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THE APPEALS CHAMBER

SITUATION RELATING TO THE CRIME OF AGGRESSION AGAINST BRAVOS

The State of Astipur's Submission in the
Appeal from the Pre-Trial Chamber's Decision on the Confirmation of
Charges of Defendant Dani Targarian of Cilanta

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LIST OF ABBREVIATIONS

[#]	Paragraph
AC	Appeals Chamber
ACHR	American Convention on Human Rights
AMIS	African Union Mission in Sudan
App/s	Appendix/es
Art/s	Article/s
Astipur	The State of Astipur
Bravos	The Republic of Bravos
Cilanta	The Commonwealth of Cilanta
CIL	Customary international law
DRC	Democratic Republic of Congo
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
fn	Footnote
ICC	International Criminal Court
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East
ISIL	Islamic State of Iraq and Syria
OTP	Office of the Prosecutor
PTC	Pre-Trial Chamber
r(r)	Rule/s
SCSL	Special Court for Sierra Leone
SWGCA	Special Working Group on the Crime of Aggression
UK	United Kingdom
UN Charter	Charter of the United Nations
UNSC	United Nations Security Council
US	United States of America
VCLT	Vienna Convention on the Law of Treaties

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EUROPEAN COURT OF HUMAN RIGHTS

Murray	*Murray v the United Kingdom* App no 14310/88 (ECtHR, 28 October 1994)

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Abu Garda	*Prosecutor v Abu Garda* (Decision on the Confirmation of Charges) ICC-02/05-02/09-243-Red, Pre-Trial Chamber I (8 February 2010)
Al Bashir	*Prosecutor v Omar Hassan Ahmad Al Bashir* (Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09-3, Pre-Trial Chamber I (4 March 2009)
Al Mahdi	*Prosecutor v Ahmad Al Faqi Al Mahdi* (Public Redacted Decision on the Confirmation of Charges against Ahmad Al Faqi Al Mahdi) ICC-01/12-01/15-84, Trial Chamber VIII (24 March 2016)
Bahar	*Prosecutor v. Bahar Idriss Abu Garda* (Decision on the Confirmation of Charges) ICC-02/05-02/09-243-Red, Pre Trial Chamber I (8 February 2010)
Banda and Jerbo	*Prosecutor v Banda and Jerbo* (Judgment on the Appeal of the Prosecutor against the decision of Trial Chamber IV of 12 September 2011 entitled 'Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation') ICC-02/05-03/09-295, Appeals Chamber (17 February 2012)
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Bemba (Confirmation)	*Prosecutor v Jean-Pierre Bemba Gombo* (Confirmation of Charges) ICC-01/05-01/08-424, Pre-Trial Chamber I (15 June 2009)
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Lubanga (Bar Table)	*Prosecutor v Thomas Lubanga Dyilo* (Decision on the Admission of Material from the "Bar Table") ICC-01/04-01/06-1981, Trial Chamber I (24 June 2009)
Lubanga (Confirmation)	*Prosecutor v Thomas Lubanga* (Decision on the Confirmation of Charges) ICC-01/04-01/06-803-tEN, Pre-Trial Chamber I (29 January 2007)
Lubanga (Judgment)	*Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06-2842, Trial Chamber I (5 April 2012)

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North Sea Continental Shelf	*North Sea Continental Shelf (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* (Judgment) [1969] ICJ Rep 3
Preah Vihear	*Case Concerning the Temple of Preah Vihear (Cambodia v Thailand)* (Merits) [1962] ICJ Rep 131

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High Command Case	*The United States of America v von Leeb et al.* in Trials of War Criminals before the Nuremberg Military Tribunals

under Control Council Law No. 10, Nuremberg, October 1946 – April 1949, vols. X-XI (1948)

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ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols nos. 11 and 14 (adopted 4 November 1950, entered into force 3 September 1953) ETC 5
ICCPR	International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171
Nuremburg Charter	Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement") (adopted 8 August 1945, entered into force 8 August 1945) 82 UNTS 279
Rome Statute	Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90
UN Charter	Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI
VCLT	Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331

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STATEMENT OF FACTS

Background

1. The State of Astipur (**'Astipur'**) is a technologically advanced country with a strong human rights record and sophisticated military.[1] Astipur neighbours the Commonwealth of Cilanta (**'Cilanta'**) and the Republic of Bravos (**'Bravos'**).[2]

2. Cilanta is home to Professor Targarian, the most-cited living international law scholar in the world.[3] Bravos is a developing country with a history of human rights abuses and repression of labour strikes.[4]

3. On 21 and 24 July 2018, Bravos launched chlorine aerial bombs in response to Bravosi mine workers' protests. The first attack killed 800 labourers. The second attack killed 1400 civilians.[5] The chlorine was supplied from a company based in Astipur, Pentaas Chemicals ('**Pentaas**').[6]

Astipur's involvement

4. The President of Astipur, James Bannister, commissioned the opinion of Professor Targarian to advise his Cabinet on the legality of airstrikes against Bravos' facilities where the chlorine aerial bombs were manufactured, stored and deployed ('**the facilities**').[7] Professor Targarian provided a draft memorandum and a final memorandum.[8]

[1] Facts, [3].

[2] Facts, app 1.

[3] Facts, [3].

[4] Facts, [3].

[5] Facts, [5].

[6] Facts, [6].

[7] Facts, apps 2-3, [8], [14].

[8] Facts, apps 1-2.

5. Professor Targarian's draft memorandum stated that there 'is a reasonable case to be made that the contemplated airstrikes would be a lawful act of humanitarian intervention'.[9]

6. President Bannister requested a more definitive final memorandum.[10] The final legal memorandum, provided to President Bannister on 28 July 2018, concluded that 'Astipur is permitted under international law, on an exceptional basis, to take measures in order to alleviate overwhelming humanitarian suffering'.[11]

7. The Cabinet approved the airstrikes against the facilities to prevent further chlorine attacks.[12] Fewer than 100 people were killed.[13] Astipur reported the airstrikes to the President of the UNSC in a communique on 29 July 2018.[14]

The search of Professor Targarian's home

8. Having been alerted to Professor Targarian's involvement in the Astipur airstrikes, the Cilanta federal police entered Professor Targarian's home between 1:15-2:00AM on 30 July 2018.[15]

9. No domestic legislation authorised this search.[16] The police indiscriminately searched Professor Targarian's family's personal belongings and removed all computers found in the home.[17]

[9] Facts, app 2 [3].

[10] Facts, [14].

[11] Facts, [14].

[12] Facts, [11].

[13] Facts, [11].

[14] Facts, [11].

[15] Facts, [13].

[16] Facts, [13].

[17] Facts, [13].

10. The police found the memoranda and correspondence between Professor Targarian and President Bannister on the computers and turned this over to the OTP on 1 August 2018.[18]

Procedural history

11. Pursuant to article 15 *bis*(6) and (8), the Prosecutor notified the UN Secretary General of the situation on 5 August 2018.[19]

12. The UNSC did not determine that the airstrikes were an act of aggression.[20] The Prosecutor relied on the PTC to authorize an investigation.[21]

13. The PTC found substantial grounds to believe that Professor Targarian was criminally liable for aiding and abetting the crime of aggression.[22]

The present appeal

14. The Defence is appealing against the PTC's confirmation of charges decision.

15. Astipur has been granted leave to appear as an *amicus curiae* in this matter pursuant to rule 103 of the Rules of Procedure.[23]

[18] Facts, [13].

[19] Facts, [16].

[20] Facts, [16].

[21] Facts, [16].

[22] Facts, [17].

[23] Facts, 1.

ISSUES RAISED

I. Whether the evidence seized from Professor Targarian's home must be excluded under article 69(7) of the Rome Statute.

II. Whether the facts described in the PTC's decision by their 'character, gravity and scale, constitute a manifest violation' of the UN Charter as required for the prosecution of the crime of aggression under Article 8 *bis* of the Rome Statute.

III. Whether a lawyer who on commission provides the government one-sided legal advice calculated to justify an armed attack on another State can be prosecuted for aiding and abetting the crime of aggression under article 25(3)(c) of the Rome Statute.

