

ICC MOOT COURT COMPETITION IN THE ENGLISH LANGUAGE

THE OFFICE OF PUBLIC COUNSEL FOR VICTIMS

Team Number: 62

Year: 2018

Total Word Count: 9938



Original: **English**

Date: 26 February 2018

THE APPEALS CHAMBER

SITUATION RELATING TO CRIMES AGAINST HUMANITY IN WESTEROS

**The Legal Representative for the Victims' Submission in the
Appeal from the Pre-Trial Chamber's Decision on Confirmation of Charges
against Defendant McGregor Klegane of Northeros**

I. TABLE OF CONTENTS

I. TABLE OF CONTENTS	2
II. LIST OF ABBREVIATIONS	4
III. INDEX OF AUTHORITIES	5
IV. STATEMENT OF FACTS	13
V. ISSUES	16
VI. SUMMARY OF ARGUMENTS	17
VII. WRITTEN ARGUMENTS	18
1. The ICC should recognize human trafficking, as set forth in the facts described in the Pre-Trial Chamber’s decision, as qualifying as “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health” under Article 7(1)(k) ICC Statute.	18
1.1. The human trafficking of the shrimp-shed laborers, in the present case, does not amount to the crime of humanity of enslavement.	18
1.1.1. The ICC Statute does not equate human trafficking to enslavement.	18
1.1.2. The crime of trafficking in persons, in this particular instance, lacks the element of exercising of power attaching to the right of ownership.	20
1.2. The crime of human trafficking in the present case qualifies as other inhumane act under Article 7(1)(k) ICC Statute.	21
1.3. The contextual element of widespread or systematic attack against any civilian population pursuant to or in furtherance of a State or organizational policy is satisfied.	23
1.3.1. There was an attack directed against any civilian population	23
1.3.2. The attack was widespread.	24
1.3.3. The attack occurred pursuant to or in furtherance of a State or organizational policy.	24
2. A corporate subsidiary that purchases shrimp at an extremely low price from the Westeros shrimp-sheds with knowledge of their labor abuses can be treated as an unindicted co-perpetrator for purposes of prosecuting the Defendant under Article 25(3)(a) ICC Statute notwithstanding Article 25(1) ICC statute.	26
2.1. Despite Article 25(1) ICC Statute, the ICC may apply a general principle of law that corporations have criminal responsibility.	26
2.1.1. Despite Article 25(1) ICC Statute, the ICC may apply a general principle of law that corporations have criminal responsibility.	27

2.1.2. The inclusion of corporations as co-perpetrators under Article 25(3)(a) ICC Statute does not contradict Article 22(2) ICC Statute.	28
2.2. In the present case, the accused has individual criminal responsibility on the basis of indirect co-perpetration.	29
2.2.1. The objective elements for commission of the crime through another person are satisfied.	30
2.2.2. The objective elements of joint commission of a crime are satisfied.	31
3. A domestic court acquittal based on an erroneous interpretation and application of law under the circumstances of this case shall not preclude the ICC from trying the crime under the exceptions to the ne bis in idem principle enshrined in Article 20(3) ICC Statute.	34
3.1. The ICC can try the accused despite the principle of ne bis in idem in Article 20(3) ICC Statute if there is an exceptional circumstance in the proceedings before the Northeros District Court.	34
3.2 The acquittal of the accused by the Northeros District Court is covered by the exceptions to the principle of ne bis in idem in Article 20(3)(a) and (b) ICC Statute.	36
3.2.1. The acquittal of the accused falls within the exception of Article 20(3)(a) ICC Statute.	36
3.2.2 The acquittal of the accused falls within the exception of Article 20(3)(b) ICC Statute.	38
VIII. SUBMISSIONS	40

II. LIST OF ABBREVIATIONS

- ACHR: American Convention on Human Rights
- CEO: Chief Executive Officer
- ECHR: European Convention for the Protection of Human Rights and Fundamental Freedoms
- ECtHR: European Court of Human Rights
- ICC: International Criminal Court
- ICCPR: International Covenant on Civil and Political Rights
- ICC Statute: Rome Statute of the International Criminal Court
- Trafficking in Persons Protocol: Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children
- VCLT: Vienna Convention on the Law of Treaties
- VLR: Victims' Legal Representative

III. INDEX OF AUTHORITIES

TREATIES AND INTERNATIONAL DOCUMENTS

1) Treaties

International Covenant on Civil and Political Rights (1966), 999 *United Nations Treaty Series* 171.....34

American Convention on Human Rights (1969), 1144 *United Nations Treaty Series* 143.....34

Rome Statute of the International Criminal Court (1998), 2187 *United Nations Treaty Series* 3.....
.....18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39

Protocol No. 7 to The Convention for The Protection of Human Rights and Fundamental Freedoms as Amended by Protocol No. 11 (1998), *Council of Europe Treaty Series* No. 117.....34, 35

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (2000), 2237 *United Nations Treaty Series* 319.....20

Council of Europe Convention on Action against Trafficking in Human Beings (2005), *Council of Europe Treaty Series* No. 197.....20

2) International Documents

Human Rights Committee, *A.P. v. Italy*, Communication No. 204/1986, UN Doc. CCPR/C/31/D/204/1986.....35

Human Rights Committee, Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, UN Doc. CCPR/C/79/Add. 79, 4 August 1997.....38

Human Rights Committee, “General Comment No. 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial”, UN Doc. CCPR/C/GC/32 (2007).....34

Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings(OSCE), Human Trafficking for Labour Exploitation/Forced and Bonded Labour: Identification -Prevention -Prosecution (2008), available at: https://ec.europa.eu/antitrafficking/sites/antitrafficking/files/osce_exploitation_identification_prosecution_en_1.pdf	22
UN Office on Drugs and Crime, Human Trafficking Indicators (2010), 2, available at: https://www.unodc.org/pdf/HT_indicators_E_LOWRES.pdf	22
Elements of Crimes (2011), available at: https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf	19, 21, 22, 24

INTERNATIONAL CASE AND ARBITRAL DECISIONS

1. International Criminal Court

(1) Situation in the Central African Republic

<i>Prosecutor v. Jean-Pierre Bemba Gombo</i> , ICC-01/05-01/08-424, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, 15 June 2009.....	19, 23, 24, 32
---	----------------

(2) Situation in the Democratic Republic of the Congo

<i>Situation in the Democratic Republic of the Congo</i> , ICC-01/04-169 (OA), Appeals Chamber, Judgment on the Prosecutor’s Appeal against the Decision of Pre-Trial Chamber I Entitled ‘Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58’, 16 July 2006.....	18, 26, 34
---	------------

<i>Prosecutor v. Thomas Lubanga Dyilo</i> , ICC-01/04-01/06-803, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 29 January 2007.....	19, 26
---	--------

<i>Prosecutor v. Thomas Lubanga Dyilo</i> , ICC-01/04-01/06-926, Appeals Chamber, Decision on the Admissibility of the Appeal of Mr. Thomas Lubanga Dyilo against the Decision of Pre-Trial Chamber I Entitled ‘D�cision sur la confirmation des charges of 29 January 2007, 13 June 2007.....	28
--	----

<i>Prosecutor v. Thomas Lubanga Dyilo</i> , ICC-01/04-01/06-1049, Trial Chamber I, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, 30 November 2007.....	27
<i>Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui</i> , ICC-01/04-01/07-322, Pre-Trial Chamber I, Decision Revoking the Prohibition of Contact and Communication between Germain Katanga and Mathieu Ngudjolo Chui, 13 March 2008.....	27
<i>Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui</i> , ICC-01/04-01/07-717, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 30 September 2008.....	19, 22, 29, 30, 31
<i>Prosecutor v. Germain Katanga</i> , ICC-01/04-01-07-1213-tENG, Trial Chamber II, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), 16 June 2009.....	35
<i>Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui</i> , ICC-01/04-01/07-1497, Appeals Chamber, Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, 25 September 2009.....	35
<i>Prosecutor v. Callixte Mbarushimana</i> , ICC-01/04-01/10-451, Pre-Trial Chamber I, Decision on the ‘Defence Challenge to the Jurisdiction of the Court’, 26 October 2011.....	18, 26, 34
<i>Prosecutor v. Germain Katanga</i> , ICC-01/04-01/07-3436-tENG, Trial Chamber II, Judgement pursuant to Article 74 of the Statute, 7 March 2014.....	20, 28, 30
<i>Prosecutor v. Bosco Ntaganga</i> , ICC-01/04-02/06-309, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, Pre-Trial Chamber II, 9 June 2014.....	23

(3) Situation in Darfur, Sudan

Prosecutor v. Bahar Idriss Abu Garda, ICC-02/05-02/09-243-Red, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 08 February 2010.....31, 32

Prosecutor v. Abdallah Banda Abakaer Nourain, ICC-02/05-03/09-121-Corr-Red, Pre-Trial Chamber I, Corrigendum of the “Decision on the Confirmation of Charges”, 7 March 2011.....31

(4) Situation in the Republic of Kenya

Situation in the Republic of Kenya, ICC-01/09-19, Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010.....23

Prosecutor v. William Samoei Ruto et al, ICC-01/09-01/11-373, Pre-Trial Chamber II, Decision on the Confirmation of Charges, 23 January 2012.....24

