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No.: ***ICC-01/04-02/06 A2***
Date: **12 August 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
Request for Leave to Submit Observations on the Merits of the Legal Questions Presented in the Appeal of the Prosecutor against the Judgment of Trial Chamber VI of 8 July 2019 (ICC-01/04-02/06-2359)

Source: **Profª Dra Yolanda Gamarra**

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

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Ms Sarah Pellet
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Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants (Participation/Reparation)

The Office of Public Counsel for Victims

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Counsel Support Section
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Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

1. Professor Yolanda Gamarra hereby requests leave to submit observations on the merits of the legal questions presented in the "Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Bosco Ntaganda" 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 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 (ICC-01/04-02/06 A2).

Expertise of Professor Gamarra on the Legal Questions Presented

2. Dr. Yolanda Gamarra is a Professor of Public International Law and International Relations at the Faculty of Law of the University of Zaragoza (Spain). She has been *amica curiae* in the Al-Bashir case at the International Criminal Court (ICC), April-October 2018. She has been Visiting Fellow at The Lauterpacht Centre for International Law (University of Cambridge) between February to June 2009 and the Royal Complutense College at Harvard (March 2011). She was Visiting Researcher (as "Salvador de Madariaga" Fellow, supported by the Spanish Ministry of Education) at the Institute for Global Law and Policy (Harvard Law School) and Fellow at the Royal Complutense College at Harvard (March-August 2012). In 2014, she was Visiting Researcher at the Max Planck Institute for Comparative Public Law and International Law (Heidelberg). She is the autor of the book *La participación española en misiones militares en el exterior. Treinta Años de contribución a la paz y seguridad internacionales* (Cizur Menor (Pamplona), Thomson Reuters/Aranzadi, 2019). She is the editor of the book *Lecciones sobre justicia internacional* (Zaragoza, IFC/DPZ/ Fundación 'Manuel Jiménez Abad', 2009) and the author of "La política hostil de Estados Unidos de Norteamérica contra la Corte Penal Internacional: los acuerdos bilaterales del artículo 98 (2) o la búsqueda de la impunidad" (*Revista Española de Derecho internacional*, 2005/1, pp. 145 – 169); "Mujeres, guerra y violencia: los modos de compensación en el Derecho

internacional contemporáneo" (*Aequalitas. Revista jurídica de Igualdad de Oportunidades entre Hombres y Mujeres*, 2005, pp. 6 – 18); "La defensa preventiva contra el terrorismo internacional y las armas de destrucción masiva: una crítica razonada" (*Revista CIDOB d'Afers Internacionals*, vol. 77, May-June 2007, pp. 227-251); "The Politics of the Legal Framework governing Spanish Foreign Policy on International Administration in Crisis Areas", in Korhonen, O. (ed.), *International Administration of Crisis Areas. Nine National Approaches* (Helsinki, KDG Research and Publications, 2007, pp. 83 – 127), "Parliamentary Control of the Deployment of Spanish Armed Forces Abroad in the Post-Iraq Era" (*The British YearBook of International Law*, 2017, vol. 87, pp. 216-230), and "Observaciones de una *amica curiae* en el caso Al-Bashir ante la Corte Penal Internacional" (*Anuario Español de Derecho Internacional,* 2020, pp. 395- 427), among others. She is co-author of "Securing Protection to Civilian Population: The Doubtful United Nations Response in Sudan" (*The Global Community Yearbook of International Law and Jurisprudence*, 2004/1, pp. 195 – 226); "Towards the Rule of Law in Kosovo: The Judicial System Under International Administration" (*The Global Community Yearbook of International Law and Jurisprudence*, 2006, pp. 165 – 189) and "United Nations Member States' Obligations Towards the ICTY: Arresting and Transferring Lukic, Gotovina and Zelenovic" (*International Criminal Law Review*, 2008/4, pp. 627 – 653).

Key Question and Initial Observation

3. Pillaging of protected objects, including churches and hospitals, constitute an attack in the framework of the conventional and customary international humanitarian law. The protection of cultural objects and hospitals have different precedents in the law of armed conflict, nevertheless they have analogous legal position in contemporary rules. So, the church of Sayo and the Monbgwalu hospital are protected by the article 8(2)(e)(iv) of the Rome Statute.