SUMMARY OF ARGUMENTS

I. EVIDENCE SEIZED FROM PROFESSOR TARGARIAN'S HOME MUST BE EXCLUDED UNDER ARTICLE 69(7) OF THE ROME STATUTE

a. There was a violation of internationally recognised human rights or of the Rome Statute; and

b. The admission of the evidence would be antithetical to and seriously damage the integrity of the proceedings.

II. ASTIPUR'S AIRSTRIKES, BY THEIR 'CHARACTER, GRAVITY AND SCALE' DO NOT 'CONSTITUTE A MANIFEST VIOLATION' OF THE UN CHARTER

a. Astipur's humanitarian intervention did not violate the UN Charter; or

b. Alternatively, the airstrikes were not a manifest violation.

III. THE DEFENDANT, WHO ON COMMISSION PROVIDED ASTIPUR'S GOVERNMENT WITH LEGAL ADVICE THAT JUSTIFIED AN ARMED ATTACK ON BRAVOS CANNOT BE PROSECUTED FOR AIDING AND ABETTING THE ALLEGED CRIME OF AGGRESSION UNDER ARTICLE 25(3)(C)

a. Professor Targarian, as an external legal advisor to the Cabinet, was not in an effective leadership position to satisfy article 25(3 *bis*); or

b. Professor Targarian did not sufficiently contribute or have the requisite mental state to be liable for aiding and abetting the alleged crime of aggression.

PRELIMINARY SUBMISSIONS

A. Standard of review

1. The PTC must confirm the charges when there is sufficient evidence to believe on substantial grounds that the Defendant is criminally liable for the crime charged.[24] The Prosecution has the burden to show that there are compelling charges beyond mere theory or suspicion.[25]

2. An appeal may be allowed where an error of law or fact has materially affected the impugned decision.[26]

3. An error of law arises where a decision is based on an erroneous interpretation of the law.[27] An error of law materially affects the impugned decision if the PTC would have reached a 'substantially different decision' had the error not been made.[28]

4. An error of fact arises where the decision was exercised on a patently incorrect conclusion of fact.[29] An error of fact materially affects the impugned decision 'whenever the failure to interfere may occasion a miscarriage of justice'.[30]

5. Astipur submits the errors made by the PTC materially affected its decision to confirm the charges against Professor Targarian. As a result, the confirmation of charges should be reversed.[31]

[24] Rome Statute, arts 61(5), 61(7)(a).

[25] Rome Statute, arts 66(2), 67(1)(i); *Lubanga (Confirmation)*, [37].

[26] Ibid arts 82(1), 83(2); *Kony*, [46].

[27] *Kony*, [80].

[28] *Bemba et al. (Appeal)*, [90].

[29] *Kony*, [80].

[30] *Bemba (Appeal)*, [40].

[31] Rome Statute, art 83(2)(a).

B. The case is not of sufficient gravity to be admitted

1. While Astipur recognises it is not a party that can challenge jurisdiction pursuant to article 19(2), it requests the Chamber to consider the admissibility of the case on its own motion.[32]

2. This Chamber must find the case inadmissible where it is not of sufficient gravity to justify further action by the Court.[33] There is no discretion under article 17(1)(d).[34]

3. To assess the gravity threshold, the Court has previously considered:

    a. The nature, manner of commission and impact of the alleged crime; [35]
    b. The quantitative and qualitative dimension of the alleged crime;[36] and
    c. The extent of damage, especially the harm to victims and their families.[37]

4. Astipur's airstrikes were a reaction to an overwhelming humanitarian crisis committed in Bravos against its own citizens.[38] The airstrikes were an isolated event, limited in scope, with casualties fewer than 100.[39] The airstrikes have not been condemned, nor declared, as an act of aggression by the UNSC.[40]

5. Previous situations before the Court were of higher gravity than this situation. The *Situation in the DRC* involved thousands of deaths and a pattern of rape, torture, forced displacement, and enlisting of child soldiers for over a decade.[41] The trial proceedings for *Katanga and Chui* and *Bemba* involved 345 and 5229 victims respectively.[42] In *Abu Garda*, the attack on the MGS Haskanita killed 12 and severely

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[32] Rome Statute, art 19(1).

[33] Ibid arts 17(1), 19(1)(d); *Lubanga (Documents),* annex 1 [44].

[34] *Lubanga (Documents)*, annex 1 [43].

[35] OTP Regulations, reg 29(2); *Lubanga (Documents)*, annex 1 [41]-[43].

[36] *Bahar*, [31].

[37] RPE, r 145(1)(c); *Bahar*, [32].

[38] Facts, [11].

[39] Ibid.

[40] Facts, [12]-[16]; UN Charter, art 39.

[41] *Situation in the DRC.*

[42] Bemba Q&A, 2*;* Katanga Q&A, 2.

wounded eight individuals; however, these casualties were AMIS peacekeepers and the Court found that the attack disrupted humanitarian aid to and security of millions of Darfurian citizens who depended on AMIS protection.[43]

6. In contrast, Astipur's airstrikes ended the risk of chemical attacks on thousands of Bravos citizens and were calculated to minimise impact on the local population.[44] Compared to the chemical attack by Bravos, and the impact of crimes committed in previous matters before the Court, Astipur's airstrikes are significantly less gravity.

7. The purpose of the gravity threshold is to maximise the Court's function as a deterrent for the commission of international crimes. [45] To prosecute the airstrikes, which do not satisfy the gravity threshold, would detract from the Court's object and purpose to prosecute *the most serious* of international crimes and offend the plain intention of the Member States to the Rome Statute.[46]

8. Therefore, Astipur submits that the Court should determine all cases in the situation relating to the purported crime of aggression against Bravos as inadmissible.

I. EVIDENCE SEIZED FROM THE DEFENDANT'S HOME MUST BE EXCLUDED UNDER ARTICLE 69(7) OF THE ROME STATUTE

9. Article 69(7) applies a two-limbed test for excluding evidence:

    a. The evidence must be obtained by a means of violation of the Rome Statute or internationally recognised human rights and;

[43] *Bahar*, [33].

[44] Facts, [11].

[45] *Lubanga (Documents)*, annex 1 [48].

[46] Rome Statute, preamble, art 1.

b. This violation must cast substantial doubt on the reliability of the evidence,[47] or the admission of the evidence must be antithetical to and seriously damage the integrity of the proceedings.[48]

10. Astipur submits that the memoranda and correspondence must be excluded because:

a. Their seizure violated Professor Targarian's right to privacy; or
b. The Rome Statute was violated; and
c. To admit those documents would be antithetical to, and seriously damage the integrity of the proceedings.

11. In finding the documents admissible, the PTC made an error which materially affected the decision. Therefore, Astipur requests the decision to be reversed.

A. There was a violation of the internationally recognised human right to privacy

12. To find a violation of the internationally recognised human right to privacy, this Chamber must be satisfied that:

a. The right to privacy is an internationally recognised human right; and
b. The Cilanta federal police search and seizure interfered with Professor Targarian's right to privacy; and
c. This interference:
    i. Was not in accordance with law; or
    ii. Did not have a legitimate aim; or
    iii. Was not proportionate to any purported aim.[49]

[47] Rome Statute, art 69(7)(a).

[48] Rome Statute, art 69(7)(b).

[49] *Bemba et al. (Appeal)*, [285]; *Lubanga (Bar Table)*, [21]; See e.g. ECHR, art 8.2; *Khoroshenko*, [118]; *Kučera*, [127]; *Klamecki*, [144].

1. Privacy is an internationally recognised human right

13. This Court has previously accepted that the right to privacy is an internationally recognised human right within the meaning of article 69(7).[50] The ICCPR and ECHR are useful for determining the scope of the right to privacy.[51]

14. The ICCPR defines privacy as the right to be free from 'arbitrary or unlawful interference with…privacy, family, home or correspondence'.[52]

15. Therefore, a violation of Professor Targarian's right to privacy can be a ground for excluding evidence.

2. There was an interference with Professor Targarian's right to privacy

16. Entry by police,[53] and a subsequent search,[54] constitute an interference with the right to privacy.

17. Professor Targarian's home was entered and her family's belongings were indiscriminately searched.[55] Professor Targarian's files were accessed by a forensics expert and her correspondence with President Bannister was passed to the OTP.