Prosecutor v. Francis Kirimi Muthaura, et al., ICC-01/09-02/11-382-Red, Pre-Trial Chamber II, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of Rome Statute, 29 January 2012.....30

(5) Situation in the Republic of Côte d'Ivoire

Prosecutor v. Charles Blé Goudé, ICC-02/11-02/11-186, Pre-Trial Chamber I, Decision on the Confirmation of Charges against Charles Blé Goudé, 11 December 2014.....28

2. International Criminal Tribunal for the Former Yugoslavia

Prosecutor v. Delalić et al., IT-96-21-T, Trial Chamber, Judgment, 16 November 1998.....21

Prosecutor v. Kordić & Cerkez, IT-95-14/2-T, Trial Chamber, Judgment, 26 February 2001.....31

Prosecutor v. Kunarac et al., IT-96-23 & IT-96-23/1-A, Appeal Chamber, Judgment, 12 June 2002.....21

3. European Court of Human Rights

<i>Le Compte, Van Leuven and de Meyere v. Belgium</i> , Application No. 6878/75, Judgment, Merits, 23 June 1981.....	38
<i>Piersack v. Belgium</i> , Application No. 8692/79, Judgment, Merits, 1 October 1982.....	39
<i>Langborger v. Sweden</i> , Application No. 11179/84, Judgment, Merits and Just Satisfaction, 22 June 1989.....	38
<i>Demicoli v. Malta</i> , Application No. 13057/87, Judgment, Merits and Just Satisfaction, 27 August 1991.....	39
<i>Nachova and Others v. Bulgaria</i> , Application No.43577/98 and 43579/98, Judgment, Merits and Just Satisfaction, 6 July 2005.....	37
<i>Siliadin v. France</i> , Application No.73316/01, Judgment, Merits and Just Satisfaction, 26 July 2005.....	20
<i>Khamidov v. Russia</i> , Application No.72118/01, Judgment, Merits and Just Satisfaction, 15 November 2007.....	37
<i>Micallef v. Malta</i> , Application No. 17056/06, Judgment, Merits and Just Satisfaction, 15 October 2009.....	39
<i>Rantsev v. Cyprus and Russia</i> , Application No. 25965/04, Judgment, Merits and Just Satisfaction, 7 January 2010.....	20, 22, 23, 37
<i>Bochan v. Ukraine (No.2)</i> , Application No. 22251/08, Judgment, Merits and Just Satisfaction, 5 February 2015.....	37
<i>L.E. v. Greece</i> , Application No. 71545/12, Judgment, Merits and Just Satisfaction, 21 January 2016.....	20

Chowdury and Others v. Greece, Application No. 21884/15, Judgment, Merits and Just Satisfaction, 30 March 2017.....20, 21, 23, 37

4. International Criminal Tribunal for Rwanda

Prosecutor v. Akayesu, ICTR-96-4-T, Trial Chamber I, Judgment, 2 September 1998.....23

5. Special Court for Sierra Leone

Prosecutor v. Issa Hassan Sesay, Morris Kallon, Augustine Gbao, SCSL-04-15-A, Appeal Chamber, Judgement, 26 October 2009.....19

4. National Documents

The Netherlands, Criminal Code (1881).....27

United States, U.S. Model Penal Code (1984)..... 27

Singapore, Provisions of the Prevention of Corruption Act (1993).....27

France, Criminal Code (1994).....27

Australia, Criminal Code (1995).....27

People’s Republic of China, Criminal Law (1997).....27

Japan, Companies Act (2006).....27

United Kingdom, Corporate Manslaughter and Corporate Homicide (2007).....27

Spain, Organic Law (2010).....27

India, Companies Act (2013).....27

DIGESTS, ARTICLES, JOURNALS AND ESSAYS

1. Digests

H.C. Black, J.R. Nolan and J.M. Nolan-Haley, *Black's Law Dictionary*, St. Paul Minn., West, 1979, 1028, xiv+1511p.....28, 29

M. Cherif Bassiouni, *Crimes against Humanity in International Criminal Law*, Hague, Kluwer Law International, 1999, xli+610p.....25

R. Gardiner, *Treaty Interpretation*, Oxford, Oxford University Press, 2015, xliii+523p.....28

J.K. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, Oxford, Oxford University Press, 2008, xxxvii+385p.....36

N. Nabil Jurdi, *The International Criminal Court and National Courts: A Contentious Relationship*, Surrey, Ashgate, 2011,xxiii+302p.....34, 38

W.A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford, Oxford University Press, 2010, lxx+1259p.....28

E. van Sliedregt, *Individual Criminal Responsibility in International Law*, Oxford, Oxford University Press, 2012, xxxii+337p.....29

2. Articles, Journals and Essays

K. Ambos, "Article 25", in O. Triffterer and K. Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Munich, Beck, 2016, 979.....30

G. Bitti, "Article 21 and the Hierarchy of Sources of Law before the ICC", in C. Stahn (ed.), *The Law and Practice of the International Criminal Court*, Oxford, Oxford University Press, 2015, 411.....36

B. Broomhall, "Article 22", in O. Triffterer and K. Ambos (eds.), *The Rome Statute of the International Criminal Court, A Commentary*, Munich, Beck, 2016, 949.....28, 29

G. Conway, “Ne Bis In Idem in International Law”, 3 <i>International Criminal Law Review</i> 2003, 217.....	34
M. M. de Guzman, “Article 21”, in O. Triffterer and K. Ambos (eds.), <i>The Rome Statute of the International Criminal Court, A Commentary</i> , Munich, Beck, 2016, 932.....	27
C. K. Hall and C. Stahn, “Article 7”, in O. Triffterer and K. Ambos (eds.), <i>The Rome Statute of the International Criminal Court, A Commentary</i> , Munich, Beck, 2016, 237.....	19
I. Haenen, “Classifying Acts as Crimes against Humanity in the Rome Statute of the International Criminal Court”, 14 <i>German Law Journal</i> 2013, 796.....	19
W.A. Schabas and M.M. El Zeidy, “Article 17”, in O. Triffterer and K. Ambos (eds.), <i>The Rome Statute of the International Criminal Court, A Commentary</i> , Munich, Beck, 2016, 781.....	36
B. Stephens, “The Amoralism of Profit: Transnational Corporations and Human Rights”, 20 <i>Berkeley Journal of International Law</i> 2002, 45.....	27
I. Tallgren and A. Reisinger Coracini, “Article 20”, in O. Triffterer and K. Ambos (eds.), <i>Rome Statute of the International Criminal Court, A Commentary</i> , Munich, Beck, 2016, 899.....	35, 36

IV. STATEMENT OF FACTS

Northeros, Southeros and Westeros are three democratic states with court systems that generally comply with international standards of due process. Of the three, only Northeros is a Party to the ICC Statute since 2003. Although all three States are members of the United Nations and the International Labor Organization, none of them is party to any of the international or regional treaties related to human trafficking or work conditions.

For the past 8 years, Mr. McGregor Klegane, a national of Northeros and an extremely wealthy and powerful businessman, has been the CEO of Giant Finger, Inc., a company incorporated in Northeros. Giant Finger is the sole-owner of Little Fingers, Inc., a subsidiary incorporated in Westeros. Mr. McGregor Klegane has the ultimate authority to disapprove the corporate actions of Little Fingers, Inc. and exercises supervisory control over Little Fingers' executive officers.

Since 2013, more than 10,000 laborers from Southeros have been employed by the shrimp-peeling sheds of Westeros. The general employment contract provides that laborers are paid an average wage for unskilled laborers in Westeros. Furthermore, under the contract, the employers retain 80 percent of the wages, together with the laborers' passports and identification documents. The employees were required to work 80 hours a week for 3 years until they paid off their debts of the transportation processing fees for their travel and work permits paid by employers, plus 10 percent interest. During the 3 year employment contract the laborers are not allowed to leave. The laborers live in rustic camps as lodgings in isolated rural areas for their work.

About 60 percent of the Westeros shrimp are purchased continually by Little Fingers, Inc. despite the public knowledge of the abusive labor practices. Because of the low cost of labor which is factored into the price of shrimp, Little Fingers', Inc. profit margin is much higher than companies which purchase shrimp in other countries, giving it a comparative advantage in the international market.

On 6 April 2015, facing international pressure after reports of widespread human trafficking in the shrimp industry, the government of Westeros publicly proclaimed that it would shut down offending work places and compensate victims. Furthermore, major exporters of Westeros

shrimp promised to bring all shrimp processing in-house where conditions could be monitored. Neither of these were fulfilled. Mr. McGregor Klegane never instructed Little Fingers, Inc. to suspend its purchasing and Little Fingers, Inc. continued purchasing from the Westeros shrimp-sheds. Consequently, a class action lawsuit was filed in the Westeros District Court on behalf of the victims of abusive labor practices in the Westeros shrimp industry against Little Fingers, Inc.

On 25 February 2017, the Westeros District Court decided that Little Fingers, Inc. continued extensive purchase of shrimp from the Westeros shrimp-peeling shed operators, with knowledge of their abusive labor practices, which led to a substantial comparative advantage for the company, implicates Little Fingers, Inc. in their widespread acts of human trafficking. The Court therefore issued a judgment against Little Fingers, Inc. and ordered it to pay \$20 million in compensatory and punitive damages to the plaintiffs. The next day, however, Little Fingers Inc. declared insolvency and shut down operations. According to news reports, its officers fled the country and their whereabouts are unknown. The victims have been paid nothing.

