SUBMERGED

ANNEX F

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Study of the Destruction of the Kakhovka Dam and Its Impacts on Ecosystems, Agrarians, Other Civilians, and International Justice

Study on Interpreting "Attack" on Protected Objects: Article 56 of the Additional Protocol I and Jurisprudence of the International Criminal Court in Light of Kakhovka Dam Attack

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F.1 The Notion of "Attack" Under Article 56 of the Additional Protocol I ("API")

Dams, along with dykes and nuclear electrical generating stations, are specially protected under Article 56 of the API, which envisages a prohibition against making them the object of attack "*if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population.*"[1] Interestingly, the draft API prepared by the ICRC, marked as the "*result of several years' joint effort,*"[2] specially protected dams, dykes, and nuclear stations against both attack and destruction:

> *"Article 49*. — Works and installations containing dangerous forces*
>
> *1. It is forbidden to attack or destroy works or installations containing dangerous forces, namely, dams, dykes and nuclear generating stations. These objects shall not be made the object of reprisals.* [emphasis added]

** Article 49 of the ICRC draft is the counterpart of what is now Article 56 of the API"*

The subsequent deletion of the term "destroy" induced some scholars to opine that any actions against a dam under someone's control are allowed under IHL

[1] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, (1977). International Committee of the Red Cross (ICRC), 1125 UNTS 3, 8 June 1977, Article 56.
[2] *Official records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977),* (1978). Federal Political Dept Bern, Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Vol. I, p. 2 of the Introduction of the Draft Additional Protocols to the Geneva Conventions of August 12, 1949, URL.

and fall out of the term "attack" and the special protection provided by Article 56.[3]

Although appearing to make sense on its face, such a conclusion is a hasty one. The main inconsistency lies in commentators' attempts to assign a different meaning to the term "attack" compared to its conventional definition in Article 49. The latter does not automatically exclude actions occurring on territory controlled by one party.[4] To properly define the ultimate scope of the prohibition to attack dams, it is worth referring to the preparatory work of the treaty and the circumstances surrounding its conclusion.[5] This investigation

[3] Bothe M., Partsch K. J., Solf W., (1982). *Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*. Martinus Nijhoff Publishers, Pp. xxi, 746, p. 396; Milanovic M., (2023). *The Destruction of the Nova Kakhovka Dam and International Humanitarian Law: Some Preliminary Thoughts.* EJIL: Talk!, URL, Tignino M., Kebebew T., Pellaton C., (2023). *International Law and Accountability for the Nova Kakhovka Dam Disaster.* Lieber Institute West Point, URL; See also Schmitt M.N., who writes "*Article 56 only applies to "attacks," a term of art in IHL. It would not bar the destruction of a Party's own dam, for instance, to flood a potential avenue of attack by the enemy. Use of the term 'attack' instead of 'destruction' was intended to make this distinction clear-cut.*" in Schmitt M. N., (2022). *Attacking Dams - Part II: The 1977 Additional Protocols.* Lieber Institute West Point, URL. However, this citation does not employ the wording "a dam controlled by a Party," but explicitly employs the phrase "Party's ***own*** dam." Indeed, as further emphasized in the discourse, "*depending on how 'own' is understood*" it could pose a challenge to prosecuting a potential Article 8(2)(b)(iv) case against Russian actors in Nova Kakhovka case (Hansen T. O., (2023). *Could the Nova Kakhovka Dam Destruction Become the ICC's First Environmental Crimes Case?* Just Security, URL). As our extensive review of, *inter alia*, the preparatory works of AP I below establishes, the term 'own' should be understood and interpreted as specifically relating to the rightful title over a territory or object, not just control.

[4] Eliav Lieblich [@eliavl], (06.06.2023), X, URL: *"There's nothing that per se precludes acts by occupants against objects within the territory from being 'attacks.'"*

[5] *Vienna Convention on the Law of Treaties*, (1969). United Nations, Treaty Series, vol. 1155, p. 331, 23 May 1969, Article 32 "Supplementary means of interpretation":
"Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or unreasonable."

can shed light on the reasons behind altering the original text of Article 56 and the intentions of the drafters.[6]

A total of 10 amendments from 25 States were submitted to the original text of the Article as prepared by the ICRC.[7] The absolute majority of amendments to the Article retained the phrase "*attack or destroy*" (see Table F.1).

Table F.1. Amendments submitted to Article 49 of the API

No. of amendment	Country/ies	Explicitly retains "destroy"[8]	Tacitly retains "destroy"[9]	Deletes "destroy"
CDDH/III/10	Romania			
CDDH/III/49	Australia			
CDDH/III/59	Belgium, Netherlands			

[6] *Ibid*, Article 32.

[7] Levie H. S., (1980). *Protection of war victims: Protocol 1 to the 1949 Geneva conventions.* Oceana Publications Dobbs Ferry, N.Y. 1979, Vol. III, pp. 278-281, URL.

[8] The amendment explicitly repeats the wording "attack or destroy."

[9] The amendment does not influence the part of the original text containing the words "attack or destroy."

