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**International
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THE APPEALS CHAMBER

Before: Judge Howard Morrison, Presiding
Judge Chile Eboe-Osuji
Judge Piotr Hormański
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

Submission of Observations to the Appeals Chamber Pursuant to Rule 103

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I. Introduction

1. These observations are submitted by Professors Geoffrey S. Corn, Richard Jackson, Chris Jenks, Eric Talbot Jensen and James A. Schoettler, Jr. as *amici curiae* pursuant to the Appeals Chamber's "Decision on the requests for leave to file observations pursuant to rule 103 of the Rules of Procedure and Evidence" of 24 August 2020.

II. Arguments

'Cluster a' questions

2. **Attacks and other Hostile acts.** Military operations during armed conflict traverse a wide array of activities not limited to attacks. Within international humanitarian law (IHL), the term 'attacks' carries specific legal meaning and consequences, and does not encompass every type of hostile activity. 'Hostilities' and 'act of hostility' appear numerous times in various IHL treaties and refer to belligerent actions with a broader scope than "attacks." *Accordingly, while all attacks are acts of hostility, not all acts of hostility are attacks.*¹
3. In the context of targeting in both international armed conflicts and non-international armed conflicts, an act of hostility that qualifies as an 'attack' triggers the IHL applicable to targeting, including the rules relating to distinction (including the obligation to refrain from targeting objects that do not meet the definition of a military objective), the obligation to take feasible precautions in attack, and the principle of proportionality.²
4. Other acts of hostility involving destruction of property on land in an armed conflict trigger the application of different IHL rules, but are not attacks. For example, article 23(g) of the Hague Regulations³ and its corollary customary rule, applicable in both international and non-international armed conflicts, prohibit the destruction of enemy property unless the act is imperatively demanded by the necessities of war.⁴ Seizure and appropriation of enemy property is governed by, *inter alia*, article 23(g) of the Hague Regulations and its corollary

¹ See e.g. Robert Kolb, *The Jurisprudence of the Yugoslav and Rwandan Criminal Tribunals on their Jurisdiction and on International Crimes (2004-2013)* 84 BRIT. Y'BK INT'L L. 131, 160 (2014); Dapo Akande & Emanuela Chiara Gillard, *Conflict-induced Food Insecurity and the War Crime of Starvation of Civilians as a Method of Warfare: The Underlying Rules of International Humanitarian Law*, 17 J. INT'L CRIM. JUST. 753, 767, fn. 39 (2019); Waldemar A. Solf, *Intervention*, 26 MILITARY L. & L. OF WAR REV. 149, 150 (1987).

² See, e.g., articles 51, 52, and 57 of Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflict (Protocol I), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I].

³ Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907 (art. 23(g) is under section II titled "hostilities").

⁴ HANS Kelsen, *PRINCIPLES OF INTERNATIONAL LAW* 72-73 (1952); Rule 50: Destruction and Seizure of Property of an Adversary in International Committee of the Red Cross, Customary IHL Database, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule50 (hereinafter ICRC CIHL Study).

customary rule, the prohibition of pillage, and the rule on appropriating booty of war.⁵

5. The IHL governing 'attacks' is distinct from that applicable to the destruction or seizure of enemy property. Similarly, the Rome Statute distinguishes between crimes involving attack and crimes involving seizure and/or destruction of property.⁶ Accordingly, the meaning of 'attacks' in both IHL and the Rome Statute does not encompass all actions that result in the loss or destruction of property.⁷
6. As a threshold matter, acts of violence directed at persons or objects under the dominion and control of a belligerent, to include persons who are *hors de combat*, do not qualify as attacks. This notion of control as it relates to the assessment of what qualifies as an attack is distinct from other uses of that term in IHL and International Criminal Law (ICL).
7. Hostilities – including attacks and the other acts mentioned above – may take place in either a contested area not controlled by any belligerent, in an area under tactical control of one of the belligerents,⁸ or in an occupied territory which is under the effective control of a belligerent.⁹ Arguing that 'attacks' cannot occur in a territory controlled by the attacking party would be erroneous and contradict article 49(2) of the First Additional Protocol to the Geneva Conventions (AP I).
8. An interpretation of IHL that categorizes every act of violence resulting in damage, destruction, or loss of property as an attack – therefore requiring the application of targeting rules – is inconsistent with IHL and would undermine that law's practical application to military operations. Additional Protocol I, State practice, and IHL treaties support this view.
9. **Basic definition of 'Attack'.** With regard to both parties and non-parties to AP I, how they define 'attack' mainly emerges from the types of activities they consider to be subject to IHL targeting rules. The practice of States reaffirms that there are actions involving destruction of property outside the context of attacks.¹⁰

⁵ U.S. DEP'T OF DEFENSE, LAW OF WAR MANUAL, at ¶ 5.17 (3rd ed. December 2016) (listing rules that apply to the seizure and destruction of enemy property "outside the context of attacks.") [hereinafter U.S. DoD LAW OF WAR MANUAL].