On 7 May 2017 the Northeros District Court decided the case Northeros initiated against Mr. McGregor Klegane for aiding and abetting crimes against humanity and the domestic crime of human trafficking. The sole judge of this trial, Judge Nefarious, was appointed to the bench for an 8 year term in 2011 by the former President of Northeros, to whom Mr. McGregor Klegane contributed millions of dollars (US) to his campaign according to the Northeros Inquirer.

In this trial, the Northeros District Court acquitted Mr. McGregor Klegane on two grounds. First, the acts described in the 25 February 2017 Judgment of the Westeros Trial Court constituted human trafficking, but did not constitute crimes against humanity as defined in Article 7 ICC Statute. Second, since the acts all took place in Westeros, they could not be prosecuted under the Northeros Human Trafficking Statute, which does not have extraterritorial application.

On 25 May 2017, the ICC Pre-Trial Chamber authorized an investigation into the Westeros shrimp laborers case at the request of the Prosecutor. After two months, the ICC issued a warrant for the arrest of Mr. McGregor Klegane for involvement in the crime against humanity

under Article 7(1)(k), Article 25(3) and Article 28(b) ICC Statute. On 10 July 2017, Northernos took Mr. McGregor Klegane into custody and transferred him to the ICC.

On 30 July 2017, the Defence raised three objections in a written submission. First, the alleged acts should not be recognized as acts under Article 7(1)(k) ICC Statute. Second, the ICC did not have jurisdiction over Little Fingers', Inc. acts because the ICC's jurisdiction is limited to natural persons under Article 25(1) ICC Statute. Moreover, Mr. McGregor Klegane could not be prosecuted as an indirect co-perpetrator of crimes against humanity merely for failing to exercise proper control over the subsidiary, under either Article 25(3) or Article 28(b) ICC Statute. Third, the retrial would violate the ne bis in idem principle enshrined in Article 17(1)(c) and Article 20(3) ICC Statute.

On 30 August 2017, after duly considering all the submissions and arguments the Pre-Trial Chamber determined that the agreements between the shrimp-peeling shed operators and the Southernos migrants constituted the crime of human trafficking in customary international law and qualified as a crime against humanity under Article 7(1)(k) ICC Statute; that Mr. McGregor Klegane could be prosecuted for involvement in the crime under both Article 25(3) and Article 28(b) ICC Statute; and that the ne bis in idem principle did not apply where the domestic court's acquittal was based on a clear error of law and there were reasons to doubt the impartiality of the domestic judge. Consequently, the Pre-Trial Chamber confirmed the charges. Against this decision, the Defence launched the present interlocutory appeal, challenging the jurisdiction and admissibility of the ICC.

V. ISSUES

1. Whether the ICC should recognize human trafficking, as set forth in the facts described in the Pre-Trial Chamber's decision, as qualifying as "other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health" under Article 7(1)(k) ICC Statute.
2. Whether a corporate subsidiary that purchases shrimp at an extremely low price from the Westeros shrimp-sheds with knowledge of their labor abuses can be treated as an unindicted co-perpetrator for purposes of prosecuting the Defendant under Article 25(3)(a) ICC Statute notwithstanding Article 25(1) ICC Statute.
3. Whether a domestic court acquittal of the Defendant based on an erroneous interpretation of the ICC Statute's definition of crimes against humanity under the circumstances of this case shall preclude the ICC from prosecuting the crime under the ne bis in idem principle enshrined in Article 20 ICC Statute.

VI. SUMMARY OF ARGUMENTS

1. The human trafficking of the shrimp-shed laborers in Westeros qualifies as the crime against humanity of “other inhumane acts” under Article 7(1)(k) ICC Statute. The human trafficking satisfies all the material elements of “other inhumane acts” in Article 7(1)(k) ICC Statute. First, the human trafficking in this particular instance does not qualify as enslavement under Article 7(1)(c) ICC Statute. Second, the human trafficking inflicted great suffering, or serious injury to body or mental or physical health, by means of an inhumane act, similar to other acts in Article 7(1) ICC Statute. Third, the human trafficking satisfies the contextual elements of a widespread and systematic attack against a civilian population.

2. Little Fingers, Inc. should be qualified as the unindicted co-perpetrator in the crime of humanity of other inhumane acts. First, it is consistent with the ICC Statute to regard legal persons, such as corporations, as unindicted co-perpetrators under Article 25(3)(a) ICC. Article 25(1) ICC Statute does not prevent this Court to apply a general principle of law that legal persons have criminal responsibility. Therefore, corporations may be considered co-perpetrators of a crime in the context of Article 25(3)(a) ICC Statute, even though the ICC has no jurisdiction to indict and prosecute them. Second, the inclusion of legal persons in the context of co-perpetration does not violate the principle of restrictive interpretation contained in Article 22(2) ICC Statute. Consequently, in this particular instance, the criminal responsibility of Mr. Klegane results from indirect co-perpetration, through his control over Little Fingers, Inc., which committed the crime of Article 7(1)(k) ICC Statute together with the co-perpetrators, the shrimp-shed operators.

3. The ICC should prosecute the case against Mr. McGregor Klegane despite his acquittal by the District Court of Northeros. Although, in principle, the principle of ne bis in idem in Article 20(3) precludes the ICC from trying a person for the same conduct if the accused was acquitted by a national court, Article 20(3)(a) and (b) ICC Statute provide two important exceptions to this principle. The acquittal of Mr. Klegane falls within both exceptions, namely the acquittal by the Northeros District Court occurred for the purpose of shielding Mr. Klegane and was the result of a proceeding which was not conducted independently and impartially and therefore was inconsistent with the intent to bring the accused to justice.

VII. WRITTEN ARGUMENTS

1. THE ICC SHOULD RECOGNIZE HUMAN TRAFFICKING, AS SET FORTH IN THE FACTS DESCRIBED IN THE PRE-TRIAL CHAMBER’S DECISION, AS QUALIFYING AS “OTHER INHUMANE ACTS OF A SIMILAR CHARACTER INTENTIONALLY CAUSING GREAT SUFFERING, OR SERIOUS INJURY TO BODY OR TO MENTAL OR PHYSICAL HEALTH” UNDER ARTICLE 7(1)(K) ICC STATUTE.

The VLR requests the Appeals Chamber to confirm the decision of Pre-Trial Chamber VI that the human trafficking of the shrimp-shed laborers in Westeros qualifies as the crime against humanity of “other inhumane acts” under Article 7(1)(k) ICC Statute. The VLR submits that Pre-Trial Chamber VI did not err in law so that the error manifestly affected the decision, i.e. without the error the decision would have been different.¹ Since the Defence appealed the Decision,² it bears the burden of proof the Pre-Trial Chamber erred in law.³ In any event, the VLR will demonstrate that the human trafficking, as described in the facts before the Pre-Trial Chamber’s decision, satisfies all the material elements of “other inhumane acts” in Article 7(1)(k) ICC Statute. First, the human trafficking in this particular instance does not qualify as enslavement under Article 7(1)(c) ICC Statute. Second, the human trafficking inflicted great suffering, or serious injury to body or mental or physical health, by means of an inhumane act, similar to other acts in Article 7(1) ICC Statute. Third, the human trafficking satisfies the contextual elements of a widespread and systematic attack against a civilian population.

1.1. The human trafficking of the shrimp-shed laborers, in the present case, does not amount to the crime of humanity of enslavement.

1.1.1. The ICC Statute does not equate human trafficking to enslavement.

The VLR submits that, in the present case, the human trafficking of the shrimp-shed laborers in Westeros does not amount to the crime against humanity of enslavement, even though

¹ *Situation in the Democratic Republic of the Congo*, ICC-01/04-169 (OA), Appeals Chamber, Judgment on the Prosecutor’s Appeal against the Decision of Pre-Trial Chamber I Entitled ‘Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58’, 16 July 2006, §33 and §84.

² *Prosecutor v. McGregor Klegane*, Decision on the Confirmation of Charges against Defendant McGregor Klegane of Northeros, 1.

³ *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10-451, Pre-Trial Chamber I, Decision on the ‘Defence Challenge to the Jurisdiction of the Court’, 26 October 2011, §4.

Article 7(2)(c) ICC Statute includes trafficking in persons in its definition of “enslavement”. As a result, if none of the acts qualify as crimes against humanity in Article 7(1)(a)-(j) ICC Statute, the ICC can rely on Article 7(1)(k) ICC Statute.⁴ To determine whether a conduct is subsumed under Article 7(1)(k) ICC Statute and not under any other crime against humanity, the conduct must have at least one material element that is distinct from the crimes of Article 7(1)(a)-(j) ICC Statute.⁵

Human trafficking will only amount to enslavement, provided that the material element of “exercising any or all of the powers attaching to the right of ownership over a person” is present. Hence, whether conduct is qualified as enslavement depends on the element of “exercising the power attaching to the right of ownership.”⁶ The ICC Statute and the Elements of Crimes confirm that not all forms of human trafficking will amount to enslavement. The definition of enslavement in Article 7(2)(c) ICC Statute requires that in the course of trafficking in persons the exercise of this power is exercised.⁷ Furthermore, Article 7(1)(c) Elements of Crimes specifies that although enslavement includes trafficking in persons, in particular women and children, the element of powers attaching to the right of ownership is the defining element of the crime of enslavement.⁸

The definition of trafficking in persons in Article 3(a) Trafficking in Persons Protocol corroborates this conclusion. In case the ICC Statute and the Elements of Crimes do not contain a definition of trafficking in persons, pursuant to Article 21(2) ICC Statute, this Court may rely upon applicable treaties which provide definitions for concepts in the ICC Statute.⁹ In this

⁴ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-717, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 30 September 2008, §452.