CDDH/III/65	Egypt, Yemen, Iraq, Jordan, Kuwait, Lebanon, Libya, Mali, Mauritania, Morocco, Qatar, Sudan, Sweden, Switzerland, Syria, UAE, Yemen			
CDDH/III/74	USSR			
CDDH/III/76	Egypt, Yemen, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Qatar, Sudan, Syria, UAE, Yemen			
CDDH/III/79	Canada			
CDDH/III/202	USA			
CDDH/III/59/Rev.1	Belgium, Netherlands			
CDDH/III/4	Vietnam			

Romania altogether proposed extending the prohibition beyond just attacking or destroying to include damage to the protected objects.[10] Among these amendments, only Australia introduced a comprehensive change that, among other things, prohibited solely "attacking" the protected objects, thus removing the concept of "destroy" from the Article.[11] However, while introducing the amendment, the Australian delegate failed to explain why they omitted the word "destroy" in their proposal.[12]

As for the amendments that sought to preserve "destroy," the joint Belgian and Dutch amendment merits specific attention.[13] While explicitly retaining the "destroy" element, these countries proposed to exempt from the prohibition to attack or destroy the protected objects the actions of the High Contracting

[10] Levie H. S., (1980). *Protection of war victims: Protocol 1 to the 1949 Geneva conventions.* Oceana Publications Dobbs Ferry, N.Y. 1979, Vol. III, p. 279, Romanian proposal No. CDDH/III/10, URL:
1. Redraft paragraph 1 as follows:
"1. Works and installations containing dangerous forces such as dams, dykes and nuclear-powered electric generating plants shall at all times be protected. It is strictly forbidden to attack, destroy or ***damage*** such works and installations or to make them the object of reprisals or hostile action." [emphasis added]. See also *Official records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977),* (1978). Federal Political Dept Bern, Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Vol. XIV, p. 155, paras. 21-22, URL.

[11] Levie H. S., (1980). *Protection of war victims: Protocol 1 to the 1949 Geneva conventions.* Oceana Publications Dobbs Ferry, N.Y. 1979, Vol. III, Australian proposal No. CDDH/III/49, URL.

[12] *Ibid*, pp. 282-283, para. 26, URL.

[13] Notably since the Commentary highlights that removing the term "destroy" fulfills at least part of the objective outlined in the Belgian and Dutch proposal: "*The deletion of the word 'destroy' accomplishes at least part of the object of the Belgian and Netherlands proposals to reserve the rights of a Party to the conflict in its own territory.*" See Bothe M., Partsch K. J., Solf W., (1982). *Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*. Martinus Nijhoff Publishers, Pp. xxi, 746, p. 396.

Parties within *their own* territories.[14] When introducing this amendment, the Belgian delegate highlighted that it is

> "[*I]ntended to safeguard, in specific terms, the right of the High Contracting Parties to manage and to develop their own territory in time of war as in time of peace, as also their right to use all their resources for their defence [...]. "*[15]

The usage of the term "own" in both the amendment and its explanation underscores its application to territories over which a State exercises sovereignty. This assertion gains support from further comments made by other delegations. To exemplify, while certain representatives opposed the Belgian and Dutch amendment as they advocated for the full protection of the dams even in the own territories of the High Contracting Parties,[16] those in favor of the exception endorsed it with a narrow interpretation, *i.e.*, refraining

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[14] Levie H. S., (1980). *Protection of war victims: Protocol 1 to the 1949 Geneva conventions.* Oceana Publications Dobbs Ferry, N.Y. 1979, Vol. III, p. 279, Belgian and Dutch proposal No. CDDH/III/59/Rev.1, URL:
Delete paragraph 1 and substitute the following:
"1. Without prejudice to the rights of the High Contracting Parties in their own territories, it is forbidden to attack or destroy engineering works or installations containing dangerous forces, such as dams, dykes and nuclear generating stations, when the partial or total destruction of these objects would endanger the civilian population in the vicinity."

[15] *Ibid*, p. 283, para. 27, URL.

[16] The representative of India "*could not support the amendment submitted by Belgium and the Netherlands (CDDH/III/59/Rev.1), since it restricted the scope of the article. On the whole, his delegation was against any amendments involving restrictions or exceptions to the rules set out in article 49, for if the destruction of dams, dykes and nuclear generating stations were to be made permissible in certain circumstances, the survival of the civilian population, which was the subject of article 48, could not be guaranteed,*" see Levie H. S., (1980). *Protection of war victims: Protocol 1 to the 1949 Geneva conventions.* Oceana Publications Dobbs Ferry, N.Y. 1979, Vol. III, p. 285, para. 43, URL. See also the stance of the representative of Norway, who "*could not support the texts proposed in amendments CDDH/III/49 and CDDH/III/59, but advocated adoption of the ICRC text, with the Romanian amendment (CDDH/III/10) and the joint amendment of the Arab countries (CDDH/III/76 and Add.l)*" in Levie H. S., (1980). *Protection of war victims: Protocol 1 to the 1949 Geneva conventions.* Oceana Publications Dobbs Ferry, N.Y. 1979, Vol. III, p. 290, para. 16, URL.

from extending the exemption to actions in foreign (*e.g.*, occupied) territories (see Table F.2).