⁶ See, e.g. Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183.9 (July 17, 1998) (not requiring an attack in the elements of crime for arts. 8(2)(b)(xiii) (war crime of destroying or seizing the enemy's property) and 8(2)(b)(xvi) (war crime of pillaging) [hereinafter Rome Statute].

⁷ See, e.g., article 54(2) of AP I, *supra* note 2 (listing "attack" and "destruction" separately); U.S. DoD LAW OF WAR MANUAL, *supra* note 5, at ¶ 5.17.

⁸ See, e.g., article 49(2) of AP I, *supra* note 2 ("The provisions of this Protocol with respect to attacks apply to all attacks in whatever territory conducted...").

⁹ ICRC, EXPERT MEETING: OCCUPATION AND OTHER FORMS OF ADMINISTRATION OF FOREIGN TERRITORY 120 (2012); YORAM DINSTEIN, THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION 110 (2nd ed., 2019).

¹⁰ See, e.g., U.S. DoD LAW OF WAR MANUAL, *supra* note 5, at ¶¶ 5.2.2.1, 5.17 and 5.26. (not subjecting to 'targeting law', *inter alia*, detentions, intelligence collection, movement restrictions and propaganda, as well as seizure of property and destruction of property outside the context of attacks).

10. The term 'attacks' applies equally in relation to all objects. The treatment of a combat action as an 'attack' depends on the action taken, not on the object selected and there is no special meaning to the term 'attacks' in the context of cultural property and hospitals. State practice identifies separate rules governing destruction of property outside the context of attacks.¹¹
11. International humanitarian law treaties also support the view that 'attacks' are a subset of destructive combat actions that could occur in armed conflict. For example, article 54(2) of AP I lists 'attack' as only one type of prohibited act of hostility.
12. **Substantive Elements of an 'Attack'.** Two necessary but not always sufficient elements, taken together, distinguish 'attacks' from other destructive actions.
13. *First, an 'attack' must involve an act reasonably expected to produce physical injury or damage to a person(s) or object(s).* 'Attack' requires the employment of force (kinetic or not) against persons or objects to produce violent *consequences*. Violent consequences, in turn, are understood as death or injury in the case of persons, or physical damage or destruction in the case of objects. Notably, mere interference with, or impediment to, the functionality of an object without causing it physical damage is insufficient to constitute an attack¹² (the contemporary debate over whether the degradation of functionality in the unique context of cyber operations qualifies as an attack is too unsettled to have any probative value in this case). Thus, activities such as electronic jamming or psychological warfare are not considered 'attacks'¹³ and are not subject to the IHL targeting rules.
14. *Second, the motivation for executing the act must be to cause harm to the adversary or other persons or objects in the conduct of hostilities.* Besides being clearly implied in the ordinary meaning of the word 'attack', as far as the definition in article 49(1) of AP I is concerned, the motive element is also reflected, *inter alia*, in the phrase 'against the adversary'¹⁴ and in the manner the term 'attack' is used in the provisions of AP I that follow article 49. The motive element is likewise reflected in International Committee of the Red Cross (ICRC) drafts that preceded the AP I diplomatic conferences,¹⁵ which served as the

¹¹ Compare ICRC CIHL Study, *supra* note 4, Rule 38 (dealing with attacks) and Rule 40 (dealing with destruction outside of attack).

¹² DANISH MINISTRY OF DEFENCE, MILITARY MANUAL 290 (2016).

¹³ See, e.g., U.S. DOD LAW OF WAR MANUAL, *supra* note 5, at ¶ 5.2.2.1; Kalliopi Chainoglou, *Psychological Warfare*, MAX PLANCK ENCYCLOPAEDIAS INT'L L. ¶14 (2016), available at <https://opil.ouplaw.com/home/MPIL>.