⁵ C.K. Hall and C. Stahn, “Article 7”, in O. Triffterer and K. Ambos (eds.), *The Rome Statute of the International Criminal Court, A Commentary*, Munich, Beck, 2016, 237; I. Haenen, “Classifying Acts as Crimes against Humanity in the Rome Statute of the International Criminal Court”, 14 *German Law Journal* 2013, 813-814.

⁶ *Prosecutor v. Issa Hassan Sesay, Morris Kallon, Augustine Gbao*, SCSL-04-15-A, Appeal Chamber, Judgement, 26 October 2009, §94.

⁷ Article 7(2)(c), ICC Statute.

⁸ Article 7(1)(c) Elements of Crimes, Footnote 11.

⁹ E.g. *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-803, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 29 January 2007, §§208-210; *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-424, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, 15 June 2009, §220.

respect, Article 3(a) Trafficking in Persons Protocol and the identical Article 4(a) Council of Europe Convention on Action against Trafficking in Human Beings have been internationally relied upon to define human trafficking.¹⁰ According to these provisions trafficking in persons includes, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs.¹¹ Hence, trafficking in persons and slavery do not coincide, but trafficking in persons has a wider scope.

In addition, an interpretation of trafficking in person in light with established human rights law pursuant to Article 21(3) ICC Statute establishes that human trafficking is conceptually broader than slavery. In its case law, the ECtHR has held that slavery requires the exercise of powers attached to the right of ownership,¹² whereas human trafficking is characterized by exploitation.¹³ Consequently, an interpretation of trafficking in persons in accordance with human rights law differentiates slavery from trafficking in persons.

1.1.2. The crime of trafficking in persons, in this particular instance, lacks the element of exercising of power attaching to the right of ownership.

The VLR has established that human trafficking in a certain instance amounts to enslavement depends on the factors which demonstrate exercise of the powers of ownership. As this Court has explained, “powers attaching to the right of ownership must be construed as the use, enjoyment and disposal of a person who is regarded as property, by placing him or her in a situation of dependence which entails his or her deprivation of any form of autonomy”.¹⁴ Furthermore, to determine whether a particular situation involves the exercising of power

¹⁰ *L.E. v. Greece*, Application No. 71545/12, Judgment, Merits and Just Satisfaction, 21 January 2016, §66; *Chowdury and Others v. Greece*, Application No. 21884/15, Judgment, Merits and Just Satisfaction, 30 March 2017, §100; *Rantsev v. Cyprus and Russia*, Application No. 25965/04, Judgment, Merits and Just Satisfaction, 7 January 2010, §278.

¹¹ Article 3(a) Trafficking in Persons Protocol; Article 4(a) Council of Europe Convention on Action against Trafficking in Human Beings.

¹² *Siliadin v. France*, Application No.73316/01, Judgment, Merits and Just Satisfaction, 26 July 2005, 122.

¹³ *Chowdury and Others v. Greece*, Application No. 21884/15, Judgment, Merits and Just Satisfaction, 30 March 2017, §93.

¹⁴ *Prosecutor v. Germain Katanga*, ICC-01/04-01/07-3436-t, Trial Chamber II, Judgement pursuant to Article 74 of the Statute, 7 March 2014, §976.

attaching to the right of ownership, the following factors are relevant: the control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labor.¹⁵ In the present case, the shrimp-shed laborers were not the victim of the crime of enslavements since their autonomy was not deprived. In this regard, in *Chowdury and Others v. Greece* working for as much as 12 hours per day and the terrible working and living conditions of the laborers were qualified as trafficking in persons.¹⁶ The shrimp-shed laborers are similarly required to work 80 hours a week and live in camps around the shrimp-peeling sheds.¹⁷ Consequently, the treatment of the shrimp-shed laborers amounts to trafficking in persons, but not slavery.

1.2. The crime of human trafficking in the present case qualifies as other inhumane act under Article 7(1)(k) ICC Statute.

Instead of the crime of humanity of enslavement, the VLR submits that the crime of human trafficking in the present case amounts to an “other inhumane act” under Article 7(1)(k) ICC Statute. The crime has two material elements that must be fulfilled: (a) the act should cause great suffering, or serious injury to body or to mental or physical health; (b) the act has similar character of nature and gravity to any other act in Article 7(1) ICC Statute.¹⁸

An inhumane treatment is an intentional act or omission that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity.¹⁹ In order to determine whether great suffering or serious injury to body or to mental or physical health was inflicted, the Court has to consider all factual circumstances, which may include the nature of the act or omission, the context in which it occurred, the personal circumstances of the victim, including age, sex and

¹⁵ *Prosecutor v. Kunarac et al.*, IT-96-23 & IT-96-23/1-A, Appeal Chamber, Judgment, 12 June 2002, §119.

¹⁶ *Chowdury and Others v. Greece*, Application No. 21884/15, Judgment, Merits and Just Satisfaction, 30 March 2017, §94 and §100.

¹⁷ *Prosecutor v. McGregor Klegane*, Decision on the Confirmation of Charges against Defendant McGregor Klegane of Northeros, 4.

¹⁸ Article 7(1)(k) ICC Statute; Article 7(1)(k) Elements of Crimes.

¹⁹ *Prosecutor v. Delalić et al.*, IT-96-21-T, Trial Chamber, Judgment, 16 November 1998, §543.

health, as well as the physical, mental and moral effects of the act upon the victim.²⁰ Victims of trafficking and exploitation are often forced to live and work in cruel conditions, may suffer violence and ill-treatment at the hands of their employers and often suffer severe physical and psychological consequences.²¹ In the present case, the shrimp-shed laborers were required to work more than 80 hours a week and lived in camps; they were required to hand over their passport and identification documents which are only returned after re-payment of their debt plus 10 percent interest; 80 percent of their wages are retained to pay back the debt by the end of the third year of employment; during the 3 years of employment they are not free to leave.²² Such behavior constitutes labor exploitation,²³ which undermines human dignity.²⁴ Since causing an injury or an attack on human dignity is causing great suffering, the practice of exploitation committed by shrimp-shed operators satisfies the first element of the crime.

The Elements of Crimes require that other inhumane acts should be of a character similar to any other act referred to in Article 7(1) ICC Statute, with “character” referring to the nature and gravity of the act.²⁵ Inhumane acts are serious violations of international customary law and the basic rights pertaining to human beings, drawn from the norms of international human rights law, which are of a similar nature and gravity to the acts referred to in Article 7(1) ICC Statute.²⁶ Since human trafficking violates the fundamental human right of not being subjected

²⁰ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-717, Pre-Trial Chamber I, Decision on the Confirmation of the Charges, 30 September 2008, §449.

²¹ *Rantsev v. Cyprus and Russia*, Application No. 25965/04, Judgment, Merits and Just Satisfaction, 7 January 2010, §222 and §320.

²² *Prosecutor v. McGregor Klegane*, Decision on the Confirmation of Charges against Defendant McGregor Klegane of Northeros, 4-5.

²³ UN Office on Drugs and Crime, Human Trafficking Indicators, 2, available at: https://www.unodc.org/pdf/HT_indicators_E_LOWRES.pdf.

²⁴ Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings (OSCE), Human Trafficking for Labour Exploitation/Forced and Bonded Labour: Identification -Prevention -Prosecution, May 2008, 19 available at: https://ec.europa.eu/antitrafficking/sites/antitrafficking/files/osce_exploitation_identification_prosecution_en_1.pdf.

²⁵ Article 7(1)(k), footnote 30 Elements of Crimes.

²⁶ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-717, Pre-Trial Chamber I, Decision on the Confirmation of the Charges, 30 September 2008, §448.

to exploitation and compulsory labor,²⁷ human trafficking amounts to an inhumane act under Article 7(1)(k) ICC Statute.

1.3. The contextual element of widespread or systematic attack against any civilian population pursuant to or in furtherance of a State or organizational policy is satisfied.

1.3.1. There was an attack directed against any civilian population

The primary object of the attack in question must be a civilian population, which therefore cannot merely be an incidental victim.²⁸ A “civilian population” comprises all persons who are civilians as opposed to members of armed forces and other legitimate combatants.²⁹ Undoubtedly, the shrimp-peeling laborers constitute civilians since they do not belong to any armed forces or legitimate combatants. An “attack” encompasses any unlawful act³⁰ and denotes a course of conduct involving the multiple commission of acts,³¹ which is determined by the case law through considering both the multiplicity of victims and the amount of the crimes.³² The VLR submits there was an attack in question, since human trafficking is a severe crime violating fundamental human rights.³³ With regards to the multiple commission, the ICC determined that 357 civilians in a period of five months fulfilled the requirement of the

²⁷ *Rantsev v. Cyprus and Russia*, Application No. 25965/04, Judgment, Merits and Just Satisfaction, 7 January 2010, §149; *Chowdury and Others v. Greece*, Application No. 21884/15, Judgment, Merits and Just Satisfaction, 30 March 2017, §99.

