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THE APPEALS CHAMBER

SITUATION RELATING TO THE CRIME OF AGGRESSION AGAINST BRAVOS

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

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LIST OF ABBREVIATIONS

Crime of Aggression	CoA
International Criminal Court	ICC or Court
International Criminal Court Statute	ICCSt. or Rome Statute
Pre-Trial Chamber	PTC
International Criminal Tribunal for the Former Yugoslavia	ICTY
United Nations International Criminal Tribunal for Rwanda	ITCR
United Kingdom	UK or U.K
European Court of Human Rights	ECtHR
Inter-American Court of Human Rights	IACtHR
European Convention of Human Rights	ECHR
United Nations	UN
United Nations Security Council	UNSC
United Nations Security Council Resolutions	UNSCR
United Nations General Assembly	UNGA
United Nations General Assembly Resolution	UNGAR
International Court of Justice	ICJ
United States	US or U.S
International Commission on Intervention and State Sovereignty	ICISS
The Special Court for Sierra Leone	SCSL
New York Times	NYT

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STATEMENT OF FACTS

I. Background of the situation

1. This situation pertains to the potential commission of the CoA by the Republic of Astipur's authorities against Bravos in the bombardments of July 28, 2018. It also involves the country of Cilanta, hometown of the accused in the case, Professor Dani Targarian. All three countries are parties to the Rome Statute and signed the Kampala amendments.

II. The economic issue

2. It is important to emphasize that Astipur was for three decades the world's major exporter of cobalt, until Bravos discovered reserves of the metal in its territory, in 2016, and started exploring them. Because of its strategy of exporting cobalt for half the market price, Bravos quickly gained a large share of the world market. Consequently, Astipur's tax revenue plummeted and unemployment rates escalated.

III. Bravos' internal issue

3. In July 2018, cobalt mine workers in Bravos started protesting for better labor conditions. When the protest escalated to an armed riot in one of Bravos' largest extraction site, in July 21, the government deployed chemical bombs to contain it.

4. Further, in July 24 another protest took place in the Bravos' city of Winterfall, where many of the families of the killed mine workers live. Having started peacefully and escalated to a violent protest, the government contained it by launching chemical bombs. Within the two attacks, 2,200 people were killed.

IV. Astipur's and Targarian's involvement in the situation

5. Astipur, having heard of the attacks in its neighbor's territory, drafted two resolutions, one after each attack, to be introduced in the UNSC condemning Bravos' use of chemical weapons. Both were vetoed by a permanent member.

6. Also, in July 23 Astipur's president commissioned an opinion on the legality of the use of force against Bravos' chemical weapons facilities from Dani Targarian, a well-known law professor from

Cilanta. Initially, she understood that the use of force could either be considered a lawful humanitarian intervention or a CoA. After receiving an extra $5,000 dollars to change her opinion, she removed the possible qualification of the fact as a CoA.

7. After a few other protests about Bravos' gas attacks started in the country, Astipur launched airstrikes against three targets related to chemical weapons in Bravos in July 28. The allegation of legality of the airstrikes was based on the Professor's final memorandum, and left approximately 100 people killed.

V. The collection of evidence in Cilanta

8. Learning about the Professor's justification of the airstrikes, Cilanta, one of the states that publicly condemned Astipur's attack had the federal police conduct a search and seizure at Targarian's house in the early hours of July 30. The Professor's computer was confiscated and her emails with Astipur's President addressing the possible illegality of the attacks were found and sent to the ICC's Prosecutor.

VI. ICC's proceedings

9. The PTC decided, by majority, to admit the case against Professor Targarian before the Court. This is her appeal to the decision.

ISSUES RAISED

-A-

Whether evidence seized from the home of the Defendant under the circumstances described in the Pre-Trial Chamber's opinion must be excluded under Article 69(7) of the ICCSt.

-B-

Whether the facts described in the Pre-Trial Chamber's decision were of the "character, gravity and scale" to "constitute a manifest violation of the Charter of the United Nations" as required for the prosecution of the Crime of Aggression under Article 8*bis* of the ICCSt.

-C-

3. 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 ICCSt.

SUMMARY OF ARGUMENTS

-A-

1. The fact that the search and seizure was conducted without a warrant does not suffice to trigger Article 69(7)'s application. First, there is no consensus in terms of IT on a warrant's necessity to conduct a search, indicating that the search was a mere breach of Cilanta's national proceedings.

2. There is no reason to doubt the reliability of the evidence. An automatic exclusion of evidence gathered by means of violation of human rights applies to cases where the reliability is doubtful from the start, *i.e* information obtained through torture, and not through the violation of one's privacy. Further, if the search had been conducted with full adherence to the national laws, the exact same evidence would be gathered, thus the violation did not affect the reliability of the evidence. Finally, following the Court's understanding in *Katanga*, all the conditions to find an evidence reliable are present.

3. Admitting the evidence would not damage the proceedings. Not only there is no consensus on the necessity of a warrant for a search, but also it was conducted by competent authorities, with reasonable reason to occur and without any indication of a use of violence that would aggravate the breach in her privacy or any other rights. This follows the Court's ruling in *Lubanga*, where there was the same discussion as to whether evidence collected by an unlawfully conducted search and seizure should be admissible.

-B-

1. Astipur cannot justify the attacks under the humanitarian intervention doctrine's assessment, once such act is not within the exceptions to the use of force provided in the UN Charter.

2. Even if the Court finds that such exception exists, the bombing was not a humanitarian intervention, once it did not have a humanitarian purpose, nor had Astipur exhausted the peaceful alternatives to the strikes.

3. The bombings must rather be considered a CoA, since they fulfill the criteria established by Article 8*bis* of the ICCSt.. They constituted an act of aggression, elevated to the status of a crime because of their character, scale and gravity, which altogether demonstrate that the attack was a manifest violation of the UN Charter.

-C-

1. Lawyers have been subject to criminal liability for providing legal advices since the Nuremberg Trials, and were also already prosecuted in the ICC. Thus, their profession does not shield them from criminal responsibility.

2. Further, Dr. Targarian abetted the commission of the CoA once both the objective and the subjective elements of the participation mode of liability, under Article 25(3)(c), are present. Once her legal opinion justifying the attacks was used as legal basis by Astipur, she objectively assisted the commission of the crime. The subjective element is also met, since she provided the assistance while knowing the President's intention to attack, and also consciously concealed the possibility of the strikes to be considered a CoA.

WRITTEN ARGUMENTS

A) THE EVIDENCE COLLECTED AT DR. TARGARIAN'S HOUSE MUST BE RENDERED ADMISSIBLE

1. The evidence collected by means of the search and seizure conducted at the accused's house cannot be excluded under Article 69(7) of the ICCSt., once it does not fulfill neither the provision of the article's paragraph, nor the conditions required by its subparagraphs "a" and "b".

