecuting Crimes Against Culture: The Contributions of the Al Mahdi and Ntaganda Cases to the ICC Approach to Cultural Property Protections', *Emory International Law Review,* Vol. 35, 2021, pp. 64, 74–75; Mark A. Drumbl, 'From Timbuktu to The Hague and Beyond: The War Crime of Intentionally Attacking Cultural Property', *Journal of International Criminal Justice,* Vol. 17, 2019, pp. 86, 92, 95; Juan Pablo Pérez-León-Acevedo &Thiago Felipe Alves Pinto, 'Enforcing Freedom of Religion or Belief in Cases Involving Attacks Against Buildings Dedicated to Religion: The Al Mahdi Case at the International Criminal Court', *Berkeley Journal of International Law,* Vol. 37, Issue 3, 2020, pp. 463–464.

32 Peta-Louise Bagott, 'How to solve a problem like Al Mahdi: proposal for a new crime of 'attacks against cultural heritage', *in* Julie Fraser & Brianne McGonigle Leyh (eds.), *Intersections of Law and Culture at the International Criminal Court,* Edward Elgar, Cheltenham, 2020, pp. 42, 53.

te.[33] However, the only mention of *'launching an attack'* is also translated as *'diriger [...] des attaques'*.[34] As far as the Elements of crimes is concerned, *'directed an attack'* is generally translated as *'a dirigé une attaque'*[35] but sometimes as *'a lancé une attaque'*.[36] *'Launched an attack'* also becomes *'a lancé une attaque'*.[37]

'Attacking' is *'attaquer'*[38] in the French text of the Statute and the Elements of crimes explains it with *'attacked'* the equivalent of which in the French version of this document is: *'a attaqué'*.[39] The Elements of crimes sometimes uses *'attacked' / 'a attaqué'* also to explain the *'directing attacks'/ 'diriger des attaques'* expressions in the Statute.[40]

Concerning crimes against humanity, the French version of the Elements of crimes almost exclusively uses *'attaque dirigée'* for *'attack directed'*[41] with the notable exception of the crime of persecution when '*attack directed*' becomes a *'campagne [...] dirigée'*.[42]

I sought advice from two highly qualified colleagues here at the ICC, a native French speaker on the one hand and a native English speaker on the other. The two constructions are nearly the same in both languages, however in French, *'lancer une attaque'* puts the emphasis on 'starting' the action while *'diriger une attaque'* suggests authority or a commanding position.

In the English text, *'to launch an attack'* could imply setting something into motion, starting an action. In that case the emphasis would be more on the 'starting'/ 'prompting' of the activity. To *'direct an attack'* could imply that the attack is 'directed against/towards' something. In that case the emphasis would be more on what is the 'object' (in a general sense of the word), *i.e.* the 'direction', of the activity. (See also the *Oxford English Dictionary* about *'to launch'*[43] and *'to direct'*[44] and the *Larousse Dictionnaire de Français*

33 *See* Articles 8(2)(b)(i), 8(2)(b)(ii), 8(2)(b)(iii), 8(2)(b)(ix), 8(2)(b)(xxiv), 8(2)(e)(i), 8(2)(e)(ii), 8(2)(e)(iii), 8(2)(e)(iv).
34 *See* Article 8(2)(iv).
35 *See* Article 8(2)(b)(i), 8(2)(b)(ii), 8(2)(e)(i).
36 *See* Article 8(2)(b)(ix), 8(2)e)(i), 8(2)(e)(iii), 8(2)(e)(iv).
37 *See* Article 8(2)(b)(iv).
38 *See* Article 8(2)(b)(v).
39 *See* Article 8(2)(b)(v).
40 *See* Article 8(2)(b)(xxiv), 8(2)(e)(ii).
41 *See* Article 7(1)(a), 7(1)(b), 7(1)(c), 7(1)(d), 7(1)(e), 7(1)(f), 7(1)(g), 7(1)(i), 7(1)(j), 7(1)(k).
42 *See* Article 7(1)(h).
43 *See* at https://www.oed.com/dictionary/launch_v?tab=meaning_and_use&tl=true#39805609.
44 *See* at https://www.oed.com/dictionary/direct_v?tab=meaning_and_use#6630372.

or the *Robert – Dictionnaire de la langue française* about *'lancer'*[45] and *'diriger'*.[46])

What I can gather from all this – as a scholar whose mother tongue is neither English, nor French – is that when *'to launch an attack'* appears as *'lancer une attaque',* the two constructions are truly identical (and the same can be said about *'to direct an attack'* and *'diriger une attaque'*), however when *'directed an attack' is 'a lancé une attaque'* as it occurs in the case of Article 8(2)(b)(ix) and Article 8(2)(e)(iv) concerning the attacks against protected objects and monuments, the English and French meanings are slightly different.