²⁸ *Situation in the Republic of Kenya*, ICC-01/09-19, Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, §82.

²⁹ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-424, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, §78.

³⁰ *Prosecutor v. Akayesu*, ICTR-96-4-T, Trial Chamber I, Judgment, 2 September 1998, §581.

³¹ *Prosecutor v. Bosco Ntaganga*, ICC-01/04-02/06-309, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Bosco Ntaganda, Pre-Trial Chamber II, 9 June 2014, §23.

³² *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-424, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, 15 June 2009, §§107-108.

³³ *Supra*, note 27.

multiplicity of victims.³⁴ In the present case, since 2013, the Westeros shrimp-peeling sheds have employed more than 10,000 Southeros laborers in exploitative circumstances. Consequently, the number of victims satisfies this requirement.

1.3.2. The attack was widespread.

The widespread or systematic character of the attack is a disjunctive requirement.³⁵ An attack is “widespread” if it is massive, frequent, carried out collectively with considerable seriousness and directed against a large number of civilian victims.³⁶ In this respect, the case law requires that it involves an attack carried out over a large geographical area or an attack in a small geographical area directed against a large number of civilians.³⁷ In the present case, the attack in question is widespread since it involved more than 10,000 victims. Since the ICC has determined that around 5812 civilians satisfies the requirement of “widespread”,³⁸ 10,000 victims are sufficient for the determination of widespread attack.

1.3.3. The attack occurred pursuant to or in furtherance of a State or organizational policy.

The VLR submits that a State policy exists in the present case. A policy to commit an attack requires that the State or organization actively promote or encourage such an attack against a civilian population; such a policy may be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack, but the mere absence of governmental or organizational action is not sufficient.³⁹ In the present case, Westeros did not combat the crime of human trafficking in its shrimp industry, provided no compensation to the victims and

³⁴ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-424, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, §108 and footnote 135.

³⁵ *Ibid.*, §82.

³⁶ *Prosecutor v. William Samoei Ruto et al*, ICC-01/09-01/11-373, Pre-Trial Chamber II, Decision on the Confirmation of Charges, 23 January 2012, §176.

³⁷ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-424, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, 15 June 2009, §83.

³⁸ *Prosecutor v. William Samoei Ruto et al*, ICC-01/09-01/11-373, Pre-Trial Chamber II, Decision on the Confirmation of Charges, 23 January 2012, §178.

³⁹ Article 7 Elements of Crimes, footnote 6.

permitted the local shrimp-shed operators to continue their business with impunity.⁴⁰ Furthermore, if a conduct was in line with the intentions of the government and would therefore remain unopposed, the policy not to oppose the attacks would meet the requirements of the policy element.⁴¹ In the case at hand, despite of knowing of the exploitation by the shed operators, the Westeros government deliberately failed to combat the attack and broke its promises which included shutting down offending work places and compensating the victims.⁴² Consequently, the policy element was satisfied in the present case.

⁴⁰ *Prosecutor v. McGregor Klegane*, Decision on the Confirmation of Charges against Defendant McGregor Klegane of Northeros, 4.

⁴¹ M. Cherif Bassiouni, *Crimes against Humanity in International Criminal Law*, Hague, Kluwer Law International, 1999, 264.

⁴² *Prosecutor v. McGregor Klegane*, Decision on the Confirmation of Charges against Defendant McGregor Klegane of Northeros, 4.

2. A CORPORATE SUBSIDIARY THAT PURCHASES SHRIMP AT AN EXTREMELY LOW PRICE FROM THE WESTEROS SHRIMP-SHEDS WITH KNOWLEDGE OF THEIR LABOR ABUSES CAN BE TREATED AS AN UNINDICTED CO-PERPETRATOR FOR PURPOSES OF PROSECUTING THE DEFENDANT UNDER ARTICLE 25(3)(A) ICC STATUTE NOTWITHSTANDING ARTICLE 25(1) ICC STATUTE.

The VLR submits that Little Fingers, Inc. is the unindicted co-perpetrator in the crime of humanity of other inhumane acts. At the outset, the VLR reiterates that since the Defence has appealed Pre-Trial Chamber VI's decision, it bears the burden of proof that Pre-Trial Chamber VI manifestly erred in law.⁴³ In any event, the VLR will demonstrate that it is consistent with the ICC Statute to regard legal persons, such as corporations, as unindicted co-perpetrators under Article 25(3)(a) ICC. Article 25(1) ICC Statute does not prevent this Court to apply a general principle of law in the meaning of Article 21(1)(c) ICC Statute that legal persons have criminal responsibility. Therefore, corporations may be considered co-perpetrators of a crime in the context of Article 25(3)(a) ICC Statute, even though the ICC has no jurisdiction to indict and prosecute them. Moreover, the inclusion of legal persons in the context of co-perpetration does not violate the principle of restrictive interpretation contained in Article 22(2) ICC Statute. Subsequently, the VLR will establish that, in the present case, the criminal responsibility of the accused results from indirect co-perpetration, through his control over Little Fingers, Inc., which committed the crime of Article 7(1)(k) ICC Statute together with its co-perpetrators, the shrimp-shed operators.

2.1. Despite Article 25(1) ICC Statute, the ICC may apply a general principle of law that corporations have criminal responsibility.

Co-perpetration in Article 25(3)(a) ICC Statute as a mode of individual criminal responsibility requires that each co-perpetrator fulfils a certain task which contributes to the commission of the crime. Consequently, each co-perpetrator becomes responsible for the whole crime and has criminal responsibility.⁴⁴ Therefore, if Little Fingers, Inc. is treated as a co-perpetrator, it must necessarily have criminal responsibility for the crime against humanity in Article 7(1)(k) ICC Statute of other inhumane act. Even though Article 25(1) ICC Statute limits the ICC's jurisdiction over natural persons, the VLR submits that Pre-Trial Chamber VI was correct to

⁴³ *Supra*, note 1 and 3.

⁴⁴ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-803, Pre-Trial Chamber I, Decision on the Confirmation of the Charges, 29 January 2007, §326; K. Ambos, "Article 25", in O. Triffterer and K. Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Munich, Beck, 2016, 988 and 1001.

treat Little Fingers, Inc. as an unindicted co-perpetrator since corporate criminal responsibility amounts to a general principle of law.

2.1.1. Despite Article 25(1) ICC Statute, the ICC may apply a general principle of law that corporations have criminal responsibility.

According to Article 21(1)(c) ICC Statute the ICC can apply the general principles of law derived by the Court from national law of legal systems of the world, as long as they do not contradict with the ICC Statute and with international law and internationally recognized norms and standards. The inquiry of the domestic legal systems should include the principal legal systems of the world, including at least representatives from civil law countries and common law countries.⁴⁵ Article 21(1)(c) ICC Statute does not require that the principle exists in all legal systems, but the principle must exist in a majority of legal systems, including the leading legal systems of the world.⁴⁶ In the case at hand, the VLR holds that corporate responsibility is a general principle of law in domestic legal systems, because numerous domestic legal systems recognize that corporations can be held accountable for harm they cause to others.⁴⁷ In common law countries, the United States, the United Kingdom, Australia, India, and Singapore accept corporate criminal responsibility.⁴⁸ In civil law countries, France, Belgium, Japan, Netherlands, China and Spain accept corporate criminal responsibility.⁴⁹

The VLR submits that the general principle of law of corporate responsibility is not inconsistent with the Statute, despite Article 25(1) ICC Statute. Pursuant to this provision the ICC only has jurisdiction over natural persons. Since the inclusion of corporate criminal responsibility was

⁴⁵ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-1049, Trial Chamber I, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, 30 November 2007, §4; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-322, Pre-Trial Chamber I, Decision Revoking the Prohibition of Contact and Communication between Germain Katanga and Mathieu Ngudjolo Chui, 13 March 2008, §12.

⁴⁶ M.M. de Guzman, “Article 21”, in O. Triffterer and K. Ambos (eds.), *The Rome Statute of the International Criminal Court, A Commentary*, Munich, Beck, 2016, 944.

⁴⁷ B. Stephens, “The Amorality of Profit: Transnational Corporations and Human Rights”, 20 *Berkeley Journal of International Law* 2002, 64.

⁴⁸ Section 2.07 U.S. Model Penal Code; Section 1 Corporate Manslaughter and Corporate Homicide (United Kingdom); Division 12 Criminal Code (Australia); Section 447, Companies Act 2013 (India); Chapter 241 Provisions of the Prevention of Corruption Act (Singapore).

⁴⁹ Article 121-2 Criminal Code (France); Article 975 Companies Act (Japan); Article 51 Criminal Code (The Netherlands); Article 30 Criminal Law (People’s Republic of China); Article 31*bis* Organic Law 5/2010 (Spain).

rejected during the drafting of the ICC Statute,⁵⁰ the VLR does not contest that the ICC cannot prosecute Little Fingers, Inc.. Nonetheless, this does not prevent an interpretation of the term “person” in Article 25(3)(a) ICC Statute as to include legal persons. In order to interpret its Statute the ICC may have recourse to Article 31 and 32 VCLT.⁵¹ In order to determine the ordinary meaning of “person” the ICC may rely on dictionaries.⁵² Accordingly, the term person covers legal and natural persons.⁵³ Moreover, in its case law on indirect perpetration under Article 25(3)(a) ICC Statute, the ICC has interpreted that a person is acting through another person when he or she has “control over an organization”.⁵⁴ Consequently, the term “person” in Article 25(3)(a) ICC Statute is not limited to natural persons. As a result, as long as the ICC does not exercise its jurisdiction over legal persons, corporate criminal responsibility does not contradict the ICC Statute.