Table F.2. The relevant stances of delegates on the Belgian and Dutch proposal[17]

Country	Stance	Comment (optional)
Yugoslavia	The representative of Yugoslavia supported "the idea expressed at the beginning of the amendment submitted by Belgium and the Netherlands (CDDH/III/59/Rev.1) […], as the destruction of dams and dykes could sometimes be a means of defence when a country was attacked." [emphasis added]	The phrases "a means of defence" and "when a country was attacked" emphasize that the exemption should exclusively extend to States within their sovereign territories as a method of countering actions from aggressor States.
Romania	"After the explanations that had been given, he [the representative of Romania] could accept the first part of the amendment submitted by Belgium and the Netherlands (CDDH/III/59/Rev.1)."	
Sweden	"Their destruction by a party on its own territory in the face of an invading enemy was different. Such action could be part	The phrasing "in the face of an invading enemy" distinctly indicates that the exemption to attack or destroy protected objects exclusively applies to

[17] *Official records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977),* (1978). Federal Political Dept Bern, Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Vol. XIV, p. 159, para. 45; p. 160, para. 47; p. 163, para 11; p. 167, para. 20; URL.

	of a scorched earth policy." [emphasis added]	territories over which a State possesses a legitimate title.
Iran	The representative of Iran "agreed with the delegations of Belgium and the Arab Republic of Egypt that it was justifiable for a Party to a conflict to take steps to put out of action objects on its own territory."	

None of the representatives mentioned the authorization for an Occupying Power to destroy a foreign protected object; the discourse was confined to the sovereign territory of either party to the conflict.

After the debate on Article 49 was closed, it was referred back to the Working Group along with all the submitted amendments. Approximately a month later, the Working Group presented its Proposal to the Third Committee, accompanied by a Report on the work of a Working Group from the Rapporteur.[18] The Proposal diverged from the original ICRC text, only prohibiting attacks on protected objects:

> *"1. Works or installations containing dangerous forces, namely dams, dykes, and nuclear electrical generating stations, shall not be made the object of attack, even where these objects are military objectives…"* [emphasis added]

The Report though did not elucidate the rationale behind omitting the term "destroy" from the initial ICRC text.[19] Given the lack of proposals (apart from

[18] Levie H. S., (1980). *Protection of war victims: Protocol 1 to the 1949 Geneva conventions.* Oceana Publications Dobbs Ferry, N.Y. 1979, Vol. III, pp. 295-296, URL.

[19] See the relevant *Report to the Third Committee on the Work of the Working Group, Committee III, 13 March 1975 (CDDH/III/264; XV, 347)* in Levie H. S., (1980). *Protection of war victims: Protocol 1 to the 1949 Geneva conventions.* Oceana Publications Dobbs Ferry, N.Y. 1979, Vol. III, pp. 293-295, URL.

the Australian one) to eliminate the term "destroy" and the absence of reasoning behind this alteration, the most plausible explanation is that the Working Group sought to reshape the language of the article in line with the rationale of the abovementioned proposal from Belgium and the Netherlands.[20]

However, rather than incorporating the logic of this proposal, which either lacked support from States due to its limitation of the prohibition's scope or, even if supported, was only endorsed in its restricted sense pertaining to sovereign territory, the Working Group went beyond the delegates' intentions by proposing the permission for the destruction of protected objects *per se*. This would potentially apply regardless of whether the Party initiating the destruction held rightful ownership of the object.

The delegates although clearly delineated that the exemption from the prohibition to attack or destroy the protected objects is confined solely to actions within territories rightfully belonging to a High Contracting Power as a Sovereign State.[21] This exemption does not extend to territories under other forms of control, such as those under the de-facto jurisdiction of an occupying or administering Powers, where the prohibition to attack or destroy the protected objects remains in force. It would be reasonable to interpret the rationale of Article 56 keeping in mind this context.

Contrarily, adopting a different stance would yield a seemingly futile interpretation that would hold limited, if any, effectiveness in the context of modern times and circumstances. The fact is that nowadays dams are specially built to withstand super-powerful impacts from the outside, but not from the

[20] This aligns with the Bothe Commentary's stance that removing the term "destroy" fulfills at least part of the objective outlined in the Belgian and Dutch proposal: "*The deletion of the word 'destroy' accomplishes at least part of the object of the Belgian and Netherlands proposals to reserve the rights of a Party to the conflict in its own territory.*" in the Bothe M., Partsch K. J., Solf W., (1982). *Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*. Martinus Nijhoff Publishers, Pp. xxi, 746, p. 396.
[21] See Table F.2.

inside.[22] The comprehensive analysis reveals that the Nova Kakhovka Dam "*was designed to withstand almost any attack imaginable — from the outside,*"[23] yet its internal structure is considered an "Achilles' heel."[24]

Therefore, if blowing up a dam from within is deemed permissible and, despite the tragic consequences, cannot be qualified as an "attack," then the provision becomes virtually inoperative with its essence being nullified. Moreover, an attack does not necessarily lead to the complete destruction of the dam and the subsequent massive surge of water. The recent attack on Dnipro Hydroelectric Station (DnirpoHES) by Russia serves as an example, demonstrating that even a massive bombardment of a dam would hardly destroy one.[25] As Ihor Syrota, director of Ukrhydroenergo, succinctly commented on the attack: "[*T]here is no threat of a dam breach as a result of the bombardment*."[26] Therefore, if the aim is to prevent the release of hazardous forces, and if even attacks are subject to criminalization, it is even more reasonable to criminalize the complete destruction of a protected object, whether from inside or from outside.

