

ICC MOOT COURT COMPETITION IN THE ENGLISH LANGUAGE

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**Case before the International Criminal Court (ICC):
Prosecutor v. Dragone Goodrider of Wessos**

**The Government Counsel's Submission in the
Appeal from the Pre-Trial Chamber's Decision on Confirmation of Charges
against Defendant Dragone Goodrider of Wessos**

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LIST OF ABBREVIATIONS

Abbreviation	Full Text
AC	Appeals Chamber
Bannister	Dr. Nimera Bannister
confirmation hearing	Confirmation of charges hearing
Council	Wessos National Security Council
CUP	Cambridge University Press
Eassos	The State of Eassos
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECtHR	European Court of Human Rights
ed / eds	Editor / Editors
Edn	Edition
EU	European Union
Goodrider	Dragone Goodrider
ibid	<i>ibidem</i> ('in the same place')
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda

ICTY	International Criminal Tribunal for the former Yugoslavia
<i>id</i>	<i>idem</i> ('the same')
IHR	International Health Regulations
ILC	International Law Commission
n	Note
NMT	Nuremberg Military Tribunals
No.	Number
OTP	Office of the Prosecutor
OUP	Oxford University Press
Para / paras	Paragraph / paragraphs
PTC	Pre-Trial Chamber
Rayder	Dr. Lance Rayder
Rome Statute	Rome Statute of the International Criminal Court
RPE	Rules of Procedure and Evidence
SCSL	Special Court for Sierra Leone
State Parties	State Parties to the Rome Statute of the International Criminal Court
TC	Trial Chamber

UK	United Kingdom
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
US	United States of America
v.	Versus
VCLT	Vienna Convention on the Law of Treaties
Vol	Volume
Wessos	The State of Wessos
WHO	World Health Organisation

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STATEMENT OF FACTS

- I. **States involved:** Wessos and Eassos are neighbouring states separated by the Bloody Mountain range. Although they do not share an amicable relationship, residents of the two states intermingle across the borders. While both States are members of the UN and the WHO, only Eassos is a party to the Rome Statute. Wessos, fearing any involuntary intrusion upon its sovereignty, has neither signed nor ratified the Rome Statute.
- II. **The Defendant:** Goodrider, a Wessos national, is the country's Minister of Defence. He possesses significant authority within the government over matters relating to national security and the military. He is also a trained lawyer.
- III. **The vaccine development programme:** In 2019, Wessos was badly affected by the H5N8 Avian Influenza. To pre-empt the high possibility that this virus may mutate and infect humans, Goodrider instructed the development of a vaccine to protect the Wessos population. As specialised equipment were recently provided, Goodrider did not provide additional funding. While there was initial success in creating the mutated strain of virus for the vaccine, an unforeseen safety breach occurred. Two scientists experienced flu-like symptoms and died on 1 March 2020.
- IV. **Goodrider's response to the safety breach:** Goodrider immediately convened a meeting on 2 March 2020 to decide on measures to be taken to contain the virus. Goodrider and the Council decided to suspend international flights, set up quarantine centres, and send clean-up crews to the homes of the infected. To avoid mass panic, they did not inform anyone of the virus's escape, dealing with the matter discreetly. Despite these efforts, the virus escaped and infected the Eassos population.
- V. **Proceedings before PTC VI on 1 August 2020:** Before voluntarily appearing on 1 August 2020, Goodrider notified the PTC in writing of his intention to represent himself. The proceedings progressed smoothly until the end when Goodrider's request for interim release pending trial was rejected. This precipitated an angry outburst from Goodrider. In response, the PTC, against Goodrider's objections, appointed him standby counsel to step in if necessary. However, before there were further outbursts, the standby counsel submitted objections on behalf of Goodrider without communicating with him on 15 August 2020.
- VI. **Proceedings before PTC VI on 1 September 2020:** Goodrider was permitted to address the PTC after he was given a vague warning that his disruptive behaviour would not be tolerated. Upon Goodrider's first employment of offensive language, the PTC immediately removed him

from the courtroom and instructed the appointed counsel to take over. Goodrider could only observe the proceedings via video-link and communicate with the counsel. He was not allowed to address the court directly.

VII. Procedural history: On 15 July 2020, the PTC issued a summons against Goodrider. On 15 September 2020, the PTC held that it was in the interests of justice to appoint standby counsel over Goodrider's objections and to require him to participate remotely. The PTC also determined that there were substantial grounds to believe that Goodrider ordered the commission of "other inhumane acts" as a crime against humanity. Additionally, it held that it could exercise the "effects jurisdiction" over Goodrider because the consequences of Goodrider's actions were felt in Eassos, a State Party to the Rome Statute. The Defence appeals against the PTC's decision and requests the dismissal of all charges.

ISSUES

- I.** Whether Goodrider was unlawfully deprived of his right to be present at the confirmation hearing under Article 61 and to represent himself under Article 67(1)(d) of the Rome Statute.
- II.** Whether the charged offenses can be prosecuted as “other inhumane acts” under Article 7(1)(k) of the Rome Statute and whether the Prosecution met its duty to establish with sufficient evidence that there were substantial grounds to believe that Goodrider ordered the commission of such a crime under Article 25(3)(b) of the Rome Statute.
- III.** Whether the ICC has jurisdiction to prosecute Goodrider under Article 12 of the Rome Statute, considering that all of his actions related to the charges of other inhumane acts occurred in his State of nationality, Wessos, which is not a party to the ICC.

SUMMARY OF ARGUMENTS

- I. GOODRIDER WAS UNLAWFULLY DEPRIVED OF HIS RIGHT TO BE PRESENT UNDER ARTICLE 61(1) AND HIS RIGHT TO SELF-REPRESENTATION UNDER ARTICLE 67(1)(D) OF THE ROME STATUTE**
- A.** A suspect’s right to be present under Article 61(1) refers to his right to be physically present before the court. Proceedings may only continue in the absence of the suspect if he has fled or waived his right to be present. Both exceptions do not apply.
- B.** While this court may invoke its inherent powers to remove a disruptive suspect, a proportionate approach should be adopted. This requires the court to exhaust other reasonable alternatives, ensure the suspect has exhibited continuously disruptive behaviour, and provide the suspect with a sufficient warning prior to removal. These safeguards were not adequately considered by the PTC.
- C.** Under Article 67(1)(d), the court may appoint a suspect standby counsel when it is in the interests of justice to do so. As Goodrider did not exhibit continuously disruptive behaviour, it was not in the interests of justice for the PTC to appoint him standby counsel. In any event, the PTC provided the standby counsel with an overly broad mandate.
- II. GOODRIDER IS NOT LIABLE FOR ORDERING THE COMMISSION OF THE CRIME AGAINST HUMANITY OF “OTHER INHUMANE ACTS” UNDER ARTICLES 7(1)(K) AND 25(3)(B) OF THE ROME STATUTE**
- A.** For a crime under Article 7(1)(k) to be established, the act must be of a similar character to the other acts in Article 7(1) and the perpetrator must intend to inflict great suffering or serious injury. The act must also be committed in the context of a widespread attack directed against a civilian population.
- B.** Goodrider’s act was not of a similar character to the other acts under Article 7(1). To be of a similar character, there must be a flagrant violation of customary international law and basic human rights. Even if Goodrider’s act resulted in a violation of human rights, the act was motivated by his domestic concern to protect the lives of Wessos citizens, which he eventually succeeded in doing. This did not amount to a flagrant violation of human rights.
- C.** Goodrider did not intend to inflict great suffering or serious injury on the Eassos citizens. Not only did Goodrider adopt measures preventing the virus from getting past international borders, but he also was unaware of the spread of the virus beyond Wessos borders.