I) A brief assessment on the rule on excluding evidence under the Rome Statute

2. The ICCSt. presents two provisions on the exclusion of evidence from the procedures: Article 69(4) and 69(7). The Court has clarified that while the first relates to general issues of admissibility, the second is *lex specialis*[1], being applicable to cases relating to allegedly tainted evidence. Thus, Article 69(7) "*expressly regulates the admissibility of evidence obtained by means of a violation of the Statute or internationally recognized human rights"*[2]. Once the present case discusses specifically whether the evidence collected at the accused's house are tainted or its admission would taint the proceedings, only Article 69(7) will be addressed.

II) The application of Article 69(7)

3. For an evidence to be excluded under Article 69(7), it must pass through a two-step assessment[3]. First, it must fulfill the requirement prescribed in the paragraph, hence it must be obtained by means of a violation of the ICCSt. or internationally recognized human rights[4]. Then, either one of the two subparagraphs' provision must be met, meaning that the evidence must either be found unreliable[5] or its admission must seriously damage the integrity of the proceedings or be antithetical[6]. None of

[1] ICC-01/04-01/06-1981, paras 34 and 43.

[2] ICC-01/04-01/06-1981, para 34.

[3] ICC-01/04-01/06-1981, para 41.

[4] Article 69(7), ICCSt.

[5] Article 69(7)(a), ICCSt.

[6] Article 69(7)(b), ICCSt..

these conditions are met. First, the search and seizure was solely a breach of the national procedure. Second, neither of the subparagraphs' requirement are met. That is because there is no reason to doubt the reliability of the evidence collected and because admitting the evidence would not damage the proceedings in any form.

a) The search and seizure amounted solely to a breach of national procedure

4. The first step to exclude evidence under Article 69(7) requires a violation of the ICCSt. or of internationally recognized human rights. In the current case, the Defense alleges the search and seizure has violated the accused's right to privacy[7]. It is not in dispute whether this right is an internationally recognized one, once the ICC itself has held that it is[8]. What is controversial is whether in this case her right to privacy was seriously violated to trigger Article 69(7). The Prosecution sustains that once the search and seizure was a mere breach of national proceedings Article 69(7) cannot be applied.

5. Even though the Court has understood the right to privacy as internationally recognized, it has sustained that it does not amount to an absolute right[9]. In *Lubanga*, it was mentioned that a search and seizure conducted against the national laws of the accused's country did not amount to a violation of the right to privacy, but rather a *"lawful interference"* of such right[10], resulted from a procedural breach in the national procedure[11]. In that occasion, the PTC I also ruled that the fact that a national judge has found the search to be unlawful was not binding on the Court[12]. The evidence was excluded from the proceedings, though, because the Chamber understood that the search violated the principle of proportionality[13], once hundreds of documents were collected, most of them irrelevant to the case[14].

[7] Case 2019, para. 17.

[8] ICC-01/04-01/06-803-tEN, para 74; ICC-01/05-01/13-1854, para 46. The Court has relied its decision on the fact that the right to privacy is enshrined in Article 17 of the ICCP, in Article 8 of the ECHR and in Article 11 of the ACHR.

[9] ICC-01/04-01/06-803-tEN, para 75.

[10] ICC-01/04-01/06-803-tEN, para 75. Also, Camenzind v. Switzerland.

[11] ICC-01/04-01/06-803-tEN, paras 76-83.

[12] ICC-01/04-01/06-803-tEN, para 69.

[13] ICC-01/04-01/06-803-tEN, para 79. The principle was extracted from the ECtHR, citing specifically Miailhe v. France, para. 39. In this opportunity, the ECtHR referred to the disproportion between the number of irrelevant documents collected and the purpose of the search.

[14] ICC-01/04-01/06-803-tEN, paras 79-81.

6. This decision in Lubanga's case is relevant mostly because of its similarities to the present one. The main illegality of the search conducted at Professor Targarian's house was the lack of warrant[15]. However, the necessity of a warrant to conduct a search is still a controversial issue in what concerns International Courts[16]. While the Military Tribunals conducted searches and seizures indiscriminately[17], the *Ad Hoc* Tribunals tended to accept proof from the searches led without a warrant if they had not been conducted by an agent of the Court[18]. Thus, due to the lack of consensus on whether the warrant is strictly necessary[19] to conduct a search and seizure, this issue must be found to be solely a violation of a national proceeding, which was already consolidated by the ICC and the ICTY not to be sufficient to trigger *per se* the application of Article 69(7)[20].

7. As for the principle of proportionality invoked by the Court in *Lubanga* to find that the evidence did violate the right to privacy, it was properly respected in the present case. Contrary to the occurred in *Lubanga*, the search at the Professor's house only gathered relevant evidence to access her share of responsibility in Astipur's attack[21], not causing any imbalance between the purpose of the search and the evidence collected. Thus, Article 69(7) must not be triggered.

b) There is no reason to doubt the reliability of the evidence

8. The first provision to exclude evidence at the second step of the 69(7)'s assessment occurs when *"the violation casts substantial doubt on the reliability of the evidence"*[22]. However, once the violation of the right to privacy does not indicate that its reliability could be tampered, and once the evidence presents all of the required elements established by the ICC to be found reliable, they cannot be excluded under Article 69(7)(a).

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[15] Case 2019, para 13.

[16] VIEBIG(2016), p. 153

[17] DE MEESTER et. al(2013), p. 283

[18] IT-97-24, July 2002. In this opportunity, the Chamber explicitly stated that "there seems to be no identifiable rule of public international law according to which it is mandatory to request a judge's warrant before conducting a search and seizure".

[19] Klamberg 2013, p. 252

[20] ICC-01/04-01/06-803-tEN, para 69; ICC-01/04-01/06-1981, para 36; ICC-01/04-01/07-2635, paras 27 and 58; ICC-01/05-01/13-1854, paras 34 and 40. For the ICTY, IT-95-14/2, para 10.

[21] Case 2019, para. 13

[22] Article 69(7)(a), ICCSt.

9. In what concerns the violation through which the evidence was collected, it is important to understand that the idea of excluding unreliable evidence serves the purpose of providing a fair trial to the accused, concerning her rights not to be judged by evidence with a doubtful content[23]. In international cases, violations of rights such as not to be tortured, not to self-incriminate or of the presence of a lawyer are clear examples of violations that cast doubt on whether the evidence collected are reliable or not[24], once the individuals are put in a position in which the content of the proof is probably tainted. In the case, it remains uncontroversial that the violation of the accused's right to privacy did not affect the evidence´s reliability, since the content of the emails found during the search[25] would not have changed if they were collected without any irregularity in the proceedings[26].

10. In this sense, if the search was conducted with the warrant, the same proof would be collected. This line of argument follows the theory of the "inevitable discovery" doctrine, which sustains that "*an illicitly obtained evidence is admissible if the prosecution proves by a preponderance of evidence that this evidence would inevitably have been discovered in a legal manner"*[27]. Similar hypothetical theories have been used by several national jurisdictions[28], and the ICC itself provided its own version of the theory in Lubanga. The Court ruled that *"if the search and seizure had been conducted in full adherence to the principle of proportionality the content of the items seized would have been the same"*[29]. Thus, if there would be no alteration in the content of the emails if they were collected with no breach of privacy, they can be considered reliable.

