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Pénale
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**International
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Date: 18 September 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

***Amicus Curiae* Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence on Behalf of the Antiquities Coalition, Blue Shield International and Genocide Watch**

Source: **Antiquities Coalition, Blue Shield International, and Genocide Watch**

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

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I. Introduction

1. In accordance with the Appeals Chamber’s Decision of 24 August 2020,¹ the Antiquities Coalition, Blue Shield International, and Genocide Watch submit amicus curiae observations on the questions presented by the Chamber’s Order of 24 July 2020 in the case against Bosco Ntaganda.² The relevant experience and expertise of these organizations and the individuals, Dr. Patty Gerstenblith, Dr. Gregory Stanton, Ms Tess Davis, and Ms Haydee Dijkstal, are set out in their Request of 14 August 2020.³

II. Observations

2. The Amici submit that the definition of “attack” as it applies to Article 8(2)(e)(iv)’s prohibition on “intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments [hereafter “cultural property”] [and] hospitals” should not be narrowly interpreted.
3. International humanitarian law (IHL) broadly defines “attacks” in Article 49(1) of the Additional Protocol I to the Geneva Conventions as “acts of violence against the adversary, whether in offence or in defence.” Commentary on the provision notes its synonymous meaning with “combat action,” an intentionally “wider scope” than provided by some dictionaries or military manuals.⁴ Schmitt rightly observes that “mention of the ‘adversary’ does not imply that only violent operations against enemy forces qualify.”⁵ Additional Protocol I’s careful wording—“acts of violence” as opposed to “violent acts”—emphasizes the resulting harm over the means of achieving it, recognizing that “attacks” include acts which in and of themselves may be nonviolent but that still have violent

¹ Prosecutor v. Ntaganda, Decision on the requests for leave to file observations pursuant to rule 103 of the Rules of Procedure and Evidence, ICC-01/04-02/06-2569, 24 August 2020, para. 10.

² Prosecutor v. Ntaganda, Order inviting expressions of interest as amici curiae in judicial proceedings (pursuant to rule 103 of the Rules of Procedure and Evidence), ICC-01/04-02/06-2554, 24 July 2020.

³ Prosecutor v. Ntaganda, Request for Leave to Submit Amicus Curiae Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence on Behalf of the Antiquities Coalition, Blue Shield International and Genocide Watch, ICC-01/04-02/06-2559, 14 August 2020, paras. 2-7. (Correction: The Request should have noted Dr. Stanton as “involved in drafting of UN Security Council resolutions for the creation of the ICTR”).

⁴ ICRC, Commentary of 1987, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Definition of Attacks and Scope of Application, para. 1880. This Commentary notes that the closest definition is “to set upon with hostile action” para. 1879.

⁵ Michael N. Schmitt, “Attack” as a Term of Art in International Law: The Cyber Operations Context, in 2012 4th International Conference on Cyber Conflict (C. Czosseck, R. Ottis, K. Ziolkowski eds 2012) 283, 290.

consequences (for example, biological warfare).⁶ The Commentary itself supports this position by stipulating that the placing of landmines could qualify.

4. The Amici support the Prosecution's submissions that "attack" in Article 8(2)(e)(iv) "reflect[s] a special meaning which is necessary to give effect to the broader prohibition in [IHL] which this crime was intended to implement."⁷ That the Article 49(1) definition of "attack" is used throughout Additional Protocol I, and not solely in relation to protections for cultural property and hospitals, supports the understanding that actions taken once hostilities have subsided are included in Article 8(2)(e)(iv)'s definition.
5. The Amici submit that an Article 8(2)(e)(iv) "attack" is not confined to actions during the "heat of battle." Such an approach is not only consistent with IHL but also with the ICC Trial Chamber's recognition in *Al Mahdi* of "the special status of religious, cultural, historical and similar objects."⁸ That Chamber held that "the element of 'direct[ing] an attack' encompasses any acts of violence against protected objects" and there is no "distinction as to whether it was carried out in the conduct of hostilities or after the object had fallen under the control of an armed group."⁹ Pre-Trial Chamber I adopted this definition of "attack" in confirming the charge against Al Hassan under Article 8(2)(e)(iv).¹⁰
6. To find instead that an attack under Article 8(2)(e)(iv) is confined to acts committed during the "conduct of hostilities" would undermine the interpretation of the crime for which Al Mahdi was convicted, and for which Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, Alfred Yekatom and Patrice-Edouard Ngaïssona are to be tried.¹¹ It would create an illogical gap in time following active combat during which cultural, medical and religious objects would lose their protection and those who destroy such objects would become immune from prosecution.

