

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/04-02/06 A2

Date: 14 August 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 Document

Request by Polina Levina and Kaveri Vaid for leave to submit observations on the merits of the legal questions presented in 'Order inviting expressions of interest as amici curiae in judicial proceedings (pursuant to rule 103 of the Rules of Procedure and Evidence)' of 24 July 2020 (ICC-01/04-02/06-2554)

Source: Ms Polina Levina and Ms Kaveri Vaid

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

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Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

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Other

Request for Leave to Submit Observations on the Merits of the Legal Questions Presented in Ntaganda Appeal

1. This is a request by Ms. Polina Levina and Ms. Kaveri Vaid, pursuant to the order of the Appeals Chamber entitled ‘Order inviting expressions of interest as amici curiae in judicial proceedings (pursuant to rule 103 of the Rules of Procedure and Evidence)’ of 24 July 2020 in the Case of the Prosecutor v. Bosco Ntaganda, respectfully seeking leave to make observations on the legal questions presented in that order.

I. Particular expertise and interest of the applicants

2. Polina Levina, the undersigned applicant, is a qualified publicist with the requisite expertise in the legal questions identified by the Appeals Chamber, in relation to international humanitarian and criminal law applicable to the protection of cultural property and medical facilities.
3. In 2019, the applicant published *Protecting cultural property in Syria: New opportunities for States to enhance compliance with international law?* in the International Review of the Red Cross. The article explored the legal framework applicable to the protection of cultural property in situations of non-international armed conflict, including the 1954 Hague Convention, the 1907 Regulations Respecting the Laws and Customs of War on Land, and how these instruments interact with the legal protections contained in the four Geneva Conventions of 1949, their Additional Protocols, and the statutes of the international criminal tribunals, including the Rome Statute. In April 2019, the article was awarded the Francis Lieber Prize for outstanding article in the field of international humanitarian law by the American Society of International Law. In 2013, the applicant published *Links between Criminal Justice Procedure and Torture: Learning from Russia* in the New Criminal Law Review, addressing how international jurisprudence on procedural safeguards interacts with domestic criminal procedure.
4. Ms. Levina has nine years of experience as a practitioner in international organizations in the field of international humanitarian law and criminal law. Her professional career has involved documenting violations of international humanitarian law and international crimes perpetrated against medical personnel and facilities in the context of the non-international armed conflicts in Georgia, Afghanistan, Syria, Ukraine, and Myanmar. This has led to an enduring interest in the legal protection of medical personnel and facilities, as well as the accurate enforcement of those protections.
5. The applicant holds a Masters in International Law from the School of Oriental and African Studies, University of London, with a specialization in international humanitarian law. She is also set to begin a PhD in Law at the University of Leiden in late 2020 on the evidentiary standards applied in the domestic prosecution of international crimes. As a current employee of the United Nations, the applicant makes clear that her participation is in her personal capacity and not as a representative of the United Nations. The views represented are her own, and not reflective of the views of the United Nations.

6. Kaveri Vaid, the undersigned applicant, is a lawyer with eight years of legal experience and over fifteen years of professional experience working on issues related to international humanitarian and criminal law. The applicant has the requisite expertise in the legal questions identified by the Appeals Chamber in relation to international humanitarian and criminal law.
7. The applicant has nearly eight years of experience litigating cases involving international humanitarian and international criminal law brought in United States courts under the Anti-Terrorism Act and the Alien Tort Statute. Before that, the applicant spent two years providing legal analyses for the former Prosecutor of the International Criminal Court and his Special Adviser on International Law on issues including the situations in Afghanistan, Darfur, and Syria, and on ways to cause the United Nations Security Council to enforce States Parties' compliance with their Rome Statute obligations. Before that, the applicant spent eight years as a grantmaker focused in part on post-conflict resolution and peacebuilding in states at risk of collapse. The applicant is currently employed as an attorney at Durie Tangri LLP.
8. In 2013, the applicant published *Discretion Operationalized Through Law: Proprio Motu Decision-Making at the International Criminal Court* in the Florida Journal of International Law. That article analyzed how the ICC Prosecutor's proprio motu power in fact implicated lawmaking with respect to the standards that must be satisfied before an investigation can be opened pursuant to Article 15 of the Rome Statute. The article was selected by the Public International Law & Policy Group's War Crimes Prosecution Watch for its Worth Reading List.
9. In 2011, the applicant published *What Counts as "State Action" Under Article 17 of the Rome Statute? Applying the ICC's Complementarity Test to Non-Criminal Investigations by the United States into War Crimes in Afghanistan* in the New York University Journal of International Law and Politics. That article evaluated the United States' non-criminal investigative responses to torture committed in Afghanistan against the requirements of Article 17 of the Rome Statute. Ms. Vaid has won multiple awards for scholarship in international humanitarian and criminal law. In 2012, the applicant won the Jerome Lipper Prize, awarded by New York University School of Law for outstanding scholarship in international law.
10. The applicant holds an LLM in international law and a Juris Doctor, *cum laude*, both from New York University School of Law. In addition, she holds a Master of Arts in International Relations from Columbia University and a Bachelor of Arts with honors in English from Williams College.

II. Summary of observations

11. In answering how 'attack' is defined under international humanitarian law the submission will demonstrate that the term 'attack' as found in various provisions of Article 8(2)(e), has a singular and consistent meaning throughout Article 8 of the Rome Statute. This meaning is the same as the definition of 'attack' in Article 49(1) of the Protocol Additional to the

Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts 1977 ('1977 Additional Protocol I'), which defines 'attacks' as 'acts of violence against the adversary, whether in offence or defence'.

