

**Annex 1: Separate opinion of Judge Howard Morrison and Judge  
Piotr Hofmański on the Prosecutor's appeal**

**Separate opinion of Judge Howard Morrison  
and Judge Piotr Hofmański on the Prosecutor’s appeal**

1. We agree with Judge Eboe-Osuji and Judge Bossa that the Prosecutor’s appeal should be rejected. However, we are of the view that the Trial Chamber committed no error in its interpretation of the term ‘attacks’ in article 8(2)(e)(iv) of the Statute and its application to the facts of the case.
2. The Trial Chamber defined the term ‘attacks’ in article 8(2)(e)(iv) of the Statute as an “act of violence against the adversary, whether in offence or defence”, utilising the same definition as in respect of the war crime of intentionally attacking civilians (article 8(2)(e)(i) of the Statute).<sup>1</sup>
3. Consistent with its interpretation of the term, the Trial Chamber declined to consider the acts of violence against the church in Sayo as war crimes under article 8(2)(e)(iv), as they did not occur ‘during the actual conduct of hostilities’.<sup>2</sup> It also concluded that it would not consider the looting of medical equipment from the Mongbwalu hospital as a crime under article 8(2)(e)(iv), because it did not constitute an ‘act of violence against the adversary’.<sup>3</sup>
4. The Prosecutor argues that the term ‘attacks’ in article 8(2)(e)(iv) of the Statute has a different meaning than in article 8(2)(e)(i) of the Statute and elsewhere in the same or other articles. Under the Prosecutor’s interpretation, an attack in terms of article 8(2)(e)(iv) would not need to occur in the conduct of hostilities<sup>4</sup> and could also include acts of violence other than acts of physical destruction of the object.<sup>5</sup>
5. We note that article 8(2)(e)(iv), which is relevant to the present appeal and ‘applicable in armed conflicts not of an international character’,<sup>6</sup> as well as the

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<sup>1</sup> [Conviction Decision](#), para. 1136, *referring to* para. 916.

<sup>2</sup> [Conviction Decision](#), para. 1142.

<sup>3</sup> [Conviction Decision](#), para. 1141.

<sup>4</sup> [Prosecutor’s Appeal Brief](#), paras 62, 109, 112-126; [T-270](#), p. 12, lines 14-18.

<sup>5</sup> [Prosecutor’s Appeal Brief](#), paras 127-128.

<sup>6</sup> Article 8(2)(e) of the Statute.

equivalent provision applicable in international armed conflict (article 8(2)(b)(ix)), use the term ‘attacks’ as follows:

Intentionally 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.

6. The term ‘attacks’ appears elsewhere in the Statute as an element of a number of crimes. Notably, the existence of an ‘attack directed against any civilian population’ is an element of crimes against humanity listed in article 7. For purposes of that article, the Elements of Crimes define the term ‘attack’ as ‘a course of conduct involving the multiple commission of acts referred to in article 7, paragraph 1, of the Statute against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack’.<sup>7</sup>

7. Article 8 of the Statute, which lists the war crimes under the Court’s jurisdiction, contains no such definition. The term ‘attacks’, or a variation thereof, appears, for instance:

- in article 8(2)(b)(ii) – ‘[i]ntentionally directing attacks against civilian objects, that is, objects which are not military objectives’;
- in article 8(2)(b)(v) – ‘[a]ttacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives’;
- in article 8(2)(e)(ii) – ‘[i]ntentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law’.

8. We are of the view that, unless the Statute contains an indication to the contrary, such as in the above-mentioned article 7, which includes a specific definition of the term in the context of crimes against humanity, a term appearing therein may be expected to have the same meaning each time it is used, in particular if it appears in the same provision. In all the above-quoted instances of the use of the term ‘attacks’ in

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<sup>7</sup> Elements of Crimes, article 7 – Crimes against humanity, Introduction, para. 3.

article 8, it should thus be presumed to have the same meaning, in particular since all the instances in which the term appears in that provision concern the definition of the various war crimes over which the Court has jurisdiction.

9. We further note that, in our interpretation of the terms used in article 8, we must be mindful of the origin of the text of this article. Notably, the formulation of the crimes listed in article 8 follows, more or less closely, rules of humanitarian law, which are set out in various international conventional instruments.

