

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

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

Date: 22 May 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***

Confidential

**Prosecution Response to "Observations of the Common Legal Representative of
the Victims of the Attacks on the Defence Appeal Part II"**

Source: Office of the Prosecutor

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

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Introduction

1. On 6 May 2020 the Common Legal Representative of the Victims of the Attacks¹ and the Common Legal Representative of the Former Child Soldiers² provided their observations to the second part of Ntaganda's appeal against the Trial Judgment.³ The Prosecution herein provides its response to two confined issues raised by the Common Legal Representative of the Victims of the Attacks ("LRV").

Confidentiality

2. Pursuant to regulation 23bis(2) of the Regulations of the Court, the Prosecution files this response as confidential since it responds to a document with the same confidentiality level.

Submissions

3. The Prosecution responds to observations from the LRV on the standard of appellate review, and on the crime of ordering displacement.

I. Observations regarding the standard of appellate review

4. The LRV agrees with the Prosecution that "as a matter of legal certainty and procedural propriety the Appeals Chamber should apply the well-established standards of appellate review that have been authoritatively formulated and are firmly rooted in decades of jurisprudence both at the Court and the international ad hoc tribunals".⁴ However, they disagree with one aspect of the Prosecution Response regarding the Appeals Chamber's corrective function with respect to legal errors. The LRV avers that "[w]hile the Prosecution is correct in arguing that '*[n]ot all errors made by a Trial Chamber are sufficient to overturn a conviction or sentence*', the Prosecution's understanding on the other hand seems to suggest that only material

¹ ICC-01/04-02/06-2525-Conf ("LRV Observations").

² ICC-01/04-02/06-2526-Conf.

³ ICC-01/04-02/06-2465-Red ("[Appeal-Part II](#)").

⁴ LRV Observations, para. 10.

errors should be reviewed by the Appeals Chamber”.⁵ The LRV disagrees with this aspect, and argues that “part of the Appeals Chamber’s corrective function is that it should set out the correct interpretation of the law where a Trial Chamber misinterpreted and misstated the law – regardless of whether a Trial Chamber’s erroneous interpretation materially affected the decision or not”.⁶ The LRV’s understanding of the Prosecution’s position appears to be based on the Prosecution’s submissions in Ground 6,⁷ where it noted that the Chamber had committed technical (but harmless) legal errors in the definition of the *actus reus* of the crime of ordering displacement under article 8(2)(e)(viii), but it submitted that the Appeals Chamber should decline to rule on them in its judgment in the interest of judicial economy.⁸

5. The Prosecution responds to this aspect of the LRV’s Observations. It provides further submissions regarding its understanding of the Appeals Chamber’s corrective function with respect to purported legal errors which are not raised by the appellant but otherwise become apparent in the course of appeal proceedings against a Trial Judgment.

6. *First*, an appellant may raise errors of law (or fact or procedure) within the terms of article 81(1) which affect the reliability of the proceedings or materially affect the decision or sentence under article 83(2). If the Appeals Chamber agrees with the appellant, it may “reverse or amend the decision or sentence” or “order a new trial before a different Trial Chamber”.⁹ Accordingly, the Prosecution submitted that “appellate proceedings are not concerned with correcting *all* errors that may have occurred at trial, but rather only those errors that have been shown to have materially affected the relevant decision”.¹⁰ The Appeals Chamber’s authority to use its prerogatives under article 83(2) only with respect to certain errors thus flows from

⁵ LRV Observations, para. 12, referring to ICC-01/04-02/06-2500-Red (“[Prosecution Response](#)”), para. 19.

⁶ LRV Observations, para. 13.

⁷ LRV Observations, para. 12.

⁸ [Prosecution Response](#), para. 117.

⁹ Statute, art. 83(2).

