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**International
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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

**Observations by ALMA – Association for the Promotion of IHL in the Case of The
Prosecutor v. Bosco Ntaganda**

Source: ALMA - Association for the Promotion of International Humanitarian Law

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

The Office of the Prosecutor

Ms Fatou Bensouda, Prosecutor

Ms Helen Brady

Counsel for the Defence

Mr Stéphane Bourgon

Ms Kate Gibson

Legal Representatives of the Victims

Ms Sarah Pellet

Mr Dmytro Suprun

Amici Curiae

Mr Roger O’Keefe

Ms Yolanda Gamarra

University of Pretoria

Mr Michael A. Newton

The Antiquities Coalition, Blue Shield

International and Genocide Watch

ALMA - Association for the Promotion of
International Humanitarian Law

Ms Agnieszka Jachec-Neale

Mr Pearce Clancy and Mr Michael Kearney of
Al-Haq

Ms Polina Levina and Ms Kaveri Vaid

Public International Law & Policy Group

Ms Peta-Louise Bagott

Mr Geoffrey S. Corn, Mr Richard Jackson, Mr
Chris Jenks, Mr Eric Talbot Jensen and Mr
James A. Schoettler, Jr.

REGISTRY

Registrar

M. Peter Lewis

Amicus Brief on the Merits of the Legal Questions Presented in Ntaganda Appeal

1. The present *amicus* brief is respectfully submitted to the Court by ALMA – Association for the Promotion of International Humanitarian Law (‘ALMA’),¹ pursuant to the Chamber’s “Decision on the requests for leave to file observations pursuant to rule 103 of the Rules of Procedure and Evidence”, issued on 24 August 2020.²
2. The *amicus* brief will provide observations on the merits of the legal questions presented in paragraph 15 of the order inviting expressions of interest:³
 - (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’?**
 - (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?**

Observations on Cluster A

3. The definition of ‘attack’ under international humanitarian law (‘IHL’) is codified in article 49 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts 1977 (‘API’). According to this definition, which reflects also customary IHL and applicable to non-international armed conflicts, “‘Attacks’ means acts of violence against the adversary, whether in offence or in defence”.
4. The first element of the definition of an attack is ‘*violence against the adversary*’. Regardless of the type of means used to commit the attack (whether it is an explosive munition, a chemical weapon or cyber⁴), some kinetic effect, i.e. damage, or the potential

¹ ALMA – Association for the Promotion of International Humanitarian Law (R.A. 580524882) is a registered non-profit, independent association under Israeli law. More information about ALMA, its activities, and members is available on its website www.alma-ihl.org.

² [ICC-01/04-02/06-2569](https://www.iccnw.org/decisions/ICC-01/04-02/06-2569)

³ [ICC-01/04-02/06-2554](https://www.iccnw.org/decisions/ICC-01/04-02/06-2554).

⁴ See for example the TALINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE, 2012, Rule 30, p. 106 (Michael .N. Schmitt ed.).

of it, is required for the act to qualify as violence. Such physical violence⁵ has to be directed against the adversary with the intent or expectation to cause such damage. This means that non-violent measures, including psychological warfare, do not qualify as an attack.⁶ The term ‘adversary’ includes combatants, civilians, military objectives or civilian objects.

5. Importantly, however, not every type of damage automatically constitutes an attack. Article 49(1) must be read in line with article 23(g) of the 1907 Hague Regulations which prohibits *“To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war”*.⁷ Some destructive acts can be justified by the necessities of war, but do not constitute an attack and be a mere part of a military maneuver movement or preparations for an attack.⁸ A simple example would be the transfer of a tank, which due to its measures, weight and speed causes damage to infrastructure.⁹ However, such damage cannot be considered as an attack against the adversary. A higher threshold of violence that still does not pass the ‘attack’ bar, is the necessity to destroy certain houses, remove trees or harm parking cars in the course of the movement of such a tank, or the removal (i.e. destruction) of structures that created an impediment to setting up a proper defence, because they obstruct a clear line of sight to the direction the opponent will be approaching from.
6. The situation becomes more complicated when, for example, an infantry unit is required to advance within an urban area, and do so while walking through civilian residential area, and by doing so causing damage to the uninvolved civilian property. If we consider the damage caused by the combatants as an attack, then the destruction of the civilian property must be considered as collateral damage under the proportionality equation. However, such analysis would lead to impractical and unreasonable interpretation of military advancement. Therefore, in order to be considered as an attack, the violence must be conducted *against* the adversary. It should be noted, that causing damage to civilian property due to the concern that adversary forces are hiding behind it, is an act against the adversary and therefore qualified to be considered as an attack. This element on its own leaves a significant grey area, which can be resolved and completed by the second element of the definition.