10. The Elements of Crimes clarify that ‘[t]he elements for war crimes under article 8, paragraph 2, of the Statute shall be interpreted within the established framework of the international law of armed conflict’.<sup>8</sup> Further, the *chapeau* of article 8(2)(e) of the Statute refers to ‘the established framework of international law’. In that regard, the Appeals Chamber has previously held that:

the specific reference to the “established framework of international law” within article 8 (2) (b) and (e) of the Statute permits recourse to customary and conventional international law regardless of whether any lacuna exists, to ensure an interpretation of article 8 of the Statute that is fully consistent with, in particular, international humanitarian law.<sup>9</sup>

11. Therefore, while accepting that, in principle, the term ‘attacks’ should have the same meaning each time it is used in article 8 of the Statute, we consider that recourse to international law of armed conflict is warranted in the present case to determine whether the term has a special meaning when it is used in article 8(2)(e)(iv) and article 8(2)(b)(ix). We will therefore examine the relevant applicable rules of humanitarian law set out in various international conventional instruments and the drafting history of article 8(2)(e)(iv) of the Statute.

*1. The origins of protection of certain objects under the 1907 Hague Regulations*

12. The Prosecutor avers that, while the formulation of article 8(2)(e)(iv) is based on article 27 of the 1907 Hague Regulations, a ‘vast majority of commentators’ accept that article 8(2)(e)(iv) ‘derive[s] from’ both articles 27 and 56 of the 1907 Hague

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<sup>8</sup> Elements of Crimes, article 8 – War crimes, Introduction. *See also* [Mr O’Keefe’s Observations](#), para. 7.

<sup>9</sup> [Ntaganda OAS Judgment](#), para. 53.

Regulations.<sup>10</sup> She adds that the drafting history of article 8(2)(e)(iv) does not clearly indicate that ‘the drafters intended to limit article 8(2)(e)(iv) to the scope of just *one* (article 27) of the two pivotal provisions of the 1907 Hague Regulations’.<sup>11</sup>

13. We note that the language used in article 8(2)(e)(iv) of the Statute incorporates elements of articles 27 and 56 of the 1907 Hague Regulations. Article 27 is contained in Section II on ‘[h]ostilities’, in Chapter I on ‘[m]eans of injuring the enemy, sieges, and bombardments’, while article 56 appears under Section III on ‘[m]ilitary authority over the territory of the hostile state’. They provide, in relevant part, as follows:

Art. 27. 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.

It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand.

[...]

Art. 56. The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property.

All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.<sup>12</sup>

14. The list of protected objects in these provisions is similar to that in article 8(2)(e)(iv) of the Statute: ‘buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected’. Other elements of these two provisions of the 1907 Hague Regulations are different. Notably, unlike article 8(2)(e)(iv) of the Statute, neither uses the term ‘attack’. Instead, the 1907 Hague Regulations indicate the context in which the listed objects are protected. Article 27 protects the relevant objects in ‘sieges and bombardments’, whereas article 56 protects such objects from seizure, destruction and wilful damage, when they are on the territory under ‘military authority’.

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<sup>10</sup> [Prosecutor’s Appeal Brief](#), para. 36; [T-270](#), p. 18, lines 13-19.

<sup>11</sup> [Prosecutor’s Appeal Brief](#), para. 37 (emphasis in original); [T-270](#), p. 14, lines 15-16, p. 18, lines 8-19.

<sup>12</sup> [1907 Hague Regulations](#).

15. The above-mentioned context in which each of the two articles of the 1907 Hague Regulations guarantees protection is relevant to the interpretation of the term ‘attacks’ used in article 8(2)(e)(iv) of the Statute. If this provision were modelled on article 27 of the 1907 Hague Regulations, the meaning of ‘attacks’ should be narrower and limited to acts typically occurring in ‘sieges and bombardments’. However, if article 56 of the 1907 Hague Regulations were the relevant one, the meaning of ‘attacks’ could extend to ‘seizure, destruction and wilful damage’. It is therefore significant to consider the preparatory work for article 8(2)(e)(iv) of the Statute.

16. We recall that, in 1997, the United States of America submitted the following proposal for a war crime to be included under the jurisdiction of the Court:

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.<sup>13</sup>

17. A footnote to this proposed war crime indicated that

[t]his alternative is based on article 27 of the Annex to the IV Hague Convention respecting the laws and customs of war on land.<sup>14</sup>

18. The proposal largely reproduced the language of article 27 of the 1907 Hague Regulations. It only replaced ‘[i]n sieges and bombardments all necessary steps must be taken to spare, as far as possible’ with ‘intentionally directing attacks against’. The formulation of the exception to the general prohibition of attacks also changed – from the use of objects ‘for military purposes’ to their use ‘in support of the military effort’.