¹⁰ [Prosecution Response](#), para. 19, citing [Lubanga AJ](#), para. 56.

the Statute. Indeed, as Judge Eboe-Osuji observed, “[t]he Appeals Chamber will not apply its remedial powers at the instance of a trifling or harmless error (of law, fact or procedure). The error in question must be *material*”.¹¹ Likewise—albeit in the context of factual errors, the ICTY Appeals Chamber has repeatedly stated that “[a]s long as the factual findings supporting the conviction and sentence are sound, errors related to other factual conclusions do not have any impact on the Trial Judgement. Accordingly, the Appeals Chamber declines, as a general rule, to discuss those alleged errors which have no impact on the conviction or sentence”.¹²

7. *Second*, an appellant may raise other errors of law (fact and procedure) which do not have such a material impact. For example, a Trial Chamber may enter findings which do not inform the *ratio decidendi* of the decision (and are not essential to it) and instead are *obiter dicta*.¹³ The Prosecution respectfully submits that the Appeals Chamber should generally abstain from ruling on alleged errors involving these findings, even if they are challenged by the appellant.¹⁴ A ruling by the Appeals Chamber in such circumstances would be tantamount to providing an advisory opinion, which the Appeals Chamber itself has deemed to be “beyond and outside the scope of its authority”.¹⁵

8. However, errors could also relate to findings that informed the Chamber’s reasoning leading to its decision but had no material impact on the ultimate decision.

¹¹ [Bemba Judge Eboe-Osuji Sep. Op.](#), para. 81; however, Judge Eboe-Osuji slightly modified the interpretation of a ‘material’ error.

¹² [Strugar AJ](#), para. 19; *see also* [Brđanin AJ](#), para. 21.

¹³ *See* ICC-01/11-01/11-695-AnxI (“[Judge Ibáñez Carranza Separate and Concurring Opinion](#)”), para. 18 (“According to the Black’s Law Dictionary, the phrase *obiter dicta* means ‘a judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential’. These are incidental remarks which are non-essential to the decision. They do not form part of the *ratio decidendi* of the case and therefore create no binding precedent. On the other hand, the *ratio decidendi* contains the rationale of the decision. It is the principle or principles of law on which the court reaches its decision and it is said to be the statement of law applied to the material facts”).

¹⁴ *See e.g.* ICC-01/11-01/11-695 (“[Gaddafi Second Admissibility AD](#)”), para. 96 (finding that “the Pre-Trial Chamber’s holding on Law No. 6’s compatibility with international law were *obiter dicta*” and not “find[ing] it necessary to address the remaining arguments in the second ground of appeal”). *But see* [Judge Ibáñez Carranza Separate and Concurring Opinion](#), para. 22 (“find[ing] difficult to accept the Common Judgment’s proposition that ‘the Pre-Trial Chamber’s findings on Law No. 6’s compatibility with international law were *obiter dicta*’”).

¹⁵ *See e.g.* [ICC-01/04-503](#) para. 30; [ICC-01/04-01/07-3132](#), para. 7. *See also* [ICC-01/04-01/06-873](#), para. 6 (“The Appeals Chamber is not invested with original jurisdiction as it clearly emerges from articles 81, 82 and 84 of the Statute save in two cases specified in the Statute, namely those identified by articles 110 and 42 (8).”).

In other words, regardless of the error the Chamber would have reached the same conclusion. In such cases, the Appeals Chamber may correct the Trial Chamber's error(s) but it will not alter the ultimate decision.¹⁶ This may also occur when the facts of a case satisfy different possible interpretations of a legal element. In such circumstances, an error in the Chamber's legal interpretation of the element has no material impact on the decision, since the Chamber would have reached the same conclusion even if it had adopted the alternative interpretation. Trial Chambers have declined to rule on conflicting interpretations of the law when the facts of a case satisfied either of them. Thus, in *Bemba*, Trial Chamber III declined to rule on the type of causal nexus that a superior's failure to exercise control properly should have with respect to the crime;¹⁷ in *Al Mahdi*, Trial Chamber VIII declined to rule on whether a co-perpetrator had to contribute to the common plan or to the crime because "on the facts of the present case this distinction makes no difference".¹⁸ Likewise, in *Ntaganda*, Trial Chamber VI did not consider it necessary to rule on the definition of an 'organisation', and the required threshold under article 7(2)(a),