18. There was an interference with Professor Targarian's right to privacy.

[50] *Bemba et al (Appeal)*, [284], fn 647.

[51] Ibid [331]; ICCPR, art 8.1.

[52] Facts, [2]; ICCPR, art 17; See also ECHR, art 8.1; ACHR, art 11.2.

[53] *Gutsanovi*.

[54] *Murray*; *Chappell*.

[55] Facts, [13].

3. The interference was disproportionate

19. The interference must be in accordance with the law, have a legitimate aim, and be proportionate to this aim.[56] The Court has referred to ECtHR cases when determining whether the right to privacy has been violated.[57]

(a) The interference was not in accordance with law

20. Astipur submits that the interference was not in accordance with the law.[58]

21. There is tension between article 69(8), which bars the Court from adjudicating matters of national law,[59] and article 69(7), which imports the international law requirement that the interference with privacy be 'in accordance with law'.[60] The drafting history of article 69(8) confirms this interpretation.[61] However, the Appeals Chamber in *Bemba et al. (Appeal)* found that article 69(8) does not preclude the Chamber from taking into account non-compliance with national law when non-compliance has been established in the factual background. [62]

22. It is an established fact that no legislation could have authorised the search of Professor Targarian's home.[63] The search was not in accordance with the law, and thus there was a violation of the right to privacy.

[56] *Bemba et al.*, [285], [331]-[332]; ECHR, art 8.2.

[57] Rome Statute, arts 21(1)(b), 21(1)(c); *Lubanga (Confirmation)*, [62]-[63], see *Bemba et al.*, [284], [286].

[58] Facts, [18].

[59] Ibid [287].

[60] *Bemba et al. (Appeal)*, [285]-[286].

[61] 1998 Draft Statute, 110; Triffterer and Ambos (2016), 1722.

[62] *Bemba et al (Appeal)*, [296].

[63] Facts, [13].

(b) There was no legitimate aim

23. Astipur submits that there was no legitimate aim for the interference. In this case before the Chamber, the search and seizure was warrantless.[64] On the facts, there was no law to authorise the searches, nor a law with which to charge Professor Targarian.[65] At the time of the search and seizure, the OTP had not initiated an investigation.[66]

24. As there was no apparent offence nor pending proceedings, there was no legitimate aim. Therefore, there was a violation of Professor Targarian's right to privacy.

(c) The interference was not proportionate

25. Additionally, Astipur submits that even if there is a legitimate aim, the manner of the search and seizure was not proportionate for two reasons.

26. First, the interference was not proportionate because of the Cilanta federal police employed unnecessarily invasive methods.[67] In *Buck*, a search and seizure of the complainant's premises undertaken to ascertain the perpetrator's identity was deemed not proportionate because there were less invasive methods available, such as a court order to produce a passport photo.[68] Cilanta federal police knew that the correspondence between Professor Targarian and President Bannister would have been conducted electronically. Nonetheless, they conducted a physical raid of the home of Professor Targarian and her family between 1:15-2:00AM. [69] These means were not proportionate because less invasive methods, such as a search of her university office during business hours, would have led to the same outcome.

27. Second, the items seized belonged to third parties and contained information that was both irrelevant and personal. Professor Targarian's family's personal belongings were

[64] Facts, [13].

[65] Facts, [13].

[66] Facts, [13], [15].

[67] *Bemba et al.*, [331].

[68] *Buck*, [47], [49].

[69] Ibid.

searched and all the computers were confiscated.[70] In *Bemba et al. (Judgment),* the collection of Western Union records by authorities was determined to be proportionate because money transfers were relevant to the case, the information obtained was limited to information about money transfers, and did not include intimate or personal details.[71] In *Lubanga (Bar Table),* hundreds of documents were seized by national authorities, many of which were unrelated to the purposes of the search. This was not a proportionate interference with the defendant's right to privacy.[72] In ECtHR cases against France, extensive searches and seizures that included irrelevant documents were ruled to be not proportionate, especially where there was no judicial warrant.[73] In this case, the computers seized contained vast quantities of information that was both irrelevant to any purported aim, and personal to Professor Targarian and her family.[74]

28. The interference was disproportionate to any purported aim because less invasive alternatives were available to the federal police and the indiscriminate nature of the search and seizure. The evidence was obtained by means of a violation of Professor Targarian's internationally recognised human right to privacy.

B. Alternatively, there was a violation of the Rome Statute

29. Additionally, the evidence was obtained by means of a violation of the Rome Statute. Article 69(5) requires that the Court 'respect and observe privileges on confidentiality as provided in the Rules of Procedure and Evidence'.

30. Rule 73(1) grants privilege to 'communications made in the context of the professional relationship between a person and [their] legal counsel', unless the client voluntarily consents to disclose or directly discloses the information.[75] If evidence is

[70] Facts, [13].

[71] *Bemba et al. (Judgment)*, [337]-[338].

[72] *Lubanga (Bar Table)*, [38].

[73] *Miailhe*, [38]-[39]; *Funke*, [53]-[57], *Crémieux*, [40]; *Camenzind*, [46].

[74] Facts, [13].

[75] RPE, r 73(1).

subject to rule 73(1) privilege, the Chamber must immediately order the Prosecution to cease dealing with the evidence.[76]

31. Rule 73(1) applies to the seized evidence because the relationship between Professor Targarian and President Bannister's Cabinet was one in which professional privilege may be invoked. President Bannister was specifically requesting advice regarding the legality of actions on behalf of the Cabinet.[77]

32. Neither President Bannister nor members of the Cabinet have waived privilege by voluntarily disclosing the contents of the correspondence or memoranda.[78] The Prosecution has not provided evidence of disclosure as required by rule 73(1)(b).[79] The memoranda remain privileged and a failure to respect this privilege violates article 69(5) and the Rome Statute.

33. As the search violated the Rome Statute, as well as Professor Targarian's right to privacy, the first limb of article 69(7) is satisfied.

C. The admission of evidence would be antithetical to and would seriously damage the integrity of the proceedings

34. Having established that the evidence was collected by one of the above violations, if its admission is antithetical and seriously damage to the integrity of the proceedings, then the evidence is inadmissible.[80] Astipur submits that the second limb has been satisfied for six reasons.

35. First, in *Lubanga (Bar Table)*, the Trial Chamber referred to suggestions that 'integrity of the proceedings' including 'respect for the rights of the person'.[81] All considerations relating to exclusion of evidence are secondary to fair trial considerations.[82] Respect

[76] *Mbarushimana (Transcripts)*, 4.

[77] Facts, [14].

[78] Facts, [15].

[79] RPE, r 73(1)(b).

[80] Rome Statute, art 69(7).

[81] *Lubanga (Bar Table)*, [42].

[82] Ibid [42].

for the rights of a Defendant is therefore an important consideration. Professor Targarian's right to privacy and to privilege over communications between a person and their legal counsel have been violated. Neither of these were a 'minor breach of procedural rules' as in the case of *Lubanga (Bar Table)*.[83] Both breaches compromise the fairness of the trial. As a result, inclusion of the evidence would be antithetical to or seriously damaging to the integrity of the proceedings.

36. Second, article 21(3) requires this Chamber to apply and interpret the Rome Statute consistently with internationally recognised human rights.[84] To accept the seized documents would be fundamentally unfair to Professor Targarian and result in a case being founded on human right violations.

37. Third, the Trial Chamber in *Lubanga (Bar Table)* determined that the impact of the violation was lessened because it was directed at a witness rather than a Defendant.[85] In this case, the impact is significantly heightened because Professor Targarian is the Defendant rather than a witness.