We can see that these differences – shown also in the annex appended to my article – appear far more frequently in the *Elements of crimes* than in the Rome Statute, and it is reasonable to suppose that they can be partly explained by the expressions used in the English and French versions of the conventions that prohibit certain war methods and serve the protection of victims or other humanitarian purposes.

Nevertheless, the above overview helps us to go further in the analysis. It is clear that the reconstruction of the genesis of the crime falling under Article 8(2)(e)(iv) was very professionally done by Schabas and when judges Morrison and Hofmański revisited it, their research led to the same conclusion concerning the will expressed by governmental experts during the negotiations and the drafting. They are also right as to the impact of the submitted US proposal.

Nevertheless, the latter[47] is worth revisiting. The submitted document concerned not only the destruction of monuments, hospitals *etc.,* but a whole series of war crimes. Apparently, it was conceived as a counter-proposal against the use of the Draft Code of Crimes against the Peace and Security of Mankind prepared by the International Law Commission.[48] It can be recognized *prima vista* that the war crimes listed by the ILC contain war crimes according to the 1907 The Hague Conventions, the 1949 Geneva Conventions and the 1977 Additional protocols. This is, by the way, clearly explained in the commentary of the draft.[49]

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45 *See* at https://www.larousse.fr/dictionnaires/francais/lancer/46124; *see also* https://dictionnaire.lerobert.com/definition/lancer#google_vignette.

46 *See* at https://www.larousse.fr/dictionnaires/francais/diriger/25796; *see also* https://dictionnaire.lerobert.com/definition/diriger.

47 War Crimes: Proposal Submitted by the United States, 14 February 1997, A/AC.249/1997/WG.1/DP.1, pp. 2–3; (hereinafter: War Crimes: Proposal Submitted by the U.S.).

48 *See* at https://legal.un.org/ilc/texts/instruments/english/draft_articles/7_4_1996.pdf.

49 *See* at https://legal.un.org/ilc/texts/instruments/english/commentaries/7_4_1996.pdf, paras. 4, 11, 14, 15, pp. 54–56.

It is widely known, however, that the US is a signatory but not a contracting party to the 1977 Additional protocols. That is why, in a very logical way, and aiming to avoid that the 1977 novelties could enter through the backdoor, the US delegation put the ILC Draft Code on the table and wherever they discovered elements taken from the Additional protocols, they meticulously tried to find their equivalents in the 1907 The Hague regulation. As a result, the ILC draft was structurally and mostly *in merito* followed, nevertheless it was still reformulated into *The Hague style* where necessary. Some minor aesthetic changes were also introduced, such as the use of capital letters first, followed by small letters in the numbering (A. was followed by a, b, c, *etc*. instead of an a. followed by i, ii, iii, *etc*.).

In this way, the A. point of the US proposal contains the same eight grave breaches of the 1949 Geneva Conventions, as did the ILC draft (although there was no mention in the main text that they were taken from the Geneva Convention).

The B. point of the US proposal under the subtitle 'other serious violations of the laws and customs applicable in international armed conflict within the established framework of international law, namely:' enumerates war crimes mostly taken *verbatim* from The Hague Regulations, although the original *to kill, to wound, to declare etc*. became *killing, wounding, declaring, etc*. Among the eighteen subpoints, as I try to show in the footnotes, eleven[50] were clearly taken from the 1907 The Hague Regulation, two[51] from the 1949 Geneva Conventions, four[52] from other conventions (in which the US is a contracting party) prohibiting the use of some types of weapons. There is also one[53] (but only one) which exhibits clear textual similarity with the 1977 Additional protocol. This can be explained by the fact that the crime of "intentionally directing an attack against civilians" can be considered as being an evident customary law rule.

It should be emphasized that the US proposal concerning cultural monuments brought slight changes to The Hague formula and the criminalization of "intentionally directing attacks" is definitely much stricter than the

50 *See* i = 1907, Article 23/ b; ii = 1907, Article 23/ c; iii = 1907, Article 23/d; iv = 1907, Article 23/f; v = 1907, Article 23/g; vi = 1907, Article 23/h first part; vii = 1907, Article 23/h second part; viii = 1907, Article 25; ix = 1907, Article 28; x = 1907, Article 28; xv = 1907, Article 27.