- D.** Goodrider’s act was not committed in the context of a widespread attack directed against a civilian population. The civilian population must be the primary, and not incidental, target of the attack. Goodrider had stated that he was wholly unconcerned about the situation in Eassos, and prioritised the well-being of the Wessos citizens.
- III. THE COURT CANNOT EXERCISE JURISDICTION OVER GOODRIDER AS THE PRECONDITIONS UNDER ARTICLE 12(2)(A) OF THE ROME STATUTE HAVE NOT BEEN MADE OUT**
- A.** The term “conduct” under Article 12(2)(a) refers to the acts underlying the crime and not the consequences of such acts. This is supported by a contextual interpretation of the provision.
- B.** Moreover, the “effects doctrine” is not recognised under customary international law because of a lack of state practice and *opinio juris*. This means that the court should not consider the “effects doctrine” in interpreting Article 12(2)(a).
- C.** Even if the *Myanmar-Bangladesh* decisions permit the consideration of consequences under Article 12(2)(a), this is limited to crimes where the consequences are the necessary outcomes of the acts. The present case does not involve such a crime. Further, this court cannot rely on *Charles Taylor* to exercise effects jurisdiction over Goodrider.
- D.** Even if the preconditions under Article 12 are satisfied, Goodrider, a national of a non-State Party, is entitled to immunity *rationae personae* before this court. The immunity arises because of his position as the *de facto* head of Wessos’ government, with authority over agencies and functions of the government.

WRITTEN ARGUMENTS

PRELIMINARY OBSERVATIONS

1. The present appeal is brought by the Defendant, Goodrider, under Article 82(1) of the Rome Statute. Preliminarily, the Government Counsel clarifies (I) the standard of review over the impugned decision, and (II) the standard of proof applicable to this hearing.

I. STANDARD OF REVIEW ON APPEAL

2. The AC can review a PTC's decision affected by errors of law or errors of fact.¹ On errors of fact, the AC can intervene when the findings are manifestly incorrect and there is no reasonable basis on which the PTC could reach that particular finding.² On errors of law, the AC will not defer to the PTC's findings and will come to its own conclusions.³

II. STANDARD OF PROOF AT THE CONFIRMATION HEARING STAGE

3. This AC can reverse or amend a decision materially affected by errors. The standard of proof at the appellate hearing will be the same as that at the confirmation hearing.⁴ The PTC applies the standard of "sufficient evidence to establish substantial grounds to believe", which requires the Prosecutor to offer concrete and tangible proof demonstrating a clear line of reasoning underpinning the allegations.⁵ This evidentiary standard similarly applies here.

¹ *Bemba et al.* 2014, AC, [18].

² *Id.*, [19].

³ *Id.*, [20].

⁴ RPE, Rule 149.

⁵ *Lubanga* 2017, PTC, [39].

ARGUMENTS

I. THE PTC ERRED IN REMOVING GOODRIDER FROM THE COURTROOM AND IN APPOINTING STANDBY COUNSEL UNDER ARTICLE 61(1) AND ARTICLE 67(1)(D) OF THE ROME STATUTE

1. Every person has the right to a fair trial.⁶ This fundamental guarantee includes the right to be present and the right to self-representation.⁷ These rights are enshrined in the Rome Statute,⁸ and uphold the credibility of this court's pronouncements by ensuring rigorous respect for the rights of persons before it.⁹ In this case, the PTC prematurely determined that Goodrider was required to participate in the hearings remotely and that it was in the interests of justice to appoint him standby counsel.¹⁰ Both determinations should be overturned because:
(A) Goodrider was unlawfully deprived of his right to be present under Article 61(1); and
(B) Goodrider was unlawfully deprived of his right to self-representation under Article 67(1)(d).

A. *Goodrider was unlawfully deprived of his right to be present under Article 61(1)*

2. Preliminarily, the PTC erroneously relied on Article 63(2) of the Rome Statute to remove Goodrider from the courtroom.¹¹ The express wording of Article 63(2) confines it to trial, and this is confirmed by its location within Part 6 of the Rome Statute (The Trial). The relevant provision is instead Article 61, which applies at the confirmation hearing.
3. The right to be present enables a suspect to effectively challenge the evidence against him.¹² This is pertinent at the confirmation hearing as the conclusions drawn by the PTC at this stage

⁶ Otto Triffterer and Kai Ambos, *The Rome Statute of the International Criminal Court: A Commentary* (C.H. Beck, Hart, Nomos, 3rd Edn, 2016), 49, 1651–1652.

⁷ Rome Statute, Article 67; Otto Triffterer and Kai Ambos, *supra* n 6, 1664–1665; Carsten Stahn, *The Law and Practice of the International Criminal Court* (OUP, 1st Edn, 2015), 1031.

⁸ Rome Statute, Articles 61, 67.

⁹ Otto Triffterer and Kai Ambos, *supra* n 6, 1651–1652.

¹⁰ *Prosecutor v. Dragone Goodrider of Wessos* (Confirmation of Charges against Defendant Dragone Goodrider of Wessos) ICC Moot Court, PTC VI (15 September 2020) (“*Goodrider*”), [20].

¹¹ *Goodrider*, *supra* n 10, [20].

¹² Fawzia Cassim, “The Accused’s Rights to be Present: A Key to Meaningful Participation in the Criminal Process” (2005) 38(2) *Comp & Int’l LJ S Afr* 285, 303.

will not only set out the factual scope of any subsequent trial,¹³ but may also result in the dismissal of charges altogether.¹⁴

4. Here, Goodrider was unlawfully deprived of his right to be present at the confirmation hearing because: (1) Goodrider's remote participation did not amount to "presence" under Article 61(1); (2) the exceptions to the right to be present at the confirmation hearing under Article 61(2) do not apply; and (3) even if the PTC relied on its inherent powers to remove Goodrider, he was still unlawfully deprived of his right to be present because these powers were exercised incorrectly.

(1) *Goodrider's remote participation did not amount to "presence" under Article 61(1)*

5. "Presence" under Article 61(1) requires the suspect to be *physically* present. This is supported by a contextual reading of the Rome Statute and the RPE in light of its object and purpose,¹⁵ and is consistent with the practice of other international criminal tribunals.

6. First, the Rome Statute and the RPE, when read together, implicitly treat "presence" as strictly referring to physical presence. For example, Rule 124 of the RPE states that the court may make an order for a defendant to attend the confirmation hearing virtually only *after* the suspect has waived his right to be present. In addition, Rule 134 *bis* requires an accused to submit a written request to the Trial Chamber to be present through the use of video technology. Further, Article 63(2) provides that a defendant is only to observe proceedings "from outside the courtroom, through communications technology" if he is disruptive during trial. These provisions imply that virtual attendance is an *alternative* to presence, rather than a *mode* of presence.

7. Moreover, a suspect's right to be physically present is consistent with the rationale underlying this right. A suspect's ability to effectively challenge the evidence against him includes the right to cross-examine witnesses,¹⁶ who may be present at the hearing.¹⁷ This ability is compromised

¹³ Rome Statute, Article 74(2); Regulations of the Court, Regulation 55.

¹⁴ Otto Triffterer and Kai Ambos, *supra* n 6, 1529.

¹⁵ VCLT, Article 31(1).

¹⁶ *Gbagbo and Blé Goudé* 2016, TC, 8.

¹⁷ Reinhold Gallmetzer, "Charges and Confirmation Hearing" in Fabricio Guariglia, Ben Batros, Reinhold Gallmetzer, George Mugwanya (eds), *The Appeals Chamber of the International Criminal Court: Commentary and Digest of Jurisprudence* (CUP, 2018), 187. See also *Mbarushimana* 2012, AC, [48].

when proceedings are conducted virtually. Courts and commentators have noted that for virtual hearings, the credibility of the witness and the veracity of the claims may only be effectively tested with physical confrontation and examination of facial features.¹⁸ This may be further exacerbated by technical problems arising from the use of virtual communications technology.¹⁹ Therefore, in order to enable suspects to effectively challenge the evidence against them and object to the charges brought,²⁰ their right to be present must refer to their right to be physically present.

8. Secondly, other international criminal tribunals have affirmed this interpretation of the right to be present.²¹ For example, in *Zigiranyirazo*, the ICTR held that the physical presence of a person before the court is “one of the most basic and common precepts of a fair criminal trial”.²² The ICTR also noted that international, regional, and national systems have adopted the view that the right to be present implies physical presence.²³
 9. Goodrider was physically removed from the courtroom at the confirmation hearing and was required to participate in the proceedings remotely.²⁴ Given that his right to be present refers to his right to be physically present, Goodrider was deprived of this right.
- (2) *The exceptions to the right to be present at the confirmation hearing under Article 61(2) did not apply*
10. Given that “presence” under Article 61(1) refers to physical presence, Goodrider could only be removed from the court if either of the two exceptions in Article 61(2) was satisfied: when the

¹⁸ See, for *eg*, *Zigiranyirazo* 2006, ICTR, TC, [32]. See also Natalie Byrom, Darah Beardon, and Abby Kendrick, *The Impact of COVID-19 Measures on the Civil Justice System* (May 2020), [5.78]; Doron Menashe, “A Critical Analysis of the Online Court” (2018) 39(4) *U Pa J Int’l L* 921, 946–947; Judiciary of England and Wales, *Civil Courts Structure Review: Interim Report by Lord Justice Briggs* (December 2015), [6.15].