⁶ Id., 290.

⁷ Prosecutor v. Ntaganda, Prosecution Appeal Brief, ICC-01/04-02/06-2432, 7 October 2019, para. 30.

⁸ Prosecutor v. Al Mahdi, Judgment and Sentence, ICC-01/12-01/15-171, 27 September 2016, para. 15.

⁹ Id.

¹⁰ Prosecutor v. Al Hassan, Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, ICC-01/12-01/18-461-Corr-Red, 13 November 2019, para. 522.

¹¹ Id., at 228. See also, Prosecutor v. Yekatom, Public Redacted Version of "Warrant of Arrest for Alfred Yekatom", ICC-01/14-01/18-1-Red, paras. 2, 10 (Nov. 17, 2018); Prosecutor v. Ngaïssona, Public Redacted Version of 'Warrant of Arrest for Patrice-Edouard Ngaïssona', ICC-01/14-02/18-2-Red, 13 December 2018, paras. 2, 10.

7. The Amici submit that the definition of “attack” should recognize the continuous nature and duration of acts of violence carried out in continuing pursuit of an overall military objective. Crimes committed under Ntaganda’s command, both during and after the immediate “conduct of hostilities”, occurred in the context of continuing UPC/FPLC operations and thus, were part of a continuing attack. Destruction of the church at Sayo and pillaging of the Mongbwalu hospital resulted from the same orders to attack that came directly from Ntaganda.

8. It is submitted that interpretation of “attack” within Article 8(2)(e)(iv) must draw from the full framework of special protections that international law affords cultural property. Article 21(1)(b) of the Rome Statute states that the ICC’s statutory framework is to be interpreted not only in accordance with “the established principles of the international law of armed conflict,” but also with the “applicable treaties and the principles and rules of international law.”¹² Relevant instruments include the 1907 Hague Regulations, the 1954 Hague Convention, and the 2003 UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage. In acknowledging “that there is no definition of the term ‘attack’ in the Statute or in the Elements of Crimes”, the Pre-Trial Chamber in *Abu Garda* looked to the sources of law set out in Article 21(1)(b) of the Statute.¹³ It is also consistent with the ‘principle of evolving interpretation’ of treaties, and the view that the Rome Statute “is a living instrument that must be read in keeping with the conditions of our times.”¹⁴

9. The Amici support the Prosecution’s position that both Articles 27 (applicable during sieges and bombardments) and 56 (during occupation) of the 1907 Hague Regulations, which provide “seamless protection” to cultural property, influenced the drafting and intended scope of crimes under the International Criminal Tribunal for the former Yugoslavia and Rome Statutes.¹⁵ To limit protection to that offered by Article 27 would represent a significant step backward in an otherwise consistent evolution toward greater protection for cultural property in different circumstances, such as the inclusion of

¹² ICC Rome Statute, Article 21(1)(b).

¹³ Prosecutor v. Abu Garda, Decision on the Confirmation of Charges, ICC-02/05-02/09-243-Red, 8 February 2020, para. 64.

¹⁴ Situation in Afghanistan, Separate opinion of Judge Luz del Carmen Ibáñez Carranza to the Judgment on the appeal against the decision of Pre-Trial Chamber II on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan, ICC-02/17-138-Anx-Corr, 5 March 2020, para. 7(iv).

