Cour
Pénale
Internationale

International
Criminal
Court

Original: **English**

No.: ICC-02/17
Date: 14 November 2019

APPEALS CHAMBER

Before: **Judge Piotr Hofmański, Presiding**
Judge Howard Morrison
Judge Luz del Carmen Ibáñez Carranza
Judge Solomy Balungi Bossa
Judge Kimberly Prost

SITUATION IN THE ISLAMIC REPUBLIC OF AFGHANISTAN

Observations of Professor Gabor Rona on the Pre-Trial Chamber's Conclusion that Events Beyond the Territory of Afghanistan Lack Sufficient Nexus to the Armed Conflict There for Purposes of Application of Rome Statute War Crimes

Source: **Gabor Rona, Professor of Practice, Cardozo Law School**

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

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I. Introduction

1. The Pre-Trial Chamber (PTC) rests much of its Decision to deny authorization of an investigation on the "interests of justice." Whether or not "interests of justice" considerations are jurisdictional is subject to dispute. However, there is at least one aspect of the impugned Decision concerning possible war crimes that the PTC has acknowledged to be jurisdictional: the notion that events occurring on the territory of a State Party to the Rome Statute other than Afghanistan lack sufficient nexus to the armed conflict to trigger application of Rome Statute.[1] I believe this conclusion incorrectly construes the Rome Statute in two respects. First, the PTC incorrectly concludes that Common Article 3 of the Geneva Conventions (CA 3) applies only to purely internal non-international armed conflicts. Second, the PTC incorrectly construes the relevant provision in the Elements of Crimes that the conduct must occur "in the context of" the non-international armed conflict, and must be associated with it.

II. Geneva Conventions Common Article 3 applies to transnational, as well as to internal, non-international armed conflicts; a proper balance between interests of military necessity and humanity yield a broader geographic scope of application of Geneva Law than of Hague Law

2. In recognition that wars happen despite a prohibition of aggression in international relations, the Law of Armed Conflict, or International Humanitarian Law (IHL) is designed to strike a balance between the dictates of military necessity and humanity.[2]

[1] This brief does not address crimes against humanity, for which no nexus to armed conflict is required.

[2] "The primary purpose of international humanitarian law (IHL) is to protect the victims of armed conflict and to regulate the conduct of hostilities based on a balance between military necessity and humanity." Melzer, *Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities*, 42 International Law and Politics 831 (2012).

The need to strike this balance is equally applicable to non-international and international armed conflict, and so, IHL applies to both types of armed conflict.

3. For purposes of this case, two foundational points are relevant.

4. First, it is critical to note that IHL is historically divided into two categories of rules: those regulating conduct of hostilities (Hague Law) and those regulating protection of persons in the power of the enemy (Geneva Law). When considering the geographic scope of application of IHL, it is necessary to distinguish between "Hague Law" issues and "Geneva Law" issues in the application of metrics balancing military necessity and humanity. In other words, IHL rules for protection of civilians and combatants *hors de combat* may apply even where IHL-based targeting is impermissible.[3] The reason is simple. Outside of a zone of hostilities, domestic policing functions are presumed to operate. "Enemy combatants" and hostile civilians can be detained rather than killed, subject to the existence of grounds and compliance with procedures established by applicable law. In other words, the dictates of humanity greatly exceed any conceivable military necessity to target persons under the more permissive rules of IHL, where the more restrictive rules of domestic and human rights law are fully operable. At the same time, there is no conceivable military necessity to withhold application of the humanitarian provisions of IHL that are Geneva Law to persons who, outside the territory of hostilities, have been rendered *hors de combat* through deprivation of liberty. In fact, there is every humanitarian reason to apply those provisions, including CA3.