¹⁹ *Kenyatta* (Prosecution’s Response) 2013, TC, [18].

²⁰ Rome Statute, Article 61(6).

²¹ *Kenyatta* 2013, Prosecution’s Response, [11]; *Zigiranyirazo* 2006, ICTR, AC, [11]; UNSC, *Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993)* (Doc No S/25704, 3 May 1993), [101]; *Hadžić* 2016, ICTY, AC, [8]; *Stanišić and Simatović* 2008, ICTY, AC, [6]; *Nourain and Jamus* 2013, TC, [21].

²² *Zigiranyirazo* 2006, ICTR, AC, [11].

²³ *Id*, [12].

²⁴ *Goodrider*, *supra* n 10, [19].

defendant had fled or could not be found, or when the defendant had waived his right to be present.²⁵ Here, neither of the exceptions apply.

11. First, Goodrider had not fled from the court and had voluntarily appeared before it.²⁶ Secondly, Goodrider had not waived his right to be present. Rule 124 deals specifically with the waiver of the right to be present at the confirmation hearing.²⁷ It states that the court can only hold a confirmation hearing in the accused's absence after he has submitted a written request. This assures the court that the suspect has fully understood "the right to be present at the hearing and the consequences of waiving this right".²⁸ The submission of a written request is therefore not a mere procedural requirement, but serves the important function of ensuring that the suspect's decision was made with full appreciation of the consequences.²⁹ Here, Goodrider did not submit any written request to waive his right to be present. Therefore, none of the exceptions under Article 61(2) apply.

(3) *Even if the PTC relied on its inherent powers to remove Goodrider, he was still unlawfully deprived of his right to be present because these powers were exercised incorrectly*

12. A strict adherence to the exceptions under Article 61(2) will render this court powerless to deal with disruptive suspects at the confirmation hearing. Given that no other provision in the Rome Statute addresses situations beyond these exceptions, there is a lacuna in the law. In such situations, the court may invoke its inherent powers to manage the conduct of its proceedings. This court has ostensibly invoked such powers in moving its proceedings online during the COVID-19 pandemic without any reference to statutory provisions.³⁰

²⁵ Rome Statute, Article 61(2). See also *Gaddafi and Al-Senussi* 2013, PTC, [25].

²⁶ *Goodrider*, *supra* n 10, [16]–[19].

²⁷ Cyril Laucci, *The Annotated Digest of the International Criminal Court* (Martinus Nijhoff Publishers, Vol 1, 2004–2006), 499.

²⁸ RPE, Rules 124(1)–124(2).

²⁹ *Nourain and Jamus* 2010, PTC, [9]–[10].

³⁰ International Criminal Court, Guidelines for the Judiciary Concerning the Holding of Court Hearings During the COVID-19 Pandemic, accessed at <<https://www.icc-cpi.int/itemsDocuments/200623-guidelines-for-court-proceedings-covid-19-eng.pdf>>.

13. However, this court’s inherent powers must be exercised in “a very restrictive manner”.³¹ Any restriction on the suspect’s right must be impaired no more than what is necessary to attain a fair and expeditious trial.³² For example, during the COVID-19 pandemic, virtual proceedings are necessary to ensure that justice does not grind to a complete halt.³³ Thus, this court should adopt a proportionate approach while exercising its inherent powers to prevent the unnecessary deprivation of this right.
14. Such an approach is exemplified in Article 63(2) regarding the removal of disruptive accused persons at trial.³⁴ The court can only remove disruptive persons when (a) the accused has exhibited continuously disruptive behaviour,³⁵ (b) it has exhausted other reasonable alternatives,³⁶ and (c) provided the accused with a sufficient warning prior to removal.³⁷ However, these safeguards were not met before Goodrider was deprived of his right to be present.
- (a) Goodrider did not exhibit continuously disruptive behaviour
15. A high threshold of persistence and repetitiveness must be met for a suspect’s behaviour to be deemed continuously disruptive.³⁸ In determining if this threshold is satisfied, the courts have considered factors such as the duration and number of disruptive acts,³⁹ the nature of the

³¹ *Bemba et al.* 2018, AC, [75].

³² *Zigiranyirazo* 2006, ICTR, AC, [14].

³³ UNODC, *The Malaysian Court’s Accessibility to Justice in the Time of COVID-19* by Judge Zainun Ali, accessed at <<https://www.unodc.org/dohadecclaration/en/news/2020/10/malaysian-courts-accessibility-to-justice-in-the-time-of-covid19.html>>; Derrick Wyatt, “In the UK the COVID-19 lockdown has accelerated the use of virtual court hearings, but will it bring permanent changes to the judicial process?”, accessed at <https://www.fidefundacion.es/In-the-UK-the-Covid-19-lockdown-has-accelerated-the-use-of-virtual-court-hearings-but-will-it-bring-permanent-changes_a1361.html>.

³⁴ Rome Statute, Article 63(2).

³⁵ Rome Statute, Article 63(2).

³⁶ Rome Statute, Article 63(2).

³⁷ RPE, Rule 170.

³⁸ William A. Schabas, *An Introduction to the International Criminal Court* (CUP, 5th Edn, 2017), 289.

³⁹ *Šešelj* 2006, ICTY, TC, [34]–[37], [55]–[62].

disruption,⁴⁰ and the delay caused on the proceedings.⁴¹ None of these factors indicate that Goodrider's behaviour was continuously disruptive.

16. First, Goodrider interrupted the PTC on only two occasions.⁴² This may be contrasted with the numerous disruptions which occurred before other criminal tribunals removed disruptive accused persons. For instance, the ICTY only removed Milošević after he disrupted proceedings on 13 occasions.⁴³ Similarly, before the Iraqi High Tribunal, Saddam Hussein was removed after at least six instances of disruptions.⁴⁴
17. Secondly, the nature of Goodrider's behaviour differs from other disruptive defendants who adopted a calculated strategy to curtail proceedings.⁴⁵ They would deliberately go on hunger strikes,⁴⁶ persistently present written submissions containing derogatory language,⁴⁷ and repeatedly boycott proceedings.⁴⁸ Towards the end of proceedings on 1 August, Goodrider only resorted to foul language in the heat of the moment after the court rejected his request for interim release pending trial. This was despite the fact that Goodrider had voluntarily appeared before the court and complied with the necessary procedures.⁴⁹ During the confirmation hearing,

⁴⁰ *Janković and Stanković* 2005, ICTY, TC, [22]–[25].

⁴¹ *Stanišić and Simatović* 2008, ICTY, AC, [17]–[19].

⁴² *Goodrider*, *supra* n 10, [17], [19].

⁴³ *Milošević* 2004, ICTY, AC, [4]; Michael P. Scharf, "ICTY Appeals Chamber Decision on Slobodan Milošević's Right of Self-Representation" (2004) 8(25) *American Society of International Law*.

⁴⁴ Edward Wong, "Hussein, Gleeful, Badgers the Judge and Declares a Hunger Strike Over His Treatment" *The New York Times* (15 February 2006), accessed at <<https://www.nytimes.com/2006/02/15/world/middleeast/hussein-gleeful-badgers-the-judge-and-declares-a-hunger.html>>; Robert F. Worth, "Prosecutors of Hussein Press Charges of Executions" *The New York Times* (14 February 2006), accessed at <<https://www.nytimes.com/2006/02/14/world/middleeast/prosecutors-of-hussein-press-charges-of-executions.html>>.

⁴⁵ See, for *eg*, *Illinois v. Allen* 397 US 337 (1970), 345.

⁴⁶ *Janković and Stanković* 2005, ICTY, TC, [22].

⁴⁷ *Šešelj* 2006, ICTY, TC, [47]; *Janković and Stanković* 2005, ICTY, TC, [22].