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[22] Garasym A., (2023). *The Kakhovka HPP was designed to withstand a nuclear attack. There is no question of its self-destruction*. TEXTY, URL; Укргідроенерго [@ukrhydroenergo], (), Telegram, URL.

[23] Glanz J. et al., (2023). *Why the Evidence Suggests Russia Blew Up the Kakhovka Dam,* (2023), The New York Times, URL.

[24] *Ibid*; See also: Kyrylenko O., (2023). *Flooded South: the consequences of blowing up the Kakhovka dam (in brief).* Ukrainska Pravda, URL:*"The dam is really built with military actions in mind – it is a capital structure with a margin of safety. It is very difficult to destroy it from the outside, it would probably be necessary to use tactical nuclear weapons to do it. But if there is access to this infrastructure, which is the case with the Russian troops, then it could be undermined from the inside."*

[25] The prosecutor's office reported that eight missiles hit the Dnipro HPP: *"Eight missiles hit the Dnipro HPP, the damage is very significant, although there is no danger to its integrity." Удар по ДніпроГЕС, блекаут у Харкові й руйнування по всій країні: найбільша атака Росії на енергетику України,* (2024). BBC News Україна, URL.

[26] Стасюк А., (2024). *Атака на Дніпровську ГЕС: чи можна знищити ракетами дамбу та які можливі наслідки підриву.* Суспільне | Новини, URL.

This interpretation aligns with the Martens Clause, a part of customary international law.[27] As the ICTY highlighted, although the "principles of humanity" and the "dictates of public conscience" may not be yet viewed as independent sources of international law, "*this Clause enjoins, as a minimum, reference to those principles and dictates any time a rule of IHL is not sufficiently rigorous or precise: in those instances the scope and purport of the rule must be defined with reference to [them].*"[28] Therefore, the ICTY noted the need to read the provisions of IHL in the light of the Martens Clause in a way that leaves the narrowest possible space for the discretionary power to attack belligerents and, furthermore, expands the protection to civilians.[29]

To ensure the sufficient scope of rigorousness and preciseness, the interpretation of the term "attack" that provides for a wider range of protection for civilians or civilian objects should be given priority under the Martens Clause.

However, even if one disagrees with this conclusion and aligns with the stance expressed in the Commentary that nothing precludes an Occupying Power from destroying a dam under its control in occupied territory, the Commentary itself acknowledges that even in such a scenario, some exceptions exist. The Commentary explicitly states the following:

> *"It is arguable, that the destruction by a Party of a dam or dyke under its control is an attack within the meaning of Art. 49(1) if it is intended to inundate enemy personnel rather than merely to interpose an obstacle halting or delaying the enemy's movement. This interpretation would also control the actions of a Party*

[27] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, p. 226, International Court of Justice (ICJ), 8 July 1996, para. 84.
[28] *Prosecutor v. Kupreškić et al. (Judgement)*, IT-95-16, International Criminal Tribunal for the former Yugoslavia (ICTY), para. 525, URL.
[29] *Ibid*, para. 525.

fighting in its national territory as well as that of an Occupying Power."[30]

On the facts of the present case, one of the Russian military's goals was to attack the Dam in such a way as to drown the Ukrainian military.[31] This is undoubtedly evidenced by the initial belief of the Russians that they had managed to strategically blow up a small part of the Dam to flood the Ukrainian military positioned on the islands in the Dnipro Delta. The Russian military and propagandists rejoiced that the Kakhovka Dam had inundated the Ukrainian army's positions on the islands.[32] Only upon realizing the complete destruction of the Dam and the subsequent devastating effects did Russian authorities and milbloggers dramatically alter their rhetoric and begin to accuse Ukrainians of damaging the Dam.

To this end, the attack on and destruction of a foreign dam, even if under the control of an Occupying Power, will fall under the prohibition of attacks on protected objects as stipulated in Article 56.

F.2 Examining the Concept of "Attack" in the Jurisprudence of the ICC

The ICC seems to interpret the term "attack" with its own nuances, albeit grounded in international humanitarian law (IHL). Three distinct approaches stand out: one employed by Trial Chamber VIII in Al Mahdi (a), another endorsed by Trial Chamber VI and backed by two Appeals Chamber judges in

[30] Bothe M., Partsch K. J., Solf W., (1982). *Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*. Martinus Nijhoff Publishers, Pp. xxi, 746, p. 396.