¹⁶ See e.g. [Bemba et al. AJ](#), paras. 347-349 (where the Appeals Chamber found that the Trial Chamber had committed legal, procedural and factual errors in the Chamber's determination regarding the collection and submission of the Western Union records; however, none of those errors, whether on their own or in combination, affected the validity of the Trial Chamber's ultimate conclusion that the records were not obtained by means of violation of internationally recognised human rights within the meaning of article 69(7)); [Ngudjolo AJ](#), paras. 286-289 (where the Appeals Chamber found that the Trial Chamber committed a procedural error when it refused to allow the Prosecution to use the Registry reports to impeach Mr Ngudjolo and witness D03-88, concerning alleged collusion between the two; however, the error was 'harmless'); 286, 290-291 (where the Appeals Chamber found that the Trial Chamber erred by not allowing the Prosecution to put witness P-0250's prior statements to him or ask the witness leading questions in order to enable him explain the reasons underlying the inconsistencies between his statements and his in-court testimony. Although this error may have substantially affected the Trial Chamber's observations concerning the witness's demeanour and many contradictions in his testimony, it was ultimately 'harmless,' because "the Trial Chamber's rejection of witness P-0250's testimony as unreliable was based on other findings of the Trial Chamber that were independent of its observations on the witness's demeanour"); see also cf. [Lubanga AJ](#), paras. 449-450 (where the Appeals Chamber found that the Trial Chamber's definition of the mental element in article 30(2)(b) was confusing, and the reference to 'risk' should have been avoided, but "in the result, the Appeals Chamber [did] not consider that the Trial Chamber's approach broadened the scope of article 30(2) and (3) [...]").

¹⁷ [Bemba TJ](#), para. 213 ("A nexus requirement would clearly be satisfied when it is established that the crimes would not have been committed, in the circumstances in which they were, had the commander exercised control properly, or the commander exercising control properly would have prevented the crimes. Noting the foregoing analysis, the Chamber emphasises that such a standard is, however, higher than that required by law. Nonetheless, in light of the factual findings below, the Chamber does not consider it necessary to further elaborate on this element").

¹⁸ [Al Mahdi TJ](#), fn. 31.

because “[i]n light of the Factual Findings, [...] it is evident that the UPC/FPLC had a well-organised structure”.¹⁹

9. Similarly, in this case, because of the factual findings by the Chamber, its errors in interpreting the *actus reus* of the crime of ordering displacement were harmless. Even if the Chamber had not erred and thus correctly interpreted article 8(2)(e)(viii), the same factual findings already made under articles 7(2)(d) and 8(2)(e)(viii) would, cumulatively, still establish Ntaganda’s liability under article 8(2)(e)(viii).²⁰ Thus, any error in the definition of the crime had no material impact.

10. The Prosecution acknowledges that, in certain cases, the Appeals Chamber may consider it desirable to rule on such harmless legal errors even if not raised by the appellant. However, it should have the necessary information before it. This depends on each error and on the circumstances of each case. While submissions by all Parties and participants on these matters may not always be necessary for the Appeals Chamber to rule, they might generally be desirable. Accordingly, the Prosecution submitted that “[s]ince these errors [...] have no bearing on the narrow points taken up by Ntaganda in Ground 6, [...] the Appeals Chamber should consequently decline to rule on this issue in its judgment, in the interest of judicial economy. Alternatively, if the Appeals Chamber does wish to rule, it could request further (concise) submissions from the Parties and participants on this matter to develop their positions”.²¹ Ntaganda did not appeal this aspect of the Trial Judgment,²² nor did he seek leave to reply (nor did he reply) to this aspect of the Prosecution’s Response.²³

¹⁹ [Ntaganda TJ](#), para. 675.