⁴⁸ *Karadžić* 2009, ICTY, TC, [6]–[10].

⁴⁹ *Goodrider*, *supra* n 10, [16]–[17].

Goodrider's outburst occurred after his standby counsel submitted written submissions on his behalf without his knowledge or consent.⁵⁰

18. Moreover, courts must exercise caution in removing persons who have only exhibited the slightest propensity for disruption.⁵¹ Goodrider's behaviour must be viewed in the light of the frustrations which suspects experience when faced with potentially complex and protracted litigation. Further, given the potentially politicised nature of claims brought before the court, vigorous and energetic challenges by the defendant are to be expected.⁵²
19. Thirdly, Goodrider's behaviour did not cause substantial delay. While past cases involved delays of minimally several months,⁵³ Goodrider's behaviour on 1 August only occurred at the conclusion of proceedings. This suggests that there was no delay caused. Any possible delay could only be confined to the hearing on 1 September, which did not seem to affect the PTC in coming to its decision two weeks later.⁵⁴ Therefore, considering the above, Goodrider did not exhibit continuously disruptive behaviour.
- (b) The PTC did not exhaust other reasonable alternatives before removing Goodrider from the courtroom
20. The court may only remove a disruptive person after other reasonable alternatives have proven inadequate.⁵⁵ Such alternatives include turning off the person's microphone and adjourning proceedings temporarily.⁵⁶ These measures afford the person a "cooling off period" while retaining the opportunity to continue participating in the proceedings.⁵⁷

⁵⁰ *Goodrider*, *supra* n 10, [19].

⁵¹ See Brent K. Marshall, J. Steven Picou and Jan R. Schlichtmann, "Technological Disasters, Litigation Stress, and the Use of Alternative Dispute Resolution Mechanisms" (2004) 26(2) *Law & Policy* 289, 292–293.

⁵² Antonio Cassese, *International Criminal Law* (OUP, 2003), 402–403.

⁵³ *Milošević* 2004, ICTY, AC, [4]; *Karadžić* 2009, ICTY, TC, [25].

⁵⁴ *Goodrider*, *supra* n 10, [19]–[20].

⁵⁵ Rome Statute, Article 63(2).

⁵⁶ Michael P. Scharf, "Chaos in the Courtroom, Controlling Disruptive Defendants and Contumacious Counsel in War Crimes Trials" (2007) Faculty Publications, Case Western Reserve University School of Law, 166, 168.

⁵⁷ *Ruto and Sang* 2013, AC, [62]; Michael P. Scharf, *supra* n 56, 168.

21. The PTC did not employ any of these reasonable alternatives before removing Goodrider from the courtroom. While the PTC could have easily declared a recess before removing Goodrider, the recess came only *after* his removal. No attempts were made to allow Goodrider a “cooling off” period.
 22. In addition, the warning issued by the PTC did not amount to a reasonable alternative. The court may only remove a disruptive person from the courtroom pursuant to Article 63(2) *after* giving him a warning.⁵⁸ Since the court must employ other reasonable alternatives after warning the person, the warning cannot itself constitute such an alternative.
- (c) The PTC did not provide Goodrider with a sufficient warning prior to his removal
23. A warning provided by the court must be explicit. This allows the suspect to be fully aware that his right to be present will be abrogated upon further disruptive behaviour.⁵⁹ The high level of specificity required is consistent with Rule 124 concerning written waiver which, as noted above,⁶⁰ requires that the “person concerned understands the right to be present at the hearing and the consequences of waiving this right”.⁶¹
 24. The warning that the PTC issued on 1 September 2020 only stated that Goodrider’s behaviour “would not be tolerated”.⁶² Goodrider was never informed of the possible consequence of removal. He was thus unaware that his actions would lead to his removal from the courtroom.
 25. Therefore, none of these safeguards were met. Accordingly, the PTC’s exercise of inherent powers to remove Goodrider from the courtroom unlawfully deprived him of his right to be present under Article 61(1).

⁵⁸ RPE, Rule 170.

⁵⁹ *Šešelj* 2006, ICTY, AC, [25].

⁶⁰ See para 6.

⁶¹ RPE, Rule 124(2).

⁶² *Goodrider*, *supra* n 10, [19].

B. *Goodrider was unlawfully deprived of his right to self-representation under Article 67(1)(d)*

26. Article 67(1)(d) enshrines the right to self-representation, which allows the suspect to conduct his defence in person or through legal assistance of his own choosing.⁶³ The suspect maintains control over his defence, as the suspect himself who suffers the consequences if the defence fails.⁶⁴ Although the right to self-representation is not absolute, the court can only override a defendant's choice of representation if it is in the interests of justice to do so.⁶⁵

27. The PTC's decision to appoint a standby counsel for Goodrider, despite his express choice and ability (as a trained lawyer) to represent himself, was not in the interests of justice because: (1) Goodrider was not substantially disruptive; and (2) alternatively, the PTC gave the standby counsel a disproportionately broad mandate over Goodrider.

(1) Goodrider was not substantially disruptive

28. In assessing whether the court acted in the interests of justice, a balance must be struck between protecting a suspect's right to self-representation and ensuring fair and expeditious proceedings.⁶⁶ Courts have appointed standby counsel where there has been a continuous and substantial obstruction of proceedings.⁶⁷ As argued above,⁶⁸ Goodrider did not exhibit continuously disruptive behaviour which substantially obstructed the proceedings. Therefore, it was not in the interests of justice to deprive Goodrider of his right to self-representation under Article 67(1)(d).

(2) In any event, the PTC gave the standby counsel a disproportionately broad mandate over Goodrider

29. Even if it was necessary to appoint standby counsel for Goodrider, it was nonetheless not in the interests of justice to appoint a standby counsel without any clear limitations on his powers.

⁶³ RPE, Rule 121(1); William A. Schabas, *Commentary on the Rome Statute of the International Criminal Court, Article 67: Rights of the Accused* (OUP, 1st Edn, 2010), 1037–1038.

⁶⁴ *Faretta v. California* 422 US 806 (1975), 819–820.

⁶⁵ Mark Klamburg, *Commentary on the Law of the International Criminal Court* (Torkel Opsahl Academic EPublisher Brussels, 2017), 498.

⁶⁶ *Norman et al.* 2004, SCSL, TC, [11]; *Milošević* 2004, ICTY, TC, [64]–[66].

⁶⁷ *Šešelj* 2006, ICTY, AC, [20]; *Milošević* 2004, ICTY, AC, [13].

⁶⁸ See paras 15–19.

The principle of proportionality requires that any restriction of the right to self-representation must be no more than what is strictly necessary to maintain the integrity and expediency of proceedings. When the standby counsel is appointed, the defendant must still retain control over his case; the counsel's role is confined to assisting the defendant. In the case of *Šešelj*, the standby counsel appointed was given strict instructions to assist the defendant through the basic procedures of trial such as courtroom procedure.⁶⁹ Importantly, he was only allowed to take over as defence counsel when requested by the defendant or the court.⁷⁰

30. Here, the standby counsel submitted an appeal on Goodrider's behalf without obtaining his consent and without communicating with him. This only happened because the PTC gave the appointed standby counsel a broad mandate to "step in if necessary". By providing a broad and vague mandate, the PTC unnecessarily and prematurely thrust the standby counsel into the role of a defence counsel, thereby violating the principle of proportionality. Accordingly, Goodrider was deprived of his right to self-representation under Article 67(1)(d).

II. THE PTC ERRED IN FINDING THAT GOODRIDER ORDERED THE COMMISSION OF A CRIME AGAINST HUMANITY UNDER ARTICLE 7(1)(K) AND ARTICLE 25(3)(B) OF THE ROME STATUTE

31. Article 7(1)(k) of the Rome Statute codifies the crime against humanity of "other inhumane acts".⁷¹ This crime prohibits the infliction of great suffering or serious injury to body or to mental or physical health.⁷² Accessorial liability may attach to an individual who "orders, solicits or induces" the commission of such "other inhumane acts", thus rendering him individually criminally responsible for the commission of that crime.⁷³
32. Goodrider was at all times guided by his concern for the citizens of Wessos. To protect the Wessos population, Goodrider instructed the development of a vaccine against the H5N8 virus.⁷⁴ When the mutated virus escaped, Goodrider immediately convened a meeting with the

⁶⁹ *Šešelj* 2003, ICTY, TC, [30].