2.1.2. The inclusion of corporations as co-perpetrators under Article 25(3)(a) ICC Statute does not contradict Article 22(2) ICC Statute.

Article 22(2) ICC Statute introduces the rule of strict construction including the prohibition of extension by analogy of definition of crimes, as part of the *nullum crimen sine lege* principle. The VLR submits that the interpretation of “person” as including legal persons in Article 25(3)(a) ICC Statute is not inconsistent with the strict construction principle.

The scope of Article 22 ICC Statute must be determined by reference to its wording.⁵⁵ In this respect, Article 22(2) ICC Statute clearly states that it is applicable to the “definition of a

⁵⁰ W.A. Schabas, *The International Criminal Court, A Commentary on the Rome Statute*, Oxford, Oxford University Press, 2010, 425-427.

⁵¹ E.g. *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-926, Appeals Chamber, Decision on the Admissibility of the Appeal of Mr. Thomas Lubanga Dyilo against the Decision of Pre-Trial Chamber I Entitled ‘Décision sur la confirmation des charges of 29 January 2007, 13 June 2007, §8; *Prosecutor v. Germain Katanga*, ICC 01/04-01/07, Trial Chamber II, Judgment Pursuant to Article 74 of the Statute, 7 March 2014, §43.

⁵² R. Gardiner, *Treaty Interpretation*, Oxford, Oxford University Press, 2015, 186.

⁵³ H.C. Black, J.R. Nolan and J.M. Nolan-Haley, *Black's Law Dictionary*, St. Paul Minn., West, 1979, 1028.

⁵⁴ *Prosecutor v. Charles Blé Goudé*, ICC-02/11-02/11-186, Pre-Trial Chamber I, Decision on the Confirmation of Charges against Charles Blé Goudé, 11 December 2014, §137.

⁵⁵ B. Broomhall, “Article 22”, in O. Triffterer and K. Ambos (eds.), *The Rome Statute of the International Criminal Court, A Commentary*, Munich, Beck, 2016, 955.

crime”. The ordinary meaning of “definition of a crime” refers to the elements of a crime,⁵⁶ which implies that this provision applies with respect to the crimes in Articles 6-8bis ICC Statute.⁵⁷ Hence, the application of the principle of strict construction cannot be extended to other provisions. Therefore, the interpretation of “person” in Article 25(3)(a) ICC Statute as including legal person does not contradict Article 22(2) ICC Statute.

2.2. In the present case, the accused has individual criminal responsibility on the basis of indirect co-perpetration.

The VLR accepts that Article 25(3)(a) ICC Statute does not explicitly provide for indirect co-perpetration. However, indirect co-perpetration, a combination of co-perpetration and indirect perpetration, is contained in Article 25(3)(a) ICC Statute on the basis of a textual interpretation of the ICC Statute.⁵⁸ The ICC has interpreted “jointly or through another person” as an inclusive disjunction, which implies the sense of “either one or another, possibly both”.⁵⁹ Therefore, the mode of indirect co-perpetration criminal responsibility as jointly with another and through another person is accepted by the Statute.

The VLR submits that the accused is responsible for the crime against humanity by virtue of his control over Little Fingers, Inc. which perpetrated the crime against humanity together with shrimp-shed operators between 6 April 2015 and 25 February 2017. The three requirements of indirect co-perpetration are: (a) objective elements for commission of the crime through another person; (b) objective elements of joint commission of a crime; (c) subjective elements, including fulfilment of the subjective elements of the crime charged, awareness of the risk that implementing the common plan may result in the realization of the crime and the acceptance of such a result by reconciliation and consent, and awareness of the factual circumstances

⁵⁶ H.C. Black, J.R. Nolan and J.M. Nolan-Haley, *Black's Law Dictionary*, St. Paul Minn., West, 1979, 334.

⁵⁷ B. Broomhall, “Article 22”, in O. Triffterer and K. Ambos (eds.), *The Rome Statute of the International Criminal Court, A Commentary*, Munich, Beck, 2016, 960.

⁵⁸ E. van Sliedregt, *Individual Criminal Responsibility in International Law*, Oxford, Oxford University Press, 2012, 167.

⁵⁹ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-717, Appeals Chamber, Decision on the Confirmation of Charges, 30 September 2008, §491.

enabling the suspect to jointly control the crime.⁶⁰ In the present case, the subjective requirements are satisfied, since the accused did not cease purchasing shrimp from the shrimp-peeling sheds despite being aware of the human trafficking.⁶¹ Hence, the accused was aware of and intended to commit the crime in question, together with the shrimp-shed operators.

2.2.1. The objective elements for commission of the crime through another person are satisfied.

The VLR submits that the accused controls Little Fingers, Inc., as perpetrator behind the perpetrator, to commit the crime in question. According to Article 25(3)(a) ICC Statute, as indirect co-perpetrator, the accused must have control over an apparatus, based on hierarchical relations between the accused and his subordinates.⁶² Furthermore, three objective elements should be satisfied: control over the organization, organized and hierarchical apparatus of power, and execution of the crimes secured by almost automatic compliance with the orders.⁶³

At the outset, the first element requires that the accused controls at least part of an apparatus of power, effectively and undisturbedly.⁶⁴ In the present case, the accused served as the corporate CEO of Giant Finger, Inc. which is the sole owner of Little Fingers, Inc. Under the company structure, the accused had supervisory control over Little Fingers', Inc. executive officers.⁶⁵ Hence, the accused effectively and undisturbedly controlled Little Fingers, Inc. Furthermore, the second element allows for the hierarchical relations between superiors and subordinates.⁶⁶ The transnational corporation in the present case has clear hierarchical

⁶⁰ *Prosecutor v. Francis Kirimi Muthaura, et al.*, ICC-01/09-02/11-382-Red, Pre-Trial Chamber II, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of Rome Statute, 29 January 2012, §§143-150.

⁶¹ *Prosecutor v. McGregor Klegane*, Pre-Trial Chamber VI, Confirmation of Charges against Defendant McGregor Klegane of Northeros, 5.

⁶² *Prosecutor v. Germain Katanga*, ICC-01/04-01/07, Trial Chamber II, Judgment pursuant to Article 74 of the Statute, 7 March 2014, §1396.

⁶³ K. Ambos, "Article 25", in O. Triffterer and K. Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Munich, Beck, 2016, 996.

⁶⁴ *Prosecutor v. Germain Katanga*, ICC-01/04-01/07, Trial Chamber II, Judgment pursuant to Article 74 of the Statute, 7 March 2014, §1412.

⁶⁵ *Prosecutor v. McGregor Klegane*, Pre-Trial Chamber VI, Confirmation of Charges against Defendant McGregor Klegane of Northeros, 5.

⁶⁶ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-717, Appeals Chamber, Decision on the Confirmation of Charges, 30 September 2008, §512; F. Jessberger and J. Geneuss, "On the

structure. Little Finger, Inc. is the wholly-owned subsidiary of the Giant Finger, Inc. The executors in Little Fingers, Inc. who directly purchase the shrimp and export to foreign countries, are the subordinates of the accused.⁶⁷ The superior-subordinate relationship is therefore clearly hierarchical.

The last element provides that the accused can utilize his subordinates as a mere gear in a giant machine in order to produce the criminal result.⁶⁸ Meanwhile, the orders do not need to be given by the superior directly to the offenders.⁶⁹ In the case at hand, the company structure shows that the accused had effective control over the employees in Little Finger, Inc.⁷⁰ Hence, the accused can pass the order to his subordinates through Giant Finger, Inc. and Little Fingers, Inc. If a subordinate in the company refuses to comply with the CEO's orders, another will usually take his place and ensure the commission. Thus, the accused can essentially decide whether and how the crime would be committed through his control over the corporation.

2.2.2. The objective elements of joint commission of a crime are satisfied.

The VLR submits that under the control of the accused, Little Fingers, Inc. is the co-perpetrator of the crime. In this respect, two objective requirements must be fulfilled: (a) existence of an agreement or common plan between two or more persons; and (b) coordinated essential contribution made by each co-perpetrator resulting in realization of the objective of the crime.⁷¹ First, between 6 April 2015 and 25 February 2017, a criminal plan was developed and set in place by the accused and the Westeros shrimp-shed operators with the purpose of human

Application of a Theory of Indirect Perpetration in Al Bashir”, 6 *Journal of International Criminal Justice* 2008, 861.

⁶⁷ *Prosecutor v. McGregor Klegane*, Pre-Trial Chamber VI, Confirmation of Charges against Defendant McGregor Klegane of Northeros, 5.

⁶⁸ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-717, Appeals Chamber, Decision on the Confirmation of Charges, 30 September 2008, §515.

⁶⁹ *Prosecutor v. Kordić & Cerkez*, IT-95-14/2-T, Trial Chamber, Judgment, 26 February 2001, §388.

⁷⁰ *Prosecutor v. McGregor Klegane*, Pre-Trial Chamber VI, Confirmation of Charges against Defendant McGregor Klegane of Northeros, 5.