51 *See* xvii = 1949/IV/Article 27; xviii = 1949/IV/Article 28.

52 *See* xi = 1925 Geneva Gas Protocol; xii = 1980 CCW; xiii = 1972 BWC; xiv = 1993 CWC.

53 *See* xvi = *grosso modo* 1977 Geneva I/Article 51(2) + Article 48.

original introductory formulation reading "[i]n sieges and bombardments all necessary steps must be taken to spare, as far as possible […]".

Point C. of the US proposal deals with serious breaches of Article 3 common to the four 1949 Geneva Conventions and reproduces their text.[54]

In a document of the Prep. Com's working group on the definition of crimes issued a week later[55] than the US proposal, we can see that although the borrowing of several formulas of the 1977 Additional protocol resulted in a considerable modification of the text submitted by the US delegation, the formula of the protection of cultural monuments is still there. A longer alternative had also been presented preceding the proposal of the US delegation. The new elements of this alternative are seemingly from Additional protocol I (and the 1954 The Hague Convention for the protection of cultural property in the event of armed conflict) and they read as follows: "[…] cannot be object of attack […]".

At later stages of the diplomatic negotiations, plenty of addenda and reformulation proposals were put on the table and the finally adopted text of the crimes in the Rome Statute is very different from the original US proposal. However, as Schabas[56] and later Morrison and Hofmański[57] convincingly argue, only slight stylistic changes occurred concerning the crime of the destruction of historical and cultural monuments and the governments agreed that the same short text should be introduced in the list of war crimes committed in an international armed conflict and in a non-international armed conflict.

This is the reason why in a – at first glance – surprising way, the interpretation of the rules of humanitarian law applicable in an international armed conflict played such an important role in the assessment of the destruction in *Al Mahdi* and later in *Bosco Ntaganda*. Schabas,[58] Morrison and Hofmański[59] refer to the notion of 'attack' as defined by the 1977 Additional Protocol I. Although both Additional Protocol I and II use the word 'attack' several times,[60] only Protocol I gives an Abstract definition of the notion. It is to be emphasized that those articles in the protocols that cover – in very

54 *See* i = 1949/I/3/a ; ii = 1949/I/3/b ; iii 1949/I/3/c ; iv = 1949/I/3/d.

55 A/AC.249/1997/WG.1/CRP.2., 20 March 1997, p. 4. *See also* A/AC.249/1997/WG.1/L.5, 12 March 1997, pp. 8–9.

56 Schabas 2017, pp. 86–88.

57 Morrison–Hofmański, pp. 6–8.

58 Schabas 2017, p. 80.

59 Morrison–Hofmański, pp. 8–9.

60 Protocol I: Articles 12, 27, 31, 39, 41, 42, 44, 49, 51, 52, 56, 57, 58, 59, 85. Protocol II: Articles 11, 13, 14, 15.

similar terms – the protection of cultural monuments, do not contain the word 'attack'.

Taking into account the text of the definition of attack in Article 49 of Additional protocol I, Schabas,[61] Morrison and Hofmański[62] turned to the ICRC Commentary and they highlight the formula that "the term 'attack' means 'combat action'".

It is worth noting that the commentary[63] uses this expression first and foremost in order to emphasize that both sides of the armed conflict (*i.e.,* to put it simply: both the 'aggressor' or 'first shooter' and the 'defender') all under the same rules.[64] Moreover, it gives an example (*i.e.,* 'placing of mines') showing that 'attack' as a 'combat action' does not necessarily and exclusively mean a human 'face to face' exercise of force or a long distance action with heavy artillery, bombing or rocketing.[65]

Although it is clear that 'attack' cannot be equated either with 'hostilities' or with 'military operation', which are generally conceived as a broader term than 'attack' in Protocol I, it is still obvious that the proper interpretation of

61 Schabas 2017, pp. 79–80.

62 Morrison–Hofmański, p. 9.

63 "1880 The definition given by the Protocol has a wider scope since it – justifiably – covers defensive acts (particularly "counter-attacks") as well as offensive acts, as both can affect the civilian population. It is for this reason that the final choice was a broad definition. In other words, the term "attack" means "combat action". This should be taken into account in the instruction of armed forces who should clearly understand that the restrictions imposed by humanitarian law on the use of force should be observed both by troops defending themselves and by those who are engaged in an assault or taking the offensive." *See* at https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/article-49/commentary/1987?activeTab=.