¹⁵ Prosecutor v. Ntaganda, Prosecution Appeal Brief, ICC-01/04-02/06-2432, 7 October 2019, paras. 33-41.

conflicts not of an international character in the 1954 Hague Convention. The Amici also look to the *Al Mahdi* Trial Chamber’s position that “special protection of cultural property in international law can be traced back to Articles 27 and 56 of the 1907 Hague Regulations” and that IHL “protects cultural objects as such from crimes committed both in battle and out of it.”¹⁶ The core principles of both Articles 27 and 56 are also reflected in the 1954 Hague Convention, which applies to conduct during both armed conflict and occupation. These different sources for the Rome Statute show that attacks against cultural property are prohibited, both during and outside the “conduct of hostilities.”

10. The Amici further submit that the 2003 UNESCO Declaration, which cites Article 8(2)(e)(iv) of the Rome Statute, demonstrates that international protections for cultural objects not only encompass activities during armed conflict but regulate conduct by a force in control of the property attacked.¹⁷ Professor Francioni concludes that the Declaration’s prohibition “covers instances of destruction of cultural heritage perpetrated by a State *within its own territory*, which is hence considered unlawful under international law.”¹⁸
11. In addition, the Amici support the submissions of the Prosecution that Article 8(2)(e)(iv) does not establish different levels of protection for different types of cultural property.¹⁹ On the other hand, the singling out of structures specifically dedicated to cultural purposes and to hospitals indicates that both are entitled to a higher level of protection than that accorded to other civilian objects, which influences the interpretation of terms such as “attack.” Article 8(2)(e)(iv) does not require actual destruction or seizure. The punishable

¹⁶ Prosecutor v. Al Mahdi, Judgment and Sentence, ICC-01/12-01/15-171, 27 September 2016, paras. 14, 15 (emphasis added).

¹⁷ UNESCO, 32 C/Res. 33 Annex, Declaration Concerning the International Destruction of Cultural Heritage, at IV, 17 October 2003. According to UNESCO, a declaration is a “means of defining norms [T]hey set forth universal principles to which the community of States wished to attribute the greatest possible authority and to afford the broadest possible support.” UNESCO, General introduction to the standard-setting instruments of UNESCO

<http://portal.unesco.org/en/ev.php-URL_ID=23772&URL_DO=DO_TOPIC&URL_SECTION=201.html#name=3>. The United Nations Legal Adviser in 1962, in response to the request of the Commission on Human Rights, regarding the Universal Declaration of Human Rights, stated: “In United Nations practice, a ‘declaration’ is a formal and solemn instrument, suitable for rare occasions when principles of great and lasting importance are being enunciated, such as the Declaration of Human Rights.” Quoted at id.

¹⁸ Francesco Francioni, Intentional Destruction of Cultural Heritage, in *The Oxford Handbook of International Cultural Heritage Law* (Francesco Francioni and Ana Filipa Vrdoljak eds 2020) 75, 79.

¹⁹ Prosecutor v. Ntaganda, Prosecution Appeal Brief, ICC-01/04-02/06-2432, 7 October 2019, paras. 18-19, 89. Both the 1954 Hague Convention and its Second Protocol establish different levels of protection to be accorded, to certain cultural property. The special protection regime of the 1954 Convention has been largely abandoned, while the enhanced protection scheme of the Second Protocol applies to only seventeen sites. UNESCO, International List of Cultural Property under Enhanced Protection <http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/Enhanced-Protection-List-2019_Eng_04.pdf>. However, the Rome Statute makes no such distinction, and one should not be implied.

crime is “intentionally directing”—not committing—an attack in recognition of the special status afforded cultural property and hospitals. This point is relevant to Ntaganda’s orders to destroy the Sayo church and to pillage the Mongwalu hospital. Article 8(2)(e)(v) specifically prohibits pillaging, but pillage of a cultural building or hospital may also constitute an Article 8(2)(e)(iv) attack when it affects the integrity and protected purpose of the structure. This interpretation should apply particularly because the purpose of special protection is not for the building itself, but rather for the function and purpose of the building and its contents, for which it is granted a special level of protection.

