

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-02/06-A2
Date: 18 September 2020

THE APPEALS CHAMBER

Before: Judge Howard Morrison, President
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

Observations of Ms Polina Levina and Ms Kaveri Vaid on the merits of the legal questions presented by the Appeals Chamber in the Case of The Prosecutor v. Bosco Ntaganda

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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I. QUESTIONS PRESENTED AND SUMMARY OF OBSERVATIONS

1. In its 24 July 2020 order inviting expressions of interest as *amici curiae* in judicial proceedings, the Appeals Chamber asked two clusters of questions: 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”?; and 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?

2. It is undisputed that Mr. Ntaganda’s forces (the UPC/FPLC) damaged the church in Sayo and looted the hospital in Mongbwalu.

3. It is also undisputed that both the damage to the church in Sayo and the looting of the hospital in Mongbwalu occurred *after*—not during—hostilities at or around each site, and that both the church in Sayo and the hospital in Mongbwalu were under the control of the UPC/FPLC at the time of the alleged crimes.

4. Article 8(2)(e)(iv) establishes a gate through which these acts cannot pass. It *only* applies to attacks. The Rome Statute does not independently define the term “attack”. Instead, it borrows from customary international law, where “attack” is a term of art. Customary international law makes clear that not all acts of violence are “attacks”. Rather, it defines an attack as an act of violence committed *against an adversary* whether in offence or defence, *ie., during hostilities*.

5. Those elements are not satisfied here. The Trial Chamber’s judgment describes that “in the immediate aftermath of the assault on Mongbwalu and the surrounding areas, members of the UPC/FPLC and Hema ‘civilians’ continued the *ratissage* operation in Sayo.” The Trial Chamber makes clear that “some time” “after” the “assault on the village”, the UPC/FPLC set up a base inside the church in Sayo; breaking the doors of the church, removing furniture, digging trenches around the church, and starting a fire inside to prepare their food.¹ In the course of litigation, the Trial Chamber also found that “Mr Ntaganda went to Sayo once the fighting had already ceased...”² After hostilities concluded in Mongbwalu, the UPC/FPLC conducted a *ratissage* operation in the town, during which they looted medical equipment from the hospital at issue here.

6. Criminalizing the damage to the church in Sayo and the looting of the hospital in Mongbwalu under article 8(2)(e)(iv) would require this Chamber to conclude that the UPC/FPLC “attacked” property under their own control after their adversary had already fled. Such a conclusion would ignore the specific meaning of “attack” in both the plain text of the Rome Statute and as defined by international humanitarian law.

7. Contrary to the OTP’s suggestion, upholding the Trial Chamber’s decision on this point would *not* leave cultural and medical property unprotected. Article 8(2)(e)(iv) is not the only provision of the Rome Statute protecting this property. For example, article 8(2)(e)(xii) prohibits destruction or seizure of the property of an adversary, unless “imperatively demanded by the necessities of conflict”. Unlike article 8(2)(e)(iv), article 8(2)(e)(xii) does not

¹ [Judgment](#), 8 July 2019, ICC-01/04-02/06-2359, para. 526.

² [Judgment](#), 8 July 2019, ICC-01/04-02/06-2359, footnote 1465.

require that destruction or seizure to occur during an “attack”, prohibiting acts of violence that cause the destruction of these sites when committed outside of hostilities. The Rome Statute thus provides comprehensive and complete protection to medical and cultural sites consistent with the requirements of international humanitarian law.

II. DEFINING AN “ATTACK” UNDER INTERNATIONAL HUMANITARIAN LAW

A. Attacks Generally

8. Article 49(1) of the Protocol Additional to the Geneva Convention of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts 1977 (“Additional Protocol I”) defines an “attack” as an “act[] of violence *against the adversary*, whether in offence or defence”³ (emphasis added). This definition is widely accepted as customary.

