

**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 by Public International Law & Policy Group 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:

Public International Law & Policy Group

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

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

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

1. This is the Public International Law & Policy Group (“PILPG”) Request for leave to submit observations pursuant to Order No. ICC-01/04-02/06-2554.

I. Particular Expertise of The Public International Law & Policy Group

2. PILPG is a global *pro bono* law firm and UN-recognized NGO that provides free legal assistance to parties involved in peace negotiations, drafting post-conflict constitutions, and war crimes prosecutions. Since its founding in 1995, PILPG has provided assistance to nearly every international and hybrid criminal tribunal and has helped create a number of domestic transitional justice mechanisms. PILPG represents an array of clients, including States, sub-State entities, and civil society actors on international law questions, including those advocating for accountability where cultural property or hospitals have been destroyed. PILPG’s international litigation expertise includes its successful representation of the SLPM/A in the PCA *Abyei Arbitration* against the Government of Sudan. Recently, PILPG’s work on the documentation of international crimes against the Rohingya was cited more than twenty times in the Court’s *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in Bangladesh/Myanmar*.
3. PILPG is led by Professor Paul R. Williams, Dean Michael P. Scharf, and Professor Milena Sterio. Professor Paul R. Williams holds the Rebecca I. Grazier Professorship in Law and International Relations at American University where he teaches in the School of International Service and at the Washington College of Law. Professor Williams has assisted over two dozen parties in major international peace negotiations and has advised numerous parties on the drafting and implementation of post-conflict constitutions, leading PILPG when it was nominated for a Nobel Peace Prize. Michael Scharf is the Dean of the Law School and the Joseph C. Hostetler-BakerHostetler Professor of Law at Case Western Reserve University. Previously, Dean Scharf served as Special Assistant to the

International Co-Prosecutor of the ECCC, and during the elder Bush and Clinton Administrations, he served in the Office of the Legal Adviser of the U.S. Department of State, where he helped draft the Statute, Rules, and Security Council Resolution establishing the ICTY. Dean Scharf has published twenty books on international criminal law and was ranked as among the most cited authors in the field of international law since 2010 by the 2016 and 2019 Sisk/Leiter studies. Milena Sterio is the Charles R. Emrick Jr. – Calfee Halter & Griswold Professor of Law at Cleveland-Marshall College of Law and was formerly an Adjunct Law Professor at Cornell, where she taught in the International War Crimes Clinic. In her capacity as expert on maritime piracy law, she has participated in the meetings of the United Nations Contact Group on Piracy off the Coast of Somalia. Professor Sterio is an editor of the prestigious IntLawGrrls blog. Professor Margaret M. deGuzman, Dr. Brianne McGonigle Leyh, Jonathan Worboys, Eian Katz, Nicole Carle, Alexandra Koch, and Raghavi Viswanath have also contributed to this Request.

III. Legal Questions Presented, Principal Argument, and Summary Conclusions

1. Questions (A) (Definitions)

4. In IHL, the word “*attack(s)*” most commonly means “*acts of violence against an adversary, whether in offence or defence*”. This definition derives from Article 49(1) of the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (“API”). While traditionally understood as temporally limited to the conduct of hostilities, in PILPG’s submission, in the context of cultural property and hospitals “*attack(s)*” must also account for acts of violence that are committed in the near aftermath of hostilities. See further below.
5. “*Conduct of hostilities*” tends to denote the phase of the armed conflict during which the parties to the conflict deploy means and methods of warfare against an

adversary. "*Combat action*" is mostly found in military manuals and is less common in IHL.

6. In the context of cultural property, "*act of hostility*" is used in Article 4 of the Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention 1954 ("1954 Convention"), Article 53 API, and Article 16 of the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts ("APII"). It covers a broader range of acts when compared to the traditional meaning of the term "*attack(s)*" and includes acts committed after the conduct of hostilities or during occupation that have or can have a substantial detrimental effect on protected objects, provided they arise from a conflict. (See ICRC Commentary to API at [2070] and APII at [4845]).

2. Questions (B) (Meaning of Article 8(2)(e)(iv))

a. The term "*attack(s)*" in Article 8(2)(e)(iv) of the Statute extends further in time than in other Articles and includes *ratissage* operations.

7. In keeping with the object and purpose of the Statute, as expressed *inter alia* in its preambular appreciation for culture and heritage, Article 8(2)(e)(iv) refers to classes of property that are afforded protection in IHL during both the conduct of hostilities and the ensuing events, which would include acts bearing a sufficiently close relation to the conflict, such as *ratissage* operations. Article 8(2)(e)(iv) must therefore be read against the relevant legal framework and relevant jurisprudence. For the avoidance of doubt, this would include, *inter alia*, Article 16 APII, the 1954 Convention and the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict of 1999.
8. Even if it is accepted that the ultimate origin of Article 8(2)(e)(iv) is Article 27 of the Regulations concerning the Laws and Customs of War on Land, 1907 ("Regulations"), the change from "*sieges and bombardments*" in the Regulations to

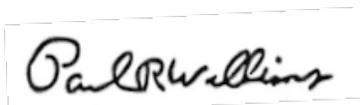
the much broader category of “attacks” in the Statute signifies a qualitative expansion of the intended protections afforded to cultural property and hospitals in times of conflict. The term “sieges” is itself instructive in its connotation of continuous action in areas where hostile forces have assumed elements of effective control, much like *ratissage* operations. Moreover, it cannot be ignored that Article 56 of the Regulations formed part of the negotiating background and thus shapes the interpretation of Article 8(2)(e)(iv), at least to some extent.

9. The fact that “attack(s)” has a narrower construction in Articles 8(2)(e)(i) and 8(2)(e)(iii) does not mean that the same definition must be applied in 8(2)(e)(iv) and this cannot be a controlling interpretive factor. The Statute includes many terms that are understood to have contextually variant meanings. For instance, terms such as “conduct” and “torture” have different effects in different provisions within the Statute, as does “attack(s)” in Articles 7 and 8 of the Statute.

b. The term “attack(s)” in Article 8(2)(e)(iv) covers acts such as pillaging and destruction.

10. IHL affords protections to hospitals and cultural property that can extend beyond the preservation of their outer structures. In certain limited circumstances, Article 8(2)(e)(iv) can therefore arguably include pillaging and destruction of these institutions, provided their tangible or intangible functions are substantially impaired and there is sufficiently close relation to conflict.

Respectfully submitted for the Public International Law & Policy Group:



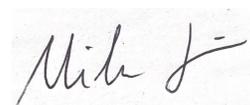
Professor Paul R. Williams

Dated: 14 August 2020



Professor Michael P. Scharf

Dated: 14 August 2020



Professor Milena Sterio

Dated: 14 August 2020

Done at Washington D.C. and Cleveland, Ohio