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No.: **ICC-01/04-02/06**
Date: **24 January 2020**

THE APPEALS CHAMBER

Before: **Judge Howard Morrison, Presiding Judge**
Judge Chile Eboe-Osuji
Judge Piotr Hofmański
Judge Luz del Carmen Ibáñez Carranza
Judge Solomy Balungi Bossa

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF
THE PROSECUTOR V. BOSCO NTAGANDA

Public

Prosecution Response to Observations of the Legal Representatives of Victims (Attack Victims) concerning Prosecution Appeal Brief

Source: **Office of the Prosecutor**

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Introduction

1. The Prosecution welcomes the support of the Legal Representative of Victims (Attack Victims) (LRV2) for the Prosecution's appeal against the Trial Chamber's decision not to convict Mr Ntaganda of the attacks on Sayo church and Mongbwalu hospital.[1] Just like the many other crimes in these localities, for which Mr Ntaganda was properly convicted, these attacks were carried out by UPC/FPLC members under Mr Ntaganda's command.[2] The only reason why the Trial Chamber acquitted Mr Ntaganda of responsibility for these incidents was its legal interpretation of article 8(2)(e)(iv) of the Rome Statute, and the meaning in that context of the term "attack".[3]

2. The Prosecution and LRV2 agree that the Trial Chamber fell into error on this one technical issue. However, consistent with the terms of its own appeal, the Prosecution respectfully disagrees with LRV2's analysis of the origin and nature of this error, insofar as they suggest that the material question merely concerns "the temporal parameters of the term 'attack'".[4] This view cannot be sustained either as a matter of logic, statutory interpretation, or the Court's own case law. To ensure the clarity of the issues on appeal, the Prosecution therefore takes this opportunity to outline briefly why it considers that the Appeals Chamber should not follow LRV2's approach, and should instead adhere to the position in the Prosecution Appeal Brief. On this basis, it should grant the relief that LRV2 and the Prosecution both request.

3. While the Prosecution has noted the Defence response to the Prosecution's appeal, opposing both the Prosecution's arguments and the requested relief,[5] the Prosecution did not seek to reply since the Defence arguments raised nothing which was unanticipated. The Prosecution will if necessary address these matters further in due course, in any oral hearing which the Appeals Chamber may decide to convene.

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[1] *See* ICC-01/04-02/06-2432 ("Prosecution Appeal Brief"); ICC-01/04-02/06-2452 ("Legal Representatives' (Attack Victims) Observations"). The other group of Legal Representatives (LRV1), representing former child soldiers, did not file observations.
[2] *See* Prosecution Appeal Brief, paras. 14, 104-105, 107, 151-152.
[3] *See* ICC-01/04-02/06-2359 ("Judgment"), paras. 1136, 1141-1142.
[4] Legal Representatives' (Attack Victims) Observations, para. 1. *See also* para. 10 (noting that the Legal Representatives "cannot entirely agree with the Prosecution's position that the term 'attack' should be given a 'special meaning' for the purposes of article 8(2)(e)(iv)" but neither can it "agree with the Defence's overly restrictive interpretation"). The Legal Representatives present "no further observations in relation to other matters litigated under Ground 2" of the Prosecution's appeal.
[5] *See* ICC-01/04-02/06-2449 ("Defence Response Brief").

Submissions

4. Consistent with the reasoning of Trial Chamber VIII in *Al Mahdi*,[6] which was also recently endorsed by Pre-Trial Chamber I in *Al Hassan*[7] and Pre-Trial Chamber II in *Yekatom and Ngaïssona*,[8] the Prosecution argues in this appeal that the term "attack" in article 8(2)(e)(iv) has a special meaning. Accordingly—and unlike pure 'conduct of hostilities' offences, such as article 8(2)(e)(i) for example—article 8(2)(e)(iv) requires only that the perpetrator directed an act of violence against a protected object. It is immaterial whether the protected object was affiliated (or not) to an adverse party to the conflict, or indeed whether it was under the control of the same party to the conflict as that to which the perpetrator is affiliated.[9]

5. This interpretation of article 8(2)(e)(iv) necessarily follows from the *chapeau* of article 8(2)(e), which requires offences to be interpreted in accordance with the "established framework of international law". This framework guarantees that protected objects such as buildings dedicated to religion and hospitals are protected from *all* acts of hostility, regardless of the context, unless they constitute military objectives.[10] The correctness of this interpretation is further confirmed by the context of article 8(2)(e)(iv) in the Statute, and the object and purpose of the Statute as a whole.[11]

