

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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THE APPEALS CHAMBER

Before: Judge Howard Morrison, Presiding Judge
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

**Amicus Curiae observations pursuant to rule 103 of the Rules of Procedure and
Evidence**

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

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I. INTRODUCTION AND SUMMARY OF OBSERVATIONS

1. Following the application with a request to submit *amici curiae* observations, pursuant to the Order of the Appeals Chamber I dated 24 July 2020¹ and its subsequent acceptance by the Chamber,² this *amicus curiae* will address the question of the meaning of the term attack and associate issues set forth in paragraphs 15 of the said Order.
2. Key observations in this submission are threefold. Firstly, it is respectfully submitted that term attack does not have special meanings in relation to specific objects. In fact, the term attack has only one meaning for the purposes of international humanitarian law (IHL). This meaning is substantively the same as the one in article 8(2)(e)(iv) of Rome Statute of International Criminal Court.³
3. Second, destruction may occur from the operations other than attack defined in article 49 of 1977 Additional Protocol I to 1949 Geneva Conventions (API). Key difference is that attacks are *per se* intended at causing harm to the adversary, while other acts involving damage and destruction are not necessarily so intended. These operations will be lawful if they satisfy relevant legal requirement of imperative military necessity, which is different to the regulations pertaining to attack. Such operations may include *ratissage* operations depending on the circumstances.
4. Third, it is submitted that characterisation of pillage and similar prohibited acts as an attack in the line with article 8(2)(e)(iv) of Rome Statute of International Criminal Court would be factually and legally incorrect. Pillage, as espoused below, is not compatible with the precepts of notion of attack, whether in this provision or under international humanitarian law.
5. Consequently, three substantive areas will be analysed before arriving at findings in this submission. First, a notion of attack and other related terms in prosecution of the hostilities will be discussed. Second, destruction of the property as a violent outcome of attack and how it relates to military necessity will be considered. Third, a crime of pillage in the context of attack will be analysed.

II. THE ATTACK AND RELATED TERMS

6. Legal framework applicable to armed conflicts contains a variety of terms that refer to various aspects of military behaviour or conduct during armed conflicts. Often these terms appear to be borrowed from the military doctrine parlance and may convey a slightly different meaning compared to their equivalents in military doctrine.
7. Fundamental expression of the principle of distinction, for instance, refers to term 'military operations'.⁴ Combatants are obliged to distinguish themselves during 'military

¹ 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-01/04-02/06-2554

² Agnieszka Jachec- Neale, Request by Dr Agnieszka Jachec-Neale for leave to submit observation on the merits of the legal questions presented in '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-01/04-02/06-2554), 14 August 2020, ICC-01/04-02/06-2563

³ See articles 8(2)(e) ("within the established framework of international law") and 21(2)(b) of the Rome Statute; *Prosecutor v. Ntaganda*, Judgment on the appeal of Mr Ntaganda against the "Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9", ICC-01/04-02/06 OA5, para. 53, 15 June 2017. The meaning of 'attack' in the context of crimes against humanity enshrined in Article 7 of Rome Statute of International Criminal Court will be different but this will not be discussed as a part of this submission.

⁴ Art 48 of Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I), 8 June 1977, 1125 UNTS 3 ("AP I").

engagement', whilst civilians may take part in 'hostilities'.⁵ Some terms denominate specific type of military action such as 'bombardment' or 'assault', notions originating in Hague Regulations 1907, firmly established to be a customary nature.⁶