[31] Кобзар Ю., (2023). *Пропаганда РФ заплуталася у своїй брехні про Каховську ГЕС - журналіст.* UNIAN.ua, URL.

[32] @jurnko, (06.06.2023), Telegram, URL. Also, on 9 June, the Security Service of Ukraine released what they said was an intercepted call between two Russian officers admitting responsibility for the destruction. In the call, the alleged officers say that the explosion was supposed to "scare" people but *"(they did) more than what they planned for."* – Brown S., (2023). *Intercepted Phone Call Proves Russia Blew Up Dam in Botched Operation, SBU Claims.* Kyiv Post, URL.

Ntaganda (b.i) and a final one embraced by three Appeals Chamber judges in Ntaganda (b.ii).

a. The Concept of "Attack" favored in Al Mahdi Case

In 2016, the ICC convicted Al Mahdi for the crime of directing an "attack" against religious and historical objects under Article 8(2)(e)(iv) of the Rome Statute. The Trial Chamber's judgment clarified that "direct[ing] an attack" covers any acts of violence against protected objects, *i.e.*, there is no "*distinction as to whether it was carried out in the conduct of hostilities or after the object had fallen under the control of an armed group.*"[33] Thus, the ICC did not require to show the nexus of certain acts of violence to the actual conduct of hostilities, while retaining the general requirement of nexus of the acts to the armed conflict as such.

However, the judges substantiated this distinct approach due to the special status of religious, cultural, historical, and similar objects, which IHL protects from crimes committed both within and outside of battle.[34] The Chamber noted that persons are protected by many distinct clauses applicable during hostilities or after an armed group has established control over an area. At the same time, it regrets that cultural objects receive protection only under Article 8(2)(e)(iv) (or 8(2)(b)(ix)), without differentiating between attacks during or after hostilities.[35] This may indicate that the ICC has extended such a broad interpretation of the "attack" to cultural objects and hospitals only.

If the Al-Mahdi approach is followed, it may be reasonable to extend it to other specially protected objects such as dams and other works or installations due to the nature of such protection. It seems that one of the main reasons for

[33] *Prosecutor v. Ahmad Al Faqi Al Mahdi (Judgment and Sentence),* ICC-01/12-01/15, International Criminal Court, 27 September 2016, para 15, URL.
[34] *Ibid*.
[35] *Ibid*.

the special protection of cultural property and hospitals is the seriousness of the consequences of attacks on them.

The Preamble of the 1954 Hague Convention makes the seriousness of damage clear: "*Damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind*." This was also confirmed in the *Jokic* and *Strugar* International Criminal Tribunal for the former Yugoslavia (ICTY) judgments in part of attacks on cultural heritage: "*Since it is a serious violation of international humanitarian law to attack civilian buildings, it is a crime of even greater seriousness to direct an attack on an especially protected site.*"[36] A similar logic to protect the wounded and sick can be seen in numerous protective instruments for medical facilities.[37]

In turn, when introducing what is now Article 56 of the API, the representative of the International Committee of the Red Cross (ICRC) noted that civilian works and installations (including dams) required special protective measures, as attacking them could lead to catastrophic outcomes.[38] Moreover, the drafting history highlights that the rationale behind prohibiting attacks on works and installations was to shield the civilian population from the

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[36] *Prosecutor v. Miodrag Jokic (Sentencing Judgement),* IT-01-42/1-S, International Criminal Tribunal for the former Yugoslavia (ICTY), 18 March 2004, paras. 45 and 53, URL; *Prosecutor v. Pavle Strugar (Trial Judgment)*, IT-01-42-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 31 January 2005, para 232, URL.

[37] *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention)*, (1949). International Committee of the Red Cross (ICRC), 75 UNTS 31, 12 August 1949, Articles 19-23, URL; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention)*, (1949). International Committee of the Red Cross (ICRC), 75 UNTS 85, 12 August 1949, Articles 22, 23, 34, 35, URL; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, (1949). International Committee of the Red Cross (ICRC), 75 UNTS 287, 12 August 1949, Articles 14, 18, 19, URL; etc.

[38] *Official records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977),* (1978). Federal Political Dept Bern, Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Vol. XIV, CDDH/III/SR.18, p. 154, para. 16, URL.

disastrous effects of the destruction of, or damage to, installations containing dangerous forces.[39]

Similarly, to cultural objects, it is reasonable to argue that objects with the potential to cause excessive damage to the environment should also be protected from attacks, both during and after active hostilities. The consequences of environmental damage are long-lasting and widespread, which silently negatively affects both the majority of living organisms in the region and the people who live in the area and actively interact with nature. Thus, according to the logic adopted in *Al Mahdi*, the general nexus to the armed conflict would suffice for the destruction of a dam to qualify as an attack – a requirement that is undoubtedly met in the Kakhovka case.