¹⁴ Nobuo Hayashi, *Requirements of Military Necessity in International Humanitarian Law and International Criminal Law* 28 B.U. INT'L L.J. 39, 112 (2010).

¹⁵ ICRC, DRAFT RULES FOR THE LIMITATION OF THE DANGER INCURRED BY THE CIVILIAN POPULATION IN TIME OF WAR 44-45 (1956) (hereinafter ICRC, DRAFT RULES) (various references to a motivation of causing harm).

basis for defining ‘attack’ in article 49(1),¹⁶ as well as in common military practices and how they are legally analyzed, as will be detailed below.

15. The motive element is critical when distinguishing between ‘attacks’ and other harmful acts, including those governed by article 23(g) of the Hague Regulations and its corollary customary rule or the constant care obligation of article 57 of AP I. Accordingly, violent acts directed at harming the adversary (including the civilian population and civilian objects) through physical injury or destruction, are “attacks” within the meaning of IHL. Conversely, without this motive the act is not an ‘attack’. For example, providing air-delivered supplies such as food or medical equipment may inadvertently cause injury or damage if the air-delivered materiel lands on a person or structure, but such delivery would not be considered an attack. Other examples include maneuver damage to roads and fields; destruction of military equipment to prevent capture by the enemy; altering buildings or land to enhance tactical advantage; or dropping excess ordnance from aircraft in an open and unpopulated area – are not “attacks”.¹⁷ These military practices, albeit destructive and sometimes occurring in preparation for attacks, are not treated as ‘attacks’.
16. Importantly, however, acts that meet the two elements above are still not attacks if directed against persons or objects under the dominion or control of the belligerent. Accordingly, acts of violence against person or objects in the power of a belligerent, meaning the person or object is under the physical control, dominion, or restraint at the hands of the belligerent (sometimes characterized as ‘possession’ or ‘power’) are not attacks, but rather, are governed by other IHL rules.¹⁸ The power/possession/control over a person or an object

¹⁶ ICRC, CONFERENCE OF GOVERNMENT EXPERTS ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS GENEVA, 3 MAY-3 JUNE 1972 (SECOND SESSION): COMMENTARY – PART ONE 90 (1972) (“This text reproduces almost word for word Article 3 of the Draft Rules of 1956”); XIV OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS 44 (1978) (hereinafter XIV OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE).

¹⁷ See Noam Neuman, *Challenges in the Interpretation and Application of the Principle of Distinction during Ground Operations in Urban Areas*, 51 VAND. J. TRANSNAT’L L. 807, 809-810, 824 (2018); MICHAEL BOTHE ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICT 321 (1982) (stating that article 52 of AP I (which defines military objectives subject to attacks) “does not deal with unintentional or unavoidable but necessary destruction of civilian objects incidental to military operations such as destruction to delay pursuit, clearing fields of fire or maneuvering through an agricultural area by the Party in control of such objects.”); 2 LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE 413-414 (H. Lauterpacht ed., 7th ed. 1952); U.S. DoD LAW OF WAR MANUAL, *supra* note 5, ¶¶ 5.17.2.2 and 15.7.2.4; YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 288 (3rd ed. 2016).

¹⁸ ICRC, DRAFT RULES, *supra* note 15, at 44 (referring to ‘enemies’ or ‘property’ outside one’s ‘power’); ICRC, DRAFT ADDITIONAL PROTOCOLS TO THE GENEVA CONVENTIONS OF AUGUST 12, 1949: COMMENTARY 62 (1973) (draft article 48) (“... as the verbs ‘to attack or destroy’ indicate, this provision is addressed to the Party to the Conflict not in possession of the indispensable objects, which are therefore not in its control”); XIV OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 16, at 395 (Bindschedler-Robert) (ICRC representative stressing that “The words ‘to attack’ were not included in draft article 66 [dealing with objects indispensable to the survival of the civilian population] because one did not attack what was in one’s possession”).

discussed here must not be confused with control over a territory, which is a separate issue. Attacks may certainly take place in a territory under the attacker's control.