⁷¹ *Prosecutor v. Bahar Idriss Abu Garda*, ICC-02/05-02/09-243-Red, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 08 February 2010, §§160-161; *Prosecutor v. Abdallah Banda Abakaer Nourain*, ICC-02/05-03/09-121-Corr-Red, Pre-Trial Chamber I, Corrigendum of the “Decision on the Confirmation of Charges”, 7 March 2011, §128 and §150.

trafficking. Little Fingers, Inc. controlled by the accused had a close relationship with the Westeros shrimp-peeling industry since Little Fingers', Inc. only source of business in Westeros is the shrimp exports for which it purchases about sixty percent of Westeros shrimp.⁷² After reports about widespread human trafficking in the shrimp industry, the government and major exporters of Westeros claimed to take actions for stopping the crime and compensating the victims.⁷³ Therefore, the accused was aware of the risk that purchasing shrimp will result in commission of the crime in question. Nonetheless, the accused did not cease the business with the local shrimp-peeling sheds while he had ultimate authority to disapprove and block the corporate actions of Little Fingers, Inc.,⁷⁴ which predicates that he accepted the consequence of the crime.

Second, under control of the accused, Little Fingers, Inc. essentially contributed to the crime. In this regard, the accused and the other co-perpetrators must carry out essential contributions in a coordinated manner which result in the fulfilment of the material elements of the crime.⁷⁵ Furthermore, the coordinated essential contribution by each co-perpetrator can result in the realization of the objective elements of the crime.⁷⁶ In the case at hand, the essential tasks of commission were divided. In the whole supply chain, the Westeros shrimp-peeling shed operators were responsible for recruiting the laborers and exploiting them to prepare shrimp for export.⁷⁷ Meanwhile, Little Fingers, Inc. took charge of purchasing a large quantity of shrimps and sending the products to restaurant- and supermarket-chains across the globe.⁷⁸ Since about 60 percent of the Westeros shrimp are purchased by the company, the business with Little Fingers, Inc. was critical for the shrimp-peeling industry. If the accused would have

⁷² *Prosecutor v. McGregor Klegane*, Pre-Trial Chamber VI, Confirmation of Charges against Defendant McGregor Klegane of Northeros, 5.

⁷³ *Ibid.*, 4.

⁷⁴ *Ibid.*, 5.

⁷⁵ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, Pre-Trial Chamber II, 15 June 2009, §350.

⁷⁶ *Prosecutor v. Bahar Idriss Abu Garda*, ICC-02/05-02/09-243-Red, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 08 February 2010, §160.

⁷⁷ *Prosecutor v. McGregor Klegane*, Pre-Trial Chamber VI, Confirmation of Charges against Defendant McGregor Klegane of Northeros, 4.

⁷⁸ *Ibid.*, 4.

ceased the business, the demand of shrimps would have been significantly reduced. As a result, the need for laborers would be reduced and the crime would have been brought under control. Hence, through Little Fingers, Inc., the accused made an essential contribution to the crime.

3. A DOMESTIC COURT ACQUITTAL BASED ON AN ERRONEOUS INTERPRETATION AND APPLICATION OF LAW UNDER THE CIRCUMSTANCES OF THIS CASE SHALL NOT PRECLUDE THE ICC FROM TRYING THE CRIME UNDER THE EXCEPTIONS TO THE NE BIS IN IDEM PRINCIPLE ENSHRINED IN ARTICLE 20(3) ICC STATUTE.

The VLR submits that the ICC may prosecute the case against the accused despite his acquittal by the Northeros District Court since the acquittal was based on a manifestly erroneous interpretation of the ICC Statute and the result of a proceeding which was not conducted independently or impartially. Although the VLR accepts that the principle of ne bis in idem in Article 20(3) ICC Statute normally precludes the ICC from trying a person for the same conduct if he was acquitted by another court, Article 20 (3)(a) and (b) ICC Statute provide two important exceptions to this principle. The VLR will demonstrate that the acquittal of the accused falls within both exceptions, namely the acquittal occurred for the purpose of shielding the accused and was the result of a proceeding which was not conducted independently or impartially and inconsistent with the intent to bring the accused to justice. Therefore, the case is admissible and the ICC is not precluded to try the accused. In any event, the Prosecutor reiterates that since the Defence made the appeal, it bears the burden of proof that the Pre-Trial Chamber made a manifest error in law.⁷⁹

3.1. The ICC can try the accused despite the principle of ne bis in idem in Article 20(3) ICC Statute if there is an exceptional circumstance in the proceedings before the Northeros District Court.

The ne bis in idem principle enshrined in Article 20 ICC Statute is commonly recognized as a principle in criminal law and as a basic human right⁸⁰ which is prevalent among the legal systems of the world.⁸¹ Procedurally, the principle prevents a new prosecution for the same conduct and, substantially, provides protection against being prosecuted and punished twice.⁸² The application of the principle is normally restricted to the same jurisdiction in which the

⁷⁹ *Supra*, note 1 and 3.

⁸⁰ N. Nabil Jurdi, *The International Criminal Court and National Courts: A Contentious Relationship*, Surrey, Ashgate, 2011, 59; Article 14 ICCPR; Article 8(4) ACHR; Article 4 Protocol No. 7 to the ECHR.

⁸¹ G. Conway, "Ne Bis In Idem in International Law", 3 *International Criminal Law Review* 2003, 217.

⁸² Human Rights Committee, "General Comment No. 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial", UN Doc. CCPR/C/GC/32 (2007), §54.

accused has already been finally acquitted or convicted.⁸³ Nonetheless, due to the insertion of the wording “another court” in Article 20(3) ICC Statute, the application of the principle of ne bis in idem extends to trials before the ICC and national and other international criminal courts.

However, the protection of ne bis in idem in Article 20 ICC Statute does not cover national and international decisions equally.⁸⁴ Article 20(3)(a) and (b) ICC Statute provide for exceptions to ne bis in idem in situations where the ICC intends to proceed against a person who has already been tried by another court, but where the trial was unsatisfactory.⁸⁵ In this respect, Article 17 ICC Statute must be read in the light of paragraph 10 of the Preamble of ICC Statute.⁸⁶ Paragraph 10 of Preamble of ICC Statute states that the jurisdiction of ICC shall be complementary to national criminal jurisdiction. Hence, the core idea of the exceptions to ne bis in idem is that certain criteria concerning the quality of criminal justice need to be fulfilled by the national proceedings.⁸⁷ The principle of ne bis in idem therefore only fully applies with regard to the decisions of the ICC and a retrial in case of national decisions may take place in exceptional circumstances.⁸⁸ Since, in the present case, the accused was previously tried by a domestic court, the Northeros District Court⁸⁹, the ICC can still try the accused provided the exceptional circumstances in Article 20(3)(a) and (b) ICC Statute are present in the trial before the domestic court.

⁸³ Article 4(1) Protocol No. 7 to the ECHR; Human Rights Committee, *A.P. v. Italy*, Communication No. 204/1986, UN Doc. CCPR/C/31/D/204/1986, §7.3.

⁸⁴ I. Tallgren and A. Reisinger Coracini, “Article 20”, in O. Triffterer and K. Ambos (eds.), *Rome Statute of the International Criminal Court, A Commentary*, Munich, Beck, 2016, 918.

⁸⁵ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-1497, Appeals Chamber, Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, 25 September 2009, §85.

⁸⁶ *Prosecutor v. Germain Katanga*, ICC-01/04-01-07-1213-tENG, Trial Chamber II, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), 16 June 2009, §74.

⁸⁷ I. Tallgren and A. Reisinger Coracini, “Article 20”, in O. Triffterer and K. Ambos (eds.), *The Rome Statute of the International Criminal Court, A Commentary*, Munich, Beck, 2016, 918.

⁸⁸ *Ibid.*, 902.

⁸⁹ *Prosecutor v. McGregor Klegane*, Pre-Trial Chamber VI, Decision of the Confirmation of Charges against Defendant McGregor Klegane of Northeros, 5-6.

3.2 The acquittal of the accused by the Northern District Court is covered by the exceptions to the principle of ne bis in idem in Article 20(3)(a) and (b) ICC Statute.

The VLR submits that the acquittal of Mr. Klegane is covered by the exceptions in Article 20(3)(a) and (b) ICC Statute. As mentioned, these exceptions provide that the ICC can exercise its jurisdiction over a person, even when that person has already been tried, if (a) the proceedings were conducted for the purpose of shielding the person; or (b) not conducted independently or impartially and conducted in a manner which was inconsistent with an intent to bring the person concerned to justice. Article 20(3)(a) and (b) ICC Statute overlap in their scope of application: shielding a person from criminal responsibility under subparagraph (a) is one way of not bringing that person to justice under subparagraph (b)⁹⁰ and subparagraph (a) may serve as a catch-all clause where the purpose of shielding a person from criminal responsibility is realized without fulfilling the criteria listed under subparagraph (b).⁹¹ Since, these two exceptions closely resemble the two forms of unwillingness defined in Article 17(2)(a) and (c) ICC Statute,⁹² the interpretation and application of Article 17(2)(a) and (c) ICC Statute can be used for Article 20(3)(a) and (b) ICC Statute. In addition, since the interpretation and application of the ICC Statute has to be consistent with recognized human rights law pursuant to Article 21(3) ICC Statute, the case law of human rights courts is relevant for interpreting the requirements in Article 20(3) ICC Statute.⁹³

3.2.1. The acquittal of the accused falls within the exception of Article 20(3)(a) ICC Statute.

The exception of “shielding” in Article 20(3)(a) is identical to Article 17(2)(a) ICC Statute and amounts to a test for discerning the bad faith of a State by way of checking the effectiveness of the national proceedings.⁹⁴ The meaning of the exception of “shielding” in Article 20(3)(a) ICC Statute was clarified by human rights law: if the authorities fail in their duty, this may

⁹⁰ I. Tallgren A. Reisinger Coracini, “Article 20”, in O. Triffterer and K. Ambos (eds.), *The Rome Statute of the International Criminal Court, A Commentary*, Munich, Beck, 2016, 926.