While the interpretation favored in *Al Mahdi* is not universally endorsed,[40] and without delving into its feasibility, for the context of our report, we will assume that if the ICC follows a similar approach in the Kakhovka case, the destruction of the Dam would indeed qualify as an attack. Moreover, subsequent ICC jurisprudence, while marked by inconsistency,[41] illustrates the potential for adopting such a collective and unified broad approach to interpreting the term "attack" across all attack-related war crimes listed in Article 8 without making exceptions for specific provisions, as done in *Al Mahdi*.

b. The Concept of "Attack" Favored in Ntaganda Case

In 2019, Trial Chamber VI delivered a guilty verdict against Bosco Ntaganda for war crimes and crimes against humanity committed during the conflict in the Democratic Republic of the Congo in 2002–2003.[42] In 2021, the Appeals

[39] *Ibid*, page 155, para 26, URL.
[40] Schabas W., (2017). *Al Mahdi Has Been Convicted of a Crime He Did Not Commit*. 49 Case W. Res. J. Int'l L. 75, URL.
[41] Clancy P., (2021). *Ntaganda and the 'Conduct of Hostilities Crimes'.* EJIL:Talk!, URL.
[42] *The Prosecutor v. Bosco Ntaganda,* ICC-01/04-02/06, International Criminal Court, URL.

Chamber confirmed the conviction of Ntaganda by a majority.[43] However, the Trial Chamber acquitted, and the Appeals Chamber upheld the acquittal of Ntaganda of two war crimes charges under Art. 8(2)(e)(iv) of the Rome Statute.[44] This article provides for liability in the case of "*intentionally directed attacks against buildings dedicated to religion, … hospitals and places where the sick and wounded are collected.*"

The charges under Art. 8(2)(e)(iv) related to the incident when, shortly after the fighting for settlements, Ntaganda forces looted the medical equipment from the hospital and "*set up a base inside the church, broke the doors of the church, removed the furniture, dug trenches around the church, and started a fire inside to prepare their food.*"[45] The Trial Chamber acquitted Ntaganda of these charges under Article 8(2)(e)(iv) of the Rome Statute due to the absence of an "attack" in the defendant's actions (i).[46] Although the Appeals Chamber Judges did not overrule these findings, the majority of judges seemed to favor another approach to interpreting the term "attack" (ii).

b.i. The concept of "attack" employed by the Trial Chamber VI

The Trial Chamber applied the definition of the term "attack" within the meaning of Article 49 AP I, namely "*acts of violence against the adversary, whether in offence or defence*."[47] Contrary to the position in Al-Mahdi, the Court endorsed a "restrictive" approach to the interpretation of the term "attacks" on specially protected objects, *i.e.*, cultural sites and hospitals.[48] The

[43] *Ntaganda case: ICC Appeals Chamber confirms conviction and sentencing decisions,* (2021). International Criminal Court, Press release, 30 March, 2021, URL.
[44] *Prosecutor v. Bosco Ntaganda (Trial Judgement)*, International Criminal Court, ICC-01/04-02/06, 8 July 2019, paras. 1142-1143, URL.
[45] *Ibid*, para. 1138, URL.
[46] *Ibid*, paras. 1142-1143, URL.
[47] *Ibid,* paras. 916 and 1136, URL.
[48] *Prosecutor v. Ahmad Al Faqi Al Mahdi (Judgment and Sentence),* ICC-01/12-01/15, International Criminal Court, 27 September 2016, para 15, URL; *Prosecutor v. Bosco Ntaganda (Trial Judgement)*, International Criminal Court, ICC-01/04-02/06, 8 July 2019, para. 1136, URL.

Court defined that "*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.*"[49] Thus, looting of medical supplies from the hospital was not "an act of violence against the adversary" and the events in the church were not during the actual conduct of hostilities as they happened after the capture of the village.[50]

In the case of the explosion of the Nova Kakhovka Dam, even the narrow interpretation of the term "attack" endorsed by Trial Chamber VI would be satisfied.

First, the Nova Kakhovka Dam was constantly in the zone of active hostilities as an object connecting the two banks of the Dnipro River controlled by different parties to the conflict.[51] In Ntaganda, Trial Chamber VI, the key factor was that the events in the church "*took place sometime after the attack*" *i.e.*, there was a certain period during which the village was seized and later just controlled by the attacking side. In the case of Kakhovka, the parties were constantly fighting each other to the limit of their capabilities, as the demarcation line at the time of the events ran along the river on which the Dam was located.[52] Moreover, the main target of the explosion was the region downstream, near the city of Kherson, where the fighting between parties was

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[49] *Prosecutor v. Bosco Ntaganda (Trial Judgement)*, International Criminal Court, ICC-01/04-02/06, 8 July 2019, para. 1136, URL.

[50] *Ibid*, paras. 1142-1143, URL.

[51] *Обстріли Берислава та Херсона, чергова авіаатака Кізомиса. 451 день війни*, (2023). Суспільне Херсон, URL; *Армія РФ обстріляла Берислав на Херсонщині: у районі зникло світло,* (2023). Espreso.tv, URL; Воронцова О., (2023). *Вночі в Новій Каховці стався бій: в окупантів переполох (відео)*. ГЛАВКОМ, URL; Головчак Х., (2023). *"Подібні дії є частиною деокупації": обрада прокоментувала стрілянину в Новій Каховці.* ТСН, URL; Мокляк А., (2023). *На Херсонщині російська авіація вдарила по селу Львове.* Суспільне Медіа, URL; *Обстріли Херсона та Зміївки, вироки колаборантам. 458 день війни,* (2023). Суспільне Медіа, URL.