⁵ For the requirement of the violence to be ‘physical’ or have ‘physical consequences’, see also Bothe, Partsch and Solf (1982), p. 289; and the ICRC commentary to AP I (Sandoz, Swinarski and Zimmermann) (1987), p. 603

⁶ See for example, Yoram Dinstein, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* (3rd edition, 2016) p. 3.

⁷ 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 (“1907 Hague Regulations”), article 23(g).

⁸ Yoram Dinstein & Arne Willy Dahl, [OSLO MANUAL ON SELECT TOPICS OF THE LAW OF ARMED CONFLICT: RULES AND COMMENTARY](#), Rule 97, pp. 93-94.

⁹ *Id.*

7. The second element of ‘attack’ (“*whether in offence or in defence*”) refers to the nexus to the conflict, i.e. the act must be conducted as part and within the context of the conduct of hostilities, whether for defence or offence. Therefore, the same conduct by the same person or group might meet the requirement for violence, but can be considered to be either within or outside the scope of an attack (belligerent nexus). The phrase ‘military operation’ is wider than ‘attack’ under IHL. While every attack is part of a military operation, a military operation as a whole is not ‘an attack’ for the purposes of article 49 API. That these two concepts are not synonymous is shown by the fact that various provisions of API refer to attacks or military operations.¹⁰
8. The definition of ‘attack’ has a significant impact on the reading of protection of civilian objects under article 52 of API. Article 52 stipulates that “*civilian objects shall not be the object of attack or of reprisals*”. However, this provision does not prohibit acts which cause damage to civilian objects as a result of military acts that do not constitute attacks. In such a scenario, the protection derives from article 23(g) of the 1907 Hague Regulations, which prohibits damage to the civilian population that is not “*imperatively demanded by the necessities of war*”. In other words, unless military necessity justifies the act, a warring party may not cause damage to civilian objects as part of conduct that does not meet the attack threshold.
9. The same analysis of ‘attack’ is applicable in the context of cultural property and hospitals. It should be noted, however, that while both hospitals and cultural property are entitled to special protections under IHL, the rationale behind that special protection is significantly different. As stipulates by the renowned IHL expert Prof. Sassòli:¹¹

As far as tangible components of cultural heritage in the power of a party are concerned, IHL affords, as always, the best protection in occupied territory and less protection in NIACs. Norm prohibiting the destruction of such cultural property through demolition, dismantlement, or abandonment by the party in whose power it is must be distinguished from the rules prohibit such destruction by an attack in the conduct of hostilities because, in the former case, such property cannot possibly constitute a military objective for the

¹⁰ See articles 43(3), 51(7) and 57(1) and (2) of API.

¹¹ It is worth noting that professor Sassòli serves as a special advisor on IHL to the ICC Office of the Prosecutor.

*destroying party. As this party has control, the object can never contribute to its enemy's military action.*¹²

10. Although the concept of 'conduct of hostilities', does not appear in codified IHL, it is vastly considered as acts taking place between the beginning of the armed conflict, and until the general close of military operations. However, not all conduct by a belligerent during an armed conflict qualifies as 'conduct of hostilities', as evidenced by the separate chapters of the relevant IHL treaties (i.e., the 1907 Hague Regulations and API), and the IHL provisions regulating the conduct of hostilities thus only concern part of the actions of a belligerent. In accordance with the 'belligerent nexus' element an 'attack' can only exist within the conduct of hostilities. 'Combat action' refers to a host of activities against the adversary, either in offence or defence, and includes the narrower concept of 'attacks'. However, the difference between 'combat action' and 'attack' is that a 'combat action' is a more inclusive term which includes, for example, acts that fall under article 23(g) of the 1907 Hague Regulations, but do not constitute 'attacks'. Such actions can include an act that does not necessarily require the use of violence, such as the deployment of forces or setting artillery battery in a strategic location. The term 'combat action' does not usually include acts that are taken within the framework of 'conduct of hostilities' but lack 'belligerent nexus', such as acts of pillage.
11. The term 'act of hostility' appears in article 53 of API. This article refers to the prohibition of acts of hostility directed against, *inter alia*, cultural objects and places of worship. Art. 53 is wider than the definition of attack and includes non-violent acts that may not cause any damage.¹³ However, much like an attack, an act of hostility has to take place within the context of the conduct of hostilities. Therefore, a destruction of a place of worship within the context of the conduct of hostilities can qualify as an 'act of hostility'. However, if conducted within the framework of an armed conflict (and therefore, IHL being the applicable legal framework) but outside of the conduct of hostilities, the act might constitute pillage or vandalism, but not an 'act of hostility'. It would still be prohibited under IHL, but on the basis of different rules. Rules that have been criminalized by other war crime.

