

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01-04-2/06 A2

Date: 14 August 2020

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

**REQUEST BY DR AGNIESZKA JACHEC-NEALE FOR LEAVE TO SUBMIT
OBSERVATIONS 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)**

Source: Dr Agnieszka Jachec-Neale

Lecturer in Law, University of Exeter

a.jachec-neale@exeter.ac.uk

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

The Office of the Prosecutor

Ms Fatou Bensouda, The Prosecutor
Ms Helen Brady

Counsel for the Defence

Mr Stéphane Bourgon
Ms Kate Gibson

Legal Representatives of the Victims

Ms Sarah Pellet

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

M. Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. The Applicant requests leave to submit *amici curiae* observations, pursuant to the Order of the Appeals Chamber I dated 24 July 2020.
2. Pursuant to rule 103 of the Rules of Procedure and Evidence, the Applicant requests leave to submit observations on the question of the meaning of the term attack and associate issue set forth in paragraphs 15 of the said Order.

II. THE APPLICANT, THEIR EXPERTISE AND THE INTEREST IN CASE

3. Dr Jachec-Neale is an expert researcher and lecturer with practical insight into how international law is applied in during armed conflict and in transitional environments. Dr Jachec-Neale has over five years' unique experience serving throughout the Kosovo crisis and in post-war Croatia with the Organization for Security and Cooperation in Europe (OSCE); subsequently at the British Institute of International and Comparative Law as Associated Fellow in the Royal Institute of International Affairs (Chatham House) where she worked on research specialising in the laws of armed conflict. She currently holds a position of President of the International Humanitarian Law Committee and sits on the Board of Directors of International Society of Military Law and Laws of War.
4. Dr Jachec-Neale main research interests include the targeting processes in armed conflicts, specifically with regards to the notion of lawful targets and protected objects. Her doctoral thesis was published by Routledge in 2015, when it became the first and - to date - only monograph dedicated to the notion of 'military objectives', which defines lawful targets during hostilities in the context of the Law of Armed Conflicts. Apart from a comprehensive analysis of the elements of the definition of the concept, she has also examined how the definition works in practice, from two multidisciplinary angles - coalition warfare and the military doctrine. She has since published number of other publications relating to law of targeting. Dr Jachec-Neale is a currently co-leader on joint research project between The Exeter Centre for International Law, University of Amsterdam and Netherlands Defence Academy, as part of the LACMO network on 'Ambiguity and vagueness of non-legal phraseology in regulative framework for conduct of hostilities'.

III. SUMMARY OF OBSERVATIONS

5. If leave to submit observations as *amicus curiae* is granted, the Applicants will submit that characterisation of pillage and similar prohibited acts as an attack in the sense of Article 49 of 1977 Additional Protocol I to 1949 Geneva Conventions and framing it in line of article 8(2)(e)(iv) of Rome Statute of International Criminal Court would be factually and legally incorrect.
6. The Applicant will analyse three substantive areas before arriving at this finding. First, a notion of attack and other related terms in prosecution of the hostilities will be analysed. Second, the Applicant will briefly look at destruction of the property as a violent outcome of attack and how it relates to military necessity. Third, the Applicant will assess a crime of pillage in the context of attack.

A. THE ATTACK AND RELATED TERMS

7. 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 or may not convey a slightly different meaning compared to their equivalents in military doctrine.

8. Fundamental expression of the principle 'of distinction, for instance, refers to term 'military operations'.¹ Combatants are obliged to distinguish themselves during 'military engagement', whilst civilians may take part in 'hostilities'.² 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.³
9. 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'. Consequently, this also means that that 'acts of hostility' against adversary in armed conflict require necessary engagement of armed force. Such acts do not necessarily need to be of violent nature; the violent consequences of one's acts will be equally, if not more pertinently, determinative of acts of hostility, which in turn constitute broadly perceived hostilities. These consequences include damage or destruction to objects and harm, including injury or death to individuals.
10. According to travaux préparatoire of 1977 Additional Protocol I to 1949 Geneva Conventions that 'military operations' were defined as a 'movement of attack or defence by armed forces'.⁴ This implies military operations are operational level term encompasses attacks as well as other types of military actions such as manouver but also 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 issue such as general recruitment of or training of armed forces, which is covered by a broader notion of 'military effort' which encompass activities indirectly connected to military operations but related to armed forces. Noteworthy 'combat action' or 'military action' may and normally will involve several military operations in prosecution of hostilities. Incursions or raids will be regarded as military operations in they are undertaken as a part of hostilities, however they not always may constitute 'attacks'.
11. The term 'attack' refers to a specific category of military operations or hostile acts. Following its inclusion in 1977 Additional Protocol the term attack became a legal 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. This definition differs from the traditional meaning of a word attack found in military parlance, where it tends to be associated only with the offensive actions.
12. Notion of attack refers to a specific type of military operation, which whilst may not always employ actual physical force (as a debate in area of cyber warfare exemplified), it is expected to result in the violent consequences to the objects of attack.
13. 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

¹ 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"), reprinted in: D. Schindler, J. Toman (eds.), op. cit., pp. 711-773

² Art 44 of API

³ 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")

⁴ 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

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 and in defence.