19. The final text of article 8(2)(e)(iv) of the Statute is almost identical to the text of the American proposal, save for the addition of a reference to buildings dedicated to education and a change to the formulation of the exception – the objects ‘are not military objectives’.

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<sup>13</sup> Preparatory Committee on the Establishment of an International Criminal Court, [War Crimes: Proposal Submitted by the United States](#), 14 February 1997, A/AC.249/1997/WG.1/DP.1, pp. 2-3; [1997 Draft Text of War Crimes](#), p. 4.

<sup>14</sup> [1997 Draft Text of War Crimes](#), fn. 12; Preparatory Committee on the Establishment of an International Criminal Court, [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, p. 9, fn. 12. See also [Ms Levina’s and Ms Vaid’s Observations](#), para. 22.

20. We note that, leaving aside its application to international armed conflict, article 27 of the 1907 Hague Regulations imposes obligations that are broader than those imposed by article 8(2)(e)(iv) of the Statute. This is because, in addition to prohibiting attacks, article 27 also requires that steps be taken to spare the relevant objects. However, given the different nature of these two provisions – one setting out a rule for belligerent parties and the other one setting out a war crime – it is natural that this formulation required adjustment. In view of the almost identical texts, we are satisfied that article 8(2)(e)(iv) (as well as article 8(2)(b)(ix)) is based on article 27 of the 1907 Hague Regulations.<sup>15</sup>

21. Article 56 of the 1907 Hague Regulations was also considered during the preparatory work. In 1996, in the course of preparatory work for the Draft Code of Crimes against the Peace and Security of Mankind – the predecessor of the part of the Statute setting out crimes within the Court’s jurisdiction – there was a proposal for a war crime based on the language of article 56 of the 1907 Hague Regulations. Article 20(e)(iv) of the draft code provided as follows:

Seizure of, destruction of or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science.<sup>16</sup>

22. An identical provision was included in the ‘Chairman’s informal texts and compilation of proposals and suggestions with regard to the definition of core crimes’ of 11 April 1996<sup>17</sup> and the proposal of Japan.<sup>18</sup> The former left open the question of whether the crime would be applicable in international or non-international armed conflict, whereas the latter was meant for armed conflict of an international character. It is also noted that the same crime was included in the list of violations of the laws and

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<sup>15</sup> See [Ms Levina’s and Ms Vaid’s Observations](#), paras 22-24; [Ms Bagott’s Observations](#), para. 7.

<sup>16</sup> International Law Commission, [Draft Code of Crimes against the Peace and Security of Mankind with commentaries](#), *Yearbook of the International Law Commission* (1996), Vol. II, Part Two, p. 53.

<sup>17</sup> [1996 Draft Definition of Core Crimes](#), pp. 7, 10. See also Preparatory Committee on the Establishment of an International Criminal Court, [Summary of the Proceedings of the Preparatory Committee during the period 25 March-12 April 1996](#), 7 May 1996, A/AC.249/1, pp. 63, 66.

<sup>18</sup> Preparatory Committee on the Establishment of an International Criminal Court, [Proposal Submitted by Japan on the Definition of War Crimes](#), 27 August 1996, A/AC.249/WP.48, p. 2.

customs of war in the Statute of the International Criminal Tribunal for the former Yugoslavia.<sup>19</sup>

23. Unlike article 56 of the 1907 Hague Regulations, the above-quoted proposal did not limit its application to situations of '[m]ilitary authority over the territory of the hostile state'.<sup>20</sup> Therefore, it could also cover cases of 'combat action'. However, this proposal did not appear in subsequent documents of the Preparatory Committee on the Establishment of an International Criminal Court. Nor is it reflected in the Statute. Therefore, contrary to the Prosecutor's contention, article 8(2)(e)(iv) of the Statute is not based on article 56 of the 1907 Hague Regulations.

2. *The term 'attacks' under the Geneva Conventions and Additional Protocols to the Geneva Conventions*

24. As indicated above, the term 'attacks' does not appear in the two above-mentioned articles of the 1907 Hague Regulations. It is therefore necessary to consider other international treaties that contain and define this term.

25. The verb 'to attack' appears in the First Geneva Convention,<sup>21</sup> which provides, in its relevant part:

Article 19

Fixed establishments and mobile medical units of the Medical Service may in no circumstances be attacked, but shall at all times be respected and protected by the Parties to the conflict.

26. A similar provision is included in the Fourth Geneva Convention:<sup>22</sup>

Article 18

Civilian hospitals organized to give care to the wounded and sick, the infirm and maternity cases, may in no circumstances be the object of attack but shall at all times be respected and protected by the Parties to the conflict.