64 "1882. Finally, it is appropriate to note that in the sense of the Protocol an attack is unrelated to the concept of aggression or the first use of armed force; (6) it refers simply to the use of armed force to carry out a military operation at the beginning or during the course of armed conflict. Questions relating to the responsibility for unleashing the conflict are of a completely different nature." *See* at https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/article-49/commentary/1987?activeTab=.

65 "1881 During the above-mentioned enquiry the question arose whether the placing of mines constituted an attack. The general feeling was that there is an attack whenever a person is directly endangered by a mine laid." *See* at https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/article-49/commentary/1987?activeTab=. The reference to the 'enquiry' concerns the background documents of the III committee during the 1974–1977 diplomatic conference. "1879. […] The questions that were raised included one relating to this question of terminology. In general, the replies indicated that the meaning given by the Protocol to the word "attacks" did not give rise to any major problems, even though military instruction manuals in many countries define an attack as an offensive act aimed at destroying enemy forces and gaining ground." *See* at https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/article-49/commentary/1987?activeTab=.

'combat action' largely depends on the degree to which the example of *mines* in the ICRC commentary is taken into consideration. In my view, the ICRC reference to the use of landmines (*i.e.,* emplacing, laying or hiding mines) – also emphasized by Marco Sassoli[66] in this context – is particularly important and interesting, because it presupposes a relative inactivity on the battlefield or in the occupied territory.

Looking back on history, we will find several examples of destruction committed much later than the seizure of a territory either for vengeance purposes or in order to humiliate the local population or to erase its artistic or religious presence. See *e.g.,* the destruction of the great synagogues of Strasbourg (1940), Riga (1941) and Vilna (1941) or the deliberate destruction of Warsaw by the troops of the Hitlerian Germany from October 1944 to January 1945 after the surrender of the July-September 1944 uprising of the Home Army *(Armia Krajowa)* resistance movement.

In this sense, taking into account the huge impact of the Geneva Conventions and the Additional protocols on the genesis of the Rome Statute and the declared will of governments as expressed by their representatives during the Rome Diplomatic conference, the question is not whether the war crimes of 'attacks against […] historic monuments'[67] or 'attacks against civilian objects'[68] or 'attacks against civilian population'[69] or 'attacks against […] material […] involved in a humanitarian assistance'[70] or an attack caus-

66 The definition in Article 49(1) "[…] however does not correspond to the normal use of the term 'attack' in military language (nor is it related to the separation of *jus in bello* from *jus ad bellum:* both a State fighting in self-defence and an aggressor may be conducting attacks) but rather to the uncontroversial idea that, for instance, laying mines and returning fire must also comply with the rules on distinction, proportionality and precautions." Marco Sassoli, *International Humanitarian Law. Rules, Controversies, and Solutions to Problems Arising from Warfare,* Edward Elgar, Cheltenham, 2024, note No. 8.300, p. 375.

67 Rome Statute, same texts in Articles 8(2)(b)(ix) and 8(2)(e)(iv): "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."

68 Rome Statute, Article 8(2)(b)(ii): "Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;".

69 Rome Statute, same texts in Articles 8(2)(b)(i) and 8(2)(e)(iv): "Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;".

70 Rome Statute, same texts in Articles 8(2)(b)(iii) and 8(2)(e)(iii): "Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;".

ing disproportional collateral damages[71] *etc.* – where 'attack' is a composite element of the given crime – can be perpetrated outside of 'combat action', but whether it is legitimate to use a restrictive interpretation of 'combat action'?

Is the notion of 'combat action' explained by Schabas as a 'battlefield'[72] provision only a face-to-face struggle, a seizure, a 'Sturm', a shelling from howitzers and guns, bombings and/or rocketing? In other words: what is a 'combat action'? The ICRC Commentary[73] to the Additional protocols dates back to 1987. It seems that the International Committee of the Red Cross has since been engaged since in a serious reflection about the need for a more elastic interpretation of 'combat action', especially concerning the impact of cyber-attacks in armed conflicts whether perpetrated by soldiers of the army or by civilians. As an ICRC position paper notes,

> "[i]f the *notion of attack is interpreted as only referring to operations that cause death, injury or physical damage,* a cyber operation that is directed at making a civilian network (such as electricity, banking, or communications) dysfunctional, or is expected to cause such effect incidentally, might not be covered by essential IHL rules protecting the civilian population and civilian objects. *Such an overly restrictive understanding of the notion of attack would be difficult to reconcile with the object and purpose of the IHL rules on the conduct of hostilities.* It is therefore essential that States find a common understanding in order to adequately protect the civilian population against the effects of cyber operations."[74] *(emphasis added)*

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71 Rome Statute, Article 8(2)(b)(iv): "Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;".

