

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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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 Hormański
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 Submit Amicus Curiae Observations on the Legal Questions Presented in the "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: Professor Geoffrey S. Corn
Professor Richard Jackson
Professor M. Christopher Jenks
Professor Eric Talbot Jensen
Professor James A. Schoettler, Jr.

**Document to be notified in accordance with regulation 31 of the *Regulations of the Court*
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I. Introduction

1. This is a request on behalf of Professors Geoffrey S. Corn, Richard Jackson, Chris Jenks, Eric Talbot Jensen and James A. Schoettler, Jr. ("the applicants") for leave to submit observations to The Appeals Chamber of the International Criminal Court pursuant to paragraph 15 of the "*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 2020.¹

II. Relevant Expertise

2. The applicants are all retired U.S. officers with extensive experience as military legal advisors and military operations, with a combined military experience of more than 100 years. They are all now law professors who teach, publish, lecture, and consult in the fields of international humanitarian law ("IHL") and international criminal law ("ICL"). Each is a co-author of *The Law of Armed Conflict: An Operational Approach* (2nd ed., 2019).
3. Geoffrey Corn is a Professor of Law at South Texas College of Law Houston and a retired U.S. Army Lieutenant Colonel (22 years of military service to include serving as the Army's senior law of war expert advisor.) He has been an expert witness at the ICTY, and is co-author of *The Laws of War and the War on Terror* (2nd ed., 2015); *National Security Law: Principles and Policy* (2015); *U.S. Military Operations: Law, Policy, and Practice* (2015); and more than 50 scholarly articles.
4. Richard Jackson is an Adjunct Professor of Law at Georgetown University and the University of Maryland, and retired from the U.S. Army as a Colonel after serving 30 years. Professor Jackson is leading expert in IHL. He is co-author of *The Laws of War and the War on Terror* (2nd ed. 2015), and numerous scholarly articles.
5. Professor Chris Jenks is an Associate Professor of Law at the SMU Dedman School of Law in Dallas, Texas, and a retired U.S. Army officer. He served 20 years as an infantry officer and Judge Advocate, to include serving as the chief of the Army's international law branch, and as Special Counsel to the General Counsel for the U.S. Department of Defense, and is the author of more than 30 scholarly articles.
6. Professor Eric Talbot Jensen is a Professor of Law at Brigham Young University in Provo, Utah, and a retired U.S. Army Cavalry and Judge Advocate officer. He served as the

¹ ICC-01/04-02/06-2554.

Special Counsel to the Department of Defense General Counsel; the Chief of the Army's International Law Branch; Deputy Legal Advisor for Task Force Baghdad; and legal advisor legal advisor in Bosnia in support of Operation Joint Endeavor/Guard. He is a co-developer of both Tallinn Manuals (International Law Applicable to Cyber Warfare and International Law Applicable to Cyber Operations). He is co-author of *The Laws of War and the War on Terror* (2nd ed., 2015); *National Security Law: Principles and Policy* (2015); and more than 30 scholarly works.

7. Professor James A. Schoettler, Jr. is an Adjunct Professor of Law at the Georgetown University Law Center, where he teaches the law of armed conflict. He is a retired U.S. Army Colonel, with 30 years of service who served as Assistant Chief (IMA), International and Operational Law Division, Office of the Judge Advocate General, U.S. Army. He is co-author of *The War on Terror and the Laws of War* (2nd ed., 2015).

III. Summary of the Arguments

'Cluster a' questions

1. Military operations during armed conflict traverse a wide array of activities. While IHL regulates all such activities, the specific nature of the activity will dictate the applicability of the specific IHL rule sets. The questions laid out by the Appeals Chamber touch upon the proper delineation and interplay between these different sets of rules.
2. Within IHL, the term 'attacks' carries specific legal meaning and does not encompass every type of a hostile activity. While the term 'conduct of hostilities' does not appear as such in any IHL treaty, the terms 'hostilities' and 'act of hostility' appear numerous times in various IHL treaties. 'Attack' is but one type of a military act conducted during an armed conflict. Without thoroughly analyzing the exact scope of the terms 'hostilities' and 'an act of hostility' at this stage, it suffices that these terms apply to actions that are different and much wider in scope than 'attack'. *Accordingly, not all acts of hostility are attacks.*
3. In the context of targeting, when an act of hostility qualifies as an 'attack', it triggers the IHL rules of distinction, precautions and proportionality. Other acts involving destruction of property on land are governed by other IHL rules. For example, article 23(g) of the Hague Regulations and its corollary customary rule² prohibit the destruction of enemy property unless the act is imperatively demanded by the necessities of war. Seizure and appropriation of enemy property are governed, *inter alia*, by article 23(g), the prohibition

² 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.


