

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

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 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

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:

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 Victims

Ms. Sarah Pellet
Mr. Dmytro Suprun

Legal Representatives of the Applicant

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

The Office of Public Counsel for Victims

Ms. Paolina Massidda

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

States Representatives

Amici Curiae

REGISTRY

Registrar

Mr. Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and
Reparations Section**

Mr. Philipp Ambach

Other

I. Introduction

1. In accordance with Rule 103 of the Rules of Procedure and Evidence and the Appeals Chamber's Order of 24 July 2020,¹ the Applicants – the Antiquities Coalition, Blue Shield International and Genocide Watch - submit this request for leave to submit amicus curiae observations in the case against Bosco Ntaganda.

II. The Applicants

2. The Applicants are not-for-profit organizations with extensive expertise and experience in regards to the protection of cultural property and heritage under international law and its intersection with international humanitarian law (IHL) and international criminal law (ICL). The Antiquities Coalition addresses better law, policy, and diplomatic cooperation for safeguarding cultural heritage from crime and conflict, prioritizing justice and accountability for war crimes, crimes against humanity, and genocide. Blue Shield International is concerned with the protection of cultural and natural heritage in the event of armed conflict and other disasters, acting as an advisory body to UNESCO and conducting trainings for militaries and organizations in the cultural and humanitarian sectors. Genocide Watch works to predict, prevent, stop, and punish genocide and other forms of mass murder under international criminal and humanitarian law, while raising awareness and influencing public policy. They believe their observations on the questions presented would be 'desirable' to the Chamber 'for the proper determination of the case.'
3. On behalf of the Applicants this request is prepared and supported by the following individuals with expertise and experience in the areas of the application of international humanitarian and criminal law to the protection of cultural property and heritage.
4. Dr. Patty Gerstenblith is a distinguished research professor of law at DePaul University and director of its Center for Art, Museum & Cultural Heritage Law. She is founding president of the Lawyers' Committee for Cultural Heritage Preservation (2005-2011), an officer of the U.S. Committee of the Blue Shield, and a member of the steering group of the ABA's Art and Cultural Heritage Law Committee. In 2017, she was part of an expert consultation on drafting a policy on prosecution of Cultural Heritage Crimes for the

¹ *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.

International Criminal Court and participated in an Intersession on Cultural Rights for the UN Human Rights Council. From 1995 to 2002, she was editor-in-chief of the International Journal of Cultural Property. She is widely published in the area of cultural heritage protection under international law, including IHL.² Dr. Gerstenblith received her PhD in art history and anthropology from Harvard University and JD from Northwestern University.

5. Tess Davis, a lawyer and archaeologist, is Executive Director of the Antiquities Coalition. She has conducted international investigations on the destruction and looting of cultural heritage during armed conflict and serves as a legal consultant for both the U.S. and foreign governments. She teaches cultural property law at Johns Hopkins University and Tulane University School of Law and is a Term Member of the Council on Foreign Relations. Cambodia knighted Davis for her work to recover treasures plundered during its civil war.
6. Dr. Gregory Stanton is the founder and president of Genocide Watch, the founder and director of the Cambodian Genocide Project, and the founder and chair of the Alliance Against Genocide. He was Research Professor in Genocide Studies and Prevention at George Mason University, the James Farmer Professor of Human Rights at the University of Mary Washington, President of the International Association of Genocide Scholars, and Coordinator for the Democratic Republic of the Congo for Amnesty International USA. Dr. Stanton was also involved in drafting of UN Security Council resolutions for the creation of the ICTY, and for the rules of procedure and evidence of the ECCC.
7. Haydee Dijkstra is a UK Barrister and US Attorney with over ten years of expertise practicing international criminal law before international courts and tribunals, including the International Criminal Court. She has also published on the topic of the protection of cultural heritage under international criminal law and before the Court.³

² Her publications include the casebook, *Art, Cultural Heritage and the Law* (now in its fourth edition), and her articles, The Destruction of Cultural Heritage: A Crime against Property or a Crime against People? 15 *John Marshall Rev. Intell. Prop. L.* 336 (2016), Beyond the 1954 Hague Convention, in *Cultural Awareness in the Military: Developments and Implications for Future Humanitarian Cooperation* 83-99 (Robert Albro and Bill Ivey eds. 2014).