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[23] VIEBIG(2016), p. 130

[24] Jalloh v. Germany, para. 105; Harutyunyan v. Armenia, para 63; Levinta v. Moldova, para. 69; Gafgen v. Germany, paras 166 and 167; Othman v. UK, para. 264; IT-97-24, February 2002, para. 8; ICC-01/04-01/07-2635, para. 55 and subsequents; Bykov v. Russia, para. 93.

[25] Case 2019, para. 13.

[26] The Court has decided in the same direction in *Bemba*. When addressing the alleged unreliability of a few documents, it has found that "If the Western Union Documents would have been obtained without any violation to the right to privacy, the content would have been the same". ICC-01/05-01/13-1854, para. 62.

[27] VIEBIG(2016), p. 77. The theory was first used by the U.S Supreme Court in Nix v. Williams.

[28] VIEBIG(2016), p. 225-227. The author identified the acceptance of hypothetical theories in the case-law of the U.S and England, for instance. At the U.S, Nix v. Williams. At UK, Regina v Alladice.

[29] ICC-01/04-01/06-1981, para 40.

11. Furthermore, the Court has proposed a list of elements that help to access whether evidence can be found reliable. Even though it has admitted that *there is no finite list of possible criteria that are to be applied in determining reliability*[30], it has established that: the source, the nature and characteristics, the contemporaneousness, the purpose and the way the evidence was gathered are key factors to verify the authenticity of the evidence[31].

12. All the factors above are present in the case. The emails were collected from the accused's computer, which is safely a reliable source; they prove exactly that the accused concurred to the crime by sending emails justifying the bombings; they were collected the day after the bombing and are dated from the day previous to its occurrence; they are for the purpose of building a case against the accused, which fulfills the fourth factor. At last, even though the documents were collected through a violation of privacy, the mode of gathering still does not interfere with the reliability of the evidence, once there are no indications in the facts that the documents were tampered. In this sense, having all the conditions to access the reliability of the emails being met, they cannot be excluded under Article 69(7)(a).

c) Admitting the evidence would not be antithetical nor damage the integrity of the proceedings

13. The Prosecution moves to argue that the second provision for excluding allegedly tainted evidence, which occurs when "*the admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings."*[32], is also not met. That is because the balancing of principles of the effective prosecution of crimes and respect for the accused's rights, required by the Court to access the severity of the damage to the proceedings[33], can only maximize both principles if the proof collected is deemed admissible. After all, excluding the evidence would cause grave harm to the Court's integrity, preventing it from finding the truth and leaving approximately one hundred victims[34] helpless, at the cost of protecting a domestic violation of an individual right that can be remedied by forms other than rendering the evidence inadmissible[35].

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[30] ICC-01/04-01/07-2635, para. 27; ICC-01/04-01/06, para. 29.

[31] ICC-01/04-01/07-2635, para. 27.

[32] Article 69(7)(b), ICCSt.

[33] ICC-01/04-01/06-1981, para 42.

[34] The numbers were reported by Bravos' press. See Case 2019, para. 11

[35] The ECtHR, for example, recognized the the violation of privacy as sufficiently grave to be brought to the Court. See Miailhe v. France, para 10 and Leotsakos v. Greece.

1) An overview of the application of subparagraph "b"

14. When addressing the application of subparagraph "b", the Court understood it serves to prevent evidence from being automatically excluded from trial, for it allows that even evidence gathered by means of violation of internationally recognized human rights can be admitted if it does not damage the integrity of the proceedings[36]. Thus, the Court has found, based on the human rights jurisprudence[37] that only the most serious violations of human rights can lead to the exclusion of evidence[38]. In addition to the fact that the balancing exercise to evaluate whether there was a serious damage to the proceedings requires a consideration of the core values of the Rome Statute[39], the rationale behind subparagraph "b", is that the decision to exclude an evidence must be guided by an idea of preserving the Court's, and only the proceedings', integrity[40].

2) The application of subparagraph "b" in Lubanga's case and its similarity to the present case

15. In the three decisions it has addressed the application of subparagraph "b", the ICC has relied upon the factual circumstances of the cases[41], not presenting any objective criteria to achieve the proper balance between the accused's rights and the effective prosecution of crimes. For this reason, the Prosecution finds that because of the factual similarities between Lubanga's case and the present one, a comparative analysis between both is relevant for the Court to understand the importance of admitting the evidence collected at the Professor's house.

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[36] ICC-01/04-01/06-803-tEN, para 75; ICC-01/05-01/13-1854, para. 63.

[37] The ECtHR found that the assessment of evidence falls essentially under national legislation. In Schenk v. Switzerland, para. 46, it decided that it "cannot exclude as a matter of principle and in the abstract that unlawfully obtained evidence […] may be admissible", and held that it had to ascertain only whether the trial as a whole was fair. Also, Saunders v. United Kingdom; Khan v. United Kingdom; and Mechelen v. The Netherlands. This reasoning was also followed by the IACHRt in Ivcher Bronstein v. Peru. In the same vein, Castillo Páez, Loayza Tamayo and Paniagua.

[38] ICC-01/04-01/06-803-tEN, para 86.

[39] ICC-01/04-01/06-1981, para 42.

[40] VIEBIG(2016), p. 164. The author also presents a thorough explanation on the discarded rationales to interpret Article 69(7), which are the ones of deterrence of national authorities to violate human rights and of remedy to the accused for having his/her rights violated.

[41] ICC-01/04-01/06-1981, paras 41-50; ICC-01/04-01/07-2635, paras 57-64; ICC-01/05-01/13-1854, paras 34 and 40.

16. In Lubanga's decision, the Court has ruled that the collection of several documents by means of a violation of privacy through an illegal search and seizure did not damage the integrity of the procedure mainly because:

> *(i) the violation was not of a particularly grave kind;*
> *(ii) the impact of the violation on the integrity of the proceedings lessened because the rights violated related to someone other than the accused, and;*
> *(iii) the illegal acts were committed by the Congolese authorities, albeit in the presence of an investigator from the prosecution*[42]

17. Also, it found relevant that the search was conducted by **competent authorities** and **without the use of force or coercion**. In the present case, these same understandings are applicable.

18. In what concerns the violation's gravity, the three objections made by the Defense to the PTC must be addressed: (i) that the search would damage the proceedings due to the lack of warrant; (ii) the time it was conducted; and (iii) the behavior of the national officers[43].