8. Term 'hostilities' denominates hostile or threatening activity against the adversary in all forms so long they relate to procession of armed conflict. In the context of armed conflicts 'hostilities' comprise of acts of violence as well as non-violent acts directly connected to undertaking of military operations. Non-conflict related acts of violence are excluded from the scope of 'hostilities'.⁷
9. According to travaux préparatoires of 1977 Additional Protocol I to 1949 Geneva Conventions that 'military operations' were defined as a 'movement of attack or defence by armed forces'.⁸ This implies that 'military operations' are operational-level concept that encompasses attacks as well as other types of military actions such as manouver, securing the area, intelligence gathering that support or enable prosecution of specific offensive or defensive movements in hostilities. The term is narrower than it may seem as it does not include issues such as general recruitment of or training of armed forces. Incursions or raids will be regarded as military operations undertaken as a part of hostilities, however they may not necessarily constitute an attack given its specific denomination and regulation.
10. The term 'attack' refers to a specific category of acts of hostility and as such the term is most certainly narrower than a notion of 'hostilities'. Following its inclusion in 1977 Additional Protocol the term 'attack' became a legal and neutral term of art complete with a definition elaborated in its article 49. Definition of attack stipulates that 'attack' comprises acts of violence against adversary whether in offence or in defence.⁹ Consequently, the law itself requires that attack must occur 'against the adversary'; to suggest otherwise simply offers incorrect interpretation of otherwise undisputed, firmly established and commonly applied formula in IHL.¹⁰
11. Notion of attack refers to a specific type of military operation, which whilst may not always need to employ actual kinetic force (as a debate in area of cyber warfare exemplified), it is expected to result in the violent consequences to the objects of attack to constitute attack.¹¹ These consequences will necessarily include physical damage or destruction to objects, or injury or death to individuals.¹² Merely capturing, seizing or even neutralizing an object will not suffice to be regarded as 'attack' even if such actions interfere with its functionality, unless it involves such destruction or damage. In this regard, it should be highlighted that both terms 'neutralization' and 'capture' which are used in definition of military objectives in article 52(2) of 1977 Additional Protocol I to

⁵ Art 44 of API

⁶ Art 25,26,27, 28 of Convention No. 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, 36 Stat 2277 TS 539, ("Hague Regulations")

⁷ Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, CUP 2nd Ed, 2010, p.2

⁸ CDDH/III/SR.2 of 2 March 1974, XIV, para 8,14, discussed in more detail in A. Jachec- Neale, *The Concept of Military Objectives in International Law and Targeting Practice*, Routledge, 2015, pp.85-88

⁹ Art 49.1 API

¹⁰ A contrario to Prosecution Appeal Brief, ICC-01/04-02/06-2432,, paras.21-64, 114-126, 131 et seqq.

¹¹ Debate surrounding the notion of attack in cyber or outer space and its focus on functional damage is irrelevant to this case as all the facts entail operations on land only.

¹² Yoram Dinstein and Arne Willy Dahl (eds), *Oslo Manual on Select Topics of the Law of Armed Conflict: Rules and Commentary*, Springer, 2020, p. 22.

1949 Geneva Conventions refer to intended effects that attack may have on the military objective. Their inclusion in this definition was not aimed to frame or define of what the attack is. Indeed, article 52(2) can only be triggered once an act is defined as an attack, and not the other way round. Drawing on definition of military objectives, to interpret the term of attack is thus unsound.¹³

12. In order to undertake an attack, one's forces are required to comply with number of specific norms, comprising both treaty and customary rules, commonly referred to as targeting legal framework or targeting law. Accordingly, and in line with a principle of distinction all parties to the conflicts, in any type of conflict, and at all times must distinguish between civilian population and those engaged in fighting and between civilian objects and military objectives. This is further strengthened by the rules operationalising in targeting framework principle of proportionality as well as precautions in attack.¹⁴
13. Noteworthy there is no evidence to support a claim that a different meaning is attached to a notion of attack depending on the category of the protected objects against which attack may be (unlawfully) launched.¹⁵ However protection of the objects during hostilities does depend on the circumstances in which the objects lose their immunity from an attack. This varies depending on the specificities of their protective regulatory framework as discussed briefly next.
14. There are essentially two levels of protection against the effects of hostilities afforded to the objects in armed conflicts. The first one is a general protection afforded to broad category of civilian objects, which may lose their immunity from attack in various circumstances, though their use or abuse by an adversary will be the most common reason for loss of immunity. In addition to this basic protection some specific civilian objects receive additional special protection, where the loss of their immunity from the attack tends to more stringently regulated. These objects include among others, medical units, cultural property and places of worship. Noteworthy church will normally be classed as a place of worship in the sense of article 53 API unless it satisfies specific requirements for its cultural property espoused in 1954 Hague Convention for the Protection of Cultural Property.¹⁶
15. Specific legal framework related to the protected objects may and often does specify their protection outside of the hostilities and specifically aside of the immunity from attack. Detailed requirements of standard of these aspects of protection will vary from object to object. It is beyond a scope of this submission to reflect on these.

