

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-02/06 A2

Date: 14 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 File Submissions Pursuant to Rule 103

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

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Ms Sarah Pellet

REGISTRY

Registrar

M. Peter Lewis

**Request for Leave to Submit Observations on the Merits of the Legal Questions
Presented in Ntaganda Appeal**

1. This is a request by ALMA – Association for the Promotion of International Humanitarian Law (R.A. 580524882) (hereinafter: ‘ALMA’) 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- 02/06-2554), for leave to submit observations on the merits of the legal questions presented in paragraph 15 of that order:
 - (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?**

Particular Expertise of ALMA in the Legal Questions Presented

2. ALMA is a registered non-profit, independent association under Israeli law. ALMA was established in March 2010 with the agenda of promoting the knowledge, discussion and understanding of International Humanitarian Law (‘IHL’) in Israel and internationally. Over the last decade ALMA been instrumental in the dissemination of IHL in Israel through a variety of educational projects. Among these projects are academic events, courses, the translation of the Rome Statute into the Hebrew language, and conducting training sessions and workshop for students and practitioners. During this last decade, ALMA has placed itself as a key actor in the field of IHL with national and international outreach. ALMA’s activities have also been documented in an article published by the International Review of the Red Cross.¹
3. The founders and the current members of ALMA are experts in the field of international law, IHL and international criminal law in different stages in their career and a variety of

¹ Ido Rosenzweig, Promoting respect for IHL by NGOs: The case of ALMA – Association for the Promotion of IHL, IRRC (2014), 96 (895/896), 1029–1042, available at: https://international-review.icrc.org/sites/default/files/irrc-895_896-rosenzweig.pdf

expertise. Members of ALMA have independently submitted amicus briefs to international criminal tribunals. Further information about the identity of ALMA members and their expertise can be found on ALMA's website (www.alma-ihl.org/who-we-are).

Summary of Observations

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'?

4. The definition of 'attack' under IHL is codified in article 49 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 the 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".
5. Two important elements of the definition of an attack are 'violence' and 'belligerent nexus'. Although the definition of attacks has developed to include cyber operations, some kinetic effect is still required for the act to qualify as violence. The second element refers to the nexus to the conflict, i.e. as part 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 IHL (belligerent nexus).
6. 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.
7. Although the concept of 'conduct of hostilities', does not appear in codified IHL, it is vastly considered as the framework from the beginning of the armed conflict, and until the general close of military operations. An 'attack' is a term that, under IHL, 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 concept of 'attacks'. The difference between 'combat action' and 'attack' therefore is that 'attack', a 'combat action' does not necessarily

require the use of violence and can include, but not limited to the deployment of forces or setting artillery battery in a strategic location.

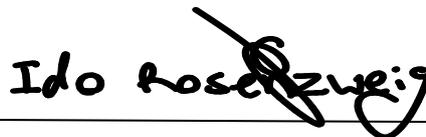
8. The definition of ‘act of hostility’ appears in article 53 of API. This article refers to the prohibition of acts of hostility directed against, *inter alia*, cultural objects and places of worship, is also wider than the definition of attack and includes non-violent acts that may not cause any damage.² 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.

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?

9. The term ‘attack’ under article 8(2)(e)(iv) refers to the definition under IHL, i.e. acts of violence against the adversary, whether in offence or in defence (belligerent nexus). 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.
10. A *ratissage* operation might be considered as an integral part of the conduct of hostilities, and therefore, acts conducted in the course of such operation are covered by article 8(2)(e)(iv), regardless of the level of control that the level of control that the party to the conflict has over the town.
11. 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. Having said that, the Rome Statute addresses these conducts specifically in its prohibition against pillage under article 8(2)(e)(v), and destruction under article 8(2)(e)(xii).

² See Commentary on the additional protocols: of 8 June 1977 to the Geneva Conventions of 12 August 1949 (1987), para. 2070.

12. 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 designated facilities.
13. Lastly, it is important to note that in accordance with article 8(2)(e)(iv) direct attacks against such facilities are not prohibited if they constitute military objectives. Therefore, the respective facility meets the IHL tests of a military objective, they are not protected from direct attack.

A handwritten signature in black ink that reads "Ido Rosenzweig". The signature is written in a cursive style and is positioned above a horizontal line.

Adv. Ido Rosenzweig, Chairperson

on behalf of

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

Dated this 14 August 2020

At Petach-Tikva, Israel