17. With respect to persons, acts of violence in violation of the IHL obligation to protect, such as murder, torture, or assault of those within the physical control of a military force, are not attacks in the sense of article 49(1) of AP I. With respect to objects, once a party has seized an object, even if its possession is temporary or tenuous, any further damage done by that party to the object would be evaluated under the “imperative necessity” standard of article 23(g) of the Hague Regulations and its corollary customary rule and the constant care obligation noted above, rather than IHL targeting rules. For example, if a party seizes a building, it is not free to continue damaging the building or its contents except as may be permitted by article 23(g) of the Hague Regulations and its corollary customary rule, and the constant care obligation found in AP I art. 57(1).
18. However, it is erroneous to treat a lack of control as dispositive in assessing whether an act of violence qualifies as an attack. Attacks must always meet the constitutive elements explained above. Accordingly, an act that caused destruction to an object not within the power of a belligerent is not *ipso facto* an attack. Routine military practices conducted from afar and which may result in damage to property, such as the firing of illumination or smoke shells to the open air, calibration of indirect fire weapons outside of populated areas, or the spreading of defoliants consistent with IHL and applicable treaties,¹⁹ do not constitute ‘attacks’ but are nonetheless subject to other IHL rules such as article 23(g) of the Hague Regulations and its corollary customary rule as well as the constant care obligation mentioned above. That damage done to objects outside one’s physical control are not necessarily ‘attacks’ is also supported by statements of ICRC delegates in the Diplomatic Conference resulting in the adoption of AP I, who – while referring to directing ‘attacks’ as limited to persons or objects outside the belligerent’s possession – referred to ‘destruction’ actions both within and beyond the belligerent’s possession.²⁰

‘Cluster b’ questions

19. War crimes under the Statute are to be interpreted in full consistency with IHL.²¹ Thus, the term ‘attack’ in article 8(2)(e)(iv) must be interpreted to be synonymous with its well-

¹⁹ XIV OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 16, at 136.

²⁰ See, for example, XIV OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE, *supra* note 16, at 136 (“For example, the use of defoliants was an act of destruction but might not perhaps be considered an attack. The article did not concern the destruction by a party to the conflict of the objects in its possession...”).

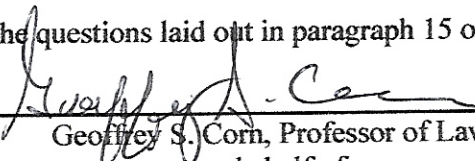
²¹ Rome Statute, *supra* note 6, arts. 8(2)(e) and 21(1)(b).

established meaning under IHL. Accordingly, the term 'attack' in this article does not hold a special meaning that is different than its meaning under IHL. Such an interpretation is over inclusive and would require application of IHL targeting rules to numerous activities that are regulated by other provisions of IHL and regularly practiced by militaries. This would distort the manner in which property is protected under IHL and consequently under the Statute. While the language and context of article 8(2)(e)(iv) clearly indicate that it is situated within the context of IHL targeting rules, other provisions in the Statute address aspects of the protection of property under IHL, such as arts. 8(2)(e)(v) and 8(2)(e)(xii), to which IHL targeting rules do not apply.

20. 'Pillage' is a different concept, factually and legally, than that of 'attack', in both IHL and ICL. It is addressed specifically and separately in arts. 8(2)(b)(xvi) and (e)(v) of the Statute. As provided in the Elements of Crimes, it must *inter alia* involve the appropriation of property for private or personal use. It does not involve, as such, physical damage to an object, and not motivated by a desire to harm the adversary – as required to qualify as an 'attack'. Accordingly, pillage is different from an attack.
21. As regards 'destruction', as explained, the legal rules pertaining to unlawful destruction of property are different than those applicable to 'attacks' in various respects, including in respect to the motive for the act. Accordingly, destruction of property is addressed specifically and separately in the Statute in arts. 8(2)(a)(iv), 8(2)(b)(xiii) and 8(2)(e)(xii).
22. Whether acts conducted in a *ratissage* operation conducted shortly after the takeover of a town constitute 'attacks' depends on the circumstances. For example, the execution by soldiers of individuals in their custody, while certainly amounting to IHL violations and to war crimes, would not qualify as 'attacks'. Conversely, if hostilities between belligerent parties are ongoing in the town, the exchange of fire between the combatants would certainly qualify as 'attacks'.

III. Conclusion

The amici curiae hope that the Appeals Chamber will find the above observations of assistance in addressing the questions laid out in paragraph 15 of its Order of 24 July 2020.



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 on behalf of

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Dated [18 September 2020], at Houston, Texas, United States of America