- of pillage, and the permission to appropriate booty of war. Accordingly, the meaning of the ‘attack’ does not encompass all actions that result in the loss or destruction of property.
4. According to article 49(1) of the First Additional Protocol to the Geneva Conventions (AP I), ‘attacks’ are defined as ‘acts of violence against the adversary, whether in offence or in defence’. The term ‘attack’ applies equally in relation to all objects. Hence, there is no special meaning to this term in the context of cultural property and hospitals.
 5. Considered in the abstract, the text of article 49(1) may suggest some ambiguity that could lead to an expansive understanding that every act that results in the damage, destruction, or loss of property is an attack. However, the common understanding of this term – reflected in State practice that identifies separate rules governing destruction of property outside the context of attacks – is inconsistent with such an expansive interpretation. This State practice, which is an important source of treaty interpretation, includes both AP I parties and non-parties and is reflected in the nature of military operations that States consider to be subject to the IHL rules triggered by an attack. The meaning of the terms is reflected in the necessary, but perhaps not exhaustive, elements of ‘attack’ addressed below.
 6. *First, an ‘attack’ must involve an act of violence to produce physical injury or damage. A sine qua non* for an ‘attack’ is an employment of force to produce violent consequences to the enemy. Violent consequences, in turn, are understood as death or injury in the case of persons, or physical damage or destruction in the case of objects. Notably, mere interference or impediment to the functionality of an object without causing it physical damage, such as electronic jamming, is insufficient to constitute an attack.
 7. *Second, the act must be reasonably expected to cause physical injury or damage.* The types of violent consequences to be considered in assessing if an act is an ‘attack’ are those which the belligerent party reasonably expects to inflict. This requires some level of likelihood of occurrence and adequate causal proximity between the act and the consequences.
 8. *Third, the motivation for executing the violent act must be to cause harm to the adversary.* This motive element is reflected, *inter alia*, in the use of the term ‘against’ in the plain language of article 49(1). Of course, all actions that result in property destruction involve certain similarities. But this does not mean that there is no distinction between actions regulated by article 23(g) and its corollary customary rule and actions regulated by the rules of targeting applicable to attacks or that these rules are interchangeable. Accordingly, military activities involving destruction of property, which are not motivated by an objective of producing direct destructive harm on the adversary, are not attacks within the meaning of IHL. Instead, these actions, albeit destructive, are most often regulated in the

conduct of hostilities by article 23(g) and its corollary customary rule. Routine military practices during hostilities which are governed by this rule, are commonly seen as lawful if they meet its requirements, with no assessment of distinction or proportionality. Such actions include, *inter alia*, damage caused by maneuver, destruction of portions of buildings to gain entry or exit for tactical advantage, or taking shelter in an unoccupied civilian building and modifying it for defensive purposes.

9. The assessment of what qualifies as an attack may also be influenced by the extent of physical control over a person or an object subjected to the act of violence. For example, acts of violence in violation of the IHL obligation to protect, such as murder, torture, or assault of those within the physical control of a military force, are not attacks in the sense of article 49(1). Physical control in this context is not, however, synonymous with the notion of 'effective control' under the law of belligerent occupation.

Cluster b' questions

10. The meaning of the term 'attacks' in article 8(2)(e)(iv) of the Rome Statute of the International Criminal Court ('Statute') is synonymous with that same term in IHL.
11. 'Pillage' is a different concept, factually and legally, than that of 'attack', in both IHL and ICL. It is addressed specifically and separately in article 8(2)(b)(xvi) and (e)(v) of the Statute. As provided in the Elements of Crimes, it must *inter alia* involve the appropriation of property, which, as such, does not involve physical damage to an object, as required to qualify as an 'attack'. Accordingly, pillage is different from an attack under IHL.
12. As regards 'destruction', as explained above, the legal rules pertaining to unlawful destruction of property is different than the one applicable to 'attacks' in various respects, including in respect to the motive for the act. Accordingly, it is addressed specifically and separately in the Statute under articles 8(2)(a)(iv), 8(2)(b)(xiii) and 8(2)(e)(xii).
13. Whether acts conducted in a *ratissage* operation constitute 'attacks' depends on the motive for and the nature of the acts and the circumstances in which they were committed. For example, the execution of individuals, while certainly amounting to IHL violations and to war crimes, would not qualify as 'attacks'. Conversely, it is possible that hostilities between belligerent parties will still occur in the town. In this context, the exchange of fire between the opposing party's combatants would almost certainly qualify as 'attacks'.



Geoffrey S. Corn, Professor of Law
on behalf of
Professor Dick Jackson, Professor Chris Jenks, Professor Eric T. Jensen, Professor James
Schoettler, Jr.

Dated this 14th day of August 2020

At Houston, Texas, United States of America