9. The phrase “against the adversary” makes clear that an “attack” under customary international law is not merely *any* act of violence. Rather, an attack must target something not under the attacker’s control. As the 1987 ICRC Commentary states, “destructive acts undertaken by a belligerent in his own territory would not comply with the definition of attack given in paragraph 1, as such acts, though they may be acts of violence, are not mounted ‘against the adversary’.”⁴

B. Attacks Against Hospitals and Cultural Property

10. This definition of ‘attack’ applies to hospitals and cultural property.

11. As to cultural property, the jurisprudence of the ICTY makes this clear. The *Kordic and Cerkez* case distinguished between acts of “seizure or destruction” of cultural property and “attacks” on cultural property. To interpret the latter, the judges referenced article 27 of the 1907 Hague Regulations – which applies to situations of active hostilities, namely, sieges and bombardments – and considered the crime to be a *lex specialis* with regard to attacks against civilian objects.⁵

12. As to hospitals, article 11 of Additional Protocol II is the only specific rule in international humanitarian treaty law according protection for hospitals and places where the sick and wounded are collected in non-international armed conflict. It applies an identical definition of attack.

C. “Attacks”, “Conduct of Hostilities”, “Combat Actions”, and Acts of Hostility

13. The term “conduct of hostilities” is not used or defined in any international humanitarian law treaty or commentary. It is widely used in the literature to delineate the rules of international humanitarian law that regulate combat versus those that regulate the treatment of persons not, or no longer, directly participating in hostilities.

³ While this definition appears in an instrument applicable to international armed conflict and does not appear in any instruments applicable to non-international armed conflict, the 1987 ICRC Commentary makes clear that “Protocol I defines attacks. This term has the same meaning in Protocol II.” [S. Junod, ‘Art. 4’ in Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, Martinus Nijhoff, Geneva, 1987), no. 4783.]

⁴ *Ibid.*, para. 1890.

⁵ ICTY Judgment, *The Prosecutor v. Dario Kordic and Mario Cerkez*, IT-95-14/2, paras. 359, 361.

14. “Combat action” is used as a term to define the term “attack” in the 1987 ICRC Commentary to Additional Protocol I.⁶

15. “Act of hostility” is a term exclusively used in relation to prohibited conduct against cultural property. Article 4(1) of the Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954 (‘1954 Hague Convention’) defines an “act of hostility” directed against cultural property an act of violence against property under the control of an opposing party but also where it is under the control of the party carrying out the violence. “Act of hostility” is thus broader than the notion of “attack” in terms of the circumstances of violence that it covers.

16. Article 4(1) of the 1954 Hague Convention imposes a separate limit on acts of hostility—it requires the protected property to be damaged or destroyed. It thus does not encompass pillage, seizure, or other misappropriation of cultural property. A *different* provision of the Convention—article 4(3)—prohibits those acts.⁷

17. Article 16 of Protocol Additional to the Geneva Conventions of 12 August 1949 and the Protection of Victims of Non-International Armed Conflicts, 8 June 1977 (‘Additional Protocol II’) affirms this definition. It prohibits the commission of “any acts of hostility directed against historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples, and to use them in support of the military effort.” The ICRC Commentary to Additional Protocol II clarifies that in this provision “[a]n act of hostility means any act related to the conflict which prejudices or may prejudice the physical integrity of protected objects.”⁸

18. Neither the text of the Rome Statute nor its *travaux préparatoires* contain any reference to the criminalization of “acts of hostilities” against cultural property.

III. THE MEANING OF AN “ATTACK” IN ARTICLE 8(2)(E)(IV)

A. A textual analysis of article 8(2)(e)(iv) establishes that “attack” retains the meaning established by customary international law

19. Article 8(2)(e)(iv) prohibits “[i]ntentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives.” By its plain text, article 8(2)(e)(iv) prohibits “[i]ntentionally directing attacks” — and *only* attacks — at protected sites. The syntax of article 8(2)(e)(iv) makes clear that whether an act of violence is an “attack” is a gating question — if the answer is no, then the perpetrator cannot be held liable under article 8(2)(e)(iv).

20. Article 8(2)(e)(iv) also provides an exception for attacks on protected sites that are military objectives. This exception affirms that the universe in which article 8(2)(e)(iv) operates is one of active hostilities where the target is not already under the attacker’s control. For an object to qualify as a “military objective” in accordance with Additional Protocol I (article 52(2)), it must make an “effective contribution to military action” such that its “total or

⁶ 1987 ICRC Commentary, no. 1880.

⁷ Jiri Toman, *The Protection of Cultural Property in the Event of Armed Conflict* (Dartmouth Publishing Company 1996), pg. 69.