19. First, as previously argued, there is no consensus on the necessity of a warrant in what concerns International Courts, thus this should not be a factor to weigh in favor of the exclusion of evidence, once it is not an indicative that it has increased the gravity of the breach to the accused's right to privacy. Regarding the time of the search, the circumstances in which it was conducted must mitigate the effect of the alleged violation: Cilanta was one of the States that publicly condemned Astipur's attacks, so it is reasonable to justify its quick response to the possibility that a national had engaged in a criminal conduct. As for the officers' behavior, there is no indication they acted violently or coerced the accused during the search, but only that the search was conducted in a flustered way. Moreover, the officers who conducted the search were from the federal police[44], thus they were a competent authority, which weighs in favor of the admission of the evidence. Hence, there is no objective indicator that the breach in the national proceedings resulted in an aggravated violation of human rights.

[42] ICC-01/04-01/06-1981, para. 47.

[43] Case 2019, para. 17.

[44] Case 2019, para. 13.

20. Although the second consideration made by the Court in *Lubanga* is not applicable to the case, once it was the accused herself who had the house searched, the third consideration is consistent with the facts of this case. As occurred in *Lubanga*, where the Congolese authorities violated the subject's right, the breach in the Professor's right to privacy was utterly responsibility of the national officers, having the ICC not taken any part in it.

21. Thus, when assessed that two out of the three considerations made by the Court in *Lubanga* regarding the impossibility of exclusion of evidence under Article 69(7)(b) are identifiable in this case, the same line of argument taken in *Lubanga* must be followed now. This consideration is only reinforced in the case with the presence of the other two factors that weighed to the admission of evidence in *Lubanga*: that the search was conducted by competent authorities and without the use of violence. In this sense, admitting the evidence would be the most effective way to maximize the Court's purpose of prosecuting crimes and valuing the due process, while the exclusion of evidence would cause graver damage to the proceedings than its admission.

III) Conclusion

22. The evidence collected at the accused's house must not be excluded under Article 69(7)'s provision in light of two main arguments. First, the violation of the accused's privacy derived solely from a violation of the national proceedings, not being aggravated because of its illegality.

23. Second, even if it can be understood that paragraph 7 is applicable, the evidence still cannot be excluded, once neither of the subparagraph's provisions are applicable to the case. The first, because there are no doubts about the reliability of the evidence, and the second, because admitting the documents would not damage the integrity of the proceedings.

B) THE AIRSTRIKES PERPETRATED BY ASTIPUR CONSTITUTE A CoA FOR BEING A MANIFEST VIOLATION OF THE UN CHARTER

1. Bravos' bombardment by Astipur cannot be considered a lawful humanitarian intervention. First, this doctrine does not fit the exceptions predicted in the UN Charter prohibiting the use of force; second, even if such exception existed, the criteria required for such exceptions to be recognized are not met. The bombardment must be considered, then, a CoA under Article 8*bis* of the ICCSt., once the attack meets the criteria required by law, chiefly for being a manifest violation of the UN Charter.

I) The lack of legal prerogatives to conduct the attack

2. Since there is no prediction on the UN Charter of an exception to the use of force through a humanitarian intervention, Astipur's bombardment must be considered from the start an unlawful violation of the Charter.

3. The UN Charter, precisely the instrument that guides the definition of Aggression under the ICC[45], explicitly prohibits the use of force of States against the territorial integrity of any other State[46], being the only two exceptions to this rule the authorization by the UNSC[47] or self-defense[4849]. Neither of these conditions are met in the case, once the two resolutions drafted by Astipur to the UNSC were vetoed by a permanent member[50], and Bravos did not attack or menaced to attack Astipur, which would trigger the right to self-defense. Thus, any use of force from Astipur would essentially be a violation of Article 2(4) of the UN Charter. Therefore, once the alleged "right to humanitarian intervention" is not one of the predicted exceptions to the use of force, it cannot be invoked to justify Astipur's attack.

II) The attack does not constitute a lawful humanitarian intervention

[45] Article 8bis, ICCSt.. The definition of the crime requires the use of force to have been an act of aggression that constitutes a manifest violation of the UN Charter.

[46] UN Charter, Article 2(4).

[47] UN Charter, Article 39.

[48] UN Charter, Article 51.

[49] The understanding that only these two are valid exceptions was reinforced in UNGAR 60/1. 2005 World Summit Outcome, para. 79.

[50] Case 2019, paras. 7 and 10.

4. Even if the Court finds that this exception exists, the bombardment of Bravos cannot be considered a lawful intervention. Unilateral interventions are rarely accepted exceptions to the rule of the prohibition on the use of force[51], being successfully invoked only in cases of human rights catastrophes[52], and scarcely under the prerogative of the humanitarian intervention doctrine[53]. In the remote case of recognizing such doctrine, Astipur's bombardment does not fulfill the elements understood as necessary for a lawful humanitarian intervention, being:

> *a) there is convincing evidence, generally accepted by the international community as a whole, of extreme humanitarian distress on a large scale, requiring immediate and urgent relief;*
> *b) it must be objectively clear that there is no practicable 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 relief of humanitarian need and must be strictly limited in time and scope to this aim (i.e. the minimum necessary to achieve that end and for no other purpose).*[54]

5. Undoubtedly, Bravos' repression of its population with chemical bombs[55] constitutes a serious violation of the civilians' human rights, but this does not mean that there was an extreme humanitarian distress on a large scale. When comparing to the cases where a humanitarian intervention was deemed

[51] The principle of such prohibition, enshrined in Article 2(4) of the UN Charter, has been consolidated by both the UNGA and the ICJ. For the Assembly Resolutions: UNGAR 2131(XX); UNGAR 2625(XXV); UNGAR 3314(XXIX); and UNGAR 42/22. As for the ICJ's understandings: ICJ Congo and ICJ Palestine.

[52] Some examples where an unilateral humanitarian intervention was not entirely condemned by the international community are the case of the NATO's bombardment in Kosovo, where an attempt of "ethnic cleansing" was directed at the Albanian population. The very States that conducted the intervention justified it in its exceptional character. ROBERTS (1999), p. 107. Also, the bombardment of Syria, in 2018, was justified with arguments relating to the catastrophe caused by the use of chemical weapons from Syria, but only the U.K resorted to the humanitarian intervention doctrine.

[53] In the Kosovo intervention by NATO, for instance, most of NATO's States did not use the doctrine as a justification for the intervention. ROBERTS (1999), p. 107. Also, RUYS (2018), p. 5.

[54] FCO Note. These criteria have been used by the U.K to justify NATO's intervention in Kosovo. Also, to a possible intervention in Syria in 2013 and in the actual bombardment of April 2018, alongside France and the U.S. It has also been used by Professor Targarian in her memorandum addressed to President Bannister.

[55] Case 2019, paras. 5 and 9.

necessary, Bravos' situation is out of such scope. The Kosovo intervention[56], for instance, related to a massive "ethnic cleansing" of the Albanians in the Serbian territory, resulted in thousands of deaths and in over 400,000 people displaced from their houses[57]. As for the Syrian bombardment, there had been hundreds of thousands of deaths before the international community accepted - not with a consensus[58]- the intervention with the use of force. Several cases of human rights violations occurred without any armed intervention response[59]. Although some action must be taken to stop the occurrence of these violations, not all of them are enough to trigger the use of force. Thus, while Bravos' use of bombs against its population is not a regular or a lawful practice, its comparison to other cases demonstrate that it has not the necessary scale to trigger the use of force, as Astipur has done.