III. DESTRUCTION OF PROPERTY

16. IHL does not define term destruction even though this term is commonly used in both treaty and customary law for centuries. Destruction is not a legal term of art, but a more operational one. It is submitted that destruction, in common parlance, could be defined as involving an act of violence that renders an object no longer usable or unable to be repaired in order to restore its primary function. Destruction would then involve a permanent and extensive damage of the object. Destruction is not thought to involve

¹³ See discussion Prosecution Appeal Brief, supra n 11, paras 131-133 specifically.

¹⁴ Articles 48, 50, 52-57 of API and their equivalent customary rules.

¹⁵ See Prosecution Appeal Brief, supra n 11 throughout but specifically paras. 114-126.

¹⁶ Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, 249 UNTS 240; Protocol for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, 249 UNTS 358 ("First Protocol"); Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 26 March 1999, 2253 UNTS 212 ("Second Protocol"),

seizing control of the objects, capture or naturalization of the object, though these can be effects of the attacks too.¹⁷

17. Damage or destruction may result from attacks but it can equally result from military operations not falling under this category. Through an attack, the attacker intends *per se* to harm to the adversary by way of applying physically destructive or damaging effect to objects or persons.¹⁸ 'Adversary' for that matter covers both enemy personnel and military objectives, as well as civilians and civilian objects (the latter's attack would be unlawful). Other military operations may not involve such intention, yet may still result in damage or destruction of the objects. For example, an act of violence against a house can be regarded an attack when an attacker specifically wants to destroy the building because it offers a cover for adversary troops against attacker's sniper position. If, however, military forces needed to move their equipment including wide tanks through a very narrow lane and they would damage the house located on such lane than the resulting destruction is not actually an aim behind the operation but more instrumental consequence of it.¹⁹ Same as with a scenario where ground forces need to demolish or modify a house in order to prepare a line of fortifications.²⁰ Such operations, specifically involving destruction or damage are subject to distinct legal rules.
18. International war crimes court in the *Hostage* case declared that there must be some 'reasonable connection' between the destruction of the property and the overcoming of the enemy forces.²¹ Destruction without this connection would be deemed a violation of international law. In other words, the court reiterated the dictum found in article 23(g) of Hague Regulations, which prohibits destruction or seizure of enemy property unless 'imperatively demanded by the necessities of war'. The court stressed that even normally protected objects such as 'private homes and churches' may be damaged if it is necessary for military operations.²² Thus, ground operations for instance in urban warfare are likely to involve damaging entry point to the houses in order to clear or secure area or to acquisition the facility as shelter for the troops. *Ratissage* operations may well fall under this category as much as they may be regarded as attack depending on the aim behind such operations and the factual circumstances.
19. It must be stressed however that destruction or damage to the protected objected in such operations can only be justified if it satisfies the requirement of 'imperative military necessity'.²³ Consequently, destruction of the property of the adversary will be wanton if it is not justified by military necessity at any point.²⁴ Further specific provisions relating to regulation of the protected objects, such as in respect to cultural property, may offer more detailed regulation of what this entails.

¹⁷ See for more discussion above para.11 and in Jachec-Neale, *supra* n 4, pp.130-131

¹⁸ N. Hayashi, *Requirements of Military Necessity in International Humanitarian Law and International Criminal Law* (2010) 28 BU Intl LJ 39, 112.