27. We observe that the Additional Protocols to the Geneva Conventions, adopted in 1977, provide for protection of relevant objects – medical units and places of worship.

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<sup>19</sup> Article 3(d) of the Statute of the International Criminal Court for the Former Yugoslavia. *See also* United Nations Security Council, [Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 \(1993\)](#), 3 May 1993, S/25704, p. 11.

<sup>20</sup> [1907 Hague Regulations](#), section III.

<sup>21</sup> [First Geneva Convention](#).

<sup>22</sup> [Fourth Geneva Convention](#).

Article 49(1) of Additional Protocol I, applicable to international armed conflicts, includes the following definition of attacks:

“Attacks” means acts of violence against the adversary, whether in offence or in defence.

28. It is accepted that this definition also applies to Additional Protocol II, regarding non-international armed conflicts.<sup>23</sup>

29. According to the commentary on Additional Protocol I, the dictionary definition which is the closest to the meaning of the term ‘attacks’ used in that Additional Protocol is ‘to set upon with hostile action’.<sup>24</sup> The term is understood as ‘combat action’ and it refers to ‘the use of armed force to carry out a military operation at the beginning or during the course of armed conflict’,<sup>25</sup> or ‘violent acts directed at harming the adversary (including the civilian population and civilian objects) through physical injury or destruction’.<sup>26</sup>

30. We note that Additional Protocol I provides for protection from ‘attacks’, as well as for protection from other hostile acts. For instance, pursuant to article 12(1) of Additional Protocol I and article 11(1) of Additional Protocol II, medical units ‘shall be respected and protected at all times and shall not be the object of *attack*’.<sup>27</sup> Similarly, pursuant to article 52(1) of Additional Protocol I, ‘[c]ivilian objects shall not be the object of *attack* or of reprisals’.<sup>28</sup> However, according to article 53(a) of Additional Protocol I, it is prohibited ‘to commit any *acts of hostility* directed against the historic monuments, works of art and places of worship which constitute the cultural or spiritual heritage of peoples’.<sup>29</sup>

31. The equivalent provision of Additional Protocol II, applicable to non-international armed conflicts – article 16 – also refers to ‘*acts of hostility*’ against such

<sup>23</sup> ICRC Commentary on Additional Protocols, p. 1452, para. 4783.

<sup>24</sup> ICRC Commentary on Additional Protocols, p. 603, para. 1879, *referring to* Shorter Oxford Dictionary, 1978, p. 127.

<sup>25</sup> ICRC Commentary on Additional Protocols, p. 603, paras 1880, 1882. *See also* [Mr Newton’s Observations](#), para. 7; [Ms Bagott’s Observations](#), para. 4.

<sup>26</sup> [Mr Corn et al.’s Observations](#), para. 15. *See also* [T-270](#), p. 73, lines 10-25; [ALMA’s Observations](#), para. 4; [Ms Jachec-Neale’s Observations](#), paras 3, 17.

<sup>27</sup> [Additional Protocol I](#) (emphasis added); [Additional Protocol II](#).

<sup>28</sup> [Additional Protocol I](#) (emphasis added).

<sup>29</sup> [Additional Protocol I](#) (emphasis added).

objects.<sup>30</sup> Additional Protocols I and II thus distinguish attacks from other hostile acts. The latter notion is broader than attacks and includes demolition of objects under the control of a party to the conflict.<sup>31</sup> This distinction shows that the word ‘attack’ has a narrow meaning in the Additional Protocols.

32. During the preparatory work for the Statute, New Zealand and Switzerland submitted a proposal based on the above-quoted article 16 of Additional Protocol II and prepared by the ICRC. The following crime was to be included in the list of ‘[s]erious violations of international humanitarian law applicable in non-international armed conflicts’:

Attacks 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.<sup>32</sup>

33. The proposal replaced the term ‘acts of hostility’ used in article 16 of Additional Protocol II with the term ‘attacks’. Given the above-mentioned distinction between the two terms, the drafters appear to have intended to narrow the scope of the proposed war crime. In any event, this proposal was not pursued and is not reflected in the Statute.

34. We also note article 85 of Additional Protocol I, which contains a list of breaches of the terms of that protocol and provides in its relevant part:

4. In addition to the grave breaches defined in the preceding paragraphs and in the Conventions, the following shall be regarded as grave breaches of this Protocol, when committed wilfully and in violation of the Conventions or the Protocol:

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<sup>30</sup> Article 16 of [Additional Protocol II](#) reads: ‘Without prejudice to The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, it is prohibited to commit 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’ (emphasis added).