⁸ 1987 ICRC Commentary, no. 4845.

partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage” to the belligerent party. Once the belligerent party captures or gains control over an object, the question of whether the object is a military objective for the purposes of judging any subsequent action against the object is moot.

21. Article 8(2)(e)(iv) is moreover not the only provision within article 8 that cabins its scope to “attacks”. Rather, the term “attack” appears in nine other provisions within article 8. It is undisputed that, in these other provisions, the term “attack” means an act of violence committed during the conduct of hostilities. It must thus have the same meaning in article 8(2)(e)(iv): reason dictates that “attack” be interpreted consistently within article 8.

B. The *travaux préparatoires* further support this definition of “attack”

22. The meaning of ‘attack’ in article 8(2)(e)(iv) is further clarified by the Preparatory Committee Draft Consolidated Text of War Crimes,⁹ which proposed two alternatives to the articulation of the crime. The first proposal would criminalize “making [protected objects]... the object of attack, causing as a result, [their] extensive destruction”. The second would criminalize “intentionally directing attacks against buildings dedicated to religion, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, unless such property is used in support of the military effort.” The footnote to the second option reads “This alternative is based on article 27 of the Annex to the IV Hague Convention respecting the laws and customs of war on land.”

23. Authoritative commentary on article 8(2)(b)(ix) — which prohibits “attacks” against protected sites in international armed conflicts — establishes that “attack” retains the same meaning as established by article 49(1) of API, namely, the use of armed force to carry out a military operation during the course of an armed conflict.”¹⁰ The Preparatory Committee applied this understanding to non-international armed conflict, concluding that the elements of article 8(2)(e)(iv) are identical to the elements of article 8(2)(b)(ix).

24. Article 27 of the Annex to the IV Hague Convention respecting the laws and customs of war on land (‘1907 Hague Regulations’) states that “in sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes...” Sieges and bombardments are situations of active hostilities. As discussed above, this same understanding of the provenance of this crime was relied on by the judges in the ICTY *Kordic and Cerkez* case, where they referenced article 27 of the 1907 Hague Regulations – and not article 56 – in their consideration of the war crime of attacks on cultural property.¹¹

25. The Prosecution’s reading of article 56 of the 1907 Hague Regulations into article 8(2)(e)(iv) is incorrect. Article 56 is contained under a chapter of the 1907 Hague Regulations headed “Military authority over the territory of the hostile State” (i.e., occupation). The rules governing occupation cannot be analogized to non-international armed

⁹ Preparatory Committee, Draft Consolidated Text, War crimes, 20 February 1997, A/AC.249/1997/WG.1/CRP.2 (the same text and footnote were adopted: *see* Preparatory Committee, Decisions taken by the Preparatory Committee at its session held from 11 to 21 February 1997, 12 March 1997, A/AC.249/1997/L.5)

¹⁰ Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court* (Cambridge University Press 2003), pg. 216. See also 1987 ICRC Commentary, no. 1882.

¹¹ ICTY Judgment, *The Prosecutor v. Dario Kordic and Mario Cerkez*, IT-95-14/2, paras. 359, 361.

conflict, and article 56 makes clear that its application relies on the exercise of control of a belligerent party over the object that is being seized, destroyed or willfully damaged.

IV. DOES “ATTACK” IN ARTICLE 8(2)(E)(IV) COVER ACTS SUCH AS PILLAGING AND DESTRUCTION?

26. The pillaging of a town or place, even when taken by assault, in both international and non-international armed conflicts is criminalized by the Rome Statute. The drafting history of this crime reveals that distinguishing between pillage from other behaviours subject to different rules, including the taking of war booty which is allowed under international humanitarian law, and the war crimes of appropriation or seizure of protected property, was challenging and at times controversial. However, this same drafting history and the plain text of the provision also illustrate that at no point was pillage considered as a crime that could be covered by the provisions regulating “attacks”, including article 8(2)(e)(iv). The act of appropriation of property for private or personal use (ie. pillage) is not criminalized by article 8(2)(e)(iv).