5. Second, it is also critical to note that the notion of a 'Common Article 3 non-international armed conflict' is broader than that of 'internal armed conflict.'[4] It is well

[3] Whether or not there exists an IHL-based authority to detain in non-international armed conflict, let alone outside the State in which hostilities occur, is a controversial issue. I believe that the IHL of non-international armed conflict neither authorizes nor prohibits such detention. But if such detention occurs, and has a factual nexus to a non-international armed conflict, the failure to comply with the requirements of Common Article 3 may constitute a war crime.
[4] Decision, https://www.legal-tools.org/doc/2fb1f4/pdf/, Para 55.

understood that an armed conflict is non-international even though the hostilities are not confined to a single state, as long as the hostilities are between a State and a non-State armed group or between two (or more) non-State armed groups. The Rome Statute clearly does not limit jurisdiction over non-international armed conflict-based war crimes to those committed in purely internal armed conflicts.[5] While it is true that the drafters of CA3 had internal armed conflicts in mind, such a limitation would leave "spill-over" armed conflicts and "foreign intervention" armed conflicts, which one noted IHL academic has observed are "legion" today[6], outside the bounds of IHL. Given that some of the States most frequently and broadly engaged in extraterritorial non-international hostilities deny the application of human rights law either to armed conflict, or extraterritorially, or both, the exclusion of such hostilities from the coverage of CA 3 would result in an untenable legal black hole.

6. The PTC ruled that events occurring beyond Afghanistan cannot be considered war crimes under the Rome Statute because CA3 is limited in application to conflicts occurring "on the territory of one of the State Parties" to the Geneva Conventions. There are several sources of jurisprudence and other authority contradicting this conclusion. I will focus on the five most persuasive examples:

7. (a) The 'scope of application' language of Additional Protocol II (AP II) to the Geneva Conventions is consistent with an understanding that CA3 applies beyond the territory of hostilities. AP II is meant to supplement CA3 and according to its Article

[5] The Statute applies "to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups. Art. 8(2)(f), Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90.

[6] M. Milanovic and V. Hadzi-Vidanovic, "A Taxonomy of Armed Conflict"; *Research Handbook on International Conflict and Security Law;* White, Christian Henderson, eds., Edward Elgar, (2012), at p. 31.

1, applies to armed conflicts taking place on the territory of "a" High Contracting Party (not "one" High Contracting Party).

8. (b) It has also frequently been noted that the CA3 phrase "on the territory of one of the High Contracting parties" was not meant to apply CA3 only to purely internal armed conflicts, but rather, to distinguish States that were party to the Geneva Conventions from those that were not. Today, as all States are Party, the distinction is moot. This is the ICRC position.[7]

9. (c) On 7 February 2002, United States President George Bush issued a Memorandum in which he claimed that Al Qaeda and Taliban detainees did not fall within the protection of CA3, because that provision applies only to armed conflicts "not of an international character," and the relevant armed conflict was, instead, international.[8] The issue was litigated in connection with detention of alleged "enemy combatants" held at Guantanamo Bay, Cuba, far from the hostilities taking place in Afghanistan. In *Hamdan vs. Rumsfeld*, the U.S. Supreme Court rejected the government's argument that CA3 applies only to armed conflicts occurring "in the territory of *one* of the High Contracting Parties" (emphasis added) to the Geneva Conventions. Instead, the Court

[7] *See*, International Committee of the Red Cross, *How is the Term "Armed Conflict" Defined in International Humanitarian Law?* (17 March 2008). https://www.icrc.org/en/doc/assets/files/other/opinion-paper-armed-conflict.pdf. *See also*, N. Melzer, "Targeted Killing in International Law", *Oxford University Press, Oxford,* (2008), p. 258. *See also*, Jelena Pejic, "The Protective Scope of Common Article 3: More than Meets the Eye", *Vol. 93, No. 81 International Review of the Red Cross,* (2011), pp. 11-14.

[8] https://www.aclu.org/legal-document/presidential-memo-feb-7-2002-humane-treatment-al-qaeda-and-taliban-detainees

ruled that alleged Al Qaeda member Salim Hamdan, was protected by CA3, which provides a floor of protections to all armed conflict detainees.[9]

10. (d) Another source of consistent authority is the International Court of Justice, which has opined that CA3 applies to all armed conflicts.[10] There is no evidence that the Court would except transnational non-international armed conflicts.