[52] *Ibid*; Eliav Lieblich [@eliavl], (06.06.2023), X, URL: *"There's nothing that per se precludes acts by occupants against objects within the territory from being "attacks." The key question to me is whether there are active hostilities in the territory. If so, the "attack" paradigm applies [...] To me it's clear that there *are* hostilities in the region, there's a nexus between this act and these hostilities, and therefore this would be an attack."*

even more intense.[53] Thus, even if "conduct of hostilities" is established as an element for the definition of an attack, it is satisfied in this case.

Second, events taking place on the territory controlled by one of the parties to the conflict but still affecting the adversary fit within the definition of "attack" (Chapter 4.2.1 of this report). Notably, the destruction of a dam in our case was an act that was primarily aimed at the adversary, while the looting of the hospital had a different aim. The Kakhovka Dam was a strategic object for the energy and agricultural industries, creating a large reservoir and restraining the river's flow. The destruction of such an object causes the release of a significant amount of water, which floods the location of enemy troops, complicating their advance and logistics. At the same time, even if an act of violence is against an adversary it doesn't justify its military necessity *per se*. Thus, the explosion of such an object should be classified as an attack.

b.ii. The concept of "attack" employed by the Appeals Chamber judges

The main position of the Office of the Prosecutor in the appeal was that Trial Chamber VI had misinterpreted the concept of "attack" in Articles 8(2)(e)(i) and (iv) of the Rome Statute.[54] The prosecution argued that due to the special protected status of cultural sites and hospitals, "attack" in Article 8(2)(e)(iv) has a "special meaning," *i.e.*, not limited to the conduct of hostilities.[55]

The Appeals Chamber majority upholds the decision of Trial Chamber VI, with Judge Ibáñez Carranza dissenting.[56] Judge Morrison and Judge

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[53] Лисогор І., (2023). *Росіяни вбили у Херсоні 13 людей (оновлено) (фото).* LB.ua, URL; Рощіна О., (2023). *Росіяни обстріляли острови й лівий берег Дніпра поблизу Херсона*. Українська правда, URL; *Війська РФ знову атакували Херсон, є поранені – ОВА,* (2023). Радіо Свобода, URL; *Генштаб повідомив про 25 бойових зіткнень на чотирьох напрямках на сході України,* (2023). Радіо Свобода, URL.

[54] *Prosecutor v. Bosco Ntaganda (Prosecution Appeal Brief)*, International Criminal Court, ICC-01/04-02/06, 7 October 2019, paras. 15, 16, URL.

[55] *Ibid*, para. 9, URL.

[56] *Prosecutor v. Bosco Ntaganda (Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled 'Judgment')*, International Criminal Court, ICC-01/04-02/06 A A2, 30 March 2021, para. 1163, URL.

Hofmański have determined that the term "attack" as employed in article 8(2)(e)(iv) of the Statute refers to "combat action" and that the Trial Chamber's decision not to employ an alternative definition of "attack"' was correct.[57] It is important to note that the ICRC, in its commentary to Article 49 of the API, defines that "*the term 'attack' means 'combat actio*n.'"[58] The ICTY also confirmed this in the *Strugar* case where it stated that the term *"refers to the use of armed force to carry out a military operation at the beginning or during the course of an armed conflict."*[59]

Judge Luz del Carmen Ibáñez Carranza, in her dissenting opinion, supported the prosecutors' position and noted that the term "attack" in Article 8(2)(e)(iv) should be interpreted in the ordinary meaning and not in the classical IHL understanding.[60] Such interpretation also defines that "*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.*"[61] One of the main ideas laid down by Judge Ibáñez is to avoid gaps of impunity under a narrow interpretation of the term "attack".

Judge Solome Balungi Bossa, in her separate opinion, agreed with this idea and stated that the "*Appeals Chamber should be careful in interpreting the Statute to ensure that it does not create an impunity gap.*"[62] She emphasized the difficulty of distinguishing between the time period between the initial

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[57] *Ibid*, para. 1164, URL.
[58] Sandoz Y., Swinarski C., Zimmermann B. (eds). "*Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949,*" (1986). International Committee of the Red Cross, para. 1880, URL.
[59] *Prosecutor v. Strugar (Trial Judgment),* IT-01-41-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 31 January 2005, para. 282, URL.
[60] *Prosecutor v. Bosco Ntaganda (Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled 'Judgment')*, International Criminal Court, ICC-01/04-02/06 A A2, 30 March 2021, para. 1166, URL.
[61] *Ibid*, para. 1168, URL.
[62] *Prosecutor v. Bosco Ntaganda (Judgment on the appeals),* ICC-01/04-02/06-2666-Anx4, Separate opinion of Judge Solomy Balungi Bossa on the Prosecutor's appeal, para. 16, URL.