⁹¹ *Ibid.*, 926.

⁹² J.K. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, Oxford, Oxford University Press, 2008, 119.

⁹³ G. Bitti, “Article 21 and the Hierarchy of Sources of Law before the ICC”, in C. Stahn (ed.), *The Law and Practice of the International Criminal Court*, Oxford, Oxford University Press, 2015, 435-436.

⁹⁴ W.A. Schabas and M.M. El Zeidy, “Article 17”, in O. Triffterer and K. Ambos (eds.), *The Rome Statute of the International Criminal Court, A Commentary*, Munich, Beck, 2016, 819.

amount to “shielding” the person from justice.⁹⁵ As a result, national criminal proceedings must be effective which entails that the national authorities must have taken all reasonable steps available to secure the evidence concerning the incident; the conclusions must be based on thorough, objective and impartial analysis of all the relevant elements; and there is no deficiency which undermines the ability to establish the circumstances of the case or the person responsible.⁹⁶ In this respect, a mere error of law by a judge while dispensing justice would not in itself be sufficient to conclude that the judge attempted to shield the accused. Nonetheless, when the error of law or fact by the national court is so evident that it amounts to a “manifest error”, it will disturb the fairness of the proceedings.⁹⁷ An error will be manifest when no reasonable court could ever have reached the conclusion or when the error is “so striking and palpable on the face” that the proceedings are regarded as grossly arbitrary.⁹⁸

In the present case, the Northeros District Court acquitted the accused inter alia on the terse motivation that the human trafficking of the shrimp-shed laborers did not fall within the scope of Article 7 ICC Statute.⁹⁹ However, trafficking in person is clearly mentioned in Article 7(2)(c) ICC Statute as, potentially, falling within the scope of the crime against humanity of enslavement. Furthermore, as established above, trafficking in persons is regarded as a serious violation of fundamental human rights,¹⁰⁰ which brings human trafficking within the purview of the crime against humanity of other inhumane acts of Article 7(1)(k) ICC Statute. Hence, despite concluding that the treatment of shrimp-shed laborers amounts to the crime of human trafficking, the Northeros District Court did not even thoroughly analyze the possibility that the crime would fall within Article 7 ICC Statute, either as the crime against humanity of enslavement in Article 7(1)(c) ICC Statute or the crime against humanity of other inhumane

⁹⁵ *Nachova and Others v. Bulgaria*, Application No.43577/98 and 43579/98, Judgment, Merits and Just Satisfaction, 6 July 2005, §167.

⁹⁶ *Ibid.*, §113.

⁹⁷ *Bochan v. Ukraine (No.2)*, Application No. 22251/08, Judgment, Merits and Just Satisfaction, 5 February 2015, §62

⁹⁸ *Khamidov v. Russia*, Application No.72118/01, Judgment, Merits and Just Satisfaction, 15 November 2007, §174.

⁹⁹ *Prosecutor v. McGregor Klegane*, Pre-Trial Chamber VI, Decision of the Confirmation of Charges against Defendant McGregor Klegane of Northeros, 6.

¹⁰⁰ *Rantsev v. Cyprus and Russia*, Application No. 25965/04, Judgment, Merits and Just Satisfaction, 7 January 2010, §§272-282; *Chowdury and Others v. Greece*, Application No. 21884/15, Judgment, Merits and Just Satisfaction, 30 March 2017, §93.

acts in Article 7(1)(k) ICC Statute. The Northeros District Court therefore failed to reach a conclusion based on thorough, objective and impartial analysis of all the relevant elements. In particular, any reasonable judge, in light of the clear wording of Article 7(2)(c) ICC Statute and the fundamental breach of human rights required for Article 7(1)(k) ICC Statute would have considered whether the exploitation and mistreatment of the shrimp-shed laborers amounted to a crime against humanity. Therefore, the Northeros District Court made a manifest error in law so that the ICC is not prevented from prosecuting the accused due to the exception in Article 20(3)(a) ICC Statute.

3.2.2 The acquittal of the accused falls within the exception of Article 20(3)(b) ICC Statute.

The VLR submits that, in any event, the domestic acquittal is covered by the exception in subparagraph (b) since the acquittal was not the result of independent and impartial proceedings. In this regard, Article 20(3)(b) ICC Statute includes three factors: independence, impartiality and lack of intent to bring a person to justice. If one of the first two factors is fulfilled, then the third is satisfied.¹⁰¹ In order to establish whether a judicial body is independent regard must be had to the appointment of its members and their term of office and to the existence of guarantees against outside pressure.¹⁰² In this light, political interference in the appointment of the judges must be prevented.¹⁰³ Furthermore, the judiciary needs to satisfy a series of requirements including independence of the executive and parties to the case and guarantees afforded by its procedure.¹⁰⁴ In the present case, Judge Nefarious was appointed by the former president to whom the accused had contributed millions of dollars (US), which entails that there is an existing common interests between the former president and the accused, Mr. Klegane. Therefore, there are not enough guarantees against any political interference and against outside pressure. Moreover, there was no recusal by Judge Nefarious in the domestic proceeding despite the existence of doubt on his independence. As a result, since no sufficient guarantees were afforded by the procedure before the Northeros District Court, the domestic

¹⁰¹ N. Nabil Jurdi, *The International Criminal Court and National Courts: A Contentious Relationship*, Surrey, Ashgate, 2011, 45.

¹⁰² *Langborger v. Sweden*, Application No. 11179/84, Judgment, Merits and Just Satisfaction, 22 June 1989, §32.

¹⁰³ Human Rights Committee, Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, UN Doc. CCPR/C/79/Add. 79, 4 August 1997, §79.

¹⁰⁴ *Le Compte, Van Leuven and de Meyere v. Belgium*, Application No. 6878/75, Judgment, Merits, 23 June 1981, §55.

proceeding was covered by the exception to the principle of ne bis in idem in Article 20(3)(b) ICC Statute.

The VLR submits that in the present case the domestic proceedings were equally not impartial. In this respect, human rights law has introduced a subjective and an objective test of impartiality.¹⁰⁵ The subjective test refers to the interest of a particular judge in a given case.¹⁰⁶ The objective test aims at considering whether a judge sufficiently offered guarantees to exclude any legitimate doubt, which mostly concerns hierarchical or other links between the judge and other actors in the proceedings.¹⁰⁷ Concerning the subjective test, since the accused is an extremely wealthy and powerful businessman in Northeros¹⁰⁸, who by his contribution to the former president, allowed Judge Nefarious to be appointed, there is doubt that Judge Nefarious will not be unduly influenced in favor of the accused. Concerning the objective test, there is already a link between Judge Nefarious and Mr. Klegane through the former president of Northeros to cast doubt on Judge Nefarious' impartiality. Furthermore, Judge Nefarious decided to acquit the accused based on a manifest erroneous application and interpretation of the law, as mentioned above. Therefore, in light of this acquittal, which no reasonable judge would have made on that basis, there exists a strong legitimate doubt with regards to the impartiality of Judge Nefarious. Consequently, the proceedings before the Northeros District Court were not independent or impartial and therefore fall within the scope of the exception in Article 20(3)(b) ICC Statute.

¹⁰⁵ *Piersack v. Belgium*, Application No. 8692/79, Judgment, Merits, 1 October 1982, §30.

¹⁰⁶ *Demicoli v. Malta*, Application No. 13057/87, Judgment, Merits and Just Satisfaction, 27 August 1991, §40.

¹⁰⁷ *Micallef v. Malta*, Application No. 17056/06, Judgment, Merits and Just Satisfaction, 15 October 2009, §97.

¹⁰⁸ *Prosecutor v. McGregor Klegane*, Pre-Trial Chamber VI, Decision of the Confirmation of Charges against Defendant McGregor Klegane of Northeros, 8.

VIII. SUBMISSIONS

The VLR respectfully requests that the Appeals Chamber of the ICC may find that:

1. The ICC should recognize human trafficking, as set forth in the facts described in the Pre-Trial Chamber's decision, as qualifying as "other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health" under Article 7(1)(k) ICC Statute.

2. A corporate subsidiary that purchases shrimp at an extremely low price from the Westeros shrimp-sheds with knowledge of their labor abuses can be treated as an unindicted co-perpetrator for purposes of prosecuting the Defendant under Article 25(3)(a) ICC Statute notwithstanding Article 25(1) ICC Statute.

3. A domestic court acquittal of the Defendant based on an erroneous interpretation of the ICC Statute's definition of crimes against humanity under the circumstances of this case does not preclude the ICC from prosecuting the crime under the ne bis in idem principle enshrined in Article 20 ICC Statute.