11. (e) Likewise, the UN Security Council also acknowledged the extraterritorial reach of CA3 by applying the Rwanda Tribunal Statute to CA3 violations committed in States that neighbor Rwanda.[11]

12. The consistent positions expressed by these authorities are essential to fulfilment of the humanitarian purposes of IHL, in general, and of CA3, in particular. Any other interpretation would result in an untenable gap in the application of IHL to armed conflict, potentially relegating some of the most vulnerable people in the world – persons *hors de combat* and deprived of liberty in armed conflict – to a legal black hole.

III. "In the context of" and "associated with" armed conflict may well be cumulative factors, but "in the context of" armed conflict does not mean "only on the territory of armed conflict."

13. The PTC understands this language from the Rome Statute Elements of Crimes to mean that the Rome Statute's war crimes provisions apply only to conduct occurring within the territory of the High Contracting Party in which hostilities occur. I participated in the negotiations on the Elements of Crimes as a Legal Advisor in the

[9] *Salim Ahmed Hamdan v. Donald H. Rumsfeld et al;* 548 U.S. 557 (2006).
[10] International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America),* Judgment, 27 June 1986, para. 218, accessed at www.icj-cij.org
[11] International Criminal Tribunal for Rwanda, Statute, Art. 1, accessed at: http://www.un.org/ictr/statute.html.

Legal Division of the ICRC and make the following representations from my personal recollection of the process.

14. Had the drafters wanted to limit jurisdiction to conduct occurring on the territory of the State experiencing hostilities, they easily could have said so. Instead, this language was crafted to make clear that simply because conduct does occur on the territory of a State experiencing a non-international armed conflict, it is not necessarily "associated with" the armed conflict. For example, if a man kills his wife's lover in Kabul, the killing may be considered to be in the territorial context of armed conflict, but not its logical context, and therefore, not associated with it. This does not mean, however, that acts outside the territory of hostilities, for example, torture of a detainee in Poland, are *per se* outside the context of the armed conflict in Afghanistan. If the torture is committed by a party to the armed conflict, against an individual alleged to be acting in support of an opposing party to the armed conflict, and for purposes related to the armed conflict, the nexus and association requirements are met. In other words, there is no indication the drafters meant to exclude coverage of conduct clearly associated with armed conflict, simply because it occurred beyond the territory of hostilities.

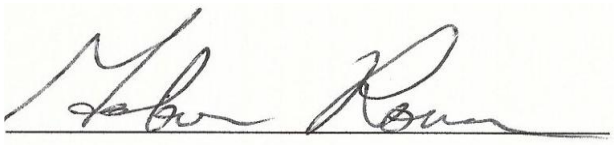
IV. Conclusion

15. Acts committed outside the territory of the State in which non-international armed conflict hostilities occur may well be beyond the scope of IHL's 'conduct of hostilities (Hague Law) provisions, but cannot be beyond the scope of its rules for protection of persons in the power of the enemy (Geneva Law), including CA 3. This conclusion is consistent with the object and purpose of IHL generally to provide maximal protection to persons *hors de combat* in armed conflict. Where a State proves unwilling or unable to exercise its criminal jurisdiction to hold accountable those who commit offenses defined in the Rome Statute, and where such offenses are committed on the territory of a State Party to the Rome Statute, the rejection of jurisdiction is incompatible with the ICC's scheme of complementarity and the Rome Statute's object and purpose to

prevent impunity for those most responsible for the most serious violations of international law.

16. For these reasons, I respectfully suggest reversal of the PTC's jurisdictional determination that conduct occurring beyond the boundaries of Afghanistan are necessarily beyond the scope of the Rome Statute's war crimes provisions.

17. I thank the Appeals Chamber for the opportunity to contribute these views. Respectfully submitted,



Gabor Rona
Dated this 14th day of November 2019
At New York, NY, United States of America.