¹² Marco Sassòli, INTERNATIONAL HUMANITARIAN LAW: RULES, CONTROVERSIES, AND SOLUTIONS TO PROBLEMS ARISING IN WARFARE, p. 567.

¹³ See Commentary on the additional protocols: of 8 June 1977 to the Geneva Conventions of 12 August 1949 (1987), para. 2070.

Observations on Cluster B

12. The term ‘attack’ under article 8(2)(e)(iv) refers to the definition under IHL. Therefore, the act must take place within the context of the conduct of hostilities, include violence and be carried out either in offence or in defence. However, the definition does not include acts that cause damage to civilian objects that are not against the adversary, or without the necessary belligerent nexus. Such actions are covered by article 8(2)(e)(xii) of the Statute.

‘Ratissage operations’

13. A ‘*ratissage* operation’ is not a term of art in IHL. If it constitutes the same as a so-called ‘mob-up operation’, which forms part of the military operation to seize control over a certain location and may include the ensuring that any remaining enemy soldiers are disarmed and taken prisoner and weaponry of the opponent is seized, it might be considered as an integral part of the conduct of hostilities. Acts conducted in the course of such operation and qualify as attacks, are covered by article 8(2)(e)(iv), regardless of the level of control that the party to the conflict has over the town. However, in line with the differentiation that was mentioned above, between ‘combat actions’ and ‘attacks’, some acts might be incidental to the natural outcome of the movement of the forces or of military maneuvers. If a ‘*ratissage* operation’ is merely a phrase to denote conduct that does not serve a military purpose and solely consists of prohibited acts against protected persons or objects, after having taken over a certain location, it is neither part of the preceding military operation nor combat action. Such prohibited conduct, such as the killing or raping of civilians that have not fled, or looting of property left behind, therefore does not constitute an attack under IHL. As such, this type of conduct, while prohibited, does not fall under article 8(2)(e)(iv), but is criminalized as different war crimes. (e.g. the war crimes of murder, rape and pillage).

Pillage and destruction

14. The definition of ‘attack’ under IHL does not extend to acts of pillaging and destruction. Consequently, they are outside of the scope of article 8(2)(e)(iv) prohibition. The main reason for not being included is that these actions lack one of the fundamental elements - such actions are not conducted for either defence or offence.

15. In order for pillage and destruction be covered under article 8(2)(e)(iv) there are two main elements that must be fulfilled: first, the acts must constitute an ‘attack’ under IHL, and second the acts must be directed against the relevant facilities. Therefore, if a relevant act of seizure or damage does not constitute an attack, for example because it is not directed against the adversary, article 8(2)(e)(iv) is not applicable. Moreover, direct attacks against such facilities are not prohibited if they constitute military objectives in accordance with article 52(2) of API, and such attacks also falls outside the scope of article 8(2)(e)(iv).

Control

16. As to the level of control that the adversary has over a town, or the time passed since the takeover of a town, it was noted above that this is not directly related to the question whether article 8(2)(e)(iv) applies to acts conducted in the course of a ‘*ratissage* operation’. This is an element that is factored in the analysis of an attack. ‘Attack’ in the sense of article 8(2)(e)(iv) is ought to be interpreted consistently throughout the Statute (i.e. similarly to article 8(2)(b)(i), (ii), and 8(2)(e)(i), etc.). Therefore, although the actual control is not a direct element, it does have an important affect over the application of the relevant clause.¹⁴

17. Lastly, it is important to note the above analysis refers to the questions in the Appeals Chamber’s invitation and only therefore refers to pillage and destruction. As set out in the present brief, these two issues in fact need not be discussed when addressing what amounts to an ‘attack’ under IHL. The Statute explicitly addresses to the prohibitions against pillage and destruction under articles 8(2)(e)(v), and 8(2)(e)(xii) respectively, and there appears to be no valid reason to try and bring such prohibited conduct under a different war crime.

ALMA thanks the Appeals Chamber for the opportunity to make these written observations.


 Ido Rosenzweig

Adv. Ido Rosenzweig, Chairperson

on behalf of

ALMA - Association for the Promotion of International Humanitarian Law (R.A.)

Dated this 18 September 2020

At Petach-Tikva, Israel

¹⁴ Rogier Bartels, [Denying Humanitarian Access as an International Crime in Times of Non-International Armed Conflict: The Challenges to Prosecute and Some Proposals for the Future](#), ILR 48(3) p. 300 (2015).