⁷⁰ *Ibid.*

⁷¹ Rome Statute, Article 7(1)(k).

⁷² EOC, Article 7(1)(k).

⁷³ Rome Statute, Article 25(3)(b).

⁷⁴ *Goodrider*, *supra* n 10, [5].

Council to contain the spread of the virus within Wessos' borders.⁷⁵ While Goodrider did not inform Eassos or the WHO about the virus, he should not be prosecuted for a crime against humanity under Article 7(1)(k) because: (A) the failure to inform Eassos and the WHO does not qualify as an "other inhumane act" under Article 7(1)(k); and (B) in any event, Goodrider is not individually criminally responsible for ordering the act under Article 25(3)(b).

A. Goodrider's failure to inform Eassos and the WHO does not qualify as an "other inhumane act" under Article 7(1)(k)

33. Crimes against humanity are the most heinous of crimes.⁷⁶ They typically cause immense suffering and are "degrading", "cruel", and "humiliating" for the victims.⁷⁷ Goodrider's failure to inform Eassos and the WHO does not qualify as an "other inhumane act" constituting a crime against humanity under Article 7(1)(k) because: (1) a breach of treaty obligations does not necessarily constitute a crime; (2) the objective and subjective elements of Article 7(1)(k) are not satisfied; and (3) in any event, the acts were not committed in the context of a widespread or systematic attack directed against a civilian population.

(1) *A breach of treaty obligations does not necessarily constitute a crime*

34. A breach of treaty obligations is characterized as an internationally wrongful act.⁷⁸ These acts may rise to the level of international crimes, or "serious breaches of obligations under peremptory norms of general international law",⁷⁹ if they were so serious as to offend the international community. Such acts include genocide, aggression, and apartheid.⁸⁰ In contrast, a state's failure to inform the WHO or other neighbouring states regarding a new disease does not *ipso facto* amount to an international crime.⁸¹ This is because such decisions are often

⁷⁵ Goodrider, *supra* n 10, [12].

⁷⁶ EOC, Introduction to Article 7; Otto Triffterer and Kai Ambos, *supra* n 6, 117.

⁷⁷ Kupreškić *et al.* 2000, ICTY, TC, [566]; Otto Triffterer and Kai Ambos, *supra* n 6, 207, 229, 233, 240, 278.

⁷⁸ James Crawford, "Articles on Responsibility of States for Internationally Wrongful Acts" (2012), 3, accessed at <https://legal.un.org/avl/pdf/ha/rsiwa/rsiwa_e.pdf>.

⁷⁹ *Id.*, 6.

⁸⁰ *Id.*, 7.

⁸¹ *Id.*, 6; Expanded Working Paper on the Recognition of Gross and Massive Violations of Human Rights Perpetrated on the Orders of Governments or Sanctioned by them as an International Crime, (28 May 1997) UN Doc. E/CN.4/Sub.2/1997/29.

guided by various economic and political considerations, and usually involve much uncertainty.⁸²

35. As a member of the WHO, Wessos has legal obligations under the IHR. It has the duty to inform the WHO regarding any impending viral outbreak.⁸³ While the failure to inform the WHO may constitute an internationally wrongful act,⁸⁴ this does not amount to an international crime. For example, during the Ebola outbreak, several African countries delayed in reporting the virus to the WHO due to resource constraints.⁸⁵ More recently, China also delayed the reveal of information relating to COVID-19 due to bureaucratic inefficiencies.⁸⁶ While these lapses in judgment departed from best practice, they did not rise to the level of international crimes. Instead, these decisions were guided by domestic concerns amidst uncertainty. Similarly, Wessos' failure to inform the WHO and Eassos is at most an internationally wrongful act, and does not amount to a crime against humanity.

(2) *The objective and subjective elements of Article 7(1)(k) are not satisfied*

36. For an act to constitute a crime against humanity under Article 7(1)(k), both objective and subjective elements of the crime must be fulfilled.⁸⁷ None of these elements are satisfied.

⁸² Thomas J. Bollyky and Yanzhong Huang, "The Multilateral Health System Failed to Stop the Coronavirus" Foreign Policy (10 March 2020), accessed at <<https://foreignpolicy.com/2020/03/10/the-multilateral-health-system-failed-to-stop-the-coronavirus/>>.

⁸³ International Health Regulations (2005) 2509 UNTS 79, Articles 6(1), 7.

⁸⁴ James Crawford, *supra* 78, 3.

⁸⁵ Steven J. Hoffman and Sarah L. Silverberg, "Delays in Global Disease Outbreak Responses: Lessons from H1N1, Ebola and Zika" (2018) 108(3) Am J Public Health 329.

⁸⁶ Julia Belluz, "China hid the severity of its coronavirus outbreak and muzzled whistleblowers- because it can" Vox (10 February 2020), accessed at <<https://www.vox.com/2020/2/10/21124881/coronavirus-outbreak-china-li-wenliang-world-health-organization>>.

⁸⁷ EOC, Article 7(1)(k).

(a) An objective element of Article 7(1)(k) is not satisfied

37. The alleged act must be of a similar character to the other acts prohibited under Article 7(1).⁸⁸ “Character” goes beyond the act’s consequences⁸⁹ and includes the nature of the act.⁹⁰ In other words, the act must be regarded as “inhumane in and of [itself]”.⁹¹ To constitute an inhumane act, there must be a *flagrant* violation of customary international law and fundamental human rights;⁹² mere human rights violations do not automatically constitute crimes against humanity.⁹³ Acts like enforced prostitution and the conducting of medical experiments on war prisoners have been recognised as “other inhumane acts”.⁹⁴ Not only do they involve gross violations of human rights, they are cruel, degrading, and an affront to human dignity.⁹⁵ To determine whether an act amounts an “other inhumane act”, considerations must be given to all of the surrounding factual circumstances. These include the nature of the act or omission, the context in which it occurred, the personal circumstances of the victim and the effects of the act upon the victim.⁹⁶
38. Goodrider’s failure to inform the WHO and Eassos of the viral outbreak was not inhumane. The decision was motivated by domestic concerns, and was a necessary step to prevent mass panic within Wessos.⁹⁷ The measures adopted by Goodrider and his ministers not only averted

⁸⁸ *Ibid.*

⁸⁹ Otto Triffterer and Kai Ambos, *supra* n 6, 240; Iris Haenen, “Classifying Acts as Crimes Against Humanity in the Rome Statute of the International Criminal Court” (2019) *German Law Journal* 796, 810.

⁹⁰ EOC, footnote 30.

⁹¹ Otto Triffterer and Kai Ambos, *supra* n 6, 237.

⁹² *Katanga and Chui* 2008, PTC, [448]; *Nuon* 2011, ECCC, TC, [164].

⁹³ Otto Triffterer and Kai Ambos, *supra* n 6, 238; Roy S. Lee, *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, 2001), 70; *Nuon* 2014, ECCC, TC, [438].

⁹⁴ Otto Triffterer and Kai Ambos, *supra* n 6, 238; *Kajelijeli* 2003, ICTR, TC, [936]; *Kupreškić et al.* 2000, ICTY, TC, [566]; *United States of America v. Karl Brandt et al.*, United States Nuernberg War Crime Trials (1946–1947), 183.

⁹⁵ UN, Vienna Declaration and Programme of Action (Adopted by the World Conference on Human Rights in Vienna on 25 June 1993), 7.

⁹⁶ *Katanga and Chui* 2008, PTC, [449].

⁹⁷ *Goodrider*, *supra* n 10, [5], [12], Annex 2.

unnecessary fear, but they also successfully contained the viral outbreak within Wessos.⁹⁸ While this decision unfortunately contributed to the situation in Eassos, it must be seen in light of the context in which Goodrider had to prioritise the safety of his own citizens. Unlike other acts that have been recognised as “inhumane”, there was no cruel and degrading treatment towards the victims. Therefore, Goodrider’s act was not of a similar character to other acts under Article 7(1).