6. The second criterion of the humanitarian intervention doctrine does not meet because there were still several alternatives to be explored before the use of force. Although Astipur attempted to pass two resolutions in the UNSC after Bravos attacked its own population[60], the time gap between the attacks and Astipur's bombardment of Bravos was only seven days.

7. As a matter of fact, President Bannister commissioned Professor Targarian's opinion on the legality of using force only two days after the first attack[61], when the second riot had not even erupted, which demonstrates he intended to bombard Bravos from the start, and not after wearing out all options. This is reinforced by the fact that no measures, such as an economic embargo or a diplomatic meeting with Bravos' representatives to attempt to cease the use of chlorine bombs, were considered before the strikes. President Bannister proposed an economic embargo **after** the bombardment[62], which indicates that the alternatives were not exhausted. Considering that Bravos had just taken Astipur's leadership in

[56] Even this case, generally accepted as a successful unilateral intervention, was considered by several States, such as Russia, as a gross violation of human rights, once the intervention took two months of bombing. HENKIN (1999) apud MCCABE (2014), p. 1011.

[57] The numbers were extracted from Robin Cook, House of Commons debate on Kosovo, 25 March 1999. Available at: https://api.parliament.uk/historic-hansard/commons/1999/mar/25/kosovo

[58] At least 17 countries have found the bombings explicitly illegal, including Russia, China, South Africa and Switzerland. A mapping of the countries' position can be accessed at https://www.justsecurity.org/55835/mapping-states-reactions-syria-strikes-april-2018-a-comprehensive-guide/

[59] WEISBORD (2008), p. 169. The author cites situations where the USNC did not make any resolutions, such as at the Korean War, the Iran-Iraq War, the Falklands War, and several Israeli operations.

[60] Case 2019, paras. 7 and 10

[61] Case 2019, para. 8.

[62] Communiqué of President Bannister do the UNSC. Case 2019, para 11.

the exportation of cobalt, the facts point to an intervention driven by economical, rather than humanitarian purposes, which is an important factor to dismiss any allegation of lawful humanitarian intervention[63].

8. For the last criterion, there is no reason to analyze the proportionality of an alleged humanitarian act if it does not present a humanitarian purpose. Therefore, if lacking this purpose, any use of force should be considered disproportionate.

9. Finally, there is no indication that destroying a few locations related to chemical weapons would prevent Bravos from suppressing the riots in other ways. Thus, Astipur's actions not only unjustifiably violated Bravos' territorial integrity, but were doubtfully successful in its alleged purpose.

10. A comparison with Syria's situation is relevant due to its similarities to this case. Even after years of civil war and hundreds of thousands of deaths, in 2013 the UK failed to pass several resolutions in the UNSC and menaced to bomb Syria's chemical weapons' related facilities relying on the "humanitarian intervention" doctrine. Still, it did not do it because there was reluctance from the international community on the legality of the use of force[64]. The bombardment of the chemical weapons' facilities was only accepted by the international community with less resistance in 2018[65], when the expectation of a peaceful solution was worn out[66]. But even in such a dramatic situation, the efficiency of a bombardment on chemical weapons' facilities is questioned, precisely because of the

[63] ICISS Report, p. XII. At this Report, the ICISS, an *ad hoc* commission of participants that worked precisely to popularize the concept of humanitarian intervention and guide the UNSC in assessing the legality of the use of force, states that the first condition to access the legality of a humanitarian intervention is that "The **primary purpose** of the intervention, whatever other motives intervening states may have, **must be to halt or avert human suffering.**".[emphasis added]. As Tom Ruys states: "This presupposes that the primary purpose of military action is to end human suffering, not to further the intervening state's political (or economic) agenda.". RUYS (2018), p. 8.

[64] The ICJ, for instance, has stated in Nicaragua's case that "the unilateral use of force by a State in another State to protect human rights cannot afford 'a legal justification' for the unilateral use of force", which appears to implicitly reject the humanitarian intervention doctrine. Also, Russia was strongly against such intervention, stating that it would possibilitate "influential countries [to] bypass the United Nations and take military action without Security Council authorization." (Putin's Opinion NYT. Available at: https://www.nytimes.com/2013/09/12/opinion/putin-plea-for-caution-from-russia-on-syria.html).

[65] Russia and China, both permanent members of the SC, have repeatedly positioned against the possibility of any kind of unilateral intervention that is not expressly allowed by the UN Charter.

[66] Although no UNSCR has passed regarding the use of force in Syria, there were several attempts to resolve the conflict peacefully. In example, UNSCR 2042(2012) and 2043(2012), ordered the Syrian government to put an end to the conflict and condemned the violations of human rights committed; also UNSCR 2118(2013), condemning Syria for violating the treaty of nonproliferation of the use of chemical weapons.

uncertainty on whether attacking a country improves the civilian's situation[67]. In this case, not only the efficiency of the attack is questionable, but also the intention behind it, and the fact that not all peaceful solutions were attempted. Therefore, having none of the criteria required by the lawful application of the "humanitarian intervention" doctrine met, Astipur's bombardment cannot be qualified as a humanitarian act, as it was contrarily argued by the government and by the accused.

III) The airstrikes can be considered as a CoA under Article 8*bis*

11. Having demonstrated that Astipur's attack was not legally justifiable neither under the general predictions of the UN Charter, nor under the rare exceptions where this general provision might not be necessary, the Prosecution moves to state that the strikes constituted a CoA under Article 8*bis* of the ICCSt..

a) The elements of the CoA

12. The definition of aggression, established by consensus of the States[68], reads that:

> *For the purpose of this Statute, "crime of aggression" means the* ***planning, preparation, initiation or execution****, by a* ***person in a position effectively to exercise control over or to direct the political or military action of a State****, of an* ***act of aggression*** *which, by its* ***character, gravity and scale****, constitutes a* ***manifest violation*** *of the Charter of the United Nations.*[69] [emphasis added]

13. Thus, to be considered a CoA, an act must fulfil three elements: a) there must be a planning, preparation, initiation or execution of an act of aggression; b) it must have been conducted by a person in a position to exercise control over the military action; and c) the act of aggression must be a manifest violation of the UN Charter, which is assessed by its character, gravity and scale. All the three elements are present in the case.

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[67] SSENYONJO (2013), p. 330

[68] SSENYONJO (2013), p. 336.

[69] Article 8bis, para.1, ICCSt.

b) The execution of an act of aggression ordered by the Cabinet of Astipur

14. The first two elements do not raise controversies on the case, once there is no doubt that an act of aggression occurred and that it was ordered by people with effective control over the military forces of Astipur.