6. Crucial to these arguments is the broader recognition that attacks *in the conduct of hostilities*—such as under article 8(2)(e)(i)—are, by definition, acts of violence directed against an adverse party to the conflict.[12] This fundamental concept is clear, and well understood, and nothing in the Prosecution appeal seeks to disturb it. Instead, the Prosecution's point is that it was never the drafters' intention to limit the application of article 8(2)(e)(iv) to this regime at all, notwithstanding the use of the term "attack". By contrast, however, LRV2 seems to consider that the drafters *did* intend article 8(2)(e)(iv) to fall within the conduct of hostilities regime,[13] but then apparently tries to reinterpret that regime such

[6] ICC-01/12-01/15-171 ("*Al Mahdi* Trial Judgment"), paras. 13-16. *See also* ICC-01/12-01/15-84-Red ("*Al Mahdi* Confirmation Decision"), para. 43.
[7] ICC-01/12-01/18-461-Corr-Red ("*Al Hassan* Confirmation Decision"), paras. 521-522.
[8] ICC-01/14-01/18-403-Red ("*Yekatom and Ngaïssona* Confirmation Decision"), para. 96.
[9] *See e.g.* Prosecution Appeal Brief, paras. 21, 27, 29-30, 103.
[10] *See e.g.* Prosecution Appeal Brief, paras. 32-57.
[11] *See e.g.* Prosecution Appeal Brief, paras. 58-64.
[12] *See* Additional Protocol I, art. 49(1).
[13] *See e.g.* Legal Representatives' (Attack Victims) Observations, para. 39 ("it cannot be reasonably inferred from the above jurisprudence that the term 'attack' under article 8(2)(e)(iv) of the Statute should also extend to the entire period 'when the object was under the control of a party to the conflict', a meaning far beyond the end

that the prohibited conduct is not limited "strictly to combat action or even the mere launching of military action".[14] This is untenable, even if efforts are made to characterise this reinterpretation as a matter of fact rather than law.[15] While LRV2 is correct in identifying various sources stressing the broad protections afforded to cultural property in armed conflict (including to buildings dedicated to religion), they mistake the significance of these sources. Rather than suggesting that the established conduct of hostilities regime should be distorted, these sources show that the special protection of such objects simply *transcends* this regime. This is precisely the point of the Prosecution appeal.

7. Nor is there any danger that this Court's jurisdiction over such conduct becomes overly expansive. If LRV2's position is motivated by such a concern, they overlook the significance of the nexus requirement as the appropriate safeguard.[16] To be a *war crime*, it is necessary that the prohibited acts against protected objects take place in the context of an armed conflict. But this does not mean that there can be any principled concern with a war crime taking place during an "extended period[] of occupation" (in international armed conflict) or when an object is otherwise under the control of a party to the armed conflict (in non-international armed conflict).[17] Indeed, it is perfectly normal for war crimes to apply in such situations. LRV2 gives no explanation for why they consider this cannot be the case.

8. In the following paragraphs, the Prosecution comments specifically on some of the arguments arising from LRV2's observations, and explains why these should not be followed.

A. The Appeals Chamber need not, and should not, elaborate upon the established meaning of an "attack" in the conduct of hostilities

9. LRV2's position appears to confuse and disrupt some of the important principles of international humanitarian law (IHL) which they seek to protect. On the one hand, they state that the term "attack" in article 8(2)(e)(iv) does *not* have a special meaning[18]—which, in the

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of the hostilities"). *See also* paras. 1 (referring to "the temporal parameters of the term 'attack'"), 10 (referring to "the temporal scope of the prohibition")

[14] Legal Representatives' (Attack Victims) Observations, para. 13. *See also* paras. 13 (suggesting that the term 'attack' "has to be interpreted in a way that accounts both for combat action and its aftermath" and arguing against a restriction "strictly to combat action or even the mere launching of military action"), 28 ("the core prohibition of article 8(2)(e)(iv) is not confined to hostilities, as it would other be deprived of its meaning should, as in the case at hand, the wrongful act be committed in the aftermath of the 'attack'—or as the Defence submits 'combat action'"), 39 (referring to "the aftermath of hostilities").