38. Fourth, in *Lubanga (Bar Table)*, the Trial Chamber determined that the breach was not of a sufficiently grave kind.[86] The violation in this case is particularly grave given that legal advisors assist governments in understanding the legal contours of their decision-making. Legal advisors may be dissuaded from this important role if they are susceptible to extrajudicial investigation when advising national governments in times of heightened danger. If a chilling effect were to prevent the provision of quality legal advice to governments in future, future decisions would be poorly informed.[87]

39. Fifth, in *Lubanga (Bar Table)*, the minimal involvement of the OTP weighed against the admission of evidence being antithetical or seriously damaging to the integrity of proceedings.[88] Though this factor also exists here, it is outweighed by the three factors above.

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[83] Ibid [20].

[84] Rome Statute, art 21(3).

[85] *Lubanga (Bar Table)*, [47].

[86] Ibid [47].

[87] Ku (2009), 451.

[88] *Lubanga (Bar Table)*, [47].

40. Sixth, neither the probative value of the evidence,[89] nor the 'seriousness of the alleged crimes committed by the accused' can affect admissibility for the purpose of article 69(7).[90] The probative value of the emails or the seriousness of the alleged crime of aggression are not to be considered.

41. These violations are such that the admission of the evidence would be antithetical to and seriously damage the integrity of the proceedings.

D. Conclusion

42. Astipur submits that the PTC made an error in finding that the memoranda were admissible.

43. The error materially affected the decision because, if the evidence had not been admitted, the PTC would not have had substantial grounds to believe that Professor Targarian committed the crime charged. Astipur requests that this Chamber reverse the PTC's decision.

[89] Ibid [43].

[90] Ibid [44].

II. THE PTC ERRED IN HOLDING THAT THE AIRSTRIKES CONSTITUTED A CRIME OF AGGRESSION

45. Astipur submits that the PTC erred in holding that the airstrikes constituted a crime of aggression.

46. The Elements of Crimes outline six elements for the crime of aggression. The appeal before this Chamber relates to the third and fifth element:

    a. Third element: The act of aggression – the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state, or in any other manner inconsistent with the UN Charter – was committed; and
    b. Fifth element: The act of aggression by its character, gravity and scale, constituted a manifest violation of the UN Charter.[91]

47. Astipur submits that neither elements are satisfied as:

    a. The UN Charter was not violated; or
    b. Even if the Chamber finds that the UN Charter has been violated, the Astipur airstrikes do not constitute a 'manifest' violation.

48. Further, the PTC made errors in considering pre-textual motives and the supply of the chemicals by Pentaas in its assessment of whether the airstrikes were genuine humanitarian intervention.

49. These errors materially affected PTC's decision. The decision should be reversed.

A. There was no violation of the UN Charter

50. Article 2(4) of the UN Charter prohibits states from the 'use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations'. Additionally, article 2(7) prohibits intervention in matters that are 'essentially within [another state's] domestic jurisdiction', subject to Chapter VII.[92]

[91] Elements of Crimes, art 8 *bis*.

[92] UN Charter, art 2(7).

51. However, this prohibition is subject to exceptions. In the UN Charter, self-defence and UNSC authorisation are express exceptions. Astipur submits that genuine humanitarian intervention does not violate the UN Charter because:

    a. Articles 2(4) and 2(7) are not engaged by humanitarian intervention; or
    b. Alternatively, CIL recognises a right of humanitarian intervention in exceptional circumstances; and
        i. This CIL has crystallised through consistent state practice and *opinio juris*; and
        ii. CIL can supersede or reinterpret the UN Charter; and
    c. The Astipur airstrikes were an act of genuine humanitarian intervention.

1. Articles 2(4) and 2(7) are not engaged by humanitarian intervention

52. Astipur submits that genuine humanitarian intervention does not violate the UN Charter because it aligns with the context, object and purpose of the UN Charter.[93]

53. The Preamble reaffirms the commitment to promote human rights and article 1 lists the promotion of human rights as a 'Purpose' of the UN.[94]

54. Genuine humanitarian intervention protects human rights, and ends and prevents the commission of crimes against humanity. Serious violations of human rights do not 'fall within the domestic jurisdiction' because they are matters of international concern and therefore, will not violate article 2(7).[95]

55. Further, genuine humanitarian intervention has the objective of preventing loss of life and in recent years, preventing chemical attacks. These interventions do not aim to change state boundaries or political regimes. Such actions are not a violation of a state's territorial integrity or political independence as required for article 2(4).[96]

56. Accordingly, Astipur submits that genuine humanitarian intervention does not engage articles 2(4) and 2(7) of the UN Charter. Astipur further submits at [80]-[93] that its

[93] VCLT, 31(1).

[94] UN Charter, preamble, art 1(3).

[95] Greenwood (2006), 606; Speech to UNSC (Netherlands), 12*;* UN Charter, art 2(7).

[96] Koh (2016), 1006-7; Rodley (2015), 778-9; *Kosovo Oral Proceedings*, 12.

actions constitute genuine humanitarian intervention. As a result, no violation of the UN Charter has occurred.

2. CIL recognises a right to genuine humanitarian intervention in exceptional situations where chemical weapons are used

57. Alternatively, Astipur submits that there is no violation of the UN Charter because:

a. CIL recognises a right to humanitarian intervention where chemical weapons are used due to:
    i. Sufficient state practice; and
    ii. *Opinio juris*; and
b. CIL can supersede or reinterpret the UN Charter.

58. CIL forms where there is a sufficiently general and uniform practice that is accepted as law.[97] State practice and *opinio juris* are to be separately assessed; however, they can arise from the same facts, and can occur simultaneously.[98] There is no single threshold as the overall context, nature of the rule and the circumstances should be considered.[99]

(a) State practice of genuine humanitarian intervention is general and uniform

59. State practice must be general and uniform.[100] Given the exceptional nature of humanitarian crises, weight should be given to 'specially affected states' such as the UK, US, and Astipur,[101] who are active in international military affairs.[102] Contrary

[97] *Nicaragua Case (Merits)*, [186]; *North Sea Continental Shelf*, [77].

[98] ILC 73rd session, 127.

[99] Ibid 126.

[100] *Asylum Case*, 277.

[101] Facts, [3].

[102] ILC 73rd session, 136

practices are not necessarily fatal.[103] Further, CIL can form in a short period of time if the state conduct is extensive and 'virtually uniform'.[104]

60. Astipur submits that post-1945, there has been general and uniform state practice of genuine humanitarian intervention. In recent years, there are five uniform instances of humanitarian intervention without UNSC authorisation:

a. NATO's intervention in Kosovo in 1999;
b. US, France and UK's intervention in Iraq in 2014;
c. US' intervention in Syria in 2017;
d. US, France and UK's intervention in Syria in 2018; and
e. Astipur's intervention in Bravos in 2018.

61. In 1999, NATO intervened in Kosovo to stop ethnic cleansing when the UNSC was paralysed by a veto.[105] The UK and Belgium relied upon a right to humanitarian intervention to justify their actions.[106] NATO and the US deliberately refrained from offering a formal legal justification, but relied upon policy and humanitarian justifications.[107]

62. Between 1991-2003, the US and UK established 'safe havens' and no-fly zones in Iraq, and protected them by force so UN officials could provide humanitarian aid to refugees and Iraqi civilians.[108] In 2014, the US launched an unauthorised targeted airstrike,[109] surrounding Mount Sinjar where 40,000 starving Yazidis had fled the intended genocide committed by ISIL. Despite later justifying its actions on consent and self-defence, the US' initial justification was on humanitarian grounds.[110] This

[103] ILC 73rd session, 137; *Nicaragua Case (Merits)*, [196].

[104] *North Sea Continental Shelf*, [74].

[105] Kosovo Report (2000), 163.

[106] Franchini and Tzanakopoulos (2018), 615.

[107] Brooks (2014), 165.

[108] Rudd (2004).

[109] Scharf (2016), 24.

[110] Scharf (2019), 604.

indicates the US' recognition of humanitarian grounds as valid justification for intervention.

63. In April 2017 the US, and in April 2018 the US, UK and France, launched airstrikes in response to the Syrian government using sarin gas on their own citizens. The urgency created by the unusual weaponry and novel delivery systems, and the crimes against humanity perpetrated during the 2018 attacks accelerated the crystallisation process, paralleling the expedited development of law regarding space and new technology.[111]

64. These unauthorised interventions were limited in scope and were driven by humanitarian concerns. Given the rarity of humanitarian crises, each situation discussed above ought to be given substantial weight and considered as a uniform and consistent state practice.