(b) A subjective element of Article 7(1)(k) is not satisfied

39. The subjective element of Article 7(1)(k) requires that the perpetrator meant to cause great suffering, or serious injury to body or to mental or physical health, or was aware that such a consequence would occur in the ordinary course of events.⁹⁹ This means that the perpetrator must have intended to cause such a consequence,¹⁰⁰ or possessed actual knowledge that this consequence would certainly follow barring an unforeseen intervention.¹⁰¹

40. Goodrider did not intend to cause great suffering upon the citizens in Eassos. His counteractive measures, such as the setting up of quarantine centres and the suspension of international flights,¹⁰² were targeted at containing the virus within Wessos in order to avoid panic.¹⁰³ To say that Goodrider intended to cause great suffering in Eassos would be in plain contradiction with his actions, which were aimed to curb the spread of virus beyond Wessos’ borders. In addition, Goodrider was wholly unconcerned with the situation in Eassos.¹⁰⁴ Therefore, far from intentionally causing suffering in Eassos, Goodrider was instead solely focused on containing the virus within his country.

41. Further, Goodrider did not possess actual knowledge that great suffering would certainly follow his failure to inform barring an unforeseen intervention. This follows from the fact that

⁹⁸ *Goodrider*, *supra* n 10, [13].

⁹⁹ EOC, Article 7(1)(k); Rome Statute, Article 30(2)(b).

¹⁰⁰ *Katanga* 2014, TC, [774].

¹⁰¹ *Id*, [774]–[777].

¹⁰² *Goodrider*, *supra* n 10, [12], Annex 2.

¹⁰³ *Goodrider*, *supra* n 10, [5], [12], Annex 2.

¹⁰⁴ *Goodrider*, *supra* n 10, Annex 2.

Goodrider did not know that the mutated virus had escaped beyond the borders of Wessos at the Council meeting. Not only did Goodrider suspend international flights from the Wessos airport to ensure the virus did not “get past [Wessos] borders”,¹⁰⁵ but he was also given no indication that the bus which the infected scientists travelled on had crossed Wessos borders.¹⁰⁶ Moreover, when Rayder informed Goodrider that the infected scientists may have passed the virus on to others on the bus, Rayder’s specific concern was that the spread of the virus could “kill hundreds of thousands of *our* people”. This indicates that Goodrider and Rayder must have been labouring under the assumption that the virus had not yet spread beyond Wessos borders. Since Goodrider did not possess actual knowledge that great suffering in Eassos would certainly follow his failure to inform, the subjective element of Article 7(1)(k) is not satisfied.

(3) *The acts were not committed in the context of a widespread or systematic attack directed against a civilian population*

42. For an act to constitute a crime against humanity, the act must be committed as part of a widespread or systematic attack directed against any civilian population.¹⁰⁷ An attack is an operation directed against a civilian population as the primary, and not incidental, target.¹⁰⁸

43. Here, the concealment was not directed against the Eassos population. Goodrider’s purpose for not disclosing the outbreak was to avoid panic.¹⁰⁹ His statement that he did not “give a damn about Eassos”¹¹⁰ was, at most, an expression of indifference as to an incidental harm that might arise from non-disclosure, and cannot be construed as a statement of primary intention. Accordingly, there is no crime against humanity under Article 7(1)(k) as there was no attack directed against a civilian population.

¹⁰⁵ *Goodrider, supra* n 10, Annex 2.

¹⁰⁶ *Goodrider, supra* n 10, [9], Annex 1.

¹⁰⁷ Rome Statute, Article 7(1).

¹⁰⁸ *Bemba* 2009, PTC, [76]; *Mudacumura* 2012, PTC, [22].

¹⁰⁹ *Goodrider, supra* n 10, [10], Appendix B.

¹¹⁰ *Goodrider, supra* n 10, Annex 2.

B. In any event, Goodrider is not individually criminally responsible for ordering the commission of a crime against humanity under Article 25(3)(b)

44. An individual is only criminally responsible when the objective and subjective requirements under Article 25(3), read with Article 30, have been satisfied. The subjective requirement is satisfied when the perpetrator intended to commit the material elements of the crime.¹¹¹ As argued above,¹¹² this intention is made out when the perpetrator means to cause the consequence or is aware that it is nearly inevitable that the consequence will follow. Mere likelihood or possibility is insufficient to attract individual criminal responsibility.¹¹³
45. Here, the requisite mental element is not satisfied. As argued above,¹¹⁴ Goodrider focused on the well-being of the Wessos population at all times. In addition, Goodrider's instructions to keep the virus secret must be seen against the timeline of events. Goodrider was informed about the deaths of the scientists on 1 March 2020. On 2 March, he decided on the necessary measures to contain the virus outbreak. There was no evidence that the virus has already escaped beyond the borders of Wessos. While Goodrider was informed that two scientists *might* have come into contact with others, the possibility of the virus spreading into Eassos remained but a mere possibility. This suggests that Goodrider was at most reckless towards the situation in Eassos.¹¹⁵ However, recklessness is not sufficient to amount to the requisite intention to attract individual criminal responsibility. Therefore, Goodrider is not individually criminally responsible for ordering the commission of a crime against humanity under Article 25(3)(b).
46. Accordingly, the PTC's decision that there are substantial grounds to believe that Goodrider ordered the commission of "other inhumane acts" as a crime against humanity under Article 7(1)(k) and Article 25(3)(b) should be overturned.

¹¹¹ Rome Statute, Article 30(1).

¹¹² See paras 39–41.

¹¹³ *Katanga* 2014, TC, [776]–[777]; *Bemba* 2009, PTC, [363].

¹¹⁴ See paras 35, 40.

¹¹⁵ *Goodrider*, *supra* n 10, Annex 2.

III. THE PTC ERRED IN FINDING THAT THE COURT CAN EXERCISE JURISDICTION TO PROSECUTE GOODRIDER UNDER ARTICLE 12 OF THE ROME STATUTE

47. State sovereignty refers to the independent authority of states to govern themselves and those within their territory.¹¹⁶ While this exclusive authority may be voluntarily delegated by states to the ICC, the court must nevertheless respect the sovereignty of states which are not State Parties to the Rome Statute. This is reflected in Article 12, which confines this court's jurisdiction to the grounds of nationality and territoriality. Given that Goodrider is a national of Wessos, a non-State Party to the Rome Statute, the PTC can only exercise jurisdiction on the basis of the territoriality principle.
48. The PTC's finding that the preconditions under Article 12(2)(a) have been satisfied should be overturned because: (A) Article 12(2)(a) requires the acts underlying the crime to have occurred on the territory of a State Party and excludes the consequences of such acts; (B) the extension of the objective territoriality principle in *Myanmar-Bangladesh* does not apply in the present case; (C) this court cannot rely on Charles Taylor to exercise jurisdiction over Goodrider; and (D) in any event, Goodrider is entitled to immunity *rationae personae* before this court.
- A. Article 12(2)(a) requires the acts underlying the crime to have occurred on the territory of a State Party and excludes the consequences of such acts**
49. Article 12(2)(a) states that the court may exercise its territorial jurisdiction where the "conduct in question" occurs on the territory of a State Party. The PTC held that this was satisfied because Goodrider's orders had resulted in deaths in Eassos, a State Party to the Rome Statute, despite the fact that these orders were wholly issued in Wessos, a non-State Party. Following this, the consequences of Goodrider's act would effectively constitute the "conduct in question".
50. The PTC's holding introduces the doctrine of effects jurisdiction into the wording of Article 12(2)(a). Effects jurisdiction refers to jurisdiction asserted by a state on the basis that the effects of a crime were felt within its territory, even if the conduct of the crime took place elsewhere.¹¹⁷ However, the doctrine of effects jurisdiction goes against the plain wording of Article 12(2)(a). The phrase "conduct in question" must refer to the acts underlying the crime and not the consequences of such acts because: (1) the Rome Statute and the EOC distinguish conduct from consequences as two distinct components of a crime; (2) the *travaux préparatoires* of the Rome

¹¹⁶ Oona A. Hathaway, "International Delegation and State Sovereignty" (2008) 71(1) *Law and Contemporary Problems* 115, 115.

¹¹⁷ *Myanmar-Bangladesh* 2019, PTC, [56].

Statute indicate that the drafters intended a restrictive interpretation of this court’s jurisdiction; and (3) the effects jurisdiction is not recognised under customary international law.