¹⁹ United States Department of Defense, *Law of War Manual*, 3rd Ed, December 2016, Section 5.17.2.4. See also sections 5.17.2.2-5.17.2.3.

²⁰ Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, CUP 3rd Ed, 2016, p.288.

²¹ *Hostage Case, United States v List (Wilhelm) and ors*, Trial Judgment, Case No 7, (1948), at 1254

²² *Ibidem*.

²³ ICRC, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW – VOLUME I: RULES* (2005), at 175-177.

²⁴ Articles 8(2)(a)(vi), 8(2)(b)(xiii) and 8(2)(e)(xii) of Rome Statute of International Criminal Court; also confirmed in *The Prosecutor v S Galic*, Judgement and Opinion of 5 December 2003, Trial Chamber, ICTY, No.IT-98-29-T; *The Prosecutor v P. Strugar*, Judgement of 31 January 2005, Trial Chamber, ICTY No. IT-01-42-T.

20. This must be distinguished from the situations when armed forces or organised armed groups embark on unlawful appropriation of the property, which may or may not include violent acts of destruction. This will be analysed next.

IV. PILLAGE

21. Pillage, interchangeably referred to as plunder, looting or spoliation is understood as unlawful appropriation of private or public property.²⁵ Pillage is a prohibited method of warfare; one which is recognised as a distinct crime in the Statute of this Court.²⁶ Pillage, under Rome Statute of this Court, indicates that it entails specific factual circumstances suggesting that appropriation must be undertaken for private or personal use to amount to pillage.²⁷ However, it has to be observed that, unlike private use, sometimes personal use may be justified by military necessity if connected to the conduct of military operations.
22. In response to this Chamber's inquiry on the relationship between pillage and an attack one can most certainly ascertain that pillage can occur during a military operation involving attacks as opportune or intended practice especially during ground operations. This has been well recognised by this Court.²⁸
23. As mentioned before, the property can only be lawfully seized or destroyed if it is 'imperatively demanded by the necessities of war' or if it considered booty of war, unless such property is an object of an attack within the full meaning of the latter term and subject to associated norms.
24. Can pillage be considered a type of attack? First, it should be recalled that pillage requires appropriation of the property. Not all acts of appropriation will necessarily engage acts of violence and those would certainly not have been considered an attack. Second, definition of attack requires intention of harming enemy, where intent behind pillage is an appropriation for private use. Consequently, it is submitted to that it would legally and factually incorrect to consider conduct satisfying requirements of the crime of pillage as an attack under IHL as well as international criminal law.
25. If the pillage cannot be viewed as attack then consideration of whether a pillage can be regarded a crime of intentional attack against civilian targets or otherwise specially protected objects is surplus, separately of the circumstances in which such objects may lose its immunity from the attacks in the context of targeting operations.

IV. CONCLUSION

26. To conclude, it has been argued in this submission that the attack is a very specific legal term of art that is regulated by a dedicated set of rules both in treaty and customary law. As discussed attacks differ to those operations which are not intended *per se* to harm to the adversary, even when they result in damage or destruction of the objects or the property involved in these operations. These are governed by other IHL rules.
27. Attack also does not encompass acts included in a crime of pillage, which specifically requires unlawful appropriation of the property.

²⁵ Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, CUP 3rd Ed, 2016, pp. 281-289.

²⁶ Articles 8(2)(b)(xvi) and 8(2)(e)(v) of Rome Statute of International Criminal Court

²⁷ ICC Elements of the Crimes, Pillage as a war crime (ICC Statute, Articles 8(2)(b)(xvi) and (e)(v))

²⁸ Rule 52, *ICRC, Customary International Humanitarian Law*, Commentary on practice, available here https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule52

Respectfully submitted:



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Dated this 18 September 2020

At Exeter, United Kingdom

At [place, country]