(b) There is sufficient *opinio juris*

65. Astipur submits that the response of the international community to these events demonstrate the requisite *opinio juris*.

66. Most states responding to the actions in Kosovo supported the airstrikes as lawful, or at least *legitimate*,[112] and the initial humanitarian justification of the 2014 airstrikes in Sinjar drew no international protest.[113]

67. The 2018 airstrikes in Syria were justified as humanitarian intervention. The UK expressly stated this to the UNSC, and the US 'were in complete agreement' with its allies.[114] Although France gave no legal justification, neither the UK's explicit nor the US' implied justification on humanitarian grounds has since been retracted or contradicted.

[111] Ibid 596; Treves (2006), [24].

[112] Brooks (2014), 166.

[113] Scharf (2019), 604.

[114] Ibid 23.

68. Further, Astipur justified their airstrikes on a right of humanitarian intervention and 'several states' supported the action.[115]

69. Silence in respect to state practice amounts to acquiescence where states have the opportunity to speak and the situation calls for a response.[116] A situation calls for a response where a practice unfavourably affects a state's interests.[117] A practice of genuine humanitarian intervention impacts the sovereignty of every state, and their obligations and protections under the UN Charter. Each state knew of the airstrikes and had reasonable time and reason to respond.

70. For Syria 2018, 56 States and NATO expressed an opinion. [118] Of these, ignoring the UK and US, 30 approved and another 12 did not question its legality.[119] Accompanying these statements were the eight votes against and three abstentions from the draft resolution condemning the airstrikes.[120] Only 11 other states opposed the legality.[121]

71. In relation to Bravos, only a dozen states condemned the attacks, with the rest acquiescing or declaring the action legitimate.[122] Significantly, only one UNSC Permanent Member voted to condemn the action.[123]

72. Therefore, there is a general and consistent practice of intervening on humanitarian grounds, as well as *opinio juris* accepting these interventions as legal.

[115] Facts, [11].

[116] ILC 73rd session, 141-2; *Preah Vihear*, [23].

[117] ILC 73rd session, 142.

[118] Syria Reaction by State; Scharf (2019), 608-610.

[119] Scharf (2019), 608.

[120] Scharf (2019), 609

[121] Scharf (2019), 610.

[122] Facts, [12]–[13].

[123] Facts, [12].

(c) CIL can supersede or reinterpret the UN Charter

73. The re-interpretation of the UN Charter through subsequent practice has previously been accepted by the ICJ.[124] In 1970, the ICJ interpreted the words 'concurring votes' in article 27(3) to include abstentions as well as positive votes on the basis that member States of the UNSC had 'consistently and uniformly interpreted the practice of voluntary abstention by a permanent member as not constituting a bar to the adoption of resolutions'.[125]

74. Astipur submits that a CIL exception of humanitarian intervention can supersede or lead to the re-interpretation of the UN Charter for three reasons.

75. First, the VCLT does not prohibit modification by subsequent CIL. The VCLT was not intended to be comprehensive – demonstrated by the accepted process of termination by desuetude or obsolescence not being included –[126] nor exclusive.[127]

76. Second, article 31(3)(b)-(c) of the VCLT requires the Chamber to take into account 'subsequent practice' and 'any relevant rules of international law' when interpreting the UN Charter. This would include the CIL discussed at [59]-[72].

77. Third, this Chamber should apply the international interpretative principles of *lex posterior* and *lex specialis.* As treaties and CIL are considered coequal sources, *lex posterior* recognises that the most recently developed rule prevails over prior law.[128] *Lex specialis* operates when two laws govern the same factual situation, a law governing the specific subject matter would override a general law.[129] Article 2(4) of the UN Charter and humanitarian intervention both concern the use of force, but the CIL concerns a specific circumstance in which it is used.

78. In addition, Astipur submits the following observations:

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[124] *South West Africa*, [22].

[125] Greenwood (2006), 23.

[126] Crootof (2016), 281.

[127] VCLT, art 42.

[128] Crootof (2016), 284.

[129] Ibid 285.

a. Since the UN Charter came in force, there have been instances of the use of force that are unjustified, justified on grounds not in the UN Charter, or justified by state consent or a treaty, suggesting the development of non-express exceptions.[130]
b. International jurists cite the rising importance of human rights and the declining superiority of state sovereignty over humanitarian issues as reasons for re-interpreting the UN Charter in light of subsequent practice.[131] This view is shared by former UN Secretary General Kofi Annan and former US President Barack Obama.[132] This was epitomised in the 2001 ICISS Report, and the Responsibility to Protect doctrine in 2005. The former recognised state sovereignty as conditional upon the protection of certain rights of the state's population.[133] The latter saw, to some extent, this protection become a responsibility of the international community.[134]

79. Therefore, as CIL may be used to reinterpret the UN Charter, and CIL recognises a right to humanitarian intervention as an exception to article 2(4), acts of genuine humanitarian intervention will not violate the UN Charter. The PTC failed to consider a valid exception to the UN Charter. The PTC's finding must be reversed because it was an error that materially affected the decision.

3. The Astipur airstrikes were an act of genuine humanitarian intervention

80. Genuine humanitarian intervention, based on state practice at [59]-[64] and the *opinio juris* at [65]-[72], must satisfy three conditions:[135]

a. Convincing evidence of extreme humanitarian distress on a large scale, requiring immediate and urgent relief;

[130] Kleczkowska (2017).

[131] Greenwood (2006), 615; Speech to UNSC (Netherlands), 12.

[132] Kofi Annan Speech to the UNGA; Obama Address to the UNGA.

[133] ICIS Report, 8.

[134] 2005 World Summit Outcome, [138]-[139].

[135] UK Prime Minister Office (14 April 2018); Ruys et al. (2018), 616-7; Kosovo Report (2000).

b. Objective clarity that there is no practical alternative to the use of force if lives are to be saved; and
c. The proposed use of force must be necessary and proportionate to the aim of relieving humanitarian suffering, and strictly limited in time and scope to this aim.

81. Alternatively, given the recent CIL responding to chemical attacks, these conditions may be narrowed to crises involving the use of chemical weapons against civilians.

(a) Pre-textual motives should not be considered

82. The sole or dominant motive behind humanitarian intervention is not relevant as subjective intent is not an element of the criteria in [80].

83. Alternatively, even if motive should be considered, then there is no sufficient factual basis for a finding of Astipur's pre-textual motives. As outlined below at [90]-[93], the response was targeted and proportional to the humanitarian objectives.

84. The PTC finding relies on the fact that both states were engaged in cobalt mining and export.[136] Given the globalisation of trade, it is likely that two states compete in an industry and a finding of fact based on coincidence and speculation is ill-founded and should be reversed. More significantly, the protests in Bravos were hindering cobalt production. If Astipur wanted a commercial advantage, they would have allowed the protests to continue.

85. The PTC made an error which materially affected the decision, as pre-textual motives was relied upon in the reasoning. These errors materially affected the PTC's decision, in that it was a salient and central feature of the judgment,[137] and ought to be reversed.[138]

[136] Facts, [4].

[137] Facts, [18].

[138] Rome Statute, art 83(2)(a).

(b) The supply of chlorine should not be considered

86. Additionally, the PTC determined that Astipur's supply of chemicals to Bravos precluded Astipur from intervening in the chlorine attacks.[139] This is an irrelevant factor given the criteria in [80].

87. The closest concept in international law is the 'clean hands' doctrine which precludes states from seeking a remedy when that state is guilty of unlawful conduct.[140] However, this is a principle of equity inconsistently applied in state-state and investor-state disputes and has never been used in international criminal law.[141] Further, it operates as a procedural bar and should not operate to strike down a substantive law defence regarding an act of aggression.

88. Even if it is relevant, the chlorine gas was supplied by Pentaas, not by Astipur. There is no evidence on which to base a conclusion that Astipur was involved in the supply. Astipur cannot be held liable for each sale of every company that has a government granted licence.