12. The Amici submit that the human element of Article 8(2)(e)(iv) must be taken into account. Using Article 3(d) of the ICTY Statute as an example, Frulli argued that “historic buildings, monuments, and works of art deserve protection above and beyond their material dimension, precisely because of their cultural value both for the local community and for humanity as a whole.”²⁰ In the war crime of destruction of cultural property under Article 8(2)(e)(iv), the victim is not the object or buildings damaged or destroyed, but the humans who give the site meaning. In *Al Mahdi*, the Court confirmed that “cultural heritage is important not only in itself, but also in relation to its human dimension” and that Al Mahdi’s “attack against the Protected Buildings not only destroyed and damaged physical structures” but “diminished the link and identity the local community had’ with such valuable cultural heritage.”²¹ In recognizing individuals and communities as direct victims of attacks on cultural property and heritage, the Court also “acknowledge[d] the suffering endured by the Malian community and the international community as a whole as a result of the destruction of the Protected Buildings.”²²

13. If the decision of the Trial Court is not reversed, “attacks” on cultural property under Article 8(2)(e)(iv) would not be punishable unless they occur during the immediate “conduct of hostilities” or heat of battle. If the protected site is attacked during the conduct of hostilities, the Court would recognize the harm to the victims. If the site is attacked after the heat of battle has subsided, but during continuous activities serving the military objectives of the attackers, the Court would not recognize the harm to the victims. This would not be a logical result. It would contradict the distinct nature, object, and purpose

²⁰ Micaela Frulli, *The Criminalization of Offences against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency*, 22 *European Journal of International Law* 203, 207 (2011).

²¹ *Prosecutor v. Al Mahdi, Reparations Order*, ICC-01/12-01/15-236, 17 October 2017, para. 16, 19.

²² *Id.*, at para. 53.

of Article 8(2)(e)(iv) and would contradict the interpretation of Article 8(2)(e)(iv) by the *Al Mahdi* Trial Chamber, which found that “the element of ‘direct[ing] an attack’ encompasses any acts of violence against protected objects” and that there is no “distinction as to whether it was carried out in the conduct of hostilities or after the object had fallen under the control of an armed group.”²³

14. In this regard, the Amici submit that the Chamber should also be guided by the “importance of the human right to cultural life and its physical embodiments,” in accordance with the Statute’s Article 21(3) mandate.²⁴ The Amici note the Appeals Chamber’s determination that, per Article 21(3), “[h]uman rights underpin the Statute; every aspect of it” and “[i]ts provisions *must* be interpreted and more importantly applied in accordance with internationally recognized human rights.”²⁵ Absent this consideration, the Court risks dehumanizing the crime and interpreting Article 8(2)(e)(iv) in a manner which misses its intrinsic connection to human culture, religion and identity.

III. Conclusion

15. For the reasons set out above, the Amici submit that the term “attack” under Article 8(2)(e)(iv) should not be narrowly restricted only to actions committed during the “conduct of hostilities”, or heat of battle, and should instead reflect the full framework of special protections afforded to cultural property and heritage under international law.

For the Antiquities Coalition, Blue Shield International and Genocide Watch:



Dr. Patty Gerstenblith



Ms. Tess Davis



Dr. Gregory Stanton



Ms. Haydee Dijkstal

Dated 18 September 2020
Washington DC

²³ Prosecutor v. Al Mahdi, Judgment and Sentence, ICC-01/12-01/15-171, 27 September 2016, para. 15.

²⁴ Prosecutor v. Al Mahdi, Reparations Order, ICC-01/12-01/15-236, 17 October 2017, para. 14.

²⁵ Prosecutor v. Lubanga, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, ICC-01/04-01/06-772, 13 December 2006, paras. 36, 37 (emphasis added).