(1) *The Rome Statute and the EOC distinguish conduct from consequences as two distinct components of a crime*

51. Article 31(1) of the VCLT states that a treaty shall be interpreted in accordance with the ordinary meaning of the terms of the treaty in their context and in the light of its object and purpose. In interpreting Article 12(2)(a), the text of the Statute and the EOC must be considered.¹¹⁸ Here, Articles 30(2) and 31 of the Rome Statute, read together with the General Introduction to the EOC,¹¹⁹ demonstrate that the term “conduct” only refers to the acts underlying the crime alone and does not include the consequences of the acts.

52. First, Article 30(2), which prescribes the requisite mental element, states that a person has intent where: (a) “[i]n relation to conduct, that person means to engage in the conduct; (b) [i]n relation to a consequence, that person means to cause that consequence”. By prescribing different standards of intent, the Rome Statute clearly distinguishes between “conduct” and “consequences”.¹²⁰

53. Secondly, Article 31, which pertains to the grounds for excluding criminal responsibility, focuses on the “conduct” of a person. The critical time for assessing the existence of a ground precluding responsibility is when the criminal conduct occurred, not when the criminal result manifested.¹²¹ Distinguishing the time in which the crime was conducted and the time in which the result of the crime was manifested again indicates the distinction between the conduct and its resulting consequences.¹²²

54. Thirdly, the EOC distinguishes between “conduct” and “consequences” when defining a crime. According to the EOC, the elements are meant to address the “conduct, consequences and

¹¹⁸ Rome Statute, Article 21(1)(a).

¹¹⁹ EOC, General Introduction, paras 2, 7.

¹²⁰ Michael Vagias, *The Territorial Jurisdiction of the International Criminal Court* (CUP, 2014), 91–92.

¹²¹ Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (Beck-Hart-Nomos, 2nd Edn, 2008), 872.

¹²² Antonio Cassese, Paola Gaeta and John Jones, *The Rome Statute of the International Criminal Court: A Commentary* (OUP, Vol 1B, 2002), 1028–1029.

circumstances associated with each crime”.¹²³ In other words, a crime comprises of conduct, consequence, and circumstance as three distinct elements such that conduct cannot extend to include consequence.

55. Consequently, “conduct” in Article 12(2)(a) cannot be read to include consequences of conduct. To interpret it otherwise would render it inconsistent with the rest of the provisions in the Rome Statute, thereby creating undesirable legal uncertainty.

(2) *The travaux préparatoires of the Rome Statute indicate that the drafters intended a restrictive interpretation of this court’s jurisdiction*

56. A treaty provision must be interpreted in light of its object and purpose¹²⁴ determined with reference to its *travaux préparatoires*.¹²⁵ The drafting history of the Rome Statute shows that Article 12(2) is to be interpreted restrictively in order to prevent an overreach of this court’s jurisdiction. During the drafting negotiations, Germany proposed to include the ground of universal jurisdiction,¹²⁶ which enable states to prosecute perpetrators of heinous crimes, regardless of where they occurred or the accused’s nationality.¹²⁷ However, this proposal was strongly opposed¹²⁸ and was ultimately excluded from Article 12 due to the collective fear that this would give the court an overly expansive jurisdiction.¹²⁹ Although the effects jurisdiction is not as far-reaching as universal jurisdiction, it has been criticised as a “slippery slope which leads away from the territorial principle towards universal jurisdiction”. A restrictive

¹²³ EOC, General Introduction, para 7.

¹²⁴ VCLT, Article 31(1).

¹²⁵ VCLT, Article 32 read with Article 31.

¹²⁶ UN, UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (1998) (Vol 2), 184.

¹²⁷ Kenneth Randall, “Universal Jurisdiction Under International Law” (1988) 66 Texas Law Review 7788; Donald Donavan and Anthea Roberts, “The Emerging Recognition of Universal Civil Jurisdiction” (2006) 100(1) AJIL 142, 142–144.

¹²⁸ United Nations, *supra* n 126, 183–184, 195–196.

¹²⁹ Olympia Bekou and Robert Cryer, “The International Criminal Court and Universal Jurisdiction: A Close Encounter?” (2007) 56(1) ICLQ 49, 51.

interpretation of Article 12(2)(a) would therefore be consistent with the State Parties' clear intentions to prevent jurisdictional overreach.¹³⁰

(3) *The effects jurisdiction is not recognised under customary international law*

57. While this court may consider rules of international law in its interpretation of the Rome Statute,¹³¹ the effects jurisdiction cannot be imported within this court's interpretation of Article 12(2)(a). This is because the effects jurisdiction is not recognised under customary international law, given insufficient widespread state practice and *opinio juris*.¹³²

58. With regard to state practice, the effects jurisdiction has only been recognised by several states, such as the US¹³³ and Hong Kong.¹³⁴ Furthermore, they have applied the effects jurisdiction narrowly in the context of anti-trust law.¹³⁵ There is also an absence of *opinio juris* – not only has the UN General Assembly disapproved of the effects jurisdiction for undermining the sovereign equality of States,¹³⁶ states such as the Netherlands, Australia, and the UK have enacted legislative blocking mechanisms to prevent extra-territorial application of US's antitrust laws.¹³⁷ Since both widespread state practice and *opinio juris* are absent, the “effects jurisdiction” is not recognised under customary international law. Therefore, this court cannot

¹³⁰ See UN, Report of The Preparatory Committee On The Establishment Of An International Criminal Court, A/CONF.183/2/Add.1, 30; UNGA, Report Of The Inter-Sessional Meeting From 19 To 30 January 1998 In Zutphen, The Netherlands, A/AC.249/1998/L.13, 36–37; UN, Draft Report of the Preparatory Committee, A/AC.249/L.19, 4–6.

¹³¹ VCLT, Article 31(3)(c).

¹³² See, *eg*, United Kingdom Aide-Memoire of 20 October 1969 to Commission of the European Communities, reprinted in Ian Brownlie, *Principles Of Public International Law* (Clarendon Press, 3rd Edn, 1979), 313; ILC, “First Report on Formation and Evidence of Customary International Law” (17 May 2013) UN Doc. A/CN.4/663, [2] for the requirements needed for recognition as customary international law.

¹³³ US Sherman Antitrust Act 1896, 15 USC, [1]ff; *US v. Aluminium Co. of America* 148 F.2d 416 (1945); *US v. Nippon Paper Industries Co. Ltd.* 109 F.3d 1 (1997), 8; Australia Criminal Code Act 1995 (Cth), s 15(1)(a); Danielle Ireland-Piper, *Accountability in Extraterritoriality* (Edward Elgar, 2017), 76.

¹³⁴ Sean Murray, “With a Little Help from my Friends: How a US Judicial International Comity Balancing Test Can Foster Global Antitrust Redress” (2017) 41(1) *Fordham International Law Journal* 227, 275.

¹³⁵ US Sherman Antitrust Act 1896, 15 USC, Chapter 1; *US v. Aluminium Co. of America*, n 133, 443.

¹³⁶ UN, *General Assembly Resolution*, GA/9479 (1998).

¹³⁷ See Netherlands's Economic Competition Act of 1956, s 39; UK's Shipping Contracts and Commercial Documents Act of 1964, ss 1–2; Australia's Foreign Proceedings (Prohibition of Certain Evidence) Act 1976; UK's Protection of Trading Interests Act 1980.

rely on the effects jurisdiction under customary international law to exercise jurisdiction over Goodrider.

59. Accordingly, the PTC erred in finding that it can exercise jurisdiction to prosecute Goodrider.

B. *The extension of the objective territoriality principle in Myanmar-Bangladesh does not apply in the present case*

60. In *Myanmar-Bangladesh*, the PTC affirmed the objective territoriality principle.¹³⁸ It held that the court could exercise jurisdiction under Article 12(2)(a) where at least part of the conduct, referring to the *actus reus* of the crime, takes place in State Party territory.¹³⁹ Specifically, the court noted that “depending on the nature of the crime alleged, the *actus reus* element of conduct may encompass within its scope, the consequences of such conduct”.¹⁴⁰

61. An examination of the relevant crime in *Myanmar-Bangladesh* and other examples provided by the court shows that this pronouncement is restricted to crimes where the consequences are so necessarily linked with the acts such that any distinction would be artificial.