14. There are 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 it. In addition to this 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 place of worship in the sense of Article 53 of Additional Protocol I to 1949 Geneva Conventions unless it satisfies specific requirements for its cultural property espoused in 1954 Hague Convention for the Protection of Cultural Property, which is applicable also in the context of the conflict of non-international character.⁵

B. DESTRUCTION OF THE PROPERTY

15. Destruction is best defined as carrying out of an act that renders an object no longer usable or unable to perform its designed function. Destruction means a permanent annihilation or damage of the object to the extent that neither can it function as intended, nor can its previous critical functionality be restored by repairs. Destruction is not thought to involve seizing control of the objects, capture or naturalization of the objects, though these can be aims and outcomes of the attacks too.⁶
16. International war crimes court in the Hostage case famously declared that there must be some 'reasonable connection' between the destruction of the property and the overcoming of the enemy forces destruction is in itself a violation of international law. In other words, the court reiterated the dictum found in Art 23(g) of Hague Regulations, which prohibits destruction or seizure of enemy property unless 'imperatively demanded by the necessities of war'. The court further explained that reasonable connection must exist between what armed forces are aiming to achieve in order to defeat the adversary and the intended destruction of the property. The court stressed that even normally protected objects such as 'private homes and churches' may be damaged if it is necessary for military operations.⁷
17. Modern law of armed conflicts takes full account of military necessity and reflects that reasonable connection in the relevant norms. Consequently, destruction of the property of the adversary will be wanton if it is not justified by military necessity at any point. Specifically, intentional destruction of the targets during hostilities that does not offer an anticipated 'definite' military advantage (in line Art. 52.2 of Additional Protocol I definition of lawful targets) with or 'concrete and direct' military advantage that appears excessive to expected incidental loss of life, injuries and damage to protected objects in

⁵Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, 249 UNTS 240, reprinted in: D. Schindler, J. Toman (eds.), *The Laws of Armed Conflicts*, 4th edn., Martinus Nijhoff, Leiden 2004, pp. 999-1025; Protocol for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, 249 UNTS 358 ("First Protocol"), reprinted in: *ibidem*, pp. 1027-1033; 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"), reprinted in: *ibidem*, pp. 1037-1051.

⁶ See for more discussion Jachec-Neale, *supra* n 4, pp.130-131

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

attack will be wanton and not legally justified in line with both principles of distinction and proportionality.

18. 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 or destruction, where the operation (even if termed as such) is intended to steal, loot or damage and destroy the property of adversary. This will be analysed next.

C. PILLAGE

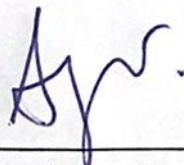
19. Pillage, interchangeably referred to as plunder, looting or spoliation is understood as unlawful appropriation of private or public property, without consent of the legal owner of the property, which cannot be justified by military necessity. In effect, it is corollary of prohibition of theft in criminal law. As mentioned before, the property can only be lawfully seized or destroyed only if it is 'imperatively demanded by the necessities of war', which is in jurisprudence of international criminal courts has been interpreted to mean that appropriation must be for private or personal use to amount to pillage.
20. Can pillage occur during an attack during hostilities? Yes, most certainly it can occur especially during ground operations and this well recognised by this Court.⁸
21. Can pillage be considered a form of attack or can an attack cover pillage? First, it should be noted that not all acts of pillage and alike engage acts of violence or result in violent outcomes and those would be excluded from the scope of notion of attack. Second, definition of attack requires the acts of violence to be in offence or defence of armed forces. As such pillage, by its very nature, is not undertaken in pursuance of offence or defence of armed forces or organised armed groups; it aims at stealing, plundering, damaging or destruction of the adversary's property without a reasonable connection to aims of military operations. If it was, it would not have amounted to pillage but a lawful appropriation of the property. Thirdly, seeing pillage as an attack would create a contradictory juxtaposition of a prohibitive norm sanctioning certain behaviour with a permissive norm defining legally compliant actions individuals are permitted to undertake.
22. 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 contexts of targeting operations.

IV. CONCLUSION AND APPLICATION

23. The Applicant share the view of the Chamber that legal issue arising from this appeal is very likely to have implication beyond this case as it relates to the fundamental and underlying norms of international humanitarian law which are being interpreted in the context of criminal process and so elaboration of these is of key importance. For this reason, the Applicant respectfully request the Chamber to grant her leave to submit observations as amicus curiae on the matters stated above.

⁸ 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:



Dr Agnieszka Jachec-Neale

Dated this 14 August 2020

At Exeter, United Kingdom