15. Regarding the occurrence of an act of aggression, a few examples to what constitute such practice are put in Article 8*bis* of the ICCSt.. Paragraph 2 reads that:

> *a) (...) 'act of aggression' means* ***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 Charter of the United Nations. Any of the following acts (...) qualify as an act of aggression* (...)
> *b)* ***Bombardment by the armed forces of a State against the territory of another State*** *or the use of any weapons by a State against the territory of another State*[70][emphasis added]

16. Once the bombardment of a State against another is explicitly put as an act of aggression, the facts leave no doubt that this element is fulfilled.

17. As for the element of those responsible, there is also no controversy to its presence in the case. In the communique sent to the UNSC by President Bannister, he stated that "*the Cabinet of Astipur unanimously voted to launch airstrikes against Bravos' facilities that manufactured the chlorine gas weapons*."[71] This shows that there was some planning and preparation to conduct the bombardment and the fact that the airstrikes occurred demonstrate not only the execution of such plan, but also that the Cabinet had effective control over the military actions of Astipur.

c) The airstrikes constituted a manifest violation of the UN Charter

[70] Article 8bis, para. 2, ICCSt. The list was almost entirely copied from UNGAR 3314(XXIX).

[71] Case 2019, para 11.

18. As the definition of the CoA exhibits, the commission of an act of aggression does not suffice for an act to be considered a crime[72]. Rather, it must be elevated to the standard of a crime by being a "manifest" violation of the UN Charter[73]. The manifest violation is characterized by the act's character, gravity and scale[74]. The three criteria are met in the situation.

1) Character

19. The "character" element is understood to be a qualitative test[75], set to prevent that cases of ambiguous legality automatically fall under the definition's scope[76]. Also, it is relevant to access the manifest character of a violation, the "*nature of the attack or the motivation behind it*"[77].

20. Astipur's attack is of character to be a manifest violation of the UN Charter. First, the bombing of another State has already triggered UNSCR and UNGAR to condemn this kind of act as acts of aggression under Article 2(4) of the Charter[78], which indicates that this type of airstrike, - when unjustified as it is the case, - is of sufficient character to be a violation of the Charter. Second, there is nothing in the facts that indicate that Astipur had any humanitarian intention. Conversely, the country had expressed intentions to strike Bravos before the second riot, reinforcing that the bombardment was economically motivated. Thus, a bombardment without reasonable humanitarian justification can only be considered of a character that manifestly violates the UN Charter.

2) Gravity and scale

[72] Another issue pertaining the definition that involved these concepts is the one that while an act of aggression can only be committed by a State, a crime of aggression is committed by an individual. GRIFFITHS(2002), pps. 309-310; STANCU(2004), pps. 87-88.

[73] LABRÍN(2018), p. 318; ISANGA(2013), p. 21

[74] Understanding 7 of the Kampala Amendments reads that in order to be a manifest violation of the UN Charter, "the three specified components--character, gravity, and scale-must each and collectively be sufficient to justify the "manifest determination.". At Kampala Review Conference.

[75] RUYS(2018), p. 4.

[76] BARRIGA(2011), p. 29. Also, UN Report 2008, para. 24; UN Report 2009, para. 13, Apud RUYS (2018), p. 4.

[77] GILLET(2013), p. 859.

[78] UNSCR 573, for instance, condemned Israel for dropping bombs at Tunisia. Also, UNSCR 424, condemning several attacks Southern Rhodesia into Zambia, including bombing, and UNGAR 36/27, condemning Israel for bombarding Iraqi's nuclear facilities.

21. Contrary to the "character" element, the ones of gravity and scale relate to a more quantitative analysis[79], set to prevent "minimal" uses of force from calling the Court's attention[80]. These criteria are met in the present case due to the severity of the strikes that killed approximately one hundred people[81].

22. First, the ICC has already found admissible cases with fewer casualties than the present one[82]. Once the "gravity" and "scale" elements are essentially quantitative, the fact that this case exceeds in casualties other cases prosecuted by the ICC, indicates that the "gravity" and "scale" thresholds for the bombardment to be a manifest violation of the UN Charter is reached.

23. Further, when specifically addressing the gravity and scale threshold of the CoA, the case is also in consonance with the international law's understandings. In the ICJ's judgment in the Nicaragua case, the court understood that not all uses of force constituted aggression, differentiating the concept from *"less grave forms of the use of force"*[83]. Following the UNGAR 2625 (XXV), it found that acts such as: the organizing or encouraging the organization of irregular forces or armed bands[84]; the assistance to rebels in the form of the provision of weapons or logistical or other support[85]; or, the border skirmishes between neighboring states[86], were not encompassed by the concept of "armed attack", but at most a threat or use of force[87], which would not trigger the aggression's definition. These examples refer to situations where the State did not act directly upon the other nation or that did not create grave danger to the population, which does not match the situation, once Astipur planned and executed three bombings that killed one hundred people. In comparison to Nicaragua's case, Astipur's attack is a grave and illegal use of force.

[79] RUYS (2018), p. 4

[80] TRAHAM(2015), pps. 57-59.

[81]The numbers were reported by Bravos' press. Case 2019, para. 11.

[82] ICC-01/13-34 16-07-2015, para 26. This case presented ten killings and 50-55 injured. Also, ICC-02/05-02/09-243-Red 08-02-2010), paras. 33 and 34, with 12 killings; and ICC-02/05-03/09-121-Corr-Red 08-03-2011, para. 27, with 8 attempts of killings.

[83] ICJ *Nicaragua*, para 191.

[84] ICJ *Nicaragua*, para 191.

[85] ICJ *Nicaragua*, para 195.

[86] ICJ *Nicaragua*,para 195. The Court has (controversially) called them "mere frontier incidents".

[87] ICJ *Nicaragua*, para 195.

24. Finally, the present situation is also of sufficient scale and gravity in comparison to the UNSC's resolutions. The UNSC found that actions like: a small arms attack on a presidential palace and an airport; an attack against another nation's capital which used small arms and bombs to kill twelve; two targeted assassinations and collateral loss of life; and violence against diplomatic missions[88], were sufficiently grave to trigger a resolution condemning the States responsible for aggression.

23. Once again, this case demonstrates to be of larger scale and gravity compared to those situations that triggered resolutions. It is true that the UNSCR are generally motivated by political interests of the States, but that does not diminish the argument that less grave situations than the current one were qualified as aggression, especially considering the number of deaths and the danger of conducting an airstrike near a capital, that is usually more populated.

24. Undoubtedly, Astipur's attack was of sufficient gravity and scale to reach the "manifest violation" standard. Deciding otherwise would be contrary to the consolidated understanding that the ICC has regarding the gravity of a situation, as well as the International Law's position.

IV) Conclusion

25. Astipur's attack in Bravos must be considered as a CoA under Article 8*bis* of the ICCSt.. First, it lacks the legal justifications required for the authorization of the use of force, and the facts demonstrate it does not fulfill the scope of any exceptions to the application of the rule prohibiting such practice. Second, it meets all of the elements under Article 8*bis*' definition, especially the fact that the strikes can be qualified as a manifest violation of the UN Charter.