[15] *See* Legal Representatives' (Attack Victims) Observations, para. 33 ("the term 'attack' does not need to be given a 'special' meaning. It merely requires a complete and fact-oriented understanding").

[16] *See* ICC-01/04-02/06-1962 OA5 ("*Ntaganda* Jurisdiction Appeal Judgment"), para. 68.

[17] *Contra* Legal Representatives' (Attack Victims) Observations, para. 10. *See also* paras. 14, 39.

[18] Legal Representatives' (Attack Victims) Observations, paras. 10, 33.

Prosecution's view, would distinguish it from the term "attack" in provisions such as article 8(2)(e)(i)—and reject the Prosecution's submission that article 8(2)(e)(iv) therefore applies equally in the absence of hostilities, such as when territory is occupied.[19] Yet on the other, they argue that an "attack" must also include "post-combat damage",[20] such as "destruction of […] protected property" that "is *sufficiently closely related* to the conduct of hostilities".[21] Likewise, they attempt to distinguish between "immediate *attacking* during a military offensive" and "a general attack (not temporarily [sic] limited by the physical act of firing a weapon)",[22] and state that "the aftermath of an attack has never been specifically excluded in war crimes cases and can, in general, not exhaustively be defined but rather depends on the facts and circumstances of each case."[23] The Prosecution urges the Appeals Chamber to treat this reasoning with caution.

10. The Prosecution agrees with LRV2 that the temporal and geographic parameters of *hostilities* in armed conflict are indeed questions of fact. The concept of 'hostilities' is itself merely a convenient description for the times and locations in which *attacks* (as defined by law) are actually carried out within the context of armed conflict, in the sense (factually) that adversaries are contesting with one another for the battle-space. As such, it is generally the case that hostilities no longer continue in circumstances such as 'occupation', when one party to the conflict has established sufficient control over the territory of another, or indeed at times and locations in which a party to the conflict has uncontested control over its own territory. This factual state of affairs is entirely without prejudice to the continuation of the armed conflict.

11. However, precisely because of the fact-sensitive nature of the questions concerning the beginning and end of 'hostilities', it is important that the relevant legal standards remain clear—especially as IHL endeavours to provide differentiated but seamless legal regulation for the treatment of persons and property both in the conduct of hostilities and outside it. Contrary to the potential implication of LRV2's position, there is no third paradigm in the law of armed conflict beyond the rules regulating the conduct of hostilities (the 'Hague Law'

[19] Legal Representatives' (Attack Victims) Observations, paras. 10, 39.
[20] Legal Representatives' (Attack Victims) Observations, para. 32.
[21] Legal Representatives' (Attack Victims) Observations, para. 15 (emphasis supplied).
[22] Legal Representatives' (Attack Victims) Observations, para. 14 (emphasis supplied).
[23] Legal Representatives' (Attack Victims) Observations, para. 14 (citing ICTY, *Prosecutor v. Popović*, IT-05-88-T, Judgment, 10 June 2010, para. 745). LRV2 continues, in this context, to argue against restricting the conduct prohibited by the term attack (within the conduct of hostilities) "to periods of hostilities *stricto sensu*". The Prosecution notes, however, that the cited passage of the *Popović* Trial Judgment relates to the nexus requirement for war crimes, and not the definition of "attack".

regime) and the rules protecting persons or objects under the control of a party to the conflict (the protective 'Geneva Law' regime). Nor can it be said that the conduct of hostilities regime—which turns in large part on the application of the legal test for an "attack"—routinely extends to circumstances where the adverse party is no longer present, or the object of the material conduct is under the control of the perpetrator. It is also important to ensure that there is no fragmentation in the general legal principles which apply. For the sake of argument, if it is true that the term "attack" in article 8(2)(e)(iv) is correctly interpreted to mean an attack in the conduct of hostilities, then "attack" in this context must have the same definition as an "attack" in the conduct of hostilities for the purpose of IHL in general.

