



Original: English

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

Date: 24 July 2020

THE APPEALS CHAMBER

Before:

**Judge Howard Morrison, Presiding
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

**Order inviting expressions of interest as *amici curiae* in judicial proceedings
(pursuant to rule 103 of the Rules of Procedure and Evidence)**

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

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Ms Helen Brady

Counsel for the Defence
Mr Stéphane Bourgon
Ms Kate Gibson

Legal Representatives of Victims
Ms Sarah Pellet
Mr Dmytro Suprun

Registrar
Mr Peter Lewis

The Appeals Chamber of the International Criminal Court,

In the appeal of the Prosecutor against the ‘Judgment’ of Trial Chamber VI of 8 July 2019 (ICC-01/04-02/06-2359),

Pursuant to rule 103 of the Rules of Procedure and Evidence,

Issues the following

ORDER

Qualified publicists of international humanitarian and/or criminal law may, by 16h00 on Friday, 14 August 2020, request leave to submit observations on the merits of the legal questions presented below in this order. Any such request for leave shall express, in no more than four pages, the applicant’s particular expertise and/or interest in the legal issue presented, as well as summary conclusions as to that issue, specifying the main lines of argument that he or she may wish to submit before the Appeals Chamber.

REASONS

1. On 8 July 2019, Trial Chamber VI (the ‘Trial Chamber’) convicted Mr Bosco Ntaganda of war crimes and crimes against humanity (the ‘Conviction Decision’).¹ Mr Ntaganda² and the Prosecutor³ lodged appeals against the Conviction Decision.
2. On 7 October 2019, the Prosecutor filed her appeal brief (the ‘Prosecutor’s Appeal Brief’).⁴
3. On 9 December 2019, Mr Ntaganda filed his response to the Prosecutor’s appeal (‘Mr Ntaganda’s Response’).⁵

¹ [Judgment](#), 8 July 2019, ICC-01/04-02/06-2359, with [Annex A](#) (ICC-01/04-02/06-2359-AnxA) and [Annex B](#) (ICC-01/04-02/06-2359-AnxB).

² [Mr. Ntaganda’s Notice of Appeal against the Judgment pursuant to Article 74 of the Statute, ICC-01/04-02/06-2359](#), 9 September 2019, ICC-01/04-02/06-2396.

³ [Prosecution notice of appeal](#), 9 September 2019, ICC-01/04-02/06-2395.

⁴ [Prosecution Appeal Brief](#), 7 October 2019, ICC-01/04-02/06-2432, with [Annex A](#) (ICC-01/04-02/06-2432-AnxA).

4. On 8 January 2020, the second group of Victims (‘Victims Group 2’) filed their observations on the Prosecutor’s appeal.⁶ On 24 January 2020, Mr Ntaganda and the Prosecutor responded to the observations of Victims Group 2.⁷

5. On 5 June 2020, the Appeals Chamber vacated the dates for the hearing before it, initially scheduled for 29 June to 1 July 2020,⁸ noting that ‘[i]f it is possible to hold a hearing at a later date, this or alternative arrangements will be communicated to all parties and participants’.⁹

6. In the Conviction Decision, the Trial Chamber found that ‘[t]he UPC/FPLC soldiers [...] looted medical equipment from the Mongbwalu hospital’.¹⁰ This finding is made in the section regarding a *ratissage* operation, conducted in the aftermath of the takeover of Monbgwalu by members of the UPC/FPLC and Hema ‘civilians’.¹¹ The Trial Chamber also found that ‘some time after the assault on the village [of Sayo], the UPC/FPLC set up a base inside the church in Sayo; they broke the doors of the church, removed the furniture, dug trenches around the church, and started a fire inside to prepare their food’.¹²

7. The Trial Chamber decided not to consider the looting of medical equipment from the Monbgwalu hospital under article 8(2)(e)(iv) of the Statute, noting that:

contrary to the Prosecution’s assertion, the Chamber does not consider that pillaging of protected objects, in particular in this case of the Mongbwalu hospital, is an ‘act of violence against the adversary’ and, consequently, it does

⁵ [Defence Response to Prosecution Appeal Brief, 7 October 2019 \(ICC-01/04-02/06-2432\)](#), ICC-01/04-02/06-2449, with [annex A](#) (ICC-01/04-02/06-2449-Anx A) and [annex B](#) (ICC-01/04-02/06-2449-AnxB).

⁶ [Observations of the Common Legal Representative of the Victims of the Attacks on the Prosecution’s Appeal against the Trial Judgment](#), 8 January 2020, ICC-01/04-02/06-2452.

⁷ [Defence Response to “Observations of the Common Legal Representative of the Victims of the Attacks on the Prosecution’s Appeal against the Trial Judgment”](#), 8 January 2020, ICC-01/04-02/06-2452, ICC-01/04-02/06-2462, with [Annex A](#) (ICC-01/04-02/06-2462-AnxA); [Prosecution Response to Observations of the Legal Representatives of Victims \(Attack Victims\) concerning Prosecution Appeal Brief](#), ICC-01/04-02/06-2463.