62. The *Myanmar-Bangladesh* decision concerned the crime of deportation, which involves the forcible movement of a population from one state to another.¹⁴¹ For this crime, the conduct of deporting a population out of one state cannot be separated from the consequence of the population being moved into another state. Such a scenario was similarly illustrated by the *Situation in the Republic of Korea*, which concerned the court’s territorial jurisdiction over the shelling of Yeonpyeong Island, territory of the Republic of Korea, by the Democratic Republic of Korea (“DPRK”). The OTP found that the act of shelling would constitute “conduct” occurring on the territory of a State Party, even though the missile was fired on the territory of the DPRK, a non-State Party to the Rome Statute. It would be an artificial distinction to separate the act of firing from the consequence of the shells hitting the targeted area.¹⁴² In both examples, the consequences were necessary outcomes of the underlying acts. Given the nature of such

¹³⁸ *Myanmar-Bangladesh* 2018, PTC, [64]; *Myanmar-Bangladesh* 2019, PTC, [62].

¹³⁹ *Myanmar-Bangladesh* 2019, PTC, [61].

¹⁴⁰ *Id.*, [50].

¹⁴¹ *Id.*, [62].

¹⁴² *Situation in the Republic of Korea* (Article 5 Report) (June 2014), [39].

crimes, the consequences should logically be considered as part of the *actus reus* for this court to exercise jurisdiction.

63. Here, the Eassos citizens' suffering was not the necessary outcome caused by the concealment of the potential viral outbreak from the WHO and Eassos. Unlike situations involving deportation and shelling of an island, suffering of the Eassos citizens was dependent upon factors which were external to the act of concealment. These include Eassos' level of emergency preparedness and available resources to deal with viral outbreaks, the pattern of human movement across and around the border, and the interaction between people in Eassos. Therefore, the rule in the *Myanmar-Bangladesh* decision allowing the court to include consequences in determining if the "conduct" has occurred on State Party territory does not apply. Accordingly, this court cannot exercise jurisdiction over Goodrider.

C. *This court cannot rely on Charles Taylor to exercise jurisdiction over Goodrider*

64. It cannot be argued that *Charles Taylor* involves the application of effects jurisdiction as the SCSL applied strict territorial principles in exercising jurisdiction over the accused. In that case, it is undisputed that both the acts and consequences underlying the alleged crimes (e.g. unlawful killings and pillaging) were committed on the territory of Sierra Leone.¹⁴³ As the crime was wholly committed on State Party territory and Taylor exercised substantial influence over the perpetrators in the State Party,¹⁴⁴ the SCSL could exercise jurisdiction over him. Here, not only did the act underlying the crime (i.e. the concealment of the viral outbreak) occur on the non-State Party territory of Wessos,¹⁴⁵ the manner in which the virus spread was beyond Goodrider's control.
65. Further, the SCSL is a court established pursuant to the UNSC Resolution 1315(2000),¹⁴⁶ which confers obligations on all UN members to cooperate with the prosecution of perpetrators of the most heinous of crimes.¹⁴⁷ While the SCSL Statute does not bind Liberia directly, Liberia has

¹⁴³ *Charles Taylor* 2012, TC, [13].

¹⁴⁴ *Id.*, [6344]–[6355].

¹⁴⁵ *Goodrider*, *supra* n 10, 14.

¹⁴⁶ UNSC, Statute of the Special Court for Sierra Leone (16 January 2002).

¹⁴⁷ Charter of the UN, Article 25.

an indirect obligation to cooperate with the SCSL pursuant to the UNSC resolution.¹⁴⁸ In contrast, the ICC was established by treaty, which is only binding on State Parties.¹⁴⁹ To extend its jurisdiction to non-State Parties is contrary to the *pacta tertiis* principle.¹⁵⁰ Since Wessos is a non-State Party to the Rome Statute and the alleged act of concealment occurred wholly in Wessos, this court cannot extend its jurisdiction to prosecute Goodrider.

D. *Even if the preconditions under Article 12 are satisfied, Goodrider is entitled to immunity rationae personae before this court*

66. Immunity *rationae personae*, or personal immunity, is an exemption from jurisdiction conferred on high-ranking state officials, such as the Head of State, Head of Government and Minister for Foreign Affairs,¹⁵¹ who are the current holders of the respective offices.¹⁵² This immunity covers both official and private acts.¹⁵³ This rule of customary international law protects the discharge of the office-holders' functions from interference by foreign authoritative acts.¹⁵⁴

67. While Article 27(2) of the Rome Statute provides that “immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the court from exercising its jurisdiction over such a person”, this does not apply to persons who are state officials of *non-State Parties* to the Rome Statute. The immunity *rationae personae* of incumbent high-ranking state officials is only waived by way of Article 27(2) when their states become parties to the Rome Statute.¹⁵⁵ This restriction of the

¹⁴⁸ *Charles Taylor* 2004, AC, [38]–[39].

¹⁴⁹ VCLT, Article 26.

¹⁵⁰ VCLT, Article 34. This principle states that a treaty only binds State Parties; it does not create obligations or rights for a third State without its consent.

¹⁵¹ *Arrest Warrant* 2002, ICJ, [51].

¹⁵² Ramona Pedretti, *Immunity of Heads of State and State Officials for International Crimes* (Brill, 2015), 25.

¹⁵³ Bruce Broomhall, *International Justice and the International Criminal Court* (OUP, 2003), 381; ILC, “Immunity of State Officials From Foreign Criminal Jurisdiction” (4 April 2013), UN Doc. A/CN.4/661, §§ 50 and 72; *Arrest Warrant* 2002, ICJ, [51].

¹⁵⁴ Dapo Akande and Sangeeta Shah, “Immunities of State Officials, International Crimes, and Foreign Domestic Courts” (2011) 21(4) EJIL 815, 818; Robert Cryer, Hakan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure* (CUP, 2nd Edn, 2010), 537–538.

¹⁵⁵ Ramona Pedretti, *supra* n 152, 247.

applicability of Article 27 to State Parties has been recognised by this court,¹⁵⁶ State Parties,¹⁵⁷ and renowned publicists.¹⁵⁸ As argued above, the ICC derives its mandate from State Parties who signed and ratified the Rome Statute.¹⁵⁹ Unlike other international criminal tribunals like the SCSL which are established by the UN and have a mandate from the international community,¹⁶⁰ this court's provisions only extend to State Parties.¹⁶¹ The waiver of immunity codified in Article 27 therefore does not apply to Goodrider.

68. Not only was Goodrider the Wessos' Minister of Defence, he has also been described as "the second most powerful official in Wessos", with budgetary and command authority in matters relating to national security.¹⁶² The sphere of his authority over the Wessos government is also demonstrated during the Council meeting, where the other ministers of Wessos deferred to his authority and obeyed his orders. Given his position as the Head of State in Wessos, which is not a State Party to the Rome Statute, Goodrider would enjoy immunity *rationae personae*. Therefore, even if the preconditions to the exercise of jurisdiction in Article 12 are met, he is exempt from the exercise of territorial jurisdiction by this court.

¹⁵⁶ *Al-Bashir* 2019, AC, [130].

¹⁵⁷ See UK's Explanatory Notes on International Criminal Court Act 2001, s 23.

¹⁵⁸ William Schabas, *International Criminal Court: A Commentary on the Rome Statute* (OUP, 2nd Edn, 2016), 600–604.

¹⁵⁹ See para 65.

¹⁶⁰ *Charles Taylor* 2004, AC, [38]–[39].

¹⁶¹ VCLT, Article 26.

¹⁶² *Goodrider*, *supra* n 10, [2].

SUBMISSIONS

Therefore, in light of the questions presented, arguments advanced, and authorities cited, the State of Wessos respectfully requests the Appeals Chamber to adjudge and declare that:

- I.** Goodrider had been unlawfully deprived of his right to be present at the confirmation hearing under Article 61 and his right to self-representation under Article 67(1)(d);
- II.** The charged offences cannot be prosecuted as “other inhumane acts” under Article 7(1)(k) and the Prosecution has not established sufficient evidence that there were substantial grounds to believe that Goodrider ordered the commission of such a crime under Article 25(3)(b); and
- III.** The Court cannot exercise jurisdiction to prosecute Goodrider under Article 12.

On Behalf of the State of Wessos

Government Counsel