²⁰ [Prosecution Response](#), para. 117.

²¹ [Prosecution Response](#), para. 116.

²² [Appeal-Part II](#), paras. 129-135.

²³ See ICC-01/04-02/06-2512 (“[Request to Reply](#)”), para. 21(2) (seeking leave to reply to “[t]he proper interpretation of the ‘nature and degree of the perpetrator’s control over victims’ and the correctness of the Prosecution’s assertion that such control was exercised by UPC/FPLC fighters”); see further ICC-01/04-02/06-2534-Conf (“Reply”), paras. 36-43.

II. Observations regarding the crime of ordering displacement in article 8(2)(e)(viii) of the Statute (Ground 6)

11. The Prosecution agrees with the LRV, as set out previously in its Response, that territorial control is not a legal requirement of the crime in article 8(2)(e)(viii).²⁴ Based on the existing factual findings in the Judgment, this is sufficient for the Appeals Chamber to dismiss Ground 6 of the appeal.²⁵

12. The Prosecution respectfully maintains its view that the Trial Chamber nonetheless erred in interpreting this crime to require “the perpetrator [to] ‘instruct *another person* in any form’ either to displace a civilian population’ or to carry out an act or omission leading to that result”, and in concluding that the order must relate to “a certain number of individuals”.²⁶

13. By contrast, with reference to a single passage in an academic commentary, it seems that the LRV considers the Trial Chamber’s interpretation to be consistent with the principle that “acts which are directly aimed at removing the civilian population from a given area are prohibited”.²⁷ Yet this conclusion is not apparent to the Prosecution, since the plain implication of the Trial Chamber’s reasoning on article 8(2)(e)(viii) would seem to be that, in non-international armed conflict, it is *not* prohibited under the Statute—for example—for the perpetrator, without justification under international law, to *directly compel individual civilians* to leave their homes. This would render the legal protections in non-international armed conflict, under the Statute, markedly less comprehensive than the legal protections in customary international law,²⁸ and thereby inconsistent with the *chapeau* of article 8(2)(e), and the context and object and purpose of the Statute. The LRV provides no concrete

²⁴ LRV Observations, para. 59.

²⁵ See [Prosecution Response](#), paras. 110-115.

²⁶ [Prosecution Response](#), para. 116.

²⁷ See LRV Observations, para. 63 (including citation in fn. 166).


²⁸ See e.g. [Prosecution Response](#), para. 116 (fn. 513).

legal argument to justify their apparent understanding, even though they acknowledge the particular importance of a correct interpretation of this crime.²⁹

14. It is for this reason that the Prosecution registered its concern with the Trial Chamber's interpretation of article 8(2)(e)(viii), even though it cannot in this case directly affect the Trial Chamber's findings. As noted, Ntaganda has not engaged with this legal issue in his appeal, and the Prosecution could not itself appeal it.³⁰ Nor has the LRV substantively engaged with the matter, notwithstanding its observations.³¹ In such circumstances, therefore, unless the Appeals Chamber chooses to request further briefing from the Parties and participants, the Prosecution maintains its view that the Appeals Chamber need not enter into the correctness of the Trial Chamber's reasoning on this issue, and should simply refrain from either endorsing or criticising it.³²

Conclusion

15. For these reasons, and those it has previously set out, the Appeals Chamber should dismiss Ntaganda's appeals.



Fatou Bensouda, Prosecutor

Dated this 22nd day of May 2020

At The Hague, The Netherlands

²⁹ LRV Observations, para. 62.

³⁰ See [Prosecution Response](#), para. 117; *see above* para. 10.

³¹ Cf. LRV Observations, paras. 61-63, 65.

³² See [Prosecution Response](#), para. 117.