<sup>31</sup> As noted in the commentary to article 53 of [Additional Protocol I](#): ‘An act of hostility must be understood as any act arising from the conflict which has or can have a substantial detrimental effect on the protected objects’ (ICRC Commentary on Additional Protocols, p. 647, para. 2070); ‘An act of hostility includes in particular the destruction of any specially protected object by any Party to the conflict, either by way of attack or by demolition of objects “under its control”’ (ICRC Commentary on Additional Protocols, p. 647, fn. 27). See [T-270](#), p. 48, lines 19-21, p. 51, lines 23-24; [Mr Newton’s Observations](#), para. 9; [Ms Levina’s and Ms Vaid’s Observations](#), para. 15; [Ms Jachec-Neale’s Observations](#), para. 10.

<sup>32</sup> Preparatory Committee on the Establishment of an International Criminal Court, [Working paper submitted by the delegations of New Zealand and Switzerland](#), 14 February 1997, A/AC.249/1997/WG.1/DP.2, p. 4 (article 3(x)).

[...]

(d) making the clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization, the object of attack, causing as a result extensive destruction thereof, where there is no evidence of the violation by the adverse Party of Article 53, sub-paragraph (b), and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives.<sup>33</sup>

35. The application of this provision is limited to objects which ‘constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement’. While it is not directly relevant to the crime at issue under the Prosecutor’s appeal, it is to be noted that the breach in question is committed through an ‘attack’ causing ‘extensive destruction’.

36. In the course of the preparatory work, a proposal was made that relied on the text of article 85(4)(d) of Additional Protocol I.<sup>34</sup> However, this proposal was not pursued and is not reflected in article 8 of the Statute.

### 3. *The 1954 Hague Convention*

37. The Prosecutor submits that article 4 of the 1954 Hague Convention ‘provides for broad obligations to respect and protect cultural property’ in both international and non-international armed conflict.<sup>35</sup> She argues that the term ‘act of hostility’ ‘encompasses all acts of violence’ in line with the general obligation under article 4(1) of that convention.<sup>36</sup> In the Prosecutor’s view, the 1954 Hague Convention ‘underlines, in the context of cultural property, that international law prohibits all acts of violence against such property, with a nexus to an armed conflict, irrespective whether they occur in the conduct of hostilities or not’.<sup>37</sup>

38. We note that article 4(1) of the 1954 Hague Convention contains an undertaking by the High Contracting Parties to ‘respect cultural property [...] by refraining from any

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<sup>33</sup> [Additional Protocol I](#).

<sup>34</sup> [1996 Draft Definition of Core Crimes](#), p. 7.

<sup>35</sup> [Prosecutor’s Appeal Brief](#), paras 43-44.

<sup>36</sup> [Prosecutor’s Appeal Brief](#), para. 45.

<sup>37</sup> [Prosecutor’s Appeal Brief](#), para. 48.

act of hostility directed against such property’.<sup>38</sup> It must be noted that only ‘property of great importance to the cultural heritage of every people’ is protected under this article of the 1954 Hague Convention.<sup>39</sup> It is different from the protected objects at issue in the present case. For that reason, the Prosecutor’s argument is unpersuasive.

39. We now turn to the Prosecutor’s contention that the Trial Chamber’s narrow interpretation of the term ‘attacks’ under article 8(2)(e)(iv) of the Statute may create a gap in the protection of objects listed under that provision.

#### 4. *Whether there is a gap in protection*

40. In the Prosecutor’s view, a narrow interpretation of article 8(2)(e)(iv) of the Statute would require, in certain cases in non-international armed conflict, to rely on article 8(2)(e)(xii), which ‘is not an adequate substitute’, as it ‘places an additional result requirement on the act of violence which does not exist for merely *directing* an attack, nor does it protect property belonging to the same party to the conflict as the perpetrator’.<sup>40</sup> The Prosecutor therefore argues that such a narrow interpretation of article 8(2)(e)(iv) of the Statute ‘would create a gap in protection for those listed objects, and thus divorce the Statute from the established framework of international law’.<sup>41</sup>

41. We note that article 8(2)(e)(iv) of the Statute is the only provision applicable in armed conflicts not of an international character that sets out a crime specifically related to buildings dedicated to religion and hospitals. However, in certain circumstances other crimes may cover the prohibited conduct in relation to such objects: the crime of

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<sup>38</sup> Article 4(1) of the [1954 Hague Convention](#) provides that:

‘The High Contracting Parties undertake to respect cultural property situated within their own territory as well as within the territory of other High Contracting Parties by refraining from any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict; and by refraining from any act of hostility directed against such property’.