[88] BELLELLI(2010), pps. 507-10 (compilation of UNSC resolutions that have used "aggression") apud MCCHALE(2014), p.1004.

C. PROFESSOR TARGARIAN CAN BE PROSECUTED UNDER ATRICLE 25(3)(C) OF THE ICCST FOR CONSCIOUSLY PROVIDING A LEGAL OPINION USED AS BASIS FOR THE COMMISSION OF A CRIME

1. Dr Targarian acted with the purpose of facilitating the CoA conducted against Bravos since she wrote a memorandum giving Astipur an alleged legal basis to bombard Bravos, even though she knew about the President's intention to strike the neighbouring country and that the diplomatic alternatives had not been exhausted. The Prosecution sustains that not only can lawyers be prosecuted for actions taken under the scope of their profession, but also that the accused's conduct satisfies both the objective and subjective elements of the liability of aiding and abetting.

I) The possibility of lawyers to be prosecuted under International Tribunals

2. The Defense's argument that lawyers who provide legal advice cannot be prosecuted for international crimes is unsustainable. As the PTC rightfully stated, lawyers have been subject to criminal liability for facilitating a crime since the Nuremberg Trials[89], when von Ribbentrop was held criminally liable for preparing the official Foreign Office memorandum to justify aggressive actions in Norway, Denmark, and the Low Countries[90]. The ICC itself has recently prosecuted lawyers for violations of the ICCSt, in *Bemba et al*, for both a direct commission of crimes and for aiding and abetting them[91]. Thus, there is no indication that a lawyer cannot be prosecuted for actions that at first might seem legal.

3. Further, it is not unusual for International Courts to prosecute actions that at first are not manifestly illegal. Several were the cases where a defendant was prosecuted for actions apparently within the scope of the law, but that turned out to facilitate the commission of crimes[92]. Thus, lawyers are not

[89] Case 2019, para. 18, item c.

[90] Major War Criminals Trial, p. 286.

[91] Bemba's lawyers were found guilty of corrupting witnesses to give false statements and of obstruction of justice under Article 70(1) (a), (b) and (c). See ICC-01/05-01/13-749 11-11-2014, paras. 73-95.

[92] ICTR-99-52. The accused responded for incitement on the commission of genocide through his radio channel as; VanAnraat (09/751003-04) was accused for the transportation of chemical substances, later used for the production of weapons in Saddam Hussein's government; Mbarushimana (ICC-01/04-01/10-465-Red, para. 8) was prosecuted for conducting a propaganda policy that aimed to blame other armed parties for the crimes committed by an armed group; Gbagbo (ICC-02/11-01/15) was accused for recruitment, training and sustainment of militias that would eventually commit crimes.

shielded from liability for aiding and abetting solely for their profession[93]. Conversely, when it is verified that the probable motive for a client to request advice on some specific issues is to avoid the consequences of a crime that may be committed in the future, lawyers **must** be held liable for providing such advice[94].

4. In this case, Professor Targarian's conduct exceeded the legal scope of the exercise of her profession. By providing a legal opinion that advised her client to bombard another country, while knowing that this action could be considered a CoA[95], she violated the internationally recognized rule that prohibits a lawyer from advising a client to take on a criminal or fraudulent action[96]. Also, by deliberately ignoring the possibility of the attack to be considered as a CoA, in the second version of her memorandum, she violated her legal duty to "*determine what is the law at the time* [of the conduct] ***and then*** *determine whether the proposed conduct may violate the law*"[97]. These violations are enough to establish substantial grounds to believe that the accused's conduct was not a mere exercise of her profession, but a contribution to a crime, which holds her subject to prosecution.

5. In conclusion, there is no legal basis to sustain the Defense's argument that a lawyer cannot be prosecuted for aiding and abetting the CoA. The Prosecution will further demonstrate that Professor Targarian's conduct fulfills the criteria established by the ICC and other IT to access the participation mode of criminal liability.

II) The Professor's conduct fulfills both the objective and subjective elements of the "aiding and abetting" mode of liability

6. Article 25(3) of the ICCSt. expressly distinguishes the responsibility of principals and accessories, and paragraph "c" addresses specifically the situations where the accused "*for the purpose of*

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[93] CIAMMAICHELLA(2007), p. 1143.

[94] NEWMAN(1994), p. 287.

[95] This knowledge can be assessed by the first version of her memorandum sent to President Bannister. Case 2019, Appendix 2, para. 3.

[96] International Bar Association Code of Ethics, rule 10; American Bar Association Rules of Professional Conduct, rule 1.4(b); Federation of Law Societies of Canada, Model Code of Professional Conduct, rule 3.2(7); Singapore Legal Professional Conduct, rule 5(1)(c); New Zealand, Lawyers Conduct and Client Care, rule 2.4; Brazilian Bar Association, Code of Ethics and Discipline, Article 8.

[97] CIAMMAICHELLA(2007), p. 1160.

facilitating the commission of such a crime, aids, abets or otherwise assists in its commission"[98]. Initially, the Court indicated that it would rely on the IT's jurisprudence to assess the objective elements of such mode of liability[99], which meant adopting a higher threshold for the participation of the accused, once the IT required that the contribution had a "substantial effect" in the commission of the crime[100]. Later, though, it understood that the "substantial effect" criterion could not be extracted from the ICCSt., thus it should not be applied by the ICC[101], meaning that any assistance that somehow has an effect in the commitment of the crime would suffice to reach the objective element of Article 25(3)(c)[102].The Prosecution will demonstrate that even if the "substantial effect" criterion was applicable, it would have been met in the present case.

7. As for the subjective elements, the Court has found that the accused must have acted intending to facilitate the commission of the crime, which implies a specific intent when compared to the one present in Article 30 of the ICCSt.[103]. Although the Court has found the "purpose" threshold only applies to the intent to **assist**, not to commit the crime[104], it has sustained that the *mens rea* required by Article 30 must still be accessed in what concerns the commission of the offense[105]. In this sense, for a person to be prosecuted for aiding and abetting, she must at least have been aware that the principal perpetrator's offence will occur in the ordinary course of events[106], and act with the purpose of assisting the perpetrator of such crime.

a) The Professor's conduct objectively assisted the commission of the crime

[98] Article 25(3)(c), ICCSt..

[99] ICC-01/04-01/10-T-8-Red2-ENG, p. 10, lines 10-16; ICC-01/04-01/10-465-Red, para. 281; ICC-01/04-01/06-2842, para. 997.