attack and the accompanying activities.[63] The reason for upholding the general position in the decision was that Judge Balungi Bossa considered 8(2)(e)(xii) (*i.e.*, destroying or seizing the property of an adversary) to be the correct qualification, not 8(2)(e)(iv).[64]

In his turn, Judge Chile Eboe-Osuji also supported the position on the difficulty of separating the actions committed during hostilities and those subsequent to them in the time period.[65] In addition, he emphasized the conceptual interconnectedness of these two types of actions and said that it is "*unrealistic to adopt a compartmentalised view of military operation.*"[66] In support of this opinion, he quoted the ICTY *Kunarac* case when it observed "*[t]he laws of war may frequently encompass acts which, though they are not committed in the theatre of conflict, are substantially related to it*."[67] He did not support the prosecutor's position for the same reason as Judge Balungi Bossa.[68]

Although the Court's majority decision did not support the expansion of the term "attack" in this particular case, three judges have a position supporting this vector in whole or in part. It seems that the judges seek to reduce the number of opportunities for impunity, at least by broadening the understanding of the term "conduct of hostilities".[69] We can also see that the three judges, Ibáñez Carranza, Balungi Bossa, and Eboe-Osuji, did not separate the events of looting and damage to the church from the main attack on the settlements.[70] Such an approach seems to create an opportunity to apply a broader

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[63] *Ibid*, para. 9, URL
[64] *Ibid*, para. 15, URL
[65] *Prosecutor v. Bosco Ntaganda (Judgment on the appeals),* ICC-01/04-02/06-2666-Anx5, Partly concurring opinion of Judge Chile Eboe-Osuji, para. 111, URL.
[66] *Ibid*, para. 130, URL.
[67] *Ibid*, para. 129, URL.
[68] *Ibid*, para. 136, URL.
[69] Clancy P., (2021). *Ntaganda and the 'Conduct of Hostilities Crimes'.* EJIL:Talk!, URL
[70] Abhimanyu G. J., (2021). *The Ntaganda appeal judgment and the meaning of "attack" in conduct of hostilities war crimes.* EJIL:Talk!, URL.

interpretation of attack not only in Article 8(2)(e)(iv) but also to all other war crimes where attack is one of the elements.[71]

The logic of the three judges regarding the difficulty of distinguishing between the main attack and the accompanying acts seems particularly relevant in cases where there is a clear line of demarcation between the parties to the conflict. The sides usually engage in active artillery and mortar duels as well as drone and small arms fire. In this case, it is important to understand that such a state of permanent and systematic clashes meets the notion of conduct of hostilities.

At the same time, one of the points of criticism for the Trial Chamber VI decision was the use of the concept of "conduct of hostilities," which according to some scholars is not used in the rules of IHL.[72] Some scholars provide a doctrinal understanding of the term as "[conduct of hostilities] refers to any conduct of military operations against the adversary, encompassing both 'attacks' and 'acts of hostility.'"[73] However, we can find this term in the context of means and methods of warfare, but not as part of the test for determining an attack.[74]

The above approach also potentially applies to Article 8(2)(b)(iv), which is a qualification for the explosion of the Nova Kakhovka Dam. The broader

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[71] *Ibid*; See also Pomson O., (2021). *Ntaganda Appeals Chamber Judgment Divided on Meaning of "Attack."* Lieber Institute West Point, URL.

[72] *Prosecutor v. Bosco Ntaganda,* ICC-01/04-02/06 A2, International Criminal Court, Amicus Curiae of Professor Roger O'Keefe, 17 September 2020, para. 5, URL; *Prosecutor v. Bosco Ntaganda,* ICC-01/04-02/06 A2, International Criminal Court, Observations by ALMA – Association for the Promotion of IHL in the Case of The Prosecutor v. Bosco Ntaganda, 18 September 2020, para. 10, URL*; Prosecutor v. Bosco Ntaganda,* ICC-01/04-02/06 A2, International Criminal Court, Amicus Curiae of Mr Pearce Clancy and Dr Michael Kearney, Al-Haq, 18 September 2020, p. 4, URL.

[73] *Prosecutor v. Bosco Ntaganda,* ICC-01/04-02/06 A2, International Criminal Court, Amicus Curiae of Professor Roger O'Keefe, 17 September 2020, para. 5, URL;

[74] *Conduct of hostilities | How does law protect in war? - Online casebook.* ICRC, URL*; Conduct of hostilities: general principles.* Diakonia International Humanitarian Law Centre, URL; *International law on the conduct of hostilities: overview*, (2010). ICRC, URL; *Prosecutor v. Bosco Ntaganda,* ICC-01/04-02/06 A2, International Criminal Court, Amicus Curiae by Prof. Dra Yolanda Gamarra, para. 8, URL.

interpretation approach will certainly simplify the burden of proving an attack in the present case and other environment-related crimes; however, it will not influence an outcome. As was analyzed in the previous section, the circumstances of the case satisfy the application of both options of the broader or narrower interpretation.