12. In particular, therefore, LRV2 is wrong to say that the established definition of an "attack", for the purpose of the conduct of hostilities, is "overly limit[ed]".[24] To the contrary, article 49(1) of Additional Protocol I, which also reflects customary international law, provides unequivocally that an "attack" is an "act[] of violence *against the adversary*, whether in offence or defence." It follows that the definition of "attack" does not prescribe the manner in which the requisite violence may be inflicted (provided it meets this threshold),[25] and that the concept of "attack" should not be divorced from the (factual) context of hostilities.[26]

13. In light of these principles, it is plainly undesirable for the Appeals Chamber to pursue LRV2's invitation to attempt to redefine the legal definition of "attack". While it is true that (as a matter of fact) it may sometimes be difficult to determine when hostilities have actually ended in a given location, and this difficulty may even be discernible in the facts of the present case, this question need not arise in this appeal. This is because, as explained in the Prosecution's brief, the protection under article 8(2)(e)(iv) extends no less to those circumstances when a party to the armed conflict is occupying territory (in international armed conflict), or otherwise exercises control over that territory (in non-international armed conflict).

[24] *Contra* Legal Representatives' (Attack Victims) Observations, para. 30.
[25] *See also* Legal Representatives' (Attack Victims) Observations, para. 35 (noting the reference to "siege" in article 27 of the Hague Regulations). A siege, however, is just another means of attack—an act of violence (since it is achieved by dominant force of arms) against the adverse party to induce their capitulation. Self-evidently, sieges occur within the factual context of hostilities.
[26] *See above* para. 10.

B. LRV2's concerns, and the authorities relied on, are better protected and explained by the approach in the Prosecution appeal

14. Despite purporting to concur with the Defence about the "drafting history and origins" of article 8(2)(e)(iv), LRV2 in fact agrees with the *Prosecution* that article 8(2)(e)(iv) does *not* solely give effect to article 27 of the Hague Regulations, which was limited to the conduct of hostilities.[27] Yet LRV2 seems to overlook the significance of this insight—which, by acknowledging that article 8(2)(e)(iv) *also* gives effect to article 56 of the Hague Regulations (applicable in occupation), contradicts their conclusion that article 8(2)(e)(iv) cannot also apply when an object is under the power of a party to the conflict and active hostilities have ceased (provided the nexus to the conflict remains).

15. Given the importance of both articles 27 *and* 56 of the Hague Regulations, it is no surprise that the ICTY's case law reflects the prohibition on directing intentional acts of violence against 'cultural' objects in the context of an armed conflict, irrespective of whether this occurred in the conduct of hostilities or not.[28] This is not because the ICTY agreed with LRV2 that the "timing of the wrongful act" (amid other relevant circumstances) is not dispositive in assessing whether an act occurred in the conduct of hostilities. Rather, it was because, in light of the crystallisation in customary law of both articles 27 *and* 56 of the Hague Regulations, it simply did not matter whether the act occurred in the conduct of hostilities or in the context of military occupation (or other control of territory), provided it had a nexus to the conflict.[29]

16. LRV2 is correct to recognise that, in the past century, international law has developed to supplement the protections contained in the Hague Regulations. For the purposes of this appeal, they may somewhat over-emphasise the 1999 Second Protocol[30]—which does not

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[27] *Compare* Legal Representatives' (Attack Victims) Observations, para. 10 ("the Defence's position correctly reflects the drafting history and origins of article 8(2)(e)(iv) of the Statute"), *with* para. 10 ("The Defence's argument that article 8(2)(e)(iv) of the Statute finds its origins in article 27 of the Hague Regulations […] is too simplistic"). On article 27, *see* Prosecution Appeal Brief, paras. 33-41. The Legal Representatives' position therefore can only be interpreted to contradict the Defence, which argued that "the origin of article 8(2)(e)(iv) lies *firmly and solely* in article 27 of the [Hague Regulations]: Defence Response Brief, para. 17 (emphasis added). *See also* paras. 23-25, 28.

[28] *See* Legal Representatives' (Attack Victims) Observations, paras. 22-23, 37.

[29] *See* Prosecution Appeal Brief, paras. 41.