³ For example, H Dijkstra, Destruction of Cultural Heritage before the ICC: The Influence of Human Rights on Reparations Proceedings for Victims and the Accused, *Journal of International Criminal Justice*, Volume 17, Issue 2, May 2019.

III. Summary of Proposed Submissions

8. If leave is granted, the Applicants will address the definition of ‘attack’ under IHL as applied to ‘buildings dedicated to religion, education, art, science or charitable purposes, [and] historic monuments’ (hereafter “cultural property”) and hospitals. An examination of this definition and the associated concepts of ‘conduct of hostilities’, ‘combat action’, ‘sieges and bombardments’ and ‘acts of hostility’ will support the position that ‘attack’ cannot be reduced to one strict and uninform interpretation, particularly applied to the distinct nature of cultural property.
9. The submissions will argue – based on a wide range of sources, including Article 49(1) of the Additional Protocol I to the Geneva Conventions – against an overly narrow interpretation confined only to actions during the ‘heat of battle’ or ‘combat.’ Such a misinterpretation would result in an illogical gap whereby parties to a conflict would be barred from damaging or destroying protected objects and buildings during active combat and occupation, but not immediately following active combat. Such an error would effectively reduce a party’s obligations once combat has subsided during a time when protection is actually more feasible. Instead, the definition of ‘attack’ should recognize the continuous nature and duration of the acts of violence carried out over a continuum for achieving a military objective. The submissions will therefore examine the nexus – the degree of temporal or other connection between the attack on cultural property and the armed conflict – to reinforce a broader reading of ‘attack’ that takes into account actions motivated by the parties’ military objectives.
10. If granted leave, the Applicants’ submissions will take the position that ‘attack’ as set out in Article 8(2)(e)(iv) must be interpreted in light of the full spectrum of IHL, including the framework for the protection of cultural heritage embodied in the 1907 Hague Regulations, the 1954 Hague Convention, the 2003 UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage, and customary international law. They will also examine the influence of the 1907 Hague Regulations in the drafting of crimes against cultural property in both the ICC and ICTY Statutes, supporting the Prosecution’s Appeals Brief that Article 27 of the Hague Regulations must be read in conjunction with Article 56.
11. The submissions will also argue, in agreement with the Prosecution, that Article 8(2)(e)(iv) of the Rome Statute does not establish different levels of protection for different types of

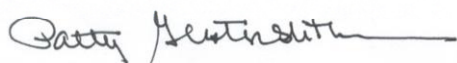
cultural property. On the other hand, the singling out of structures specifically dedicated to cultural purposes and to hospitals indicates that both are entitled to a higher level, which influences the interpretation of terms such as ‘attack.’ While Article 8(2)(e)(v) specifically prohibits pillaging and would include pillage of the structures covered by Article 8(2)(e)(iv), there are circumstances in which pillage of a protected building would constitute an Article 8(2)(e)(iv) attack. This should be understood particularly because the purpose of special protection is not necessarily for the building itself but rather for the function and purpose of the building for which it is granted a special level of protection.

12. The submissions will set out how IHL, customary international law, and the Court’s jurisprudence support an interpretation recognizing that certain attacks leading to damage and destruction are not just crimes against objects, but against the people whose culture and religion are the reason that those objects and buildings are specifically protected, or whose lives and health depend on them, as in the case of hospitals. Case law on the Court’s recognition of the harm to victims caused by similar damage and destruction in *Al Mahdi* and *Al Hassan* will be cited. Recognition of the human element to this crime is necessary when interpreting ‘attack’ to preserve the distinct nature, object, and purpose of Article 8(2)(e)(iv). Failure to recognize this nature risks dehumanizing the crime and minimizing these prohibited actions as mere damage or destruction not rising to the level of an ‘attack’ despite an intrinsic connection to human culture, religion and identity.

IV. Conclusion

13. For the reasons set out above, the Applicants respectfully request leave from the Chamber to submit written observations in accordance with the Chamber’s Order and Rule 103, and submit that the proposed submissions will assist the Chamber in its determination.

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



Dr. Patty Gerstenblith
Dr. Gregory Stanton

Ms. Tess Davis
Ms. Haydee Dijkstal

Dated 14 August 2020
Washington DC