72 "Thus, case law of the Court has made a very clear distinction between the war crimes associated with "battlefield attacks," of which article 8(2)(e)(iv) is a species, and those that are associated with the conflict but that take place after a civilian population has "fallen into the hands" of the party charged with violating the laws and customs of war. The situation in "occupied" Timbuktu belongs to this second category." Schabas 2017, p. 83, s*ee also* on pp. 82, 86, 94.

73 Sandoz *et al.* (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949,* International Committee of the Red Cross, Martinus Nijhoff, Geneva, 1987.

74 Cyber warfare: Eight rules for "civilian hackers" during war, and four obligations for states to restrain them International Humanitarian Law and Cyber Operations during Armed Conflicts. ICRC position paper Submitted to the 'Open-Ended Working Group

Knut Dörmann, whom Schabas cited concerning the relationship between 'attack' and 'combat action',[75] notes in another article that the notion of 'armed attack' is not completely the same when used in the context of international humanitarian law and in case of recourse to legitimate self-defense. He also refers to governmental positions in the perception of cyber warfare.[76] He confirms that the ICRC is clearly in favor of considering that type of cyber operation as an 'attack'.[77] In another article Dörmann mentions other examples as well.[78] In the chapter written in the 4th edition of the Commentary of the Rome Statute, Dörmann emphasizes – in the context of cyber warfare – that

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on Developments in the Field of Information and Telecommunications in the Context of International Security' and the 'Group of Governmental Experts on Advancing Responsible State Behaviour in Cyberspace in the Context of International Security'. November 2019, p. 8.

75 Schabas 2017, p. 80. (Schabas refers to the text about Article 8 of the Rome Statute in the 3rd edition of the Triffterer Commentary: Otto Triffterer & Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary, Third Edition,* C.H. Beck–Hart–Nomos, München–Oxford–Baden-Baden, 2016, p. 342.

76 Laurent Gisel *et al.,* 'Twenty years on: International humanitarian law and the protection of civilians against the effects of cyber operations during armed conflicts', *International Review of the Red Cross,* Vol. 102, Issue 913, 2020, pp. 307–308.

77 "The question of whether or not an operation amounts to an "attack" as defined in IHL is essential for the application of many of the rules deriving from the principles of distinction, proportionality and precaution, which afford critical protection to civilians and civilian objects. For many years, the ICRC has taken the position that an operation designed to disable a computer or a computer network during an armed conflict constitutes an attack as defined in IHL whether the object is disabled through destruction or in any other way. This view is also reflected in the positions of a number of States." Gisel *et al.* 2020, p. 333.

78 "Bothe/Partsch/Solf in their commentary to AP I point out that the term "acts of violence" denotes physical force. Thus, the concept of "attacks" excludes dissemination of propaganda, embargoes or other non-physical means of psychological, political or economic warfare. Based on that understanding and distinction, CNA through viruses, worms, logic bombs etc. that result in physical damage to persons, or damage to objects that goes beyond the computer program or data attacked can be qualified as "acts of violence" and thus as an attack in the sense of IHL. Given that elsewhere in the same section of AP I, namely in the definition of a military objective, reference is made to neutralization of an object as a possible result of an attack, one may conclude that the mere disabling of an object, such as shutting down of the electricity grid, without destroying it should be qualified as an attack as well. It is also helpful to look at how the concept of attack is applied to other means and methods of warfare. There is general agreement that, for example, the employment of biological or chemical agents that does not cause a physical explosion, such as the use of asphyxiating or poisonous gases, would constitute an attack." Knut Dörmann, *Applicability of the Additional Protocols to Computer Network Attacks,* at https://www.icrc.org/sites/default/files/external/doc/en/assets/files/other/applicabilityofihltocna.pdf, p. 4.