Circumstances of the case

4. Much of the current debates amongst scholars and international practitioners (O'Keefe[1] *v.* Lostal Becerril[2]) are focused on the meaning and scope of the protection of cultural objects in armed conflicts. The case of the *Prosecutor v. Bosco Ntaganda* allows us to deepen into the legal issue of the meaning of 'attack' in accordance with article 8 (2) (e) (iv) of the Rome Statute. Part of the peace building effort is the restoration of the rule of law, in particular by seeking the full application of the international human rights norms and international humanitarian norms that establish the minimum standards necessary to achieve a stable society. Only by holding accountable those responsible for mass war crimes and crimes against humanity, including those committed against 'buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals an places where the sick and wounded are collected' can there be a basis for post-conflict societies to establish the rule of law and move towards peace.

The request for a definition of 'attack' under international law and international humanitarian law, in particular in the context of cultural property and hospitals

5. The term of 'attack' is not clearly defined in international law. What constitutes an 'attack' is not satisfactorily described in Article 51 of the UN Charter or in Resolution 3314 (XXIX) of the UNGA on the definition of aggression (although examples are provided), or in the Rome Statute. 'Attack' in ICTY case law is defined such as an act of violence committed during the course of an armed conflict (*Prosecutor v. Galic*[3]). However, the ICC dismissed this case law as well as the doctrinal interpretation of such as inconsistent. The ICC case law considers that the term 'attack' refers to any large-scale in nature combat action

[1] R. O'Keefe, "The Meaning of 'Cultural Property' under the 1954 Hague Convention" 46 *NILR* (1999) pp. 26-56.

[2] M. Lostal Becerril, "The Meaning and Protection of 'Cultural Objects and Places of Worship' under the 1977 Additional Protocols", 59 *NILR* (2012) pp. 455-472.

[3] ICTY, *Prosecutor v. Stanislav Galic*, Judgment, 5 December 2003, para. 52. Case No IT-98-29-A.

and targeted at a large number of persons (*Prosecutor v. Jean-Pierre Bemba Gombo,*[5] among others).

Scope of the concepts of 'attack', 'conduct of hostilities' and 'combat action'

6. 'Conduct of hostilities' is different from 'attack' in the article 4 of the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict[8] (HC) and the article 6(a) (i) and (ii) of the Second Protocol (1999) to the HC[9]. In international humanitarian law, the term 'conduct of hostilities' regulates and limits the methods and means of warfare. Its purpose is to strike a balance between legitimate military action and the humanitarian objective of reducing human suffering, particularly of civilians.
7. 'Combat action' refers to the military acts in the framework of a war directed to the enemy until causing their defeat and dispersion.

Differences between 'attack' and 'act of hostility'

8. An 'act of hostility' involves abusive and aggressive behavior that can be reflected in emotional or physical violence, at the hands of a single person, a small group or a large number of people and be directed at one or more subjects. The Second Protocol (1999) to the HC imposes a higher standard of protection concerning the prohibition of acts of hostility against cultural properties. An 'act of hostility' can be equated with an act of aggression. The difference between 'acts of hostility' – which comprise demolitions as well – and 'attack' seems to be narrow.

Scope of the concept of 'attack' under the article 8(2)(e)(iv) of the Statute and the acts such as pillaging, destruction or acts committed in the course of a *ratissage* operation

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[5] ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment, 21 March 2016, para. 163. ICC-01/05-01/08.

[8] Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1954.

[9] Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Even of Armed Conflict, The Hague, 26 March 1999.

9. Having in mind the meaning of the article 8(2)(e)(iv) of the Rome Statute, a broad interpretation of 'attack' applying to religious properties and hospitals would be a violation of the principle of legality. Any 'attack' aimed at a cultural property (as civilian object) with a special nature is unlawful *per se,* unless it has been turned into a military object. But when do these types of objects cease to be civil and become a military objective? Even as dual-use objects (civil and military), the protection from indiscriminate attacks must be guaranteed. The minimum standard of protection included in international humanitarian law recognizes that the concept of 'military objective' is more stringent than that of 'imperative military necessity'.

Profª Dra Yolanda Gamarra

Dated this 12 August 2020

At Zaragoza, Spain