12. The submission will thus counter the Prosecutor's argument that "that the term "attack" in article 8(2)(e)(iv) must be accorded a special meaning different from its meaning elsewhere in article 8, such as in article 8(2)(e)(i)."¹
13. The submission will also demonstrate that this singular, consistent usage of the term 'attack' throughout Article 8 of the Rome Statute does not apply to the facts in question, namely the UPC/FPLC's damage of the church at Sayo and the removal of medical equipment from the hospital at Mongbwalu, since hostilities had ceased and both the church and hospital were under the control of the concerned forces. The submission thus supports the Trial Chamber VI's understanding of article 8(2)(e)(iv) as excluding acts of pillage, in convicting Mr Bosco Ntaganda of war crimes and crimes against humanity.²
14. The main line of argument in the submission posits that the efforts to which the Prosecutor goes to distinguish between an 'attack' as an act of hostility in the context of the conduct of hostilities, and an 'attack' as willful damage or destruction of an object while under the control of a party to an armed conflict, is unnecessary given the existence of a war crime under Article 8 of the Rome Statute that criminalizes the exact conduct in question, namely article 8(2)(e)(xii), the war crime of destroying or seizing the enemy's property.
15. The distinction between the term 'attack' and the terms 'destruction' or 'seizure' within Article 8 reflect the precise difference in terminology and legal provenance that the Prosecutor describes in her appeal. The two different contexts in which medical facilities or cultural property are rendered unusable are reflected in the existing treaty law, in the plain reading of its provisions. Article 8(2)(e)(iv) criminalizes attacks against protected objects as violent acts against an adversary in the context of hostilities, while article 8(2)(e)(xii) criminalizes the destruction or seizure of enemy's property that enjoys protection under international law while under the control of a party to the armed conflict. The UPC/FPLC's damage of the church at Sayo and the removal of medical equipment from the hospital at Mongbwalu falls under the latter crime.
16. This amicus curiae submission will explore the logic of international humanitarian law that underpins these two provisions, and how the exercise of effective control by a party to an armed conflict informs how that conduct is criminalized. This is relevant given the Prosecutor's agreement that in the aftermath of Mr. Ntaganda's successful assault on Sayo,³ UPC/FPLC fighters "set up a base inside the church in Sayo; [...] broke the doors [...], removed the furniture, dug trenches around the church, and started a fire inside to prepare their food",⁴ all of which are acts that require the exercise of control over the property in question and indicate that hostilities had ceased in the locations in question.

¹ [Prosecution Appeal Brief](#), 7 October 2019, ICC-01/04-02/06-2432, para. 19.

² [Judgment](#), 8 July 2019, ICC-01/04-02/06-2359, paras. 761, 1141-1142.

³ [Judgment](#), 8 July 2019, ICC-01/04-02/06-2359, para. 500.

⁴ [Judgment](#), 8 July 2019, ICC-01/04-02/06-2359, para. 526.

17. The submission will outline how ‘attack’ is defined in relation to cultural property and hospitals, the difference between ‘attack’ and ‘act of hostility’, and elucidate the differences between the concepts of ‘attack’, ‘conduct of hostilities’ and ‘combat action’ in international humanitarian law, with reference to the Additional Protocols to the Geneva Conventions and their commentaries, and the Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954. These differences are critical, insofar as they delineate the scope of conduct that is covered by each term. The ICRC Commentaries make clear that the term ‘attack’ means ‘combat action’.⁵ An ‘act of hostility’ is a term exclusively used in relation to prohibited conduct against cultural property. The term is found in article 4(1) of the Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954 and is broader than an ‘attack’. An ‘act of hostility’ directed against cultural property refers to an act of violence against cultural property not only where the property is under the control of an opposing party but also where it is under the control of the party carrying out the violence. The specific use of this term in relation to cultural property, is however limited to the type of hostility being caused, namely the property’s demolition. It does not encompass pillage, seizure or other misappropriation of cultural property.
18. Following an exploration of the above issues, the submission will demonstrate that the term ‘attack’ in article 8(2)(e)(iv) of the Statute has a clear meaning, consistent with the definition of ‘attack’ in the Additional Protocols to the Geneva Conventions and with other usages of the term in Article 8 of the Rome Statute.
19. This meaning of ‘attack’ does not cover acts such as pillaging and destruction. The war crime of pillage is separately criminalized under article 8(2)(e)(v), and destruction of property protected under international law is criminalized under article 8(2)(e)(xii).
20. Finally, the submission will address whether conduct criminalized under article 8(2)(e)(iv) would cover acts committed in the course of a *ratissage* operation, conducted shortly after the takeover of a town. A *ratissage* operation is understood as a raid with the objective of “raking” or clearing a location following its takeover. The fact that the operation takes place after the takeover of a town indicates that the party conducting the *ratissage* operation is in control of the town and that active hostilities have ceased. The ability of the party to conduct the operation evidences its ability to exercise control over the town. Accordingly, the damage and destruction to the church at Sayo and seizure of medical equipment rendering the hospital at Mongbwalu useless, are both criminalized under article 8(2)(e)(xii), rather than article 8(2)(e)(iv).



Polina Levina and Kaveri Vaid

Dated this 14 August 2020

At Geneva, Switzerland and Los Angeles, California, United States of America

⁵ 1987 Commentary to the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, para. 1880.