⁸ [Scheduling order for a hearing before the Appeals Chamber](#), 9 March 2020, ICC-01/04-02/06-2486.

⁹ [Order regarding the hearing scheduled for 29 June - 1 July 2020](#), 5 June 2020, ICC-01/04-02/06-2542, para. 5.

¹⁰ [Conviction Decision](#), para. 514.

¹¹ [Conviction Decision](#), para. 512.

¹² [Conviction Decision](#), para. 526 (footnote omitted). *See also* para. 1138.

not constitute an attack within the meaning of Article 8(2)(e)(iv) of the Statute. This incident is therefore not further considered.¹³

8. With respect to the church in Sayo, the Trial Chamber found that, since the attack on the church ‘took place sometime after the assault, and therefore not during the actual conduct of hostilities’, the first element of article 8(2)(e)(iv) was not met.¹⁴ As a result, this incident was not further considered.¹⁵

9. In her appeal, the Prosecutor submits that by ‘failing to acknowledge’ the principles underlying the protection afforded to objects such as the church in Sayo and the hospital in Mongbwalu, the Trial Chamber misinterpreted article 8(2)(e)(iv) of the Statute in relation to ‘the protection it extends to “cultural” objects (in this case, the church at Sayo), and the protection it extends to hospitals and places where the sick and wounded are collected (the hospital at Mongbwalu)’.¹⁶ The Prosecutor acknowledges that although ‘the protections of “cultural” objects and hospitals have different antecedents in international law, [...] they have nonetheless evolved to arrive at a similar legal position’.¹⁷

10. Mr Ntaganda argues that in line with ‘the established framework of international law’, the term attack ‘should be interpreted in accordance with article 49(1) of [Additional Protocol I] and so limited to acts committed during the actual conduct of hostilities’.¹⁸ He submits that the *travaux préparatoires* of the Statute ‘evidence that the origin of article 8(2)(e)(iv) lies firmly and solely in article 27 of the regulations annexed to the fourth Hague Convention of 1907’, which is ‘a “battle-field” provision directed to the conduct of hostilities’.¹⁹ Mr Ntaganda contends that the instruments of protection of ‘cultural’ objects, on which the Prosecutor relies in her appeal, refer to the term ‘act of hostility’ and that it is illogical to read one term of art, ‘attack’, as meaning another, ‘act of hostility’.²⁰

¹³ [Conviction Decision](#), para. 1141 (footnote omitted).

¹⁴ [Conviction Decision](#), para. 1143.

¹⁵ [Conviction Decision](#), para. 1143.

¹⁶ [Prosecutor’s Appeal Brief](#), para. 6 (emphasis in original omitted).

¹⁷ [Prosecutor’s Appeal Brief](#), para. 6.

¹⁸ [Mr Ntaganda’s Response](#), para. 47.

¹⁹ [Mr Ntaganda’s Response](#), paras 17, 19.

²⁰ [Mr Ntaganda’s Response](#), para. 26.

11. The Appeals Chamber notes that in her appeal the Prosecutor raises a legal issue related to the meaning of the term ‘attack’ in article 8(2)(e)(iv) of the Statute that may have implications beyond the present case. In these circumstances, the Appeals Chamber considers that it may be desirable to receive observations from qualified publicists of international humanitarian and/or criminal law on this issue.

12. The Appeals Chamber therefore invites qualified publicists with the requisite expertise, who are interested in submitting observations on this issue, to file with the Registrar, by 16h00 on Friday, 14 August 2020, expressions of interest in which the applicant expresses, in no more than four pages, his or her particular expertise and/or interest in the legal issue presented, as well as summary conclusions as to that issue, specifying the main lines of argument that they may wish to submit before the Appeals Chamber.

13. The Appeals Chamber emphasises that any such request for leave to submit observations shall be filed in accordance with regulations 23, 33, 36 and 37 of the Regulations of the Court and regulation 24 of the Regulations of the Registry.

14. The Appeals Chamber shall subsequently determine who will be granted leave to submit observations. The Appeals Chamber will also specify the modalities for the submission of such observations and responses thereto, bearing in mind the need for an expeditious conduct of the proceedings. Mindful of the present circumstances related to the COVID-19 pandemic, the Appeals Chamber will set out a procedure for receiving observations from those who will be granted leave: in writing or at a hearing, including through virtual participation if necessary.

15. The Appeals Chamber contemplates asking the following main questions to those who will ultimately make their observations under rule 103 of the Rules of Procedure and Evidence. Additional questions may be posed after *amici* are selected.

- a. How is ‘attack’ defined under international humanitarian law, particularly in the context of cultural property and hospitals? What are the differences between the concepts of ‘attack’, ‘conduct of hostilities’ and ‘combat action’? What is the difference between ‘attack’ and ‘act of hostility’?

- b. What does the term ‘attack’ mean in article 8(2)(e)(iv) of the Statute? Does it cover acts such as pillaging and destruction? Would it cover acts committed in the course of a *ratissage* operation, conducted shortly after the takeover of a town?

Done in both English and French, the English version being authoritative.



Judge Howard Morrison
Presiding

Dated this 24th day of July 2020

At The Hague, The Netherlands