[30] *See* Legal Representatives' (Attack Victims) Observations, paras. 11-13, 31. *See* Prosecution Appeal Brief, paras. 87-91. In contrast to the Legal Representatives, the Prosecution cannot discern any significance, for the purposes of the present appeal, in the drafters' choice in the 1999 Second Protocol to prohibit making cultural property "the object of attack", as opposed to prohibiting any "act of hostility" as used in the 1954 Hague Convention itself as well as Additional Protocols I and II. This view is shared by commentators such as O'Keefe: *see* Prosecution Appeal Brief, para. 89 (fn. 148).

apply to the whole variety of objects protected by articles 27 and 56 of the Hague Regulations,[31] and also post-dates the drafting of the Statute of this Court. Yet there is no doubt that the international community has indeed sought to affirm and reaffirm its commitment to meaningful and comprehensive protection of cultural property.[32] This underlines the improbability of the view that the drafters of the Statute intended article 8(2)(e)(iv) to be substantially *narrower* in its scope than articles 27 and 56 of the Hague Regulations, which reflect the basic guarantee on which subsequent instruments (such as the 1954 Hague Convention, and its Protocols, and Additional Protocol I) have built.

17. LRV2 also points out that most academic writings on the protection of cultural property emphasise the important objectives served by such protection, and the variety of objects to which it applies.[33] While this may be correct, it simply has no bearing on the precise means to interpret the term "attack" for the purpose of article 8(2)(e)(iv), other than supporting the conclusion that—while remaining consistent with the established framework of international law—it should not be interpreted unduly narrowly.

18. Finally, somewhat surprisingly, LRV2 appears to cite the judgment in *Al Mahdi* in support of their position.[34] It is true—again consistent with the Prosecution appeal—that the *Al Mahdi* trial judgment recognises that article 8(2)(e)(iv) draws on articles 27 *and* 56 of the Hague Regulations.[35] And it is also true that the focus is on the propensity of the perpetrator's act to lead to the damage or destruction of the protected object.[36] But it is not true to suggest, as LRV2 would seem to do, that *Al Mahdi* can be followed without acknowledging that article 8(2)(e)(iv) applies *beyond* the conduct of hostilities, when the protected object is under the control of a party to the conflict.[37]

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[31] *See* Prosecution Appeal Brief, para. 88.
[32] Legal Representatives' (Attack Victims) Observations, para. 11.
[33] Legal Representatives' (Attack Victims) Observations, para. 21. *See also* para. 34.
[34] Legal Representatives' (Attack Victims) Observations, para. 14. *See also* paras. 36-37.
[35] *Al Mahdi* Trial Judgment, para. 14 (cited at Legal Representatives' (Attack Victims) Observations, para. 14, fn. 22).
[36] Legal Representatives' (Attack Victims) Observations, para. 14 ("the central prohibition lies in the aim of the conduct—the destruction of the protected property"). The Prosecution notes, however, that article 8(2)(e)(iv) does not require the perpetrator to have a specific intent to destroy the protected object; all that is required is the intent to direct an "attack" (an act of violence) against the protected object, with the relevant knowledge.
[37] *Compare e.g.* Legal Representatives' (Attack Victims) Observations, paras. 14, 36-37, *with* paras. 10, 39. *See* *Al Mahdi* Trial Judgment, paras. 31 ("Around early April 2012, following the retreat of Malian armed forces, the groups Ansar Dine and Al-Qaeda in the Islamic Maghreb ("AQIM") took control of Timbuktu. From then until January 2013 Ansar Dine and AQIM imposed their religious and political edits on the territory of Timbuktu and its people. They did so through a local government […]"), 38 ("The attack [on protected objects, contrary to article 8(2)(e)(iv)] itself was carried out between around 30 June 201

19. In conclusion, therefore, while the Prosecution agrees with LRV2 that objects entitled to special protection under article 8(2)(e)(iv) not only benefit from protection from attacks in the conduct of hostilities but also "other adverse conduct, such as destroying, vandalising, ransacking, or otherwise rendering [the object] unusable",[38] this conclusion does not follow from an attempt to expand the meaning of an "attack" in the conduct of hostilities. Rather, it follows from the particular nature of the international law prohibition(s) which are given effect in article 8(2)(e)(iv), which transcend the conduct of hostilities to apply to the intentional direction of all acts of violence against protected objects with a nexus to the armed conflict. This is not only the necessary implication of the arguments in the Prosecution appeal, but also many of the arguments in LRV2's observations, when viewed in their proper context.

Conclusion

20. For all these reasons, and on the basis of the arguments advanced by the Prosecution, the Appeals Chamber should grant the relief requested in the Prosecution appeal, an outcome which is also supported by LRV2.

Fatou Bensouda, Prosecutor

Dated this 24th day of January 2020
At The Hague, The Netherlands

2 and 11 July 2012").
[38] Legal Representatives' (Attack Victims) Observations, para. 25.