89. The PTC made errors in considering the supply of chlorine gas. This error materially affected the decision, and therefore the decision ought to be reversed.[142]

(c) The Astipur airstrikes were an act of genuine humanitarian intervention

90. First, the airstrikes were in response to Bravos deploying chlorine bombs to disperse riots, resulting in 2,200 killed.[143] This is a violation of international norms and the human right to life.[144] Other large-scale protests had commenced throughout

[139] Facts, [18].

[140] *Chorzów Factory*, 31.

[141] *Meuse* (Hudson J), 77*; Preah Vihear* (VP Alfaro), 40*; Nicaragua Case (Merits)* (Schwebel dissent), [128].

[142] Rome Statute, art 83(2)(a).

[143] Facts, [5], [9].

[144] ICCPR, art 6.

Bravos.[145] Given the established pattern of conduct,[146] there was a real risk that Bravos would continue using chemical weapons.

91. Second, there was no practical alternative. An UNSC resolution enabling the use of force was impossible given the Permanent Member veto.[147] Other alternatives such as diplomacy, negotiations, and sanctions were impractical given the urgent escalation of humanitarian distress.

92. Finally, the force used was necessary and proportionate. Three tailored airstrikes, launched at 1:30AM to minimise casualties, targeted facilities in which chlorine bombs were manufactured, stored and deployed.[148] The chlorine aerial bombs were the sole source of the humanitarian crisis and carried a real risk of causing innumerable deaths had Astipur not intervened.

93. Astipur's airstrikes were a valid exercise of the right under CIL of humanitarian intervention. Astipur submits that there was no violation of the UN Charter, as humanitarian intervention is a valid exception. Without a violation, no act of aggression has occurred. Article 8 *bis* is not engaged.

B. Alternatively, the airstrikes are not a manifest violation of the UN Charter

94. Alternatively, even if no exception under CIL is established, Astipur submits that the purported violation of article 2(4) of the UN Charter was not of the 'character, gravity and scale' to constitute a manifest violation, as:

a. 'Manifest' is a threshold that excludes mere violations; and
b. Astipur's airstrikes, being genuine humanitarian intervention, by its character, gravity and scale did not constitute a manifest violation.

[145] Facts, [11].

[146] Facts, [3], [5], [9].

[147] Facts, [7], [10].

[148] Facts, [11]

1. 'Manifest' is a threshold that excludes mere violations

95. Astipur submits that article 8 *bis* excludes situations that are not serious violations of the UN Charter, or situations that have ambiguous, debated legality.

96. 'Manifest' should be interpreted according to the article's ordinary meaning in its context and in light of the Rome Statute's object and purpose.[149]

97. Ordinarily, 'manifest' means 'obvious' and 'serious' and can be distinguished from 'mere' violations.[150] This interpretation is confirmed by the *travaux préparatoires*, which highlight an intention to exclude 'borderline cases',[151] and acts of which the legality is debated.[152] Additionally, Understanding 6 of the ICC Aggression amendments states that aggression is the 'most serious and dangerous form of the illegal use of force.'[153] This Understanding can be taken into account as a subsequent agreement between the parties when interpreting article 8 *bis*.[154]

98. Therefore, the manifest threshold excludes mere violations of the UN Charter that are not obvious or serious. A violation that does not meet the manifest threshold cannot be a basis for the crime of aggression under article 8 *bis.*

99. Whether a violation is obvious and serious requires consideration of its 'character, gravity and scale'.[155] Astipur submits that these three criteria raise different, although overlapping, considerations.

100. 'Character' requires a qualitative evaluation of the violation's nature, excluding everything that is not an incontrovertible breach of the UN Charter. The drafting history clarifies that the accused's intent should not be considered when determining

[149] VCLT, art 31(1).

[150] *Bemba et al. (Appeal)*, [295].

[151] VCLT, art 32; SWGCA 2007 Report, annex II [16]; SWGCA 2006 Report, [19]; SWGCA 2005 Report, annex II [37].

[152] SWGCA 2005 Discussion Paper 3.3; SWGCA 2007 Report, annex II [16]; SWGCA 2008 Report (June), [24]; SWGCA 2009 Report, [13].

[153] Aggression Understandings, annex III [6].

[154] VCLT, art 31(3)(a).

[155] Elements of Crimes, art 8 *bis*(3).

the character, having rejected both the 1999 and 2000 proposals submitted by Germany which included intention.[156]

101. 'Gravity' encompasses two ordinary meanings of qualitative 'seriousness',[157] and quantitative 'severity, magnitude and consequence'.[158] It is also confirmed by the drafters' intention to limit the scope of article 8 *bis* to serious cases and exclude cases, of which the legality is debated or ambiguous, that fall into the 'grey area'.[159]

102. 'Scale', in the ordinary sense previously accepted by the Court,[160] refers to a quantitative analysis of the level of force used and the effects of that force.

103. A 'manifest' violation is distinguished from one that has an insufficient level of force, severity, magnitude and consequence, and one that is not obviously illegal.

2. Humanitarian intervention is not a manifest violation of the UN Charter

104. Astipur submits that, quantitatively, the airstrikes are not of sufficient gravity and scale to constitute a violation of the UN Charter. Only three airstrikes were launched, and fewer than 100 civilians were killed. This is particularly apparent when comparing the present situation with those previously before the Court as discussed at [3]-[7].

105. Further, qualitatively, the airstrikes' character and gravity do not constitute an act of aggression because genuine humanitarian intervention is not an incontrovertible breach of the UN Charter nor sufficiently serious to constitute a manifest violation.

106. Even if the Chamber is unwilling to find a CIL exception to article 2(4) of the UN Charter, the extent of legal disagreement on humanitarian intervention indicates that a

[156] Barriga and Kreβ (2012), 340, 367.

[157] *Abu Garda,* [31].

[158] Van Schaack, n 126, p 486; *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v US) 1984 ICJ 14, [195], [247], [249] (26 November); *Oil Platforms* (Islamic Republic of Iran v US) 2003 ICJ 161, [62], [72] (6 November).

[159] SWGCA 2008 Report (June), [24].

[160] *Muthaura et al.*, [145].

breach in these circumstances is not sufficiently obvious to constitute a 'manifest' violation for the following reasons.

107. First, as discussed in [59]-[64], humanitarian intervention has continued to be practised by states as a legitimate response to overwhelming humanitarian necessity.

108. Second, the international response to recent instances of humanitarian intervention indicate its legal ambiguity, as discussed at [65]-[72]. The ambiguity is further demonstrated by the defeat of the UNSC resolution condemning Astipur's airstrikes with eleven oppositions, three abstentions and only one vote in favour.[161] Additionally, there was no UNSC resolution confirming that the airstrikes were an act of aggression in the six months after the Prosecutor gave notice pursuant to article 15 *bis*(6) and (8).[162]

109. Third, excluding genuine humanitarian intervention complies with a proper interpretation of article 8 *bis* by construing the article consistently with internationally recognised human rights,[163] and interpreting any ambiguity in favour of the accused.[164]

110. The gravity of the violation is qualitatively insufficient because it aligns with the object and purpose of the UN Charter. The airstrikes were in response to an overwhelming humanitarian catastrophe and prevented the risk of crimes against humanity and a breach of the international prohibition against chemical weapons.

111. Therefore, the 'character' and 'gravity' of genuine humanitarian intervention render such acts within the 'grey area' of the law, which is excluded by the manifest threshold.

112. Astipur's airstrikes are not a manifest violation of the UN Charter as they constituted genuine humanitarian intervention.

[161] Facts, [12].

[162] Facts, [16].

[163] Rome Statute, art 21(3).

[164] Rome Statute, art 22(2).

C. Conclusion

113. Astipur submits that there has been no violation of the UN Charter, or alternatively, that the violation was not manifest. The PTC made errors which materially affected the decision. Therefore, Astipur requests this Chamber to reverse the PTC decision.