27. Destruction, as an act carried out by a belligerent in control of an object, is not covered by article 8(2)(e)(iv). Such destruction, as alleged by the Prosecution in the *Ntaganda* case, has previously been litigated by this Court. According to the Trial Chamber’s jurisprudence in *Katanga* and *Mbarushimana*, the destruction or seizure of the enemy’s property when such destruction or seizure was not required by military necessity, is criminalized under article 8(2)(e)(xii) and entails acts such as setting ablaze, demolishing, or otherwise damaging property. In *Mbarushimana*, the Trial Chamber found that article 8(2)(e)(xii) covers destruction that took place “in the aftermath of the attack”.¹²

V. WOULD “ATTACK” IN ARTICLE 8(2)(E)(IV) COVER ACTS COMMITTED IN THE COURSE OF A RATISSAGE OPERATION?

28. A *ratissage* operation is 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 persons and objects in the town.

29. These two factors, 1) the exercise of control by the party conducting the *ratissage* operation and, 2) the acts taking place in the course of a *ratissage* operation carried out *after* the cessation of hostilities, are instructive. These two factors demarcate whether the acts committed in the course of the *ratissage* operation qualify as crimes that occur in the course of the conduct of hostilities versus those that occur outside the conduct of hostilities. As discussed above, it is undisputed that both the damage to the church in Sayo and the looting of the hospital in Mongbwalu occurred *after* – not during – hostilities at or around each site. Both occurred during the course of the UPC/FPLC’s *ratissage* operations in Sayo and Mongbwalu, after the UPC/FPLC had carried out an assault and taken control of the towns and hostilities had ceased. These facts indicate that “attack” in article 8(2)(e)(iv) does not cover acts committed in the course of a *ratissage* operation.

¹² Decision on the confirmation of charges, ICC-01/04-01/10, para. 175.

30. The question of who exercises control over the objects or persons being attacked goes to the core logic of international humanitarian law. With control over objects or persons come certain obligations. When an object is under the control of the enemy, the enemy is bound by the laws and customs applicable in non-international armed conflict *specifically* addressing the treatment of objects under the control of the belligerent party. Among these laws is the prohibition of destroying or seizing the property of the adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict, conduct criminalized by article 8(2)(e)(xii).

31. Suggestions that article 8(2)(e)(xii) would not encompass the conduct attributed to the UPC/FPLC in damaging the church at Sayo and looting the hospital at Mongbwalu and thus leave such objects unprotected is false. The UPC/FPLC looted and seized civilian property in Sayo and Mongbwalu that they perceived to be ‘war booty’ from the Lendu.¹³ But the church and hospital were not ‘war booty’ (ie. military equipment of the enemy) whose seizure is permitted by international humanitarian law. The Sayo church and Mongbwalu hospital were civilian property protected by article 8(2)(e)(xii). Both qualify as “property of the adversary” as defined in *Katanga*, where the “adversary” was defined as including “individuals or entities aligned with or with allegiance to a party to the conflict adverse or hostile to the perpetrator”¹⁴, affiliation “which can be established in the light of the ethnicity or place of residence of such individuals or entities.”¹⁵ And indeed, article 8(2)(e)(xii) not only “concerns *all* kinds of enemy property”¹⁶, but according to authoritative commentary, must be supplemented with “rules contained in various instruments of international humanitarian law [that] deal with *specific* acts of seizure/requisition and set up special conditions for their lawfulness or unlawfulness” (emphases added). In relation to the issues at hand, the same authoritative commentary cites article 56 of the 1907 Hague Regulations and article 4(3) of the 1954 Hague Convention as the relevant specific rules.¹⁷ This demonstrates that article 8(2)(e)(xii) is the Rome Statute provision that criminalizes the UPC/FPLC’s damage of the Sayo church and Mongbwalu hospital, and that these acts, committed in the course of a *ratissage* operation, are not covered by “attack” in article 8(2)(e)(iv).



Ms Polina Levina and Ms Kaveri Vaid

Dated this 18 September 2020

At Geneva, Switzerland and Los Angeles, California, USA

¹³ [Judgment](#), 8 July 2019, ICC-01/04-02/06-2359, para. 515.

¹⁴ Decision on the confirmation of charges, ICC-01/04-01/10, para. 171.

¹⁵ Judgment, 7 March 2014, ICC-01/04-01/07, para. 892.

¹⁶ Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court* (Cambridge University Press 2003), pg. 251.

¹⁷ *Ibid.*, pg 259.