> "[s]uch attacks could be for example the opening of a floodgate of a dam which leads to the death of persons in the flooded areas – it can't mean a difference whether such casualties are caused by a bomb or by means of a cyber attack. What defines an attack is not the violence of the means – as it is uncontroversial that the use of biological, chemical or radiological agents would constitute an attack –, but the violence of the effects or consequences, even if indirect."[79]

Cyber-attacks against health institutions may also fall into this category. In his comprehensive overview about the applicability of international humanitarian law on cyber warfare, citing the so-called Tallin Manual,[80] Marco Sassoli posits that "[t]he intended effects of a cyber operation therefore determine whether it can be qualified as an attack."[81]

As ICRC experts Kubo Mačák, Laurent Gisel, Tilman Rodenhäuser argue that "a cyber attack may qualify as a war crime provided certain specific conditions are fulfilled […]. For example, the war crime of directing an attack against a medical facility under the *Rome Statute* of the International Criminal Court provided for in Articles 8(2)(b)(xxiv) and (e)(ii), could conceivably be committed using cyber-means."[82]

It is worth adding that the attacks against hospitals also fall under Articles 8(2)(b)(ix) and 8(2)(e)(iv), *i.e.,* the same articles where attacks against historical monuments are penalized.

Following this line of arguments and taking into account the creativity and technical skills of robotic and drone producing military engineers, one can easily imagine operations where a neighborhood is targeted to annihilate the given object or when a hidden device emplaced earlier is activated from a distance, or a planned avalanche or flooding caused by an explosion

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79 Knut Dörmann, 'B2 Para. 2(a): Meaning of 'war crimes' – Grave breaches', *in* Kai Ambos (ed.), *Rome Statute of the International Criminal Court, Article-by-Article Commentary, Fourth edition,* Beck–Hart–Nomos, München–Baden-Baden–Oxford, 2022, pp. 362–410, cited text on p. 369.

80 The cyber-attack is "a cyber operation, whether offensive or defensive, that is reasonably expected to cause injury or death to persons or damage or destruction to objects. […] it is the use of violence against a target that distinguishes attacks from other operations […] non-violent operations, such as psychological operations or cyber espionage, do not qualify as attacks." Michael N. Schmitt (ed.), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations,* Cambridge University Press, Cambridge, 2017, Note No. 255, p. 415.

81 Sassoli 2024, Note No. 10.121, p. 580.

82 Kubo Mačák *et al., Cyber attacks against hospitals and the COVID-19 pandemic: How strong are international law protections?,* at https://blogs.icrc.org/law-and-policy/2020/04/02/cyber-attacks-hospitals-covid-19/.

destroys the envisaged target. I am convinced that such an operation can be lawfully considered an 'attack' and apparently, it is such a 'combat action' where the military units of the respective parties are present at different times.

Instead of submitting other possible examples of military actions thought up in an ivory tower, I'd rather return to the example of the 'placement of mines' contained in the explanation of 'attack' in the Commentary of the additional Protocols. In my view, this example cannot be disregarded when the meaning of 'combat action' is construed. Dörman notes that

> "[t]he term 'acts of violence' denotes physical force. It covers the use of weapons, but such as disseminating propaganda, embargos or non-physical forms of psychological, political or economic warfare would not fall under the notion of attack. However, there is no reason to believe the 'attack' is limited to kinetic means and methods of warfare."[83]

Recently, the 34th International Conference of the Red Cross and Red Crescent, *i.e.,* a regular meeting of governments and of national red cross societies included this issue in a resolution stating that the conference

> "[…] 8. urges States and parties to armed conflicts to protect civilian populations and other protected persons and objects, including historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples, in accordance with their international legal obligations, including with regard to ICT activities;".[84]

7. Conclusions

To conclude, in my view, the notion of 'combat action' does not only cover loud and ferocious man-to-man, weapon-to-weapon type devastating direct confrontations. Instead, an 'attack' embraces other *hostile action(s)* if planned with the purpose of causing harm to the opponent in the armed conflict, irrespective of whether it is directed against human beings or material or immaterial property.

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83 Dörmann 2022, p. 399.

84 *See* at https://rcrcconference.org/app/uploads/2024/10/34IC_R2-ICT-EN.pdf. *See also* Kubo Mačák, 'The First Humanitarian ICT Resolution: Ambitions and Limitations', *EJIL Talk,* 25 November 2024.

With regard to individual crimes, the fulfillment of the factual and legal criteria specified in the *Elements of crimes* determines whether the conduct in question constitutes a crime punishable under the Rome Statute.