III. THE PTC ERRED BY HOLDING THAT PROFESSOR TARGARIAN COULD BE CRIMINALLY LIABLE FOR AIDING AND ABETTING THE CRIME OF AGGRESSION

115. As submitted at [9]-[43], the documents seized from Professor Targarian's home should be inadmissible because the search and seizure violated her right to privacy, as well as the Rome Statute, to such an extent that it would seriously damage the integrity of the Court if admitted. Absent these documents, the Chamber does not have sufficient evidence to find that there are substantial grounds to believe that Professor Targarian aided or abetted the crime of aggression. The PTC's decision should be reversed.[165]

116. Alternatively, although lawyers can *prima facie* be prosecuted for aiding and abetting the crime of aggression, they must fulfil articles 25(3 *bis*) and 25(3)(c). However, Astipur submits that these articles are not satisfied as Professor Targarian:

a. Was not in a position to satisfy the leadership threshold required in article 25(3 *bis*); and
b. Does not satisfy the material element of aiding and abetting; and
c. Does not satisfy the mental element of aiding and abetting.

117. Astipur requests that this Chamber finds that the Prosecution has failed to establish substantial grounds to believe that that Professor Targarian is criminally liable for aiding and abetting the crime of aggression. The Chamber should reverse the PTC's decision.[166]

A. Article 25(3 *bis*) is satisfied

118. Astipur submits that Professor Targarian cannot be held liable under article 25(3)(c) due to the operation of 25(3 *bis*).[167] This article limits individual criminal liability for the crime of aggression to 'persons in a position effectively to exercise control over or to direct the political or military action of a State'.[168]

[165] Rome Statute, art 83(2)(a).

[166] Rome Statute, art 83(2)(a).

[167] Rome Statute.

[168] Rome Statute, art 25(3 *bis*).

1. Article 25(3 bis*) requires individuals to hold significant military or political power*

119. Interpretation of articles should be 'in accordance with the ordinary meaning…in their context and in the light of its object and purpose'.[169] Recourse may also be had to the *travaux préparatoires* to confirm the meaning.[170]

120. Two key features of the Rome Statute's context are contained in article 1, which gives the Court jurisdiction over 'the most serious crimes of international concern', and article 27, which rejects the immunities and exemptions previously attached to those in absolute leadership positions. This context emphatically calls for prosecution to focus on 'those most responsible.'[171]

121. Definitions of 'control' and 'direct' indicate that article 25(3 *bis*) requires the person to decisively manage a state's political or military action.[172] This includes *de facto* or *de jure* leaders of the state.

122. The *travaux préparatoires* confirm this interpretation. The purpose of the article to target leaders as principle perpetrators was undisputed in the 2009 SWGCA.[173] Professors Claus Kreβ and Carrie McDougall played key roles in the drafting of the crime of aggression amendment, and both endorse this interpretation.[174]

123. The Nuremburg and Tokyo Tribunals' prosecution of crimes against peace offer some guidance on the scope of article 25(3 *bis*), despite their limited precedential value. The crime against peace was the primitive form of the crime of aggression. Even though the Tribunals' constitutive instruments did not have the equivalent of article 25(3 *bis*),[175] each Tribunal predominantly limited liability to leaders.[176] Most convictions secured were against members holding substantial military or political power.

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[169] VCLT, art 31; *Al Bashir*, [126].

[170] VCLT, art 32.

[171] McDougall (2013), 168.

[172] Ibid 181.

[173] SWGCA 2004 Report, [53].

[174] Kreβ and Holtzendorff (2010), 1189; McDougall (2013).

[175] Nuremberg Charter.

[176] McDougall (2013), 178.

124. The actual basis of liability varied within and between Tribunals.[177] In prosecuting Raeder, the IMT based liability on contribution, finding that he was liable for carrying out Hitler's directives despite having no part in their formulation.[178] However in the *Krauch et al.* trial,[179] which concerned 23 directors of a chemical manufacturing conglomerate, liability was limited to those with a responsibility for the 'formulation and execution of [the relevant] policies'.[180] Conversely, the *High Command* case limited liability to participants with the power to 'shape or influence' state policy.[181] In most cases, the precursor to the crime of aggression targeted those with real power, and excluded 'instruments of the policy makers'.[182]

125. Instead of codifying these Nuremberg thresholds, article 25(3 *bis*) limits liability for the crimes of aggression even further.[183] Raeder would satisfy article 25(3 *bis*), not for his *contribution*, but because he was in an effective position to control Germany's navy as the commander-in-chief of the Navy. Other convictions would not have been secured, such as the Chief of the Information Bureau of the Foreign Office, Toshio Shiratori, in the IMTFE. Shiratori was convicted for actively 'expressing views on matters of policy [such as alliance formation and military expansion]…which received consideration in high quarters'.[184] He was not in a position to effectively direct or control Japan's military or political actions. Professor Targarian was even less involved than Shiratori, as her engagement was limited to two occasions, explicitly in an external advisory capacity and only about the legality of a proposed airstrike.[185]

[177] Ibid 178-190.

[178] Ibid 172; *Goring et al.*, 568.

[179] *Krauch et al.*

[180] Ibid 1124.

[181] *Von Leed et al.*, 486, 489.

[182] *High Command Case*, 486-9.

[183] McDougall (2013), 182.

[184] Ibid fn 33-46.

[185] Facts, [14].

126. The drafters intentionally narrowed the Nuremberg standard by excluding those who merely had the power to shape or influence state action.[186] A wide scope risked capturing an excessive number of potential perpetrators, particularly in a democracy where there is a shared responsibility in decision-making. Article 25(3 *bis*) withdraws this uncertainty, limiting the power to those with effective 'control or direction of military or political actions' of a state.[187]

2. Article 25(3 bis*) is not satisfied in the case of Professor Targarian*

127. Whilst a person with *de facto* authority to control or direct Astipur's military or political actions can satisfy article 25(3 *bis*), Professor Targarian's position did not have such authority. Her position was strictly limited to a legal advisor providing advice on a discrete issue of law.[188]

128. Professor Targarian's engagement was limited to two written memorandums.[189] Although the Cabinet considered her advice, it was one of an innumerable amount of other strategic, security, human rights, and diplomatic factors in the political process.

129. The emphasis placed on her advice in the communique is because the communique's purpose was to present the *legal* justification for the airstrikes to the UNSC.[190] It cannot be said that Professor Targarian had *de facto* power to make decisions relating to the political or military actions of Astipur. Professor Targarian's legal advice, whilst useful to the Cabinet, was one of a number of factors to which each Cabinet member would have independently considered. She did not direct or control Astipur's military or political actions.

130. If Professor Targarian was found to satisfy article 25(3 *bis*), this would widen the scope of article 8 *bis* and undermine the capacity for governments to seek both legal and non-legal advice from experts. This ultimately risks not only each state's ability to

[186] McDougall (2013), 182; Barriga and Kreβ (2012), 20-2.

[187] Rome Statute, art 25 (3 *bis*).

[188] Facts, [14].

[189] Ibid.

[190] Facts, [11].

regulate domestic matters, but also the peace and security of the international community.

131. Therefore, Professor Targarian cannot be individually liable for the crime of aggression as liability is excluded by article 25(3 *bis*). Astipur requests the Appeals Chamber to reverse the PTC's decision.

B. Professor Targarian does not satisfy the relevant material or mental elements

132. Additionally, there are no substantial grounds to establish the material and mental elements of aiding and abetting.

1. Material Elements

(a) A substantial contribution is required

133. There are two possible standards for the material element of aiding and abetting:

a. A mere contribution;[191] or
b. A substantial contribution.[192]

134. The first standard was adopted in *Bemba et al.* where the Trial Chamber relied on previous ICC decisions,[193] and found that an accessory's contribution did not need to meet any standard.[194] The Appeals Chamber further suggested that a 'causal' link between the assistance and the commission of the offence was unnecessary.[195]

135. Although these cases propose a higher mental threshold in an attempt to minimise the scope of the mode of liability, this strict interpretation reduces the material element such that it is applicable to every 'landlord, every grocer, every power utility provider, every secretary, every janitor or even every tax payer who does anything which

[191] *Bemba et al. (Judgment)*, [91].