[100] IT-94-1-T, paras. 688–692; IT-96-21-T, paras. 325–329; IT-98-34-T, para. 63; IT-02-60-T, para.726; IT-96-21-A, para. 352; IT-95-17/1-T, paras. 226, 229, 231, 233–235; IT-95-14/1-T, para. 61; IT-94-1-A, para. 229; IT-98-32-A ,para. 102; IT-95-14-A, paras 46, 48; IT-99-36-T, para. 271; ICTR-96-3-T, para. 43; ICTR-96-13-T, para. 126; ICTR-95-54A-T, para. 597; ICTR-96-10 & ICTR96-17-T, para. 787; SCSL-04-14-A, para. 73.

[101] ICC-01/05-01/13-1989-Red, para. 93.

[102] ICC-01/05-01/13-749, para. 35; ICC-02/11-02/11-186, para. 167; ICC-02/04-01/15-422-Red, para. 43; ICC-01/12-01/15-84-Red, para. 26; ICC-02/04-01/15-428, para. 29; ICC-01/05-01/13-1989-Red, paras. 93-94.

[103]ICC-01/05-01/13-749, para. 35; ICC-02/11-02/11-186, para. 167; ICC-02/04-01/15-422-Red, para. 43; ICC-01/12-01/15-84-Red,para. 26; ICC-02/04-01/15-428, para. 29; ICC-01/05-01/13-1989-Red, para. 95.

[104] ICC-01/05-01/13-1989-Red, para. 97.

[105] ICC-01/05-01/13-1989-Red, para. 98.

[106] ICC-01/05-01/13), para 98.

8. The ICC consolidated that Article 25(3)(c) requires solely that the accused's contribution had an effect in the commission of the offense and that this effect need not to be substantial or anyhow qualified. Although it must not be proven that the participation was a *conditio sine qua non* to the occurrence of the crime, the assistance must have had some causal effect in its commission[107]. The Prosecution sustains that the Professor's memorandum can be considered an assistance in terms of Article 25(3)(c), once it clearly affected the President's decision to commit the CoA.

9. The facts present that the memorandum was written specifically to assist the President of Astipur with the enlightenment regarding a legal question[108]. Once the President did not have the necessary legal knowledge to access the legality of the strikes, it the memorandum served as a support for his decision. Also, there is a causal relation between the document and the commission of the crime, since the legal opinion was precisely the legal basis used by Astipur to conduct the attacks in Bravos. As the decision to strike the bombs in Bravos without the authorization of the UNSC was only made after the release of the Professor's memorandum, there are substantial basis to believe that the document was essential for the crime to occur. Further, the *communiqué* made by Astipur on July 28 expressly resorted in the accused's advice to justify the attack[109]. Thus, the attacks would possibly have not occurred, or would at least be delayed, if the Professor had not issued the legal opinion encouraging the bombings.

10. Considering that the ICC found that there is no objective qualification to the assistance[110], and that the IT have consolidated that the participation need not to be criminal itself[111], there is no impediment for a legal opinion to be objectively characterized as an assistance in terms of Article 25(3)(c). In the present case, not only the memorandum had an effect in the commission of the crime, but this effect was considerably elevated. This indicates that even if there was a necessity to objectively qualify the assistance, as the Court initially understood[112], Professor Targarian's participation would still satisfy this threshold.

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[107] ICC-01/05-01/13-1989-Red, para. 94. This understanding is also consolidated in the ICTY's jurisprudence, in IT--95--14--A para.48; IT--95--9--A, para.85; IT--95--13/1-A, para.200.

[108] Case 2019, paras. 8 and 14.

[109] Case 2019, para. 11.

[110] ICC-01/05-01/13-1989-Red, para. 93.

[111] IT-95-17/1-T, para. 243; IT-05-87-A, para. 1663; IT-02-60-A, paras 201-202.

[112] ICC-01/04-01/10-T-8-Red2-ENG, p. 10, lines 10-16; ICC-01/04-01/10-465-Red, para. 281; ICC-01/04-01/06-2842, para. 997.

b) Subjective elements

11. The subjective elements for aiding and abetting, that the accused presented both the general intent required by Article 30 and the specific intent exposed in Article 25(3)(c), are also present. Once she changed her memorandum's content due to a request from President Bannister for a "more definitive" opinion to the legality of the airstrikes[113], being aware that the bombings could be considered a CoA, there are no doubts that the Professor acted with the purpose of facilitating the offense.

1) The accused was aware that the offense would occur in the ordinary course of events

12. The knowledge that her actions would assist the perpetration of a crime can be verified from the first time the accused was asked for her opinion on the legality of the airstrikes. In this opportunity, President Bannister was clear that he intended to order a strike at Bravos, and had not done yet only because he was advised to get an independent legal opinion[114]. The mere fact that he expressly stated his desire to strike, but needed to rely on a legal justification to do so, is already sufficient to affirm that the accused knew that her memorandum would be used to justify an eventual bombardment.

13. The second time she was contacted, her awareness became unquestionable, once President Bannister requested a more definitive opinion to *convince* the Cabinet of Astipur that the strikes would be legal[115]. By knowing the President's intention to strike and that her opinion would be the legal basis to conduct the attack, it is uncontroversial that Professor Targarian knew that with her assistance a crime would be committed.

2) The accused acted with the purpose of facilitating the crime

14. Professor Targarian's action with the purpose of aiding and abetting the crime can also be extracted from the emails exchanged between her and President Bannister. As demonstrated, the President did not conceal his intention to strike Bravos from the beginning, which indicates that the accused was aware of such intention. It was also demonstrated that the Professor was aware that her memorandum would provide the legal justification necessary to move forward with the strikes. Finally, the first

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[113] Case 2019, para 14.

[114] Case 2019, para. 14.

[115] Case 2019, para. 14.

version of the memorandum demonstrates her opinion that the attacks would not be a crime, while recognizing that they could still be considered as a CoA[116].

15. This set of facts would not deem her responsible if she had only released the first version of the memorandum. Still, the Professor consciously withdrew the possibility of the bombing to be considered as a CoA, after receiving $5,000 dollars to do so, and while knowing that her opinion would be used to **convince** Astipur's Cabinet to authorize the attack. This awareness of these circumstances raises substantial basis to believe that Professor Targarian acted consciously with the purpose of facilitating the crime. For that, the subjective criteria for the participation are met.

III) Conclusion

16. The Prosecution demonstrated that not only the Defense's argument that lawyers cannot be prosecuted under the CoA is unsustainable, but most important that Professor Targarian's conduct can be considered a participation under Article 25(3)(c). By providing a one-sided legal opinion, while aware that it would facilitate the commission of a crime and having aimed to provide such assistance, her conduct fulfills both the objective and subjective criteria of the participation mode of liability.

[116] Case 2019, Appendix 2, para. 3.

SUBMISSIONS

Having presented all arguments, the Prosecution respectfully requests the Chamber to:

a) Maintain the PTC understanding that the evidences collected at the accused's house are admissible;

b) Reaffirm that the airstrikes conducted by Astipur can be considered a CoA, under Article 8*bis* of the ICCSt.;

c) Find that the Professor's assistance can be considered as aiding and abetting the CoA;

d) Confirm the charges against the accused, leading her to trial.