<sup>39</sup> [1954 Hague Convention](#), article 1(a), which reads:

‘For the purposes of the present Convention, the term “cultural property” shall cover, irrespective of origin or ownership:

(a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above’.

<sup>40</sup> [Prosecutor’s Appeal Brief](#), paras 59-60 (emphasis in original); [T-270](#), p. 14, lines 3-11.

<sup>41</sup> [T-270](#), p. 14, lines 1-3.

pillaging under article 8(2)(e)(v) or the crime of destroying or seizing the property of an adversary, which both apply to, *inter alia*, scenarios outside of hostilities.<sup>42</sup> While accepting that the scope of application of these provisions may differ in some aspects from article 8(2)(e)(iv) of the Statute, we are not persuaded that the interpretation proposed by the Prosecutor would be appropriate to cover any ‘gap in protection’.<sup>43</sup> We recall the principle set out in article 22(2) of the Statute:

The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.

42. Even if we were to accept that, despite all the foregoing considerations, the definition of ‘attacks’ in article 8(2)(e)(iv) of the Statute is ambiguous, we would be unable to interpret it in the way suggested by the Prosecutor. Such interpretation would not be in favour of Mr Ntaganda and thus in contravention of the above-mentioned principle.<sup>44</sup>

#### 5. Conclusion

43. We find that, viewed in the light of the established framework of international law of armed conflict and the drafting history of the Statute, article 8(2)(e)(iv) of the Statute is based on article 27 rather than on article 56 of the 1907 Hague Regulations. The choice of the word ‘attacks’, rather than ‘acts of hostility’ or ‘seizure of, destruction of or wilful damage done to’, shows the drafters’ intention to apply a narrow definition of that word. In that sense, the term ‘attack’ must be understood in the same way as it is defined in article 49(1) of Additional Protocol I: it is an ‘act[] of violence against the adversary, whether in offence or in defence’. It is narrower than the term ‘acts of hostilities’ used in, among other provisions, article 16 of Additional Protocol I. It follows that the term ‘attack’ means ‘combat action’, or, if used as a verb, ‘to set upon with hostile action’.

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<sup>42</sup> See [Ms Levina’s and Ms Vaid’s Observations](#), para. 7; [Mr Corn \*et al.\*’s Observations](#), para. 19; [Mr Newton’s Observations](#), para. 6.

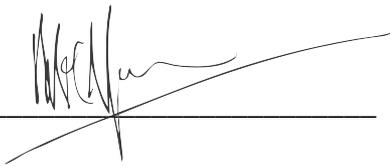
<sup>43</sup> [T-270](#), p. 14, lines 1-3.

<sup>44</sup> See [Mr Ntaganda’s Response to Prosecutor’s Appeal](#), paras 30-32, 47; [Mr Newton’s Observations](#), para. 4; [Ms Gamarra’s Observations](#), para. 17.

44. We therefore find that the Trial Chamber did not err in defining the term ‘attack’ as an ‘act of violence against the adversary, whether in offence or defence’.<sup>45</sup> It did not err by not applying a different definition of ‘attack’ to article 8(2)(e)(iv) of the Statute.<sup>46</sup> Consequently, it was not an error for the Trial Chamber to decline considering the acts of violence against the church in Sayo, which did not occur ‘during the actual conduct of hostilities’,<sup>47</sup> and the looting of medical equipment from the Mongbwalu hospital.<sup>48</sup>

45. As we find no error in the Trial Chamber’s interpretation of the term attack, it is not necessary to address the remainder of the Prosecutor’s arguments regarding damage to the protected object’s ability to perform its function or the attack being a crime of conduct. Accordingly, we reject the Prosecutor’s appeal.

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



**Judge Howard Morrison**



**Judge Piotr Hofmański**

Dated this 30<sup>th</sup> day of March 2021

At The Hague, The Netherlands

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<sup>45</sup> [Conviction Decision](#), para. 1136.

<sup>46</sup> See [T-270](#), p. 51, lines 10-14, p. 54, lines 21-24, p. 70, lines 15-18; [Ms Bagott’s Observations](#), para. 8.

<sup>47</sup> [Conviction Decision](#), para. 1142.

<sup>48</sup> [Conviction Decision](#), para. 1141.