[192] *Mbarushimana (Confirmation)*, [276]-[280].

[193] *Blé Goudé*, [167]; See also *Ongwen*, [43]; *Al Mahdi*, [26].

[194] *Bemba et al. (Judgment)*, [91]; *Bemba et al. (Appeal)*, [1326]-[1327].

[195] *Bemba et al. (Appeal)*, [1326].

contributes to a group'.[196] This is at odds with the purpose of the Rome Statute as identified in [7], which is to prosecute the most serious crimes and those most responsible for them. Notably, the Chamber is not bound to follow *Bemba et al. (Appeal).*[197]

136. The preferred interpretation is that of the PTC in *Mbarushimana* where it was found that due to the 'gravity' threshold in admissibility and the intention to exclude 'infinitesimal' contributions, the word 'substantial' should be read into the text of article 25(3)(d).[198] Similarly, the Trial and Appeals Chambers in *Lubanga* adopted the substantial standard.[199] This interpretation best aligns with international tribunal jurisprudence.[200] At the ICTY, contribution required a 'substantial effect' on the perpetration of the crime,[201] and defendants were acquitted when their 'low rank' meant they could not have contributed to the operation's success.[202] This standard should be adopted.

(b) Professor Targarian's advice is not a substantial contribution

137. Professor Targarian does not meet the 'substantial' contribution requirement. President Bannister's cabinet is a forum for discussion and debate which serves as a check on arbitrary decision-making.

138. Cabinets will take into account a range of factors when making decision; advice related to law, politics, security, human rights and other strategic ramifications of the use of force. Legal advice was merely one factor being considered.[203] Professor Targarian's advice was simply one part of a process developed within an environment

[196] *Mbarushimana (Confirmation)*, [277].

[197] Rome Statute, art 21(2).

[198] *Mbarushimana (Confirmation)*, [276]-[280]; Cf. *Mbarushimana (Appeal on Confirmation)* (Separate Opinion of Judge Fernandez du Gurmendi), [9]-[14].

[199] *Lubanga (Judgment)*, [997]-[1001]; *Lubanga (Appeal)*, [467]-[468].

[200] *Bemba et al. (Appeal)*, [1326].

[201] *Vidoje*, [134].

[202] *Sainovic*, [1636] citing *Einsatzgruppen Case*, 581.

[203] Facts, [14].

of human rights compliance.[204] The Cabinet, who made the decision to launch the airstrike, was considering a response to the Bravos atrocities from 21 July 2018.[205] During the week of negotiations between Cabinet members, they only had access to Professor Targarian's advice for one day.[206] As a result, the relative significance of such advice could not be viewed as 'substantial'.

139. The PTC made an error which materially affected its decision in finding that Professor Targarian satisfied the material element of aiding and abetting.

2. Mental Elements

(a) A Defendant must be aware of the essential elements of the offence, and that they would occur in the ordinary course of events, whilst acting with the aim of facilitating that offence.

140. For Professor Targarian to be criminally responsible for aiding and abetting the crime of aggression, she must have acted '[f]or the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission'.[207]

141. In interpreting this section, the Court has used three different standards:

a. The accessory must have an objective awareness of the principal's intention to commit the crime;[208] or
b. The accessory must share the intention of the principal;[209] or
c. The accessory must be aware of the essential elements of the offence, that it would occur in the ordinary course of events, and acted with the aim of facilitating that offence.[210]

142. Astipur submits that the third standard should be adopted for three reasons.

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[204] Facts, [3].

[205] Facts, [5].

[206] Facts, [14].

[207] Rome Statute, art 25(3)(c).

[208] *Mbarushimana (Confirmation)*, [274].

[209] *Blé Goudé*, [167], [170]; *Ongwen*, [43]; *Al Mahdi*, [26].

[210] *Bemba et al. (Judgment)*, [97]-[98].

143. First, the third standard reconciles the aiding and abetting definition in article 25(3)(c) with article 30, which states that a person is only criminally liable if they committed the material elements of the crime with intent and knowledge.[211] The first and second standard does not consider article 30.

144. Second, *Blé Goudé*, *Ongwen* and *Al Mahdi* adopted the second standard. These judgements applied article 25(3)(c) without considering article 30 or alternative mental standards. The judgment of the Trial Chamber in *Bemba et al.* more extensively considered the issue, analysing and dismissing the other two standards before arriving at the third.[212] Furthermore, the Trial Chamber referred to ICTY, ICTR and SCSL jurisprudence.[213] The Appeals Chamber in *Bemba et al.* upheld this interpretation.[214]

145. Third, if the definition is ambiguous and subject to several interpretations, the third standard should be adopted as ambiguities should be resolved in favour of the Defendant.[215] The third standard is the most rigorous, thus most in the Defendant's favour.

146. Therefore, the third standard should be used when determining whether Professor Targarian had the requisite mental state for aiding and abetting the crime of aggression.

(b) Professor Targarian does not meet the mental standard

147. Astipur submits that Professor Targarian:

a. Was not aware that the offence would occur in the ordinary course of events; and
b. Did not act with the aim of facilitating the crime of aggression.

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[211] Ibid [98].

[212] *Bemba et al. (Judgment)*, [97]-[98].

[213] Ibid [88].

[214] *Bemba et al. (Appeal)*, [1401]

[215] Rome Statute, art 22(2).

148. First, she was not aware that the offence would occur in the ordinary course of events. Knowledge that something will occur in the ordinary course of events requires 'virtual certainty' that it will happen barring an 'unforeseen intervention'.[216] Professor Targarian was asked for her independent legal opinion on the legality of the proposed airstrikes, and informed that President Bannister wanted to authorise the action.[217] She also knew that her memorandum would be presented to the Cabinet for their deliberation.[218]

149. Professor Targarian could not be virtually certain that the airstrikes would occur. She was an academic in Cilanta, in a position both geographically and professionally removed from political and military decision-making. She was aware that the document would be used to 'convince' the Cabinet to approve the strikes,[219] which indicates that other factors were being considered. Further, the mechanisms of Cabinet decision-making is not something which can be predicted with 'virtual certainty'.

150. Second, Professor Targarian did not act with the aim of facilitating the crime of aggression. Lawyers providing bona fide legal advice will generally fail to satisfy this standard as the advice is generated to inform a client on the legality of a proposed action, and not to endorse the action.[220] Although she knew why her client wanted the memoranda, this does not change the intention of providing genuine legal opinion. Even if there was an alteration in the final draft, it cannot be said to be so skewed as to distort the law to facilitate a crime. As discussed at [57]-[70], the legality of humanitarian intervention is a widely debated, ambiguous and evolving area in international law open to various interpretations.

151. Professor Targarian does not satisfy the mental elements for aiding and abetting the crime of aggression.

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[216] *Lubanga (Appeal)*, [447]; *Katanga*, [776]; *Bemba (Confirmation)*, [362]-[369].

[217] Facts, [14].

[218] Ibid.

[219] Facts, [14].

[220] Bilder and Vagts (2004), 693.

C. Conclusion

152. The PTC made errors in their reasoning. These errors materially affected the outcome, as the charges would not have been confirmed had the errors not been made.

153. Even if contrary to Astipur's submissions the evidence is found to be admissible, and the Astipur airstrikes constitute a manifest violation of the UN Charter, Professor Targarian cannot be liable for aiding and abetting the crime of aggression due to the operation of article 25(3 *bis*) and her failure to satisfy the elements of article 25(3)(c).

CONCLUDING SUBMISSIONS

Wherefore in light of the questions presented, arguments advanced and authorities cited, the State of Astipur respectfully requests this Chamber adjudge and declare that:

I. **Reverse** the PTC's determination that the ICC has jurisdiction over this case.

II. **Reverse** the PTC's determination that the evidence seized from Professor Targarian's home is admissible.

III. **Reverse** the PTC determination that the Astipur airstrikes constitute a 'manifest' violation of the UN Charter.

IV. **Reverse** the PTC's determination that Professor Targarian can be held liable for aiding and abetting the crime of aggression.

V. **Reverse** the PTC's decision to confirm the charges against Professor Targarian.

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